This is Exhibit "**3**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

March 9, 2006

Introduction

This paper is intended for drafters in the Branch to assist them in their legal examination functions under the *Department of Justice Act* and the *Statutory Instruments Act* as well as in managing legal risks related to the bills and regulations they prepare. It begins by outlining the role they play, including the examination functions. It then describes the management frameworks for legal risks and the types of legal risk that are typically encountered in drafting legislative texts and concludes with guidance on how to assess the level of legal risk.

Legal examination and risk management are part of the daily work of drafters, but they can sometimes pose complex challenges. Accordingly, the paper describes the steps to be followed in discharging both functions, including the threshold for raising a matter to a higher level of management. A summary of these steps is included in Appendix 2.

General Role of Drafters

The core function of drafters is to prepare in both official languages a bill or regulation that translates Government policy into law. This requires a sound understanding of both the policy

and the legal effect that the law will have.

Drafters are also concerned with the intelligibility, coherence and consistency of federal legislative texts, particularly the quality and equivalence of both language versions. They are more generally concerned with the integrity of the legal system as a whole and must, in particular, take into account the relationships between federal law and the private law of the various provinces and territories as well as the impact that rules, principles and concepts of provincial and territorial law may have on federal law.

As counsel in the Department of Justice, drafters also have an advisory role on many issues involving legal principles and policies.[1] This role flows from the *Department of Justice Act*. Section 4 provides generally that the Minister of Justice is the "official legal adviser to the Governor General and the legal member of the Queen's Privy Council for Canada" and shall "advise on all matters of law referred to the Minister by the Crown". Section 5 sets out the role of the Attorney General, notably including the duty to "advise the heads of the several departments of the Government on all matters of law connected with such departments".

When a draft bill or regulation is completed, it constitutes an opinion from the drafters that the bill or regulation will have the legal effect required to implement the policy. Arriving at this opinion almost always requires the involvement of other counsel in the Department of Justice. This is why counsel from departmental legal services Units or Justice Policy Units should be available to assist on all draftingfiles. It also explains why the various specialized advisory units within the Justice provide advice in particular areas of the law. Drafters are entitled, and indeed encouraged, to rely on their advice in preparing their drafts and any associated opinions.

Statutory Examination Responsibilities

Drafters also have particular statutory responsibilities to examine draft bills and regulations. These responsibilities originated in the *Canadian Bill of Rights* in 1960 and the *Statutory Instruments Act* in 1971. Although they considerably predate the current government and departmental policies on risk management, they share the same general concern with legality, both in terms of particular laws and in terms of the legal system generally. They engage a basic principle of the rule of law: that the Government must act in accordance with the law. It must not do anything that would bring the administration of justice into disrepute.

Bills

Section 4.1 of the *Department of Justice Act* and the *Canadian Charter of Rights and Freedoms Examination Regulations*[2] establish examination responsibilities relating to the *Canadian Charter of Rights and Freedoms*. Section 3 of the *Canadian Bill of Rights*[3] and the *Canadian Bill of Rights* Examination Regulations[4]establish comparable responsibilities relating to that Act. Under these provisions:

- The Minister of Justice is required to examine every Bill introduced in or presented to the House of Commons by a Minister.
- The examination is for the purposes of ascertaining whether any of the provisions of the Bill are inconsistent with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*.
- Once a bill is introduced or presented to the House, the Clerk of the House of Commons refers it back to the Chief Legislative Counsel.
- A member of the Legislation Section examines the bill and reports the results of their examination to the Chief Legislative Counsel who in turn certifies, on behalf of the Deputy Minister of Justice, that the bill has been examined for compliance with the *Charter* and the *Bill of Rights*.
- Finally, the Minister of Justice has an obligation to report any inconsistencies to the House

of Commons at the first convenient opportunity.[5]

It is also important to recognize the broader context in which these procedures operate. Charter concerns may be identified by Justice counsel and addressed throughout the policy development and drafting stages. In addition, when Cabinet authority is being sought for a program or policy proposal, including the drafting of legislation, the Cabinet support system requires the memorandum to Cabinet to include an analysis of the Charter or other constitutional implications of the proposal.[6]

Regulations

Section 3 of the *Statutory Instruments Act* (*SI Act*) provides for specific examination functions related to proposed regulations:

- It requires the Clerk of the Privy Council to examine every proposed regulation in consultation with the Deputy Minister of Justice.
- This examination is for the purposes of *ensuring* that each proposed regulation satisfies the following criteria identified in subsection (2):

  (a) it is authorized by the statute pursuant to which it is to be made;
  (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
  (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
  (d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

- Drafters in the Regulations Sections of the Legislative Services Branch examine proposed regulations on behalf of the Deputy Minister of Justice.
- Once they have completed their examination, they "blue-stamp" the proposed regulation for transmittal to the Office of the Assistant Clerk of the Privy Council Office-Orders in Council. The stamp indicates that the proposed regulation has been "examined" in accordance with the requirements of section 3 of the Act.
- In the absence of any further advice from the Department of Justice, it also indicates that there are no matters to draw to the attention of the regulation-making authority. In other words, the Department of Justice has no objection to raise with the Privy Council Office to the draft regulation on the basis of the criteria in section 3.
- Finally, subsection 3(3) requires the Clerk to advise the regulation-making authority that each proposed regulation has been examined and indicate any matter to which the attention of the regulation-making authority should be drawn.

Some regulations are exempted from examination under the *SI Act*, but they must nevertheless be examined under section 4.1 of the *Department of Justice Act*[7] (*DoJ Act*) as follows:

- When the Orders in Council Secretariat of the Privy Council Office registers such a regulation, it then sends a copy to the Legislative Services Branch for examination under section 4.1;
- The regulation is examined by a drafter and then the Chief Legislative Counsel on behalf of the Deputy Minister of Justice certifies that it has been examined for compliance with the *Charter*;
- Finally, as with government bills, the Minister of Justice has an obligation to report any inconsistencies to the House of Commons at the first convenient opportunity.

Examination Standards and Reports

The standards established by section 4.1 of the *DoJ Act* and section 3 of the *SI Act* are similar, but not identical.

The object of the section 4.1 examination is to "ascertain whether any of the provisions are inconsistent / *vérifier si l'une de leurs dispositions est incompatible* " with the purposes and provisions of the Charter or the Bill of Rights. The Department has interpreted this standard to be that there is "no credible argument" to support a conclusion of consistency. A report is required only when this has been "ascertained". A credible argument has been explained as one that is reasonable, *bona fide* and capable of being successfully argued before the courts.

The examination under section 3 of the *SI Act* is "to ensure that" the proposed regulation meets the examination criteria [French version: *procède ...à l'examen des points suivants*]. These criteria include consistency with the Charter and the Bill of Rights, but they also extend to other matters. Although some of these also involve potential invalidity (statutory authority), the others do not necessarily ("form and draftsmanship" and "unusual or unexpected use of the authority").

[redacted]

Although the reporting standard under section 3 of the *SI Act* entails considerable discretion, it should be understood to focus on matters of legality and, like the reporting standard under section 4.1 of the *DoJ Act*, to require a report if there is no credible argument to support the validity of a proposed provision or its consistency with the Charter or the Bill of Rights.

Thus, an evaluation of whether a report should be made under section 4.1 of the *DoJ Act* or section 3 of the *SI Act* depends on what legal arguments (including supporting evidence if required)[8] can be made about validity or consistency. The absence of a credible argument to support the validity or consistency of a provision entails a high probability that if a court were faced with a challenge to the provision it would find that it was invalid or inconsistent. These arguments involve the interpretation of laws generally as well as the application of the *Canadian Charter or Rights and Freedoms* and the *Canadian Bill of Rights*. An evaluation under section 3 also involves various other fields of law, most notably constitutional law (the division of legislative powers) and administrative law (judicial review of the exercise of regulation-making and other powers). International law and private law (both common law and civil law) are also often relevant.

Evaluating whether a report should be made involves identifying provisions of the law that raise legal concerns and then examining these provisions in detail to see what arguments can be made for and against their validity or consistency.

[redacted]

There is a considerable degree of judgment in evaluating the strength of legal arguments. Judicial decisions dealing with the matter may be persuasive, depending on the jurisdiction and level of court and the pertinence of the decision. Appellate decisions, particularly those of the Supreme Court of Canada, are most influential.

When there are no judicial decisions on point (as is often the case), the strength of legal arguments is to be evaluated using general legal reasoning, particularly the principles and rules for interpreting legislation.

Finally, consideration has to be given to previous Justice legal opinions related to the matter. Justice counsel give advice on a departmental basis, not as individuals. The Government relies on

this advice, not only when making a particular decision, but also to make later related decisions. The advice must be consistent and departures from previous opinions should not be made without sound reasons and in consultation with managers and other units concerned.

Given the nature of their work and training, drafters are in a good position to determine whether there is a credible legal argument in relation to legal questions that they frequently deal with, such as the interpretation of laws or the scope of regulation-making authority. However, in many cases, before they provide advice on whether a report should be made, they should consult with counsel in Departmental Legal Services (or the instructing Justice Policy Unit in the case of Justice bills and regulations) or one of the specialist advisory sections of the Department. This is particularly true of complex areas such as constitutional law that often have a bearing on the validity or application of laws.

If there is no credible legal argument to support a conclusion that a provision is valid or consistent, the provision should be reported and no further risk analysis is needed to justify the report.

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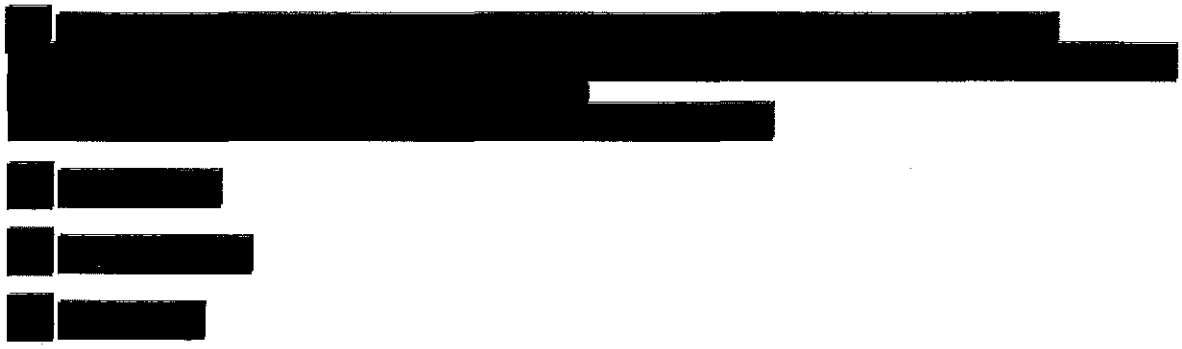
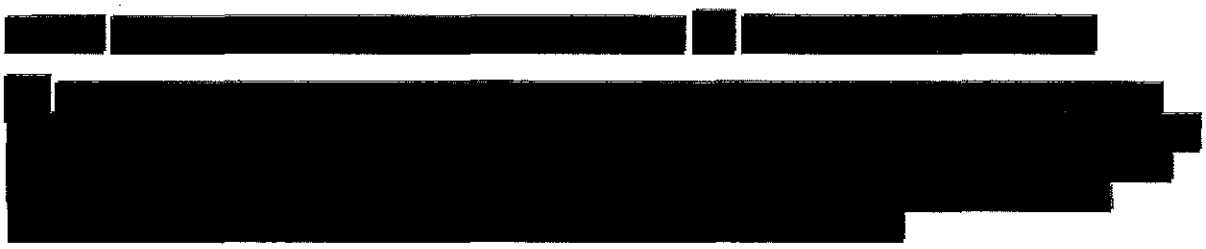


[5] In this paper, further references to the Charter examination under section 4.1 examination should be read as including the Bill of Rights examination.



[8] For example, evidence needed to support arguments under section 1 of the *Charter* or the existence of conditions precedent to the making of regulations.

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STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Legal Risk Management

Introduction

Risk management is an essential part of the process for making policy or program decisions. Legal risks are an important subset of the risks that the Government must take into account in the more general risk assessments it makes in relation to its policies and programs.[1] Many of the risks that typically arise in law-making jeopardize policy or program objectives that depend on either the validity of a law or the way in which it is interpreted or applied.

The following are some fundamental concepts related to legal risk management:

"Risk" refers to the uncertainty that surrounds future events and outcomes.

"Legal Risk" is a risk arising out of an issue or event giving rise to a need for a legal response. A legal risk may also arise from a legal issue requiring a response or action by the government of a legal, communication-related, organisational or political nature.[2]

"Level of a risk" is quantified in terms of the *likelihood* (chance, probability) of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and the *severity* or magnitude of the consequences of that outcome or event.

Accountability Frameworks

The Treasury Board's Management Accountability Framework (MAF) establishes the standards for management in the Government of Canada and is the basis for management accountability between departments/agencies and the Treasury Board Secretariat (TBS) and the Public Service Human Resources Management Agency (PSHRMAC).[3]

Under this Framework, all departments/agencies are required to report on their management of legal risk, as evidenced by

- ongoing/regular scanning of programs for legal risks, in a manner commensurate with the nature of the department's activities and mandate;
- senior management engagement in Legal Risk Management (LRM), including the active review, avoidance, mitigation and management of legal risks;
- effective sharing of information on legal risks, including with the Department of Justice and central agencies (in large part to create a "whole of government" perspective); and
- contingency planning to respond to risks that have materialized.

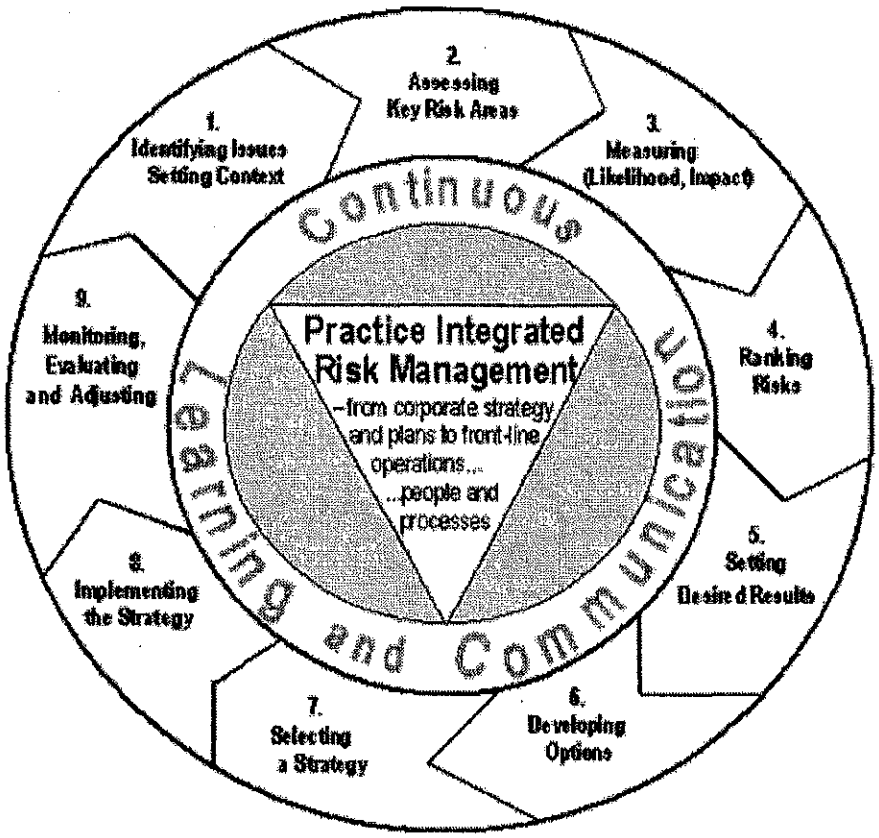
The Department of Justice Accountability Framework and Governance Structure for Legal Risk Management[4] says:

- LRM is a priority of the Department of Justice.
- LRM is the process of making and carrying out decisions that reduce the frequency and severity of legal problems that prejudice the government's ability to meet its objectives successfully. Its main components are the detection, avoidance, mitigation and

management of legal risks. LRM is linked to Integrated Risk Management, which is a component of the TBS Management Accountability Framework.

- LRM is practiced by client departments in partnership with Justice. It is one of the principal processes used by the Department to provide the highest quality legal service to the government of Canada and its institutions.
- LRM is also the responsibility of Justice itself, with respect to the legal risks of its own policies and legislation.
- LRM includes: scanning (risk identification), evaluation of the nature of legal risks, assessment of the level of the risks, information sharing, management of high impact legal risks, contingency planning, informing and engaging senior officials and Ministers (individually and collectively) on key LRM issues, identification and analysis of government-wide trends, instrument choice, dispute resolution, understanding of roles and responsibilities, case management and tracking techniques (e.g. I-Case).
- It is the responsibility of all employees and managers across the Department of Justice to know and apply LRM principles and methods appropriate to their particular positions and areas of responsibility.
- In addition, certain individuals or units have responsibility to provide functional direction and to coordinate the activities of others as they carry out their LRM duties.
- An accountability framework for a devolved system for LRM requires that senior managers in the Department ensure that responsibility and accountability cascades down within their areas of management.

