



Minister of Justice and
Attorney General of Canada

Ministre de la Justice et
procureur général du Canada

INFORMATION PAPER

- Statute Law (Canadian Charter of Rights and Freedoms) Amendment Bill
- Equality Issues in Federal Law - A Discussion Paper

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INTRODUCTION

When the Canadian Charter of Rights and Freedoms was enshrined in the Constitution in 1982, federal lawyers began a systematic review of the statutes to see where amendments were needed to ensure compliance.

This is an enormous undertaking, as there are more than 1,100 federal laws of general application.

The Statute Law (Canadian Charter of Rights and Freedoms) Amendment Bill and the discussion paper entitled Equality Issues in Federal Law are two initiatives emerging from that review.

Charter issues also figure in a number of other exercises -- the review of the Criminal Code and other criminal law, now being carried out by the Department of Justice* in consultation with the provinces and others, for example, and the reference of the Chief Electoral Officer's report to the Standing Committee of the House of Commons on Privileges and Elections.

Another notable initiative is the discussions being pursued by the Department of Indian and Northern Affairs to eliminate Indian Act provisions that discriminate on the ground of sex.

Some issues have been set aside pending the outcome of cases now before the courts. For example, the Supreme Court of Canada is now considering a challenge to the Lord's Day Act based on section 2 of the Charter, which guarantees freedom of conscience and religion.

In addition, the review of the statutes brought to light a number of gray areas where distinctions based on grounds set out in section 15 of the Charter raise important questions of legal and social policy -- mandatory retirement, for example, and whether women should be admitted to combat roles in the Canadian Armed Forces.

* Submissions on criminal law reform may be directed to the General Counsel, Policy Planning and Criminal Law Amendments, Department of Justice, Ottawa, Ontario, K1A 0H8.

The discussion paper is intended to provide a basis for consultations with the public on such issues, so the Government can hear debate before formulating its own proposals.

The Charter compliance bill deals with some straightforward matters -- legal rights under sections 7-9 and 11 of the Charter, mobility rights under section 6 and fundamental freedoms under section 2, as well as with equality rights under section 15 -- which do not fall within the scope of other initiatives.

These notes briefly outline some of the main features of both the discussion paper and the bill.

I - EQUALITY RIGHTS

The review of federal statutes turned up examples of:

- . Inconsistency (in the age of majority, for example).
- . Outworn assumptions (especially that breadwinners are always men and dependents always women).

(1) Section 15

Section 15 of the Charter provides that:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Sex

A number of controversial issues are thrown open for debate in the discussion paper, including:

- (a) Maternity Benefits: Is it reasonable to require that women who claim maternity benefits under the Unemployment Insurance Act have at least 20 weeks of employment in the qualifying period while regular benefits are payable on the strength of as little as 10 weeks of employment?
- (b) Pensions: Should the Pension Benefits Standards Act continue to permit the use of mortality tables in such a way that women, because they live longer than men on average, draw smaller monthly or annual benefits than men for equal contributions?
- (c) Women in the Armed Forces: Would military effectiveness be compromised if combat roles were opened to women?

Amendments proposed in the bill would eliminate sexual distinctions in 9 laws, as follows:

- (d) Military Discipline: Removing authority from the National Defence Act to limit or modify the application of the Code of Service Discipline to women.
- (e) Benefits Plans: Offering the same benefits to husbands and widowers that wives and widows are now entitled to under the Merchant Seaman's Compensation Act, Veterans Rehabilitation Act, War Veterans Allowance Act, War Service Grants Act, Army Benevolent Fund Act and Returned Soldiers Insurance Act.
- (f) Bankruptcy: Giving marriage settlements made on men the same protection under the Bankruptcy Act from a spouse's creditors as those made on women now have.
- (g) Shipping: Making it possible under the Canada Shipping Act for a woman who works aboard ship to have part of her earnings payable to dependents at home, as a man now can.

