

Against Privileging the *Charter*: The Case of Federal Pre-Enactment Constitutional Review

*Wade Wright**

Sections 4.1 and 4.2 of the Department of Justice Act impose constitutional review and reporting requirements on the federal Minister of Justice that are engaged pre-enactment, when government bills are being “introduced” or “presented.” However, sections 4.1 and 4.2 do not treat all aspects of the Constitution equally; their review and reporting requirements are limited to only one aspect of the Constitution — the Canadian Charter of Rights and Freedoms. Sections 4.1 and 4.2 thus privilege the Charter, treating it as an aspect of the Constitution that somehow warrants special treatment.

This paper makes the case that the privileging of the Charter evident in sections 4.1 and 4.2 is unjustified. The paper also describes and defends a proposal to address this unjustified privileging of the Charter, which would see the scope of sections 4.1 and 4.2 expanded beyond the Charter to the Constitution of Canada broadly. The result of this proposal would be that the Minister would be required to consider all aspects of the Constitution in the course of satisfying the requirements in sections 4.1 and 4.2.

Le ministre de la Justice (qui est également le procureur général du Canada) a une obligation juridique générale de s'assurer que toute action gouvernementale fédérale respecte la loi, y compris la Constitution, la « loi suprême du Canada ». L'obligation juridique générale du ministre est opérationnalisée dans plusieurs obligations légales plus précises, exposées dans les articles 4.1 et 4.2 de la Loi sur le ministère de la Justice. Ces articles imposent le contrôle constitutionnel et des exigences en matière de rapport sur le ministre qui sont entrepris avant la promulgation, lorsque les projets de loi émanant du gouvernement sont « présentés ». Cependant, les articles 4.1 et 4.2 ne traitent pas tous les aspects de la Constitution de la même manière; leurs exigences en matière de rapport et de contrôle sont limitées à un seul aspect de la Constitution : la Charte canadienne des droits et libertés. Ainsi, les articles 4.1 et 4.2 privilègient la Charte, la traitant comme un aspect de la Constitution qui semble justifier un traitement spécial.

L'auteur de cet article soutient que le privilège accordé à la Charte dans les articles 4.1 et 4.2 est injustifié. Il décrit et soutient également un projet pour aborder ce privilège injustifié qui verrait la portée des articles 4.1 et 4.2 élargie au-delà de la Charte, à la Constitution du Canada d'une manière générale. Le résultat de ce projet serait que le ministre serait obligé de considérer tous les aspects de la Constitution au moment de s'acquitter des obligations des articles 4.1 et 4.2.

* Assistant Professor, Faculty of Law, Western University. Thanks are offered to Andrew Bonnell and Alisha Kapur for excellent research assistance. This paper was prepared with financial assistance from the Western Law Dean's Research Fellowship and a Western University SSHRB Grant.

The federal Minister of Justice (who is also the federal Attorney General)¹ has a general legal duty to ensure that all federal government action respects the law, including the Constitution — the “supreme law of Canada.”² This general legal duty is codified in the *Department of Justice Act (DOJ Act)*, which, among other things, requires the Minister to “see that the administration of public affairs is in accordance with law.”³

The Minister’s general legal duty to ensure that all federal government action respects the law, including the Constitution, is operationalized in several more specific statutory duties, set out in sections 4.1 and 4.2 of the *DOJ Act*, which impose review and reporting requirements that are engaged pre-enactment, when government bills⁴ are being “introduced” or “presented.”⁵ One striking feature of these specific review and reporting requirements — which are described in more detail below⁶ — is that the federal pre-enactment constitutional review they contemplate is limited to one aspect of the Constitution: the *Canadian Charter of Rights and Freedoms*.⁷ Unlike the Minister’s general legal duty to ensure that all federal government action respects the law, these specific requirements focus exclusively on the *Charter*; they do not require the Minister to consider any other aspect of the Constitution, including the federal-provincial division of powers in the *Constitution Act, 1867*⁸ and the “Aboriginal and treaty rights” “recognized and affirmed” by the *Constitution Act, 1982*.⁹ These requirements thus privilege the *Charter*, treating it as an aspect of the Constitution that warrants special treatment.

This paper argues that the privileging of the *Charter* evident in the federal review and reporting requirements in sections 4.1 and 4.2 is unjustified. It argues that the neglect of all of the many other non-*Charter* aspects of the Constitution in the provisions is unjustified, but that the neglect of Aboriginal

1 Hereinafter “the Minister.”

2 *Constitution Act, 1982*, s 52 being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*CA 1982*]. See further, Wade K Wright, “Canada’s ‘Constitution Outside the Courts’: Provincial Non-enforcement of Constitutionally Suspect Federal Criminal Laws as Case Study” in Richard Albert, Paul Daly & Vanessa A MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 103 at 111-13.

3 *Department of Justice Act*, RSC 1985, c J-2, s 4(a) [*DOJ Act*].

4 Government bills are bills that have been approved by cabinet and introduced by a minister. They are distinct from private Members’ bills, which are put forward by a private Member of Parliament.

5 *Supra* note 3, ss 4.1-4.2.

6 See Part I, *below*.

7 *CA 1982*, *supra* note 2 at Part I [*Charter*].

8 See in particular *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-95, reprinted in RSC 1985, Appendix II, No 5.

9 See in particular *CA 1982*, *supra* note 2, s 35.

and treaty rights is particularly striking, in light of the history of the provisions, as well as the mistreatment of Indigenous Peoples in Canada, which has been well documented by, among others, the Truth and Reconciliation Commission.¹⁰ The paper also describes and defends a proposal to address this unjustified privileging of the *Charter*, which would see the scope of sections 4.1 and 4.2 expanded beyond the *Charter* to the Constitution broadly. The result would be that the Minister would be required to consider all aspects of the Constitution in the course of satisfying their requirements.

The paper is organized in three parts. Part I diagnoses the problem. It describes the current federal review and reporting requirements, identifying how they privilege the *Charter*, and it then addresses why this privileging of the *Charter* is unjustified. Part II describes my proposed response to this unjustified *Charter* privileging — statutory amendments that would expand the review and reporting requirements beyond the *Charter* to the Constitution broadly. Part III identifies and answers some of the key arguments that might be advanced against this proposal, and in doing so, fleshes out further what would be gained by adopting the proposal.

Two caveats should be noted at the outset. First, in this paper, I focus on one aspect of the federal review and reporting requirements — the unjustified privileging of the *Charter* evident in them. There is a rich body of scholarship that describes, debates and critiques these requirements.¹¹ This scholarship considers a variety of proposed reforms to the requirements,¹² but fails to address how they privilege the *Charter*.¹³ This paper focuses on the privileging of

10 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) [TRC].

11 For critiques of (the existing approach to) the federal review and reporting requirements, see e.g. Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal & Kingston: McGill-Queen's University Press, 2002); Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31:2 *Queen's LJ* 598; James B Kelly, "Legislative Activism and Parliamentary Bills of Rights: Institutional Lessons for Canada" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 86; Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the Human Smugglers Act" (2014) 51:2 *Osgoode Hall LJ* 377. For defences of (the existing approach to) the requirements, see e.g. Grant Huscroft, "Reconciling Duty and Discretion: The Attorney in the Charter Era" (2009) 34:2 *Queen's LJ* 773.

12 Many of these proposed reforms are helpfully summarized in Bond, *supra* note 11 at 423-24.

13 Two exceptions are: Vanessa MacDonnell, "Foundation and Framework: How Unwritten Constitutional Principles Shape Political Decision-Making" (12 June 2019), online (blog): *IACL-AIDC Blog* <<https://blog-iacl-aidc.org/2019-posts/2019/6/12/foundation-and-framework-how-unwritten-constitutional-principles-shape-political-decision-making-bfa5x>> [<https://perma.cc/>

the *Charter*, and addresses the debates, critiques and proposed reforms in the scholarship relating to sections 4.1 and 4.2 only to the extent they weigh for or against this privileging of the *Charter*.

Second, I consider only the federal review and reporting requirements. The provincial attorneys general are also required to ensure that all relevant provincial government action respects the law, including the Constitution,¹⁴ and have adopted review procedures aimed at operationalizing this requirement.¹⁵ However, I am not aware of any province that has an equivalent of the federal review and reporting requirements addressed in this paper. If the review procedures adopted provincially also reflect the *Charter* focus adopted federally, either legally or (more likely) in practice, they should also be reformed, to address the Constitution broadly.

I. Diagnosing the Problem

This part of the paper diagnoses the problem, beginning with a description of the federal review and reporting requirements, including how they privilege the *Charter*.