The Risk Management framework utilized when developing this risk evaluation and management process is similar to the diagram below.



[redacted]

Identifying Legal Risks

Risk identification is critical to effective risk management. It enables DOJ and other departments to:

- Gain an awareness of emerging issues that could raise significant legal risk.
- Avoid being "blindsided".
- Get an accurate assessment of contingent liabilities.
- Manage legal risks strategically.
- Explore non-litigious ways to resolve disputes.
- Set up risk management regimes.

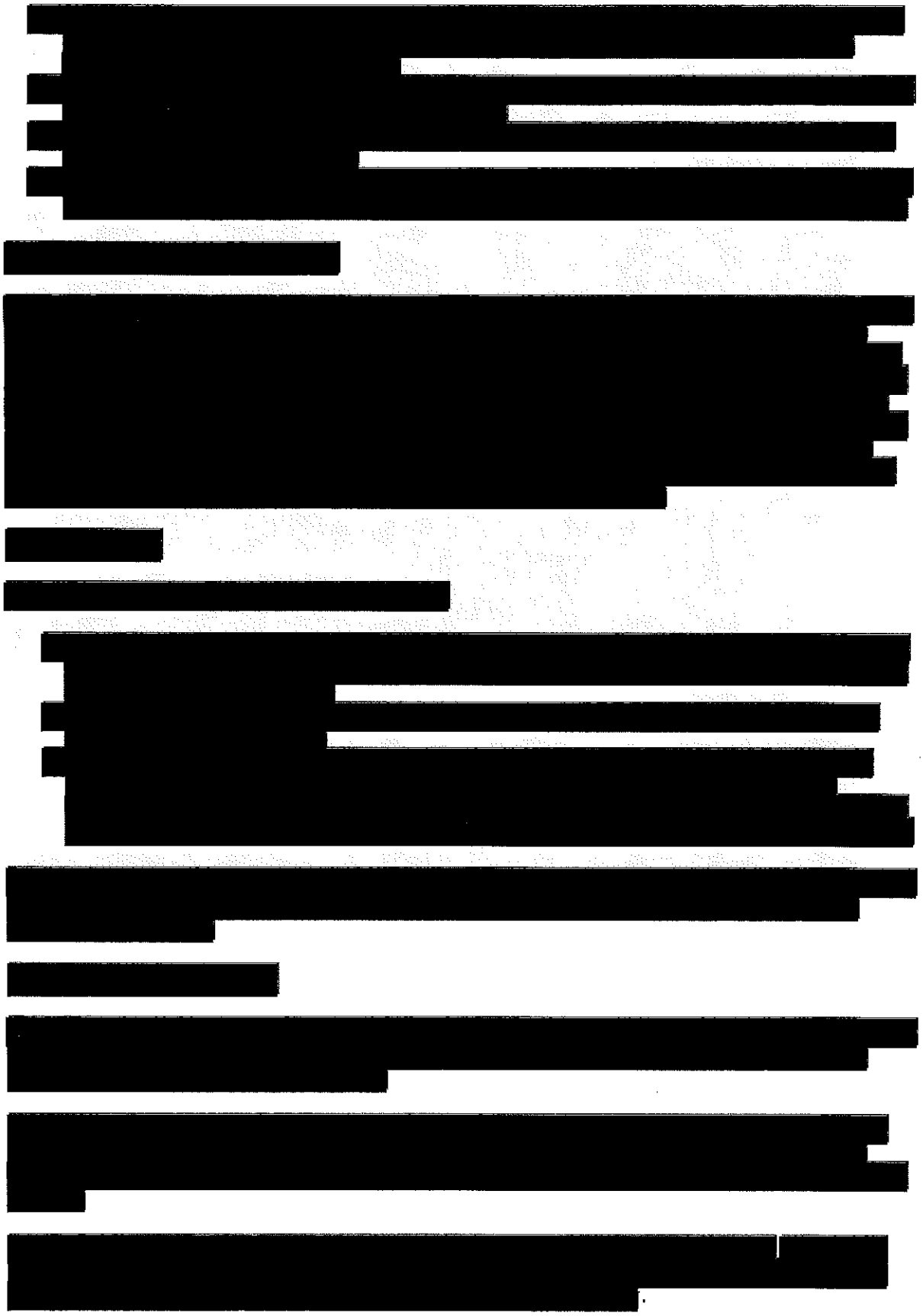
Under the Treasury Board Management Accountability Framework, all departments, including DOJ, must establish a risk management process that will identify legal risks at an early stage, including

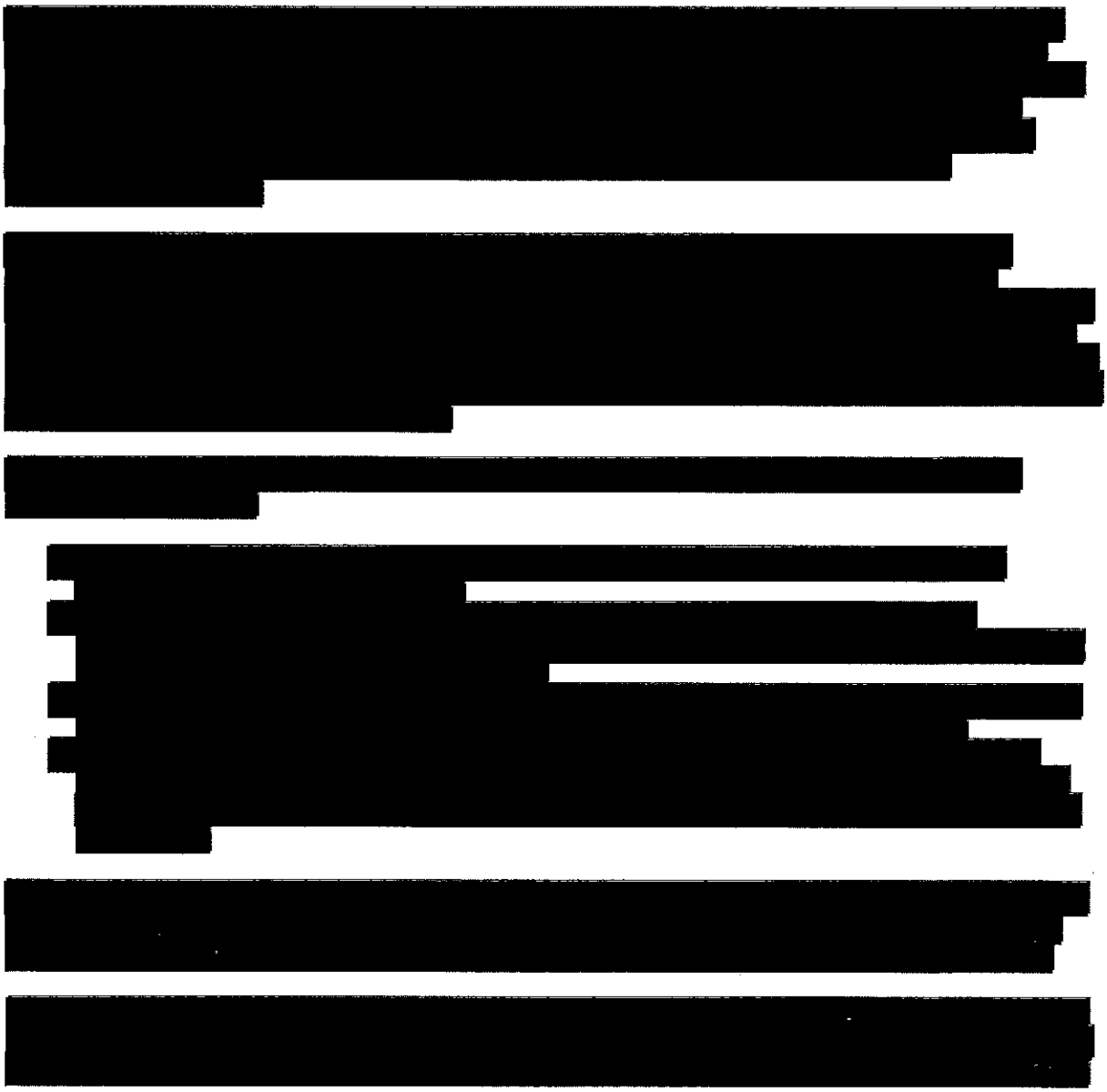
- all civil and criminal litigation;
- non-litigation legal risks that could lead to litigation or have a significant impact on
    - the national interest,
    - the Charter or the Constitution,
    - the government's, the department's or other departments' policy, law, regulations and programs,
    - the government's, the department's or other departments' finances (if the cost may exceed the ability of the department to pay),
    - federal-provincial-territorial-international relations, treaties or agreements,
    - relations with Aboriginal people or Metis, or
    - public confidence in the government or in the courts;
- legal issues or events that may be controversial, attract media attention, or involve Cabinet ministers or prominent public figures; and
- high-impact human rights, personnel, access and privacy, gender or diversity issues.

DOJ has a further obligation to inform other departments of known legal risks that could affect their policies or programs when it delivers legal services to its clients and to provide an assessment of such legal risks.

Considering the Nature of a Legal Risk

Legal risk assessment must be legally accurate and based on a solid analysis of the relevant law. It must also be relevant in the sense that it provides specific conclusions that enable clients to make an informed decision about their course of action. Legal risk assessment is also influenced by the policy and operational context in which it arises. [redacted]





Assessing the Level of a Legal Risk

As indicated above, the level of a legal risk is generally quantified in terms of two dimensions:

- the *likelihood* of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and
- the *severity* of the consequences of the adverse outcome or unwanted event if it occurs (*impact*).

Once the nature of a legal risk has been evaluated, the results of the evaluation may be used to assess the level of the risk. The following chart, particularly the numbering of risk levels, is based on risk assessment grids used throughout the government. It indicates levels of legal risk that express varying degrees of likelihood and impact (severity). The latter relates to the potential effect on the client department, other departments or the government as a whole.

This chart is suggested only as a general guide for characterizing the level of legal risk. The

expression of likelihood in terms of percentages is approximate rather than a precise measure. It should also be noted that levels 1 to 3 (which involve minimal impact) will seldom apply to legislative provisions because of the general, ongoing nature of their application.

		RISK LEVEL		
IMPACT ON GOVERNMENT	**Significant**	Medium (7)	High (8)	High (9)
	Moderate	Low (4)	Medium (5)	High (6)
	Minor	Low (1)	Low (2)	Medium (3)
LIKELIHOOD OF ADVERSE OUTCOME		Under 30%	30 to 70 %	Over 70%

The significance of the various risk levels in the context of drafting services is explained in the next section.

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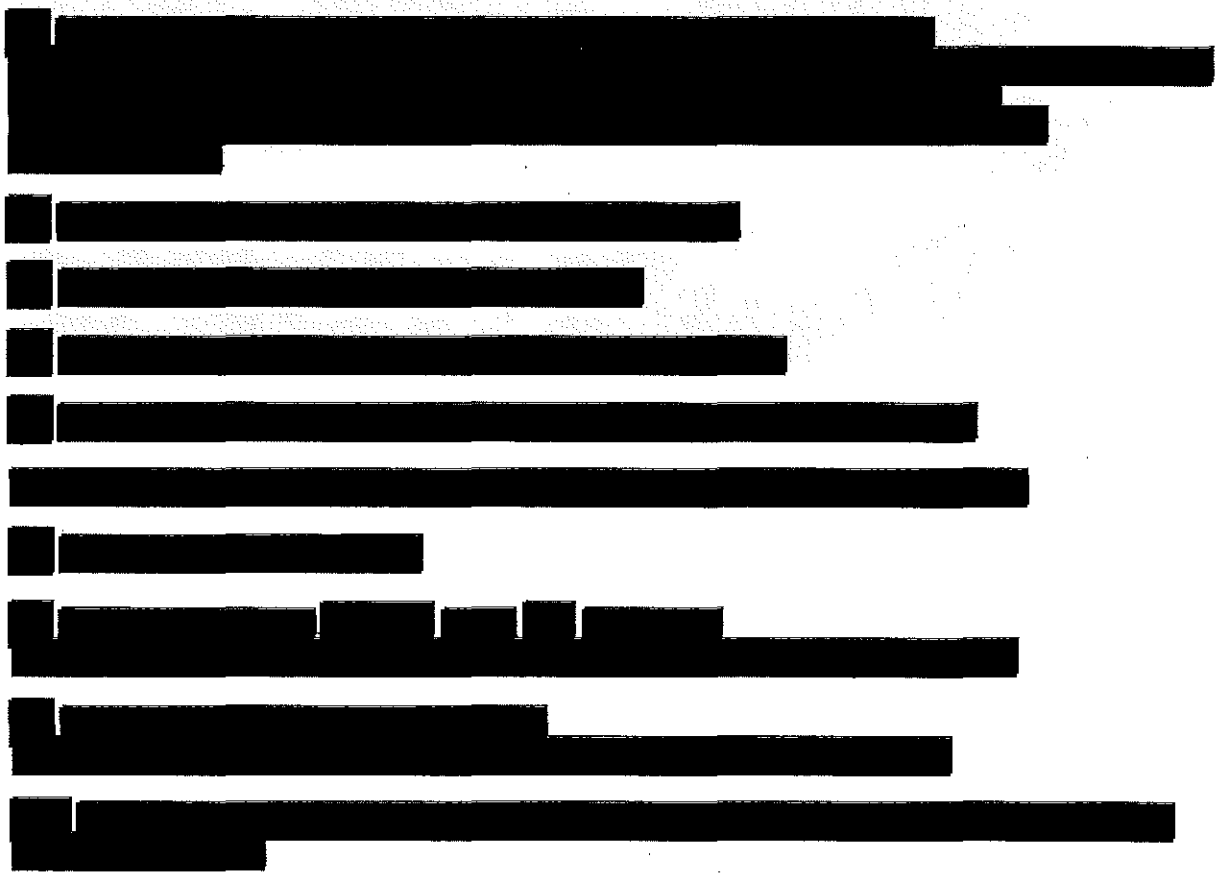

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STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Statutory Examination and Legal Risk Management Steps

Drafters in the Drafting Services Group should follow the steps outlined below in order to meet the statutory examination requirements and the Department's legal risk management objectives. Their role is to satisfy themselves that legal issues and risks raised by their drafts have been evaluated and addressed. In determining the level of risk, drafters will not necessarily, as noted above, have the information needed to assess each aspect of the risk or, indeed, to determine the overall level of the risk. There may be others in Justice, most notably in the Departmental Legal Services Units (or the Justice Policy Units in the case of Justice bills and regulations), or in client departments who are able to make these assessments. But drafters still have to participate in arriving at a conclusion as to the level of the legal risk and in managing the risk as set out below.

Initial Assessment

In reviewing draft provisions or policy instructions, drafters are attempting to understand the legislative or regulatory proposal, its policy, operational, political and financial context and the time-frame for completing it. This understanding is needed to identify any policy shortcomings or ambiguities, to uncover or highlight legal issues and to determine how to structure the proposal. In the same way, it is important that client officials understand the legal principles giving rise to any legal concerns and appreciate the need for Justice counsel to understand the applicable contextual framework. A mutual understanding of each other's "reality" will go a long way in ensuring that Justice counsel and client officials work together in resolving identified legal issues.

In the drafting of a bill or regulation, the identification and assessment of legal issues is selective. Not every legal issue needs to be discussed. In fact, drafting may proceed with little

discussion of legal issues if the proposal and its legal foundation are clear. Discussions about legal issues arise when the drafters have concerns that cannot be readily addressed within the framework of their instructions. These concerns may be raised at a very general level to prompt further policy work (for example, by asking "have you considered the impact of privacy rights on this matter?"). They may also involve the drafters' determination of the strength of legal arguments about validity or consistency, particularly in the context of the statutory examination functions under section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act*.

Drafters are encouraged to discuss concerns with their managers and colleagues within the Legislative Services Branch (including the Advisory and Development Services Group and the Legislative Revision Services Group) and the relevant Legal Services Units (LSU), or the Justice Policy Units in the case of Justice bills and regulations. Aspects of risk, such as the scope of the risk or the risk of challenge, may require consultation with LSUs and their clients or the JPUs. Drafters may also seek input from the specialized advisory groups in Justice, for example the Human Rights Law Section in relation to Charter issues. Their contribution may be sought whenever a significant issue arises that would benefit from their views. If a formal opinion is required to address the concerns in a drafting file,[1] the drafters and the other counsel involved should agree on who is in the best position to prepare it. This may depend on which aspects of the matter are most significant and who is in the best position to consider them. It may also be appropriate for the opinion to be developed jointly with different counsel responsible for the different aspects.

Drafters should inform client officials as early as possible about any significant concerns, including a preliminary assessment of the level of risk involved and the nature and scope of any additional legal work or analysis that may be underway or required.

Concerns may be resolved in either of the following ways:

- client officials modify their legislative proposal or timetable in a way that takes care of the concerns; or
- the drafters are satisfied, on the basis of the contextual framework or upon a closer analysis of the law, that their concerns are not reportable under the *DoJ Act* or the *SI Act* (in other words, a credible legal argument can be made in support of the proposal) and the level of risk is not high.

