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THE NOTWITHSTANDING CLAUSE OF THE CHARTER

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The Notwithstanding Clause of the Charter
(HillStudies)

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EXECUTIVE SUMMARY

Section 33(1) of the *Canadian Charter of Rights and Freedoms* (the Charter) permits Parliament or the legislature of a province to adopt legislation to override certain rights and freedoms for a limited period, subject to renewal. Such a use of the notwithstanding power must be contained in an Act, not in subordinate legislation (such as regulations), and must be express rather than implied.

The existence of the notwithstanding clause has been controversial since it was passed. This provision, which is seen as the key element that enabled the participants in the November 1981 Federal–Provincial Conference of First Ministers to reach agreement on the Charter, has given rise to widely differing views among both constitutional scholars and politicians.

The past few years have seen a resurgence in the use of the notwithstanding clause, and recent invocations of section 33 have reignited the debate over the notwithstanding clause.

This HillStudy sets out the content of section 33, the sequence of events leading to its adoption in 1981, and the way in which its drafters, parliamentarians and others at the time expected it would be used. It then goes on to describe the circumstances in which the notwithstanding clause has been invoked. Lastly, it presents a number of arguments for and against the use of the clause.

THE NOTWITHSTANDING CLAUSE OF THE CHARTER

1 INTRODUCTION

The constitutional notwithstanding clause[1] set out in section 33 of the *Canadian Charter of Rights and Freedoms*[2] (the Charter) has been controversial since its emergence from a November 1981 Federal–Provincial Conference of First Ministers. The controversy became more pronounced at the time of the 15 December 1988 Supreme Court of Canada decisions in the *Ford*[3] and *Devine*[4] cases dealing with the signage provisions of Quebec's Bill 101 (*Charter of the French Language*) and the subsequent adoption by the Quebec National Assembly of Bill 178 (*An Act to Amend the Charter of the French Language*). This legislation contained a section 33 override clause (in this case affecting Charter guarantees of freedom of expression [section 2(b)] and equality rights [section 15]).

However, a resurgence in the use of the notwithstanding clause by certain provinces has been observed in the past few years, in what some authors have described as a "renaissance."[5] Recent invocations of section 33 have reignited the debate over the use of the notwithstanding clause among constitutional scholars and politicians, particularly when it is pre-emptively included in legislation rather than in response to a specific court ruling.

This HillStudy sets out the content of section 33, the sequence of events leading to its adoption in 1981, and the way in which its drafters, parliamentarians and others at the time expected it would be used. It then goes on to describe the circumstances in which the notwithstanding clause has been invoked. Lastly, it presents a number of arguments for and against the use of the clause.

2 CONTENT OF SECTION 33

Section 33(1) of the Charter permits Parliament or a provincial legislature to adopt legislation to override section 2 of the Charter (containing such fundamental rights as freedom of expression, freedom of conscience, freedom of association and freedom of assembly) and sections 7 to 15 of the Charter (containing the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, a number of other legal rights and the right to equality). Such a use of the notwithstanding power must be contained in an Act and not subordinate legislation (regulations), and must be express rather than implied.

Under section 33(2) of the Charter, on the invocation of section 33(1) by Parliament or a legislature, the overriding legislation renders the relevant Charter right or rights "not entrenched" for the purposes of that legislation. In effect, parliamentary sovereignty is revived by the exercise of the override power in that specific legislative context.[6]

Section 33(3) provides that each exercise of the notwithstanding power has a lifespan of five years or less, after which it expires, unless Parliament or the legislature re-enacts it under section 33(4) for a further period of five years or less.

A number of rights entrenched in the Charter are not subject to recourse to section 33 by Parliament or a legislature: democratic rights (sections 3 to 5 of the Charter), mobility rights (section 6), language rights (sections 16 to 22), minority language education rights (section 23), and the guaranteed equality of men and women (section 28). Also excluded from the section 33 override are section 24 (enforcement of the Charter), section 27 (multicultural heritage) and section 29 (denominational schools) – these provisions do not, strictly speaking, guarantee rights.

All rights and freedoms set out in the Charter are guaranteed, subject to reasonable limitations under the terms of section 1. This has the effect, in combination with section 32 of the Charter (making the Charter binding on Parliament and the legislatures) and section 52 of the *Constitution Act, 1982*[7] (making the Constitution, of which the Charter is a part, the supreme law of Canada), of entrenching the rights and freedoms set out in the Charter. The invocation of section 33, and especially of section 33(2), pierces the wall of constitutional entrenchment and resurrects, in particular circumstances, the sovereignty of Parliament or a legislature. Consequently, the Charter is a unique combination of rights and freedoms, some of which are fully entrenched, others of which are entrenched unless overridden by Parliament or a legislature.