A. Privileging the *Charter* in Federal Pre-Enactment Constitutional Review

The federal Minister's general legal duty to ensure that all federal government action respects the law, including the Constitution, is operationalized, as not-

G9G3-RLXJ] (suggesting that “the existing *Charter* vetting process . . . could be expanded to include unwritten constitutional principles”); Andrew Flavelle Martin, “The Attorney General’s Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada* (Attorney General)” (2019) 52:1 UBC L Rev 201 (suggesting, in passing, that the federal review and reporting requirements should be extended to the Constitution broadly, *ibid* at 226). A private Member’s bill introduced by former federal Minister of Justice Irwin Cotler in 2013 would have reformed the federal review and reporting requirements in various ways, including by expanding them beyond the *Charter* to the Constitution broadly: see Bill C-537, *An Act to ensure legislative compliance with the Canadian Bill of Rights and the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms*, 1st Sess, 41st Parl, 2013 (first reading 17 June 2013). The bill died on the order paper when Parliament was prorogued in September 2013.

14 See e.g. *Ministry of the Attorney General Act*, RSO 1990, c M17, s 5(b) (requiring the Attorney General of Ontario to ensure that the “administration of public affairs is in accordance with the law”); *Attorney General Act*, RSBC 1996, c 22, s 2(b) (imposing the same duty on the Attorney General of British Columbia).

15 See further, Patrick J Monahan & Marie Finkelstein, “The Charter of Rights and Public Policy in Canada” (1992) 30:3 Osgoode Hall LJ 501; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005) at 213-20.

ed, in several specific statutory duties. The first of these specific statutory duties is set out in section 4.1(1) of the *DOJ Act*. Section 4.1(1) provides that:

... the Minister shall ... examine ... 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 ... report any such inconsistency to the House of Commons at the first convenient opportunity.

This provision creates two interrelated statutory duties: first, a duty for the Minister to review all government bills, with an eye to ascertaining whether any part of them is “inconsistent” with the *Charter*; and second, a duty for the Minister to report any inconsistencies revealed during this review process to the House of Commons. These review and reporting requirements are triggered only for government bills (“Bill[s] introduced ... or presented ... by a [Crown] minister”). The Minister is not required to review for or report on *Charter* inconsistencies in private Members’ bills.¹⁶

A number of critiques have been levelled against section 4.1, both as it is framed and has been applied by successive federal Ministers.¹⁷ One of the most common criticisms has been that the provision has, as Kent Roach put it, “withered on the vine,” because successive federal Ministers have interpreted and applied it too deferentially, with the result that no *Charter* inconsistency has ever been reported to the House.¹⁸ The application of section 4.1 was also litigated in a recent court challenge launched by a former Department of Justice lawyer.¹⁹ This challenge — which ultimately failed — alleged that the standard that is being applied by federal Ministers in determining whether a government bill is inconsistent with the *Charter* — the “credible argument” standard²⁰ — is too low to satisfy the requirements of section 4.1. In rejecting

16 The review and reporting requirements in section 4.1(1) are supplemented by other statutory provisions that impose similar requirements for federal regulations. See e.g. *Statutory Instruments Act*, RSC 1985, c S-22, s 3 (especially s 3(2)(c), requiring the “Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, [to] examine ... [a] proposed regulation to ensure that ... it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the [*Charter*]”); and *DOJ Act*, *supra* note 3, ss 4.1(1)-(2) (triggering the Minister’s s 4.1 review and reporting duties for federal regulations that are not reviewed for *Charter* inconsistency under s 3 of the *Statutory Instruments Act*).

17 *Supra* note 11 (see the sources listed).

18 Roach, *supra* note 11 at 626.

19 *Schmidt v Canada (Attorney General)*, 2018 FCA 55 [*Schmidt*].

20 Under the “credible argument” standard, a government bill is “inconsistent” with the *Charter* — and hence a report to Parliament is required — only if there is no credible argument to support the bill’s constitutionality (*ibid* at para 4). *Schmidt* argued that a stricter standard should be applied; under this standard, a government bill would be “inconsistent” with the *Charter* — and hence a report to

this challenge, the Federal Court of Appeal held that the credible argument standard “is a reasonable reading of what this legislation requires.”²¹

The Trudeau government reformed the federal review and reporting requirements in 2019, augmenting them with a second specific statutory duty, set out in section 4.2(1) of the *DOJ Act*.²² Section 4.2(1) — which codified a practice first adopted by then Minister of Justice Jody Wilson-Raybould in 2015 — requires the Minister “for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown ... to ... table ... a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*.” Section 4.2(2) provides that the purpose of these “Charter statements” “is to inform members of the Senate and the House of Commons as well as the public of those potential effects.”²³

The key thing to note about sections 4.1 and 4.2, for the purposes of this paper, is that their review and reporting requirements relate to only one aspect of the Constitution: the *Charter*. Section 4.1(1) requires the Minister to examine all government bills for any “inconsisten[cies] with the purposes and provisions of the [*Charter*].” Similarly, section 4.2(1) requires the Minister to prepare statements that set out the “potential effects of [these] Bill[s] on the rights and freedoms that are guaranteed by the [*Charter*].” These provisions do not require the Minister to consider any other aspect of the Constitution, including the federal-provincial division of powers in the *Constitution Act, 1867* nor the Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. The *Charter*, only one aspect of the *Constitution Act, 1982*, and of the broader Constitution of Canada, is clearly privileged in these provisions, singled out for special treatment.²⁴

B. Why Privileging the *Charter* is Unjustified

The obvious question that emerges, once we identify how sections 4.1 and 4.2 privilege the *Charter* in federal pre-enactment constitutional review, is whether this privileging of the *Charter* is justified. This question has been largely neglected. The scholarship, and the historical record of the provisions, alludes to

Parliament would be required — if the bill is “more likely than not inconsistent” with the *Charter* (*ibid*).

21 *Ibid* at para 106.

22 *Supra* note 3, s 4.2.

23 *Ibid*.

24 For a response to a potential argument that this claim is overblown because there are other pre-enactment review requirements that extend to other parts of the Constitution, see Part III(A), *below*.

several justifications for privileging the *Charter*, but without addressing the issue explicitly or comprehensively. Accordingly, if the question of justification is understood in a descriptive sense, as a question about whether an attempt has been made to justify the *Charter* privileging in the provisions, the answer would be no. This part, therefore, approaches the question in a normative sense, considering whether the *Charter* privileging in the provisions *could* be justified — in other words, whether it is *justifiable*. This part of the paper argues that the answer is no, that there is no convincing justification for limiting the law’s review and reporting requirements in sections 4.1 and 4.2 to the *Charter*.

1) Addressing the Indirect Arguments for Privileging the *Charter*

One way that we can approach the question of whether it is justifiable for sections 4.1 and 4.2 to privilege the *Charter* is indirectly, by identifying the arguments that have been or could be offered for their review and reporting requirements, and then determining whether there is anything in these arguments that does or could justify limiting the requirements to the *Charter*. I pursue this line of enquiry in the current part. I conclude that there is nothing in the arguments for sections 4.1 and 4.2 that justifies their privileging of the *Charter*.

One caveat should be noted here. There have been serious concerns raised about whether, and how much, the benefits attributed to sections 4.1 and 4.2 have actually been achieved.²⁵ I assess some of these concerns below, in the context of a discussion of arguments that might be offered against my proposal to extend sections 4.1 and 4.2 beyond the *Charter* to the Constitution broadly.²⁶ For now, I will assume that the provisions do or could achieve the benefits attributed to them, and will focus on addressing whether there is anything in these arguments for the provisions that justifies limiting their review and reporting requirements to the *Charter*.

i) Compliance

One of the primary arguments that has been offered for the review and reporting requirements in sections 4.1 and 4.2 is that they will (or could) help to ensure greater compliance, by preventing or reducing *Charter* issues before laws are enacted, thereby obviating the need for judicial review after the fact.²⁷ This compliance-based argument for the provisions is reflected in

25 *Supra* note 11 (see the sources listed).

26 See Part III, *below*.

27 There is a danger that this review process will focus on whether a bill “is likely to survive judicial review,” neglecting what the Constitution “requires or permits.” See Vanessa MacDonnell, “The Civil Servant’s Role in the Implementation of Constitutional Rights” (2015) 13:2 Intl J Cont L 383 at 393.

the legislative record. For example, commenting on the introduction of section 4.1 in 1985, John Crosbie, then the federal Minister of Justice, noted that the provision “[imposes an] obligation on the Minister of Justice to examine regulations and Government Bills *to ensure they are consistent with the Charter*.”²⁸ This compliance-based argument for sections 4.1 and 4.2 is also addressed in the scholarship. For example, (now Justice) Grant Huscroft wrote that section 4.1 “is designed to promote the consistency of legislation with the *Charter*, the assumption being that the threat of a report of inconsistency will dissuade governments from proposing bills that are inconsistent with the *Charter*, and that if an inconsistent bill were to be introduced it would be either amended or defeated once the House were apprised of the inconsistency.”²⁹

There are two strands to this compliance-based argument for sections 4.1 and 4.2. The first strand of the argument emphasizes a process of *executive* review — an internal review process performed by the federal Minister and his or her delegates in the Department of Justice that operates to prevent or reduce *Charter* issues as government bills are being developed, before they are “introduced” or “presented” to the House of Commons. The assumption here is that sections 4.1 and 4.2 will (or could) help to ensure greater *Charter* compliance early in the federal law-making process because “the threat of a report of inconsistency [by the Minister] will dissuade governments from proposing bills that are inconsistent with the *Charter*.”³⁰ The second strand of the compliance-based argument for sections 4.1 and 4.2 emphasizes *legislative* review — a review process that involves the House, and even the broader public. The assumption here is that sections 4.1 and 4.2 will (or could) help to ensure greater *Charter* compliance even if the process of internal review falls short because a bill containing a *Charter* inconsistency “would be ... amended or defeated once the House were apprised of [it]” due to political pressure.³¹

There would seem to be two possible arguments that could be gleaned from the compliance-based argument for sections 4.1 and 4.2 that might be advanced to justify privileging the *Charter* in federal pre-enactment constitutional review. The first would be an argument that it is justifiable to privilege the *Charter* here because there is *no* reason to increase compliance with any other aspects of the Constitution. This argument can be dismissed out of hand. The federal Minister, as noted earlier, has a general legal duty to ensure

28 *House of Commons Debates*, 33-1, Vol 3 (27 March 1985) at 3422 [emphasis added].

