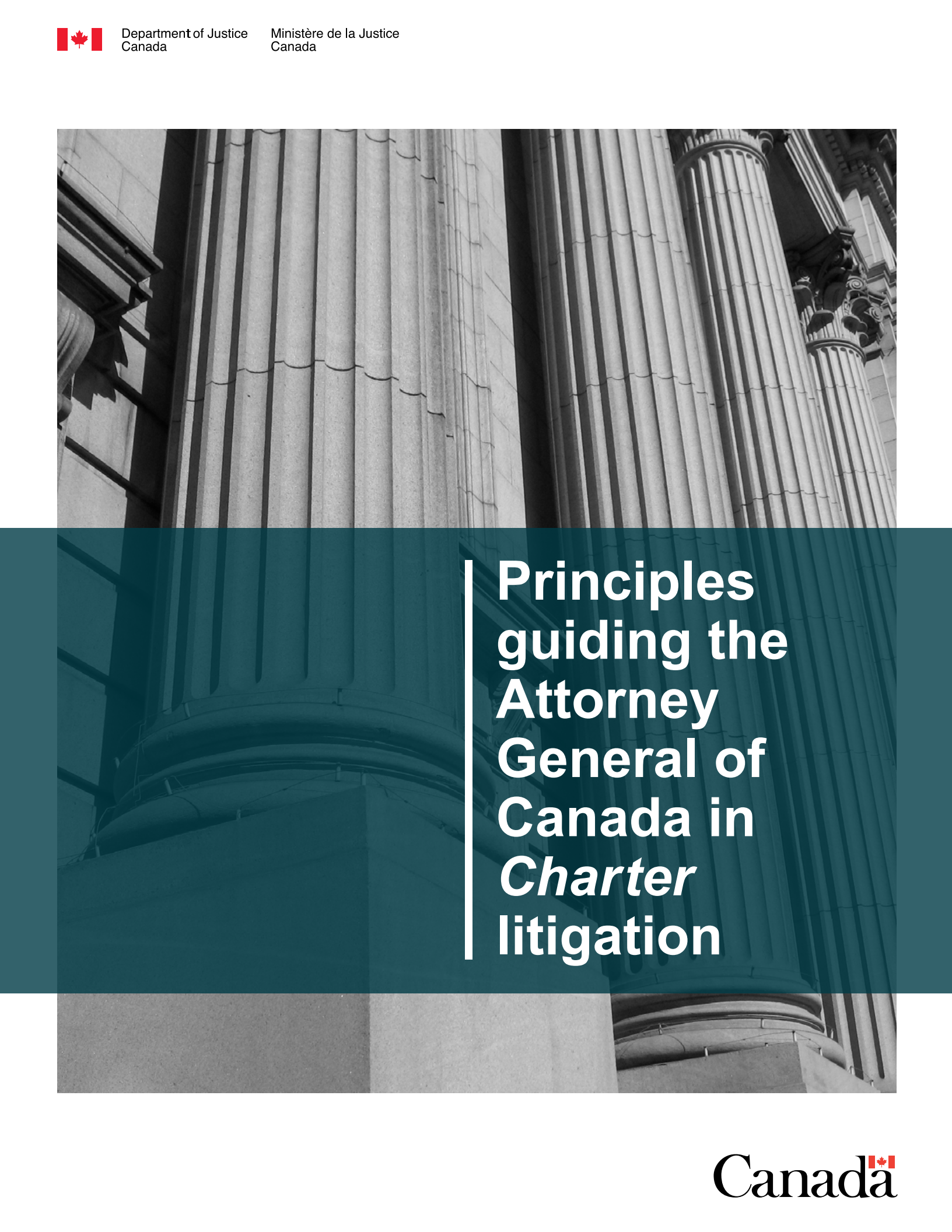




Department of Justice
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Ministère de la Justice
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The background of the entire page is a black and white photograph of a classical building with large, fluted columns. A dark teal horizontal band is superimposed over the middle of the image, serving as a background for the title text.

Principles guiding the Attorney General of Canada in *Charter* litigation

Canada 

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Foreward by the Attorney General of Canada

In my mandate letter from the Prime Minister, I was tasked as Attorney General of Canada to review the Government of Canada's litigation strategy. Further, I was mandated to make decisions to end appeals or positions inconsistent with the Government's commitments, the *Charter of Rights and Freedoms*, and Canadian values. In order to promote openness and transparency with respect to the litigation positions taken by the Attorney General, I have published annually a *Litigation Year in Review*, outlining litigation accomplishments.