3 ORIGINS OF SECTION 33

At the time of the patriation of the Constitution, the establishment of a legislative override in an entrenched constitutional document was unprecedented; it was a uniquely Canadian development with no equivalent in either international human rights documents or western democratic human rights declarations.[8] However, there are a number of Canadian legislative precedents to section 33 to be found in the notwithstanding provisions contained in the *Canadian Bill of Rights*,[9] the *Saskatchewan Human Rights Code*,[10] the *Alberta Bill of Rights*[11] and Quebec's *Charter of Human Rights and Freedoms*.[12] Each of these provisions says that the Bill of Rights, Code or Charter is to have primacy over conflicting legislation unless the override provision is invoked.

Since the recollections of both participants in and observers of the 1980–1982 constitutional patriation process differ on this issue, the origins of section 33 can be described only in general terms. All the participants were probably familiar with the legislative human rights notwithstanding provisions then in existence at both the federal and provincial levels. It appears that a notwithstanding provision for the Charter was first proposed by Saskatchewan in the summer of 1980 during the

deliberations of the Federal–Provincial Continuing Committee of Ministers Responsible for Constitutional Affairs. It was seen as a compromise between those for and those against an entrenched Charter. The differences in view at that time, however, were too wide to be breached by this proposed compromise.[13]

The idea of a notwithstanding clause next surfaced during the Federal–Provincial Conference of First Ministers held in Ottawa from 8 to 13 September 1980. On 11 and 12 September 1980, the Government of Quebec circulated to the other provinces a document entitled "A Proposal for a Common Stand of the Provinces." This discussion paper attempted to find common positions on a number of issues. In relation to the Charter, the proposal was to entrench fundamental and democratic rights, and to make legal and non-discrimination rights subject to a notwithstanding provision. This discussion paper, which came to be known as the "Chateau consensus," was never really agreed to by all the provinces; eventually, even Quebec backed away from it.[14]

Once the September 1980 Federal–Provincial Conference of First Ministers had broken down, activity continued in the parliamentary, judicial and diplomatic arenas. Finally, on 28 September 1981, the Supreme Court of Canada rendered its decisions on three constitutional reference cases that had come to it from the Courts of Appeal of Manitoba, Newfoundland and Quebec. The Supreme Court concluded that the federal government had the strict legal right to engage in unilateral constitutional patriation but that, according to convention, it would need some degree of provincial support – less than unanimity but more than two provinces – to proceed.

Consequently, throughout October 1981, a number of meetings took place among federal and provincial officials and ministers in preparation for a Federal–Provincial Conference of First Ministers to be held from 2 to 5 November 1981. One measure proposed at different times and in different forms by Alberta, British Columbia and Saskatchewan was the possibility of a notwithstanding provision.

4 NOVEMBER 1981 FIRST MINISTERS' CONFERENCE

The First Ministers' Conference seemed to be at a stalemate on 4 November 1981 when the federal Minister of Justice, Jean Chrétien, and the Attorneys General of Ontario and Saskatchewan, Roy McMurtry and Roy Romanow, worked out a possible compromise. The text of the agreement, completed overnight and without Quebec's participation, included entrenchment of a charter of rights with a notwithstanding provision applicable to fundamental freedoms, legal rights and equality rights.

According to Mr. Chrétien, it was only then that the federal government had agreed that legal and equality rights could be overridden. That said, Prime Minister

Pierre Elliott Trudeau was persuaded to agree to the extension of the notwithstanding provision to fundamental freedoms, but only on condition that the provision as a whole be subject to a five-year sunset and re-enactment clause. Consequently, in public session on 5 November 1981, all governments, except that of Quebec, signed the constitutional accord containing the notwithstanding provision.[15]

The matter was not finished, however. As then worded, section 33 would have allowed for an override not only of section 15 equality rights, but also of section 28, which guaranteed the equality of men and women. As a result of a massive pressure campaign organized by feminist and human rights groups across Canada, both federal and provincial governments agreed to withdraw any reference to section 28.[16]

5 FRAMERS' INTENTIONS

Many participants in the First Ministers' Conference, as well as parliamentarians and commentators, speculated at the time about the merits of the notwithstanding clause and how it would be used.