29 Huscroft, *supra* note 11 at 776.

30 *Ibid.* See similarly Hiebert, *supra* note 11 at 10-11; Bond, *supra* note 11 at 421-22.

31 Huscroft, *supra* note 11 at 776.

that all federal government action respects the Constitution.³² This general legal duty — which, as noted, has been codified in statute³³ — is not limited to the *Charter*; it extends to the Constitution as a whole. It is also a basic requirement of the rule of law — a fundamental principle underlying the constitutional system in Canada — that “all government action must comply with the law, including *the Constitution*,” a requirement that is not limited to the *Charter*.³⁴

It might be argued in response that there is no need for *the Minister* to ensure compliance with the Constitution because judicial review is available for this purpose. Those accustomed to viewing the courts as the exclusive, or at least primary, “guardian of the Constitution” may find this argument attractive.³⁵ However, for those, like me, who understand the political (legislative and executive) and judicial branches to play a shared, complementary role in safeguarding the Constitution, this argument would be unconvincing for principled reasons.³⁶ The courts not infrequently invoke concerns about their institutional competence and democratic legitimacy in rejecting constitutional claims, in whole or in part; the view that the political branches should not worry about the Constitution at the pre-enactment stage — that they should “pass now, justify in court later” — would potentially leave the Constitution underenforced in such cases.³⁷ In addition, “the majority of legislation passed will not be litigated and therefore will not be subject to judicial review,” with the real risk that at least some (and perhaps many) constitutional infirmities will simply never be remedied in the courts.³⁸ In any case, an argument that judicial review is an available and preferable vehicle to address any constitutional issues would really be an argument against sections 4.1 and 4.2; it would not

32 *Supra* note 2 and accompanying text.

33 *DOJ Act*, *supra* note 3 and accompanying text.

34 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 71-72, 161 DLR (4th) 385 [emphasis added] [*Secession Reference*].

35 See e.g. *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, 169, 11 DLR (4th) 641 (referring to the courts as the “guardian of the Constitution”).

36 See further, Wright, *supra* note 2 at 131. For others that also advocate shared, complementary approaches, see e.g. Brian Slattery, “A Theory of the Charter” (1987) 25:4 *Osgoode Hall LJ* 701; Hiebert, *supra* note 11; Kelly, *supra* note 11; MacDonnell, *supra* note 27. Unlike some scholars (see e.g. Huscroft, *supra* note 11 at 778-82; Dennis Baker, *Not Quite Supreme: The Courts and Constitutional Interpretation* (Montreal & Kingston: McGill-Queen’s University Press, 2010)), I do not take this shared, complementary approach so far as to deny that the courts should have the final or authoritative word in interpreting and applying the Constitution (unless an exceptional provision like the s 33 notwithstanding clause is utilized). See Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “Charter Dialogue Revisited - Or ‘Much Ado About Metaphors’” (2007) 45:1 *Osgoode Hall LJ* 1 at 30-38 (where my co-authors and I address this issue).

37 Janet L Hiebert, “Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review” (2012) 58 *SCLR* (2nd) 87 at 103 (criticizing this view).

38 *Ibid* (making this point about the *Charter*).

be an argument for privileging the *Charter* in the provisions. It would provide an argument for repealing the provisions, not limiting the review and reporting requirements imposed by them to only one aspect of the Constitution.

The second argument that might be gleaned from the compliance-based argument for sections 4.1 and 4.2, and that might be advanced to justify privileging the *Charter* in federal pre-enactment constitutional review, is that there is *less* (not no) reason to worry about compliance with other aspects of the Constitution. The argument here might take several forms. One form of the argument might emphasize newness as a reason to think that compliance with the *Charter* is less likely. The argument here would be that, since the *Charter* was new, section 4.1 was necessary to help instil a new culture of rights in the federal government.³⁹ It seems possible that federal (and indeed all government) actors were less likely to respect the new *Charter* than other, older aspects of the Constitution (like the division of powers) in the years immediately after it was enacted; after all, even if they were inclined to respect the *Charter* enthusiastically (and there is some indication they were not),⁴⁰ they may have been uncertain or may have disagreed about its meaning. However, the *Charter* is now 38 years old, and so an argument from newness now seems difficult to sustain, whatever its initial merits. Moreover, an argument from newness would not explain or justify excluding the other aspects of the *Constitution Act, 1982* — including Aboriginal and treaty rights — from the scope of sections 4.1 and 4.2. After all, the *Charter* was added at the same time. In addition, it would not justify the continuing privilege given to the *Charter* in section 4.2, which was added in 2019.

Another form of this compliance-is-less-likely argument might involve an argument that compliance with the *Charter* is less likely, not due to its newness, but generally. There may well be aspects of the Constitution that are less likely to be neglected than others, due, among other things, to varying incentives and constitutional safeguards. Elsewhere, for example, I have argued that, in Canada, the intergovernmental apparatus operates as a “political safeguard of federalism” that prevents or limits some failures to respect the federal-provincial division of powers.⁴¹ This discussion of the political safeguards of

39 For shades of this argument, see e.g. Hiebert, *supra* note 11 at 7, 12.

40 See e.g. Mary Dawson, “The Impact of the Charter on the Public Policy Process and the Department of Justice” (1992) 30:3 Osgoode Hall LJ 595 at 596 (noting a “bureaucratic tendency to wish the Charter away” in the early years after its enactment); James B Kelly, “Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government” (1999) 42:4 Can Public Administration 476 at 493-94 (making a similar point).

41 Wade K Wright, “The Political Safeguards of Canadian Federalism: The Intergovernmental Safeguards” (2016) 36:1 NJCL 1.

federalism highlights a difference between the division of powers that may make it less likely to be neglected than the *Charter*: namely, that the division of powers confers various legislative powers *on the federal and provincial governments*, unlike the *Charter*, which confers rights and freedoms *on individuals* (and some disadvantaged groups). This is important because a government may often have more ability to check a government than individuals (or disadvantaged groups). Even so, the political safeguards of federalism are not completely reliable, and the same may well be true of other constitutional safeguards outside of the courts.⁴² Moreover, given the historical and ongoing oppression and neglect of Indigenous Peoples in Canada, it is hard to imagine a serious argument that *Charter* rights and freedoms are more likely to be neglected than Aboriginal and treaty rights.⁴³ In any case, there is no evidence in the legislative record that the privileging of the *Charter* in sections 4.1 and 4.2 reflects considered judgments about varying likelihoods of compliance. If the provisions were to be amended to reflect such judgments, careful study and a more fine-grained approach would be needed. In addition, it seems entirely possible — even likely — that this sort of careful study would reveal that some aspects of the Constitution are merely *less* likely to be neglected, *not* that they are *never* likely to be neglected — in which case, it is hard to see why those aspects of the Constitution should be excluded from the scope of sections 4.1 and 4.2 altogether. Sections 4.1 and 4.2 may have less of a compliance role to play in these situations, but they may nonetheless still have a role to play.

ii) Transparency and Accountability

A second argument that has been offered for the review and reporting requirements in sections 4.1 and 4.2 is that they will (or could) help to promote transparency and accountability, both to Parliament and the broader public. As with the compliance-based argument for the provisions, this transparency and accountability-based argument for the review and reporting requirements in the two provisions is reflected in the legislative record. For example, section 4.2(2) provides that the purpose of the *Charter* statements requirement introduced in 2019 “is to inform members of the Senate and the House of Commons as well as the public of [any] potential effects” that a government bill has on *Charter*-protected rights.⁴⁴ Similarly, the Department of Justice’s website indicates that “Charter Statements are a transparency measure intended to inform parliamentary and public debate on a bill and help increase awareness and understanding

42 *Ibid* at 67-71.

43 *TRC*, *supra* note 10 (providing an excellent overview of some of this historical and ongoing mistreatment).

