# *Legislative Scrutiny and the Charter of Rights: A Review of Senate Practices and Procedures*

**by Gary O'Brien**

*This article examines how the Senate of Canada attempts to ensure that rights are protected when it examines proposed legislation. While some believe that the Senate is uniquely situated to deal with minority rights protection, its responsibilities in this area differ little from other Canadian legislatures. Since there has been commentary from a number of scholarly sources of Parliament's response to the challenges raised by the Charter, it is useful for the accuracy of the record to describe some of the actions taken by the Senate for dealing with rights issues. The article concludes with some options for reform which have been expressed by individual senators which could provide insight into the kinds of institutional reform the Senate may wish to undertake in the future concerning the protection of rights.*

A traditional view of parliamentary institutions is that legislatures deal with the good of the community as a whole and that courts deal with the fundamental rights of individuals. This theory has been seriously challenged in the post-World War II era as legislatures around the world, prompted by the adoption of such conventions as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, increasingly brought a rights perspective and greater guarantees of freedom into their deliberations. The Parliament of Canada has dealt with the subject of civil liberties on many occasions in the last half-century. For example, in 1947 the Senate and House of Commons created a Special Joint Committee on Human Rights and Fundamental Freedoms and a final report was tabled the following year. In 1950, the Senate established its own Special Committee on Human Rights and Fundamental Freedoms which expressed the opinion that a bill of rights incorporated into the constitution would be desirable. A resolution urging the advisability of introducing a Bill of Rights or a Declaration of Rights was presented by the St. Laurent Government to the House of Commons in 1952. In 1958, *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms* (the Canadian Bill of Rights) was introduced by the Diefenbaker government and adopted by Parliament in 1960. In 1977, the *Canadian Human Rights Act*, introduced by the Trudeau government, was enacted. However, it was the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 that directly focused the attention of Canadian parliamentarians on the importance of examining how proposed legislation may impact on fundamental rights.

Pursuant to section 24(1) of the *Charter*, it is the courts which ultimately decide if anyone's rights or freedoms as guaranteed by the *Charter* have been infringed or denied. The courts now possess clear powers to nullify legislation and as of 2002, 64 statutes have been invalidated as

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inconsistent with the *Charter*. While judicial activism is a matter of much controversy, it would appear that few parliamentarians want to abdicate to the judiciary the difficult task of resolving how social policy should be balanced with the conflicting *Charter* rights. Many would agree with the following assessment expressed by Senator Raynell Andreychuk on the role of the *Charter* in the law-making process: "…the *Charter* will rest not only with the Courts because it does not speak to the courts alone. It speaks to parliamentarians at both the federal and provincial level. Parliamentarians must take the *Charter* into account, not after the fact by court analysis, but as a tool before we pass legislation. We must integrate into our work the need to reflect upon what the *Charter* says about the rights and freedoms of Canadians".[1]

Despite the respect given to the *Charter* by legislators, a number of commentators have been critical of the attention Parliament pays to it. James B. Kelly states that with notable examples: "…parliamentary scrutiny from a rights perspective is generally absent in Canada during the legislative process".[2] Janet L. Hiebert has written: "…If Parliament is to be a significant partner in a constitutional conversation, its processes for *Charter* evaluation need to be reassessed".[3] C.E.S. Franks states: "While the executive took additional measures in pre-vetting to ensure that legislation met the new standards imposed by the *Charter*, parliament did not, itself, add additional procedures or mechanisms to review bills from a rights perspective…Consequently entrenchment of the *Charter* has elevated the courts at the expense of parliament".[4] Errol P. Mendes writes: "…the Supreme Court indicated that it will not interpret the *Charter* in a vacuum. It will engage in a dialogue with Parliament which has been proposed by leading constitutional jurists in Canada…We do not really have an adequate dialogue at the moment. As one Department of Justice official confided, what takes place is not really a dialogue between the Supreme Court and Parliament, but between some Department of Justice officials and the Court".[5]

## International Comparisons

Many of those critical of Parliament's *Charter* practices point to the United Kingdom and Australian Parliaments as better models for protecting rights. Both have adopted systematic procedures for vetting legislation from a rights perspective.