The realization of our Government's commitment to openness and transparency is promoted by outlining the principles that guide the litigation positions and decisions of the Attorney General of Canada. There will sometimes be cases in which the Attorney General will defend the constitutionality of legislation that the Government intends to change, or has spoken out against. It is important that the public appreciate why the Government will sometimes continue to litigate cases that are seemingly at odds with its policy positions. For this reason and others, I

have sought to outline the principles that, in my view, should guide the Attorney General in the discharge of her duties.

In the discussion below, I focus on the Attorney General's role in overseeing *Canadian Charter of Rights and Freedoms* litigation against the Crown and identify the following six principles:

- 1) constitutionalism and the rule of law;
- 2) parliamentary democracy;
- 3) adjudication;
- 4) continuity;
- 5) consistent application of the *Charter*; and
- 6) access to justice.

As will become evident, I view the unique role of the Attorney General as a fundamental pillar of the rule of law in Canada. In its simplest articulation, the rule of law ensures that no one, including the elected Government of the day, is above the law. As a guardian of the rule of law, the Attorney General is tasked with upholding the public interest.

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Introduction: the role of the Attorney General of Canada

As the Chief Law Officer of the Crown, the Attorney General's primary roles are the provision of legal advice to the government and the oversight of litigation by or against the federal Crown. In both her advisory and litigation roles, the Attorney General fulfils her duty by promoting respect for the law in all government affairs. Fundamental to the Attorney General's roles is a responsibility to act in the public interest, which enables the development of principled litigation strategy.

By law, the office of the Attorney General of Canada is held by the Minister of Justice. Several of the Minister of Justice's responsibilities align closely with those of the Attorney General, including her responsibility to see that the administration of public affairs is conducted in accordance with the law, as well as her oversight of all matters connected with the administration of justice. The Minister of Justice also carries a policy portfolio, proposing new legislative initiatives and other measures for Cabinet and parliamentary consideration.

The pairing of the Attorney General's functions with those of a Minister of the Crown may at first glance appear to call into question the independence and impartiality of the Attorney General's conduct of litigation. However, the judicially-recognized responsibility of the Attorney General to "act in the public interest" guides how the Attorney General discharges her legal responsibilities.

In carrying out her responsibilities in the public interest, the Attorney General can turn to several established principles to inform her civil litigation strategy. The principles outlined below make special reference to the Attorney General's role in litigation involving the *Charter*, specifically when federal legislation is challenged. The challenged federal legislation may have been adopted by the current or by a previous Parliament. As reviewed below, the Attorney General's duties transcend transitions between governments.



Principles governing litigation strategy in *Charter* cases

1. The principle of constitutionalism and the rule of law



The *Charter* is part of the supreme law of Canada, and any law or government decision inconsistent with it is of no force or effect. Both in the provision of legal advice and in litigation, the Attorney General demonstrates the greatest possible commitment to respecting constitutional rights. In this respect, the Attorney General's role can broadly be described as an “ambassador of the *Charter*”.

This first principle guides decisions on litigation positions. Where the Attorney General concludes that there is no viable argument in favour of the challenged federal legislation or government action, a *Charter* violation should be conceded.

The structure of the *Charter* invites a more nuanced position than unqualified concessions of unconstitutionality. Section 1 of the *Charter* provides that rights and freedoms may be subject to reasonable limits if those limits are prescribed by law and demonstrably justified in a free and democratic society. This means that Parliament may enact

laws that limit rights and freedoms, and that the *Charter* will be violated only where a limit is without justification.

As a result, the Attorney General will sometimes apply the principle of constitutionalism and the rule of law by recognizing that a right or freedom has been limited, but without conceding that the limitation is without justification. Instead, the Attorney General may seek to demonstrate through litigation that federal legislation is justified in limiting rights and freedoms, thereby respecting the *Charter*.

Similarly, the Attorney General may oppose a *Charter* claim for the purpose of making arguments on the appropriate remedy. For instance, while the claimant may seek to have a law struck down in its entirety, the Attorney General may argue for a more limited “reading down” of an impugned provision or may argue that any declaration of unconstitutionality should be suspended so as to afford Parliament time to craft a responsible change in the law.

2. The principle of parliamentary democracy



The Parliament of Canada is the democratic law-making body at the federal level. It enacts, amends, and repeals federal legislation. When the constitutionality of federal legislation is challenged before the courts, the Attorney General seeks to ensure that there is a vigorous defence of the law. Both the constitution and the public interest require the Attorney General to respect Parliament's legislative authority.

To this end, the Attorney General of Canada bears a responsibility to uphold federal law until it is changed by Parliament or declared unconstitutional by a court. That responsibility is carried out by arguing in defence of the law's *Charter* compliance, in line with the previous and other principles. The principle of parliamentary democracy favours preserving meaningful scope for ministerial and parliamentary decision-making.

