CHARTER FIRST

A BLUEPRINT FOR PRIORITIZING RIGHTS IN CANADIAN LAWMAKING

CANADIAN CIVIL LIBERTIES ASSOCIATION
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ABOUT THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Formed in 1964, the Canadian Civil Liberties Association (CCLA) is a non-profit, non-partisan, national organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the constitutionally guaranteed rights and freedoms of everyone in Canada. It conducts research, public education, advocacy and litigation aimed at ensuring the protection and full exercise of those rights and liberties. The Association has thousands of supporters across Canada and a wide variety of people, occupations and interests represented in its membership.

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EXECUTIVE SUMMARY

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

This report, and CCLA's broader Charter First campaign, seek to address what we believe are critical accountability and transparency gaps in our federal lawmaking process that can enable the advancement of unconstitutional laws. At no point in the current process are ministers or parliamentarians required to publicly defend the constitutionality of bills they introduce, or of amendments proposed, with any sort of rigorous analysis. At the same time, many parliamentarians simply do not have the resources at their disposal, or the requisite knowledge, to effectively assess the constitutionality of the laws they are asked to enact.

The status quo has forced affected individuals and public interest organizations, such as CCLA, to launch *Charter* challenges as the only available recourse. How unfortunate given that some of these challenges — which come at a significant cost not only to the applicants, but also the public — could likely have been avoided had Parliament done its duty to uphold the *Charter*. And while these lengthy court cases play out, often over many years, the laws in question remain on the books, unfairly and unlawfully restricting the fundamental rights and freedoms of Canadians.

Centre Block, Parliament Hill, Ottawa

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

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

SUMMARY OF RECOMMENDATIONS

1. Parliament should amend the ineffective section 4.1 of the *Department of Justice Act* such that the Minister of Justice is required to issue a detailed statement of *Charter* compatibility when a government bill is introduced in Parliament. The statement should lay out the government's principled position regarding how, on **a balance of probabilities**, the bill complies with the purposes and provisions of the *Charter*. This should include an acknowledgement of which rights, if any, are engaged by the bill; the government's justification for any potential infringements under section 1 of the *Charter*; the 'tests', factors, or reasonable alternatives considered to reach the conclusion; reference to jurisprudence and relevant judicial precedents; and an acknowledgement if the bill contradicts existing norms or precedents.

2. Parliament should create a position of Charter Rights Officer, with a staff and mandate to provide independent assessments of the *Charter* compliance of bills, and to serve in an advisory role to parliamentarians and parliamentary committees on *Charter* issues.

3. The Senate and House of Commons should review and revise their respective amendment admissibility rules to allow committees to debate and vote on amendments that address *Charter* concerns regardless of whether they go beyond the 'scope and principle' of a bill.

4. For all government bills, the Charter Rights Officer should issue an independent assessment of *Charter* compliance, ideally prior to Second Reading in the House or Senate (depending on where a given bill is introduced). If amendments are made at any subsequent point, the Officer should issue addendums, ideally before final votes on the bill are taken. (If the bill was introduced in the Senate and amendments are made by Senators, then the Minister of Justice should issue an addendum to the government statement of compatibility at First Reading in the House.)

5. For any private members' bill or Senate public bill that passes Second Reading in the House or Senate respectively, the Charter Rights Officer should issue an independent assessment of *Charter* compliance. If amendments are made at any subsequent point, the Officer should issue addendums, ideally before final votes on the bill are taken.

House of Commons, Parliament Hill, Ottawa.

We recognize that these recommendations, if adopted, would not prevent unconstitutional laws from being proposed or passed. We do, however, anticipate that they would produce the following positive outcomes.

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

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

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

PART 1: INTRODUCTION

> "At no point in the current process are ministers or parliamentarians required to publicly defend the constitutionality of bills they introduce …

The Canadian government and parliamentarians are required to uphold the Constitution of Canada — and *Canadian Charter of Rights and Freedoms* therein — in all matters of law and policy. This is a given, but does it always happen in reality?

In recent years, we at the Canadian Civil Liberties Association (CCLA) have become increasingly concerned about the frequency and ease with which laws with clear constitutional vulnerabilities have been proposed and passed by Parliament — only to be challenged later, and, in some cases, be struck down by the courts for violating the *Charter*. Key examples include parts of the S*afe Streets and Communities Act* (Bill C-10) and the *Protecting Canada's Immigration System Act* (Bill C-31). Some have been challenged in the courts, but have yet to receive final judgment, such as the *Anti-Terrorism Act, 2015* (Bill C-51), parts of which CCLA is challenging. The same is true for the *Fair Elections Act* (Bill C-23), key components of which the new government has promised to repeal. Others, meanwhile, such as the *Act to amend the Income Tax Act (requirements for labour organizations)* (Bill C-377) and the *Strengthening Canadian Citizenship Act* (Bill C-24), were viewed as so clearly unconstitutional that legislation to repeal them was tabled before any judicial decisions could even be rendered. Then came Bill C-14 on physician-assisted dying, which was passed in apparent contravention of the language and spirit of the Supreme Court decision in *Carter v. Canada*,[1] striking down the previous law on the matter.

Rights and freedoms are not chips to be traded for political advantage, or matters that can solely be left to our already overburdened courts to sort out. This is serious business that has real consequences for individuals in Canada when mistakes — or worse, insidious choices — are made by our elected representatives. For example, suppose someone serves time in jail, only to have it be concluded years later that his or her mandatory minimum sentence amounted to cruel and unusual punishment. Or consider a person seeking

Peace Tower, Parliament Hill, Ottawa

refugee status in Canada forced back into dangerous circumstances after being unable to appeal their denial of entry on the basis of their country of origin, only for that later to be found an act of discrimination in violation of Canada's legal obligations. Or just imagine how many Canadians with debilitating medical conditions — who wish to end their prolonged suffering with dignity but cannot since their death is not "reasonably foreseeable" — will continue to suffer as they await the conclusion of another multi-year court battle.

This report, and CCLA's broader Charter First campaign, seek to address what we believe are critical accountability and transparency gaps in our federal lawmaking process that can enable the advancement of unconstitutional laws. At no point in the current process are ministers or parliamentarians required to publicly defend the constitutionality of bills they introduce, or of amendments proposed, with any sort of rigorous analysis. Perhaps notably, not even the Senate, commonly referred to as the 'chamber of sober second thought', is bound to meaningfully address *Charter* matters. At the same time, many parliamentarians simply do not have the resources at their disposal, or the requisite knowledge, to effectively assess the constitutionality of the laws they are asked to enact.

The status quo has forced affected individuals and public interest organizations, such as CCLA, to launch *Charter* challenges as the only available recourse. How unfortunate given that some of these challenges — which come at a significant cost not only to the applicants, but also the public — could likely have been avoided had Parliament done its duty. And while these lengthy court cases play out, often over many years, the laws in question remain on the books, unfairly and unlawfully restricting the fundamental rights and freedoms of Canadians.

Meanwhile, the limited safeguards we do have are simply not working. Typically, the Department of Justice (DOJ) provides legal opinions to the Minister of Justice regarding the constitutionality or legal vulnerabilities of government-proposed legislation. However, the government has refused to make these opinions public, stating that they are subject to solicitor-client privilege.[2] The Minister is also required to report to Parliament when he or she finds government legislation to be inconsistent with the *Charter* (as per section 4.1 of the *Department of Justice Act*).

> “Rights and freedoms are not chips to be traded for political advantage, or matters that can solely be left to our already overburdened courts to sort out.

But government officials have suggested that the Minister need only report when there is no credible argument to support a bill's constitutionality.[3] *No credible argument.* This standard is bafflingly obtuse and so low that, in practice, *not a single report relaying concerns about Charter compliance under section 4.1 has ever been made to Parliament.* The reason why should be fairly obvious: a government would rather avoid scrutiny — especially on *Charter* grounds — just as it proposes a bill. Furthermore, none of this covers private members' bills or Senate public bills — other forms of legislation that can and have raised constitutional concerns.

Our goal here is not to "*Charter*-proof" federal legislation; that would be impossible and arguably undesirable given that the interpretation of *Charter* rights is constantly evolving. Similarly, we are not suggesting that, if adopted, the recommendations in this report would suddenly make *Charter* challenges unnecessary. On the contrary, CCLA, for its part, will continue to press forward with the organization's existing *Charter* challenges,* and will not hesitate to bring more in the future. It is also important to note that we recognize and respect both the role of the courts in adjudicating constitutional disputes, and Parliament's power to legislate as granted by Canadians. However, the fact remains that our government and parliamentarians — both present and future — have an obligation to ensure, in good faith, that the bills they propose and pass into law are, to the best of their knowledge and understanding, compliant with the *Charter*.

Thus, the goal of the Charter First report and campaign is to see that new checks and balances are introduced into Canada's federal lawmaking process — ones that we believe will raise the standard of *Charter* compliance of bills tabled and passed in Parliament. These mechanisms would provide more transparency and accountability to Canadians, as well as more information and resources to parliamentarians in their consideration of *Charter* issues. If adopted, not only would our lawmaking process be better, so would our laws themselves.

This concept is not novel; other Commonwealth jurisdictions have various mechanisms in place to help ensure bills are consistent with human rights guarantees.[4] For example, in New Zealand the Attorney General must report to the House of Representatives any provision in a proposed bill that "appears inconsistent with

* As of this writing, CCLA is challenging key provisions of Bill C-51 (*Anti-Terrorism Act, 2015*), the overuse of segregation in federal prisons, and aspects of the *Personal Information Protection and Electronic Documents Act*.

any of the rights and freedoms contained" in the *New Zealand Bill of Rights Act, 1990*.[5] Although not required by legislation, the vetting that is done in order to provide the Attorney General with a basis for these reports is made available to the public and MPs.[6] In the United Kingdom, the minister sponsoring a bill is required to issue a statement on its compatibility with the *European Convention on Human Rights* (ECHR) before Second Reading.[7] The country also has a Joint Committee on Human Rights that examines every bill that passes First Reading for compatibility with ECHR rights.[8] While these approaches have varying degrees of success, and are not necessarily transferable models for Canada, they highlight the fact that attention to human rights guarantees is prioritized in countries with which we have much in common, that such scrutiny is properly a responsibility for all branches of government, and that Canada can aspire to do better.

To further make the case for reform, this report covers the following ground: key bills and the consequences of them passing into law without proper consideration of their constitutional vulnerabilities; the ineffectiveness of section 4.1 of the *Department of Justice Act*; the case of *Schmidt v. Canada*, in which CCLA intervened, and which helped to expose, and inspire action on, this issue; a closer look at the process which resulted in the passage of Bill C-14 on physician-assisted dying; and our conclusions with detailed policy recommendations.

In order to ensure that our work was well-informed and rigorous, we consulted with the following legal and political science scholars, practitioners, and organizations to hear their views about our current system and possible options for reform: Irwin Cotler, Adam Dodek, Charles Feldman, Janet Hiebert, Peter Hogg, James Kelly, Carissima Mathen, Peter Russell, Edgar Schmidt, and the Association of Justice Counsel. We are grateful for their participation in our initial consultations and for the feedback we received on our final recommendations. Ultimately, the recommendations in this report represent only the views of CCLA — ones which we hope others will consider, critique, or endorse.

The *Charter of Rights and Freedoms* is frequently referred to as among the most unifying expressions of Canadian values, and as a national patriotic symbol. However, it is much more than that; it is a centrepiece of the highest law of the land, Canada's Constitution. And while our courts are empowered to rule on constitutional matters, this does not excuse Parliament from ensuring, to the fullest extent possible, that laws enacted uphold fundamental rights and freedoms. Unfortunately, at critical times in the past, Parliament has simply failed to do so, resulting in serious consequences for Canadians. This is why processes must be put in place to help ensure we get it right, from the start.

Indeed, it's time to put the *Charter* first.

PART 2: BAD BILLS, REAL RISKS

> "Why provoke an avoidable constitutional challenge?
>
> *~ Honourable Ron Atkey, former Chair of the Security Intelligence Review Committee*

We begin by briefly examining Parliament's consideration of several key bills and the consequences of them becoming law. This is to demonstrate why better, proactive *Charter* compliance vetting is so desperately needed in our federal legislative process.

In CCLA's view, key aspects of the laws discussed below are, on balance, unconstitutional.[9] However, we acknowledge that not all of them have yet been declared as such by the courts, and that some observers may disagree. We also acknowledge that assessing *Charter* compliance — particularly whether rights infringements are justified under section 1 — can be a complex endeavour that requires one to reconcile legal rights with policy considerations. However, one thing is for certain: once proposed, these bills were widely viewed as controversial because of the extent to which they restrict *Charter* rights, in apparent disproportion to reasonable alternatives, and/or to the facts and policy concerns at issue in each case. Further, at no point during parliamentary consideration of each bill was constitutionality assessed openly, adequately, and meaningfully by our elected representatives advancing them. Did the bill infringe on certain *Charter* rights? Which ones? Were the restrictions justifiable? If so, on what grounds? Was there evidence to reinforce the necessity of the restrictions? This is the sort of analysis required to defend against *Charter* challenges; it should not be foreign to our lawmakers.

