
POINTS OF VIEW

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WHY A NOTWITHSTANDING CLAUSE?

The Honourable Peter Lougheed

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PROLOGUE

David Schneiderman

The notwithstanding clause, section 33, of the Canadian Charter of Rights and Freedoms is among the more ubiquitous of the compromises that emerged out of the 1980-81 constitutional round. The blanket invocation of the clause in Quebec in 1982 was used as a form of political protest against the patriation package; its use in 1988 to shield Quebec's language of commercial signs law prompted the withdrawal of the support of the Manitoba Legislature to the Meech Lake Accord, leading ultimately to the Accord's demise in 1989; and its proposed use in Alberta to place limits on damages available to victims of forced sterilization led to a hailstorm of criticism and, within a period of only twenty-four hours, an abrupt retreat by the government. More recently, Albertans once again debated the utility of the notwithstanding clause in order to shield, of all things, Alberta's *Human Rights Code* from the requirement of including sexual orientation among the list of prohibited grounds of discrimination.

The publication of the Honourable Peter Lougheed's 1991 Merv Leitch Lecture on "Why a Notwithstanding Clause?", then, could not be more timely. The former Premier of Alberta provides us with details regarding the initial introduction of the proposal for a legislative override of Charter rights and important insights into some of the concerns he and the premiers of Saskatchewan and Manitoba had to an entrenched bill of rights. Mr. Lougheed recounts some of the instances where the notwithstanding clause has been invoked and reviews academic debates regarding its compatibility with Canadian political and legal values. He argues ultimately for retention of the notwithstanding clause but with some alterations to the section so as to improve its operation.

We learn a number of important lessons from Peter Lougheed's lecture. First, the legislative override was intended to be used only in those rare instances where the legislature was in disagreement with judicial interpretation regarding major matters of public policy. For instance, the former Premier indicates that his government would have been prepared to use the notwithstanding clause in 1987 to shield legislation preventing hospital workers from striking had the Supreme Court of Canada ruled that it was contrary to the Charter. Ultimately, the Court did not find that it contravened the freedom of association of workers.

Second, what Premier Lougheed and others had in mind in proposing the notwithstanding clause in 1981 was the experience in the United States when judicial decision making was out of step with public opinion on important policy

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matters. In regard to such matters as the abolition of slavery and the introduction of the “New Deal” legislation, judicial interpretation of the Bill of Rights obstructed important policy initiatives in the United States. Section 33, in contrast, allows effective action to be taken by legislators without the necessity of a civil war or threats of packing the court with pro-government appointees. According to Peter Lougheed, the notwithstanding clause “allows effective political action on the part of legislators to curb an errant court.”

Lastly, argues Mr. Lougheed, a decision by *legislators* to invoke the notwithstanding clause should be approached with the same cautious consideration and deliberation as *courts* undertake in ruling on Charter claims. In considering overriding a protected right or freedom, legislators should be satisfied, among other things, that the objective they wish to pursue is sufficiently important, and that there are not other, less intrusive, means of reaching the same policy objective. In sum, “[i]f a legislature wishes to take issue with the Court’s determination, it too should be required to consider whether the limit is one that is justifiable in a free and democratic society.”

What lessons, then, might be learned from Mr. Lougheed’s lecture for contemporary debates about the use of the notwithstanding clause? It is clear that, as the Premier anticipated, governments usually will have to expend political capital if they are to invoke the clause after a court has ruled that legislation is an unreasonable limit on Charter rights and freedoms. The Government of Alberta learned this lesson in the context of the proposed Bill 26, limiting damages which would be available to subjects of forced sterilization performed pursuant to government policy. Although the Government of Quebec sacrificed only Anglophone public opinion within Quebec when the clause was used in 1988 to shield the language of commercial signs law, a steep political price was paid outside the province with the failure of the Meech Lake Accord. Certainly, as Peter Lougheed shows, there have been uses of the clause within Quebec that have been non-controversial. But it is clear that most governments in all parts of the country do not want to be seen to be overriding Charter rights, and that the general public find it unseemly for their elected politicians to be seen to be doing so. Invoking the legislative override, therefore, usually will require a significant amount of political will and public consensus — which leads us to the second lesson learned. As Peter Lougheed suggests, legislatures and Parliament should allow for public deliberation should a government contemplate use of the clause. The Government of Alberta seems

to have learned this lesson from the debacle associated with Bill 26 — failing to have meaningfully consulted important political constituencies, including even members of the Government caucus, meant that too many were taken by surprise. That the Government has learned this lesson is evident from the response of the Premier of Alberta and other members of cabinet that the notwithstanding clause would not be invoked in the future without some form of “public consultation.”

Finally, it may be said that the notwithstanding clause is best left to those occasions when the judiciary is so out of step with important socio-economic policy as to obstruct social change through law. While Loughheed’s text does not speak directly to this issue, it can reasonably be inferred from some of the examples he cites. Most certainly, the text of the clause itself speaks to no specific conditions which must be satisfied before legislation can be shielded from Charter review. The only formal requirement in the text is that the law declare which sections of the Charter, among those available, are intended to be preempted. So as a matter of formal law, there are no other restrictions to the use of the clause. Legislators, however, will have to weigh a number of factors when considering use of the clause.

It can fairly be said that, by virtue of the aims, objectives, and structures of the Charter, it would not be appropriate for a legislature to invoke the override where legislation is designed to further disadvantage a disadvantaged group. In other words, the notwithstanding clause should not be used to single out members of a minority group who already are vulnerable to the economic or political power of the majority. This, I believe, was one of the intuitive objections that many had to Alberta’s Bill 26. On the other hand, if an important socio-economic initiative is being obstructed by a Charter interpretation over which reasonable people of good will might disagree, then it may be legitimate for a legislature or Parliament to invoke the override.