When faced with a provision that raises a legal risk, drafters should explore ways of eliminating or reducing the risk. If this can be accomplished in a way that is acceptable to the client, then it should be done. Otherwise, if the risk is low or medium, the drafters should make sure that the client is fully aware of it and then proceed to finalize the bill or blue-stamp the regulation. If the risk level appears to be high or the provision appears to be reportable, or of there is uncertainty or disagreement on these matters, the drafters should continue with the detailed analysis described next.

Detailed Analysis: Confirming Legal Position and Consultation

Legal concerns are not always readily resolved, either because clients are unwilling or unable to modify their proposal so as to resolve the problem or because a closer legal analysis confirms the initial assessment of the problem. When drafters have conducted their initial assessment in consultation with their LSU or JPU counterparts and any other Justice colleagues as appropriate they may be faced with a provision that appears to be *reportable* or raises a *high level of legal risk*.

If in such circumstances the client insists that the bill be completed and printed for review by the Privy Council Office, or that the regulation be blue-stamped, the drafters should formally bring the matter to the attention of their manager. They should also inform the client officials of this

referral and indicate that the regulation will not be blue-stamped or the bill will not be completed without instructions from their manager. The manager should immediately get in touch with his or her LSU or JPU counterpart. If more than one department is involved in the drafting of a particular provision, it may be necessary to involve all the LSUs or JPUs concerned.

Managers may also have to be brought into a file to resolve disagreements among Justice drafters and counsel.

If the managers work out a solution or agree that the legal issue is not reportable and poses a low or medium level of risk that cannot be eliminated or reduced with the concurrence of the client, then the drafting manager should inform the drafters of this conclusion and authorize the regulation to be blue-stamped or the bill to be completed. As well, the LSU or JPU manager should inform appropriate client officials of this decision.

If the managers determine that the proposal is reportable or poses a high risk, this determination may be sufficient to convince client officials to make appropriate changes to their proposal. The matter would then be returned to the drafters for appropriate next steps. However, it is also possible that client officials may continue to refuse to make the required changes and reiterate, at the highest levels, their decision to proceed with the proposal and to accept all associated risks. A formal written risk assessment should be prepared and provided to the client and a contingency plan based on the assessment should be prepared jointly with client department and the LSU or JPU counsel.

If managers are unable to work out a suitable solution or disagree on the law or level of risk associated with the issue, they should refer the matter to the next management level. Consistent with the principle that "Justice should speak with one voice", any internal disagreement within the Department of Justice must be resolved, if need be by the Deputy Minister or one of the Associate Deputies. Any provision that is determined to be reportable or to pose a high legal risk, including being in conflict with the *Charter*, may be brought to the attention of the Privy Council Office or ministers. Who specifically will make and report the determination of the Department of Justice will depend on the circumstances of each case.

Conclusion

Drafting and examining legislative texts and managing the legal risk associated with them are daunting enterprises. Laws, by their very nature, are of broad and continuing application. Efforts to ensure their legality and to minimize or eliminate risk will count their returns many times over. And just as the preparation and enactment of laws involves a host of people, both within and outside the Department of Justice, so too the assessment and mitigation of legal issues and risk do not fall on the shoulders of any one person or group. Legal examination and risk management, like the making of laws itself, can only succeed as a cooperative effort that brings together the variety of talents needed to produce laws that will achieve their goals.

Appendix 1 Appendix 2

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[1] For regulations files, see the *Guidelines for Drafting Services Group Legal Advice on Regulations* http://doinet/lsb_e/Direction/guidel_draft.htm.

Date Modified: 2011-03-11

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Appendix 2 - Steps for Statutory Examination and Legal Risk Management

In the drafting of a bill or regulation, the identification and assessment of legal issues is selective. Not every legal issue needs to be discussed. In fact, drafting may proceed with little discussion of legal issues if the proposal and its legal foundation are clear. Discussions about legal issues arise when the drafters have concerns about a provision that cannot be readily addressed within the framework of their instructions. The following summarizes the steps that drafters should take in consultation with their Departmental Legal Services or Justice Policy colleagues when they encounter such legal issues. These steps may have to be repeated as instructions or circumstances change or new information comes to the attention of the drafters or other Justice counsel involved.

Statutory Examination

1. Identify the provisions of the bill or regulation that raise concerns in terms of the examination criteria under section 4.1 of the *Department of Justice Act* or section 3 of the *Statutory Instruments Act*.

2. Evaluate the strength of the legal arguments that can be made for and against the validity or consistency of those provisions.
   - Is there relevant case law and, if so, how relevant and authoritative is it?
   - Are there relevant Justice opinions and, if so, how relevant and authoritative are they?
   - Should colleagues within the Branch or in the specialized advisory services of Justice be consulted?

3. If there is no credible argument to support a conclusion that a provision is valid or consistent, the provision may be reportable (see step 10 and following).

Legal Risk Management

Evaluating the nature of the legal risk

4. In addition to considering the results of steps 1 and 2, similarly evaluate the strength of the legal arguments relating to any other concerns that a court or other decision-making body – including the SJC or an international tribunal – might find provisions to be invalid or to apply contrary to the Government's view, including
   - Would the provision be interpreted too narrowly to sufficiently support the relevant government policy or program?
   - Would a challenge by the SJC be successful?
   - Would a challenge before an international tribunal be successful?

5. Evaluate the scope of the risk
   - Does the risk affect a multitude of actions over a period of time or is it confined to a few instances of limited duration?
   - What is the value of the financial or other interests at stake?
   - Will the legal issue arise in other circumstances?

6. Evaluate the probability of challenge
   - Who is affected by the Act or regulation?
   - What is the likelihood that someone will challenge the validity or application of the Act or regulation?
   - What is the likelihood that the SJC will challenge the validity of the regulation?

7. Evaluate the probable consequences
   - What remedy would a court grant if it finds that an Act or regulation is invalid?
   - Would the scope of the remedy be confined by reading down or severing invalid provisions?
   - Will the remedy affect similar matters arising in other circumstances?
   - What disposition would the SJC make if it considers a regulation to be invalid?
   - Will the disposition affect similar matters arising in other circumstances?

Assessing the level of the legal risk

8. The level of a legal risk is generally quantified in terms of two dimensions:
   - the *likelihood* of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and
   - if it happens, the *severity* of its consequences (*impact*).

Use the following chart as a general guide to determine the level of a legal risk:

		RISK LEVEL		
IMPACT ON GOVERNMENT	**Significant**	Medium (7)	High (8)	High (9)
	Moderate	Low (4)	Medium (5)	High (6)
	Minor	Low (1)	Low (2)	Medium (3)
LIKELIHOOD OF ADVERSE OUTCOME		Under 30%	30 to 70 %	Over 70%

Resolving and Managing Legal Issues and Risks

9. Explore with the client ways of eliminating or reducing the risk.

10. If it appears that the provision is reportable or that the risk is *high*, immediately raise the matter with manager and inform client.

11. Manager consults immediately with Departmental Legal Services or Justice Policy manager. If they conclude that the provision is not reportable, that the risk is low or medium and that it cannot be eliminated or reduced, proceed to complete drafting or examination (blue-stamping).

12. If managers conclude that the provision is reportable or that the risk is high and the client insists on proceeding, they should raise the matter to the next management level. Contingency plans should be prepared in consultation with legal services counsel and the client department.

13. If no resolution is reached with the client through successive management levels, the matter may be raised with Privy Council Office and ministers.

Date Modified: 2011-03-16

This is Exhibit "**4**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

Public Sector Integrity Commissioner

Commissaire à l'intégrité du secteur public

Ottawa, Canada K1P 5Y7

PROTECTED B

Personal and Confidential

This is Exhibit "B" referred to in the affidavit of Edgar Schmidt sworn before me in Ottawa on the 13 day of November 2013

Commissioner of oaths

JOREY BOUCHER
A COMMISSIONER OFFICER
COMMISSAIRE DU GREFFE

September 4, 2012

Mr. Edgar H. Schmidt
General Counsel and Special Advisor
Legislative Services Branch, Department of Justice
Room 7081 SAT
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Re: Request for Access to Legal Advice, File No. 2012-LAR-0132

Dear Mr. Schmidt:

On July 19, 2011, you made a request to receive free legal advice pursuant to section 25.1 of the *Public Servants Disclosure Protection Act* (the "*Act*") on the grounds that you are considering making a protected disclosure of wrongdoing. Section 25.1 of the *Act* gives me the discretionary authority to approve access to legal advice to any person who qualifies up to an amount of $1,500, and in exceptional circumstances, that amount can be increased to $3,000. My Office has concluded its review of the information you provided and this letter is to inform you of my decision not to approve your request for access to legal advice for the following reasons.

I first want to address your preliminary question in regard to my previous position at the Department of Justice (DOJ) and whether this poses any difficulty for me in dealing with your request. I occupied the position of Associate Deputy Minister responsible for Corporate Services and Civil Law at the DOJ from 1997 to 2003 and various other positions before then. In these positions, I have had no direct involvement in ensuring the conformity of legislation and regulations with the *Canadian Bill of Rights* (the "*Bill of Rights*") or the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). My lack of involvement with these issues combined with the fact that it has been over nine years since I occupied my last position at the DOJ are the basis on which I have concluded that there is no real, apparent or potential conflict of interest that would preclude me from dealing with your application for legal advice.

Eligibility

As stated previously, the basis of your request is that you are considering making a disclosure of wrongdoing under the *Act*, as such you meet the first eligibility criterion under paragraph 25.1(1)(*a*) of the *Act*.

Conditions

Subsection 25.1(3) of the *Act* sets as a condition that I may grant access to free legal advice to a public servant who is considering making a disclosure only if I am of the opinion that the act or omission to which the disclosure relates likely constitutes a wrongdoing under this *Act* and that the disclosure is likely to lead to an investigation being conducted under this *Act*.

The subject-matter of your proposed disclosure concerns the application and interpretation of certain provisions of the *Bill of Rights*, the *Department of Justice Act* and the *Statutory Instruments Act* (the "*SIA*"). Section 3(1) of the *Bill of Rights* requires the Minister of Justice (and by inference the Deputy Minister of Justice and the DOJ) to examine every Bill introduced or presented to the House of Commons by a Minister in order to ascertain whether any of the provisions thereof are "inconsistent" with the purposes and provisions of the *Bill of Rights*. It also requires the Minister of Justice to report any such inconsistency to the House of Commons at the first convenient opportunity. Section 4.1 of the *Department of Justice Act* provides a substantially identical provision in relation to the *Charter*.

Subsections 3(2) and (3) of the *SIA* sets out the duties of the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, in reviewing proposed regulations. In essence, the process established under the *SIA* calls for a review to ensure that a proposed regulation is authorized by its enabling statute; that it does not constitute an unusual or unexpected use of the authority under which it is made; that it does not trespass unduly on existing rights and freedoms and that is not, in any case, inconsistent with the purposes and provisions of the *Charter* and the *Bill of Right*. The *SIA* requires the Deputy Minister of Justice to ensure that this review is conducted and that he or she provide advice to the regulation-making authority in regard to these requirements.

You are of the view that since 1992 and on-going to this date, the aforementioned provisions are not being followed by the DOJ. Instead of ascertaining whether the provisions of a Bill or regulation is "inconsistent" with the *Bill of Rights* or the *Charter*, you claim that DOJ has directed its officials to ascertain whether any provision is "so manifestly inconsistent with the *Bill of Rights* or the *Charter* that no argument can reasonably be advanced in favour of its consistency". You also allege that when the DOJ or its lawyers come to the opinion that a provision is likely or even very likely inconsistent with the *Bill of Rights* or the *Charter*, this fact is not communicated to the Minister as long as the DOJ is of the view that some argument can still reasonably be advanced in favour of consistency. This practice, in your view, prevents the Minister from considering the issue and making a report as required by sections 3 and 4.1 of the *Bill of Rights* and the *Department of Justice Act* respectively to the House of Commons in regard to any inconsistency.

The question that arises from your assertions is whether the qualitative and quantitative criteria used by the DOJ to assess whether proposed enactments are "inconsistent" with the *Bill of Rights* and the *Charter* are reasonable and defendable under accepted principles of statutory interpretation. As such, you are requesting funding under section 25.1 of the *Act* to obtain legal advice on the legality of the practices described above.

Your request of July 19 and memorandum of August 16, 2012 provide legal analysis and arguments in support of your allegations. However, other than your own views on the subject, you have not provided any information about a specific incident or instance where a lawyer's opinion in dealing with these issues has been altered for improper reasons, wrongfully concealed from the Minister, or where inappropriate pressure was put on a lawyer to change his or her opinion. That being said, I have taken into account that perhaps such information would be solicitor-client privileged and therefore cannot be disclosed. Nonetheless, I do not believe that there are sufficient grounds to satisfy the first part of the test under subsection 25.1(3) of the *Act* on whether the acts or omission likely constitute wrongdoing.

The second part of the test under subsection 25.1(3) of the *Act* requires me to assess the likelihood of a disclosure leading to an investigation. In doing so, I have considered the possible application of subsection 24(1) of the *Act*. Paragraph 24(1)(*e*) provides that the Commissioner may refuse to deal with a disclosure or commence an investigation when the subject-matter of the disclosure relates to a matter that results from a balanced and informed decision-making process on a public policy issue. As there is some degree of discretion in determining and interpreting whether the provisions of a Bill or regulation might be "inconsistent" with the *Bill of Rights* or the *Charter*, consideration would have to be given to paragraph 24(1)(*e*) of the *Act* having regard to the subject-matter of your disclosure.

Also, paragraph 24(1)(*f*) of the *Act* provides that the Commissioner may refuse to deal with a disclosure or commence an investigation for any valid reason. In this case, I would have to take into account that legal advice on the constitutionality of Bills and regulations is protected by solicitor-client privilege, and that several other aspects of the evidence would likely be considered confidences of the Queen's Privy Council. Because subsection 30(1) of the *Act* prohibits my Office from requesting or considering information that is solicitor-client privileged or a confidence of the Queen's Privy Council, consideration would have to be given to the practicality of conducting an investigation in relation to these allegations. This consideration would raise the possible application of section 24(1)(*f*) of the *Act* in the event of a disclosure.

In determining whether an investigation in regard to this subject-matter is likely, I find that there is a significant likelihood that your disclosure would not lead to an investigation, either for want of specificity, or pursuant to paragraphs 24(1)(*e*) and (*f*) of the *Act*. Based on the information provided, I cannot conclude that your disclosure would "likely" lead to an investigation, as required by the second part of the test under subsection 25.1(3) of the *Act*.

I thank you for bringing this matter to my attention and I regret not being able to give you a more favourable response. Should you have any questions about this decision, please do not hesitate to call Mr. Brian Radford, Senior Counsel, at 613-946-2141.

Sincerely,

Mario Dion
Commissioner

This is Exhibit "**5**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

No. 105

JOURNALS

OF THE

HOUSE OF COMMONS

OF CANADA

OTTAWA, MONDAY, APRIL 7, 1975

2.00 o'clock p.m.

PRAYERS

STATEMENT BY MR. SPEAKER

MR. SPEAKER: May I suggest to the House that the proposed change in providing for the daily presentation of replies to questions on the Order Paper will entail an alteration in the printing of the Order Paper.

Presently, notice of questions as received are printed daily on the Notice Paper of the Orders of the Day and a consolidation of all questions has been printed on Mondays with a listing of question numbers on Wednesdays.

In order to cut down or eliminate what may be considered as superfluous printing, I suggest that in future the notice of written questions be printed daily, as received and that the consolidated notice of written questions be printed but once a week—that is to say on Mondays only.

Is that agreed? Agreed.

Mr. Lang, a Member of the Queen's Privy Council, laid upon the Table,—Copies of Opinion pursuant to Section 3 of the Canadian Bill of Rights with reference to Bill S-10, An Act to amend the Feeds Act. (English and French).—Sessional Paper No. 301-7/13.

Mr. Gillespie, a Member of the Queen's Privy Council, laid upon the Table,—Report entitled "Private and Public Investment in Canada—Outlook 1975". (English and French).—Sessional Paper No. 301-1/213.

Pursuant to Standing Order 39(4), the following four Questions were made Orders of the House for Returns:

No. 84—*Mr. Fortin*

What were the expenses or contributions made by any federal department for the Toronto and Vancouver Exhibitions, each year since 1969?—Sessional Paper No. 301-2/84.

No. 724—*Mr. Marshall*

1. What interest does the government have in the property located in Western Newfoundland known as Pinetree Radar Site, which was left by the American Government after the phase-out of the Ernest Harmon Air Force Base?

2. What is the nature of the interest, if any, of (*a*) the Department of National Defence (*b*) the Department of Transport (*c*) Telesat Canada (*d*) RCMP (*e*) the Department of Public Works in acquiring property at the location?

301 - 7/13

301-7/13

REPORT TO THE HOUSE OF COMMONS
BY THE MINISTER OF JUSTICE
PURSUANT TO SECTION 3 OF THE
CANADIAN BILL OF RIGHTS

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:

> Properly construed and applied, the 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.

(April) 7, 1975

Minister of Justice.