House of Commons, Parliament Hill, Ottawa

BILL C-51: *ANTI-TERRORISM ACT, 2015*

Bill C-51 was introduced on January 30th, 2015 and received Royal Assent on June 18th later that year. In Parliament, the sponsor of the bill, then Minister of Public Safety, Honourable Steven Blaney, cited the attacks of October 2014 in Saint-Jean-sur-Richelieu and Ottawa as key reasons for why this new anti-terrorism legislation was needed. "Those incidents are etched in our hearts and in our memory and show us how serious these issues are for us as a country," he stated. He also noted that the terrorist threat is "real" and "evolving," and that government officials had "spared no effort to create a balanced bill."[10]

Honourable Peter MacKay (left) and Honourable Steven Blaney (right) arrive to testify on Bill C-51 before the House of Commons Standing Committee on Public Safety and National Security on March 10, 2015 (REUTERS/Chris Wattie)

Charter Concerns

As CCLA pointed out throughout the legislative process, including before House and Senate committees as well as in the media,[11] Bill C-51 was nowhere near balanced. It allowed for an exponential increase in information sharing between government agencies and with foreign actors, without adherence to legal safeguards or accountability mechanisms. Privacy rights would be significantly curtailed in the name of defending against the extremely broad description of "activities that undermine the security of Canada." The Canadian Security Intelligence Service (CSIS) would be given extraordinary new powers to take covert action, including the ability to seek a warrant, in secret, to violate the *Charter* — a radical proposition contrary to the rule of law and the role of the judiciary. The broad new criminal offence of promoting or advocating terror threatened legitimate speech and dissent. Important judicially recognized constitutional protections to the security certificate regime would be reversed, in direct contravention of *Charter* rights. Canadians' mobility rights would be impaired, absent due process. The list goes on.

A litany of legal experts and civil society members shared our concerns. At the committee stage, University of Toronto law professor Kent Roach told parliamentarians, "I think that there is certainly a high risk of a *Charter* challenge." In discussing CSIS's "totally novel" new warrant power, he explained: "A warrant is granted by a judge to avoid a *Charter* violation, whereas the CSIS warrant could authorize a *Charter* violation, so we have an open-ended authorization for the violation of any *Charter* right. To me, that may be very difficult to justify under the *Charter*." And on whether the government had justified the proportionality of that provision, Roach added:

> *We really are not being honest with the public in prescribing by law what Charter rights we're talking about. My own view is that the first* Charter *right that will be violated by one of these warrants is the section 6 right of citizens of Canada to leave or to come back to Canada. We could be having a debate, as they have had in the U.K., about whether reasonable and proportional limits should be placed on that right, but that's a very different and more specific debate than saying to Federal Court judges that they can authorize any violation of the* Charter.[12]

Honourable Ron Atkey, a former MP, Cabinet minister, and Chair of the Security Intelligence Review Committee, went even further, asserting that the CSIS warrant provision "is clearly unconstitutional and will be struck down by the courts." He elaborated, "This notion of Parliament authorizing a *Charter* breach, short of using the notwithstanding clause, is clearly unconstitutional and is not consistent with our constitutional tradition and the way in which section 1 of the *Charter* operates." He also posed to parliamentarians the very question at the heart of the Charter First report and campaign: "Why provoke an avoidable constitutional challenge?"[13]

Representing the Canadian Bar Association, lawyer Peter Edelmann asserted that "certain parts of Bill C-51 are clearly unconstitutional."[14] Aboriginal legal scholar and activist, Dr. Pamela Palmater argued that, to direct the Department of Justice to "rubber-stamp the bill as compliant [with the *Charter*] even if it has a 95% chance of being overturned in court is not democratic."[15]

In September 2015, after the bill had been passed, Kent Roach and University of Ottawa law professor Craig Forcese published "False Security: The Radicalization of Canadian Anti-Terrorism," in which they called C-51 the "most radical national security law ever enacted" in the era of the *Charter of Rights and Freedoms*.[16]

The October 22, 2014 attack on Parliament Hill in Ottawa spurred the government to introduce Bill C-51

Inadequate Defence of *Charter* Compatibility

Bill C-51 was enacted without any serious attempt by the government to defend its constitutionality. There was no explanation of why Canada's existing national security laws and powers (already quite extensive), or other reasonable alternatives to the provisions in Bill C-51, were insufficient to prevent the attacks of October 2014, or to protect Canadians from future attacks. There was not even any acknowledgement of which *Charter* rights the bill implicated.

Instead, Canadians were given limited-context, hypothetical scenarios such as the following, presented by Minister Blaney to promote the mass information sharing provisions of Bill C-51:

> *A passport officer contacts an applicant's reference person as part of a routine check. Without being asked, the reference person expresses some concerns about the applicant's intentions abroad. The reference fears the applicant could go to Iraq to fight alongside ISIL, because he supports its goals. At this time, the passport officer can open an investigation in order to determine if the passport application should be denied for national security reasons … However, that officer will have a hard time sharing information proactively for further investigation of that threat. This could push the individual to commit a terrorist act in Canada … Under the Anti-Terrorism Act, 2015, passport officers would be able to proactively share information with a national security agency in order to combat this possible terrorist threat.*[17]

> "... at no point during the approximately 18 hours of committee discussion on Bill C-51, did any government representative meaningfully address concerns about constitutionally protected rights and freedoms.

What Minister Blaney neglected to mention here was that, not only could the information be shared with a national security agency, but that the original version of the bill also authorized further sharing of the information "with any person for any purpose" (this language was later changed, but still authorized sharing amongst no less than 17 government agencies and with foreign entities). Was the widest of possible nets in terms of privacy infringement necessary? After all, the suspicions relayed to the passport officer in this example were based on a single source and could have been erroneous. Then Minister of Justice, Honourable Peter MacKay argued that C-51 was justified on account of the "many safeguards associated with the tools" enacted by the bill.[18] In reality, these were severely lacking. And while safeguards and accountability mechanisms are critical, and can support section 1 *Charter* arguments, they alone do not necessarily make a law constitutional.

At the amendment stage, only four substantive changes to Bill C-51 were accepted (all proposed by the government) out of over 100 proposed amendments: language was added to clarify that all forms of protest, advocacy, dissent and artistic expression — lawful or unlawful — would be excluded from the definitional linchpin of the information sharing provisions;[†] CSIS would not be able to arrest people; information sharing would be limited as described above; and the Minister of Public Safety's power to compel an airline to prevent someone on the no-fly list from travelling would be limited.[19] While the changes did address some *Charter* concerns, many remained, including the aforementioned CSIS warrants. It is notable as well that when asked to waive attorney-client privilege and disclose DOJ advice about the *Charter* issues raised by the bill, Minister MacKay simply responded, "We're not going to do that."[20] But possibly most troubling is that, at no

[†] Information sharing is authorized in the bill when related to a recipient institution's responsibilities in relation to "activities that undermine the security of Canada". This term was initially defined to exclude "lawful advocacy, protest, dissent and artistic expression". Many pointed out that an unlawful protest might include one for which proper insurance had not been purchased or the appropriate permit had not been obtained, even though such a protest would hardly undermine national security. When the bill was amended at Committee, the reference to the lawfulness requirement was removed.

point during the approximately 18 hours of committee discussion on Bill C-51, did any government representative meaningfully address concerns about constitutionally protected rights and freedoms.[21]

Avoidable Consequences

Just weeks after it was passed, CCLA initiated a *Charter* challenge to the *Anti-Terrorism Act, 2015*, together with Canadian Journalists for Free Expression.[‡] As of this writing, the challenge is ongoing while the law remains in effect.

The *Act* presents innumerable consequences, most, if not all, of which are playing out in secret. What we do know is that at least four government agencies, including the Department of Immigration, Refugees and Citizenship, the Canada Border Services Agency, and CSIS, have made use of the new information sharing powers provided by Bill C-51.[22] Taken together with the variety of mass surveillance activities we already know are occurring, there is a strong possibility that the personal information of many Canadians is being intercepted and shared.[23] We also know that CSIS has used "threat mitigation measures" that did not require a warrant in nearly two dozen cases.[24] When asked whether this will occur more frequently in the future, CSIS director Michael Coulombe responded in the affirmative.[25] Furthermore, in May 2016, it was reported that CSIS had disclosed only one privacy breach in 2015, leading the Privacy Commissioner to investigate whether additional breaches had gone unreported.[26]

Another consequence is the greater likelihood of mistakes involving the no-fly list, which we have reason to believe is growing as a result of Bill C-51. The most notable examples of individuals listed by mistake were six-year-old Syed Adam Ahmed and toddlers Sebastian Khan and Naseer Muhammad Ali. Each of these children have experienced security delays when attempting to travel with family, and their Canadian-born parents worry that things could get worse as they get older.[27] Others could be listed without knowing until they are stopped at an airport, at which point it can be extremely difficult to clear their name.[28]

[‡] The challenge addresses five key components of the legislation: (1) amendments to the *CSIS Act*, (2) amendments to the *Immigration and Refugee Protection Act*, (3) amendments to the *Criminal Code* with respect to "advocating or promoting terrorism", (4) the new *Secure Air Travel Act*, and (5) the new *Security of Canada Information Sharing Act*.

BILL C-23: *FAIR ELECTIONS ACT*

Bill C-23, commonly known as the *Fair Elections Act*, was introduced on February 4th, 2014 and received Royal Assent on June 19th of that year. In Parliament, the sponsor of the bill, then Minister of Democratic Reform, Honourable Pierre Poilievre, promised that it would greatly improve the quality of Canadian federal elections. "[The bill] keeps everyday citizens in charge of democracy by pushing special interests out of the game and fraudsters out of business." He added that the bill "would make it harder to break the law and easier to vote."[29]

Charter Concerns

As CCLA told the House of Commons Standing Committee on Procedure and House Affairs on April 2nd, 2014, Bill C-23 would undermine the constitutionally-protected right to vote.[30] Rather than make it easier to vote, as promised, the bill would remove vouching and voter information cards as acceptable forms of identification, likely disenfranchising some marginalized, low-income and indigenous Canadians, as well as students and seniors. As we noted, in the 2011 general election, over 100,000 Canadians established their identity at polling stations by way of vouching.

An open letter published in the National Post, signed by over 150 Canadian university professors, affirmed these concerns and raised others. " ... [T]his bill contains proposals that would seriously damage the fairness and transparency of federal elections and diminish Canadians' political participation," they wrote. The group also expressed alarm about the "lack of due process" the bill itself was being given.[31]

At the committee stage, Canada's Chief Electoral Officer, Marc Mayrand, told parliamentarians that measures in the bill "undermine its stated purpose" of "ensuring fair elections." He noted that the new ID requirements would restrict the voting ability of seniors "who live in long-term care facilities and who vote on site," adding that these individuals "do not have driver's licences, hydro bills, or even health cards, which are typically kept by their children or facility administrators."[32]

Representing the Assembly of First Nations (AFN), Peter Dinsdale explained: "Many First Nation communities don't use home addresses in this manner and many are serviced by postal boxes. Additionally, many First Nation citizens living in urban areas, including students, may not have ID that corresponds with a current address at the time of voting." He argued that the

Honourable Pierre Poilievre speaking in the House of Commons on February 5, 2014, the day after Bill C-23 was introduced (REUTERS/Chris Wattie)

proposed changes were "a step backwards" and would impose additional barriers to voting beyond those the AFN was already trying to remove.[33]

Representing the Native Women's Association of Canada, Teresa Edwards stated that the *Fair Elections Act* would especially impact aboriginal women:

> *Aboriginal young women are often single mothers. They live in poverty and have high rates of mobility, and are often forced to move several times a year ... They could be moving on and off reserve or from different provinces to be with other family members. Sometimes it's due to housing crises, poverty or they're going after jobs, going away to school, or perhaps they are fleeing violence.*[34]

Voter information cards, as proof of residency, and vouching, she explained, have enabled many aboriginal women to vote.