44 *DOJ Act*, *supra* note 3, s 4.2(2).

of the Charter.²⁴⁵ As with the compliance-based argument, the transparency and accountability-based argument for the review and reporting requirements in sections 4.1 and 4.2 is also identified in the scholarship. For example, Kent Roach has argued that “the reporting requirement [in section 4.1] could provide for a more informed and vigorous public and Parliamentary debate about the potential *Charter* problems of proposed legislation.”²⁴⁶

Is there anything in this transparency and accountability-based argument for the provisions that would point to a justification for limiting the review and reporting requirements in sections 4.1 and 4.2 to the *Charter*? In my view, the answer is no. If the review and reporting requirements in the provisions increase transparency and accountability, promoting a more “informed and vigorous public and parliamentary debate,” it is hard to see why the *Charter* comes in for special treatment. Elsewhere, I have argued that political actors and the broader public play an important role in the intergovernmental apparatus that operates as a political safeguard of federalism that prevents or limits bills that fail to respect the federal-provincial division of powers.⁴⁷ This work suggests that there would be equal value in extending the review and reporting requirements in sections 4.1 and 4.2 beyond the *Charter* to other aspects of the Constitution, facilitating “a more informed and vigorous public and Parliamentary debate about the [*constitutional*] problems of proposed legislation.”

iii) Judicial Review

A third argument that has been offered for the review and reporting requirements in sections 4.1 and 4.2 is that they do or could facilitate the federal government’s response to later judicial review proceedings raising *Charter* issues. Janet Hiebert, for example, has argued that section 4.1 (and legislative rights review more broadly) may encourage legislative and executive actors “to anticipate possible Charter challenges and consciously develop a legislative record for addressing judicial concerns.”⁴⁸ This legislative record, suggests Hiebert, “may include policy objectives, consultations with interested groups, social-science data, the experiences of other jurisdictions with similar legislative initiatives, and testimony before parliamentary committees by experts and in-

45 See Government of Canada, “Charter Statements” (last modified 19 November 2020), online: *Department of Justice* <<https://www.justice.gc.ca/eng/csj-sjc/pl/charte-charte/index.html>> [<https://perma.cc/32LL-E8L5>].

46 Roach, *supra* note 11 at 626.

47 Wright, *supra* note 41.

48 Hiebert, *supra* note 11 at 10.

terest groups,” as well as “legislative preambles, which state the objectives and assumptions underlying the legislation.”⁴⁹

Again, there would seem to be nothing in this argument about judicial review that would point to a justification for limiting the review and reporting requirements in sections 4.1 and 4.2 to the *Charter*. The particular types of information that may be useful may vary, depending on the aspects of the Constitution involved, but there is no reason to think that, as a general matter, anticipating and developing a legislative record to address potential judicial concerns would not also have some value in cases dealing with other aspects of the Constitution, like the division of powers and Aboriginal and treaty rights. The courts regularly refer to the legislative record in assessing constitutional claims dealing with laws challenged on non-*Charter* grounds.⁵⁰ Indeed, the courts considered the legislative record in division of powers and other constitutional cases before the *Charter* was enacted in 1982.⁵¹

2) Addressing the Direct Arguments for Privileging the *Charter*

Another way that we can approach the question of whether it is justifiable for sections 4.1 and 4.2 to privilege the *Charter* is directly, by addressing the arguments that have been or could be offered for giving it special treatment. I pursue this line of inquiry in this part of the paper. Because the *Charter* focus of the provisions has not been justified explicitly or comprehensively, I extrapolate these arguments from the scholarship on, and historical record of, sections 4.1 and 4.2. I conclude that any arguments for the *Charter* privileging evident in sections 4.1 and 4.2 do not withstand critical scrutiny.

i) Path Dependency

One argument that is implied in the scholarship and historical record for privileging the *Charter* in sections 4.1 and 4.2 is a sort of path dependency argument. By path dependency, I mean the idea that historical choices influence, and perhaps constrain, present choices. This argument would ground the privileging of the *Charter* in sections 4.1 and 4.2 in the history of their review and reporting requirements. Section 4.1 was inspired by, and indeed

49 *Ibid.*

50 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 60-1 to 60-10.

51 See e.g. *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 438-39, 471-72, 68 DLR (3d) 452 (division of powers case citing a white paper and parliamentary debates); *Re Residential Tenancies Act*, [1981] 1 SCR 714 at 721-23, 123 DLR (3d) 554 (case under s 96, *Constitution Act, 1867* citing a law reform commission report and a green paper).

closely “mirrors,”⁵² section 3 of the *Canadian Bill of Rights*, which was enacted in 1960.⁵³ Section 3 requires the Minister to review federal bills for any inconsistencies with the rights and freedoms protected by the *Canadian Bill of Rights*, and to report any such inconsistencies to the House. The argument for privileging the *Charter* in section 4.1 — and now section 4.2 — might be that these provisions simply track section 3. Section 4.1 — and now section 4.2 — focus on the rights and freedoms protected by the *Charter*, this argument might go, because the provision that inspired section 4.1 — section 3 — focused on the rights and freedoms protected by the *Canadian Bill of Rights*.

The historical connection between section 3 of the *Canadian Bill of Rights* and section 4.1 — and in turn section 4.2 — may provide an *explanation* for why sections 4.1 and 4.2 privilege the *Charter*, but it is hard to see how it provides a *justification* for it.⁵⁴ It is understandable that section 3 focused on the *Canadian Bill of Rights*: it was contained within the *Canadian Bill of Rights*, and so understandably focused on the rights and freedoms that the *Canadian Bill of Rights* protects. But, as noted, sections 4.1 and 4.2 were enacted in 1985, in the wake of the enactment of the *Constitution Act, 1982*. The *Constitution Act, 1982* enshrined a new *Charter*, but it did much more; it also, for example, recognized and affirmed Aboriginal and treaty rights (section 35) and entrenched a new constitutional amending formula (Part V). The *Constitution Act, 1982* also included a provision — section 52 — that recognizes the supremacy of the “Constitution of Canada,” which explicitly extends beyond the *Constitution Act, 1982* to a variety of other constitutional instruments, including the *Constitution Act, 1867*, one of the foundational constitutional documents in Canada.⁵⁵ Sections 4.1 and 4.2 not only neglect the other aspects of the *Constitution Act, 1982*, they also neglect these other aspects of the Constitution of Canada.

A variation of this argument might be that section 3 and sections 4.1 and 4.2 both exemplify a particular concern for individual and group rights and freedoms, which somehow warrant special treatment. The idea here might be that other aspects of the Constitution of Canada — like the federal-provincial division of powers in the *Constitution Act, 1867* — do not warrant this sort of special treatment because (at least on one view) they involve legislative pow-

52 Bond, *supra* note 11 at 381.

53 *Canadian Bill of Rights*, SC 1960, c 44, s 3.

54 By an explanation, I mean a *factual* account of why something happened; by a justification, I mean a normative account of why something should (or should not) have happened in the way that it did.

55 For further discussion of the definition of “Constitution of Canada,” see the text accompanying notes 68 to 70, below.

ers, rather than individual and group rights and freedoms. This argument would seem to envision a sort of constitutional hierarchy, with the rights and freedom-conferring aspects of the Constitution — or perhaps even of the *Charter* more narrowly — treated as more important than other aspects of the Constitution. Such a hierarchy, however, has been rejected by the Supreme Court of Canada.⁵⁶ In addition, even if we bracket this concern about constitutional hierarchy, it is worth noting that the *Charter* is not the only aspect of the *Constitution Act, 1982* — or indeed the broader Constitution of Canada — that protects individual and group rights and freedoms. For example, section 35 of the *Constitution Act, 1982* — which is not part of the *Charter* — recognizes and affirms Aboriginal and treaty rights, as noted, and the *Constitution Act, 1867* protects educational rights (section 93) and language rights (section 133) as well. Section 25 of the *Charter* — which provides that the *Charter* “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” — seems to foreclose any argument that *Charter* rights are more important than Aboriginal and treaty rights. Moreover, even some aspects of the Constitution that do not protect rights directly can be understood to do so indirectly; for example, the division of powers can be understood as an indirect vehicle for Quebec to safeguard the rights of its unique (primarily Francophone) political community, and for all provinces to oppose interferences with individual rights more broadly.⁵⁷ Section 4.1 — and now section 4.2 — would thus seem to be underinclusive on this rights-based version of the argument as well.

ii) Risk Avoidance

Another argument that is implied in the scholarship and the historical record for privileging the *Charter* in sections 4.1 and 4.2 is risk avoidance. The argument here is that sections 4.1 and 4.2 are justified in privileging the *Charter* because there is a greater risk that the courts will accept a constitutional challenge involving the *Charter* than any other aspect of the Constitution. This argument would understand the two provisions to be a rational attempt by federal actors to engage in risk avoidance, by identifying and responding to this greater risk of loss in the courts. This argument differs from the argument discussed above about ensuring compliance, because the focus here is less on whether federal actors are likely to comply and more on how likely that *the courts* are to accept

56 See e.g. *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 2 (“[a]s the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions”).