The classic instance where such a corrective would have been valuable is the so-called “Lochner era” in the United States. From the late nineteenth to the early twentieth century, the Supreme Court of the United States disallowed a wide range of legislative interventions into the marketplace. They did not block all laws of this type, but intervened enough so as to make it impossible for government, for instance, to limit the number of hours of work or prohibit the traffic in the product of child labour. Here, the judiciary was insufficiently

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attentive to the needs of society and the demands made upon the government to counteract the force of the market.

Short of a legislative objective designed to advance important social policy goals, then, use of the override should be condemned. Use of the notwithstanding clause solely for the purpose of singling out an already vulnerable group, absent other independent and important social policy objectives, would not qualify under this standard. In this light, the Government of Alberta was right to resist pressures to invoke the notwithstanding clause to exclude gays and lesbians from the protection of Alberta's human rights code.

* * *

About the Merv Leitch Lecture

The Merv Leitch Q.C. Memorial Lecture Series, and the companion Merv Leitch Q.C. Scholarship Fund, were organized to honour the memory of Merv Leitch, former Attorney General, Treasurer, and Minister of Energy for the Province of Alberta. The annual lecture series has alternated on a yearly basis between the University of Calgary and the University of Alberta. The Merv Leitch scholarships are directed toward students who excel in the two fields of law which were of interest to Mr. Leitch and where he made the most substantial public contributions — constitutional law and natural resource law.

PROLOGUE

David Schneiderman

L'article 33 de la Charte canadienne des droits et libertés (appelé «disposition d'exemption» et parfois «clause dérogatoire»), fait partie des compromis notoires issus de la série de pourparlers constitutionnels de 1980-81. En 1982, l'invocation générale de la clause au Québec a servi d'outil politique de contestation du rapatriement; l'usage qu'en a fait le Québec en 1988 pour protéger la loi relative à l'affichage commercial dans une autre langue, a conduit le Manitoba à retirer son appui à l'accord Meech et entraîné l'échec ultime de l'Accord en 1989; et le recours envisagé par l'Alberta afin de limiter les dommages-intérêts à verser aux victimes de la stérilisation forcée a provoqué, en vingt-quatre heures seulement, un tollé de protestations et le repli précipité du gouvernement. Plus récemment, les Albertains se sont interrogés de nouveau sur l'utilité de la disposition d'exemption en vue de soustraire, paradoxalement, le *Human Rights Code* de l'Alberta à l'obligation d'inclure l'orientation sexuelle parmi les motifs illicites de discrimination.

La publication de la conférence Merv Leitch de l'honorable Peter Lougheed «Pourquoi une disposition d'exemption?» [*Why a Notwithstanding Clause?*] est donc d'actualité. L'ancien premier ministre de l'Alberta fournit des détails sur la présentation initiale de la proposition autorisant la dérogation à la Charte des droits et partage certaines de ses préoccupations et celles des premiers ministres de la Saskatchewan et du Manitoba au sujet de l'enchâssement d'une déclaration des droits. M. Lougheed rappelle plusieurs cas de recours à la clause et examine les discussions théoriques traitant de sa comptabilité avec les valeurs politiques et juridiques canadiennes. En conclusion, il se prononce en faveur du maintien de la disposition d'exemption mais avec quelques modifications susceptibles d'en améliorer le fonctionnement.

La Conférence de Peter Lougheed enseigne plusieurs leçons importantes. Premièrement, le droit de dérogation législatif ne devait servir que dans les rares cas où l'assemblée législative rejette une interprétation judiciaire concernant d'importantes questions de politique publique. Ainsi, l'ancien premier ministre indique que son gouvernement aurait envisagé d'invoquer la disposition d'exemption en 1987 pour protéger la loi interdisant au personnel hospitalier de faire la grève, laquelle loi avait été déclarée inopérante. La Cour suprême finirait d'ailleurs par conclure que cette loi ne contrevenait pas à la

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liberté d'association des travailleurs.

Deuxièmement, si M. Lougheed et d'autres avaient souhaité proposer la disposition d'exemption en 1981, c'est en se fondant sur l'expérience américaine – où le processus décisionnel judiciaire ne reflétait plus l'opinion publique sur les grandes questions de politique. Concernant l'abolition de l'esclavage et la présentation des lois relatives à la Nouvelle Donne, notamment, l'interprétation judiciaire de la Déclaration des droits avait fait obstacle à d'importantes initiatives politiques aux États-Unis. L'article 33, au contraire, permet au législateur d'agir efficacement sans guerre civile ou sans avoir à remplir les tribunaux de recrues pro-gouvernement. Selon Peter Lougheed, la disposition d'exemption «permet au législateur de mener une action politique efficace pour freiner les errances possibles des tribunaux.»

M. Lougheed soutient enfin que, pour les *législateurs*, la décision d'invoquer la disposition d'exemption exige un degré de circonspection et de délibération égal à celui qu'exercent les *tribunaux* statuant sur les demandes de règlement en vertu de la Charte. Les législateurs qui envisagent de déroger à un droit ou une liberté garantie doivent notamment s'assurer que l'objectif visé est suffisamment important et qu'il n'existe aucun autre moyen d'action qui soit moins intrusif. En bref, «quand une assemblée législative souhaite contester la décision de justice, elle a aussi doit déterminer si les limites sont de celles dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.»