Dr. Abram Oudshoorn, Chair of the London Homeless Coalition, argued that the new voter ID requirements would "present a very real challenge to people experiencing homelessness across Canada and disenfranchise them from a significant part of the democratic process." He added, "In any policy analysis, when a particular subset [of the population] is affected, that is a red flag."[35]

Inadequate Defence of *Charter* Compatibility

Section 3 of the *Charter* states, "Every citizen of Canada has the right to vote in an election of the members of the House of Commons ... " Bill C-23 clearly undermined that right, yet the government made no substantial case for its constitutionality. No reasons were offered as to why alternatives, such as improving the administration of vouching, were insufficient to ensure elections were fair. The government did not even provide any actual evidence of voter fraud to support the stated policy rationale behind the bill's voter ID provisions (there is no evidence that vouching has resulted in fraud anyway).

> Section 3 of the Charter states, "Every citizen of Canada has the right to vote in an election of the members of the House of Commons…" Bill C-23 clearly undermined that right, yet the government made no substantial case for its constitutionality.

Instead, Canadians heard intimations that administrative irregularities during elections *could* result in voter fraud. As Minister Poilievre stated during his remarks at Second Reading in the House of Commons:

> *Each fraudulent vote cancels out an honest one. To avoid this, we currently have identification requirements under the* Canada Elections Act. *Voters can choose from one of 39 acceptable forms of ID. When they fail to bring any of those, someone can vouch for their identity. Elections Canada commissioned a study last year that found irregularities in one in four cases where vouching was used. Having irregularities 25% of the time constitutes an unacceptable risk.*[36]

As we argued in our submissions to the Procedure and House Affairs Committee, if administrative irregularities are a problem, then we should work to remedy that problem. But a response that results in the disenfranchisement of eligible voters — even just a few — is simply indefensible. As the Supreme Court noted in a recent contested election case dealing specifically with irregularities, some of which arose from vouching: "It is well accepted in the contested election jurisprudence that the purpose of the *[Canada Elections] Act* is to enfranchise all persons entitled to vote and to allow them to express their democratic preferences. Courts considering a denial of voting rights have applied a stringent justification standard."[37]

At the amendment stage, 45 government-proposed amendments to Bill C-23 were accepted, while over 200 from the opposition were rejected.[38] Despite a notable change with regard to vouching,[§] legitimate concerns about voter disenfranchisement remained. Under the law, voter identification cards would still no longer be considered valid forms of ID.

Avoidable Consequences

Unsurprisingly, the *Fair Elections Act* quickly became the subject of a *Charter* challenge. Not even two weeks after the *Act* received Royal Assent, the Council of Canadians and the Canadian Federation of Students sought an injunction to suspend

[§] The change permits Voter A, with picture ID and proof of address, to vouch for Voter B, with picture ID only, at the same polling station by signing a written oath attesting to Voter B's address, co-signed by Voter A.

the operation of section 46(3) of the *Act* before the October 2015 federal election. They argued that removing the discretion of the Chief Electoral Officer to authorize voter identification cards (VICs) as a valid form of ID would disenfranchise a large number of voters who might not have other forms of ID.[39]

Although the judge refused to grant the injunction, in part due to the fact that the next federal election was right around the corner, he did recognize that there was "a serious issue to be tried," explaining:

> *In [*Henry v. Canada *(BCSC and BCCA)], the courts found that the previous voter identification requirements that were enacted by Parliament in the 2007 reforms to the* Canada Elections Act *violated section 3 of the* Charter. *Given that the changes enacted by the* Fair Elections Act *impose even stricter requirements for voter identification, it is logical to infer that they, too, would be found to violate section 3. The prohibition against the use of the VIC to establish identity or residence is, arguably, a further restriction on access to the polls since it restricts the means by which voters may establish their identity or residence in order to obtain a ballot.*[40]

The judge also acknowledged that "irreparable harm" would be suffered by predominantly young, indigenous, or elderly voters if they were effectively disenfranchised.[41] While the decision on the injunction was upheld on appeal,[42] a hearing on the merits of the *Charter* challenge itself has yet to occur (and may not if the issue is addressed by Parliament). However, during the 2015 election, the Council of Canadians received numerous reports of problems experienced by voters. These included people being unable to vote in advance polls in at least 10 ridings, 100 voters being turned away at a polling station in Okanagan-Coquihalla, and problems with registration and voter ID.[43] There were also media reports about long lines deterring people from voting and problems with ID requirements.[44] While it is still too soon to know with certainty whether the new rules caused voter disenfranchisement, these reports are discouraging.

BILL C-10: *SAFE STREETS AND COMMUNITIES ACT*

Bill C-10, colloquially referred to as the "Omnibus Crime Bill" or "Tough on Crime Act", was introduced on September 20th, 2011 and received Royal Assent on March 13th, 2012. In Parliament, the sponsor of the bill, then Minister of Justice, Honourable Rob Nicholson, stated that its purpose was to "protect society and to hold criminals accountable." He added, "The objective of our criminal law reform agenda over the past few years has been to build a stronger, safer and better Canada."[45]

Charter Concerns

CCLA argued in submissions to the House of Commons Standing Committee on Justice and Human Rights that Bill C-10 contained a number of provisions that were unconstitutional.[46] For example, it lowered the standard of proof required to impose an adult sentence on a minor. The bill also imposed a series of mandatory minimum sentences for broad and vague offences, including low-level drug crimes.[47] These all but guaranteed the proliferation of unjust, grossly disproportionate sentences which could amount to cruel and unusual punishment. Generally, we asserted that the bill would do little to achieve its stated purpose of making Canada safer, and would unfairly impact marginalized Canadians, such as aboriginal peoples and individuals struggling with mental illness and addictions.

Others shared similar concerns about the bill's constitutionality at the committee stage. University of Toronto criminology professor Anthony Doob used a telling example to highlight how the bill created sentences that violated the principle of proportionality — a bedrock principle in criminal sentencing:

> *To stop organized crime from renting homes and setting up marijuana grow-ops Bill C-10 would impose a nine-month minimum sentence on a student living in a rented apartment who grows a single marijuana plant so she can share marijuana with her boyfriend. If she owned the apartment, she would not face a mandatory minimum prison sentence as long as she grew no more than five plants. If she had six to 200 plants in a dwelling she owned, she'd be facing only a six-month mandatory minimum prison sentence.*[48]

He added, "Mandatory minimum penalties almost certainly violate or force the violation of the principle of proportionality."[49]

Representing the Canadian Bar Association, lawyer Michael Jackson raised concerns about the way in which C-10 would amend the *Corrections and Conditional Release*

Act (CCRA). As he explained, central to the CCRA is the "principle enshrined in the *Charter* that justifiable limits must be demonstrably made in accordance with principles of proportionality and rationality, and not be arbitrary." He added, "One of those principles is that state authority must be exercised in the least restrictive manner consistent with public safety, staff safety, and offenders."[50]

> "... among those amendments found to be inadmissible was a proposal to have Bill C-10 reviewed to ensure it was not inconsistent with the Charter.

But as he pointed out in a subsequent committee hearing, Bill C-10 was set to "exorcize all references" to that constitutional standard in the CCRA."[51]

Catherine Latimer, Executive Director of the John Howard Society noted that "the removal of the 'beyond a reasonable doubt' standard for young persons to receive an adult sentence is contrary to the Supreme Court decision in *R. v. D.B.* and thus may violate section 7 *Charter* rights."[52] She also made a critical point that happens to be central to the *Charter* First report and campaign: "We hope the Minister of Justice will seriously consider his statutory obligation to ensure that all legislative proposals are *Charter*-compliant before approving a bill that so seriously threatens to create a degree of prison overcrowding that would be cruel and unusual under section 12 of the *Charter*."[53] (See Part 3 of this report for more on the Minister of Justice's statutory obligation to report *Charter* inconsistencies to Parliament.)

Inadequate Defence of *Charter* Compatibility

As with all cases examined in this report, the Minister of Justice made no statement of *Charter* incompatibility in relation to Bill C-10. That means, at least by current standards, that, in the opinion of the Minister, there was a credible argument for the bill's constitutionality. Whatever that argument was, Canadians were not privy to it. The government also ignored decades of thorough social science research indicating that the kind of mandatory minimum sentences proposed in C-10 — while likely inflicting cruel and unusual punishment on individuals in the criminal justice system — would not achieve the stated policy objective of deterring crime.

At Second Reading debate and in committee, Minister Nicholson only went so far as to summarize the provisions of Bill C-10 and emphasize how it would "better

protect victims."[54] His parliamentary secretary, Honourable Kerry-Lynne Findlay, stressed the bill's "tailored approach" to mandatory minimum sentences for serious drug offences, and that such sentences would only be engaged when "specific aggravating factors" are present. She added that the provisions of the bill

> *would allow the courts … to exempt an offender from the mandatory minimum sentence … where the offence involved no other aggravating factors other than a previous conviction for a serious drug offence, and the offender successfully completes a treatment program.*[55]

Unfortunately, Bill C-10 was not as limited as advertised in its potential impact on *Charter* rights. As Ms. Findlay noted, before C-10, the *Controlled Drugs and Substances Act* (CDSA) did not contain any mandatory minimum sentences, so this was a new frontier for criminal justice law in Canada. Moreover, the aggravating factors referred to can, and do, trigger disproportionate sentences. There is the aggravating factor of having a prior drug conviction despite the reality that some of the most common drug offenders are struggling addicts with prior low-level convictions. There is also the vague aggravating factor of committing an offence "in or near an area normally frequented by persons under the age of 18". And further, as mentioned, the penalties are worse for offenders who produce drugs in rented properties versus properties they own, and for producers in possession of an arbitrarily greater number of marijuana plants.

At the amendment stage on the House side, only a handful of amendments, proposed by the government, were accepted, while over 100 opposition amendments were either rejected or ruled inadmissible by the Chair of the Justice and Human Rights Committee. It is notable that among those amendments found to be inadmissible was a proposal to have Bill C-10 reviewed to ensure it was not inconsistent with the *Charter*.[56] At Report Stage, more opposition amendments were rejected, including ones to remove mandatory minimum sentences and to restore the standard of proof required to impose an adult sentence on a minor. In the end, the government did agree to take up select opposition amendments to the *Justice for Victims of Terrorism Act* on the Senate side, but all of the bill's key *Charter* vulnerabilities remained when it was passed into law.

Avoidable Consequences

While the *Safe Streets and Communities Act* cannot be blamed for all of the problems plaguing Canadian prisons, it certainly did not help. In late August 2012, Howard Sapers, the Correctional Investigator of Canada, reported that there

Bill C-10 was passed by Parliament despite warnings that it would exacerbate the pre-existing problem of overcrowding in federal prisons.

was already — even before the full brunt of the new crime law was felt — a record-high number of inmates in federal prisons, in many cases forcing 'double-bunking' in small cells (some as small as only 5 square meters) and sparking violence.[57] In May 2014, we learned from Auditor General Michael Ferguson that these problems were ongoing and could get worse in the long term despite federal government spending to create 2,700 new spaces for the rising number of inmates.[58] Even the United Nations Human Rights Committee in July 2015 echoed CCLA's concerns — expressed vehemently through written submissions and verbal testimony[59] — that Canada's record on prison overcrowding, solitary confinement, and treatment of mentally ill prisoners was worsening.[60]

Meanwhile, to the surprise of few, a number of mandatory minimum sentences enacted by Bill C-10 were immediately challenged in court. Some have been struck down, notably in the Supreme Court case of *R. v. Lloyd*[61] and the British Columbia Court of Appeal case of *R. v. Dickey*[62] discussed below.