Richard Hatfield, then premier of New Brunswick, said:

> I am concerned about the fact that there are provisions for opting out in important areas. I want to give you an undertaking that I will do everything possible to urge the Legislature of New Brunswick not to use that opportunity, consistent with my firm view that if we are going to have rights, they must be shared by all Canadians, regardless of where they live.[17]

G. W. J. Mercier, Manitoba's attorney general at the time, stated:

> [T]he rights of Canadians will be protected, not only by the constitution but more importantly by a continuation of the basic political right our people have always enjoyed – the right to use the authority of Parliament and the elected Legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy.[18]

Allan Blakeney, then premier of Saskatchewan, described how he believed the notwithstanding clause would be used by Parliament and the legislatures:

> It contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so w[e]ll for so many centuries.[19]

Shortly after the First Ministers' Conference, then prime minister Pierre Elliott Trudeau expressed his opinion of the notwithstanding clause as follows:

> I must be honest and say that I don't fear the notwithstanding clause very much. It can be abused as anything can, but the history of the Canadian Bill of Rights Diefenbaker had adopted in 1960, it has a notwithstanding clause and it hasn't caused any great scandal [*sic*]. So I don't think the notwithstanding clause deters very significantly from the excellence of the Charter.[20]

He went on to say later in the same interview:

> [I]t is a way that the legislatures, federal and provincial, have of ensuring that the last word is held by the elected representatives of the people rather than by the courts.[21]

Roy McMurtry, who participated in the First Ministers' Conference as Attorney General of Ontario, has written:

> The fact is that the clause does provide a form of balancing mechanism between the legislators and the courts in the unlikely event of a decision of the courts that is clearly contrary to the public interest. On the other hand, political accountability is the best safeguard against any improper use of the "override clause" by any parliament in the future.[22]

Other participants in the 1981 First Ministers' Conference have also indicated their views. Thomas S. Axworthy said:

> [T]he non-obstante clause will not be employed lightly; the 1960 Federal Bill of Rights had a similar override provision and it was only employed once in two decades (in 1970 with the *Public Order Temporary Measures Act*), and the provinces have shown a similar disinclination to use the override provisions contained in their provincial human rights legislation.[23]

Jean Chrétien, then minister of justice, said:

> What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy. … It is important to remember that the concept of an override clause is not new in Canada. Experience has demonstrated that such a clause is rarely used and when used it is usually not controversial. … It is because of the history of the use of the override clause and because of the need for a safety valve to correct

> absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.[24]

A number of other commentators also indicated how they expected Parliament and the legislatures to use section 33. Gérard V. La Forest, then of the New Brunswick Court of Appeal and later of the Supreme Court of Canada, made the following comment in 1983:

> My guess is that this provision will rarely be used. The political unpopularity of making declarations contrary to the Charter will militate against this. That certainly has been the experience with the Canadian Bill of Rights and with Quebec's Charter of Rights and Freedoms. I am aware, of course, of Quebec's general attempt not to be bound by the Charter, but this was done in the context of a transcendent political situation that is not in its essence centred on questions of human rights.[25]

Professor Peter Hogg said:

> Presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked. …[T]he necessity of re-enactment every five years will force periodic reconsideration of each exercise of the override power, at intervals which (in some jurisdictions at least) will often yield a change of government. This reinforces the already powerful political safeguards against an ill-considered use of the power.[26]

And finally, Professor Paul C. Weiler had this to say about the notwithstanding clause:

> Since the Canadian polity had shown itself sufficiently enamoured of fundamental rights to enshrine them in its Constitution, invocation of the non obstante clause was guaranteed to produce a great deal of political flak. No government can risk taking such a step unless it is certain that there is widespread support for its position. …
>
> Canadian judges are given the initial authority to determine whether a particular law is a "reasonable limit [of a right] … demonstrably justified in a free and democratic society." Almost all of the time, the judicial view will prevail. However, Canadian legislatures were given the final say on those rare occasions where they disagree with the courts with sufficient conviction to take the political risk of challenging the symbolic force of the very popular Charter. That arrangement is justified if one believes, as I do, that on those exceptional occasions when the court has struck down a law as contravening the Charter and Parliament re-enacts it, confident of general public support for this action, it is more likely the legislators are right on the merits than were the judges.[27]

The above comments on the expected use of section 33 have a number of elements in common. Section 33 was seen as a safety valve to be used only on rare occasions, and it was expected that it would be used in relation to non-controversial issues. It was anticipated that resort to section 33 would be to preserve basic social and political institutions.

It was also foreseen that legislatures would only resort to invoking this clause with the widespread support of public opinion and to break deadlocks created by unacceptable judicial decisions. However, since then, a number of situations have arisen where section 33 was used in a way not foreseen by those participating in the 1981 First Ministers' Conference or by commentators, including the omnibus, routine invocation of section 33 by the Quebec National Assembly between 1982 and 1985 and the preventive use of section 33 by a number of legislative assemblies.

6 SECTION 33 INVOCATION

Events surrounding Quebec language law stimulated vigorous debate on section 33 of the Charter. In the 1981 constitutional accord, the federal government and all the provinces except Quebec agreed upon the terms of constitutional change. The Quebec government expressed its strong opposition to those terms by including a notwithstanding clause in every piece of legislation put before the National Assembly between 1982 and 1985. It also caused every Quebec law in place at the time the Charter came into force to be amended with like effect.