Quelles leçons tirer, finalement de la conférence de M. Lougheed pour les débats actuels traitant du recours à la disposition d'exemption? Il est clair, comme le premier ministre l'avait prévu, que les gouvernements devront en général développer leur capital politique s'ils souhaitent invoquer la clause après qu'un tribunal a statué que la loi en question limite abusivement la portée la Charte des droits et libertés. Le gouvernement de l'Alberta a appris cette leçon dans le contexte du projet de loi 26, limitant les dommages offerts aux victimes de la stérilisation forcée en vertu d'une politique gouvernementale. Bien que le gouvernement du Québec n'ait sacrifié que l'opinion publique anglophone au Québec en invoquant la clause en 1988 pour protéger la loi relative à l'affichage commercial, il a payé un prix élevé à l'extérieur avec l'échec de l'accord Meech. Comme le démontre Peter Lougheed, tous les recours à la disposition d'exemption au Québec ne prêtent pas à controverse.

Mais il est clair, partout au pays, que la plupart des gouvernements ne veulent pas être perçus comme se soustrayant à la Charte des droits, et que le public n'apprécie pas que ses politiciens élus soient vus sous ce jour. Le recours au pouvoir de dérogation exigera donc une volonté politique considérable et un consensus public — ce qui nous conduit à la seconde leçon apprise. Comme Peter Lougheed le suggère, les assemblées législatives et le Parlement devraient prévoir une concertation publique quand le gouvernement envisage d'invoquer la disposition d'exemption. Le gouvernement de l'Alberta semble avoir tiré cette leçon de la déroute associée au projet de loi 26 — en l'absence d'une réelle consultation des intervenants politiques importants, y compris des membres du caucus, trop de gens ont été pris au dépourvu. Il est évident que le gouvernement a su tirer la morale de l'histoire si l'on en croit la réaction du premier ministre de l'Alberta et des autres membres du Cabinet qui se sont engagés à ne pas invoquer la disposition d'exemption sans consultation publique préalable.

On peut enfin conclure que la disposition d'exemption doit être réservée aux cas où il existe entre l'ordre judiciaire et les politiques socio-économiques un décalage tel que le droit fait obstacle au changement social. Bien que M. Lougheed n'aborde pas la question directement, elle se déduit aisément de certains des exemples cités. Il est vrai que le texte de l'article 33 ne fait référence à aucune exigence particulière à satisfaire avant de soustraire une loi à l'application de la Charte, hormis que ladite loi doit expressément indiquer les articles de la Charte auxquels elle déroge. Ainsi, sur le plan du droit formel, il n'existe pas d'autre restriction au recours à la disposition d'exemption. Les législateurs devront cependant prendre un certain nombre de facteurs en considération avant de l'invoquer.

On peut à juste titre déclarer que, compte tenu des visées, des objectifs et des structures de la Charte, il serait peu approprié qu'une assemblée législative invoque la disposition d'exemption pour une loi qui vise à désavantager plus encore un groupe défavorisé. En d'autres termes, la disposition d'exemption ne doit pas servir à particulariser les membres d'un groupe minoritaire déjà vulnérable au pouvoir économique ou politique de la majorité. Là réside, quant à moi, une des objections intuitives de bon nombre d'opposants au projet de loi 26 de l'Alberta. Par ailleurs, quand une initiative socio-économique importante est contrecarrée par une interprétation de la Charte remise en question par des personnes raisonnables et de bonne volonté, une assemblée législative ou un

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Parlement peut légitimement invoquer la clause dérogatoire.

Une mesure corrective telle que celle-ci aurait été particulièrement utile à «l'époque Lochner» aux États-Unis. De la fin du XIX^e au début du XX^e siècle, la Cour suprême des États-Unis a rejeté toute une gamme d'interventions du législateur sur le marché. Les juges n'ont pas fait opposition à toutes les lois de ce type, mais suffisamment pour empêcher que le gouvernement ne limite les heures de travail ou n'interdise le commerce de produits émanant du travail des enfants, par exemple. Le corps judiciaire n'a donc pas été assez attentif aux besoins de la société et aux pressions exercées sur le gouvernement pour neutraliser la force du marché.

À moins de satisfaire un objectif législatif visant l'avancement de causes politiques sociales importantes, le recours à la disposition d'exemption est à proscrire. L'invocation de l'article 33 dans le seul but de particulariser un groupe déjà vulnérable, en l'absence de tout autre objectif social indépendant important, n'est pas valable. Ainsi, le gouvernement de l'Alberta a eu raison de résister à ceux qui le poussaient à invoquer la disposition d'exemption pour soustraire les gais et les lesbiennes à la protection du Code des droits de la personne de l'Alberta.

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À propos de la Conférence Merv Leitch

La série de conférences commémoratives Merv Leitch Q.C., et le Fonds de bourses d'études Merv Leitch Q.C., ont été institués pour honorer la mémoire de Merv Leitch, ancien procureur général, trésorier et ministre de l'Énergie de la province d'Alberta. La série annuelle de conférences se donne alternativement à la University of Calgary et à la University of Alberta. Les bourses d'études Merv Leitch récompensent les étudiants et étudiantes qui excellent dans les deux domaines qui intéressaient plus particulièrement M. Leitch et auxquels il a apporté les contributions publiques les plus notables — le droit constitutionnel et le droit des ressources naturelles.

WHY A NOTWITHSTANDING CLAUSE?

The Honourable Peter Lougheed*

When I was asked to decide the subject for this lecture I concluded that it obviously should be in the areas of constitutional or natural resource law. As I thought about it, the recollection of an important personal event, that had long-term constitutional significance, resolved the decision for me. It is an event that has not before been made public.