In the *Lloyd* case, the Supreme Court struck down the one-year mandatory minimum sentence for drug trafficking,[63] declaring it would "sometimes mandate sentences that violate the constitutional guarantee against cruel and unusual punishment [section 12]" unjustifiably under section 1.[64] The Court found that the law was too broad for three reasons. First, it applied not only to "professional drug dealers who sell dangerous substances for profit", but also

to "drug addicts who possess small quantities of drugs that they intend to share with a friend, spouse, or other addicts."[65] Second, the law's broad definition of "traffic" captured the conduct of drug dealers as well as potentially "someone who gives a small amount of a drug to a friend, or someone who is only trafficking to support his own habit."[66] Third, the law applied to those convicted of "designated substance offence[s]", involving any prohibited substance, in any amount — "even, for example, a small amount of marihuana" — within the past 10 years.[67] More generally, Chief Justice Beverley McLachlin asserted that laws establishing mandatory minimum sentences for a broad range of conduct "will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."[68]

In the *Dickey* case, the B.C. Court of Appeal declared two-year mandatory minimum sentences for the following drug offences to be unconstitutional: those committed in or near a school; on or near school grounds; in or near any other public place usually frequented by persons under the age of 18; or using the services of, or involving, such a person.[69] The Court noted that, while the defendant did commit the serious offence of selling cocaine, he did so to support an addiction that had developed following a work-related injury. Moreover,

Honourable Rob Nicholson speaking in the House of Commons on September 21, 2011, the day after Bill C-10 was introduced (REUTERS/Chris Wattie)

he had never sold drugs to persons under 18 despite carrying out transactions on the grounds of a boarded-up school.[70] Furthermore, after his arrest, Dickey "completely defeated" his addiction, regained full-time employment, and "had moved on with his life in an established, positive way", factors which would normally be taken into consideration in sentencing.[71] For these reasons, the Court found a two-year prison sentence to be grossly disproportionate to the six month sentence that was appropriate in the circumstances.[72]

BILL C-31: *PROTECTING CANADA'S IMMIGRATION SYSTEM ACT*

Bill C-31 was introduced on February 16th, 2012 and received Royal Assent on June 28th of that year. In Parliament, the sponsor of the bill, then Minister of Citizenship, Immigration, and Multiculturalism, Honourable Jason Kenney, stated that its purpose was to improve Canada's asylum system by granting "fast protection to bona fide refugees who need Canada's assistance," while removing "false asylum claimants who seek to abuse our generosity." He added that the bill was intended to "combat human smugglers from targeting Canada," and to enhance immigration security screening procedures.[73]

Charter Concerns

In submissions to the House of Commons Standing Committee on Citizenship and Immigration, CCLA argued that provisions in Bill C-31 would violate the *Charter* rights of refugees to life, liberty, and security of the person; to be free from discrimination; and to be free from arbitrary detention.[74] These provisions would also violate Canada's binding legal obligations to refugees and asylum seekers pursuant to the 1951 UN Refugee Convention and other international human rights laws.[75] When introduced, the bill gave the Minister of Citizenship and Immigration broad authority to designate the arrival of groups of people in Canada as 'irregular'. Everyone in such groups, aged 16 or older (with some limited exceptions[¶]), would then be labelled as 'designated foreign nationals' and would automatically be detained without the possibility of review for *12 months* (the provision was later amended, but the change did not cure the bill's constitutional failings). Under previous law, immigration detention was subject to review within 48 hours, and the Supreme Court had already ruled in *Charkaoui v. Canada* that 120 days of detention without review is unconstitutional.[76] Further, designated refugees would be subject to different timelines for their refugee hearings, and different rules surrounding appeal eligibility. The whole scheme risked endangering the safety of refugees through its disregard for Canada's legal and humanitarian obligations to offer protection to individuals fleeing persecution and threats to their very life.

Other legal experts and civil society members expressed similar concerns to parliamentarians. Mitchell Goldberg, a lawyer representing the Quebec Bar Association's

[¶] The exceptions are: Canadian citizens; anyone recognized as an Indian under the *Indian Act*; and persons holding valid visas or documents concerning whom, on examination, an officer is satisfied that they are not inadmissible.

Committee on Immigration and Citizenship, stated definitively:

> *Every single law that comes before Parliament is supposed to be vetted by the justice department to determine whether it is in conformity with the* Charter, *since we are supposed to have the rule of law in this land. I would love to see the legal opinion that the government supposedly has indicating that this law is constitutional and, specifically, the detention provisions. I would love to see that opinion. I think a lot of us would love to see that opinion because it's very hard to imagine that a legal expert could say how and why this bill is constitutional.*[77]

Goldberg ultimately predicted that "not only might [the law] be challenged, it will be challenged."[78]

Lawyer Chantal Desloges drew the distinction between constitutionality and humanitarianism:

> *Mandatory detention for a long term is simply unconstitutional. I'm not going to talk about fairness. I'm not going to talk about bleeding heart issues. It's simply unconstitutional. The courts will not uphold it. One year is arbitrary. Why one year? Where did the one year come from?*[79]

Representing the Canadian Association of Refugee Lawyers, Donald Galloway explained why a *Charter* challenge to C-31 would have a high probability of success:

> *Normally when you mount a constitutional challenge, you identify that you've got an uphill battle. The issue may require analogies to be drawn to other areas of law. It may require complicated arguments. But here we have a record from the Supreme Court of Canada in the* Charkaoui *case that has made certain matters explicitly clear.*[80]

Lawyer Lorne Waldman highlighted other aspects of C-31 that were vulnerable to a court challenge, including "the provisions denying family reunification because of the impact it will have on refugees in Canada." He lamented, "Undoubtedly, we're going to be spending years in the courts as these matters get adjudicated, instead of doing what we should be doing, which is protecting refugees."[81]

Bill C-31 even caught the attention of international organizations, such as Human Rights Watch. In a news release, the organization's Refugee Program Director, Bill Frelick, said of the bill's purported goal of punishing and preventing human smuggling, "Instead of identifying and punishing human smugglers, this bill would punish their victims."[82]

Halifax, Nova Scotia (July 27, 2013): On Barrington Street, a woman protests Bill C-31 during the Halifax Pride Parade

Inadequate Defence of *Charter* Compatibility

Throughout parliamentary consideration of Bill C-31, the government neglected to meaningfully address its constitutionality. Few reasons were provided as to why the existing *Immigration and Refugee Protection Act* (IRPA) was insufficient to meet the government's policy goals. After all, it already granted extensive detention powers, including for the purposes of preventing a danger to the public; for ensuring that individuals appear for examinations, hearings or removal; if an officer were not satisfied of a foreign national's identity; if it were necessary in order to complete examinations; and if there were reasonable grounds to believe that a person is inadmissible on grounds of national security, or for violating human rights under domestic or international law.[83]

At Second Reading, Minister Kenney declared that Canadians were worried about "large human smuggling operations, for example, the two large ships that arrived on Canada's west coast in the past two years" and about "a large number of false refugee claimants who

> “Every single law that comes before Parliament is supposed to be vetted by the Justice Department to determine whether it is in conformity with the Charter...
>
> *~ Mitchell Goldberg, President of the Canadian Association of Refugee Lawyers*

do not need Canada's protection."[84] He added that Canada's asylum system was "broken."[85] In arguing for the provision denying those from designated countries of origin the right to appeal decisions of the Immigration and Refugee Board, Minister Kenney avoided addressing whether the *Charter* right to equality was implicated:

> *Under the current system, with the redundant administrative appeals and post-claim recourses, a manifestly unfounded asylum claimant is able to stay in Canada often for up to five or six years or longer and claim benefits that whole period of time. This is a positive incentive for false claimants to abuse and clog up our system, while delaying protection for the bona fide refugees who do need our protection.*[86]

However, Minister Kenney did not hide the fact that the original version of C-31 would allow the government to "detain migrants who arrive through illegal smuggling operations for up to 12 months without review."[87]

At committee, Minister Kenney noted that the changes introduced by Bill C-31 "may result in legal challenges," but that the government was confident the bill was "lawful."[88] He did not elaborate. In other testimony, Scott Nesbitt, Department of Justice counsel for the Canada Border Services Agency, made only allusions to the government's views on the constitutionality of C-31.

> *Of course, the bill may be subject to a* Charter *challenge; that's the way our legal system works. At the end of the day, it will be for the court to determine whether the bill complies with the* Charter. *The position is that it's defensible under the* Charter, *not that the* Charter *does not apply ... You probably are familiar with the* Department of Justice Act *and section 4.1, which requires the Minister of Justice to examine every government bill that's presented in the House to ensure it's consistent with the purposes and provisions of the* Charter. *I can tell you that this bill wouldn't be before the committee today had the Minister of Justice determined, when he did that examination, that the bill was not consistent with the purposes and provisions of the* Charter.[89]

As mentioned earlier, lawmakers cannot ensure perfect *Charter* compliance and, indeed, it is critical that any law can be challenged in the courts. However, this does not absolve governments and parliamentarians from doing the utmost to ensure it does not come to that. Simply calling a bill "lawful" or "defensible under the *Charter*" — without explanation or legal analysis in the face of significant constitutional concerns — is unacceptable.

At the amendment stage, over a dozen government amendments were accepted, including the creation of an initial detention review after two weeks, and a reduction in the length of detention without review thereafter, from 12 to 6 months. However, these changes did not cure what remained a deeply flawed and unconstitutional bill. Not only is mandatory group detention a gross violation of due process rights, but, on an individual basis, someone could still be detained for longer than the period of 120 days referenced in the *Charkaoui* decision of the Supreme Court, possibly without meaningful review.** Meanwhile, the Minister of Citizenship and Immigration would also maintain broad powers to discriminate against certain refugees and appeals would be denied to claimants from designated countries of origin (among others). A motion to strike out the latter provision was among the over 50 opposition amendments tabled at committee and Report Stage, all of which were rejected. Not surprisingly, the denial of appeal provision was eventually struck down in a successful *Charter* challenge.

Avoidable Consequences

It is difficult to know the extent of the consequences of Bill C-31 becoming law given that certain provisions have been used sparingly, and given its potential to deter vulnerable asylum seekers from seeking protection in Canada. However, one major *Charter* challenge has already proven that the concerns raised during the legislative process were legitimate and warranted.

In 2015 the Federal Court of Canada struck down the C-31 provision denying refugee claimants from designated countries of origin access to the Refugee Appeal Division (RAD). In *Y.Z. v. Canada*, the Court found that provision to be in violation of equality rights under section 15 of the *Charter*.[90] The three claimants in the case were denied an appeal "on the basis that there was adequate state protection" in the designated countries of origin (DCO) from where they came in eastern Europe.[91]

** The initial two-week review may not be an effective one for certain grounds. In particular, the tight timeline may make it very difficult for a refugee claimant to obtain legal assistance or to gather the documentation that may be necessary to establish one of the grounds for release.

> “Simply calling a bill “lawful” or “defensible under the *Charter*” — without explanation or legal analysis in the face of significant constitutional concerns — is unacceptable.

In its decision, the court ruled that the provision in question ...

> *... draws a clear and discriminatory distinction between refugee claimants from DCO-countries and those from non-DCO countries, by denying the former a right to appeal a decision of the [Refugee Protection Division (RPD)] and allowing the latter to make such an appeal. This is a denial of substantive equality to claimants from DCO countries based upon the national origin of such claimants.*[92]

The court also declared that the provision was not justified under section 1 of the *Charter*, for it was not “minimally impairing” in its pursuit of the objective “to reduce the layers of recourse and ensure that failed claimants from DCOs can be removed faster.”[93] In response to arguments presented by the government, the court wrote:

> *Just because every refugee claimant still gets a full hearing before the RPD, and even though there may be provisions in the IRPA, the Regulations and the RPD Rules to seek adjournments, or to extend filing deadlines if the expedited timelines cannot be obeyed, or to reopen an application, these factors cannot justify the fact that some claimants can and others cannot make an appeal to the RAD. [..]*
>
> *An appeal to the RAD is a significant benefit for claimants, and denying this appeal to some claimants based on their country of origin is a serious impairment of their right to equality.*[94]

While the three claimants were ultimately successful in their *Charter* challenge, their struggle to earn asylum in Canada did not end there, and the court awarded them no costs.[95]

BILL C-377: *AN ACT TO AMEND THE INCOME TAX ACT (REQUIREMENTS FOR LABOUR ORGANIZATIONS)*

While so far we have focused on government bills, private members' bills (PMBs) are also relevant to this discussion. These are introduced by MPs without Cabinet positions (from government or opposition parties). While the vast majority of PMBs do not become law, some do and may affect *Charter* rights. Significantly, the requirement set out in section 4.1 of the *Department of Justice Act* — that the Minister of Justice review bills for compliance with the *Charter* and report inconsistencies to Parliament — does not apply to PMBs, offering even fewer safeguards in the event that they are constitutionally suspect. Consider the following notable example.

Bill C-377, *An Act to amend the Income Tax Act (requirements for labour organizations)* was introduced in the House of Commons as a PMB by Conservative MP Russ Hiebert on December 5th, 2011. Following the prorogation of Parliament, it was re-introduced in the following legislative session and passed in June 2015. The bill required unions to publicly disclose any spending of $5,000 or more as well as any salary of more than $100,000. The reporting requirements would have applied as early as December 31st, 2015 had the new Minister of National Revenue not waived them for unions and labour trusts. On January 28th, 2016, the Trudeau government tabled legislation to repeal Bill C-377.

In explaining the rationale for the bill, Mr. Hiebert noted in the House of Commons that union dues are 100% tax deductible, and that labour organizations themselves have tax exempt status. He added that the changes were "in line with the greater transparency that we are demanding from government departments, public agencies and native reserves," and with "other Canadian institutions that benefit from significant public funding."[96]

Charter Concerns

Constitutional concerns about Bill C-377 came not only from the labour organizations that would be affected, but also from a variety of other voices. The concerns related to potential infringements of freedom of expression, freedom of association, and privacy.