This systematic practice largely ceased after 1985, with section 33 being used only rarely by Quebec governments since that time. However, Quebec resorted to the notwithstanding clause again after the Supreme Court of Canada, in the *Ford* and *Devine* cases on the language of commercial signs, ruled that an outright prohibition of the use of languages other than French was an unreasonable limitation on the freedom of expression guaranteed by the Charter.[28] The Quebec government then introduced an amendment to the language law that would maintain unilingual French signs outside premises while permitting the use of bilingual signs inside. To ensure that the amendment would not become the object of another legal challenge, the amending legislation invoked the legislative override authority of section 33 and the similar provision in Quebec's *Charter of Human Rights and Freedoms*. This marked the first time that the override had been used in direct response to a Supreme Court of Canada decision, rather than in anticipation of litigation.

In 1993, when the invocation of the notwithstanding clause reached the end of its five-year life, the Quebec National Assembly lifted the ban on English-language signs and amended the law to require only that French be "markedly predominant."[29] The amended legislation was not protected by a notwithstanding clause.

Outside Quebec, it would appear that the notwithstanding clause was used only three times before 2018.[30] The first such use was in Yukon's *Land Planning and Development Act*,[31] assented to in 1982 but never proclaimed in force. The statute provided in section 39 that the provisions of the Act relating to the nomination of persons to be members of the Land Planning Board (established under section 3 of the Act) or Land Planning Committees (established under section 17) by the Council of Yukon Indians (now the Council of Yukon First Nations) operate notwithstanding the *Canadian Bill of Rights* and section 15 of the Charter.

The second use was by the Saskatchewan legislature, to protect back-to-work legislation[32] of a kind that the Saskatchewan Court of Appeal had earlier held was contrary to the freedom of association in section 2(d) of the Charter.[33] At the time the provincial government enacted the notwithstanding clause, it was in the process of appealing the Court of Appeal decision to the Supreme Court of Canada. The Supreme Court of Canada subsequently allowed the appeal, upholding the provincial government's view that the back-to-work legislation did not violate the Charter.[34] Hence, the use of the notwithstanding clause was not necessary.

The third use was by the Legislative Assembly of Alberta, which adopted a private member's bill in March 2000 amending that province's *Marriage Act* to define marriage as exclusively heterosexual and to insert a notwithstanding clause for purposes of overriding the Charter.[35] A subsequent Supreme Court of Canada ruling on 8 December 2004 confirmed that the power to determine who has the legal capacity to marry falls within the sole jurisdiction of the federal Parliament.[36] Alberta's Minister of Justice and Attorney General, Ron Stevens, responded to the ruling by stating that if the federal government enacted legislation codifying same-sex marriage, his province would not invoke the notwithstanding clause in order to retain the one-man one-woman definition of marriage in Alberta. Referring to the Supreme Court decision, he stated in part:

> What this means now, is that the Federal Government has the full ability to make uniform law through parliament allowing for same-sex unions. Alberta does not have the ability to invoke the notwithstanding clause in relation to federal legislation. Since the court ruled the authority over same-sex marriage falls to the federal government, it is only the federal government who can invoke the notwithstanding clause to maintain the traditional definition of marriage. We understand it's likely the federal government will introduce legislation that would allow marriage to be defined as a union of two people.[37]

Subsequently, in July 2005, Parliament adopted the *Civil Marriage Act*,[38] which, for the first time, codified a definition of marriage in Canadian law, expanding on the traditional common-law understanding of civil marriage as an exclusively heterosexual institution. That Act defines marriage as "the lawful union of

two persons to the exclusion of all others," thus extending civil marriage to conjugal couples of the same sex. It states, among other things, in its preamble that "the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the Charter to deny the right of couples of the same sex to equal access to marriage for civil purposes."

Starting in 2018, the notwithstanding clause began to be invoked more frequently. At least five such clauses have been included in provincial laws passed since then, and although some have narrowly avoided coming into force.

In 2018, the Legislative Assembly of Saskatchewan invoked section 33 in the *School Choice Protection Act*.[39] This Act was passed in response to a court ruling on funding for non-Catholic students to attend in Catholic schools, although the ruling was later overturned by the Court of Appeal for Saskatchewan.[40] Given the Court of Appeal's decision, the clause in question never came into force, even though the bill received Royal Assent.

In 2023, the Legislative Assembly of Saskatchewan invoked the notwithstanding clause again when it passed *The Education (Parents' Bill of Rights) Amendment Act*.[41]

Meanwhile, the National Assembly of Quebec has invoked section 33 twice since 2018: once to override sections 2 and 7 to 15 of the Charter in *An Act respecting the laicity of the State*, which it passed in 2019, and once to override the same sections in *An Act respecting French, the official and common language of Québec*, which it passed in 2022.[42] The override provision set out in *An Act respecting the laicity of the State* was renewed following the coming into force, in June 2024, of *An Act to enable the Parliament of Québec to preserve the principle of parliamentary sovereignty with respect to the Act respecting the laicity of the State*,[43] which extended the validity of the override provision for a second period of five years.