Shortly after our government was sworn into office in September, 1971, I asked the new Attorney General, Merv Leitch, to come see me. I requested Merv to prepare an Alberta Bill of Rights. This would be the first item of legislation to be introduced at the first session of the new Legislature in the spring of 1972.

Some weeks later Mr. Leitch asked to see me to discuss an important matter. He came to my office and described his progress in preparing Bill 1, the Alberta Bill of Rights. Merv said to me, "Premier, we will have to provide in this Bill for a notwithstanding clause!" I responded, "What the hell is a notwithstanding clause?"

Merv patiently explained to me (something that he had to do on a number of occasions) that we needed to include a clause which allowed, if public policy dictated, for other Alberta laws to operate notwithstanding the Alberta Bill of Rights. He explained that this was required in the event that either the government wished to propose legislation contrary or at odds with the rights or freedoms contained in the Alberta Bill of Rights or a court ruled that a particular piece of Alberta legislation was invalid because it purported to authorize the abrogation or infringement of any of the rights or freedoms recognized and declared in the Alberta Bill of Rights.

Thus, came section 2 of the *Alberta Bill of Rights*:

* P.C., C.C., Q.C., Partner, Bennett Jones. Premier, Province of Alberta, September 1971 to November 1985. This essay is the text of the Inaugural Merv Leitch Q.C. Memorial Lecture delivered at the University of Calgary, November 20, 1991.

Every law of Alberta shall, unless it is expressly declared by an Act of Legislature that it operates notwithstanding the *Alberta Bill of Rights* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.

Nine years later in Ottawa on September 1980 at an open, televised First Ministers' Conference on the Constitution, Prime Minister Trudeau espoused the desirability of patriating the Canadian Constitution with a Charter of Rights and Freedoms. The Premiers of Saskatchewan and Manitoba, Allan Blakeney and Sterling Lyon respectively, argued just as eloquently that such a Charter was not needed in Canada but that, in any event, the supremacy of Parliament should prevail over the appointed judiciary. I supported them on behalf of Albertans.

It was at this point that Merv Leitch engaged me in a private side discussion and suggested that I intervene by proposing a "notwithstanding clause" along the lines of section 2 of the Alberta Bill of Rights. I did so. My impression was that many around the table were not in any different a position than myself nine years earlier and were not knowledgeable about the concept. They did, though, couch their responses in more diplomatic language than I had done. In fact, a few said to me later that they had never heard of such a concept, although it had existed in obscurity in Mr. Diefenbaker's Bill of Rights for many years.

The concept, sometimes known as *non-obstante*, became an integral part of the constitutional drama that unfolded during the balance of 1980 and through 1981.

The final "deal" (sadly absent of Quebec) on November 5, 1981 was, as is almost always the case, a trade-off. Essentially Mr. Trudeau got his Charter of Rights and the Western Premiers got both the Alberta Amending Formula and a notwithstanding clause.

Section 33 of the *Constitution, 1982* provides:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or

sections 7-15 of this Charter.

- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Section 2 sets out the guarantees of major fundamental freedoms. Sections 7-14 provides for legal rights and section 15 for equality rights.

The evolution of section 33 is described in Alberta Hansard on November 21, 1983 in this exchange between the Leader of the Opposition and the Premier:¹

Mr. Notley: Mr. Speaker, on a point of order. The question really relates to an option the government is now considering. In reviewing that process of consideration, I think it is important to go back and find out what the situation was in 1981, in order to obtain the facts of the matter. Therefore, I submit that the question is in order. However, I could certainly rephrase the question, and ask the Premier to advise the Assembly: in the process of considering the option of using a notwithstanding clause, was it the position of the government of Alberta that this notwithstanding clause should apply to section 2, dealing with the fundamental freedoms outlined in the Charter?

Mr. Lougheed: Mr. Speaker, yes, it definitely was. The then premiers of Manitoba and Saskatchewan and the Premier of Alberta took the position in the constitutional discussions that we needed to have the supremacy of the legislature over the courts. As I mentioned in the House on November 6, 1981, we did not [want] to be in a position where public

¹ *Alberta Hansard*, No. 71 (21 November 1983).

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policy was being dictated or determined by non-elected people. We took the position that that therefore definitely needed to apply to section 2 of the Constitution, under fundamental freedoms, insofar as the American experience had been that judicial interpretations and other actions which were fundamentally different from the view of legislators were taken from time to time. So it was very definitely the view of the government of Alberta, supported by the then premiers of Manitoba and Saskatchewan, that the notwithstanding section, section 33, should apply to section 2.

Mr. Notley: Mr. Speaker, a supplementary question to the Premier. Was that understanding based on a very rare use of this notwithstanding clause, to deal essentially with what would be a miscarriage of justice as opposed to a policy difference of the Legislature with the Charter of Rights?

Mr. Lougheed: Mr. Speaker, it was far beyond the issue of a miscarriage of justice. It would be when major matters of public policy were being determined by the court as a result of an interpretation of the Charter. It was the view of those of us who expressed that position, which ultimately prevailed in the constitutional negotiations, that it should be the legislators and not the courts that should determine these matters.

Since the concept of notwithstanding was introduced in Canadian constitutional debate, it has been most controversial with very divided opinions. It remains today a current and emotional issue of constitutional significance.

Its origins, as I have described, would seem to make it a logical but provocative subject for the first Merv Leitch Memorial lecture. So the question is: should section 33 of the Canadian constitution, namely, the notwithstanding clause, be removed?

Those in favour of its removal include [former] Prime Minister Mulroney, former Prime Minister Mr. Trudeau, the Canadian Bar Association, many academics and many commentators. In favour of its retention are some Western Canadian Premiers and governments, many academics and many commentators.