(3) Age

Among issues raised in the discussion paper are:

- (a) Mandatory Retirement: Is it a reasonable exception under section 1 of the Charter to make people retire from work at a fixed age despite section 15's ban on age discrimination? If it is not a reasonable exception in general, should mandatory retirement still be permitted in special cases -- among judges, for example, in the military and in the RCMP?
- (b) Age of Majority: Should persons under age 18 still be prohibited, for example, from contributing to a Registered Home Ownership Savings Plan?

Following the example of electoral, criminal and other law that sets the age of majority at 18, the bill proposes that:

- (c) Directorships: The minimum age for members of boards under the Canada Cooperative Associations Act and the Canada Corporations Act be reduced to 18 from 21.
- (d) Ships' Pilots: Age no longer be a permitted criterion for qualification for certificates issued under the Pilotage Act.

- (e) Courts Martial: The minimum age of 21 for officers sitting on courts martial be removed from the National Defence Act.

(4) Disability

The discussion paper raises questions in four areas:

- (a) Armed Forces: Is it fair to exclude persons with disabilities from roles they are capable of fulfilling, on the ground that they might later be placed in operational roles with more stringent fitness requirements?
- (b) Immigration: Is it fair to close the doors on persons with disabilities because they might draw heavily on social and health services when misfortune could eventually place any immigrant in the same position?
- (c) Voting: Is it fair to deny the vote to persons involuntarily confined to an institution because of mental disability when there is no requirement on voters generally to show an understanding of the electoral process before they cast ballots?
- (d) Unemployment Insurance: Is it reasonable that people who claim benefits because of temporary disability caused by illness must have at least 20 weeks of employment in the qualifying period while those who claim regular benefits need as little as 10 weeks?

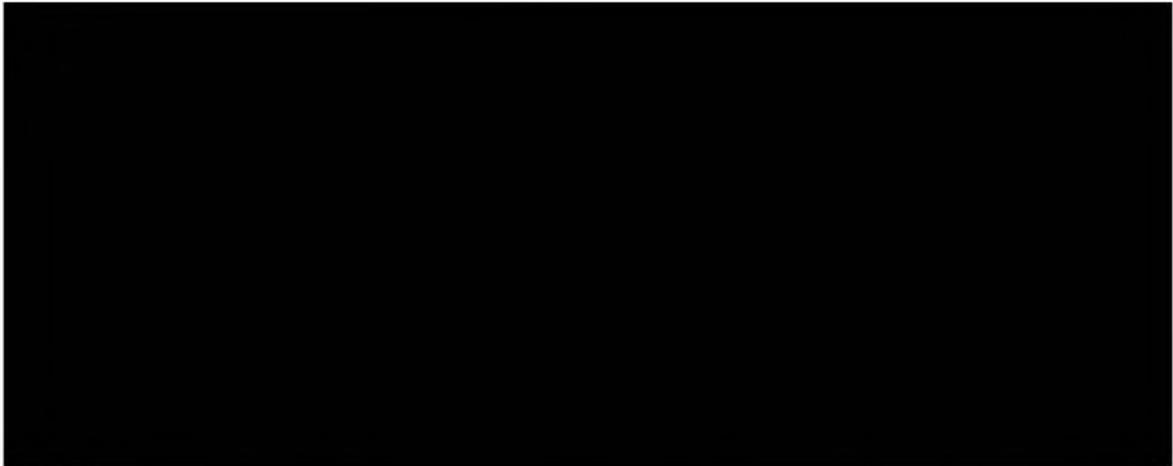
The bill proposes that:

- (e) Canada Shipping Act: As a matter of sensitivity to a changing understanding of mental problems, the term "lunacy" be replaced by "mental disability."

(5) Race

The discussion paper notes that the only racial distinctions spelled out in federal law relate to native peoples.





(6) Other

Because the list of grounds in section 15 does not appear to be exhaustive, the discussion paper deals with some other grounds as well.