The Legislative Assembly of Ontario invoked section 33 for the first time in 2021 to pass Bill 307, the *Protecting Elections and Defending Democracy Act, 2021*,[44] which included a provision overriding sections 2 and 7 to 15 of the Charter. However, the constitutional validity of Bill 307 was challenged by the Working Families Coalition, and on 6 March 2023, the Ontario Court of Appeal struck down the bill on the grounds that it infringed the right to vote guaranteed by section 3 of the Charter.[45] In the same decision, the Ontario Court of Appeal found that the government had properly invoked the notwithstanding clause. However, as noted above, the notwithstanding clause cannot be applied to section 3 of the Charter. The Court suspended the effect of the declaration of invalidity for 12 months to give the Ontario government time to prepare new legislation that is Charter-compliant.

In 2022, the Legislative Assembly of Ontario also passed the *Keeping Students in Class Act, 2022*, which provided for an override of sections 2, 7 and 15 of the

Charter.[46] However, this Act was repealed soon after it passed and was deemed to have never been in force.[47]

Ontario also invoked section 33 in Bill 31, Efficient Local Government Act, 2018. However, this bill never went beyond second reading.[48]

Finally, if Bill 11, An Act respecting proof of immunization, introduced in the Legislative Assembly of New Brunswick in 2019, had passed in its original form, it could have marked the province's first invocation of the notwithstanding clause. However, it was defeated at third reading.[49]

7 ARGUMENTS FOR AND AGAINST SECTION 33

Arguments have been made both in favour of and against allowing legislatures to override constitutionally guaranteed rights and freedoms. Those who argue in favour of section 33 do not see it as inconsistent with entrenched rights and freedoms and contend that it provides a mechanism whereby, in exceptional circumstances, the elected legislative branch of government may make important policy decisions and isolate them from review by the unelected judicial branch of government. They argue that the threat to individual rights is not great because there is a five-year limit on any use of the notwithstanding power. Any such legislative override will be subject to public debate at the time of its first enactment and at the moment of any subsequent re-enactment. They also point out that only some, not all, rights are subject to such a provision.

Supporters of section 33 further maintain that, while it is useful and, indeed, very valuable for the courts to play a role in the elaboration of the rights and freedoms that Canadians should enjoy, it is not proper for them to act as legislators. In their view, giving the courts a greater "political" role is controversial given that they are not accountable to the electorate. On top of this, giving the courts a role in policy-making would compromise their independence and impartiality and would hasten their politicization.

It may thus be argued that a legislative override, by allowing final political decisions to be made by the elected representatives, mitigates the politicization of the courts. In the United States, where the courts interpret and apply a constitution that has no equivalent to section 33, judicial decisions about the constitution have a greater finality and the stakes are correspondingly higher. The significant political element in the selection of judges, particularly at the United States Supreme Court level, has been openly acknowledged; indeed, the president's power to nominate the judges of federal courts means that the composition of those courts is quite regularly an issue in presidential election campaigns.

Closely linked to the "safety valve" or "unintended consequences" argument is the idea that legislators, and not judges, should have the final word on public policy

Simply put, this suggests that a notwithstanding clause is needed where a judicial decision based on Charter guarantees might result in a threat to important societal values or goals. What is more, since the rights and freedoms recognized in the Charter are often referenced and can be interpreted in a variety of ways, the courts may issue rulings that legislators did not anticipate.

In short, section 33 has been generally justified on the grounds that it preserves the principle of parliamentary sovereignty. Section 33 also makes it possible for Parliament or a provincial legislature to remedy a judicial interpretation of the Charter that it considers misguided or erroneous.

In 1989, a number of respected constitutional authorities were asked whether section 33 represented a threat to Canadians' basic rights and whether it should be repealed. Professor Wayne MacKay of the Faculty of Law at Dalhousie University spoke in favour of retaining the section:

> The notwithstanding clause should be kept, at least for the present. It permits debate about which rights are fundamental in Canadian society and which should prevail when rights are in conflict. In a democratic society steeped in the tradition of parliamentary supremacy, it is proper to give our elected legislators the final word.
>
> But isn't the point of entrenching rights in a charter that you protect those rights by making the courts the final arbiters rather than the legislatures? Yes, it is, and despite the notwithstanding clause, that is what has happened and will continue to happen in all but a few situations.[50]

Professor MacKay went on to say that, until the notwithstanding clause is abused "by some thwarting of the legitimate aspirations of a truly dispossessed or marginalized group in our society," we should give our legislators and our Constitution the benefit of the doubt.[51]