As I argue below, I favour the retention but wish to conclude with three possible amendments to section 33.

Next, though, I want to examine the notwithstanding concept in more

detail, its recent application, the comparative United States' constitutional approach, and the principal arguments for and against section 33.

The Concept of Notwithstanding

The notwithstanding clause reflects a balance between two competing interpretations of our democratic system. Canada has an historic tradition of parliamentary supremacy. This is reflected in the preamble to the *Constitution Act, 1867* which expresses the desire that the Dominion have a "constitution similar in principle to that of the United Kingdom."

Prior to the Charter, the role of the courts was to give effect to the political choices made by the legislators. Subject only to issues relating to the division of powers, courts were bound by the idea that Parliament was supreme and the court's role of judicial review was limited. While the Charter raises to an unprecedented level the protection of rights and freedoms afforded to Canadians, it is acknowledged that democratic society sometimes requires the abrogation of these rights for important reasons.

Two University of Toronto professors, Russell and Weiler, point out that section 33 reflects that British tradition of responsible democratic government balanced with the American tradition of judicially enforced constitutional rights and the idea of constitutional supremacy.² This latter aspect is represented by section 52 of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada and any law inconsistent with it is of no force or effect.

This type of response to the tension between the supremacy of Parliament and judicial activism is not without precedent. As mentioned, a similar provision can be found in the Alberta Bill of Rights, and also the Quebec Charter of Human Rights and Freedoms, and the Canadian Bill of Rights.

Through the notwithstanding clause, Parliament or the legislature of a

² "Don't Scrap Override Clause — It's a very Canadian Solution" *The Toronto Star* (4 June 1989) B3.

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province may expressly declare that legislation passed by it shall operate notwithstanding the fundamental freedoms (of conscience and religion, thought and expression, assembly and association), legal rights or the equality rights guaranteed by the Charter. To invoke the notwithstanding clause, the legislature must make an express declaration that it is overriding a particular right or rights in the Charter.

There are limits to the use of the notwithstanding clause. Section 33 does not affect the guarantee of rights and freedoms in section 1, Democratic Rights (section 3-5), Mobility Rights (section 6), Official Languages of Canada (sections 16-22), and Minority Language Education Rights (section 23).

As well, a declaration that legislation shall operate notwithstanding the Charter automatically ceases to have effect five years after its enactment. The declaration may be re-enacted, compelling the government invoking section 33 to review its use and subjecting the express infringement to renewed public scrutiny every five years.

Justice Gérard LaForest, prior to his appointment to the Supreme Court, predicted that the political unpopularity of making section 33 declarations would result in the clause rarely being used.³ He claimed that the effect of the limitations on rights guaranteed in the Charter should not be over-estimated. The protection of rights in the United States and other countries have always given way to what he calls the "sustained will of the legislative branch of government" which is, after all, elected by the people. His assertion is that if a legislature wants the law in place, the courts will ultimately defer to the legislation re-enacted in a different form than that originally rejected. In effect, what the Charter ensures is sober second thought.

A recent example of this was Justice Minister Kim Campbell's struggle to replace the rape shield law which was recently struck down by the Supreme Court of Canada as being a violation of the accused's legal rights.⁴ Another

³ Hon. Gérard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Can. Bar Rev. 19 at 26.

⁴ *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577.

example is the criminal code provisions relating to the storage of firearms which have been impugned at lower court levels as infringing Charter rights.⁵ The recently passed legislation on gun control appears to have addressed this.

Predictions as to the minimal use of section 33 seem to have been accurate. In fact, use of similar clauses in the Bill of Rights may have been a reliable indicator.

The *non-obstante* provision in the Canadian Bill of Rights was used only once, that being in the *Public Order (Temporary Measures Act)*,⁶ which replaced the *War Measures Act*. Arguably, the absence of any extensive use of the override provision in the Canadian Bill of Rights was not the result of a deep-seated respect for judicial determination on rights issues, but as a result of the fact that there were no judicial restraints imposed on the Government of Canada as a result of the Bill of Rights which were of sufficient concern to resort to the override. It will be recalled that, under the Canadian Bill of Rights, the Supreme Court seriously questioned its own power to strike down legislation, on the premise that Parliament was supreme. As a result the Bill of Rights arose only rarely to offer any protection.

The override provision found in section 52 of the Quebec Charter of Human Rights was used nine times prior to the enactment of the Canadian Charter of Rights and Freedoms. It has since been used along with section 33 of the Canadian Charter in response to the Bill 101 decision.⁷ The override was used, overwhelmingly, in situations where the limitations on rights probably would have been upheld by the courts in any event. For example, Quebec invoked the override clause in its *Jurors Act* to require that jury selection be limited to Canadian citizens of full age on electoral lists.⁸ Another instance

⁵ See, for instance, *R. v. Durham* (1991) 6 C.R. (4th) 178 (Ont. Gen. Div.); rev'd (1992) 15 C.R. (4th) 45 (Ont. C.A.). Also see *R. v. Finlay* (1991) 6 C.R. (4th) 157 (Sask. C.A.); rev'd (1993) 23 C.R. (4th) 321 (S.C.C.).

⁶ S.C. 1970, c.2.

⁷ *Ford v. A.G. (Que.)*, [1988] 2 S.C.R. 712; S.Q. 1988, c.54, s.10.

⁸ R.S.Q., c.J-2, s.52.

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where the Quebec override was invoked was in the case of Quebec's *Youth Protection Act*, which allowed *in camera* proceedings when a youth is the accused.⁹ In this case, section 23 of the Quebec Charter explicitly exempted young persons from public trials where a public trial would not be in the young person's best interests. This raises further questions as to whether the use of the override was necessary in the circumstances.