In addressing the House of Commons Standing Committee on Finance, Michael Mazzuca, Chair of the National Pensions and Benefits Law Section of the Canadian Bar Association, laid out some of the key constitutional concerns:

> *The* Canadian Charter *enshrines and protects Canadians' freedom of expression and freedom of association. Bill C-377 would impose upon labour organizations and labour trusts, both defined terms under the bill, very substantive and, some would say, onerous reporting requirements and detailed statements. These are not, as we've heard earlier, the same as those with respect to charities. These are not aggregate amounts that need to be reported; the way the bill is currently framed would require that information about transactions be recorded, including payer, payee, the purpose of the transaction, and a description of the transaction itself. To the extent that this in any way places a restriction on individual Canadians' freedom of expression and freedom of association, the CBA believes that such a restriction would place the bill at risk of a* Charter *challenge. Also the bill does not, on its face, set out a justification for these infringements."*[97]

Then Privacy Commissioner of Canada, Jennifer Stoddart, also addressed the committee. While acknowledging the importance of "[t]ransparency and accountability ... [for] good governance ... and robust democracy," she nonetheless testified that "the extent of public disclosure of personal information contemplated in this bill does raise serious privacy concerns."[98] She elaborated:

> *This bill aims to increase transparency and accountability of unions vis-à-vis their members by requiring detailed disclosure of salaries and other individualized expenses through online posting. However, the bill goes much farther than that by requiring such disclosures also be made to the public at large, which in my humble opinion, oversteps what is needed to achieve its stated objective. [...]*
>
> *Some of the preceding speakers have said that because labour organizations are tax exempt under the* Income Tax Act *and because membership dues are tax deductible, labour organizations should be subject to a higher degree of public accountability. However, it is not clear that the names, the salaries, and the disbursements above $5,000 in respect of all labour organization employees and contractors need to be publicly disclosed to achieve this more limited objective. I think this is a significant privacy intrusion, and it seems highly disproportionate."*[99]

Perhaps an unlikely opponent of the bill, former Conservative Senator Hugh Segal had attempted to weaken it when it first reached the Senate. However, when Parliament was prorogued in 2013, his amendments were lost and not revived when the bill again proceeded through both chambers the following session. By then, Mr. Segal had retired from the

Senate, but nevertheless re-iterated his opposition to the bill in an opinion piece:

> *This badly drafted bill, whatever the stated intent of "transparency," was a violation of the constitution, a violation of privacy and a direct attack on the right to organize and run unions, a right basic to a free market economy and the give and take essential to balance and fairness, first legislated by Sir John A. Macdonald's government five years after Confederation … I am confident that at the first legal challenge it will be struck down by the courts for all the reasons laid out by expert committee witnesses two years ago.*[100]

Inadequate Defence of *Charter* Compatibility

As noted above, section 4.1 of the *Department of Justice Act* does not apply to PMBs; however, they are referred to a House subcommittee for consideration of whether they are non-votable. One of the criteria the subcommittee considers is whether a bill is clearly unconstitutional. However, according to Stéphane Dion, who previously served as a member of the subcommittee, in practice: "It does not carry out an in-depth, exhaustive, and definitive analysis of bills. In this committee, we simply decide whether or not a bill should be debated or voted upon."[101] As with the vast majority of PMBs, despite some debate among subcommittee members, Bill C-377 was allowed to proceed.

Further, since no section 4.1 type requirement applies to PMBs, and since they are not introduced by a member of the government, it can be harder for opponents to press a given bill's sponsor on constitutional matters. Some have even suggested that, at times, the PMB process has been exploited by governments seeking to advance initiatives that are not fit for explicit government promotion. In recent years, a number of PMBs, with potentially serious rights implications, have been proposed and passed. Bill C-377 is but one significant example.[102]

When asked by a member of the House Committee on Finance how he would respond to critics who argue that the bill threatens constitutional rights, such as freedom of speech and freedom of association, Mr. Hiebert responded simply, "If it were unconstitutional, then charities wouldn't be disclosing as they currently are."[103]

Two years later, before the Senate Committee on Legal and Constitutional Affairs, Mr. Hiebert stated that Bill C-377 "does not violate any *Charter* rights, or the privacy of Canadians, by asking for limited disclosure of salary and benefits, or for paid time spent on political activities."[104] When asked if the bill upheld freedom of speech and expression, he replied:

> *I believe it does, yes. I believe that the fact that the bill specifically exempts labour organizations from detailed disclosure about their core activities addresses that issue. I believe that requiring them to disclose the gifts that they give or travelling to conventions would not inhibit them in any way from associating or their expression … They simply have to disclose some elements of what they've been doing. Because it doesn't regulate or inhibit them … I do not feel it would fail under a* Charter *challenge …* [105]

While Mr. Hiebert did introduce some amendments intended to address privacy concerns — such as those surrounding pension plan and health benefit details and the listing of home addresses — these failed to address the fundamental constitutional concerns raised. For example, the bill still required the disclosure of certain individual transactions despite valid concerns that this undermined labour rights.

Consequences Averted

When Bill C-377 was being considered, many unions had promised to challenge it in the courts. One such challenge was launched before the Alberta Court of Queen's Bench by the Alberta Union of Provincial Employees (AUPE). However, following the election, the new government quickly introduced legislation to repeal the bill. Bill C-4 was introduced in the House

New Democratic Party Leader Tom Mulcair speaking in the House of Commons on December 12, 2012; the same week he argued that Bill C-377 undermined labour rights and if enacted would not survive a Charter challenge (REUTERS/Chris Wattie)

on January 28th, 2016 and the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities reported the bill back to the House without amendment on May 12th, 2016. At the time of writing, it remains before the House.

As a result of Bill C-4, the litigation pending in Alberta was adjourned and, provided the bill passes, will likely be abandoned.

The Supreme Court of Canada, Ottawa.

OTHER BILLS, OTHER CONSEQUENCES

The examples provided in this section are just a sample of some of the legislation that might have been improved — or avoided — if meaningful *Charter* vetting were required. While the volume of concerning legislation has perhaps increased in recent years, the last session of Parliament does not simply reflect a particular moment in time, nor is this an issue that is specific to one political party. For example, in 2001 the Liberal government, through Justice Minister Anne McLellan, introduced the *Youth Criminal Justice Act,* which created a presumption that young offenders of certain types of offences would be treated as adults for sentencing purposes. In addition, the young person would not benefit from the same privacy protections as other young offenders. Despite some *Charter* concerns being expressed during parliamentary debate, the law was passed and the presumption was later struck down by the Supreme Court in a 2008 decision.[106] The young person at the centre of that case had spent a great deal of time and resources fighting the battle.[††]

CCLA's concerns about inadequate attention being paid to *Charter* vulnerabilities are focused on a *system* that is failing, not on a particular government or individual. The failure to properly consider constitutional concerns not only has real consequences for individual Canadians, but also costs taxpayers unnecessarily. Reports[107] indicate that the last government spent almost $7 million in litigation costs defending laws and policies that were ultimately held to be unconstitutional.[108]

[††] DB pled guilty to manslaughter in July 2004 and was allowed to proceed with his *Charter* challenge on September 10, 2004. His case was not finally disposed of by the Supreme Court of Canada until May of 2008.

PART 3: WEAKNESSES OF THE CURRENT APPROACH

> "This standard is bafflingly obtuse and so low that, in practice, not a single report relaying concerns about *Charter* compliance under section 4.1 has ever been made to Parliament.

Canadian law already recognizes that Members of Parliament need information about whether the bills they are considering put *Charter* rights and freedoms at risk. Under the *Department of Justice Act*, the Minister of Justice has an obligation to determine whether any provisions of government bills presented to the House of Commons are inconsistent with the purposes and provisions of the *Charter*. In particular, section 4.1(1) of the *Department of Justice Act* states:

> *Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the* Statutory Instruments Act *and every bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the* Canadian Charter of Rights and Freedoms *and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.*[109]

Although this provision of the *Department of Justice Act* has been in effect since 1985, there has never been a single report made to Parliament under section 4.1. The overarching purpose of it seems clear: to ensure that laws are consistent with the *Charter*, or at least to ensure that Parliament is aware of any inconsistencies. However, the specific function and appropriate interpretation of section 4.1 have been the subject of considerable debate and, most recently, litigation before the Federal Court of Canada.[110]

> While the government claimed that determining constitutional compliance was a matter for the courts, CCLA argued that all branches of government have a vital role to play in ensuring *Charter* compliance

THE CREDIBLE ARGUMENT STANDARD

In 2012, Edgar Schmidt, a lawyer then employed by the Department of Justice, filed a statement of claim in Federal Court, arguing that section 4.1 is being interpreted in a way that is contrary to its language and purpose. Schmidt says that the provision has been interpreted to only require the Minister of Justice to report to Parliament when he or she determines that a provision of a bill is 'manifestly or certainly' inconsistent with the *Charter*. Schmidt argues (and we agree) that it is as a result of this low standard — a wrongful interpretation of the *Act* — that no report to Parliament under section 4.1 has ever been made.

By the time Schmidt's claim went to trial in 2015, the Federal Court was considering the case on the basis of an agreed statement of facts.[111] Thus, at least on certain points, Schmidt and the government were in agreement. Most significantly, there was agreement that the Minister decides whether there is an inconsistency with the *Charter* by determining if there is a credible argument to support the constitutionality of a proposed measure. This standard — the *credible argument standard* — was described in a number of documents put before the Court. In some of these documents, a credible argument was said to be one that is reasonable, *bona fide*, and capable of being successfully argued before the courts. In other documents, it was suggested that a report was only necessary where the likelihood of a successful challenge is almost certain due to 'manifest inconsistency'. The documents make clear that situations like this are very unusual and require special treatment.

CCLA'S INTERVENTION IN *SCHMIDT V. CANADA*

Before the Federal Court, Schmidt argued that the Minister of Justice's obligation should be interpreted in a way that would require a report where it was considered *more likely than not* that a constitutional challenge would succeed. CCLA intervened in the case to oppose the use of the credible argument standard, and to provide the Court with the perspective of those Canadians affected by the existing approach.[112]

CCLA argued that one of the purposes underlying section 4.1 was to bring the question of rights compliance forward in Parliament for close examination, consideration and debate. While the government claimed that determining constitutional compliance was a matter for the courts, CCLA argued that all branches of government have a vital role to play in ensuring *Charter* compliance. In its decision in the case, the Federal Court summarized CCLA's position as follows:

> *Under the current system, Parliament has no way of knowing on which credible argument the government will rely should a challenge arise due to solicitor-client privilege and the principle of cabinet confidences.*
>
> *Furthermore, not all potentially inconsistent legislation is challenged in court; allowing such legislation to be enacted by Parliament, without it being informed of its dubious nature, opens the window to the public being ruled by laws inconsistent with guaranteed rights. Yes, the [c]ourts have their role to play, but the current system effectively skips Parliament's role in reviewing legislation.*[113]

We also highlighted the human toll of the credible argument standard: in every case where a law is ultimately struck down by a court, ordinary Canadians have paid the price by having their rights violated while they worked to challenge the law. In our view, the credible argument standard does not serve Parliament, the government or the public interest.

THE COURT'S DECISION

Justice Simon Noël of the Federal Court issued a decision on March 2nd, 2016, rejecting Edgar Schmidt's argument that section 4.1 requires the Minister of Justice to report to Parliament when a provision is 'more likely than not' inconsistent with the *Charter*.[‡‡] However, the Court acknowl-

[‡‡] Significantly, the decision points out that the evidence before the Court had been redacted to protect solicitor-client privilege as between the government and the Department of Justice. Noël J. noted at para 10: "This Court does not have access to practical examples of the actualization of the examination and reporting duties. As such, the role of the Court is limited to determining the acceptability of the framework created by the examination provisions; the Court's role does not entail determining the acceptability of any specific actions taken by the Minister of Justice."

edged that the current 'credible argument' standard is weak, and that ultimately it is up to the Minister to decide whether a report to Parliament is required:

> *The present system requires the "credible argument" standard to correctly reflect the wording of the examination provisions. It is not a system that aims to give a full guarantee that draft bills and draft regulations are* Charter*-proof. Yes, there is no doubt the reporting mechanism is weak, but I cannot read into it more than the legislation provides for. The examination mechanism, on the other hand, shows that draft bills and draft regulations are, hypothetically, reliably checked within the Department of Justice in order to identify and neutralize potential inconsistencies. Yet, the Minister of Justice is not bound by the opinion reached by the lawyers of the Legal Services Branch who performed their analysis regarding consistency with guaranteed rights. It is not the drafter's role to fetter the discretion of the Minister when she personally ascertains whether an inconsistency is present or not.*[114]

Further, the Court emphasized that, if change is to occur, it must be brought about by an act of Parliament.