Professor François Chevrette of the Faculty of Law at the Université de Montréal was also in favour of retaining the notwithstanding clause, even though he was opposed to the Quebec government's recent use of section 33. He pointed out that the balance between political and judicial power in Canada is very delicate, unlike in the United States where there is no tradition of parliamentary supremacy. In Canada, political power can override a judicial decision on an important or sensitive issue, and there is then an opportunity for national debate. People would reflect, he said, and the politicians might change their minds when a particular use of the notwithstanding clause came up for renewal.[52]

Section 33 is considered by critics to be inconsistent with the entrenchment of human rights and freedoms. In the words of former Quebec cabinet minister Clifford Lincoln, who resigned in protest against the language law amendment,

"rights are rights." In his view, the rights and freedoms in the Charter are subject to judicial interpretation but must be protected against legislative transgression.

According to some critics of the override, it is when the majority of the public is in favour of, or at least not opposed to, the limitation or elimination of the rights of a minority that constitutional protections are needed. Moreover, the Charter does not create absolute rights and freedoms that must be applied literally; section 1 of the Charter provides that the rights and freedoms guaranteed are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 should thus give the courts enough flexibility to accommodate legislative goals that infringe a guaranteed right or freedom.

Other opponents of the notwithstanding clause claim that it creates a hierarchy of rights since a legislature's power to override is limited to fundamental freedoms, legal rights and equality rights. This could undermine the importance of overridable rights in the eyes of the public or decision-makers. Some authors also note that the choice of which rights may or may not be subject to override is difficult to defend.[53]

Another argument that has been raised against section 33 is that the "rights and freedoms that can be overridden are so significant as to raise questions about the nature of the freedom that remains."[54] Constitutional expert Morris Manning expressed it as follows:

> If our freedom of conscience or religion can be taken away by a law which operates notwithstanding the Charter, if our right to life or liberty can be taken not in accordance with the principles of fundamental justice, what freedom do we have?[55]

It has been argued that the mere existence of the override power could entice governments to use it rather than invoking section 1 of the Charter. The Canadian Bar Association, at its 1984 annual meeting in Winnipeg, concluded that section 1 of the Charter provides ample protection for legislative authority,[56] and therefore recommended that section 33 be repealed. The Association felt that if the section were not repealed, the use of the override power should at least be subject to guidelines.[57]

Some people are concerned that the notwithstanding clause might be used in cases where rights and freedoms are rightly in need of protection. In 1985, Herbert Marx, who was then the Liberal Opposition Justice Critic in Quebec, stated that "the danger of having a 'notwithstanding clause' will become evident when we need protection most – we will not have it." In support of his argument, Mr. Marx referred to the October crisis of 1970, when the federal government set aside the *Canadian Bill of Rights* (which had a notwithstanding clause) by enacting the *Public Order (Temporary Measures) Act.*[58]

Senator and parliamentary expert Eugene Forsey also spoke out against section 33:

> The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Although it does not apply to the whole Charter of Rights, it does apply to a very large number of the rights and freedoms otherwise guaranteed. …
>
> Clearly, then, it gives federal and provincial legislators very wide powers to do as they see fit in limiting or denying those rights and freedoms. The Charter would not have protected the Japanese-Canadians who were forcibly interned during World War II. Nor will it protect anyone advocating an unpopular cause today.
>
> Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter of Rights.[59]

In 2016, Professor Adam Dodek wrote that the process that led to its inclusion in the Charter "lacked democratic legitimacy" and contributed to section 33 becoming the "bête noire of Canadian constitutional policy."[60]

One school of thought rejects the pre-emptive use of the notwithstanding clause. Proponents of this view argue that the notwithstanding clause should be reserved for reactive use in response to a court ruling, so that legislatures can still have the "final say" over courts. In their opinion, pre-emptive or preventive use of the notwithstanding clause with the aim of forestalling future legal challenges to a statute could be seen as illegitimate or even undemocratic. In this regard, authors Guillaume Rousseau and François Côté of the Université de Sherbrooke identified a distinctive approach in Quebec to the preventive use of the notwithstanding clause, writing:

> While the question of a preemptive use [of the notwithstanding clause] is subject to controversy in the Anglo-Canadian doctrine, it seems to be more accepted in Quebec.[61]

The use of the notwithstanding clause was the subject of a vote in the House of Commons in February 2023. The motion, which was defeated, stated "that it is solely up to Quebec and the provinces to decide on the use of the notwithstanding clause."[62] The debate on this motion touched on whether or not a pre-emptive use of the notwithstanding clause would be legitimate.[63]

In short, the inclusion of the notwithstanding clause in the Charter was, and remains, controversial. There is no doubt that differing opinions on this provision will continue to fuel debate in the years to come.