In 1998, the British Parliament passed the *Human Rights Act* which incorporated the *European Convention on Human Rights* into domestic law. The Act provided for the creation of a Joint Committee on Human Rights with a mandate to examine "matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)". Under this term of reference, the Joint Committee examines each bill introduced into either House and reports before second reading approval any provisions of a bill which are likely to raise questions of compatibility with 'Convention rights' within the meaning of the *Human Rights Act*. The Act also specifies that ministers responsible for introducing government bills are required to provide a written statement, that in his or her opinion, the bill is compatible with Convention rights, or that it is not compatible but the government would like the House to consider the bill anyway. It should be noted that in the United Kingdom the judiciary does not have a mandate to invalidate legislation but only to make a "declaration of incompatibility" if primary legislation cannot be interpreted in a manner consistent with Convention rights. Parliament would decide whether to accept or ignore the judicial declarations of incompatibility.

The Commonwealth of Australia does not have a Bill of Rights. However, the Australian Senate has established a Standing Committee for the Scrutiny of Bills which is mandated under its standing orders to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts "trespass unduly on personal rights and liberties". When a bill is introduced in either House, it is examined by the committee's legal adviser who provides a written report to the committee whether or not it offends against the committee's principles. A committee's *Alert Digest* is then circulated with adverse comments included and tabled in the Senate. Ministers can then be invited to make a response to the committee's comments. *Odgers' Australian Senate Practice* (2001, p. 379) describes the subsequent actions by the committee as follows:

> If the committee receives a response from a minister, that response is reproduced in a subsequent report. In its reports which are also tabled on a weekly basis during sitting periods, the committee re-states its concerns about a bill, refers to the relevant ministerial response and then makes any comments it considers appropriate, including any differences of opinion between the committee's view and that of the minister. In reporting to the Senate, the committee expresses no concluded view on whether any provisions offend against its principles or should be amended. These are regarded as matters for the Senate to decide.[6]

## Canadian Senate Practices and Procedures

While many senators have expressed high regard for the *Charter* and believe they have a responsibility to examine bills from its perspective, in reality that task is not easy. The *Charter* is written in broad language and there

is much discretion in interpreting such terms as "qualified rights". Many senators lack expertise in understanding the legal rules of interpretation or detailed knowledge of Supreme Court jurisprudence. Law-making is just one function they perform. They also understand that *Charter* issues are essentially legal issues and that unlike questions of procedure there is no one umpire such as the Speaker to decide such matters. As is well documented by parliamentary authorities "The Speaker will not give a decision upon a constitutional question nor decide a question of law…".[7]

Nevertheless, the Senate has structured itself in a number of ways to deal with *Charter* issues.

**Senate Committees and *Charter* Issues**

Of the 15 standing committees the Senate has established, three deal specifically with *Charter* rights: the Standing Committee on Aboriginal Peoples, the Standing Committee on Human Rights and the Standing Committee on Official Languages. The Human Rights Committee was created on April 15, 2001 and is authorized to examine upon reference from the Senate bills and other matters "relating to human rights generally". Likewise, the Official Languages, created on October 10, 2002, studies bills and other matters "relating to official languages generally" also upon reference from the Senate. Both committees represent valuable platforms for those groups with interests in protecting minority rights to come before Parliament to express their views. These two committees allow senators to develop expertise, to pursue policy studies on issues related to fundamental rights and to keep government departments and agencies accountable.

The Senate also participates with the House of Commons in the work of the Standing Joint Committee on the Scrutiny of Regulations which has a permanent order of reference to review government regulations and other statutory instruments. Each session the Committee requests and is given approval to use as one of its criteria of review whether or not a regulation is in conformity with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights* and to report to both Houses accordingly. Offending regulations may then be revoked.

The Standing Committee on Legal and Constitutional Affairs has a general mandate which includes federal-provincial relations, the administration of justice, law reform and the judiciary and its research staff is drawn primarily from the Library of Parliament. Bills which may have *Charter* implications are often referred to it. Some of the more important legislative reviews undertaken by the Legal and Constitutional Affairs Committee are as follows:

> Bill C-220, *An Act to amend the Criminal Code and the Copyright Act (profit from authorship respecting crime*), reported June 10, 1998. The Committee held thirteen meetings on the bill and heard almost thirty witnesses. In its report, the Committee specifically addressed the issue of "Freedom under the *Charter*". It concluded: "… your Committee is equally concerned that Bill C-220 could restrict the *Charter* rights of Canadians to access the broadest possible range of material about issues of significance to their society…Although deeply mindful of the aversion that victims of heinous crimes experience toward the potential of such harm, your Committee is of the view, based on its understanding of Supreme Court of Canada *Charter* jurisprudence, that Canadian courts are unlikely to conclude a social ill currently exists of a scope to justify the sweeping measures contemplated by Bill C-220". The Committee's recommendation that the Bill not be proceeded with further was agreed to by the Senate.