57 See further, Wright, *supra* note 2 at 119-120.

a *Charter challenge* (although a lack of concern for compliance may increase losses in the courts).

This sort of risk avoidance argument for section 4.1 is suggested in the historical record. Janet Hiebert, for example, has linked the introduction of various new federal pre-enactment review procedures in the mid-1980s — including section 4.1 — with “[g]rowing concerns about how legislation would fare before the Supreme Court” under the *Charter*.⁵⁸ This sort of risk avoidance argument for section 4.1 is also suggested in the scholarship. Patrick Monahan and Marie Finkelstein, for example, seemed to suggest (in 1992, granted) that the “growing concerns” of federal actors highlighted by Hiebert were actually justified, because “[w]hereas prior to 1982, the risk of constitutional reversal in the courts was relatively limited, the enactment of the *Charter* has very substantially increased those risks.”⁵⁹

Does this risk avoidance argument justify the privileging of the *Charter* in sections 4.1 and 4.2? Again, in my view, the answer is no. The risk avoidance argument attributes one narrow, instrumental purpose to sections 4.1 and 4.2 — avoiding or mitigating the risk of a loss in the courts. In doing so, it gives little weight to the constitutional guarantees themselves, focusing instead on judicial responses to them. In addition, it gives little weight to some of the other benefits that do or could accrue when political and judicial actors play a shared, complementary role in interpreting and applying the Constitution — benefits that are captured in the arguments for sections 4.1 and 4.2 discussed earlier (ensuring greater compliance, promoting transparency and accountability, and facilitating judicial review).⁶⁰

In any case, this risk avoidance argument justifies the privileging of the *Charter* in sections 4.1 and 4.2 only if the risk is (sufficiently) greater than the courts will accept a constitutional challenge involving the *Charter* than another aspect of the Constitution. However, it is far from obvious how this risk should be assessed. For example, if we simply tally up the Supreme Court (and perhaps appellate and trial court) decisions that accept constitutional challenges under the *Charter* along with those decisions that accept constitutional challenges involving other aspects of the Constitution and then compare the numbers, we would likely conclude that there is a greater risk of loss under the *Charter* than under at least some other aspects of the Constitution, like the federal-provincial

58 Hiebert, *supra* note 11 at para 13.

59 Monahan & Finkelstein, *supra* note 15 at 505 [emphasis in original].

60 See Part I(B)(i), *above*.

division of powers.⁶¹ And yet, the *Charter* protects a large number of different rights and freedoms, unlike, say, section 35 of the *Constitution Act, 1982*, which is focused on Aboriginal and treaty rights, and so it is not obvious that we should focus on the simple numbers of losses. A different analysis — like one that, for example, focuses on *comparative rates* of loss — might reveal quite a different picture about the relative likelihood of loss in the courts.

Moreover, if the concern is risk avoidance — insulating federal laws from successful constitutional challenges — it is also far from obvious that a greater risk of loss under the *Charter* should be determinative, regardless of how it is determined. It would seem that we should be concerned about any sufficiently serious risk of loss under any aspect of the Constitution. After all, even if the risk of loss is higher under the *Charter* than under other aspects of the Constitution, the risk of loss may still be significant enough under other aspects of the Constitution to warrant concern. It is noteworthy, in this respect, that the courts have accepted a variety of constitutional challenges involving aspects of the Constitution other than the *Charter* in recent years, including the federal-provincial division of powers,⁶² Aboriginal and treaty rights,⁶³ and the amendment provisions in Part V of the *Constitution Act, 1982*.⁶⁴

In addition, even if the risk is quite low that the courts will accept a constitutional challenge involving some aspect of the Constitution for a period of time, this of course can change. The levels of caution that the courts adopt in response to *Charter* challenges can vary over time, just like the levels of caution that the courts adopt in response to challenges involving other aspects of the Constitution can vary over time. This is not merely a hypothetical scenario; it has happened with the federal-provincial division of powers. In the 1990s and 2000s, the Supreme Court seemed quite unreceptive to division of powers challenges that attempted to assert limits on federal and provincial jurisdiction, but in more recent years, the Court has been somewhat more receptive to such

61 By way of example, in 2016, the Supreme Court released twelve constitutional decisions — ten dealing with the *Charter* and two dealing with the division of powers; the constitutional claim succeeded in both of the two division of powers claims, but it succeeded in eight of the *Charter* claims. See further Benjamin L. Berger, Sonia Lawrence & Spiros Vavougiou, “Constitutional Cases 2016: An Overview” (2017) 81 SCLR (2nd) x1i at x1i-x1ii (listing the various decisions).

62 See e.g. *Reference re Assisted Human Reproduction Act*, 2010 SCC 61; *Reference re Securities Act*, 2011 SCC 66; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23; *Reference re Environmental Management Act*, 2020 SCC 1.

63 See e.g. *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40; *Tsleil-Waututh Nation v Canada (Attorney General)* (2018), [2019] 2 FCR 3, 2018 FCA 153.

64 *Reference re Senate Reform*, 2014 SCC 32; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Supreme Court Reference*].

claims, accepting several division of powers challenges to federal and provincial laws.⁶⁵ A justification for privileging the *Charter* in sections 4.1 and 4.2 that is grounded in assumptions about comparative risk of loss in the courts is not only unprincipled, but is itself risky.

II. Proposal to Address the Problem

The previous part of this paper canvases the arguments that have been or could be offered for privileging the *Charter* in the pre-enactment review and reporting requirements imposed by sections 4.1 and 4.2. It concludes that none of these arguments is convincing, and that the privileging of the *Charter* in these provisions is therefore unjustified. The question that then emerges is what is to be done about this problem.

The proper response to the unjustified privileging of the *Charter* in sections 4.1 and 4.2 is to extend the two provisions beyond the *Charter* to the broader Constitution as a whole.⁶⁶ The provisions could be amended as follows:⁶⁷

4.1 (1) “Subject to subsection (2), the Minister shall ... 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 Constitution of Canada** and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.”

4.2 (1): “The Minister shall, for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown, cause to be tabled, in the House in which the Bill originates, a statement that sets out:

(a) the power or powers granted to Parliament in the Constitution of Canada to enact the Bill; and

⁶⁵ See *supra* note 62; Wade K Wright, “Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review” (2016) 72 SCLR (2nd) 365.

⁶⁶ As noted earlier, while the privileging of the *Charter* identified in this paper has largely been neglected, there have been occasional suggestions, from scholars and policymakers, to extend the federal pre-enactment constitutional review requirements beyond the *Charter*. See *supra* note 13.

⁶⁷ The revised text has been bolded. I have not included revised texts for ss 4.1(2) or 4.2(2). These provisions would also need to be amended, to reflect the revisions to ss 4.1(1) and 4.2(1).

(b) the **other** potential effects of the Bill on the **powers, duties**, rights and freedoms that are guaranteed, **recognized or affirmed** by the **Constitution of Canada.**”

There are two key changes to note here. First, sections 4.1 and 4.2 would be extended beyond the *Charter* to the broader Constitution of Canada, thereby addressing the unjustified privileging of the *Charter* identified in this paper. By the Constitution of Canada, I mean the Constitution of Canada as defined in section 52(2) of the *Constitution Act, 1982*. The definition of the Constitution of Canada in section 52(2) includes various constitutional documents, including the *Constitution Act, 1867* (which, as noted earlier, includes the federal-provincial division of powers) and the *Constitution Act, 1982* (which, as also noted earlier, includes the *Charter*, but also the Aboriginal and treaty rights recognized and affirmed by section 35).⁶⁸ The definition in section 52(2) is also not exhaustive; the Supreme Court of Canada has said that the definition includes both written aspects (like parts of the *Supreme Court Act*)⁶⁹ and unwritten aspects (like unwritten constitutional principles)⁷⁰ that are not explicitly included in the definition. For clarity, a new subsection should be added along with the revised sections 4.1 and 4.2 that defines the term the Constitution of Canada, by tying it to the definition in section 52(2).

Second, new language would be added to section 4.2(1) that expands its *constitutional* statement (it would no longer be merely a *Charter* statement), by requiring it to set out “the power or powers granted to Parliament in the Constitution of Canada to enact the Bill,”⁷¹ and “other potential effects ... on the powers [and] duties” (and not merely the “rights and freedoms”) in “the Constitution of Canada.” This new language would respond to the expansion of the statement beyond the *Charter* to the broader Constitution, which includes not merely “rights and freedoms,” but also various powers and dut-

68 *CA 1982, supra* note 2, s 52(2) defines the Constitution of Canada to “include[]: (a) the *Canada Act 1982*, including this Act [the *Constitution Act, 1982*]; (b) the Acts and orders referred to in the schedule [which includes the *Constitution Act, 1867* and various other documents]; and (c) any amendment to any Act or order referred to in ... (a) or (b).”