NOTES

1. Also referred to as a non-obstante or override clause.
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).
3. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.
4. *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790.
5. See in particular Peter W. Hogg and Wade K. Wright (since 2020), *Constitutional Law of Canada*, 5th ed. suppl., ch. 39:2.
6. See in particular Henri Brun et al., "La souveraineté parlementaire," *Droit constitutionnel*, 6th ed., 2014.
7. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.).
8. Dale Gibson, *The Law of the Charter: General Principles* 1986, p. 125. At least two jurisdictions have adopted provisions similar to section 33 of the Charter since 1982. Israel's *Basic Law: Freedom of Occupation (1994)* contains a notwithstanding clause, section 8, which allows the Knesset [Parliament of Israel] to enact a provision that violates freedom of occupation,

   > if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.

   See Israel, *Basic Law: Freedom of Occupation*, 1994. In Australia, section 31 of the State of Victoria's *Charter of Human Rights and Responsibilities Act 2006* allows its legislature to declare that a statute will apply despite being incompatible with guaranteed rights in "exceptional circumstances." See Australia, State of Victoria, *Charter of Human Rights and Responsibilities Act 2006*, s. 31.
9. *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2.
10. Saskatchewan, *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 44 (CanLII).
11. Alberta, *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 2.
12. Quebec, *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12, s. 52.
13. Roy Romanow, John White and Howard Leeson, *Canada… Notwithstanding: The Making of the Constitution 1976–1982*, 1984, p. 45. A 25th anniversary edition of this book was published by Thomson/Carswell in 2007.
14. Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution*, 1982, pp. 60–62.
15. For a more detailed recounting of these events, see Roy Romanow, John White and Howard Leeson, *Canada…Notwithstanding: The Making of the Constitution 1976–1982*, 1984, pp. 197–215; Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution*, 1982, pp. 263–302; and Edward McWhinney, *Canada and the Constitution 1979–82: Patriation and the Charter of Rights*, 1982, pp. 90–101. For the personal memoirs of participants in these events, see Roy McMurtry, "The Search for a Constitutional Accord – A Personal Memoir," *Queen's Law Journal*, Vol. 8, 1982; and Roy Romanow, "Reworking the Miracle: The Constitutional Accord 1981," *Queen's Law Journal*, Vol. 8, 1982.
16. Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 1983, pp. 83–85; and Chaviva Hosek, "Women and the Constitutional Process," in Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act*, 1983, pp. 280–300.
17. Canadian Inter-Governmental Conference Secretariat, Federal–Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, p. 114.
18. Ibid., p. 115.
19. Ibid., p. 125.
20. Transcript of an Interview with then prime minister Pierre Elliott Trudeau by Jack Webster, CHAN-TV Vancouver, 24 November 1981, p. 5.
21. Ibid., p. 6.

22. Roy McMurtry, "The Search for a Constitutional Accord – A Personal Memoir," *Queen's Law Journal*, Vol. 8, 1982, p. 65.

23. Thomas S. Axworthy, "Colliding Visions: The Debate over the Charter of Rights and Freedoms 1980–81," in Joseph Weiler and Robin Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, 1986, p. 24.

24. Library of Parliament, "House of Commons Debates, 32nd Parliament, 1st Session: Vol. 12 ," Canadian Parliamentary Historical Resources, Database, 20 November 1981, pp. 13042–13043. The three civil libertarians cited by Mr. Chrétien are Alan Borovoy, Gordon Fairweather and Walter Tarnopolsky, according to articles in *The Gazette* of 7 November 1981 and *The Globe and Mail* of 9 November 1981.

25. Gérard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview," *Canadian Bar Review*, Vol. 61, 1983, p. 26.

26. Peter W. Hogg, "A Comparison of the Bill of Rights and the Charter," in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary*, 1982, p. 11.

27. Paul C. Weiler, "The Evolution of the Charter: A View from the Outside," in Joseph Weiler and Robin Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, 1986, p. 57.

28. It is worth noting, however, that when the Supreme Court of Canada heard and ruled on the *Ford* and *Devine* cases, Quebec's *Charter of the French Language* already contained a valid invocation of the notwithstanding clause. Thus, while the Supreme Court of Canada did conclude that the impugned provisions violated the Charter, they were declared invalid on the grounds that they were inconsistent with the similar guarantees in Quebec's *Charter of Human Rights and Freedoms*.

29. Quebec, *An Act to amend the Charter of the French language*, S.Q. 1993, c. 40, s. 18.

30. The following account of when the notwithstanding clause has been used outside Quebec is taken from Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. suppl., 2007, para. 36:2. For more detailed information concerning legislation where the notwithstanding clause has been used, see Tsvi Kahana, "The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter," *Journal of Canadian Public Administration*, Vol. 44, 2001.