Alberta has never used the override provision in its Bill of Rights.

Examples of the Use of Section 33

As noted earlier, one use of the section 33 override is found in the infamous *Derogation Act* passed by Quebec, in protest, excluding all Quebec, laws from the application of section 2 and sections 7 through 15 of the Charter.¹⁰

This occurred in 1982 when the Levesque Government introduced into Quebec's National Assembly provisions which overrode the fundamental freedoms, the legal rights and equality rights provided for in the Charter in relation to all and subsequent legislation. The purpose was to reflect the Quebec Government's view that they were not a signatory to the new Canadian Constitution, and this was a method for them to express their opposition to the process even though Quebec was legally bound by the Constitution Act of 1982. This Quebec *Derogation Act* was not applied after April 1986 by the Bourassa Government as a conciliatory move in anticipation of the Meech Lake constitutional negotiations.

Another use of section 33 is found in a 1986 amendment to the Saskatchewan labour relations act, forcing civil servants back to work notwithstanding section 2(d) of the Charter.¹¹ Although this particular invocation of section 33 was preemptive, in the sense that the Saskatchewan legislators used it "in anticipation of a constitutional challenge to the legislation," the

⁹ S.Q. 1984, c.4, s.84.

¹⁰ S.Q. 1982, c.21.

¹¹ *The SGEU Dispute Settlement Act*, s.s. 1984-85-86, c.111, s.9.

legislators justified the preemptive use by arguing that it was actually in “response” to the decision of the Saskatchewan Court of Appeal in the *Dairy Workers* case, where back-to-work legislation was found to be an infringement of the right to freedom of association.¹²

It should be noted that the use of section 33 by the Saskatchewan government proved to be unnecessary because of the Supreme Court of Canada decisions in the *Public Service Alliance, Dairy Workers, and Alberta Labour Reference (Alberta Union of Public Employees) v. Attorney General of Alberta*¹³ cases where it was found that section 2(d) of the Charter (freedom of association) does not give rise to the right to strike.

Of course, the most notorious use of the notwithstanding clause arose in the *Quebec Signs* case, where Quebec’s Bourassa government invoked the override. As Premier Bourassa put it at the time, use of the clause “to enforce a language policy goes against the traditional attitude of tolerance and openness shown by Quebecers ... it means suspending civil liberties, pure and simple ... (but) if I must upset the rest of English Canada because I must protect the future of the French language and society, well, I accept the risk.”¹⁴ This led to the resignation of four of Bourassa’s English-speaking ministers and prompted Brian Mulroney to declare that the Canadian Constitution was “not worth the paper it was printed on.”¹⁵ Manitoba Premier Gary Filmon responded to this use of the override clause by withdrawing the approval of the Manitoba legislature for the Meech Lake Accord.

The use of section 33 has been threatened where the possibility of a seemingly undesirable judicial response appears imminent. I was personally involved in 1983 as Premier of Alberta in just such a situation. We had passed in the Alberta Legislature what was known as Bill 44 (*The Public Service Employee Relations Act*)¹⁶ which prevented hospital workers from striking. It

¹² *RWDSU v. Government of Saskatchewan*, [1985] 5 W.W.R. 97.

¹³ [1987] 1 S.C.R. 313.

¹⁴ Quebec, Assemblée nationale, *Journal des débats* (20 décembre 1988) 4423-26.

¹⁵ Canada, House of Commons, *Debates* (6 April 1989) 153.

¹⁶ R.S.A. 1980, c.P-33.

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was a fundamental part of the government's legislative program. The union of the affected workers (*Alberta Union of Provincial Employees*) commenced action on the basis of an interpretation that freedom of association in section 2 of the Charter meant that workers have a constitutional right to strike. This in due course developed into the aforementioned *Alberta Labour Reference* case decided by the Supreme Court of Canada in 1987.

We (the Alberta Government) decided at the time, after considerable deliberation, to announce in advance in the legislature (November 17, 1983) that if the Supreme Court of Canada ultimately ruled that our legislation precluding the right of hospital workers to strike was invalid because of the freedom of association provisions of the Charter, that we, the Alberta government, would forthwith introduce similar legislation and include the "notwithstanding" clause as provided by section 33.¹⁷

There are clearly two sides to this approach. In favour was the view that it was deceitful not to alert our adversaries of our strong intentions. On the other hand, some viewed the statement as a threat that could influence the courts. We had previously rejected the idea subsequently used by the Saskatchewan Government of a preemptive move using the notwithstanding clause in the legislation, as they did in 1986 with the aforementioned Saskatchewan labour relations act.

Recently, there have been calls for the use of the notwithstanding clause to address current public policy problems, the answers to which have been somewhat frustrated by Supreme Court decisions.

Such was the case following the Supreme Court decision holding that refugees were entitled to a full oral hearing and various appeals before they could be deported.¹⁸ Most recently, as mentioned, there were calls for the use of section 33 to reinstate the rape shield law struck down by the Supreme Court in past months.

¹⁷ *Alberta Hansard*, No. 69 (17 November 1983) at 1680.

¹⁸ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

The Parameters of Government Response to Supreme Court Decisions in the United States

It may be useful for Canadians to examine the comparative situation in the United States. Like our Charter, the American Bill of Rights entrenches and protects rights and freedoms in a system of judicial supremacy. The Bill of Rights, however, contains no provision equivalent to our notwithstanding clause. A brief look at the history of judicial activism and the lack of an effective responsive power by the elected legislature is helpful in appreciating the merits of Canada's notwithstanding clause.