This principle aligns with the constitutional separation of powers between the executive branch and the legislative branch, according to which the Attorney General, as a member of the executive, should not undermine parliamentary authority by conceding the unconstitutionality of laws that have been enacted by Parliament. The Government may seek to amend legislation in order to improve legislation from a *Charter* perspective in circumstances where the existing legislation is not unconstitutional. In such cases, where there are viable arguments to support the existing law's constitutionality, it may be in the public interest for the Attorney General to defend the *Charter* compliance of federal legislation at the same time that the Government promises to amend or repeal it. In such cases, the Attorney General may seek an adjournment of the litigation pending legislative reform.

3. The principle of adjudication

In Canada's constitutional order, the adjudication of contested questions of law is the responsibility of our independent courts. Where a dispute arises as to the compliance of legislation or government action with the *Charter*, it falls on the courts to determine authoritatively the outcome of the dispute. In arriving at a conclusion on the merits, courts in our adversarial judicial system are assisted by full and fair argument by counsel, each putting forward the best case for and against the compliance of federal legislation with the *Charter*.

The Attorney General plays an indispensable role in *Charter* litigation by ensuring that courts have the benefit of full and fair argument, which they require in

order to carry out their constitutional responsibility to adjudicate disputes according to the law. Unqualified admissions by the Attorney General on constitutional questions may frustrate the courts' ability to arrive at informed conclusions on a law's *Charter* compliance.

In some past instances where Attorneys General have made large-scale concessions on *Charter* compliance, the courts have expressed reservations on their ability to arrive at informed conclusions without the benefit of full and fair argument. For these reasons, the public interest will usually be served by the Attorney General's decision to present the best case for the constitutionality of federal law.



4. The principle of continuity



The reference to the “Crown” in the description of the Attorney General as the “Chief Legal Officer of the Crown” captures the importance of the principle of continuity. The Crown transcends transitions between governments. It signals the continuity, from Attorney General to Attorney General and from ministry to ministry, of the duties of government. The adversarial nature of civil proceedings should not suggest that the Attorney General’s litigation positions are those of a given Minister. Consistent with the Attorney General’s constitutional responsibilities, litigation positions are always those of the Crown and are developed in the public interest.

It follows that the Crown’s legal position, as advanced by the Attorney General, should be coherent and consistent over time. A change in government should not be grounds for an Attorney General to undo a previous Government’s legislative agenda by conceding constitutional arguments

before the courts. However, this principle does not prevent an Attorney General from changing the litigation positions and strategies of her predecessor. It rather signals that such changes should be informed by the Attorney General’s evaluation of what is in the public interest, which includes an interest in maintaining coherent legal positions before the courts.

Different Attorneys General will differ in their assessments of the public interest, just as changing circumstances will inform different assessments of the public interest over time, but their evaluations should always be true to what is in the public interest. Different governments and different Parliaments recognize the importance of having an Attorney General who will defend their decisions when challenged and who will seek to maintain decision-making authority.

5. The principle of consistent application of the *Charter*



Federal law presumptively applies uniformly across the country. A finding of unconstitutionality by a court in one province or territory has immediate effect only in that province or territory. Therefore, a decision by the Attorney General not to challenge or appeal a finding of unconstitutionality could result in the uneven application of *Charter* rights. The decision of a court in one province or territory would invalidate federal legislation in that province, but not in others. In many contexts, the inconsistent application of

Charter rights between provinces and territories will be contrary to the public interest.

Pursuant to this principle, the Attorney General may conclude that it is in the public interest to appeal a *Charter* decision to the Supreme Court of Canada in order to allow for a pan-Canadian determination of the legislation's constitutionality, as well as a pan-Canadian interpretation of the relevant *Charter* right.

6. The principle of access to justice



The Government of Canada's decision to reinstate the Court Challenges Program was based on the recognition that the costs of litigation can impede access to justice. For many marginalized individuals and groups, seeking relief in courts may not be a realistic or viable option absent financial assistance.

Where the issue in dispute is discrete and limited to the parties before the courts, access to justice may be served by the quick resolution of the matter, reserving scarce judicial resources for other matters

that are the subject of broader legal disputes. In other cases, where a judicial declaration on a constitutional issue may have broader importance for individuals or groups who are not directly before the courts, access to justice may favour the continuation of litigation so that the issue can be decisively resolved for the parties before the court and many others affected by the outcome.

Conclusion

These principles, all in service of the public interest, have guided the development of the Attorney General of Canada's litigation strategies. When taking legal positions on the compliance of federal legislation with the *Charter*, the Attorney General should always advance the public interest. Other Ministers of the

Crown will help define the public interest and inform the merits of litigation strategies, providing direction as affected Ministers involved in litigation. At all times, the litigation strategies of an Attorney General should be principled.