> *Legislative change is needed if we deem it necessary to reform the current system. Different countries use different language, different balances of parliamentary supremacy, and different legal mechanisms to effect different examination and reporting standards. If there is political will to alter the balance Canada has opted to strike, it is for the proper political and legislative processes to achieve. If indeed, the applicable standard warrants change, the appropriate channel by which to do so is the legislative process. Mr. Irwin Cotler's Bill C-537 attempted such a modification. Although his proposed modifications did not become law, his method illustrates the appropriate conduit to enact reforms. The means to do so may be different than those identified by Mr. Cotler, but if changes to the examination and reporting processes are called for, new legislation will need to be enacted and existing statutes amended.*[115]

As of this writing, Edgar Schmidt is appealing the Federal Court's decision on a number of grounds, and CCLA has once again sought to intervene in the case. While we support the appeal to ensure that a more meaningful standard is used in interpreting section 4.1, we also believe that reform can be achieved through other means, as described further in this report.

PART 4: BILL C-14, MEDICAL AID IN DYING – A CASE STUDY

> "The government's justification simply did not provide the sort of comprehensive and meaningful analysis that parliamentarians need in order to consider whether to pass a law, and that Canadians deserve from their elected representatives.

The issue of assisted suicide has been a controversial one for decades; it has been the subject of debate before Canadian courts and Parliament. In 1993, Sue Rodriguez, diagnosed with amyotrophic lateral sclerosis (ALS), went to the Supreme Court to argue that the *Criminal Code's* prohibition on assisted suicide was an unreasonable violation of her *Charter* rights.[116] That challenge failed and the law remained on the books despite the introduction of a number of private members' bills on the subject in the intervening years. In the fall of 2014, the Supreme Court heard a new challenge to the law in the case of *Carter v. Canada,*[117] based on a different record of evidence and accumulated experience with assisted dying regimes in other countries. Ultimately, the Supreme Court found that the *Criminal Code*'s absolute prohibition on medical assistance in dying violated section 7 of the *Charter*. Parliament was initially given one year to address the ruling, after which time the law would cease to be in effect.

In response to the *Carter* decision, the federal government sought to craft legislation permitting medical assistance in dying for certain individuals, in line with the constitutional parameters that had been established by the Court. The process through which the relevant bill, C-14, became law is an interesting and contemporary study in the functioning of our parliamentary system. It highlights some of the problems with how we currently look at constitutional vulnerabilities, but may also provide a hint of what might be possible with a better system in place.

THE *CARTER* DECISION

The Supreme Court's decision in *Carter* found that the *Criminal Code*'s absolute prohibition on providing any assistance to someone seeking to end their own life violated the section 7 *Charter* rights of people suffering from "a grievous and irremediable medical condition".[118] The applicants in the case had established that some people were choosing to end their lives earlier than they would have liked to avoid having to enlist the assistance of others, usually forcing friends or family to break the law and face potentially serious consequences. There was also evidence that other countries had managed to allow medical aid in dying without many of the dire consequences that opponents of the practice fear. In striking down the law, the Court gave Parliament and the provinces 12 months to develop a new legislative regime, "should they so choose."[119] This was eventually extended by a further four months in light of the October 2015 election, which had arguably hindered the government's ability to draft and pass legislation.[120] As a result, the court's decision would take effect on June 6th, 2016.

INTRODUCTION OF BILL C-14

On April 14th, 2016, the new government introduced Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying).*

The bill's introduction was preceded by a number of efforts to determine the way forward on the assisted dying issue. The Conservative government had established an External Panel on Options for a Legislative Response to *Carter v. Canada*. That panel's mandate changed under the new government, but it had engaged in fairly extensive consultations with individuals, experts and organizations through a variety of means, and then reported on the results and key findings of those consultations.[121] In addition, while not organized by the federal government, a provincial-territorial expert advisory group on physician-assisted dying was convened, which issued its own report containing extensive recommendations for the implementation of an assisted dying regime at the provincial-territorial level.[122] Finally, in mid-December 2015, Parliament passed motions to establish a special joint committee on assisted dying, which presented recommendations to the House

on February 25th, 2016.[123] Included was explicit recognition that a terminal condition should not be a prerequisite to accessing medical assistance in dying, and that advance requests should be permitted in some circumstances.[124]

Notwithstanding the extensive consultations and recommendations made, Bill C-14 was widely panned upon its introduction. Many pointed out that the bill's strict eligibility criteria were not in line with the *Carter* decision and contradicted the recommendations of the special joint committee. In particular, access to a medically-assisted death was restricted to those for whom death is "reasonably foreseeable," and where they are in "an advanced state of irreversible decline in capability." Since the bill's language and spirit appeared to deviate significantly from the *Carter* decision, the question of the bill's constitutionality was almost immediately at the forefront of debate in Parliament, in the media, and across the country.

Interestingly, the federal government took a new approach when tabling C-14: on its own initiative, it published a statement on the bill's potential *Charter* impacts, essentially offering a defence of its constitutionality.[125] In principle, the release of such a statement was a welcome step that appeared to recognize the need for government transparency and accountability

Prime Minister Justin Trudeau responds to questions about Bill C-14 during Question Period in the House of Commons on May 31, 2016 (REUTERS/Chris Wattie)

surrounding *Charter* issues. Moreover, it had the potential to provide parliamentarians with valuable information about the bill's *Charter* vulnerabilities. Unfortunately, the justification offered was severely deficient: it did not address concerns that the bill unjustly excluded many people whose rights were affirmed by the *Carter* decision. The government's justification simply did not provide the sort of comprehensive and meaningful analysis that parliamentarians need in order to consider whether to pass a law, and that Canadians deserve from their elected representatives. When read in its entirety, the statement amounts to a simple conclusion that the government believed it had struck "an appropriate balance between the competing rights, interests and values" at play in light of the complex nature of the issue.[126]

PARLIAMENT CONSIDERS BILL C-14

As Parliament and, in particular, the House Justice and Human Rights Committee began consideration of Bill C-14, several constitutional issues were raised by stakeholders and experts. One concern was the issue of conscience protection for medical practitioners who object to providing assistance in dying, linked to the *Charter*'s protection of freedom of religion and conscience under section 2(a). In addition, many voiced concerns that the eligibility criteria in the bill did not align with the *Carter* decision (and thus would violate section 7 of the *Charter*), primarily because it required that a person's natural death be "reasonably foreseeable." Initially, the government took the position that this requirement was in keeping with *Carter*. As Justice Minister Jody Wilson-Raybould stated before the committee:

Justice Minister Jody Wilson-Raybould defends Bill C-14, the government's medically-assisted dying bill, in the Senate chamber on June 1, 2016 (REUTERS/Chris Wattie)

> *The bill was deliberately drafted to respond to the circumstances that were the focus of the* Carter *case, where the court only heard evidence about people with late-stage incurable illnesses who were in physical decline and whose natural deaths were approaching. The court said the complete prohibition on assisted dying was a violation of* Charter *rights for persons in these circumstances. In this way, the eligibility criteria in Bill C-14 comply with the* Carter *decision. They focus on the entirety of the person's medical circumstances and not on the specific list of approved conditions or illnesses. By defining the term "grievous and irremediable medical condition", the bill would ensure that all competent adults who are in an irreversible decline while on a path toward their death would be able to choose a peaceful, medically assisted death, whether or not they suffer from a fatal or terminal condition.*[127]

Many witnesses that appeared before the committee interpreted the eligibility criteria much differently, and argued strongly that, as drafted, the law was unconstitutional.

Professor Jocelyn Downie of Dalhousie University, an expert in law and medicine who sat on the provincial-territorial expert advisory group, argued that the eligibility criteria unjustifiably limited access to medical aid in dying, and took the government to task over its attempt to justify the bill's constitutionality:

> *Unless Bill C-14 is amended, many individuals experiencing enduring and intolerable suffering from grievous and irremediable conditions will be left with three options. They can take their own life prematurely, often by violent or dangerous means; they can stop eating until death by starvation is not too remote or in the not too distant future, such that they will then qualify for assisted death; or they can suffer until they die from natural causes. This is a profoundly and unconscionably cruel choice. [...]*
>
> *It is important to note that the government has acknowledged that Bill C-14 limits the* Charter *rights, specifically by excluding mature minors, individuals with mental illness as their sole condition, and requests made in advance of loss of capacity. However, it has failed to provide parliamentarians with any reasonable basis on which to conclude that these limits are, for section 7 rights, in accordance with the principles of fundamental justice, or for both the sections 7 and 15 rights, demonstrably justified in a free and democratic society. In other words, you have not been given anything solid upon which to base a conclusion that this bill does not violate the* Charter.[128]

Professor Downie addressed the government's justification directly, making strong statements about the failings of the rationale:

> *The government provided a legislative background document to explain why it has concluded that Bill C-14 is consistent with the* Charter. *However, this document's justifications for limiting the rights are grossly inadequate. The document's weaknesses include the following: misrepresentation of legislation in the permissive jurisdictions; misrepresentation of data from the permissive jurisdictions; reliance on unreliable sources of evidence for claims about the permissive jurisdictions; reliance on an ethical distinction explicitly rejected by Justice Smith in* Carter*; reliance on assumptions that are fundamentally inconsistent with the advance directives legislation in place in provinces and territories across this country; and reliance on a staggeringly unbalanced set of experts.*[129]

> "The government's conclusory statements about striking an appropriate balance failed to adequately convey its principled argument in favour of the bill's constitutionality

Joseph Arvay, the constitutional lawyer who successfully argued the *Carter* case, also spoke forcefully before the committee, arguing that the criteria effectively required that patients be considered "terminal", and that this contravened the *Carter* decision and thus the *Charter*:

> *The reason it's unconstitutional is that by defining those entitled to physician-assisted dying … Parliament has excluded an entire group of individuals who otherwise would enjoy the* Charter *rights that the Supreme Court of Canada gave in* Carter*, and that group is the physically disabled, whose death is not reasonably foreseeable … Parliament can't do that by claiming that it's a section 1 justification. Section 1 was fully argued in the* Carter *case.* Carter *created a floor of constitutional rights and entitlement, not a ceiling. Parliament can provide further rights and entitlements, and the courts can provide further rights and entitlements, but Parliament can't take away any of the rights and entitlements that the Supreme Court of Canada gave to the disabled. Bill C-14 actually carves right out of the Carter decision the rights given to the physically disabled, and it can't do that.*[130]

The government's position was not without its supporters. Professor Dianne Pothier, an expert in constitutional law, argued that the *Carter* case had not dealt in any detail with the constitutional rights of the vulnerable, and that the criteria established by Bill C-14 were consistent with section 7 of the *Charter* and, in the alternative, would be saved by section 1.[131]

The debate about the bill's constitutionality continued throughout its progress through both houses of Parliament. Prior to Third Reading in the House of Commons, NDP Member Murray Rankin proposed that, rather than reading the bill a third time, the House send it back to the Justice Committee for the purpose of determining whether its eligibility criteria were in line with the *Carter* decision. This proposal was ultimately rejected by a margin of 267–54.

When the bill proceeded to the Senate, there was a great deal of debate and concern about its constitutional implications. This led Senators to amend the bill in several ways, including by removing the requirement that a person's death be "reasonably foreseeable" in an attempt to re-align C-14 with the *Carter* decision. When the amended bill returned to the House, this

primary substantive change was the subject of considerable debate once again. But while the House ultimately accepted some of the Senate's amendments, the proposal to remove the reasonable foreseeability requirement was rejected.

Once again, the government offered a public justification for the bill's constitutionality, this time focusing specifically on the particular issue of the eligibility criteria. In an addendum to the government's initial *Charter* justification, the DOJ argued that a new legislative regime only had to comply with the *Charter* — not necessarily the *Carter* decision.[132] Citing the theory that Parliament and the courts are engaged in a dialogue, with no single institution having a monopoly on *Charter* interpretation, the DOJ claimed that Bill C-14 was constitutional in light of its objectives. This marked a departure from the government's previous position that C-14's eligibility criteria were in line with the *Carter* decision.

BILL C-14 BECOMES LAW, IS CHALLENGED

When C-14 returned to the Senate, with the reasonable foreseeability requirement re-inserted, Senators ultimately voted to pass the bill, which received Royal Assent and became law on June 17th, 2016. Ten days later, a notice of claim was filed in the Supreme Court of British Columbia challenging the law and, in particular, the reasonable foreseeability requirement; the requirement that an illness, disease or disability be incurable; and the requirement that the individual be in an advanced state of irreversible decline in capability.[133] The claim was brought by Julia Lamb, a 25-year old woman with spinal muscular atrophy, and the British Columbia Civil Liberties Association. As of this writing, the case has not yet been heard in court.