In the USA there is no *non-obstante* power available to the President or Congress to deal with Supreme Court decisions with which they disagree. Thus, the various levels of government must use the available methods of dealing with judicial activism.

Among the powers which the President possesses to respond to court decisions is the power to appoint Supreme Court Judges. The most familiar example of an attempt to change the direction of the Court's decisions by using the appointment power is found in the "New Deal" crisis of the 1930s, where President Roosevelt wanted to increase the size of the Court in order to appoint judges who would support his "New Deal" legislation. A more current example of the power to appoint judges favourable to the President's policy objectives was President Reagan's attempt to create a Supreme Court that shared his anti-abortion philosophy in order to overturn the controversial decision in *Roe v. Wade*.¹⁹ This apparently was continued by President Bush in his appointment of Justice Clarence Thomas, and there is reason to believe that, after over 10 years of appointing new judges, there is finally a conservative majority on the US Supreme Court that will reflect the anti-abortion position held by the President's office.²⁰

In Canada, the entrenchment of section 33 appears to prevent the

¹⁹ 410 U.S. 113 (1973).

²⁰ [This turned out not to be the case. See *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992) — Ed.]

need to abuse the judicial appointment process in response to controversial court decisions relating to section 2 and sections 7 to 15 of the Charter. The notwithstanding clause allows legislators the opportunity to change or modify the effect of judicial decisions with which they are not in agreement. As well as being a more legitimate response, it is much quicker than the appointment powers which, in the example of *Roe v. Wade*, could not help President Reagan reach his objective after eight years in office.

In Canada, the Governor-in-Council (the Cabinet), on the recommendation of the Federal Minister of Justice, holds the power to appoint the Supreme Court Judges, and the Prime Minister effectively has the power to appoint the Chief Justice.

A second option available to the President of the United States is to ignore or disobey a Supreme Court decision or to refuse to supply the resources required to implement the decision. This was done during the American Civil War, when President Lincoln ignored a decision by the Supreme Court in a case involving civil rights. Despite the lack of credibility and respect for the Supreme Court, which was a result of the questionable *Dred Scott* decision (1857)²¹ where the US Supreme Court appeared to be approving of slavery, Lincoln had to vigorously defend his "war powers."

Section 33 of the Charter avoids the need for a balancing of prestige between the courts and elected officials in relation to section 2 and sections 7 to 15 of the Charter, as it explicitly allows Parliament or a legislature to defy a court decision, assuming certain prescribed requirements are met.

Overall, the ability of the President of the United States and of Congress to deal with Supreme Court decisions is weak. In all of the cases there must be a decision which greatly conflicts with the standards of the day, a great consensus among politicians, widespread support among the people, and a situation serious enough to allow some justification in going against the Courts' interpretation of the Constitution.

Section 33 of the Charter effectively remedies the problems that US

²¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

legislators have had in responding to judicial decisions with which they disagree. The drafters of the Canadian Charter foresaw the problem created by judicial supremacy in the US, and opted to form a system of checks and balances between the judiciary and legislators before judicial supremacy could assert itself. Thus, at least one premise supporting the existence of section 33 is that it allows effective political action on the part of legislators to curb an errant court.

The Great Canadian Debate

In Canada, the debate regarding the notwithstanding clause continues. Is this provision a loophole that devalues and dilutes individual rights permitting abuses by legislators? Reference could be made to the Japanese internment during World War II, the head tax on Chinese immigrants during the early part of this century or the suspension of rights pursuant to the *War Measures Act*. Or, is section 33 an essential safety valve and check on the power of the judiciary in a system with a tradition of legislative supremacy?

The issues were succinctly pointed to in an academic debate between John Whyte, of the Faculty of Law at Queen's University and Peter Russell of the Department of Political Science at the University of Toronto.²²

John Whyte asserts that a legislative override is inappropriate in a constitutional democracy. While section 33 may be "a concession to Canada's long tradition of parliamentary supremacy," Whyte suggests that our parliamentary tradition also embodies a deep respect for rights, and that the question of whether we should retain the override ought to be determined according to principles of rights and an assessment of social goods and evils. Whyte emphasizes that our constitutional contract is guided by legalism, democracy and federalism, and that these factors should be looked to in considering whether section 33 is a good feature in our constitution.

Whyte claims that our commitment to legalism and the binding legal

²² J.D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta. L. Rev. 347; P.H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L. Rev. 293.

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resolution of disputes would be consistent with the non-existence of section 33. He makes this claim, asserting that we, as a nation, have decided that rights issues would be resolved through adjudication. It may be, however, that what we have, in fact, chosen as a nation is a constitutionalization of rights, subject to a final *political* judgment in certain instances, rather than a final judicial determination as to the extent of all rights.

This position was asserted by Professor Monahan of Osgoode Hall Law School. In his opinion the override was included in the Charter in response to the fear that the courts may attempt to insulate rights and liberties from the democratic process. Section 33 exemplifies the idea that legislation does not necessarily destroy freedom but can itself create it. He asserts that section 33 reflects a commitment to the idea that there is not necessarily an antithesis between the state and freedom.²³

There is a further way in which section 33 may actually expand the rights afforded to Canadians. Knowing that governments can resort to section 33, courts may feel more willing to apply stricter interpretations of the enumerated rights and freedoms. Difficult decisions will be made more easily knowing that society and its government will have the ultimate say in the matter.

Whyte readily accepts that it is a good thing that the constitutional patterns that we create are hardly ever pure, and he notes that one of the virtues of the override power is that it has allowed Canada to create a regime for protecting human rights while leaving room for determined legislators to maintain collective social arrangements that they consider particularly important.