This is Exhibit "**6**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

THE IMPACT OF THE CHARTER ON THE PUBLIC POLICY PROCESS AND THE DEPARTMENT OF JUSTICE©

BY MARY DAWSON*

I. INTRODUCTION

In the ten years since the proclamation of the *Canadian Charter of Rights and Freedoms,*[1] governments at all levels have faced a period of rapid change. Not only has the *Charter* resulted in changes to many laws, it has also changed the way governments operate and introduced a substantial element of uncertainty in the operation of government programmes. This paper will discuss the impact of the *Charter* on the public policy process from the perspective of the federal Department of Justice. In particular, it will look at the changing role of the Department of Justice in the policy-development process. It will also touch briefly on some of the substantive legal issues at the forefront of public policy decision making with which we continue to grapple.

II. POLICY DEVELOPMENT AND THE CHARTER

It has taken considerable effort for policy planners in the federal government to come to grips with the *Charter.* Equally, there has been a "working-in" period for the Department of Justice.

In the beginning, the *Charter* presented a host of value-laden policy issues. The lack of certainty about how provisions of the *Charter*

 I appreciate the assistance of the Public Law Sector of the Department of Justice, particularly the Human Rights Law Section.

* Associate Deputy Minister (Public Law), Department of Justice, Canada.

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

applied in particular cases made those who had to rely on the Department's advice somewhat uncomfortable. Not surprisingly, policy planners, who initially lacked familiarity and comfort with the *Charter*, resisted seeking legal advice; there was even a bureaucratic tendency to wish the *Charter* away.

Lack of certainty regarding the *Charter*'s application presented the Department of Justice with serious challenges. Providing legal advice to guide policy development in such an environment was frequently difficult. Initially, the Department found itself in a reactive mode as *Charter* challenges were filed and court decisions released. The government's policy agenda was often driven by specific cases. A series of significant *Charter* cases, such as *Singh* v. *Minister of Employment and Immigration*[2] and *R.* v. *Schachter*,[3] emphasized the serious burden on the government.[4]

The Department's initial experiences served as a catalyst for some serious thinking about the handling of *Charter* issues. It had to re-examine its role as legal adviser to the government and had to reassess when and how to provide legal advice. Similarly, other government departments and agencies had to reflect upon how legal issues, particularly *Charter* issues, should be addressed in the policy-development process.

The result was a growing recognition that the Department of Justice would operate more like a central agency of government, such as the Privy Council Office or Treasury Board. At the same time, the Department was moving toward what it calls "management of the law." "Management of the law" represents the Department's efforts, in all areas of law, including the *Charter*, to be proactive, to stay on top of legal trends, and to provide legal services that enable the government to deal with legal issues in an orderly and organized way.

Outside the Department of Justice, other departments have recognized the need to ensure that *Charter* considerations are integrated into the policy-development process. The Deputy Minister of Justice has urged government departments to consult their legal advisers during the early stages of policy development so that legal issues, especially

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[2] [1985] 1 S.C.R. 177 [hereinafter *Singh*].

[3] (1992), 93 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Schachter*].

[4] See Part IV below for a discussion of this issue.

Charter issues, are identified and analyzed before policy options are fixed. The Department has devoted considerable effort to deciding on the most appropriate and consistent means by which to provide advice to policy makers most in need of it.

In 1991, the Clerk of the Privy Council, at the request of the Department of Justice, wrote to all deputy ministers outlining steps to ensure that *Charter* issues were identified and assessed before new policy proposals were considered by Cabinet. He specifically asked them to involve their legal advisers early in the policy-development process so that a *Charter* analysis could be reflected in the Cabinet document. The analysis had to include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs.

Justice lawyers in the departmental legal service units are the first to be involved in the identification of *Charter* issues during the policy-development process. However, the Department has devoted considerable attention to educating policy managers in the various departments on the kinds of issues that raise *Charter* concerns. Policy planners are often aware that they must seek legal advice from Justice's departmental legal officers, their point of first contact.

The Department of Justice has made efforts to assist the frontline Justice lawyers to develop *Charter* issues and define them to their clients. As one of its initial responses to the *Charter*, the Department established the Human Rights Law Section in the Public Law Sector. There are more than twenty lawyers in this section whose duties include research, policy work, and offering advice and litigation support in matters relating to the *Charter* and other human rights statutory instruments. The Human Rights Law section, which serves as a centre of *Charter* expertise for Justice lawyers and their clients, provides legal support to the Department's frontline lawyers.

In addition to the general duty of the Minister of Justice Attorney General to provide legal advice to government departments, the Minister has certain obligations under the *Department of Justice Act*[5] and the *Statutory Instruments Act*.[6] Amended in 1985 by the *Statute Law*

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[5] R.S.C. 1985, c. J-2.

[6] R.S.C. 1985, c. S-22.

(Canadian Charter of Rights and Freedoms) Amendment Act,[7] these statutes require the Minister to examine all government bills introduced in the House of Commons, as well as most regulations, for consistency with the *Charter*, and to report any inconsistency to the House. The Minister has not had to make such a report to the House of Commons but the very existence of these obligations has created a very powerful check on the policy process. The Minister's obligation cannot be ignored either by Justice lawyers or by their clients when they are assessing proposed legislation and regulations for consistency with the *Charter*.

In assisting the Minister with her obligations, Justice lawyers must carefully consider the existing case law under the *Charter*, the policy rationale for the proposed law, and whatever evidence there is to support the need for the law. They are not expected to give their approval to some aspect of proposed legislation or regulations because it might stand up on the narrowest reading of the *Charter*. Nor can they let what they perceive to be important social and economic goals overcome their sense of what is acceptable under the *Charter*. They have a responsibility to consider the overall public interest in the legislation or regulations, and must not raise unnecessary obstacles to the achievement of important policy goals. In this vein, they must also be careful not to pander to a particular group's interests at the cost of the overall public interest.

The decision by Justice counsel whether to take the position that a proposed law is inconsistent with the *Charter* is not an easy one. Characterizing the issues and thus determining which side of the prism to look through is often the most difficult part of the process. The Justice lawyer will consider whether there are good arguments that may be advanced for the *Charter* validity of the proposed law and then must predict the probable outcome of a *Charter* challenge. The degree of risk that will compel the advice that a proposed law is inconsistent with the *Charter* is difficult to quantify. Nevertheless, Justice lawyers have to be prepared to give a frank and realistic assessment and to state when a proposed law is not likely to be acceptable.

There are no set procedures to determine how *Charter* issues are resolved. Part of the role of the legal adviser in the policy-development process is to ensure that they *are* resolved. There are a number of ways

[7] R.S.C. 1985, c. 31 (1st Supp.).

in which this can be accomplished. For the most part, serious *Charter* issues are resolved by officials before policy proposals are submitted to Cabinet. Usually this occurs either informally in meetings between officials, or after the department developing the policy receives a legal opinion. If a *Charter* issue is not resolved earlier, the Minister of Justice may be invited to express her views to the appropriate Cabinet committee.

The *Charter* has involved the Department of Justice in the policy-development process of its client departments to an extent that would previously have been considered unnecessary and inappropriate. This has been difficult both for the Department's lawyers and clients. Lawyers are more used to providing legal advice than creating new policy options. Clients quite naturally fear that lawyers, under the guise of offering legal advice, will either divert them from their objectives or take over some of their responsibilities for policy development.

Justice lawyers' involvement in policy formation has given rise to new responsibilities for them. They must determine how best to give effective legal advice at the early stages of policy development, when policy proposals, with a number of options under consideration, are likely to be very vague. Clients look to the Department of Justice for a broad-based approach to *Charter* problems. Working in the policy-formation process can be time consuming and very frustrating for lawyers used to working within well developed policy schemes.

As outlined above, the *Charter* has affected the development of policy options. Legal considerations have become as important as fiscal considerations for policy development. It is becoming clear now that the legal adviser is an important member of the policy-development team and that *Charter* implications of policy options need to be considered at an early stage. Clearly the *Charter* does foreclose certain options to governments. In many instances, though, the law may not be clear enough to require an automatic rejection of policy options. Or, the facts and evidence that support a justification under section 1 of the *Charter* may not be sufficiently well developed or identified to permit policy options to be decided. The legal adviser has a role in helping the client understand the requirements of the *Charter* as it applies to a particular case.

The *Charter* has been a very significant consideration in policy development in the areas dealing with social benefits, criminal law, and refugee determination. The difficulty for lawyers is that in all of these

areas, social and economic policy considerations play a very important role in legal analysis. Lawyers, therefore, have had to work closely with experts in these fields to develop with them an understanding of the effects of and justifications for various policy options.

III. CHARTER LITIGATION

Despite its efforts to scrutinize legal issues at the policy-development stage, the Department of Justice has found and will continue to find itself in court, as individuals and groups take different views of the *Charter*'s consistency with the policies and practices of the government. Here, too, the Department is working diligently to ensure that it articulates a coherent understanding of the *Charter*, one that takes into account broad public policy considerations.

The Department of Justice has a well developed internal process for the consideration of legal issues. It is not a rigid system, but a fairly flexible and diversified one, with mechanisms for resolving difficult and important legal questions. These mechanisms include the Department's litigation and *Charter* committees. These committees are composed of senior lawyers who review *Charter* litigation and the arguments to be made on behalf of the Attorney General of Canada.

To enhance its capacity to manage *Charter* litigation, the Department has also taken steps to ensure that its members are better informed about *Charter* cases. It now consults much more widely within government before making decisions. Frequently, departments other than the one responsible for the challenged legislation are interested in the litigation and the position that will be advanced before the courts.

There is a tendency on the part of officials to want to defend legislation that is attacked under the *Charter*. However, proper "management of the law" requires officials to scrutinize carefully the legislation and the government's position in the litigation, taking into account recent developments in the fast-paced world of *Charter* law. The government is prepared to recognize that legislation may not pass *Charter* muster. For example, before the last federal elections, the

government conceded that denying judges[8] or persons with disabilities[9] the right to vote was a violation of the *Charter*.

IV. INTERPRETING THE CHARTER

The *Charter* is still in the early stages of interpretation. Part of the difficulty for legal advisers in the policy-development process is that they must frequently give advice within the narrow context of a single legal decision. Broad approaches to *Charter* rights for use in policy development are difficult to develop because of a lack of jurisprudence interpreting many of the *Charter* provisions.

Within the government there is growing appreciation that one cannot wait for a court decision in order to resolve *Charter* problems. An area of particular concern pertains to benefit programmes, which have been challenged in a wide range of cases in the courts throughout Canada. After *Schachter,* the difficulties in attempting to develop a policy immediately after the child-care provisions of the *Unemployment Insurance Act*[10] had been found to be inconsistent with the *Charter* became apparent. The pressure on the federal government not to take anything away from any of the parties who had benefitted from the decision of the trial division of the Federal Court in *Schachter*[11] tended to constrain the government's policy options.

One of the criticisms most frequently made within government pertains to the cost of ensuring that laws and government programmes are consistent with the *Charter.* An example frequently cited to illustrate the cost of ensuring *Charter* consistency is the hundreds of millions of dollars spent to revamp Canada's refugee determination system after *Singh.*[12] Costs are a factor in determining how the government should

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[8] *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.).

[9] *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.).

[10] S.C. 1970-71-72, c. 48.

[11] It was held at trial that the distinction between natural and adoptive parents under the *Unemployment Insurance Act, ibid.*, was discriminatory, contrary to section 15(1) of the *Charter*. Strayer J. considered that the appropriate remedy was not to strike down the adoptive parents' benefits but to extend them to the natural parents ([1988] 3 F.C. 515 (T.D.)).

[12] In *Singh, supra* note 2, it was held that a refugee claimant was entitled to an oral hearing for the determination of refugee status.

comply with *Charter* rights. The Supreme Court of Canada has recognized in such cases as *Irwin Toy Ltd.* v. *A.G. Quebec*[13] that governments must often allocate scarce resources among important social goals, a factor to be considered when the court measures social legislation against *Charter* standards and considers the issue of justification under section 1.

A number of recent cases have raised questions about the government's capacity to target social benefits to certain groups. In *Schachter*,[14] the government did not appeal the trial judge's finding that the denial of unemployment insurance benefits to natural fathers was a violation of the *Charter*. The question that the government raised in the Supreme Court of Canada involved the interrelationship between the courts and Parliament in solving equality problems. In the same case, the Federal Court attempted to resolve the problem by extending the adoptive parents' benefits to biological parents. This was not the only way to solve the problem. In fact, Parliament had adopted a less costly way in the meantime.[15] This case squarely raised the question of the government's capacity to allocate scarce resources among various groups.

Given the limited resources available, the federal government is naturally concerned about its capacity to solve social problems in a manner that is compatible with *Charter* requirements. It is particularly wary of providing social benefits in circumstances where, because of subsequent *Charter* decisions, its liabilities may turn out to be greater than anticipated.

These are some of the issues with which the Department of Justice is wrestling and on which we provide some assistance to the courts in developing our understanding of the *Charter*. At their core are fundamental questions about Parliament's responsibility for developing and giving expression to public policy, the role of the courts under the *Charter*, and the scope of the *Charter* itself.

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[13] [1989] 1 S.C.R. 927 at 990. See also *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 286 and *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 527.

[14] *Supra* note 3.

[15] See the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, s. 20; S.C. 1990, c. 40, s. 14.

V. CONCLUSION

The *Charter* has pulled the Department of Justice into the mainstream of decision making in government and has posed major challenges for the Department.

These challenges include the reorganization of the Department's legal services so that *Charter* issues are adequately considered at all stages of the policy-development process. Justice lawyers must be prepared to provide sufficient information on the requirements of the *Charter*. However, the impact of the *Charter* has meant that the responsibilities of Justice lawyers cannot end there. Often, Justice lawyers have to go further to deal with complex and difficult policy issues; they have to assist other departments in identifying their options for resolving *Charter* issues.

The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.

As time goes on, *Charter* assessment is expected to become even more thoroughly integrated into the policy-development process. As the *Charter* evolves, it is anticipated that the government will get better at finding its way through *Charter* issues on the road to achieving important public policy goals.

OSGOODE HALL LAW JOURNAL

CONTENTS

IMPACT OF THE CHARTER ON THE PUBLIC POLICY PROCESS: A SYMPOSIUM

ARTICLES

VOLUME 30 NUMBER 3 FALL 1992

IMPACT OF THE CHARTER ON THE PUBLIC POLICY PROCESS: A SYMPOSIUM

PREFACE

The papers in this symposium were first prepared as contributions to a collaborative research project, which was designed to assess the extent to which government policy making has been affected over the last ten years by the enactment of the *Charter*. The papers were first presented at a conference on the *Charter of Rights* held at York University in November 1991. The participants at the conference included representatives from government, practising lawyers, scholars, representatives of interest groups, and journalists. The conference was jointly sponsored by the York University Centre for Public Law and Public Policy and the Osgoode Hall Law Journal.[1]

The existing scholarship and analysis of the impact of the *Charter* has tended to focus on the results in individual cases or groups of cases, and the reasoning employed by judges in those cases. This focus on the work of courts provides only a partial and incomplete view of the impact that the *Charter* has had on the operations of government. The focus of the papers in this symposium is on the way that the *Charter* has affected the ongoing policy process within government, as well as the administration and enforcement of laws following their enactment.

The introductory paper by Patrick Monahan and Marie Finkelstein provides an overview of the major conclusions, which emerged from the papers and the discussions at the conference. The second paper examines the effect of the *Charter* on law enforcement and administration. The symposium then includes two sets of papers organized as round-table discussions. The first set is written by current

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[1] The Journal symposium contains only a selection of papers presented at the conference, which have been revised for publication in the Journal. A complete set of original conference papers is forthcoming in P. Monahan & M. Finkelstein, eds., *The Impact of the Charter on the Public Policy Process* (North York, Ont.: York University Centre for Public Law and Public Policy, 1993).

or former policy makers within government, who reflect on the way in which the *Charter* has affected government policy making on a day-to-day basis. The second group of papers provides a perspective from commentators outside government and explores the impact of the *Charter* on Canadian political culture.

The overall direction of the research project was the responsibility of Marie Finkelstein. Peter Russell of the Department of Political Science at the University of Toronto provided very helpful advice and encouragement throughout the project. The November 1991 conference was coordinated by Chad Hutchinson. Denise Boissonneau, the Administrative Assistant of the York University Centre for Public Law and Public Policy, organized and managed the Conference and ensured that it was a success.

—The Board of Editors

This is Exhibit "7" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

Third Session
Thirty-fourth Parliament, 1991-92-93

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chairman:
The Honourable GÉRALD-A. BEAUDOIN

Tuesday, June 15, 1993

Issue No. 48

Complete Proceedings on:
Examination of Bill S-20, An Act to change the name of The Canadian Medical Association

Fifth and Final Proceedings on:
Examination of Bill C-109, An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act

INCLUDING:
THIRTY-SECOND REPORT OF
THE COMMITTEE (Bill S-20)

APPEARING:
The Honourable Pierre Blais
Minister of Justice and
Attorney General of Canada

WITNESSES:
(See back cover)

28430

Troisième session de la
trente-quatrième législature, 1991-1992-1993

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Président:
L'honorable GÉRALD-A. BEAUDOIN

Le mardi 15 juin 1993

Fascicule n° 48

Unique fascicule concernant:
L'étude du Projet de loi S-20, Loi modifiant le nom de l'Association médicale canadienne

Cinquième et dernier fascicule concernant:
L'étude du Projet de loi C-109, Loi modifiant le Code criminel, la Loi sur la responsabilité civile de l'État et le contentieux administratif et la Loi sur la radiocommunication

Y COMPRIS:
TRENTE-DEUXIÈME RAPPORT
DU COMITÉ (Projet de loi S-20)

COMPARAÎT:
L'honorable Pierre Blais
Ministre de la Justice et
Procureur général du Canada

TÉMOINS:
(Voir à l'endos)

[*Text*]

general, permitted the admission of evidence in court regardless of how it was obtained.