- (a) Citizenship: While there would likely be general agreement that citizens are entitled to certain rights denied non-citizens -- indeed, the Charter itself in section 3 guarantees voting rights to citizens only -- is it reasonable to require, for example, that only citizens can register pedigrees under the Livestock Pedigree Act? Can a strong preference for citizens under the Public Service Employment Act be justified when, in fact, non-citizens may be placed in Public Service jobs for which no qualified Canadians are found?
- (b) Marital and Family Status: Can, for example, a distinction between widowed and divorced parents be justified in sponsorship regulations under the Immigration Act?
- (c) Sexual Orientation: Are the Canadian Armed Forces justified in refusing to enrol homosexuals or lesbians?

II - LEGAL RIGHTS

In general, legal rights are being dealt with in the review of criminal law. For example, the Criminal Law Amendment Bill (C-18) introduced in the House of Commons in December, 1984, proposes abolition of the writs of assistance under which some RCMP officers enforcing the Narcotic Control Act and other laws can make searches without first obtaining warrants in the usual way. The Charter compliance bill is confined to matters not being dealt with elsewhere.

(1) Section 7-9 and Parts of Section 11

The Charter provides that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
8. Everyone has the right to be secure against unreasonable search or seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.
11. Any person charged with an offence has the right...
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - (e) not to be denied reasonable bail without just cause;...
 - (h) if finally acquitted of the offence, not to be tried for it again, and if finally found guilty and punished for the offence, not to be tried or punished for it again....

(2) Inspections: The privacy of Canadians would get further protection under amendments proposed to more than two dozen statutes, as follows:

- (a) Private Homes: Federal officials would have to get a warrant from a judge to enter a private home without consent for a routine inspection under the Canada Agricultural Products Standards Act, Bankruptcy Act, Consumer Packaging and Labelling Act, Canadian Dairy Commission Act, Electricity and Gas Inspection Act, Electricity Inspection Act, Feeds Act, Fertilizers Act, Fish Inspection Act, Food and Drugs Act, Freshwater

Fish Marketing Act, Fruit, Vegetables and Honey Act, Gas Inspection Act, Canada Grains Act, Livestock and Livestock Products Act, Meat Inspection Act, Pest Control Products Act, Pesticide Residue Compensation Act, Plant Quarantine Act, Precious Metals Marking Act, Saltfish Act, Seeds Act, Canada Shipping Act, Textile Labelling Act, Transportation of Dangerous Goods Act, Weights and Measures Act, and Western Grain Stabilization Act. While most inspections are made in commercial premises, the amendments would remove any room for doubt about the need for warrants to enter private dwellings, recognizing the special concern that the courts have historically shown for the privacy of the home.

- (b) **Fisheries:** Limits would be put on the rights that fisheries officers have under the Coastal Fisheries Protection Act to remain aboard a vessel and to bring a vessel to port for a search of its cargo. It is proposed that officers have the right to remain aboard a vessel only as long as reasonably necessary to ensure that the law is being respected. The right to divert a vessel to port for a search of the cargo would come into play only when there are reasonable grounds for believing there has been a breach of the Act or of the conditions of a fishing licence.

(3) Searches

As opposed to an "inspection," which occurs when an officer enters premises to see whether the rules are being followed, a "search" occurs when the officer believes there has been a violation of the statute and enters premises to look for evidence.

The bill proposes that:

- (a) **Warrants:** In line with a Supreme Court ruling on the Combines Investigation Act, warrants granted by a judge be required for virtually all searches.
- (b) **Exception:** Warrantless searches be permitted in exigent circumstances -- when delay in getting a warrant could endanger human life or safety or lead to the loss or destruction of evidence.

These provisions would apply to the Canada Water Act, Clean Air Act, Canada Corporations Act, Customs Act, Environmental Contaminants Act, Fisheries Act, Fishing and Recreational Harbours Act, Canadian Human Rights Act, Migratory Birds Act, National Parks Acts and Northern Inland Waters Act.