Whyte sums up his concern with section 33 by stating:

The unfortunate aspect of this benign description of the override clause as a restrained tool, instrument of thoughtful response and balancer of constitutional ideologies is its use is simply not likely to be restricted to instances that match this description. The primary reason for wishing to

²³ P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 119.

do away with the override clause is that the anxiety that produced the political demand for entrenched rights cannot rationally be calmed in the face of the legislative power granted by section 33. That anxiety is simply this: political authority will, at some point, be exercised oppressively; that is, it will be exercised to impose very serious burdens on groups of people when there is no rational justification for doing so.

Harkening back to the American examples, it seems that the same risk exists in a system of judicial supremacy over rights where there is no legislative override.

Professor Peter Russell is Whyte's nemesis in the debate over the retention or abandonment of section 33. Professor Russell published a response to Whyte's critique of section 33, defending the existence of section 33. Russell accepts that the override cannot be defended by an appeal to simple majoritarianism, which admittedly is an unacceptable ethical foundation for a constitutional democracy.

After dismissing the unacceptable arguments in favour of the override, Professor Russell puts forward the case for the override. As far as substantive considerations are concerned, Russell asserts that judges are not infallible, and given that fact there should be some process more reasoned than court-packing and less cumbersome than constitutional amendment, through which the merits of a judicial decision can be publicly debated, and possibly rejected.

Russell also points out that the role of the courts under the Charter is, increasingly, a role which involves political choices or policy decisions, particularly under section 1 of the Charter, and flatly dismisses any suggestion that the debate on such issues becomes closed once the judiciary speaks. Russell's point is that, although we will normally abide by and respect judicial decisions regarding rights, occasionally situations will arise in which the citizenry, through a responsible and accountable process, concludes that a judicial resolution of a rights issue is seriously flawed, and seeks to reverse it. A current example which comes to mind is the recent striking down of the rape shield law by the Supreme Court of Canada. The public and the politicians were shocked by the decision striking down what was perceived to be a useful and important law, and the Minister of Justice struggled to redraft this provision while taking care not to breach the Charter. The task must be a tremendous one, and perhaps this exemplifies an instance where the use of section 33

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would not only be appropriate, but popular as well.

The purpose of the override is to provide an opportunity for the responsible and accountable public discussion of rights issues, and this might be undermined if legislators are free to use the override without open discussion and deliberation of the specifics of its use. There is little room to doubt that, when defying the Supreme Court, as well as overriding a pronounced right, a legislature should consider the importance of the right involved, the objective of the stricken legislation, the availability of other, less intrusive, means of reaching the same policy objective, and a host of other issues. It should not only be the responsibility of the Courts to determine whether a limit is reasonable or demonstrably justifiable in a free and democratic society. If a legislature wishes to take issue with the Court's determination, it too should be required to consider whether the limit is one that is justifiable in a free and democratic society.

The idea that amendments to the notwithstanding clause ought to promote a more thorough debate was adopted by the Royal Commission on the Economic Union and Development Prospects for Canada; better known as the 1985 MacDonald Commission.²⁴

The Commission determined that the clause was significant for parliamentary supremacy and important to the interaction between the guarantee of rights and Canadian federalism. In this respect, it is important that the enactment of a section 33 declaration be done with due consideration. Parliamentary or legislative debate will be the primary form for scrutinizing the use of section 33 and it is critical that Canadians ensure the use is consistent with appropriate standards of responsible and just administration.

This, according to the Commission, could be promoted by requiring the overriding legislation to indicate the purpose of such legislative action. The statement of purpose would assist in promoting more useful dialogue regarding

²⁴ Canada, Report of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol. III (Ottawa: Supply and Services Canada, 1985) at 278.

the enactment of such a declaration and further, it would assist a court in ensuring that the infringement of a complainant's rights did not exceed that which was necessary to achieve the legislative objective.

Conclusion

On reflection, ten years later, I hold to the same view now as I did then. The notwithstanding clause — section 33 of the constitution — should be retained on the basis of the supremacy of the elected Parliament over an appointed judiciary.

However, I believe there is scope for three amendments to the section:

- (1) If a notwithstanding clause is used, the legislature or Parliament should be required to spell out the purpose of the legislation, as suggested by the MacDonald Royal Commission. Thus, section 33 should also be amended to disallow, as Quebec has done, standard form overrides.
- (2) A simple majority does not appear adequate for Parliament or a provincial legislature to introduce legislation including a notwithstanding clause. It is too substantive an action by the elected body and hence requires a higher level of authorization than a simple majority. I agree with the federal government's constitutional proposals of September 1991, that "the votes necessary to Parliament or a provincial legislature to invoke the override clause of the Charter be changed from a simple majority to sixty per cent of the Members of Parliament or the provincial legislature."²⁵

²⁵ Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services, 1991) at 4.

- (3) The approach used by the Saskatchewan Government in 1986 in the Saskatchewan labour relations act, preempting judicial review in advance, be disallowed. In my mind, such an action is undemocratic in that the purpose of section 33 was ultimate supremacy of Parliament over the judiciary not domination over or exclusion of the judiciary's role in interpreting the relevant sections of the Charter of Rights.

An amendment could take the following form:

Parliament or the legislature of a province is prohibited from making a declaration under subsection 33(1) until such time that all rights of appeal are exhausted and a final judicial determination is rendered.

I respect the view of those that disagree with me. It is precisely the nature of debate that Merv Leitch appreciated and enjoyed. I sense he would appreciate the logic and sincerity of both points of view. I wish he was standing beside me so he could help me answer your questions.