Things are different now. Section 24 of the Charter provides a scope for courts to consider remedies for improper police behaviour, including the exclusion of evidence for Charter breaches. We think it is time to allow the Charter to do its work in this matter and to determine questions of admissibility if raised in accordance with Charter jurisprudence, which permits a balancing of the interest involved rather than a rigid rule. This may result in fewer instances of evidence being excluded. However, rather than being a criticism of this bill, I see that as a plus. Truth is an objective that should be sought in judicial proceedings, not at all costs, but at least so long as the administration of justice is not brought into disrepute. The Charter text balances these interests. The current rule in the Criminal Code is inflexible.

Je n'entends pas m'attarder longuement sur la question des communications au moyen d'appareils cellulaires. Notre objectif est de corriger une lacune en protégeant les communications faites à l'aide de moyens techniques qui évoluent rapidement. Nous estimons, monsieur le président, que la technologie elle-même permettra bientôt (on l'espère en tout cas) d'éliminer ce problème. Les transmissions numériques réduiront la vulnérabilité de ces communications et les rendront probablement plus faciles à encoder.

Pour l'instant, ce que nous avons tenté de faire, c'est d'établir un juste équilibre entre le droit des uns de communiquer en toute sécurité et le droit des autres d'avoir accès aux ondes. Les fonctionnaires me disent que personne n'est entièrement satisfait, d'aucuns trouvant que nous sommes allés trop loin, d'autres pas assez, ce qui représente souvent le juste milieu. J'ai souvent le privilège de me retrouver dans ce genre de situation-là avec plusieurs de nos législations, surtout lorsque l'on touche le Code criminel où l'on doit toujours avancer à un rythme qui puisse correspondre aux intérêts généraux de la population.

Je vous remercie de votre attention et je suis disponible avec les gens autour de moi pour répondre à vos questions.

Le président: Merci, monsieur le ministre. Nous allons maintenant commencer la période des questions. Sénateur Neiman.

Senator Neiman: Mr. Chairman, thank you.

[*Traduction*]

lité puisque la *common law*, de façon générale, permettait aux tribunaux d'admettre des preuves quelle que soit la façon dont elles avaient été obtenues.

Les choses sont différentes aujourd'hui. L'article 24 de la Charte donne aux tribunaux une certaine latitude en ce qui concerne les mesures de réparations possibles en cas de comportement blâmable de la police, y compris l'irrecevabilité des preuves en cas de violation des dispositions de la Charte. Nous pensons qu'il est temps de laisser la Charte s'appliquer en cette matière et de régler les questions de recevabilité, lorsqu'elles sont soulevées, conformément à la jurisprudence relative à la Charte, qui permet un équilibre des intérêts en cause plutôt que d'établir une règle rigide. Il est possible que les cas où des preuves seraient jugées irrecevables se fassent plus rares par conséquent. Cependant, je vois là un avantage du projet de loi plutôt qu'un inconvénient. La vérité est un objectif qu'il faut rechercher dans la procédure judiciaire, pas à n'importe quel prix, mais au moins dans la mesure où l'administration de la justice ne tombe pas en discrédit. Le texte de la Charte établit un équilibre entre ces intérêts, alors que la règle prévue actuellement dans le Code criminel est inflexible.

I do not wish to spend any more time on this issue of cellular telephone communications. Our objective is to remedy a shortcoming in protecting communication by rapidly evolving technical devices. We feel, Mr. Chairman, that the technology itself will soon make it possible (or so we hope) to eliminate the problem. Digital transmissions will make these communications less vulnerable and will probably make them easier to encrypt.

For the time being, what we have attempted to do was to establish a fair balance between the rights of some to communicate in security and the rights of others to have access to the airwaves. My officials have told me that no one is entirely satisfied: some people think we have gone too far, others find we have not gone far enough, and this often shows we have arrived at the middle ground. I have often been privileged to find myself in this type of situation with our legislation, especially when we a dealing with the Criminal Code, where we must always make progress at a rate that corresponds to the general interests of Canadians.

Thank you for your attention. I and the people with me are now ready to answer your questions.

The Chairman: Thank you, Mr. Blais. We will now start the question period. Senator Neiman.

Le sénateur Neiman: Monsieur le président, je vous remercie.

[*Text*]

Mr. Minister, also, for those explanations that you have given us with respect to Bill C-109. I do not have to tell you, as you emphasized yourself again, that a great part of this bill has to do with provisions regarding what are drafts.

Mr. Minister, we all know why we are here and I think the most important part of this bill is the provisions that deals with wiretap legislation. Just before I ask specific questions, I would like you to give us a little background about how this legislation is determined in this particular form. I know it is all done with your draftspeople in the Justice Department, but the law provides that you, as Minister, have to certify that. The Department of Justice Act says that the Minister shall examine every bill that is introduced by a Minister of the Crown, and that under the regulations of that act, the Deputy Minister will provide a certificate to that effect.

Is that done without exception, and how do you determine that? It would be impossible for you to examine them all. I am not even sure your Deputy Minister could do such a thing. However, given that these bills, particularly in the Criminal Code, touch so directly and so frequently on Charter questions or protections, how do you determine what you are going to proceed with, when you hear or are told of witnesses that say, "This is going to violate the Charter, this is another state that we are making, we should not be doing this"? Is there some kind of a balance that you reach in your department, where you say, "Well, in spite of what all these witnesses say, we are going to go ahead with this and we think it will be Charter approved."

How do you make these decisions, because as you must know, there are several sections in here, that in spite of the good intentions — and I accept that unreservedly — must comply with the Charter. I am very concerned about some of the sections in here.

Mr. Blais: Mr. Chairman as Minister of Justice, it is my responsibility to make sure all legislation complies with the Charter. It is easier when it is my own legislation. As you know, if the cabinet brings forward legislation, I have the responsibility as the Queen's counsel to give advice and a certificate about whether or not it complies with the Charter. Sometimes we have to evaluate a real assessment. If we go with the court, what are the chances we get to the okay with the Charter? In a sense the Cabinet has a right to say, "Well, we have the advice, there is a risk," possibly 20 per cent, 40 per cent. The cabinet makes its decision on that.

[*Traduction*]

Monsieur le ministre, je vous remercie également pour les explications que vous nous avez données au sujet du projet de loi C-109. Je n'ai pas besoin de vous dire, puisque vous l'avez souligné vous-même encore une fois, que ce projet de loi se compose en bonne partie de dispositions relatives à des mesures provisoires.

Monsieur le ministre, nous savons tous pourquoi nous sommes ici, et je pense que les dispositions portant sur l'écoute électronique constituent la partie la plus importante du projet de loi. Avant de vous poser des questions précises, j'aimerais que vous nous donniez une idée de la façon dont ce projet de loi en est arrivé à sa forme actuelle. Je sais que ce sont vos rédacteurs, au ministère de la Justice, qui ont fait tout le travail, mais la loi prévoit que vous, en tant que ministre, devez donner votre autorisation. La Loi sur le ministère de la Justice précise que le ministre doit examiner tout projet de loi déposé par un ministre de la Couronne et que le sous-ministre doit établir un certificat en ce sens en vertu des règlements d'application de cette loi.

Est-ce que cela se fait sans exception, et comment procédez-vous? Il vous est impossible d'examiner tous les projets de loi. Je ne suis même pas sûre que votre sous-ministre puisse le faire. Cependant, étant donné que ces projets de loi, particulièrement ceux qui portent sur le Code criminel, touchent très souvent directement les questions relatives à la Charte ou les protections qu'elle accorde, j'aimerais savoir comment vous déterminez la façon dont vous allez procéder, alors que des témoins affirment — à vous ou à d'autres — que certaines dispositions violent la Charte, que nous sommes en train de changer la nature de notre État et que nous ne devrions pas le faire. Essayez-vous d'établir un certain équilibre dans votre ministère en décidant, malgré ce qu'affirment tous les témoins, d'aller de l'avant parce que vous croyez que ce sera jugé conforme à la Charte.

Comment prenez-vous ces décisions? Comme vous le savez sûrement, il y a de nombreux articles de ce projet de loi qui, malgré les meilleures intentions du monde — et je l'accepte sans réserve —, doivent être conformes à la Charte. Il y a certains articles qui me préoccupent beaucoup.

M. Blais: Monsieur le président, à titre de ministre de la Justice, je suis responsable de veiller à ce que toutes nos lois respectent la Charte. C'est plus facile quand ce sont des lois qui viennent de moi. Comme vous le savez, si le Cabinet propose des lois, j'ai la responsabilité, en tant que conseiller de la Reine, de donner mon avis et de certifier si leurs dispositions respectent ou non la Charte. Parfois, nous devons effectuer une évaluation en bonne et due forme. Si ces lois sont contestées devant les tribunaux, quelles sont nos chances qu'elles soient jugées conformes à la Charte? En un sens, le Cabinet a le droit de dire, après avoir obtenu mon avis, qu'il y a un risque, par exemple de 20 ou de 40 p. 100. Et il prend ensuite sa décision en conséquence.

[Text]

Obviously, I will not table the bill, give it my personal guarantee, if my own people are not satisfied with the Charter questions, because it is not another minister asking me that kind of a permission. A specialized unit of 25 lawyers, working at this specific point, dealing with all elements of the Charter, assists me with the human rights and legal issues. Charter decisions are moving very fast. You have Charter decisions made at different courts levels on a regular basis.

In that specific case, I am confident. I asked my people to look into this particular legislation. It is done regularly with other legislation because of decisions of the courts to which we have to comply. We have to contemplate those changes and comply with the Charter. Obviously, we have to give police some tools, some means, of dealing with drug trafficking. Unfortunately those criminals are not putting their agreement in writing.

People in the community have asked me regularly whether police are going to be given the Charter-proof tools to fight crime. It was a question of confidence. Though there is no 100-per-cent guarantee, I am reasonably sure this legislation is Charter-resistent.

Senator Neiman: Starting with the definition of a private communication; that section seemed unexceptionally avid, that you have to appraise it to make it more specific. I do not understand why you moved the definition of consent from the consent section of the Criminal Code, cancelled it there, and put it here, because this is under 183.1, added to the definition section.

What was the purpose behind that? That, in itself, is not a definite. Why did you not just add it to the definition section if you considered it a definition. It is not really that, it is an explanation of the powers, and to me it should have stayed where it was. Do you have an explanation?

Fred Bobiasz, Counsel, Criminal Law Policy, Department of Justice: Certainly, Senator Neiman. I believe that you are referring to proposed Section 183.1. I think you understand that we are really not re-enacting anything, it is re-positioning.

Senator Neiman: Exactly. I am asking why you did it, because it is not a definition. It is really powers under the consent section. I thought it more properly belonged where it was before, if you were going to leave it and have it in there at all.

[Traduction]

Il est évident que je ne vais pas déposer un projet de loi, et lui donner mon assentiment personnel, si mes propres fonctionnaires ne sont pas satisfaits des aspects relatifs à la Charte, parce qu'il ne s'agit pas alors d'un autre ministre qui me demande ce genre de permission. Nous avons un service spécialisé composé de 25 avocats, qui travaillent à ce côté de la question, qui étudient tous les éléments de la Charte, et qui me conseillent sur les questions relatives aux droits de la personne et les autres questions juridiques. Les décisions sur la Charte vont très vite. Il y a des tribunaux de différents niveaux qui en prennent régulièrement.

Dans ce cas-ci, je suis confiant. J'ai demandé à mes gens d'étudier le projet de loi sous cet angle. Cela se fait régulièrement dans le cas des autres lois à cause des décisions des tribunaux auxquelles nous devons nous plier. Nous devons examiner ces changements et respecter la Charte. Il est évident que nous devons donner à la police des outils, des moyens de lutter contre le trafic des stupéfiants. Malheureusement, ces criminels ne nous donnent pas leur accord par écrit.

Les gens, dans la population, me demandent régulièrement si la police pourra disposer d'outils à l'épreuve de la Charte pour lutter contre le crime. C'est une question de confiance. Même s'il ne peut pas y avoir de garantie à 100 pour cent, je suis à peu près certain que ce projet de loi résistera à l'examen, en ce qui concerne sa conformité à la Charte.

Le sénateur Neiman: Commençons par la définition de l'expression «communication privée»; cet article est exceptionnel, en ce sens que vous avez dû l'évaluer pour le préciser. Je ne comprends pas pourquoi vous avez déplacé la définition du consentement qui se trouvait dans l'article du Code criminel sur la question, pourquoi vous l'avez abrogée là-bas et ajoutée ici, puisqu'elle se trouve à l'article 183.1, après l'article comprenant les définitions.

Quel était l'objectif de ce changement? Ce n'est pas en soi une définition. Pourquoi ne pas avoir ajouté cette précision tout simplement dans l'article comprenant les définitions, si vous jugiez que c'en était une? Mais ce n'en est pas vraiment une; c'est une explication des pouvoirs et à mon avis, cela aurait dû rester où c'était. Avez-vous une explication?

M. Fred Bobiasz, conseiller juridique, Politique en matière de droit pénal, droit pénal, ministère de la Justice: Certainement, sénateur Neiman. Vous parlez, je pense, de l'article 183.1 proposé. Vous comprenez bien que ce n'est pas vraiment un changement, mais simplement un déplacement.

Le sénateur Neiman: Exactement. J'aimerais savoir pourquoi vous avez fait cela parce que ce n'est pas une définition. C'est en réalité une définition des pouvoirs prévus dans l'article portant sur le consentement. Il me semblait que cette disposition était plus à sa place auparavant, si vous vouliez l'inclure d'une façon ou d'une autre dans le projet de loi.

This is Exhibit "**8**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

First Session
Thirty-eighth Parliament, 2004-05

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable LISE BACON

Thursday, November 3, 2005
Wednesday, November 23, 2005
Thursday, November 24, 2005

Issue No. 25

Fourth meeting on:
Bill S-39, An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act
and

First (last) meeting on:
Bill C-49, An Act to amend the Criminal Code (trafficking in persons)
and
First (last) meeting on:
Bill C-53, An Act to amend the Criminal Code (proceeds of crime) and the Controlled Drugs and Substances Act and to make consequential amendments to another Act

APPEARING:
The Honourable Irwin Cotler, P.C., M.P.,
Minister of Justice and Attorney General of Canada

INCLUDING:
THE THIRTEENTH AND FOURTEENTH REPORTS OF THE COMMITTEE
(Bill C-49 and Bill C-53)

WITNESSES:
(*See back cover*)

Première session de la
trente-huitième législature, 2004-2005

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Présidente :
L'honorable LISE BACON

Le jeudi 3 novembre 2005
Le mercredi 23 novembre 2005
Le jeudi 24 novembre 2005

Fascicule n° 25

Quatrième réunion concernant :
Le projet de loi S-39, Loi modifiant la Loi sur la défense nationale, le Code criminel, la Loi sur l'enregistrement de renseignements sur les délinquants sexuels et la Loi sur le casier judiciaire
et
Première (dernière) réunion concernant :
Le projet de loi C-49, Loi modifiant le Code criminel (traite des personnes)
et
Première (dernière) réunion concernant :
Le projet de loi C-53, Loi modifiant le Code criminel (produits de la criminalité) et la Loi réglementant certaines drogues et autres substances et modifiant une autre loi en conséquence

COMPARAÎT :
L'honorable Irwin Cotler, C.P., député,
ministre de la Justice et procureur général du Canada

Y COMPRIS :
LES TREIZIÈME ET QUATORZIÈME RAPPORTS DU COMITÉ
(Le projet de loi C-49 et le projet de loi C-53)

TÉMOINS :
(*Voir à l'endos*)

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public interest with the concurrence of all parties. This is proposed legislation in the public interest to combat the scourge of organized crime and the drug-related dimensions inextricably bound up with it.

I hope that some of what I said today has helped you to better appreciate the bill. My colleagues here are prepared to clarify that which I left incoherent and to respond to any concerns, questions or comments you may have.

Senator Milne: Mr. Minister, you said that you have compared this bill to legislation in other free and democratic countries. Many of those other free and democratic countries do not have a Charter of Rights and Freedoms. You may have noticed that this place is a little more concerned with Charter freedoms and the constitutional rights of individuals than is the other place.

Under section 8 of the Charter, we are all protected from unreasonable search and seizure. Are you confident that reversing the onus onto an accused to prove that an item is not the proceeds of crime will not be found to violate section 8?

Can it possibly be saved by section 1?

Mr. Cotler: I am glad you brought up that question, senator, for a number of reasons.

First, as I said, we looked at other jurisdictions, such as Australia, the U.K. and Ireland. I singled those out because they have reverse-onus provisions not unlike what we are proposing here. You made the important point that we have a Charter of Rights; other jurisdictions may not. Therefore, we must hold ourselves to this standard of the Charter of Rights, not to the standard of the common law that will obtain in those jurisdictions.