69 *Supreme Court Act*, RSC 1985, c S-26; see also *Supreme Court Reference, supra* note 64, holding that the provisions of the *Supreme Court Act* relating to the composition of the Court are subject to the unanimity amending formula, and explicitly identifying s 4(1) (requiring nine judges), s 5 (outlining who may be appointed) and s 6 (requiring three judges from Quebec) (*ibid* at paras 73-74, 91-93); the Court further held that the provisions of the *Supreme Court Act* relating to the “other essential features” of the Court are subject to the seven-fifty amending formula, without mentioning particular provisions (*ibid* at paras 73-74, 94).

70 See e.g. *Secession Reference, supra* note 34 at paras 32, 49-82.

71 The requirement is to state the power or powers “to enact” a bill. The analysis would engage those doctrines and principles involved with a *validity* analysis under the division of powers.

ies. The federal-provincial division of powers, for example — which would be caught by the proposed changes — both empowers (conferring certain legislative powers on the federal and/or provincial orders of government) and also, at least on the conventional view, disempowers (denying certain legislative powers to one order of government). The new language relating to power(s) granted to Parliament recognizes this power-conferring feature of aspects of the Constitution of Canada — and more fundamentally, that federal laws enacted by Parliament without the requisite legislative power are “to the extent of the inconsistency, of no force or effect.”⁷² The language mimics a requirement in the United States, first implemented in 2011, that all bills introduced in the United States House of Representatives must include a “constitutional authority statement,” which must “cite[] as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill.”⁷³

One final point should also be noted about this proposal. The proposal may highlight the need for changes to the existing federal pre-enactment constitutional review process. For example, and perhaps in particular, the expansion of sections 4.1 and 4.2 to include the Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982* may highlight the need for improvements in the federal pre-enactment constitutional review process when it implicates the constitutional rights, powers and interests of Indigenous Peoples. There is some work that addresses this issue,⁷⁴ but if my proposal was taken up, Indigenous Peoples should be consulted about whether and how to implement it, and these consultations should address how to ensure the inclusion of Indigenous voices in applying it.

III. Addressing Potential Objections To the Proposal

Part I of the paper identifies and responds to one potential objection to the proposal to expand sections 4.1 and 4.2 beyond the *Charter* to the Constitution: that judicial review is already available to ensure constitutional compliance.⁷⁵ This part identifies and responds to other possible objections to the proposal.

72 *CA 1982*, *supra* note 2, s 52(1).

73 US, Congressional Research Service Reports, *Constitutional Authority Statements and the Powers of Congress: An Overview* (R44729) (11 March 2019) at 11. This requirement is not imposed by statute, but rather a congressional rule. See US, House of Representatives Committee on the Rules, 116th Cong, *Rules of the House of Representatives*, Committee Print (2019) at rule XII clause 7.

74 See e.g. James (Sákéj) Youngblood Henderson, “Aboriginal Attorney General” (2003) 22 Windsor YB Access Just 265 (recommending the creation of an “Aboriginal Attorney General,” tasked, among other things, with assessing federal laws for inconsistencies with Aboriginal and treaty rights); *TRC*, *supra* note 10 at Call to Action 51. See also the text accompanying note 90.

75 See the text accompanying notes 35-38.

In doing so, it also fleshes out further what would be gained by adopting the proposal.

A. Impeding Federal Lawmaking

One potential objection to the proposal — particularly the new requirement for the Minister to indicate the power(s) granted to Parliament in the Constitution to enact a bill — may be that it would impose an undue burden on the Minister, and thus unduly impede federal lawmaking. However, it is to be hoped that, in keeping with the Minister's duty to ensure that all federal government action respects the Constitution, a process is already in place that determines whether Parliament has the legislative power under the division of powers to enact a bill. If it does not exist, this would be a serious cause for concern. If it does exist, this new requirement would merely bring this determination out into the open. In addition, insight can be gleaned here from the experience in the United States. As noted, all bills introduced in the United States House of Representatives must include a "constitutional authority statement," which must "cite[] as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill."⁷⁶ In many cases, the constitutional authority statements offered in the House are quite basic, saying something to the effect that "[t]his bill is enacted pursuant to the power granted to Congress under Article I, Section 8, Clause 2 of the United States Constitution."⁷⁷ A similar requirement to state the power(s) granted to Parliament to enact a bill would not have to be any more onerous in Canada (although it could be, if the legislative and/or ministerial will was there to make it so, legislatively and/or in practice).

A related concern might be that this new requirement to indicate the power(s) granted to Parliament to enact a bill could impede federal lawmaking because federal Ministers — and the federal government more broadly — might become unduly cautious or defensive, due to concerns about how this aspect of the new constitutional statement could be invoked and treated in future constitutional challenges by litigants and the courts. The word "unduly" in the previous sentence is doing a good deal of work; after all, if the caution or defensiveness reflects legitimate constitutional concerns, we might question whether it is undue. In addition, this requirement is merely an extension of an existing requirement for the Minister to provide a *Charter* statement, and I am

76 Congressional Research Service Reports, *supra* note 73 at 11.

77 This example is cited in Hanah Metchis Volokh, "Constitutional Authority Statements in Congress" (2013) 65:1 Fla L Rev 173 at 174. Some Members of the House opt to provide more detailed statements (*ibid*).

not aware of any evidence that demonstrates that undue caution or defensiveness has resulted federally from this existing statutory duty. In any case, while a detailed consideration of how the courts do, and should, treat constitutional interpretations by legislative and executive actors is beyond the scope of this paper,⁷⁸ my own view is that the courts should be cautious in attributing legal weight or consequences to these sorts of constitutional statements in constitutional challenges. As currently framed, *Charter* statements do seem to anticipate — and attempt to respond to — this sort of concern about future use and impact. Every *Charter* statement includes the following explicit caveat:

A Charter Statement is ... not intended to be a comprehensive overview of all conceivable Charter considerations. Additional considerations relevant to the constitutionality of a bill may also arise in the course of Parliamentary study and amendment of a bill. A Statement is not a legal opinion on the constitutionality of a bill.⁷⁹

The message seems clear: that all interested parties, including litigants and courts in future constitutional challenges, should be cautious in attributing legal weight or consequences to *Charter* statements. This cautionary language could be — and likely would be — maintained if the proposal described in this part was taken up. The two references to the *Charter* could simply be replaced with the word “constitutional.”

B. Redundancy

Another potential objection to the proposal might be that it is redundant. The argument here would be that the proposal is unnecessary, because the Minister is already under a legal duty to ensure that all federal government action respects the Constitution as a whole, and there are already federal pre-enactment constitutional review requirements in place that satisfy this legal duty. The privileged treatment of the *Charter* in sections 4.1 and 4.2, this argument might go, is thus a mere formality.

It is true, as noted earlier, that the Minister has a general legal duty to ensure that all federal government action respects not just the *Charter*, but the entire Constitution.⁸⁰ It is also true that there are some requirements in place that help to operationalize this legal duty. For example, and in particular, federally, all proposals to prepare a government bill must be approved by the cabi-

78 I have considered the issue in other work. See, in particular, Wright, *supra* note 65.

79 See e.g. Government of Canada, “Bill C-6: An Act to amend the Criminal Code (conversion therapy)” (last modified 28 October 2020), online: *Department of Justice* <<https://www.justice.gc.ca/eng/csj-sjc/pl/charte-charte/c6b.html>> [<https://perma.cc/P57R-LAN7>].

80 See the text accompanying notes 2-3.

net. This approval process involves a Memorandum to Cabinet, which must include “an analysis of the Charter *and other constitutional implications* of any ... proposal.”⁸¹ These “other constitutional implications” include a consideration of “whether the proposal raises division of powers issues that are likely to be sensitive in the current federal-provincial context”⁸² as well as the impact of the proposal on Aboriginal and treaty rights.⁸³ Similarly, all private Members’ bills — which do not fall within the scope of the review and reporting requirements imposed on the Minister by sections 4.1 and 4.2, because they are not “introduced ... or presented ... by a minister of the Crown” — must be assessed by the House of Commons’ Subcommittee on Private Members’ Business; the Subcommittee’s assessment must consider various “votability criteria,” including whether a bill “clearly violate[s] the *Constitution Acts, 1867 to 1982*.”⁸⁴ None of these requirements are limited to the *Charter*, unlike sections 4.1 and 4.2. We might conclude therefore that there are already federal pre-enactment constitutional review requirements in place that mimic the proposal in this paper to extend sections 4.1 and 4.2 to the Constitution, rendering my proposal redundant.

However, this sort of redundancy objection would, in my view, be unfounded. Some form of federal pre-enactment constitutional review relating to other aspects of the Constitution clearly occurs, but we know very little about what this review process involves, beyond the formal requirements referred to in the previous paragraph. This is because successive federal Ministers — and the federal government more broadly — have chosen to conduct this

81 Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2nd ed (Ottawa: Government of Canada, 2001) at 95 [emphasis added].