31. Yukon, *Land Planning and Development Act*, S.Y. 1982, c. 22.

32. Saskatchewan, *Saskatchewan Government Employees Union Dispute Settlement Act*, S.S. 1984–85–86, c. 111, s. 9.

33. *Retail, Wholesale and Department Store Union, Local 544 v. Saskatchewan*, 1985 CanLII 184 (SK CA).

34. *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

35. Legislative Assembly of Alberta, Bill 202, Marriage Amendment Act, 2000, S.A. 2003, c. 3, ss. 4 and 5. Peter Hogg notes that a notwithstanding declaration was also included in Alberta Bill 26 of 1988, which would have limited the amount of compensation payable to victims of a (long-discontinued) provincial sterilization program; however, the bill was withdrawn by the government after a public outcry. See Peter W. Hogg, *Constitutional Law of Canada*, 5th edition suppl., 2007.

36. *Reference re Same-Sex Marriage*, 2004 SCC 79.

37. Government of Alberta, "Justice Minister responds to Supreme Court of Canada Same-sex Marriage Reference," News release, 9 December 2004.

38. Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes (short title: Civil Marriage Act), 38th Parliament, 1st Session (S.C. 2005, c. 33). For a description and analysis of this bill, see Mary C. Hurley, *Legislative Summary of Bill C-38: The Civil Marriage Act*, Publication no. 38-1-LS-502E, Library of Parliament, 14 September 2005.

39. Saskatchewan, *The School Choice Protection Act*, S.S. 2018, c. 39 (CanLII).

40. *Good Spirit School Division No. 204 v Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109 (CanLII); and *Saskatchewan v Good Spirit School Division No. 204*, 2020 SKCA 34 (CanLII).

41. Saskatchewan, *The Education (Parents' Bill of Rights) Amendment Act*, S.S. 2023, c. 46 (CanLII).

42. National Assembly of Quebec, Bill 21: An Act respecting the laicity of the State, 42nd Legislature, 1st Session (S.Q. 2019, c. 12) (CanLII); and National Assembly of Quebec, Bill C-96: An Act respecting French, the official and common language of Québec, 42nd Legislature, 2nd Session (S.Q. 2022, c. 14) (CanLII).

43. National Assembly of Quebec, Bill 52: An Act to enable the Parliament of Québec to preserve the principle of parliamentary sovereignty with respect to the Act respecting the laicity of the State, 43rd Legislature, 1st Session (S.Q. 2024, c. 21), *Gazette officielle du Québec*, Part 2, 19 June 2024.

44. Legislative Assembly of Ontario, Bill 307, Protecting Elections and Defending Democracy Act, 2021, 42nd Legislature, 1st Session (S.O. 2021, c. 31).

45. *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139.

46. Legislative Assembly of Ontario, Bill 28, Keeping Students in Class Act, 2022, 43rd Legislature, 1st Session (S.O. 2022, c. 19).

47. Legislative Assembly of Ontario, Bill 35, Keeping Students in Class Repeal Act, 2022, 43rd Legislature, 1st Session (S.O. 2022, c. 20).

48. Legislative Assembly of Ontario, Bill 31, Efficient Local Government Act, 2018, 42nd Legislature, 1st Session.

49. Legislative Assembly of New Brunswick, Bill No. 11, An Act Respecting Proof of Immunization, 59th Legislature, 3rd Session.

50. "Is There a Threat to Our Rights? A Reader's Digest Forum," compiled by C. Tower and P. Body, *Reader's Digest*, June 1989, p. 103.

51. Ibid., p. 104.

52. Ibid.

53. See in particular Peter W. Hogg and Wade K. Wright (since 2020), *Constitutional Law of Canada*, 5th ed. suppl., ch. 36:22.

54. This and the following two arguments against section 33 are derived from Philip Kaye, *The Notwithstanding Clause*, Current Issue Paper No. 72, Legislative Research Service, Ontario Legislative Library, November 1987 (revised September 1992), pp. 18–19.

55. Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982*, 1983, p. 55.

56. Canadian Bar Association, "Annual Meeting – Resolutions," *National* (Resolution 84-01-A), September 1984, p. 27.

57. Ibid.

58. Martin Hershorn, "An Interview with Herbert Marx," *Viewpoints*, Vol. 13, No. 8, Winter 1985, p. 1.

59. "Is There a Threat to Our Rights?: A Reader's Digest Forum," compiled by C. Tower and P. Body, *Reader's Digest*, June 1989, pp. 101–102.

60. Adam Dodek, "The Canadian Override: Constitutional Model or *Bête Noire* of Constitutional Politics," *Israel Law Review*, Vol. 49, No. 1, 2016, p. 57.

61. Guillaume Rousseau and François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights in *Revue générale de droit*, Vol. 47, No. 2, 2017, p. 345.

62. House of Commons, *Vote No. 257*, 44th Parliament, 1st Session, 13 February 2023.

63. House of Commons, *Debates*, 9 February 2023.