During the debate on Bill C-14, the government demonstrated some recognition that *Charter* issues should be addressed openly when a bill is tabled, and in a manner that enables parliamentarians and Canadians to consider how guaranteed rights and freedoms may be affected were it to become law. However, as mentioned, the content of the justification was clearly lacking in this case. The government's conclusory statements about striking an appropriate balance failed to adequately convey its principled argument in favour of the bill's constitutionality. Moreover, the government's justification changed over the course of the legislative process, thereby confusing the debate rather than clarifying the bill's rights implications.

PART 5: RECOMMENDATIONS & CONCLUSIONS

> "... from a constitutional compliance perspective, the baseline quality of government proposed legislation would improve, perhaps immediately and likely over time.

For more than 50 years, CCLA has worked to ensure that Canadian laws protect and promote fundamental rights and freedoms. We have done this work before courts and legislators, and engaged with Canadians through public education programs and the media. We believe that now is the moment to address deficiencies and gaps in our legislative process in a more comprehensive way, and have developed recommendations to help the executive and legislative branches assess the compliance of legislation with the *Canadian Charter of Rights and Freedoms*.

The new legislative process we propose below could be brought about through a combination of legislation and procedural changes to the Standing Orders and Senate Rules. Although the vast majority of legislation originates with the government in the House of Commons, we have also addressed the process for government bills introduced in the Senate, and for private members' bills and Senate public bills.

PRELIMINARY STEPS

In order to function effectively, the modified legislative process we propose below requires the following preliminary steps:

1. Amend section 4.1 of the *Department of Justice Act* to Require ministerial statements of *Charter* compatibility for all government bills

As explained earlier, under section 4.1 and current practice, the Minister of Justice only reports *Charter* inconsistencies to Parliament when there is no credible argument to defend the constitutionality of provisions of a government bill. We also noted that, as a result of this low standard and ministerial discretion, no such report has ever been made. Thus, we propose flipping the script by requiring the Minister to issue a statement of *Charter* compatibility for every government bill introduced in Parliament.[134] Such statements should lay out the government's principled position

regarding how, **on a balance of probabilities,** a given bill complies with the purposes and provisions of the *Charter*. This should include:

i. Specific analysis on rights issues at play (i.e. which rights, if any, are engaged; and, if there is a potential infringement, the government's justification for it under section 1 of the *Charter*).

ii. The 'tests', factors, or reasonable alternatives considered to reach the conclusion.

iii. Reference to jurisprudence and relevant judicial precedents, as well as an acknowledgement if the bill contradicts existing norms or precedents.

2. Create an independent Charter Rights Officer

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

i. While the House and Senate Law Clerk and Parliamentary Counsel are fully capable of assessing bills for compliance with basic rights, these offices are already responsible for drafting private members' bills and Senate public bills. Thus, they could be perceived as having a conflict of interest if asked to review tabled legislation, including bills they may have drafted or on which they provided legal advice.[§§]

ii. By placing the responsibility for rights vetting in one new office, this proposal avoids splitting the work between the House and Senate law clerks, thereby avoiding duplication and ensuring consistency as bills move from one House of Parliament to the other.

iii. It would underscore the importance of upholding our rights and freedoms, and signal to parliamentarians and Canadians that it is a national priority.

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

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

> … we propose flipping the script by requiring the Minister to issue a statement of Charter compatibility for every government bill introduced in Parliament.

3. Broaden the scope of admissible amendments at committee

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

Therefore, these rules should be modified so that committees are given more opportunities to vote on amendments that address *Charter* concerns that may have been raised by the Charter Rights Officer or expert witnesses. This change could be accomplished by the Senate and House of Commons reviewing and revising their amendment rules.

A MODIFIED LEGISLATIVE PROCESS

In addition to the changes proposed above, we recommend the following mandatory steps be inserted into the legislative process for all bills tabled in Parliament.

NOTE: In instances where a bill is expedited through the House or Senate and time does not permit the Charter Rights Officer to fulfill their role, a statement to this effect should be issued.

GOVERNMENT BILLS INTRODUCED IN THE HOUSE OF COMMONS

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

GOVERNMENT BILLS INTRODUCED IN THE SENATE

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

PRIVATE MEMBERS' BILLS

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

SENATE PUBLIC BILLS

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

POSITIVE OUTCOMES

We recognize that these recommendations, if adopted, would not prevent unconstitutional laws from being proposed or passed. We do, however, anticipate that they would produce the following positive outcomes.

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

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

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

There may be disagreement with our proposals, as well as suggestions for improvements or substantial modifications. These would be welcome. In the very least, our hope is that the Charter First report and campaign represents the beginning of an important conversation among parliamentarians and individuals in government, civil society, the media, and the broader Canadian public. Our commitment to the *Charter* must be reflected adequately in our federal lawmaking process, and the recommendations we propose are intended to be an important step in that direction.

For inquiries or to get involved with CCLA's Charter First campaign, please visit ccla.org/charterfirst:

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END NOTES

PART 1: INTRODUCTION

1 *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

2 *Schmidt v. Canada (AG)*, 2016 FC 269 at paras 19, 44 and 72 [*Schmidt*].

3 See the discussion of *Schmidt* in Part 3 of this report, which highlights the agreement between the parties that the Department of Justice relies on a "credible argument standard" in assessing the *Charter* compliance of proposed legislation.

4 For a very thorough discussion of the mechanisms in place in New Zealand and the United Kingdom, see Janet L. Hiebert & James B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge: Cambridge University Press, 2015) [Hiebert & Kelly].

5 *New Zealand Bill of Rights Act, 1990*, s 7.

6 Hiebert & Kelly, *supra* note 4 at 53.

7 *Human Rights Act 1998* (U.K.), c 42, s 19.

8 Hiebert & Kelly, *supra* note 4 at 237, 251.

PART 2: BAD BILLS, REAL RISKS

9 For more comprehensive constitutional analysis on the bills highlighted in this report, please visit www.ccla.org.

10 *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1529-30 (Hon Steven Blaney).

11 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 56 (23 March 2015) at 1909 (Ms Sukanya Pillay) and Senate Committee on National Security and Defence, *Evidence*, 41st Parl, 2nd Sess, Issue 16 (20 April 2015) (Ms Sukanya Pillay). See also Canadian Civil Liberties Association, Submission to the Senate Committee on National Security and Defence regarding Bill C-51 (20 April 2015), online: <https://ccla.org/cclanewsite/wp-content/uploads/2015/05/CCLA-Senate-Committee-20-04-15.pdf> and Ms Sukanya Pillay, "Canada's Anti-Terror Bill is Gift-Wrapped in Rhetoric", *Huffington Post* (3 April 2015), online: <http://www.huffingtonpost.ca/sukanya-pillay/bill-c-51-terror-bill-_b_6792728.html>.

12 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 55 (12 March 2015) at 1925 (Prof Kent Roach).

13 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 54 (12 March 2015) at 913-5 (Mr Ron Atkey).

14 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 59 (25 March 2015) at 2037 (Mr Peter Edelmann).

15 House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 57 (24 March 2015) at 845 (Dr Pamela Palmater); The remark about the Department of Justice rubber stamping laws that have a 95% chance of being overturned likely refers to evidence and arguments made in *Schmidt*, *supra* note 2.

16 Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at viii.

[17] *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1535 (Hon Steven Blaney).

[18] *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1715, 1725 (Hon Peter MacKay).

[19] House of Commons, Standing Committee on Public Safety and National Security, *Minutes of Proceedings*, 41st Parl, 2nd Sess, No 62 (31 March 2015).

[20] House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 53 (10 March 2015) at 930 (Hon Peter MacKay).

[21] Kady O'Malley, "Bill C-51 amendments seem unconnected to committee process", *CBC News* (31 March 2015), online: <http://www.cbc.ca/news/politics/bill-c-51-amendments-seem-unconnected-to-committee-process-1.3014704>.

[22] Jim Bronskill, "C-51: Federal Agencies Use New Information-Sharing Powers In Anti-Terror Law", *Huffington Post* (24 March 2016), online: <http://www.huffingtonpost.ca/2016/03/24/several-agencies-use-new-information-sharing-provisions-in-anti-terror-law_n_9537826.html>.

[23] For example, in its 2014-2015 Annual Report, the Security Intelligence Review Committee (SIRC) noted concerns about the retention of metadata in relation to individuals not specifically targeted by a CSIS warrant. See SIRC Annual Report 2014-2105, *Broader Horizons: Preparing the Groundwork for Change in Security Intelligence Review*, online: <http://www.sirc-csars.gc.ca/pdfs/ar_2014-2015-eng.pdf> at 24-26. In addition, reports and documents obtained by the Globe and Mail through access to information requests indicate that a metadata surveillance program was re-authorized in 2011. See Colin Freeze, "Data-collection program got green light from MacKay in 2011", *The Globe and Mail* (10 June 2013), online: <http://www.theglobeandmail.com/news/national/data-collection-program-got-green-light-from-mackay-in-2011/article12444909/#dashboard/follows/>.

[24] Tonda Maccharles, "CSIS used Bill C-51 powers several times to disrupt suspected terrorists, Senate hears", *The Toronto Star* (7 March 2016), online: <https://www.thestar.com/news/canada/2016/03/07/csis-used-bill-c-51-powers-several-times-to-disrupt-suspected-terrorists-senate-hears.html>.

[25] Proceedings of the Standing Senate Committee on National Security and Defence, 42nd Parl, 1st Sess, Issue 2 (7 March 2016).

[26] Alex Boutilier, "Watchdog looking into CSIS privacy breach reporting", *The Toronto Star* (22 May 2016), online: <https://www.thestar.com/news/canada/2016/05/22/watchdog-looking-into-csis-privacy-breach-reporting.html>. In addition, concerns about CSIS practices were raised by the Federal Court in a case where the Court concluded that CSIS failed to meet its duty of full and frank disclosure when it applied for a Domestic Interception of Foreign Telecommunications and Search (DIFTS) warrant and that CSIS had no lawful authority to make requests to foreign agencies to intercept the telecommunications of Canadians outside of the country. See *X (Re)*, 2013 FC 1275 and *X (Re)*, 2014 FCA 249.

[27] "No-fly list flags more Canadian toddlers as security risks", *CBC News* (4 January 2016), online: <http://www.cbc.ca/news/canada/toronto/no-fly-list-flags-more-canadian-toddlers-as-security-risks-1.3388927>.

[28] A person can only apply to Passenger Protection Canada to have his or her name removed from the no-fly list if he/she has been "denied transportation" and has "received a written direction when attempting to obtain a boarding pass." See: Public Safety Canada, "Recourse for Listed Persons" (Ottawa: Public Safety Canada, 2015), online: <http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/pssngr-prtct/rcnsdrtn-eng.aspx>.

[29] *House of Commons Debates*, 41st Parl, 2nd Sess, No 42 (5 February 2014) at 1530 (Hon Pierre Poilievre).

[30] Canadian Civil Liberties Association, Brief to the Standing Committee on Procedure and House Affairs regarding Bill C-23 (1 April 2014), online: <https://ccla.org/cclanewsite/wp-content/uploads/2016/08/2014-03-31-Brief-to-Standing-Commitee-Submissions-on-C-23-final.pdf>.

[31] "Don't undermine Elections Canada" *The National Post* (11 March 2014), online: <http://news.nationalpost.com/full-comment/dont-undermine-elections-canada>.

[32] House of Commons, Procedure and House Affairs Committee, *Evidence*, 41st Parl, 2nd Sess, No 20 (6 March 2014) at 1135, 1140 (Mr Marc Mayrand).

[33] House of Commons, Procedure and House Affairs Committee, *Evidence*, 41st Parl, 2nd Sess, No 27 (3 April 2014) at 1110 (Mr Peter Dinsdale).

[34] House of Commons, Procedure and House Affairs Committee, *Evidence*, 41st Parl, 2nd Sess, No 27 (3 April 2014) at 1210 (Ms Teresa Edwards).

[35] House of Commons, Procedure and House Affairs Committee, *Evidence*, 41st Parl, 2nd Sess, No 31 (9 April 2014) at 2015 (Dr Abram Oudshoorn).

[36] *House of Commons Debates*, 41st Parl, 2nd Sess, No 42 (5 February 2014) at 1530 (Hon Pierre Poilievre).

[37] *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para 34-5.

[38] See Joan Bryden, "NDP launch last-ditch effort to kill Fair Elections Act", *Huffington Post* (12 May 2014), online: <http://www.huffingtonpost.ca/2014/05/12/fair-elections-act-ndp_n_5311620.html> and Josh Wingrove, "Fair Elections Act back on fast track after 45 amendments submitted", *The Globe and Mail* (28 April 2014), online: <http://www.theglobeandmail.com/news/politics/harper-government-submits-45-amendments-to-contentious-fair-elections-act/article18302902/>.