82 *Ibid.*

83 The *Guide to Making Federal Acts and Regulations*, *supra* note 81 — which sets out Privy Council guidelines relating to the federal law-making process — does not explicitly require Aboriginal and treaty rights to be considered in a Memorandum to Cabinet. However, the Guide does identify Aboriginal and treaty rights in a discussion of the constitutional constraints on law-making powers (*ibid* at 7, 34), and so it seems clear that they are intended to be captured by the reference to “other constitutional implications.” In addition, it would appear that a Memorandum to Cabinet must also take into account: 1) the “Cabinet Directive on the Approach to Modern Treaty Implementation” (last updated July 13, 2015), online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/en/g/1436450503766/1544714947616>> [<https://perma.cc/T2R6-DPAE>]; and 2) the consultation and accommodation guidelines prepared by the Department of Indigenous and Northern Affairs Canada (Government of Canada, “Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult” (March 2011), online: *Indigenous and Northern Affairs Canada* <https://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp3_2_1> [<https://perma.cc/UTD9-ZR7C>]).

84 Audrey O’Brien & Marc Bosc, eds, *House of Commons Procedure and Practice*, 2nd ed (Cowansville: Thomson Reuters, 2009) at 1127. See further, Charlie Feldman, “Legislative Vehicles and Formalized Charter Review” (2016) 25:3 *Const Forum Const* 79 at 81-82.

review process mostly “behind closed doors,” largely shielding the process itself and the results of it with claims of solicitor-client privilege and cabinet privilege.⁸⁵ Some intrepid scholars (like Janet Hiebert and James Kelly) and litigants (like Edgar Schmidt) have managed to reveal important details about the review process for the *Charter*.⁸⁶ And yet, the review process for other aspects of the Constitution remains underexplored, and hence more of a mystery. Accordingly, we do not know whether the review process applied by the Minister — and the federal government — for the *Charter* truly mimics the review process for other aspects of the Constitution to any significant degree in practice. Further complicating matters, the review process itself may fluctuate in response to new developments. For example, we do not know whether or how the Supreme Court of Canada’s decision in 2018 in *Mikisew Cree First Nation v. Canada*⁸⁷ — which held that the Crown’s duty to consult Indigenous Peoples before taking action that may adversely affect their recognized or asserted Aboriginal and treaty rights does not apply to the law-making process — has impacted or might impact the review process in the Aboriginal and treaty rights context.⁸⁸ However, even if the review processes for the various aspects of the Constitution are similar, it is hard to see how this similarity supports the privileging of the *Charter* in sections 4.1 and 4.2. If anything, it suggests that there would be little disruption involved if the review requirements were to be extended in keeping with my proposal.

In any case, sections 4.1 and 4.2 do not impose only *review* requirements. They also impose two *reporting* requirements on the Minister — one to report any *Charter* “inconsistenc[ies]” revealed by the review process to the House (section 4.1), and the other to prepare a *Charter* statement that sets out the potential “effects” of a bill on the *Charter* (section 4.2). These two reporting requirements are limited to the *Charter*; there is no equivalent for other aspects of the Constitution.⁸⁹ As a result, the Minister is not (clearly)

85 Roach, *supra* note 11 at 603-04. See also Hiebert, *supra* note 11 at 8; Bond, *supra* note 11 at 382-83.

86 Hiebert, *supra* note 11; Kelly, *supra* note 15; Schmidt, *supra* note 19.

87 2018 SCC 40.

88 This is not addressed in the documents referred to in *supra* note 83.

89 It might be argued that a broader reporting requirement is implied, perhaps by the Minister’s general legal duty to ensure that all federal government action respects the law, or by the *DOJ Act* — particularly if, as Andrew Flavelle Martin and others have argued, the Minister is understood to be the legal adviser to the House of Commons (or Parliament more broadly) and not only the federal Crown. See Martin, *supra* note 13; see also Roach, *supra* note 11 at 640. However, even though there is much to be said for the argument that the Minister is also a legal adviser to the House, this view does not seem to be shared by the relevant federal actors or (some of) the courts. See Martin, *supra* note 13 (describing — and criticizing — the views of both). Hence, to be accepted, a broader reporting requirement would likely need a clear(er) statutory foundation.

required to report any inconsistencies revealed by any non-*Charter* federal pre-enactment constitutional review process to the House, and the *Charter* statement does not extend — as the name suggests — beyond the *Charter* to the broader Constitution. The proposal offered here would thus not be redundant.

Finally, even if there were redundancy, in whole or in part, in the review and reporting requirements as they operate in practice, there would remain an expressive argument against sections 4.1 and 4.2, as currently framed. Sections 4.1 and 4.2 impose review and reporting requirements that, on their face, are limited to the *Charter*. In doing so, they suggest, whether intentionally or not, that the *Charter* somehow warrants special treatment by the Minister during federal pre-enactment constitutional review. The neglect of Aboriginal and treaty rights in sections 4.1 and 4.2 is particularly striking in this respect. After all, as noted, section 4.1 was enacted in 1985, in the wake of the enactment of section 35 of the *Constitution Act, 1982*, which recognized and affirmed Aboriginal and treaty rights at the same time as it entrenched a new *Charter*. Moreover, section 4.2 was enacted in 2019, four years after the release of the Truth and Reconciliation Commission's Final Report, which documented the oppression and neglect of Indigenous Peoples in Canada, and called upon the federal government, among other things, "to develop a policy of transparency by publishing the legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights" (Call to Action 51).⁹⁰ By privileging the *Charter*, sections 4.1 and 4.2 convey the message, however unintentionally, that the unique rights of Indigenous Peoples need not be taken as seriously as the *Charter* — an idea that has a troubling lineage, and troubling discriminatory connotations. The proposal would address, at least in part, this expressive argument against sections 4.1 and 4.2, by expanding their requirements beyond the *Charter* to the Constitution of Canada, which includes the Aboriginal and treaty rights recognized and affirmed by the *Constitution Act, 1982*.⁹¹ The proposal would also go some (but admittedly not all) of the way towards implementing Call to Action 51, in particular by requiring the broader *constitutional* statements under section 4.2 to describe the "potential effects" of any bill on the Constitution of Canada — which, again, includes Aboriginal and treaty rights.

90 See *TRC*, *supra* note 10.

91 As I note earlier, if this proposal was to be taken up, Indigenous Peoples should be consulted about it. See the text accompanying note 74.

C. Repeal Not Revise

Another potential objection to the proposal to expand sections 4.1 and 4.2 beyond the *Charter* to the Constitution as a whole might be an argument that the proper solution to the privileging of the *Charter* in the provisions is not to revise the provisions, but rather to repeal them. The argument here might be that sections 4.1 and 4.2 serve no or little useful role, and thus that it would be a waste of time for the federal government to devote time to revising the two provisions as proposed.

There have been, as noted earlier, a number of critiques levelled against section 4.1, both as it is framed and has been applied by successive federal Ministers.⁹² For example, as noted earlier, Kent Roach has argued that section 4.1 has not lived up to its potential to ensure greater compliance with the *Charter* and to promote transparency and accountability because no Minister has ever reported an inconsistency with the *Charter* to the House.⁹³ Jennifer Bond has gone even further, arguing that, in some cases, the review and reporting requirements contemplated by the provision have been used by federal government actors to *impede* transparency and accountability — providing a form of “political cover” that uses the fact of review and the lack of a report to deflect legitimate constitutional critique while simultaneously avoiding substantive engagement with the critique.⁹⁴

The critiques levelled against section 4.1 are serious ones, and ought to be taken seriously, including in any future reform of sections 4.1 and 4.2. It is beyond the scope of this paper to address the substance of these critiques, and any reforms that could — and should — be pursued to address them. This paper is concerned with the “what,” not the “how,” of sections 4.1 and 4.2. My primary concern, in keeping with this focus, is thus with whether the critiques of sections 4.1 and 4.2 undermine my proposal, because they might support an argument for repealing the provisions rather than revising them along the lines that I propose. My view is that they do not.

It is important to note that the most serious critiques of section 4.1 pre-date section 4.2. There has been little scholarship that considers section 4.2, including whether it might address or mitigate the critiques levelled against section 4.1 — which is perhaps unsurprising, as section 4.2 is fairly new (as noted, although the provision codifies a practice that was first adopted in

92 See *supra* note 11.

93 See *supra* note 18 at 626 and accompanying text.

94 Bond, *supra* note 11 at 379.

2015, it was enacted in only 2019).⁹⁵ However, as framed and/or applied, section 4.2 may go *some* of the way towards addressing *some* of the critiques of section 4.1. For example, by identifying the *Charter* “effects” of all government bills, the *Charter* statements required by section 4.2 may, as then Minister Jody Wilson-Raybould claimed in 2018, “highlight for public and parliamentary consideration and debate the key *Charter* rights and freedoms that are engaged in ... legislative initiatives”⁹⁶ — compensating, at least in part, for the lack of reporting under section 4.1. Section 4.2, and the *Charter* statements being issued under section 4.2, are ripe for attention in the scholarship. For now, the key point is that, to the extent that section 4.2 *does* address or mitigate the critiques levelled against section 4.1, this would weigh against an argument that it would be a waste of time to broaden the provisions as I propose.