(c) National Defence Act: Explicit authority to make searches be written into the National Defence Act, where there is now none. Military personnel would get statutory authority to search the premises of persons subject to the Code of Service Discipline and to make searches in connection with movement in to and out of defence establishments.

(4) False Imprisonment

The bill proposes removing portions of the Canada Shipping Act that prevent an action for false imprisonment by a sailor arrested or imprisoned aboard ship on improper or insufficient grounds for desertion or absence without leave.

(5) Military Justice

The bill proposes a number of amendments to the National Defence Act to bring military justice into line with the civilian justice system, as follows:

- (a) Right to counsel: Military personnel facing summary trial would get the right to assistance at their trials, which they do not now have. An assisting officer in these cases would not necessarily have formal legal training, as operational circumstances could often make it impossible to provide qualified lawyers, but there are other safeguards on the fairness of summary proceedings:
- (i) The results of all summary trials are automatically reviewed by officers of the Judge Advocate General.
 - (ii) Where the penalty could be loss of rank, imprisonment or a fine over \$200, the accused has the right to elect trial by court martial, where there is a right to legally-trained counsel.
- (b) Bail: Provision would be made for release pending trial, which is not now provided for.
- (c) Defence: Any defence available in a criminal case in the civil courts would be available to military personnel tried under the Code of Service Discipline. Criminal Code provisions regarding insanity would also apply.

The amendments also propose that:

(d) Double Jeopardy: Once a charge against a member of the Armed Forces has been disposed of in the military courts, it could not be tried again in the civilian courts.

(6) Human Rights Tribunals

The bill proposes that the Canadian Human Rights Commission lose the power to select the members of tribunals established to rule on discrimination cases under the Canadian Human Rights Act. Tribunal members would be chosen by an independent official to be appointed by the Governor in Council. This amendment is intended to remove any possibility of suspecting bias in tribunals, whose members are now chosen by the same body, the Commission, that decides there is sufficient evidence of discrimination to justify tribunal hearings in the first place.

(7) Seizure and Forfeiture

The bill proposes amendments to eliminate arbitrary features from present arrangements, as follows:

(a) Fisheries: The Minister would lose the power to order the forfeiture of fish, vessels or other goods when there is a conviction under the Fisheries Act. Only the convicting court could order forfeiture, and the order could be appealed. Only when criminal proceedings are not launched would the Minister have the power to cancel or suspend a lease or licence for contravention of the Act. When there were criminal proceedings, suspension or cancellation would be for the court to decide.

(b) Weights and Measures Act: Federal inspectors would lose the power to seal a device when an inspection or service fee has not been paid, as it is possible to recover the debt in other ways.

III - FUNDAMENTAL FREEDOMS

(1) Section 2

Among other things, Section 2 of the Charter provides that:

2. Everyone has the following fundamental freedoms:...
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication....

(2) In Camera Proceedings

The bill proposes that hearings on applications under the Immigration Act be held in public except when the adjudicator accepts an application to proceed behind closed doors because of the damage that publicity could have on particular interests.

IV - MOBILITY RIGHTS

(1) Subsection 6.(1)

The Charter provides in subsection 6.(1) that:

- 6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Transfer of Offenders

Under treaties with some foreign countries, Canadians undergoing punishment abroad can be transferred to Canada to complete their penalties, and vice versa. These transfers are carried out under the Transfer of Offenders Act. The Solicitor General has the power to approve or block a transfer, but the Act sets out no criteria for this decision.

The bill proposes that the Governor in Council be given authority to make regulations setting out criteria.

CONCLUSION

Looking to the future, the Charter compliance bill also proposes amendments to the Department of Justice Act to require the Minister of Justice to examine Government-sponsored bills and regulations, to check that they are consistent with the Charter.

Ref: Martin Low
General Counsel
Human Rights Law
Department of Justice
Ottawa, Ontario
K1A 0H8

(version française disponible)

Tel.: (613) 992-1027