[39] *Council of Canadians v. Canada* (*Attorney General*), 2015 ONSC 4601.

[40] *Ibid* at para 70.

[41] *Ibid* at para 80-81.

[42] *Council of Canadians v. HMQ*, 2015 ONSC 4940.

[43] Council of Canadians, Media Release, "Unfair Elections Act creating challenges but millions persevere and vote anyway" (15 October 2015), online: <http://canadians.org/media/unfair-elections-act-creating-challenges-millions-persevere-and-vote-anyway>.

[44] See "Some voting delayed amid ballot shortages, staff no-shows", *CBC News* (19 October 2015), online: <http://www.cbc.ca/news/politics/canada-election-2015-polls-open-vote-1.3277587> and "Federal Election 2015: Voter complains of problems at Elections Canada polling station", *CBC News* (28 September 2015), online: <http://www.cbc.ca/news/canada/prince-edward-island/federal-election-2015-voter-complains-of-problems-at-elections-canada-polling-station-1.3246409>.

[45] *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (21 September 2011) at 1515 (Hon Rob Nicholson).

[46] Canadian Civil Liberties Association, Brief to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-10 (28 October 2011), online: <https://ccla.org/cclanewsite/wp-content/uploads/2015/03/CCLA-Brief-C10.pdf>.

[47] CCLA has also raised concerns about mandatory minimum sentences before the UN Committee on Economic, Social and Cultural Rights. See Canadian Civil Liberties Association, Report to the UN Committee on Economic, Social and Cultural Rights (January 2016), online: <https://ccla.org/cclanewsite/wp-content/uploads/2016/02/Report-to-the-UN-Committee-on-Economic-Social-and-Cultural-Rights.pdf> at 15-18.

[48] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 1st Sess, No 5 (18 October 2011) at 850 (Prof Anthony Doob).

[49] *Ibid* at 930.

[50] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 1st Sess, No 5 (18 October 2011) at 905 (Mr Michael Jackson).

[51] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 1st Sess, No 10 (3 November 2011) at 905 (Mr Michael Jackson).

[52] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 1st Sess, No 5 (18 October 2011) at 1005 (Ms Catherine Latimer).

[53] *Ibid*.

[54] *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (21 September 2011) at 1530 (Hon Rob Nicholson).

[55] *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (21 September 2011) at 1650-55 (Hon Kerry-Lynne Findlay).

[56] House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings*, 41st Parl, 1st Sess, No 15 (23 November 2011).

[57] Maureen Broshanan, "Record high prison numbers sparking violence", *CBC News* (27 August 2012), online: <http://www.cbc.ca/news/canada/record-high-prison-numbers-sparking-violence-1.1260764>.

[58] Mark Kennedy, "Canadian prison overcrowding going to get worse in long-term, auditor general reports", *The National Post* (6 May 2014), online: <http://news.nationalpost.com/news/canada/canadian-prison-overcrowding-going-to-get-worse-in-long-term-auditor-general-reports>.

[59] Canadian Civil Liberties Association, "CCLA Welcomes Concluding Observations for Canada by UN Human Rights Committee" (23 July 2015), online: <https://ccla.org/ccla-welcomes-concluding-observations-for-canada-by-un-human-rights-committee/>.

[60] Human Rights Committee, Concluding observations on the Sixth Periodic Report of Canada, UNHRCOR, 114th Sess, 3176 & 3177th Mtg, UN Doc CCPR/C/Can/CO/6 (13 August 2015) at para 14.

[61] *R. v. Lloyd*, 2016 SCC 13 [*Lloyd*].

[62] *R. v. Dickey*, 2016 BCCA 177 [*Dickey*].

[63] *Controlled Drugs and Substances Act*, SC 1996, c 19, s 5(3)(a)(i)(D).

[64] *Lloyd, supra* note 61 at para 2.

[65] *Ibid* at para 29.

[66] *Ibid* at para 30.

[67] *Ibid* at para 31.

[68] *Ibid* at para 35.

[69] See clauses (A) and (C) of section 5(3)(a)(ii) of the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[70] *Dickey, supra* note 62 at para 58.

[71] *Ibid* at para 59.

[72] *Ibid* at para 68.

[73] *House of Commons Debates*, 41st Parl, 1st Sess, No 90 (6 March 2012) at 1505 (Hon Jason Kenney).

[74] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 33 (30 April 2012) at 1644 (Ms Nathalie Des Rosiers). See also Canadian Civil Liberties Association, Brief to the Senate Standing Committee on Social Affairs, Science and Technology regarding Bill C-31 (19 June 2012), online: <https://ccla.org/cclanewsite/wp-content/uploads/2016/08/2012-06-04-Submissions-to-Senate-re-Bill-C-31-Immigration-and-Refugee-Protection-FINAL.pdf>.

[75] CCLA also raised concerns about Bill C-31 before the UN Committee Against Torture. See Canadian Civil Liberties Association, Report to the UN Committee Against Torture (48th Sess, May 2012), online: <https://ccla.org/cclanewsite/wp-content/uploads/2015/05/FINAL-CCLA-UNCAT-MAY-20121.pdf> at 8-9.

[76] *Charkaoui, Re*, 2007 SCC 9 at para 91.

[77] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 34 (1 May 2012) at 1128 (Mr Mitchell Goldberg).

[78] *Ibid*.

[79] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 37 (2 May 2012) at 1700 (Ms Chantal Desloges).

[80] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 38 (3 May 2012) at 1010 (Mr Donald Galloway).

[81] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 41 (7 May 2012) at 1705 (Mr Lorne Waldman).

[82] Human Rights Watch, Media Release, "Canada: Vote No on Migrant Detention Bill" (16 March 2012), online: <https://www.hrw.org/news/2012/03/16/canada-vote-no-migrant-detention-bill>.

[83] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 55.

[84] *House of Commons Debates*, 41st Parl, 1st Sess, No 90 (6 March 2012) at 1505 (Hon Jason Kenney).

[85] *Ibid* at 1515.

[86] *Ibid*.

[87] *Ibid* at 1510.

[88] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 31 (26 April 2012) at 1640 (Hon Jason Kenney).

[89] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41st Parl, 1st Sess, No 44 (10 May 2012) at 940 (Mr Scott Nesbitt).

[90] *Y.Z. v. Canada (Citizenship and Immigration)*, 2015 FC 892 at para 130, 170. See also: "Court strikes down appeal bar for nationals of Designated Countries of Origin", Canadian Council for Refugees (24 July 2015), online: <http://ccrweb.ca/en/court-strikes-down-RAD-bar-DCOs>.

[91] *Ibid* at para 4.

[92] *Ibid* at para 130.

[93] *Ibid* at paras 161-62.

[94] *Ibid* at paras 162, 166.

[95] *Ibid* at paras 173-74 and 185.

[96] *House of Commons Debates*, 41st Parl, 1st Sess, No 74 (6 February 2012) at 1105 (Mr Russ Hiebert).

[97] House of Commons, Standing Committee on Finance, *Evidence*, 41st Parl, 1st Sess, No 83 (25 October 2012) at 1610 (Mr Michael Mazzuca).

[98] House of Commons, Standing Committee on Finance, *Evidence*, 41st Parl, 1st Sess, No 90 (7 November 2012) at 1600 (Ms Jennifer Stoddart).

[99] *Ibid* at 1605.

[100] "Ex-Tory Senator Segal: Why I Fought Labour Bill C-377", *The Tyee* (1 September 2015) online: <http://thetyee.ca/Opinion/2015/09/01/Segal-Fought-Bill-C-377>.

[101] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, 41st Parl, 1st Sess, No 29 (22 April 2015).

[102] See, e.g., Jennifer Ditchburn, "Conservatives using prolific number of private member's bills to avoid proper vetting", *The National Post* (3 July 2014), online: <http://news.nationalpost.com/news/canada/canadian-politics/conservatives-using-prolific-number-of-private-members-bills-to-avoid-proper-vetting-ndp>; Bruce Cheadle, "Tories back record number of private member's bills", *The Globe and Mail* (8 May 2013), online: <http://www.theglobeandmail.com/news/politics/tories-back-record-number-of-private-members-bills/article11797023/>.

[103] House of Commons, Standing Committee on Finance, *Evidence*, 41st Parl, 1st Sess, No 83 (25 October 2012) at 1545 (Mr Russ Hiebert).

[104] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, 41st Parl, 1st Sess, No 29 (22 April 2015).

[105] *Ibid*.

[106] See *R v. DB,* 2008 SCC 25.

[107] See Amy Minsky, "Conservatives spend almost $7M defending unconstitutional legislation", *Global News* (17 June 2015), online: <http://globalnews.ca/news/2055556/conservatives-spend-almost-7m-defending-unconstitutional-legislation/>.

[108] See also House of Commons, *Order Paper and Notices*, 41st Parl, 2nd Sess, No Q-1145 (31 March 2015).

PART 3: WEAKNESSES OF THE CURRENT APPROACH

[109] *Department of Justice Act,* RSC 1985, c J-2, s 4.1. This provision mirrors similar provisions in the *Bill of Rights* and the *Statutory Instruments Act* to ensure that bills are not inconsistent with the purposes and provisions of the *Bill of Rights* and that regulations that are passed are in fact authorized by the statutes under which they have been enacted.

[110] Schmidt, *supra* note 2.

[111] See Statement of Agreed Facts, Court File T-225-12, online: <http://charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-agreed-facts.pdf>.

[112] CCLA's Memorandum of Fact and Law filed before the Federal Court, Court File T-2225-12, online: <https://ccla.org/cclanewsite/wp-content/uploads/2015/10/2015-09-01-Factum-Schmidt.pdf>.

[113] *Schmidt*, supra note 2 at paras 72-73.

[114] *Ibid* at para 285.

[115] *Ibid* at para 287.

PART 4: BILL C-14, MEDICAL AID IN DYING: A CASE STUDY

[116] *Rodriguez v. British Columbia* (Attorney General), [1993] 3 SCR 519.

[117] *Carter*, *supra* note 1.

[118] *Ibid* at para 147.

[119] *Ibid* at para 126.

[120] *Carter v. Canada*, 2016 SCC 4.

[121] External Panel on Options for a Legislative Response to Carter v. Canada, Consultations on Physician-Assisted Dying: Summary of Results and Key Findings (15 December 2015), online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/pad.pdf>.

[122] Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, Final Report (30 November 2015), online: <http://www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf>.

[123] Special Joint Committee on Physician-Assisted Dying, Report, 42nd Parl, 1st Sess, (February 2016), Medical Assistance in Dying: A Patient Centred Approach, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode= 1&Parl=42&Ses=1&DocId=8120006>.

[124] *Ibid*, Recommendations #2 & 7.

[125] Government of Canada, Legislative Background: Medical Assistance in Dying (Bill C-14) (Ottawa: Department of Justice, 2016) at 19-22.

[126] *Ibid* at 20.

[127] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 10 (2 May 2016) at 1609-1610 (Hon Jody Wilson-Raybould).

[128] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 13 (4 May 2016) at 2045 (Prof Jocelyn Downie).

[129] *Ibid* at 2050.

[130] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 14 (5 May 2016) at 850 (Mr Joseph Arvay).

[131] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 13 (4 May 2016) at 1800-1805 (Prof Dianne Pothier).

[132] Government of Canada, Legislative Background: Medical Assistance in Dying (Bill C-14) - Addendum (Ottawa: Department of Justice, 2016), online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/addend/index.html>.

[133] *Julia Lamb and British Columbia Civil Liberties Association v. Attorney General of Canada*, BCSC Court File: S-165851, Notice of Civil Claim, online: <https://bccla.org/wp-content/uploads/2016/06/2016-06-27-Notice-of-Civil-Claim-1.pdf>.

PART 5: RECOMMENDATIONS & CONCLUSIONS

[134] See James B. Kelly, "The Parliament of Canada and the Charter of Rights: The Need to Establish a Joint Scrutiny Committee on Human Rights" (6 January 2016) *Séamus in Irish* (blog), online: <https://jamesbkelly.org/2016/01/06/the-parliament-of-canada-and-the-charter-of-rights-the-need-to-establish-a-joint-scrutiny-committee-on-human-rights>. We recognize that there are significant benefits associated with having a special joint committee engage in rights-based review, and that such a specialized committee would develop expertise that may not accrue in the ordinary standing committees where rights considerations are but one of many things the committee must examine. However, given the current partisan nature of Canadian parliamentary committees, as well as uncertainty over the future composition of the Senate, our recommendations entrust a Charter Rights Officer with advising parliamentarians and committees on *Charter* concerns and vulnerabilities.

CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES