

S E C R E T

MEMORANDUM TO CABINET
MEMOIRE AU CABINET

July 22, 1982
Le 22 juillet 1982

CHARTER OF RIGHTS IMPLEMENTATION

MISE EN OEUVRE DE LA CHARTE DES DROITS

MINISTER OF JUSTICE
MINISTRE DE LA JUSTICE

S E C R E T

Charter of Rights Implementation

Object

1. The purpose of this memorandum is to seek Cabinet's approval of a process for the implementation of the Charter of Rights and Freedoms and of the corresponding international human rights commitments of Canada in areas of federal jurisdiction.

Decisions Required

2. Cabinet is requested to approve a proposed work plan to ensure consistency of law at the federal level with the Charter of Rights and Freedoms and, in specific instances, with the international human rights obligations of Canada and to establish the requisite priority for the project; to approve the responsibilities of Minister of Justice and other Ministers in this connection; and to establish a mechanism for a continuing review of federal policy formulation destined for legislative initiatives to ensure consistency with the Charter and other human rights obligations.

Considerations

I Background

3. Since the proclamation of the Constitution Act, 1982, the Charter of Rights and Freedoms overrides federal law to the extent of any inconsistency with the exception of the equality rights set out in s. 15 thereof. Remedies are available to individuals in relation to Charter rights, and in the absence of modification of federal law to conform to the Charter, there is a risk of adverse Court decisions and of embarrassment. At the international level, insofar as Canadian laws and practices may not conform with international agreements which have been ratified, Canada's international responsibility is engaged and, under the Optional Protocol to the International Covenant on Civil and Political Rights in particular, individual recourse to the UN Human Rights Committee to assert rights in such cases is assured. While Canadian law was determined at the time of ratification of the International Covenants to be in general conformity, it is clear that in certain areas there are gaps in the application of the Covenants and other international obligations under the domestic law of Canada. It is accordingly imperative that all federal law be reviewed and where necessary, revised, to ensure conformity at the earliest possible date.

4. This memorandum will speak of bringing about consistency with Canada's international human rights obligations, in addition to the Charter. In the limited time frame that is contemplated for implementation of the Charter, it is unrealistic to expect that federal law could or should be reviewed from the standpoint of the entire range of Canada's international human rights responsibilities. A mechanism designed to secure the fullest application of these obligations in Canadian law over an extended time frame will be

II The Implementation Process

Organization

8. Organizationally, the Department of Justice has established a Human Rights Law Section, which will have the primary responsibility for the conduct of the Charter of Rights implementation process across the federal government. In this work, the new section will draw upon the expertise of lawyers in the Departmental Legal Services units assigned to the majority of federal departments and agencies and upon the in-house lawyers of those federal entities which administer legislation but are not supported by lawyers from the Department of Justice.

9. With regard to the allocation of resources for the conduct of this project, Treasury Board has approved a submission authorizing new resources for the Department of Justice for this purpose and for the new and on-going responsibilities of the Department of Justice in this field. In view of the expertise of in-house lawyers in the legislation administered by other departments and agencies, additional resources attributable to the deployment of other officials of these Departments to assist in policy development should be minimal. Nevertheless it is evident that a considerable effort will be required at senior policy levels in most departments and agencies over the short and medium term to accomplish this review of legislation. Ministers will be requested to ensure that the necessary priority is given to this task.

10. The timing for the several phases of the implementation process will be indicated as each phase is described; it is worth noting as anticipated parameters of the project that it is likely that two omnibus human rights law amendment bills will need to be enacted prior to April, 1985. Having regard to the government's commitment to the Charter and to the international human rights obligations that have been undertaken by Canada, this time frame should be shortened if practicable, and should certainly culminate in the proclamation of the necessary legislation by the practical completion of the government's current mandate.

The Review Process: Phase 1

11. Phase 1 of the proposed review process relates to all rights and freedoms guaranteed by the Charter other than equality rights, and it comprises four stages leading to legislative proposals. Phase II of the process will deal with equality rights, while Phase III will deal with the non-legislative aspects of federal activity, leading to a modification of regulations, policy and administrative directives and guidelines and programs. These phases are not temporally discrete; the activities to be undertaken in each stage overlap and coalesce. Attached as Table "A" is a chart outlining the various activities and the timetable applicable to each phase of this project.

12. The initial stage in Phase I of the review of existing federal law is the identification of conflicts, actual or potential, between all federal statutes and the Charter of Rights and Freedoms and the provisions of Canada's international human rights obligations that correspond to the Charter issues so identified. Priority has been given to the statutory body of federal law, and this identification stage has been underway for some time now, with all departments and agencies, with the assistance of the lawyers assigned to them, engaged in an assessing of the statutes they administer against the standards set out in the Charter. It is anticipated that the initial identification will be completed in the very near future.

13. The intermediate stage is the review and analysis of the list of problem areas that have been identified in stage one. This assessment will be done at the Justice Headquarters, primarily by the Human Rights Law Section, in consultation with the lawyers assigned to departments and agencies, and senior policy advisors of departments and to determine the policy objective underlying areas of potential inconsistency. Confirmation of actual or potential Charter inconsistencies will be given by the Department of Justice and the proposed completion date for this stage is August 30, 1982. In addition to assessment of the Charter implications that have been revealed in the identification phase, problem areas will be scrutinized from the perspective of the corresponding aspects of the international human rights instruments that bind Canada.

14. As noted above, in terms of the current implementation process, it appears feasible to deal only with the international obligations that relate to Charter issues. Where there is such an overlap of the provisions of the Charter and international obligations, it would appear desirable to resolve both Charter and international issues. To go beyond the issues dealt within the Charter at the present time, however, would very substantially increase the magnitude of the project, by requiring a review of legislation in relation to the broader scope of Canada's international obligations, and for a purpose which does not appear to have the same practical urgency. Areas in which there may be a question about the precise application of Canada's international obligations in domestic law will be dealt with progressively by means of the proposed procedure for scrutinizing future legislation for constitutional and human rights issues and in response to practical and identifiable areas of concern for Canada's respect for its international obligations. This will be undertaken by the Department of Justice in conjunction with responsible officials of the Department of External Affairs.

15. Stage three is the consultative, policy formulation process, in respect of statutes or provisions thereof which require immediate modification to comply with the Charter or the corresponding international obligations undertaken by Canada. In this stage, lawyers from the Human Rights Law Section

will consult with senior policy officials and the legal service units of the departments and agencies that are concerned with legislation that is considered to risk conflict with the Charter or with the corresponding provisions of international obligations. In this period possible means of amending legislation will be considered to remove these risks of conflict in a manner that will be feasible and practicable in the circumstances to which the particular legislation applies and that will entail the least disruption to existing programs and the minimum level of resource requirements. A specific concern which will be addressed, with the Central agencies as well as the administering department, will be the financial implications of any particular policy evolution. It is anticipated that the financial impact of the legislative changes required in Phase I of the project will be minimal. The completion of this stage will result in the formulation of a consolidated Memorandum to Cabinet proposing the amendment of all statutes necessary to give effect to the rights other than the equality rights of the Charter. It is anticipated that the completion of these substantive policy proposals to the Cabinet will be feasible by late October, 1982.

16. Stage four of this phase of the project is the legislative drafting phase. In view of the urgency of the initial amendments to bring about conformity in areas of present risk of attack under the Charter, and on the assumption that individual policy proposals will be consolidated into a single Omnibus Bill, it would appear desirable to authorize the Legislation Section of the Department of Justice to draft over the course of the summer and early fall elements of an Omnibus Bill on which policy agreement can be reached without controversy at the level of officials. The target date for introducing a Bill would be November, 1982.

17. A specific element of the initial policy proposals will have to be an amendment to the Department of Justice Act, to provide a mechanism for scrutinizing Bills for Charter consistency, in conformity with an undertaking that was given by the Minister of Justice during the proceedings of the Special Joint Committee on the Constitution. A further issue for consideration will be a review of the Canadian Bill of Rights, and the elements of the Bill of Rights which are not encompassed by the Charter.

18. Use of the Omnibus Bill technique will not, of course, affect the normal process of legislation which is unrelated to Charter and other human rights obligations. However, as such legislation is brought forward, any human rights implications will have to be addressed and resolved and a mechanism to accomplish this will be implicit in the process of scrutiny that is proposed in paragraph 19 below. For amending Bills which are unrelated to human rights obligations, the underlying legislation which is not being amended will have to be scrutinized for consistency. Where there are human rights issues that arise in such cases, a decision will be required on an ad hoc basis, whether

the amendments that would be required should go forward by way of the Omnibus Bill process or as a part of the particular amending Bill.

The Review Process: Phase 2

19. Phase 2 of the proposed review process relates to the equality rights contained in section 15 of the Charter and the corresponding rights provided in relevant international instruments that apply to Canada. In essence, the stages of activity parallel those identified for Phase 1, but with a more extended lead time. The essential activities, participants, outputs and timing are indicated in Table "A". The timing which is proposed for these activities would result in a Memorandum to Cabinet going forward in late September or October, 1983, with legislation available for introduction by December, 1983 or early in 1984. With the serious policy and resource implications that may arise from the implementation of the equality rights, it is conceivable that the policy formulation stage of this Phase of the implementation project might require further time for consideration and reconciliation of competing influences.

20. Failure to have policy settled and a Bill available for introduction by the end of 1983 or early in 1984 might involve serious constraints, as the customary end of the current mandate approaches, in securing the enactment of the necessary legislation prior to the date on which the equality rights become effective and enforceable. A specific and important consideration in this phase, which may well be more significant than in Phase 1, will be the financial implications of the enforceability of equality rights. For both reasons departments and agencies have been asked to initiate the identification of equality concerns in the legislation and programs they administer as well as the "non-equality" aspects of the Charter. Those responsible for legislation involving equality issues should begin to develop their approach to these issues with the Departmental Legal Service unit assigned to them, with a view to accelerating the resolution of policy concerns about equality rights in the period immediately following the introduction of the initial Omnibus Bill.

The Review Process: Phase 3

21. Phase 3 of the Review Process relates to the modification of regulations and other statutory instruments, administrative and policy guidelines or directives and programs which are not made pursuant to statutory authority. This Phase is contemporaneous with both other Phases, in that departments and agencies are now identifying non-statutory aspects of their activities to ensure consistency with the Charter and with the international obligations relevant to identified Charter problems. This is being undertaken with the assistance of the lawyers assigned to departments and agencies. While the centralized services of the Department of Justice in this area will be focussed on the legislative phases of the implementation project as a matter of priority, advice and assistance will be

available in difficult and controversial areas, such as the current consideration of the rights of public servants to express themselves publicly on matters of government policy and administration, and in connection with the corresponding issues that flow from Canada's international obligations. In this latter respect consultation with the Department of External Affairs would be undertaken. Departments and agencies should be required to provide information periodically on the steps taken to bring regulations, administrative and policy guidelines into conformity with the human rights commitments of the Government, and the Minister of Justice should consolidate this information into reports to Cabinet, to ensure that the necessary follow-up to this phase of the review process is carried forward in a coordinated manner. The Human Rights Law Section of the Department of Justice would be the catalyst for such follow up, calling upon Departmental Legal Services Units in the various departments and agencies to bring forward the necessary data.

III Mechanism for Continuing Review of Policy Proposals for Charter Consistency

22. It will be necessary to ensure that future legislative initiatives of the Government are consistent with the Charter and with all aspects of Canada's international human rights obligations. A mechanism of this nature is already provided under Section 3 of the Canadian Bill of Rights, which requires the Minister of Justice to scrutinize Bills and regulations from the perspective of the Bill of Rights, and to report to Parliament on any inconsistencies. A similar responsibility would seem to flow from the entry into force of the Charter, although the purpose of the scrutiny is not so limited as under the Bill of Rights and the reporting relationship and other details would differ. As a matter of the efficient administration of the Cabinet decision-making process, it would seem necessary to engage Charter issues in a formal manner prior to a determination by Cabinet to adopt a particular policy recommendation. As an appropriate means to ensure an effective review of Charter implications, policy proposals leading to legislation should not go forward to a policy committee of Cabinet without prior formal consultation on the constitutional and human rights implications of the proposed policy with the Department of Justice. Where issues arise that relate to the application of Canada's international human rights responsibilities, the Department of Justice would ensure the requisite consultation with the Department of External Affairs. Instructions to this effect should be given by Cabinet that will be applicable to all future memoranda to Cabinet.

Financial Considerations

23. There are no financial considerations that are directly related to the present memorandum on the implementation process. While financial implications are likely to flow from the implementation process,

in Phase I the financial implications of legislative changes will be minimal. Financial considerations may well be significant in connection with equality rights; but clearly, the financial impacts can only be identified in the subsequent memoranda which will formulate substantive implementation proposals.

Federal Provincial Considerations

24. The federal-provincial linkages that exist in connection with this initiative are at present indirect. The implementation process at both levels of government was discussed at a meeting of Deputy Attorneys-General in February, 1982 and the importance of the process was emphasized. A review of developments in all jurisdictions is expected to occur at a meeting of Deputy Attorneys-General in the early fall. During the legislative implementation process, further consultation will be undertaken. In February, 1981, the Federal-Provincial Meeting of Ministers responsible for Human Rights called for a coordinated approach to legislation in relation to the international Covenants, and instructed the Continuing Federal-Provincial Committee of Officials responsible for Human Rights to keep this issue under review for further consideration at the next Ministerial meeting, currently expected to be held in June, 1983. In connection with Charter litigation, a system of coordination and information sharing is being developed with the provinces.

Interdepartmental Considerations

25. This paper has been discussed with officials of the Privy Council Office, the Ministry of State for Social Development, the Treasury Board, External Affairs, FPRO and Secretary of State.

Political Considerations

26.

Status of Women Considerations

27. There are no Status of Women considerations in the approval of an implementation project; there are substantial implications for Status of Women as substantive proposals evolve and appropriate consultations will be conducted at that time.

Public Information Considerations

28. The Canadian Unity Information Office has implemented a public information program to provide Canadians with basic information on the Charter of Rights. In connection with the Charter of Rights implementation process, additional public information activities as to the Government's approach to Charter implementation would be only in response to specific inquiries, in accordance with the attached Communications Plan. Substantial public information efforts will be called for when substantive changes in

the law are brought forward. A public information plan will be developed as an element of the substantive memoranda to Cabinet.

Recommendation

29. It is recommended that Cabinet direct the Minister of Justice to undertake, as a matter of the highest priority and in consultation with all Ministers as required, the following measures to bring about the effective implementation of the Charter of Rights and Freedoms and, where they correspond to Charter issues, the international human rights obligations of Canada:

- (a) review all existing laws, regulations and administrative practices, in a three phase process: (i) legislative change required by aspects of the Charter other than equality rights, (ii) legislative change in relation to equality rights, and (iii) non-legislative change;
- (b) bring forward substantive proposals to ensure legislative conformity with the Charter and international human rights obligations in two legislative stages, the first to be introduced at the earliest possible date and the second to be introduced at a date consistent with assured enactment during the current mandate of the government.

30. It is further recommended that the Cabinet

- (a) approve the activities and timetable for the Charter of Rights implementation process set out in Table "A" as a work plan for officials engaged in the project;
- (b) confirm the responsibility of the Minister of Justice to proceed immediately in conformity with that work plan; and
- (c) direct other Ministers to assist the Minister of Justice to achieve the objectives of the work plan in accordance with the timing established therein, in order to ensure the timely formulation of substantive recommendations to Cabinet.

31. It is further recommended that the Cabinet require the Minister of Justice to report periodically to Cabinet on the modification of regulations, administrative and policy guidelines and directives and programs for the purposes of Charter implementation and that all Ministers be directed to assist in this endeavour.

32. It is further recommended that Cabinet direct that future memoranda to Cabinet which may lead to legislative initiatives contain a section on Constitutional and Human Rights Considerations, showing that the Department of Justice has been formally consulted on the constitutional implications of the

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proposed policy and in particular its human rights implications, together with the Department of External Affairs in relation to Canada's international obligations in the field of human rights.

Minister of Justice

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TABLE A

Charter of Rights Implementation

	<u>Activity</u>	<u>Participants</u>	<u>Output</u>	<u>Time Frame</u>
<u>Phase I</u>	Review of legislation for non-equality rights and freedoms	All departments and agencies, with DLS units	Policy Proposals for Omnibus Bill	Nov. 1982
Stage 1	Identification of conflicts	Same	Lists of possible conflicts	July 1982
Stage 2	Review of conflicts	Human Rights Law Section in conjunction with DLS units and administrators and policy advisers of departments and agencies	Confirmation of conflicts	June 14-Aug. 30, 1982
Stage 3	Policy formulation	Same	Memorandum to Cabinet	July 7 - Oct. 30, 1982
Stage 4	Legislative drafting	Legislation Section, instructed by Human Rights Law Section and relevant departments and agencies	Omnibus Human Rights Law Amendment Bill	Aug. 1 - Nov. 15, 1982
<u>Phase II</u>	Review of legislation for equality rights	All departments and agencies, with DLS units	Policy proposals for Omnibus Bill	November 1984
Stage 1	Conflict Identification	Same	List of possible conflicts plus initial assessment	June/82 Dec./82
Stage 2	Conflict review	Human Rights Law Section in conjunction with DLS units and administrators and policy advisers of departments and agencies	Confirmation of conflicts	Sept./82 Feb./83
Stage 3	Policy formulation	Same	Memorandum to Cabinet	Sept.- Oct./83
Stage 4	Legislative drafting	Legislation Section, instructed by Human Rights Law Section and relevant departments and agencies	Omnibus Human Rights Law (Equality) Amendment Bill	Dec./83

	<u>Activity</u>	<u>Participants</u>	<u>Output</u>	<u>Time Frame</u>
<u>Phase III</u>	Review of Regulations, Administrative and Policy Guidelines/ Directives and Programmes	All Departments and agencies, with DLS units	Changes in Regulations and Statutory Instruments, and Policies and Directives not based on Statute	July/82- March/85
Stage 1	Conflict Identification	Same	List of conflicts plus initial assessment	June/82- Dec./82
Stage 2	Conflict Review	DLS units in consultation with Human Rights Law Section	Confirmation of conflicts	July/82- Feb./84
Stage 3	Policy Formulation	Departments and Agencies, in consultation with Human Rights Law Section and Privy Council Office Section where required	Amendments to Regulations/ Statutory Instruments; Modification of Departmental policies, guidelines, etc.	Sept./82 March/85
Stage 4	Periodic reports to Cabinet	Minister of Justice	Report	Sept./83 March/85