Bill C-37, *An Act to amend the Judges Act*, reported October 22, 1998**.** – The Committee held six hearings and heard from a variety of witnesses. It proposed eight amendments to bill, including one touching on the definition of the term "surviving spouse". In its report, the Committee stated:

> One area of contention with "surviving spouse" was the inclusion of the phrase "of the opposite sex" in clause 1 of the bill with regard to who may receive pension benefits. This concern was expressed by witnesses, and by members of the committee, that the exclusion of same-sex couples would be a violation of section 15 of the *Charter of Rights and Freedoms,* particularly in light of recent court rulings. Furthermore, the current Judges Act does not contain any definition of "surviving spouse," thus making this a new exclusion.
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> In order to correct this problem, the Legal and Constitutional Affairs Committee recommends that clause 1 of Bill C-37 be deleted. In this case, we feel that maintenance of the status quo is preferable to potentially making bad law." The Senate concurred in the amendment as did the House of Commons.

Bill C-40, *An Act respecting extradition*, reported March 25, 1999 – The Committee held eight hearings on the bill and took testimony from a number of government officials and members of the legal profession. In this case the committee did not propose amendments. However some members of the committee seriously questioned whether the level of discretion available to the Minister of Justice in extradition cases involving Canadians violated section 7 of the *Charter* regarding life, liberty and the security of the person. They were unsuccessful in amending the bill. However, as James B. Kelly writes: "In *United States of America v. Burns*, the Supreme Court of Canada reviewed the constitutionality of the amendment Extradition Act and determined that the unlimited discretion available to the Minister of Justice in cases involving the

extradition of Canadian citizens to jurisdictions with the death penalty violated section 7 of the *Charter*. In effect, the Supreme Court articulated the same concern with the Act as several members of the Standing Senate Committee and disagreed with the Minister of Justice's certification that the amendments were constitutional." [8]

Bill C-7, An *Act respect of criminal justice for young persons*, reported November 8, 2001 – The Committee held a series of meetings on the bill and heard from over 60 witnesses. It recommended 13 different amendments to 11 clauses of the bill. Some of them were based on the Committee's interpretation of the *Charter* and of the *United Nations Convention on the Rights of the Child* and on its desire to see the legislation comply with these instruments. The Senate as a whole disagreed with the Committee's interpretation and defeated its report. However, the Act was challenged in court and on October 18, 2004, two sections were struck down by the Provincial Court of British Columbia as offending the *Charter*.

Pursuant to Rule 74(1), "The subject-matter of any bill which has been introduced in the House of Commons but not read the first time in the Senate may be referred to a Standing Committee for study". This procedure was used effectively in the Senate's examination of Bill C-36, *An Act to amend the Criminal Code and the Official Secrets Act* (the Anti-Terrorism Bill). Because of the bill's importance in the wake of the events of September 11, 2001 and because it clearly had potential *Charter* problems, the Senate began examining the bill without waiting for it to arrive as it normally would have after it had been adopted by the House of Commons. The special committee which was charged with studying the bill heard from three ministers and thirty witnesses and in its report of November 1, 2001, made a number of recommendations to correct potential *Charter* violations. Because these proposed amendments arrived early in Parliament's legislative process, the government was able to consider and act on them. The Senate's important contributions to improving Bill C-36 are generally acknowledged.

The Senate has established the practice of inviting those officials who are concerned with *Charter* rights to appear before it in committee of the whole which is essentially all members of the Senate sitting as a committee in the Senate Chamber. Normally, Senate proceedings are not televised but on these occasions permission is granted to provide for the coverage of their testimony. Senators are able to obtain a better understanding of the work of their offices and to learn of the difficulties they may be experiencing. Privacy Commissioners (February 18, 1999; May 18, 2000; October 16, 2000; November 7, 2003) and the Chief Commissioner of the Canadian Human Rights Commission (May 1, 2001) have appeared.

Other examples of Senate activism on *Charter* issues can also be mentioned. Bill C-28, the Pearson Airport Agreements Bill, which was defeated in the Senate on June 19, 1996, was given much scrutiny by senators from the perspective of the *Charter*. On October 7, 2003 and again on November 3, 2004, the Senate gave authorization for a committee examination of the implications of including in legislation non-derogation clauses relating to existing aboriginal and treaty rights of the aboriginal peoples of Canada. Concerns for the protection of *Charter* rights were prominently expressed in the Senate debates on Bill C-33, *An Act respecting the water resources of Nunavut*, which received Royal Assent on April 30, 2002 and Bill C-39, *An Act to replace the Yukon Act,* assented to on March 27, 2002. On September 26, 2001, the Social Affairs, Science and Technology Committee tabled a report entitled: *The Health of Canadians – The Federal Role: Issues and Options* which among other subjects examined the issue about whether social programs like health care should be part of any legal claim under the *Charter*.

**Options for Reform**

Senators seem relatively satisfied with the way *Charter* issues are dealt with. For example, Senator Noel Kinsella, then Deputy Leader of the Opposition and now Leader of the Opposition, has stated: "I have always been very satisfied with manner in which colleagues in this house have examined legislative proposals and tested those proposals against our *Charte*r values. Although we have our intense debates across the aisle, I have been impressed with the sobriety with which all honourable senators bring their *Charter* analysis to a bill before the house at any given time" [9] The Standing Senate Committee on Human Rights in its report *Promises to Keep: Implementing Canada's Human Rights Obligations* dated December 2001 stated: "Although it is by no means perfect, Canada's machinery of government is responsive to its domestic human rights obligations".

However, some senators have made a number of suggestions on improving procedures for *Charter* scrutiny. Senator Lois Wilson, who is now retired and who before being appointed to the Senate was the first woman Moderator of the United Church, testified before the Human Rights Committee about the need to alert senators to potential *Charter* conflicts earlier in the legislative process:

> …domestically there is no instrument by which parliamentarians can take the time to examine the issues, receive testimony and then formulate the legislation. We tend to do it after the fact: Does this bill conform with the *Charter* and covenants? My wish list would be that we do

> that work before the legislation is formulated. It is my hope this committee may see its way to doing that or at least see that it is done by some group in the system…Parliament also has the capacity for regional hearings, which is a very strong thing in its favour. The subject of human rights needs to be focused, as it is in Australia and the U.K., so that Parliament is alerted when things are coming along that have human rights implications.[10]

Senator Serge Joyal believes that the government should be more willing to share with Parliament the advice it receives from its officials about the risk assessments they make of credible *Charter* arguments against a particular bill. He has written:

> According to the *Department of Justice Act*, it is the responsibility of the Minister of Justice in respect of all Government bills to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms.'*However, departmental advice received by the Minister remains confidential. Clearly, the responsibility of ensuring that proposed legislation is consistent with the *Charter* should not be the exclusive purview of one minister of the Crown. Surely Parliament, collectively, must satisfy itself that any given bill is consistent with the *Charter* before it is enacted. Anything less would amount to an abdication of its legislative role to the courts.[11]

Proposals have also been made that Senate committees create formal checklists of key review elements in order to improve their effectiveness in reviewing legislation. Such checklists are used for example in Memoranda to Cabinet. There have been suggestions that a formal rule be created whereby Senate committees, in their reports on legislation, include a checklist indicating they have considered a number of specific issues and stating any implications which they view as significant. Along with such matters as regional issues, costs and benefits and national finance, they would have to consider the impact of the bill on gender equality, interests of minorities and human rights.

## Conclusion

Developing effective legislative practices and procedures to scrutinize legislation from the perspective of the *Charter of Rights and Freedoms* is a challenge since protecting and interpreting rights in effect means interpreting constitutional law, not an easy task for legislators who have many other issues of public policy to consider at the same time. As shown by the parliamentary record, senators take their responsibilities in this matter seriously and have established processes and practices to carry out this function. As seen by proposals of individual senators, they will continue to re-examine their practices and procedures and develop them further as they see fit.

## Notes

1 Senate of Canada, *Debates,* April 17, 2002.

2. James B. Kelly, "Governing with the *Charter of Rights and Freedoms*". *The Supreme Court Law Review*, Volume 21, 2002, p. 317.

3. Janet L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy". *Choices: Courts and Legislatures (IRPP),* June 1999, p. 37.

4. C.E.S. Franks, "Parliament, Intergovernmental Relations, and National Unity". Kingston: Institute of Intergovernmental Relations, Queen's University, 1999.

5. Errol P. Mendes, "The Role of Parliament in Assessing Canada's Implementation of its Domestic and International Human Rights Obligations". Presentation to the Human Rights Committee, Senate of Canada, p. 7.

6. Australia. Department of the Senate. *Odgers' Australian Senate Practice*. Tenth Edition, 2001.

7. See *Beauchesne's Parliamentary Rules and Orders*, Sixth Edition), c 324.

8. Kelly, *op. cit*, p. 321.

9. Senate of Canada, *Debates,* April 17, 2002.

10 Senate of Canada, *Proceedings of the Standing Senate Committee on Human Rights*, April 15, 2002.

11. Serge Joyal, (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*. Canadian Centre for Management Development, McGill-Queen's University Press, 2003.