Our officials, from what I would call a legal policy point of view, looked to see how these measures worked in other jurisdictions. They had to see whether what we were proposing comported with the Charter. I put the same questions to them as you have asked of me. I did that, first, to see if there is a prima facie breach of a Charter right — that is, section 8 with regard to search and seizure provisions — and if there is, is it otherwise saved under the section 1, demonstrable justificatory approach? What other free and democratic societies do is not unrelated to section 1, because that section directs us to look at what those societies do. You are correct in saying it is not enough to look at what other free and democratic societies do if it does not comport with our protections under the Charter.

I could best ask Mr. Cohen, who looked at these Charter provisions in that context, in particular at section 8, to respond.

Stanley Cohen, Senior General Counsel, Human Rights Law Section, Department of Justice Canada: I should answer it pretty easily by suggesting that the emphasis in section 8 jurisprudence has been on the protection of privacy interests and not the protection of property interests per se. I do not want to leave that on my own shoulders. I would rather quote from one paragraph

parfaitement comment nous pouvons légiférer dans l'intérêt public avec l'accord de tous les partis. Il vise à faire obstacle au fléau du crime organisé et aux activités liées à la drogue qui lui sont inextricablement liées.

J'espère que ce que j'ai dit aujourd'hui vous aide à mieux comprendre le projet de loi. Mes collègues ici sont prêts à clarifier ce qui reste d'incohérent et à répondre à toutes vos questions ou commentaires.

Le sénateur Milne : Monsieur le ministre, vous dites que vous avez comparé ce projet de loi aux mesures législatives qui existent dans d'autres pays libres et démocratiques. La plupart de ces autres pays n'ont pas de charte des droits et libertés. Vous avez peut-être remarqué que, comparativement à l'autre endroit, on se préoccupe davantage ici des libertés prévues par la Charte et des droits constitutionnels des individus.

En vertu de l'article 8 de la Charte, nous sommes tous protégés contre les fouilles et les saisies abusives. Êtes-vous certain que le fait d'imposer le fardeau de la preuve à l'accusé, qui devra prouver qu'un bien n'est pas le produit de la criminalité, ne sera pas jugé contraire à l'article 8?

Cette disposition peut-elle être validée par l'article premier?

M. Cotler : Je me réjouis que vous posiez cette question, madame le sénateur, pour un certain nombre de raisons.

Tout d'abord, comme je l'ai mentionné, nous avons examiné d'autres pays, comme l'Australie, le Royaume-Uni et l'Irlande. J'ai choisi ces pays parce que leurs dispositions concernant le renversement du fardeau de la preuve sont semblables à celles que nous proposons ici. Vous faites valoir que nous avons une charte des droits et que d'autres pays n'en ont pas. Par conséquent, nous devons nous en tenir à la norme de la Charte des droits, et non à la norme de la common law qui prévaut dans ces pays.

Nos fonctionnaires ont examiné comment ces mesures s'appliquaient dans d'autres pays, du point de vue de ce que j'appellerais une politique juridique. Ils devaient vérifier si ce projet de loi était conforme à la Charte. Je leur ai posé les mêmes questions que vous me posez. Je l'ai fait tout d'abord pour vérifier si, à première vue, on portait atteinte à un droit établi par la Charte — c'est-à-dire, l'article 8 concernant les fouilles et les saisies — et, le cas échéant, si cette mesure pouvait néanmoins être validée par l'article premier. Ce que font d'autres sociétés libres et démocratiques n'est pas sans lien avec l'article premier, puisque cet article nous amène à regarder ce que font ces sociétés. Vous avez raison de dire que ce n'est pas suffisant d'examiner ce que font d'autres sociétés libres et démocratiques si ce n'est pas conforme aux garanties prévues par la Charte.

Je ferais mieux de demander à M. Cohen de vous répondre, puisqu'il a examiné les dispositions de la Charte dans ce contexte, en particulier l'article 8.

Stanley Cohen, avocat général principal, Section des droits de la personne, ministère de la Justice Canada : Je pourrais facilement vous répondre en disant que la jurisprudence concernant l'article 8 met l'accent sur la protection de la vie privée et non sur la protection des biens en soi. Je ne veux pas assumer la responsabilité de cette affirmation. Je vais plutôt lire un extrait

from a decision by Mr. Justice McPherson, who is now on the Ontario Court of Appeal. He was sitting in the Ontario Court General Division at the time. It is a case involving Unishare Investments Limited in 1994. This is a forfeiture case involving selling flowers and a seizure without a permit. This kind of issue was raised. Regarding section 8, he said that:

> The case law establishes clearly that not all things or property are protected by section 8 of the Charter. Rather, property is protected under section 8 only if the seizure of the property intrudes into or tramples the interests and values protected by section 8. In case after case, the Supreme Court has stated that section 8 protects the bodily integrity and privacy of people, not their property, unless the property being searched or seized relates directly to a privacy interest. If the Supreme Court of Canada had wanted to say that property standing alone was protected by section 8 of the Charter, almost every case it has dealt with provided an opportunity to do so.

We could have a long and extensive discussion about whether section 8 jurisprudence has been modified since that time. Undoubtedly, Charter arguments can be formulated on section 8. I would not want to present this as saying that there is no concern over Charter matters. Rather, we believe that there are strong, credible arguments that can be presented on section 8 in defence of this measure.

Senator Milne: Has the Supreme Court spoken on this matter?

Mr. Cohen: You can go back to *Hunter v. Southam* in the Supreme Court and examine the opinion of Mr. Justice Dickson, as he then was. We find that the emphasis in section 8, the core value being protected, is privacy. That is Mr. Justice McPherson's taking-off point.

Senator Baker: It is section 7, and not section 8, fundamental justice.

Senator Milne: They are carrying on from section 7 and fundamental justice.

Mr. Cotler: Let me go back to my depleted intellectual capital from my professorial days and try to recall some of that. I think it is relevant to the cluster of Charter issues that may arise, whether it is section 8 or section 7, and its relationship to section 1. We talk about the entire cluster of legal rights in section 7 onward in the Charter.

It was that cluster of legal rights that was looked at. To contextualize it for a moment, as Madam Justice Bertha Wilson put it, in Charter cases, if you want to appreciate the constitutionality of any particular piece of legislation, you have to look at the context in which it was enacted. I can give you example after example that has certain fact patterns that become valid in the context in which that issue arises.

d'une décision du juge McPherson, alors juge de la Cour de l'Ontario (Division générale), qui se trouve maintenant à la Cour d'appel de l'Ontario. Il s'agit d'une affaire mettant en cause Unishare Investments Limited, en 1994. Dans cette affaire, des fleurs étaient vendues et il y a eu confiscation et saisie sans permis. Ce genre de questions a été soulevé. Concernant l'article 8, le juge a écrit ceci :

> La jurisprudence établit que ce ne sont pas tous les objets ou biens qui sont protégés par l'article 8 de la Charte. Plus précisément, les biens sont protégés par l'article 8 uniquement si leur saisie constitue une intrusion dans les droits ou les valeurs protégés par l'article 8 ou un empiètement sur ces droits ou valeurs. Dans plusieurs affaires, la Cour suprême du Canada a statué que l'article 8 protège l'intégrité physique et le droit à la vie privée de la personne, et non leurs biens, à moins que les biens qui font l'objet d'une fouille ou d'une saisie aient un rapport direct avec le droit à la vie privé. Si la Cour suprême avait voulu dire que le bien en tant que tel était protégé par l'article 8, elle aurait pu le faire parce que presque chaque affaire lui en donnait l'occasion.

Nous pourrions discuter longuement à savoir si la jurisprudence concernant l'article 8 a changé depuis ce temps. Il ne fait aucun doute que des arguments fondés sur l'article 8 pourraient être présentés. Je ne veux pas que vous ayez l'impression que nous avons négligé ces aspects. Nous croyons plutôt que des arguments solides et crédibles peuvent s'appuyer sur l'article 8 pour défendre cette mesure.

Le sénateur Milne : La Cour suprême s'est-elle prononcée sur cette question?

M. Cohen : Vous pouvez prendre la décision de la Cour suprême dans l'affaire *Hunter c. Southam* et examiner l'opinion exprimée par le juge Dickson, plus tard Juge en chef. En ce qui concerne l'article 8, nous constatons que l'accent est mis sur la vie privée, que c'est là la principale valeur à protéger. C'est sur ce point que s'appuie le juge McPherson.

Le sénateur Baker : C'est l'article 7, et non l'article 8, la justice fondamentale.

Le sénateur Milne : Ils commencent à l'article 7 et à la question de la justice fondamentale et poursuivent ensuite.

M. Cotler : Malgré mes facultés intellectuelles affaiblies, j'aimerais revenir à l'époque où j'enseignais et essayer de me rappeler de certaines choses. Je crois qu'on parle de l'ensemble des dispositions de la Charte qui peuvent être soulevées, que ce soit l'article 8 ou l'article 7, et du lien avec l'article premier. Nous parlons de l'ensemble des droits juridiques à partir de l'article 7 de la Charte en montant.

C'était l'ensemble des droits juridiques qui ont été examinés. Pour mettre cela en contexte, comme madame le juge Bertha Wilson l'a dit, dans les causes liées à la Charte, si vous voulez évaluer la constitutionnalité d'une loi quelconque, vous devez examiner le contexte dans lequel cette loi a été promulguée. Je peux vous donner de nombreux exemples où certaines situations sont validées par le contexte.

If we look at the reverse-onus scheme in this particular bill, we have to appreciate, from a contextual point of view, that it is invokable only after conviction for a criminal organization offence or for certain serious drug offences. Also, the reverse-onus scheme requires — and this is the burden on the Crown for prosecutorial purposes — the Crown to satisfy an additional test in demonstrating that the offender engaged in a pattern of criminal activity for the purpose of receiving a material benefit or that the legitimate income of the offender cannot reasonably account for all of the offender's property.

I appreciate that if you look at the overall context of the Charter, the reverse-onus provision, if I can use another term, raises a presumption of a prima facie breach of Charter rights. The reverse-onus provisions have been upheld by the courts, including the Supreme Court of Canada. I refer you to the analysis of the Supreme Court in the *R. v. White* case 1998, 2 S.C.R., at page 3.

I will give you a quick summary of that case, which applies particularly to the understanding of context and purpose, another principle that the court uses in interpretation and charter jurisprudence along with the contextual principle, the purpose principle and the comparative principle in looking at other free and democratic societies and so on. The relevant factors that the court enunciated in upholding provisions such as those that have been put before you include the importance of the objective of the legislation — that might be called the purposive principle interpretation — and its careful design. We go to the *Oakes* test and the rational connection between the objective of the legislation and the means used to secure that objective and whether the results are impaired as minimally as possible. With respect to these Charter interpretive principles — the contextual principle, the purposive principle, the rational connection and the minimal impairment principle in the *Oakes* case — the Supreme Court's analysis in *R. v. White* goes into that.

Their particular application to this bill — what the court directs us in *White* and in all other cases on the Charter to look at — is tied specifically to the important objective of fighting organized crime and effectively depriving it of the financial gain that is its main motivating force.

I would expect that the court would look at the genre of criminal activity that we are seeking to combat here and will appreciate not only that we are dealing with criminal organizations and that the bill is targeted specifically to those organizations, but that we cannot necessarily get at the ill-gotten proceeds of crime without this kind of legislation.

The purposive nature of the legislation would be appreciated by the court in the context of what organized crime engages in. I think that the court would then ask the following: Is there a rational connection between the particular offences that are eligible for the application of the reversal of the onus and the reversal of the onus itself, the rational means test? Inherent in the

Si nous regardons le régime établi par ce projet de loi qui permet d'inverser le fardeau de la preuve, nous devons comprendre, d'un point de vue contextuel, qu'il peut être invoqué seulement après qu'il y a eu déclaration de culpabilité relativement à une infraction d'organisation criminelle ou certaines infractions graves liées à la drogue. Par ailleurs, ce régime exige — et c'est le fardeau que doit assumer le ministère public à des fins de poursuite — que le ministère public démontre que le contrevenant était engagé dans des activités criminelles répétées dans le but d'en retirer un avantage matériel ou que le revenu légitime du contrevenant ne peut justifier tous les biens qu'il possède.

Si vous tenez compte du contexte général de la Charte, la disposition concernant le renversement du fardeau de la preuve, si je peux utiliser une autre expression, laisse présumer à prime abord qu'on a porté atteinte aux droits établis par la Charte. Or, pareilles dispositions ont été confirmées par les tribunaux, y compris la Cour suprême du Canada. Je vous renvoie à l'analyse de la Cour suprême du Canada dans l'affaire *R. c. White* de 1998, 2 R.C.S., page 3.

Je vais vous résumer brièvement cette affaire, qui s'applique tout particulièrement à la compréhension du contexte et de l'objet, un autre principe sur lequel la cour s'appuie pour rendre ses décisions, outre la comparaison avec d'autres sociétés libres et démocratiques, etc. Les facteurs que la cour invoque pour maintenir des dispositions comme celles que vous avez devant vous comprennent, entre autres, l'importance de l'objectif de la loi — on pourrait parler de l'interprétation du principe fondé sur l'objet — et la façon dont elle a été soigneusement conçue. Cela nous amène au critère établi dans l'arrêt *Oakes* et au lien rationnel entre l'objectif de la loi et les moyens utilisés pour atteindre cet objectif en portant le moins possible atteinte aux droits. Dans l'affaire *R. c. White*, la Cour suprême s'appuie sur ces principes d'interprétation de la Charte — le principe fondé sur le contexte, le principe fondé sur l'objet, le lien rationnel et le principe fondé sur l'atteinte minimale.

Dans le cas du projet de loi, l'application de ces principes — que la Cour nous enjoint de vérifier dans l'arrêt *White* et dans toutes les autres causes traitant de la Charte — est liée précisément à l'objectif important qui consiste à lutter contre le crime organisé et à le priver des gains financiers qui sont sa principale source de motivation.

Je m'attendrais à ce que la Cour considère la nature des activités criminelles auxquelles nous nous attaquons et qu'elle reconnaisse à la fois que nous avons affaire à des organisations criminelles ciblées précisément par le projet de loi, et que nous ne pouvons pas nécessairement arriver à confisquer les produits de la criminalité sans une loi de ce genre.

L'intention du projet de loi serait évaluée par la Cour dans le contexte des activités auxquelles le crime organisé se livre. Ensuite, je crois que la Cour se demanderait s'il y a un lien rationnel entre les infractions admissibles à une inversion du fardeau de la preuve et l'inversion du fardeau de la preuve comme telle, selon le critère des moyens rationnels. Il est dans la nature

very nature of organized crime is the commission of numerous offences for the accumulation of that illicit income. The rational connection would also be further supported by additional preconditions on forfeiture, which require proof, and that is the important point. The court will say that we have to provide proof of a pattern of criminality or unexplained accumulation of assets. Again, it would be the contextual principle, in respect of which we have a high threshold of evidentiary requirements tailored to the understanding of the nature of a criminal organization and how it uses ill-gotten proceeds of crime, including from drug-related offences, to further its international criminal activity, of which the organized crime component in Canada is one part.

The bill narrowly targets a genre of offences and thereby, with all the protections and safeguards, minimally impairs rights and provides a rational connection between the objectives sought, that is, the combatting of this scourge of organized crime, and the means used to achieve it.

In my view, senator, as someone who has concerns about reverse-onus provisions, having regard to the context of the bill, namely, organized crime; to its purpose, namely, to combat the ill-gotten proceeds of that organized crime; and finally, to the means by which we are seeking to do it, that is, through the crafting of a narrowly tailored law specifically designed to counter that specific genre of offences, I think the court would see it as one where if there was a prima facie violation of a Charter right — that itself would be arguable — the section 1 justificatory framework would be there.

Mr. Cohen wants to add a small point.

Mr. Cohen: I was trying to respond directly to your section 8 issue, senator, but reverse onus as it has been litigated in the law has pretty well always occurred as an argument raised in relation to section 11(*d*) of the Charter, which deals with the presumption of innocence. What we are dealing with here at the stage of forfeiture is someone who has already been convicted. Thus, there is no applicable presumption of innocence at this stage in these proceedings.

Senator Milne: The minister is leading into the next part of my questioning, which was presumption of innocence. I see that there is a relief-from-seizure provision in the bill, clause 9, for an innocent third party. What will innocent third parties have to go through to get their property back? Will they have to prove their innocence?

Mr. Cotler: In going through the safeguards in my previous answer to you, senator, I should have included the role of judicial discretion, which we are preserving, and also the judicial discretionary limit on the total amount of forfeiture in the interests of justice. Third-party interests are among the factors that could be considered by the courts in setting any such limit in individual cases, and more specifically, there are avenues under the current proceeds-of-crime scheme in the Criminal Code, before any amendment, by which an innocent third party can seek to retain an interest in property that will otherwise be or has been the subject of forfeiture proceedings. The bill makes specific provisions for ensuring that these avenues will apply in respect of reverse-onus forfeiture as well.

même du crime organisé de commettre de nombreux crimes pour acquérir d'importants gains illicites. Le lien rationnel serait également confirmé par d'autres conditions sine qua non à la confiscation, qui exige de fournir des preuves, ce qui est important. La Cour voudra qu'on démontre qu'il y a activités criminelles répétées ou accumulation inexpliquée de biens. Encore une fois, ce serait le principe fondé sur le contexte, en vertu duquel il y a beaucoup d'exigences auxquelles il faut satisfaire en matière de preuve pour comprendre la nature d'une organisation criminelle et comment elle utilise les produits de la criminalité, y compris celle liée à la drogue, pour promouvoir ses activités criminelles dans le monde et notamment au Canada.

Le projet de loi cible un genre limité d'infractions et, avec toutes les mesures de protection et les garanties prévues, il constitue une atteinte minimale aux droits et il établit un lien rationnel entre l'objectif recherché, c'est-à-dire la lutte contre le fléau du crime organisé, et les moyens utilisés pour les atteindre.

Madame le sénateur, les dispositions sur l'inversion du fardeau de la preuve m'inquiètent moi aussi mais, après avoir examiné le contexte du projet de loi, qui est le crime organisé, son objectif, qui est de lutter contre les produits de la criminalité et, enfin, les moyens par lesquels on veut le faire, c'est-à-dire en concevant une loi qui cible des infractions bien précises, je pense que la Cour estimerait que, même s'il y avait à première vue atteinte à un droit garanti par la Charte — ce qui resterait contestable — le cadre de justification de l'article premier servirait de rempart.

M. Cohen veut ajouter quelque chose.

M. Cohen : J'essayais de répondre directement à votre question sur l'article 8 de la Charte, madame le sénateur, mais l'inversion du fardeau de la preuve a pas mal toujours été contestée en vertu de l'alinéa 11*d*) de la Charte, qui traite de la présomption d'innocence. Dans le cas qui nous occupe, la confiscation vise toujours quelqu'un qui a déjà été déclaré coupable. Donc, la présomption d'innocence ne s'applique pas à cette étape des procédures.

Le sénateur Milne : Vous m'amenez à poser ma question suivante sur la présomption d'innocence. Je vois que l'article 9 du projet de loi prévoit la restitution des biens confisqués dans le cas de tierces parties innocentes. Qu'est-ce que ces personnes doivent faire pour récupérer leurs biens? Devront-elles prouver leur innocence?

M. Cotler : Parmi les mesures de protection dont je vous ai parlé tout à l'heure, madame le sénateur, j'aurais dû mentionner le pouvoir discrétionnaire des tribunaux, qui est préservé, et le fait que les tribunaux peuvent restreindre le montant total des biens confisqués dans l'intérêt de la justice. Les intérêts des tierces parties font partie des facteurs pris en considération par les tribunaux pour limiter ce montant et, plus précisément, le régime actuel prévoit déjà des moyens par lesquels une tierce partie innocente peut conserver un bien qui autrement ferait ou a déjà fait l'objet d'une mesure de confiscation. Des mesures précises ont été prévues dans le projet de loi pour que ces recours s'appliquent en cas d'inversion du fardeau de la preuve.

I will turn it over to Mr. Scromeda to respond more specifically.

Shawn Scromeda, Counsel, Criminal Law Policy Section, Department of Justice Canada: The minister is correct. We are careful to ensure that the current ability under the proceeds-of-crime scheme for third parties to contest forfeiture is preserved and extended to this scheme as well. Those are a number of technical amendments included in the bill.

In addition, as the minister has pointed out, there is an additional power here, not included in the current proceeds-of-crime scheme, which gives judicial discretion where additional third-party interests could be taken into account. For example — I think this is perhaps one of your concerns — if a third party was unrepresented and may not have been able to take advantage of some of the current provisions, a judge nevertheless, of his or her own motion, could raise it at the discretionary stage by saying, "No, this does not appear to be validly the proceeds of crime," or, "There appear to be other interests in this. I have my own motion and will limit forfeiture here." We have included an additional protection.

Finally, there is an additional protection inherent in the nature of what we have defined as being subject to reverse-onus forfeiture. With respect to the current scheme, there is no direct requirement that it be property of the offender. There is just a requirement that it be proceeds of crime.

Here, because we are more narrowly targeting it and are otherwise putting it on the offender to prove that it is not proceeds of crime we have limited it to the term used in the bill itself, "property of the offender." The Attorney General will have to demonstrate that it is property of the offender. We are talking about a narrower concept right from the outset.

Senator Baker: I want to congratulate the minister on his excellent presentation. Judges who will be looking at this proposed law in the future will appreciate that, because sometimes there is not a clear indication from the government as to the purpose of legislation. You have been forthcoming, exact and complete in your answer.

Mr. Cotler: The reason is I learned in my professorial days that you should read the purposes into the record so the court will understand what you had in mind.

Senator Baker: You will notice in *R. v. Sharpe* in 2002, this committee was singled out by the Chief Justice of the day in saying this was the only contribution. In fact, it was Senator Beaudoin who was singled out.

Mr. Cotler: He is another constitutional law professor.

Senator Baker: The reverse onus is clearly codified in various sections, 515, for example. Whether or not you will be released after you are charged, it is spelled out as a reverse onus in 515(6). We codified the reverse onus in other legislation, for example, the Fisheries Act. Where it has not been codified, as the minister has said, given the circumstances of the day and the public importance of legislation such as we have seen on impaired driving, every highway traffic act allows a police officer now to stop somebody for no good reason, generally speaking, and

Je vais demander à M. Scromeda d'apporter d'autres précisions.

Shawn Scromeda, avocat, Section de la politique en matière de droit pénal, ministère de la Justice Canada : Le ministre a raison. Nous tenons à ce que les recours offerts actuellement aux tierces parties pour contester la confiscation des produits de la criminalité soient préservés et reportés dans le nouveau régime. Il y a un certain nombre de modifications d'ordre technique prévues dans le projet de loi.

De plus, comme le ministre l'a souligné, le nouveau régime confère aux tribunaux un pouvoir discrétionnaire, qu'ils n'ont pas actuellement, pour tenir compte des intérêts des tierces parties. Par exemple, et je crois que c'est peut-être l'une de vos préoccupations, si une tierce partie n'était pas représentée et n'avait peut-être pas eu l'occasion de se prévaloir des dispositions actuellement en vigueur, un juge pourrait tout de même, de son propre chef, décider de limiter la mesure de confiscation s'il estimait qu'il ne semble pas s'agir de produits de la criminalité ou qu'il y a d'autres intérêts en jeu. Nous avons prévu une mesure de protection additionnelle.

Enfin, il y a une autre mesure de protection qui vise ce qui est admissible à l'inversion du fardeau de la preuve. En effet, dans le régime actuel, il n'est pas absolument nécessaire que les biens confisqués appartiennent à l'accusé. Il suffit que ce soient des produits de la criminalité.

Étant donné que le régime proposé est plus restreint et exige que l'accusé démontre qu'il ne s'agit pas de produits de la criminalité, nous avons limité la confiscation aux biens de l'accusé. Le procureur général devra prouver que les biens lui appartiennent. Nous restreignons la portée du régime dès le départ.

Le sénateur Baker : Je tiens à féliciter le ministre de son excellent exposé. Il va éclairer les juges qui auront à examiner le projet de loi plus tard, parce qu'il arrive que l'objectif d'une mesure législative n'est pas clairement précisé par le gouvernement. Vous vous êtes prononcé de façon directe, précise et complète.

M. Cotler : J'ai appris, quand j'étais professeur, qu'il faut faire faire consigner les objectifs pour que le tribunal comprenne ce que vous aviez en tête.

Le sénateur Baker : Vous allez remarquer, dans l'arrêt *R. c. Sharpe*, en 2002, que le juge en chef de l'époque a cité notre comité pour sa contribution. En fait, c'est le sénateur Beaudoin qui a été cité.

M. Cotler : Il est aussi professeur de droit constitutionnel.

Le sénateur Baker : L'inversion du fardeau de la preuve existe déjà dans différents articles, comme l'article 515. En effet, un prévenu inculpé peut être ou non libéré selon ce qui est prévu au paragraphe 515(6). Il en est aussi question dans d'autres lois, comme la Loi sur les pêches. Quand l'inversion du fardeau de la preuve n'est pas prévue, comme le ministre l'a dit, les circonstances et l'importance pour la population de mesures comme celles sur la conduite avec facultés affaiblies sont prises en considération, si bien que toutes les lois sur le code de la route

justify it by section 1 of the Charter. I do not think, minister, there is such a big deal here. Would you not agree? It is not such a big deal. What we have in legislation today as it relates to forfeiture is comprehensive.

The only thing that has really changed here that I can see is that you are extending a designated offence to include hybrid offences. Why you would do that I do not know. Under the forfeiture provision of the Controlled Drugs and Substances Act — section 8, as I remember — it clearly says that everything is indictable over $1,000; or is it $2,000, Mr. Cohen? Everything under that is considered to be a hybrid offence.

Mr. Cohen: No.

Senator Baker: Yes. You can be convicted either by summary conviction or indictably; the Crown can proceed if the amount of money involved is less than $2,000.

The Chairman: Senator Baker, you are asking a question; you should wait for the answer.

Senator Baker: Maybe in his answer he can correct me. My question is why would you do that? Why would you extend it to summary conviction offences and seize property of less than $2,000, as it applies to section 8 of the Controlled Drugs and Substances Act?

Mr. Scromeda: May I provide a preliminary response to that question? We have to be careful here; that is not part of the reverse-onus forfeiture scheme. That particular amendment is one of the clarification amendments with respect to the current scheme. Therefore, that amendment in that clause of the bill is restricted to the definition of "designated offence." With respect to reverse onus, we have further restricted the application of this scheme to certain offences so that —

Senator Baker: I am not talking about reverse onus; I am talking about the change you are making here in the bill. I am saying the only change I can see that is of any substance is in the definition of "designated offence."

Mr. Scromeda: Even that one, from our perspective, is more a case of clarification. We feel that hybrid offences are already captured, and perhaps this was your point. We changed some wording of the code to make that clearer — it was just a clarification amendment.

Mr. Cotler: May I take this back one stage to emphasize the difference, because I think that is the underlying sense of your question, senator? It is not different in the sense that we are engaged here in combatting the ill-gotten proceeds of crime, for which a remedy of forfeiture upon conviction already exists in the Criminal Code. It is not different in the sense that the Crown can still proceed with respect to that existing scheme. It does not have to use the new scheme if, under the facts and circumstances, the present scheme would be appropriate for that purpose.

permettent maintenant à un policier de procéder à une arrestation sans raison valable et de justifier son geste par l'article premier de la Charte. Monsieur le ministre, cette mesure ne me semble pas si extraordinaire. N'êtes-vous pas d'accord? Il n'y a rien de tellement extraordinaire là-dedans. Ce que le projet de loi prévoit à propos de la confiscation est compréhensible.

Tout ce qui change vraiment, d'après ce que je crois comprendre, c'est que l'infraction désignée inclut les infractions mixtes. Je ne sais pas pourquoi vous en avez décidé ainsi. L'article 8, je crois, de la Loi réglementant certaines drogues et autres substances prévoit clairement que tout montant de plus de 1 000 ou est-ce 2 000 $, monsieur Cohen, est punissable par voie de mise en accusation, n'est-ce pas? Toute somme inférieure à ce montant est considérée comme une infraction mixte.

M. Cohen : Non.

Le sénateur Baker : Oui. Vous pouvez être déclaré coupable par procédure sommaire ou par mise en accusation; le ministère public peut ordonner la confiscation si la somme d'argent visée est inférieure à 2 000 $.

La présidente : Sénateur Baker, vous posez une question et vous devriez attendre la réponse.

Le sénateur Baker : Il peut peut-être me corriger dans sa réponse. Je veux savoir pourquoi vous agissez de la sorte. Pourquoi étendre la portée de la loi aux infractions punissables par voie de déclaration sommaire de culpabilité et permettre la confiscation de biens de moins de 2 000 $, dans l'article 8 de la Loi réglementant certaines drogues et autres substances?

M. Scromeda : Puis-je fournir une première réponse à cette question? Il faut être prudent parce que cela ne fait pas partie du régime d'inversion du fardeau de la preuve. Cette modification sert à clarifier le système actuel. Par conséquent, la modification prévue par cette disposition du projet de loi s'applique uniquement aux « infractions désignées ». Pour ce qui est de l'inversion du fardeau de la preuve, nous avons restreint davantage l'application du régime à certaines infractions pour que ...

Le sénateur Baker : Je ne parle pas de l'inversion du fardeau de la preuve, mais de la modification faite dans le projet de loi. Pour moi, le seul changement de fond est justement la définition du terme « infraction désignée ».

M. Scromeda : Pour nous, même cette modification sert davantage à clarifier le régime en vigueur. Nous estimons que les infractions mixtes sont déjà visées, et c'est peut-être ce que vous dites. Nous avons changé le libellé du Code pour le rendre plus clair — c'est tout ce à quoi sert la modification.

M. Cotler : Puis-je revenir un peu en arrière pour faire ressortir les changements, parce qu'il me semble que c'est le sens de votre question, monsieur le sénateur. Il n'y a pas de changement dans le sens où nous luttons toujours contre les produits de la criminalité et qu'une mesure de confiscation sur déclaration de culpabilité existe dans le Code criminel. Il n'y a pas de changement dans le sens où le ministère public peut toujours intervenir selon le régime en vigueur. Il n'est pas tenu de recourir au nouveau régime si le régime en vigueur convient dans les circonstances.

What is different, and I think not unimportantly so, is that it targets all criminal organization offences as defined in section 2 of the Criminal Code for which punishment is five years or more. Therefore, it targets the core of what we want to combat — namely, organized crime, the criminal organizations engaged in that purpose, and the offences under the Controlled Drugs and Substances Act, specifically trafficking, import/export and cultivation of controlled substances where convictions were obtained. Here too, there is the interrelationship between the two. I might add that in identifying the criminal organizations and the drug-related offences in terms of the ill-gotten proceeds of crime, the serious range of these provisions can effectively embrace all property that is the result of the ill-gotten proceeds of crime. I am bringing in some of my own criminal law practical experience, Senator Andreychuk, not just the constitutional, professorial aspect that I was referring to with regard to the Charter.

The current bill will also, from an operational point of view, require the Crown, as a precondition to the reverse onus — which is not part of the old legislation, but a very important component of this bill — to show that the offender engaged in a pattern of criminality for the purpose of receiving the material benefit, or that the legitimate income of the offender cannot reasonably account for the offender's property. This entire component is not part of the other legislation simply because this is the underpinning of the reverse onus at the core of the new bill. I think in that sense, you see some important, distinguishable differences related to the purpose of the bill and the context in which that purpose is to be carried out.

Senator Andreychuk: I have three questions. Hopefully, they will be easy to answer.

Under the policies that we have, did you file a certificate with your cabinet colleagues that this bill complies with the Charter of Rights and Freedoms?

Mr. Cotler: I like your question for another reason. I have always felt that it is regrettable that people cannot sit in on some of these cabinet meetings because you would see a serious exchange of views such as I get when I come to this committee, which is why I enjoy appearing here. Yes, I did certify to my cabinet colleagues that this had the good housekeeping seal of constitutional approval — Charter protections. It was part of the memorandum to cabinet and it asked are there any risk factors with respect to this bill? In particular, are there constitutionally suspect factors? We have to certify that, and I take this on in my role as a minister.

Senator Andreychuk: Did you give it a clean bill of health or did you say there are concerns?

Mr. Cotler: Part of that is attorney-client privilege. It has to remain within the context of solicitor-client privilege, but I will say that I gave this a constitutional seal of approval.

Senator Andreychuk: I appreciated your candour at the start when you said that this is a difficult bill. and that even the Minister of Justice of Canada has to struggle to understand the

Ce qui a changé, et je pense que ce n'est pas banal, c'est que le projet de loi cible toutes les infractions d'organisation criminelle, telles qu'elles sont définies à l'article 2 du Code criminel, qui entraînent une peine d'au moins cinq ans. Par conséquent, le projet de loi cible ce que nous voulons vraiment combattre, à savoir le crime organisé, les organisations criminelles et les infractions visées par la Loi réglementant certaines drogues et autres substances, plus précisément le trafic, l'importation et l'exportation ainsi que la culture de certaines drogues, pour lesquelles il y a eu déclaration de culpabilité. Il faut remarquer le lien qui existe entre les deux. J'ajouterais que les dispositions qui touchent la désignation des organisations criminelles et des infractions liées à la drogue à propos des produits de la criminalité peuvent viser tous les biens qui sont des produits de la criminalité. Sénateur Andreychuk, mon expérience de criminaliste me sert, pas seulement celle de professeur de droit constitutionnel, comme je l'ai dit à propos de la Charte.

Le projet de loi va également obliger le ministère public, comme condition sine qua non à l'inversion du fardeau de la preuve — ce qui ne figure pas dans l'ancienne loi mais est un aspect important du projet de loi — à démontrer que l'accusé s'est livré à des activités criminelles répétées ou que son revenu légitime ne peut justifier de façon raisonnable la valeur de son patrimoine. Tout cet aspect ne fait pas partie de l'autre loi simplement parce que c'est le fondement de l'inversion du fardeau de la preuve qui est au cœur du nouveau projet de loi. Je pense que, dans ce sens, vous constatez des différences importantes et notables concernant l'objectif du projet de loi et le contexte dans lequel il s'applique.

Le sénateur Andreychuk : J'ai trois questions à poser, et j'espère qu'il sera facile d'y répondre.

Conformément aux politiques que nous avons, avez-vous confirmé à vos collègues du Cabinet que le projet de loi respecte la Charte des droits et libertés?

M. Cotler : J'aime votre question pour une autre raison. J'ai toujours trouvé regrettable que les gens ne puissent pas assister à certaines réunions du Cabinet parce que vous verriez que les discussions sont vives, comme elles le sont quand je comparais devant votre comité — et c'est d'ailleurs la raison pour laquelle j'aime venir vous rencontrer. Oui, j'ai effectivement affirmé à mes collègues du Cabinet que cette mesure avait reçu le sceau d'approbation sur le plan constitutionnel, pour ce qui est des garanties de la Charte. Il en était question, entre autres, dans le mémoire au Cabinet, et on a demandé s'il y avait des facteurs de risque à propos de projet de loi, en particulier sur le plan constitutionnel. Nous devons confirmer la question, et j'en prends la responsabilité en tant que ministre.

Le sénateur Andreychuk : Lui avez-vous donné une note parfaite ou avez-vous signalé qu'il y avait des problèmes?

M. Cotler : C'est en partie une question de secret professionnel. Il faut respecter la règle du secret professionnel, mais je peux vous dire que j'ai donné mon approbation sur le plan constitutionnel.

Le sénateur Andreychuk : J'ai remarqué votre franchise au début quand vous avez dit que c'est un projet de loi difficile à comprendre même pour le ministre de la Justice du Canada qui

This is Exhibit "**9**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

First Session
Thirty-ninth Parliament, 2006

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable DONALD H. OLIVER

Thursday, June 22, 2006
Tuesday, June 27, 2006
Wednesday, June 28, 2006
Thursday, June 29, 2006

Issue No. 3

Business of the committee

and

First, second and third meetings on:

Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability

APPEARING:
The Honourable John Baird, P.C., M.P.,
President of the Treasury Board
The Honourable Vic Toews, P.C., Q.C., M.P.,
Minister of Justice and Attorney General of Canada

WITNESSES:
(*See back cover*)

Première session de la
trente-neuvième législature, 2006

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Président :
L'honorable DONALD H. OLIVER

Le jeudi 22 juin, 2006
Le mardi 27 juin 2006
Le mercredi 28 juin 2006
Le jeudi 29 juin 2006

Fascicule n° 3

Travaux du comité

et

Première, deuxième et troisième réunions concernant :

Le projet de loi C-2, Loi prévoyant des règles sur les conflits d'intérêts et des restrictions en matière de financement électoral, ainsi que des mesures en matière de transparence administrative, de supervision et de responsabilisation

COMPARAISSENT :
L'honorable John Baird, C.P., député,
président du Conseil du Trésor
L'honorable Vic Toews, C.P., c.r., député,
ministre de la Justice et procureur général du Canada

TÉMOINS :
(*Voir à l'endos*)

44118-44122-44123-44126

With all legislation that comes forward, the Canadian Charter of Rights and Freedoms is extremely important. A process is in place that before legislation can go forward at cabinet level a certificate is filed indicating that it complies with the Canandian Charter of Rights and Freedoms. It is your responsibility to ensure that legislation complies with, and meets the expectations of, the Charter.

The certificate, I understand, was filed. Are you satisfied that Bill C-2, to the extent that any Minister of Justice can assess, meets the standards of the Canadian Charter of Rights and Freedoms?

Did your government, in taking office, change the policy that was in place?

Mr. Toews: Perhaps, to answer the second question, I am not aware of any change in policy. I would have been directly involved in any change to that policy in the interpretation of section 4.1 of the Department of Justice Act, which requires me to examine government bills to determine whether any of their provisions are inconsistent with the Charter of Rights and Freedoms.

In this particular case, obviously we filed the certificate. There is no report indicating that I have any concern.

One always must bear in mind the role of the Minister of Justice. We need to remember that our opinion on these matters is not conclusive, nor should we stand in the way of legitimate policy initiatives of government; that governments must bring forward legislation that appears to be constitutional and that legislation, to the best of our knowledge, is constitutional.

We should not shy away from controversial issues simply because somebody will raise a constitutional argument. I have not yet met a lawyer who is not prepared to raise a constitutional argument on every aspect of every bill we brought forward. The standard should not be that there might be a constitutional challenge. Constitutional challenges will always be brought forward.

We look at the issue of constitutionality. We also look at the issue of what policy we are advancing. Then we say to the various departments involved and the government lawyers involved, please marshal the evidence necessary to defend this particular policy initiative. I am confident in this area that there is sufficient evidence to protect the initiatives we are taking, on a constitutional basis.

Senator Andreychuk: Let us follow up on that. That was certainly one of the expectations of the assessment the minister would make in filing a certificate.

I have been sitting on this committee for many years. Whatever government is in power has the right, on behalf of citizens, to introduce the policy directions and changes that they deem appropriate. We, in this committee, are mindful of that. We often look at a bill and find that its flaws, even with regard to the Charter, come in the drafting stage.

La Charte canadienne des droits et libertés est extrêmement importante pour tous les projets de loi proposés. Avant d'être présentées au Cabinet, les mesures législatives doivent être accompagnées d'un certificat attestant qu'elles sont conformes à la Charte. C'est à vous qu'il incombe de confirmer que le projet de loi respecte la Charte et répond à ses attentes.

Je comprends que le certificat a été présenté. Êtes-vous convaincu que le projet de loi, dans la mesure où vous pouvez l'évaluer, répond aux normes de la Charte canadienne des droits et libertés?

En prenant le pouvoir, est-ce que votre gouvernement a changé la politique en vigueur?

M. Toews : Pour répondre à votre deuxième question, il n'y a eu, autant que je sache, aucun changement de politique. Je serais directement intervenu si on avait changé la politique liée à l'interprétation de l'article 4.1 de la Loi sur le ministère de la Justice qui m'oblige à examiner les projets de loi émanant du gouvernement en vue de vérifier s'ils sont compatibles avec les fins et dispositions de la Charte canadienne des droits et libertés.

Évidemment, dans le cas qui nous occupe, nous avons déposé le certificat. Rien n'indique que j'ai des craintes.

Il faut toujours tenir compte du rôle du ministre de la Justice. Mon opinion sur ces questions n'est pas définitive, et je ne dois pas non plus m'opposer à des mesures légitimes que le gouvernement veut prendre en matière de politique; les gouvernements doivent proposer des mesures législatives qui semblent être constitutionnelles et, autant que je sache, ce projet de loi est constitutionnel.

Nous ne devons pas éviter les questions controversées sous prétexte que quelqu'un va soulever des arguments d'ordre constitutionnel. Je n'ai pas encore rencontré un avocat qui n'est pas prêt à en soulever sur chaque aspect des projets de loi que nous proposons. On ne doit se dire que la constitutionnalité d'une mesure pourrait être contestée, parce que ce sera toujours le cas.

Nous examinons la question de la constitutionnalité. Nous examinons également la politique que nous faisons valoir. Nous demandons ensuite au ministère visé et aux avocats du gouvernement de rassembler les preuves nécessaires pour défendre la mesure. Je suis convaincu que, dans le cas qui nous occupe, nous avons assez de preuves pour garantir les mesures proposées, sur le plan constitutionnel.

Le sénateur Andreychuk : Pour poursuivre là-dessus, c'est sûrement un des aspects évalués par le ministre pour produire le certificat.

J'ai siégé pendant des années à ce comité. Le gouvernement au pouvoir, quel qu'il soit, a le droit, au nom des citoyens, de proposer les orientations et les changements qu'il juge appropriés. Le comité en est conscient. On constate, en examinant un projet de loi, que c'est souvent à l'étape de la rédaction qu'on en relève les lacunes, même à propos de la Charte.

This is Exhibit "**10**" referred to
in the affidavit of John Mark Keyes
sworn before me, this 28th day
of May, 2015

Lori Brenning

A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Justice.
Expires December 3, 2016.

House of Commons
CANADA

Legislative Committee on Bill C-2

CC2 • NUMBER 002 • 2nd SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, October 30, 2007

Chair

Mr. Rick Dykstra

These reforms included in Bill C-27 had not progressed to the same level of understanding and support in the previous session and now include additional improvements to address concerns that have been identified in the House of Commons as well as by my provincial and territorial counterparts. Let me take a moment to go through these reforms.

• (1640)

The Tackling Violent Crime Act retains all of the reforms previously proposed in Bill C-27 regarding peace bonds, which had been well received within the House of Commons and beyond. Accordingly, Bill C-10 proposes to double the maximum duration of these protective court orders from one to two years and to clarify that the court can impose a broad range of conditions to ensure public safety, including curfews, electronic monitoring, treatment, and drug and alcohol prohibitions.

I believe this particular provision will be well received across this country. Many people have complained for many years that by the time you get a one-year peace bond, it's too short a period of time, and that two years would be much more appropriate in terms of getting the bond and having it put in place.

Under this bill as well as under the former Bill C-27, crown prosecutors will still have to declare in open court whether or not they intend to bring a dangerous offender application where an individual is convicted for a third time of a serious offence.

We have retained some procedural enhancements to the dangerous offenders procedures, allowing for more flexibility regarding the filing of the necessary psychiatric assessments.

As in the former Bill C-27, an individual who is convicted of a third sufficiently violent or sexual offence is still presumed dangerous.

Bill C-10 also toughens the sentencing provision regarding whether a dangerous offender should receive an indeterminate or a less severe sentence. This amendment modifies Bill C-27's approach to make the courts impose a sentence that ensures public safety.

Finally, it includes a new provision that would allow a crown prosecutor to apply for a second dangerous offender sentencing hearing in the specific instance where an individual is convicted of breaching a condition of their long-term supervision order.

This second hearing targets individuals who were found by the original court to meet the dangerous offender criteria but were nonetheless able to satisfy the court that they could be managed under the lesser long-term offender sentence. If they show by their conduct, once released into the community, that they are not manageable and are convicted of the offence of breaching a condition of their supervision order, they would now be subject to another dangerous offender sentence hearing.

Importantly, this new proposal does not wait for the offender to commit yet another sexual assault or violent offence to bring the offender back for a second hearing for a dangerous offender sentence. Instead, it would be triggered simply by the offender's failure to comply with the conditions of his release contained in his long-term supervision order—for example, for failing to return to his residence before curfew or for consuming alcohol or drugs. Of course, this second hearing would also be triggered if the offender in fact did commit a further sexual or violent offence after his release into the community.

These new proposals directly respond to a serious problem identified by provincial and territorial attorneys general in recent months. Indeed, some of these issues have been flagged since about 2003. Since the 2003 judgment by the Supreme Court of Canada in the Johnson case, many violent offenders who meet the dangerous offender criteria have nonetheless managed to escape its indeterminate sentence on the basis that they could be managed; that is, the risk of harm that they pose to the community could be successfully managed in the community under a long-term offender sentence.

So we reviewed the dangerous offender cases since the 2003 Johnson case and identified 74 such violent offenders. We then looked at how these individuals fared once they were released into the community. To date, 28 of these 74 dangerous offenders have been released into the community. Of these 28, over 60% were subsequently detained for breaching the conditions of their long-term supervision and 10 were convicted of breaching a condition of their long-term supervision orders.

• (1645)

Bill C-10 will prevent dangerous offenders from escaping the dangerous offender indeterminate sentence in the first place and will enable us to more effectively deal with those who nonetheless receive the long-term offender sentence but then demonstrate an inability to abide by the conditions of their long-term offender supervision order.

Of course I have carefully considered the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights in respect of the totality of these new dangerous offender reforms, and I am satisfied that they are fully constitutional. These measures have been carefully tailored to provide a prospective, targeted, and balanced response to the real and pressing problem posed by these dangerous offenders.

[*Translation*]

To sum up, Mr. Chairman, the Tackling Violent Crime Act proposes reforms that have already been supported by the House of Commons.

[*English*]

In the case of the new dangerous offender provisions, it proposes modifications that many have signalled an interest in supporting.

I appreciate the collaborative spirit this committee and members have shown thus far to enable the commencement of the review of Bill C-10, and it is my hope and that of all Canadians that this collaboration will continue to enable expeditious passage of this bill.

Thank you, Mr. Chair.

• (1700)

[*English*]

Hon. Rob Nicholson: One of them is just what I indicated. There are those individuals with whom we believe there is a problem. If they get a dangerous offender designation and then they are subsequently released into the public and they then don't comply, the way the law is set up it becomes very difficult. They basically have to start all over again, and as you may know, this is a very time-consuming, difficult, expensive operation that crown attorneys are sometimes reluctant to pursue.

So that is very much a concern that I believe is being addressed. It is also one of the reasons why in Bill C-27, since the Johnson case, which I'm sure you're familiar with, we've actually seen a reduction in the number of attempts to designate individuals as dangerous offenders. That reduction, I believe, was a direct result of the Johnson decision. We are attempting to clarify that as well, and I think that would be helpful and would be welcomed by crown attorneys.

Mr. Hoover, I believe, has something else that he might be able to add.

Are we out of time on this, Mr. Chair?

The Chair: Minister, he may have something to add, but Mr. Hoover may have to do that at the next opportunity.

Hon. Rob Nicholson: Okay, fair enough.

The Chair: Mr. Ménard's time is up.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Mr. Chair, on the basis that we don't want to delay this and we've heard from the minister, including even on the one amendment they've made to that part of Bill C-2 that was the old Bill C-27, I'll pass—even though, Mr. Minister, I always enjoy having you here.

Thank you.

The Chair: Mr. Nicholson.

Hon. Rob Nicholson: If I might say, Mr. Comartin, I always enjoy listening to you. Even from the comfort of my own home in Niagara Falls, I did hear your comments with respect to this bill. I've listened to you on a number of occasions. I think your comments are, as usual, helpful, and I appreciate hearing them.

The Chair: Thank you, Mr. Minister.

Mr. Harris, seven minutes.

Mr. Richard Harris (Cariboo—Prince George, CPC): Thank you, Mr. Chair.

Mr. Minister, thank you for coming today.

I want to say that Bill C-2, upon study, is a bold bill. It has substantive changes to the Criminal Code, and I'm sure it will be appreciated by Canadians who have been looking for an extra measure of safety for themselves and their families. The bill does have some very bold moves, and it's tough on violent crime. History will show that in many cases when a bill such as this has come up for legislation, or is even passed through legislation—and it's been decades since anything like this has come along—the constitutional challenge people are just rubbing their hands together, waiting to get at it.

So that Canadians can avoid being disappointed about any hitches that might be in this bill, what assurances can you give us, Minister, that all of the due diligence has been done that will enable Bill C-2 to withstand any possible constitutional challenges?

Hon. Rob Nicholson: I appreciate your comments, Mr. Harris, and quite frankly, I appreciate your sitting on this committee. You're not a regular member, I know, of the justice committee, and to you and your colleagues who are prepared to give your time and efforts to get legislation like this through, it is much appreciated.

The drafting of these pieces of legislation undergo considerable scrutiny. It's incumbent upon me, as Minister of Justice, to confirm in my own mind that the bill, first of all, meets the test set out by the Canadian Bill of Rights. That's an obligation that rests on the Minister of Justice for every piece of legislation that is tabled in the House of Commons. In addition, our department is very careful in terms of making sure that legislation, to the extent that we are able to predict these things, will withstand a challenge under the Charter of Rights and Freedoms.

Now, that being said, it is the right of individuals who are charged with offences in this country, or of their solicitors on their behalf, to file applications to have these measures tested. That function has been around in Canada since about 1960, I guess, with the introduction of the Bill of Rights. A number of bills were challenged, and of course since the Charter of Rights and Freedoms we have seen quite a bit of testing. It presents extra challenges to those who draft these, but appropriately so. I remember that in the mid-1980s, when I was a member of Parliament, part of our challenge was to just check on legislation that was already in place—never mind new pieces of legislation, just the legislation that was already on the books. Many—I shouldn't say many, but a fair number—were found to have some constitutional deficiencies. So part of the challenge the justice committee faced was to deal with many pieces of legislation that were updating Canada's laws, to take into consideration that there were these other considerations that had to be met.

Coupled with that was the assurance that whatever we tabled would meet a constitutional challenge. I remember the bill in 1993 to make it a crime to possess child pornography. I'm sure that in my office I had comments, briefs, and articles a foot thick questioning whether this was going to meet a constitutional challenge, and as a member of the committee, looking at that and having looked at the Charter of Rights, it seemed to me that in fact it probably would, that this was a very reasonable piece of legislation; for the first time, to make it an offence to possess child pornography. But I was under no illusions. It was challenged, of course, on at least a couple of occasions, and there have been some changes to that legislation since, but it has managed to stick-handle its way through the years and is still part of the law of this country.

So it's not just me; the people in the Department of Justice who are experts in this area take their responsibility very seriously. So yes, they draft every piece of legislation, every line, every clause, with a view to ensuring to the greatest extent possible that these will withstand constitutional challenge.