In addition, even if — as seems possible, even likely — section 4.2 does not completely address some or all of the criticisms levelled against section 4.1, it is important to note that the critics do not deny that the provision *could* — and to some extent *does* — still play a useful role. Indeed, some of the chief critics of section 4.1 — like Kent Roach, Janet Hiebert and Jennifer Bond — also seem to be strong believers in the provision’s *potential* to achieve some or all of the benefits referred to earlier: ensuring greater compliance, promoting transparency and accountability, and facilitating judicial review.⁹⁷ Moreover, despite their reservations about how section 4.1 is currently framed and/or applied, Hiebert and Bond appear to accept that the provision still achieves at least some of its benefits some of the time.⁹⁸ Even those who seem more skeptical of section 4.1 — like Grant Huscroft — also appear to accept that the provision can achieve some of these benefits some of the time.⁹⁹

Finally, and related to the previous point, those — like Hiebert and Bond — who critique section 4.1 do not appear to support its repeal, but rather its reform. They critique the provision, not because they believe that it does or could play no useful role, and so should be repealed, but because they believe it

95 See the text accompanying notes 22-23.

96 The Honourable Jody Wilson-Raybould, “Patriation, the Recognition of Rights and Reconciliation” (2017) 49:1 *Ottawa L Rev* 59 at 85 [emphasis in original].

97 Roach, *supra* note 11 at 623-26; Hiebert, *supra* note 11 at 3-19; Hiebert, *supra* note 37 at paras 27-30; Bond, *supra* note 11 at 389-90.

98 See e.g. Hiebert, *supra* note 11 at 7, 13; Hiebert, *supra* note 37 at para 10; Bond, *supra* note 11 at 421-22 — all suggesting that section 4.1 may ensure greater compliance *to some extent*.

99 Huscroft, *supra* note 11 at 794-95 (arguing that s 4.1 helps ensure greater compliance through executive review — and not, as some suggest, or prefer, through legislative review).

is not living up to its full potential.¹⁰⁰ Similarly, even those who seem somewhat more skeptical of section 4.1, like Huscroft, do not advocate for its repeal; they are simply skeptical of some of the reforms — and more optimistic arguments — offered by others.¹⁰¹

D. Competence

Another potential objection to the proposal to expand sections 4.1 and 4.2 beyond the *Charter* to the Constitution as a whole — and the last that I will address in this paper — would invoke concerns about competence. The argument here might be that the various actors involved in operationalizing sections 4.1 and 4.2 would lack the competence to implement the proposal, because they lack the competence to interpret and apply some or all of the aspects of the Constitution that are currently excluded from the scope of sections 4.1 and 4.2 — namely, everything but the *Charter* (which we can call the excluded aspects of the Constitution, for ease of reference).

Sections 4.1 and 4.2 — and the arguments for them — engage various actors, including members of the executive branch, the legislative branch, and even the broader public. However, as others have noted, the federal pre-enactment constitutional review process — including the review and reporting processes envisioned by sections 4.1 and 4.2 — is dominated by the Minister (upon whom the requirements in sections 4.1 and 4.2 are imposed) and the government lawyers in the Department of Justice that help the Minister satisfy their requirements.¹⁰² We might think that other actors (for example, in the legislative branch) should play a larger role, but this is simply not the current reality.¹⁰³ Accordingly, in assessing this argument about a lack of competence, we should focus on whether the Minister — and the government lawyers that work under the Minister — lack the competence to interpret and apply some or all of the excluded aspects of the Constitution.

We face several challenges in assessing an argument that the Minister and government lawyers would lack the competence to implement the proposal be-

100 Hiebert, *supra* note 37 at paras 31-39 (offering various proposed reforms to s 4.1); Bond, *supra* note 11 at 421-24 (rejecting repeal). Compare Roach, another critic-defender of section 4.1, who argues that s 4.1 should be repealed if anything can pass muster under it, but who then describes and defends a variety of proposed reforms to make it more robust. See Roach, *supra* note 11 at 623-6, 632.

101 Huscroft, *supra* note 11 at 791-95 (critiquing several reforms proposed by Kent Roach).

102 See e.g. MacDonnell, *supra* note 27 at 384, 390-92; Hiebert, *supra* note 11 at 8-13, 15; Kelly, *supra* note 11 at 7-9, 17-18, 225-38.

103 See e.g. Hiebert, *supra* note 11 at 3-19 (arguing for a larger role for Parliament but acknowledging that the current process is dominated by the executive).

cause they lack the competence to interpret and apply the excluded aspects of the Constitution. First, we simply do not know enough about how the Minister and the government's lawyers currently approach these excluded aspects of the Constitution. The federal government, as noted, has chosen to conduct the pre-enactment constitutional review process largely behind closed doors, and the work that does look at how the executive and legislative branches approach the Constitution has focused largely on the *Charter*.¹⁰⁴ Second, even if we could overcome these issues and undertake an examination, we would have to focus on a variety of different constitutional provisions and issues, which would invariably raise their own unique considerations. Even so, there are good reasons to doubt that such an examination would support an argument that the Minister and government lawyers lack the competence to interpret and apply some or all of the excluded aspects of the Constitution.

Bearing the challenges referred to in the previous paragraph in mind, there are two key concerns that might arise when we think about whether the Minister and government lawyers would lack the competence to implement the proposal, due to a lack of competence to interpret and apply some or all of the excluded aspects of the Constitution. First, we might be concerned that the Minister and government lawyers would lack the *motivation* (for individual or institutional reasons) to consider the excluded aspects of the Constitution. This is not something that can or should be dismissed outright as a concern. The motivations that exist to consider or value different aspects of the Constitution may vary, including over time, as noted earlier.¹⁰⁵ The Minister (who is a member of cabinet, and also an elected parliamentarian) may also have different motivations than government lawyers (who are not members of cabinet or elected).¹⁰⁶ However, a requirement to review and report on all aspects of the Constitution may counteract (at least some of) the lack of motivation that may exist to consider or value all aspects of the Constitution. In addition, any concerns about unequal motivation could be addressed by accompanying institutional changes aimed at counteracting these inequalities.¹⁰⁷

Second, we might be concerned that the Minister and government lawyers would lack the *knowledge or expertise* to consider the excluded aspects of the

104 See the text accompanying note 85.

105 See the text accompanying note 41.

106 MacDonnell, *supra* note 27 at 392; Wright, *supra* note 2 at 127.

107 See e.g. James B Kelly & Matthew A Hennigar, "The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights" (2012) 10:1 Intl J Const L 35 at 48-50 (arguing for the separation of the offices of the Attorney General (AG) and the Minister of Justice, making the AG — who would not be a full member of cabinet — responsible for constitutional advice and the Minister responsible for legal policy).

Constitution. Again, this is not something that can or should be dismissed outright as a concern. Here again, the knowledge or expertise that may exist to consider different aspects of the Constitution may vary, including over time. For example, the Minister and/or government lawyers may lack a thorough appreciation of the Indigenous cultures, languages, worldviews and legal traditions that are engaged in Aboriginal and treaty rights cases.¹⁰⁸ In addition, the levels of knowledge and expertise between the Minister and government lawyers may vary; the Minister is invariably a lawyer, but he or she may not always be steeped in the finer details of constitutional law. However, the Minister has a wealth of legally-trained government lawyers with expertise in constitutional law, and so it seems unlikely that there would be a complete lack of knowledge or expertise within the federal government to address the excluded aspects of the Constitution.¹⁰⁹ In any case, if such a dearth of knowledge or expertise did actually exist federally, this would (or should) be cause for alarm — and the proposal may well provide the impetus to address the problem, helping the federal government to build its capacity in these areas going forward.

Conclusion

This paper addresses an underexamined feature of federal pre-enactment constitutional review: that the review and reporting requirements imposed by sections 4.1 and 4.2 of the *DOJ Act* privilege one aspect of the Constitution, the *Charter*. It argues that this privileging of the *Charter* is unjustified, both in the sense that it has not been justified and that it cannot be justified. The paper then offers a proposal to address this unjustified privileging of the *Charter* — statutory amendments that would expand sections 4.1 and 4.2 beyond the *Charter* to the broader Constitution of Canada. The amendments would require the Minister to consider all aspects of the Constitution, including the federal-provincial division of powers and Aboriginal and treaty rights, in satisfying the review and reporting requirements. The amendments would include a new requirement that the Minister identify the power(s) granted to Parliament in the Constitution to enact a Bill. These amendments would address one unjustified feature of federal pre-enactment constitutional review — the privileging of the *Charter* in sections 4.1 and 4.2.

108 See further, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

109 MacDonnell, *supra* note 27 at 404.