SECTION 33: THE *CHARTER'S* SLEEPING GIANT

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Section 33 was included in the Canadian Charter of Rights and Freedoms *as a concession to those who were concerned that the* Charter *would enable Canadian courts to override the democratic principles of Parliamentary supremacy. At its inception, however, section 33 was also widely feared as a threat to the significance of the individual rights and freedoms set out in the* Charter. *Has this fear materialized? Over the past twenty years, section 33 has seen very little use, although calls and proposals for its use recently seem to have increased. Nevertheless, section 33 remains a constitutional tool which governments may consider when attempting to balance Canada's sometimes conflicting constitutional principles (such as, the principles of democracy and respect for minority rights). With these ideas in mind, this paper attempts to describe the role which section 33 presently plays in the* Charter *based on this section's use over the past twenty years and its purpose as contemplated in 1982. The paper concludes that section 33 is a sleeping giant within the* Charter*: now mostly quiet and unthreatening but, if awakened by increased and unnoticed or unopposed use, still capable of significantly changing Canada's constitutional and legislative landscape. The responsibility for controlling section 33's future role in the* Charter *lies primarily with the Canadian public; the first step in fulfilling this role is for the public to note that, whatever its current status, section 33 remains a constitutional giant.*

I. INTRODUCTION

Canada's reputation for being a nation of compromise and concession has seldom been more well-deserved than in 1982 when Canada added to its constitutional framework the *Canadian Charter of Rights and Freedoms*[1] and included in that document section 33, the "notwithstanding clause."[2]

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 Section 33 of the *Charter, ibid.*, reads as follows:

> (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 to 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.

Ironically, while the *raison d'etre* of the *Charter* is to protect the basic legal, civil and human rights of Canadians from government abuse, section 33 specifically permits the federal, provincial, and territorial governments to pass laws which contravene some of the most fundamental rights and freedoms guaranteed by the *Charter*. Obviously, the power conferred on Canadian governments by section 33 represents a compromise forged between advocates of individual rights and proponents of Parliamentary supremacy.[3] The inclusion of section 33 in the *Charter* gives this compromise constitutional status, making the tension between individual rights and Parliamentary supremacy a built-in feature of Canada's constitutional landscape and an integral element of the *Charter*'s overall character. Arguably, then, the notwithstanding clause explicitly and implicitly affects all understanding and analysis of the *Charter*, making a discussion of the past, present, and future status of section 33 a necessary and fundamentally important step when reflecting on Canada's twenty years of *Charter* experience. By appreciating the role which section 33 has played in the *Charter* to date, we can better understand, influence, and direct the future use of this provision.

In this paper I will attempt to describe the role which section 33 presently plays in the *Charter* based on section 33's use over the past twenty years. As the title of this paper suggests, I contend that section 33 is a sleeping giant within the *Charter*. I will begin by outlining the various ways in which section 33 is a giant within the *Charter*, many of which were apparent in 1982 and which were highlighted by commentators at the time. Next, I will explain why I consider this giant to have been in a state of sleep during the past twenty years. This explanation will include a discussion of section 33's use to date, an issue which has received surprisingly little academic, media, or public attention. Finally, building on my observations regarding section 33 as a sleeping giant, I will offer some comments on the role which section 33 might play in the *Charter*'s future

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(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).

The term "notwithstanding clause" is commonly used to refer to section 33 itself and to the provision of an Act of Parliament or a legislature which invokes section 33 (i.e. the section of an Act which indicates that part or all of the Act is to operate notwithstanding listed *Charter* protections). For simplicity's sake I will use this nomenclature in this paper. Nevertheless, section 33 may be more aptly described as the "notwithstanding power" or the "notwithstanding mechanism" since the section empowers legislatures to include in their legislation a "notwithstanding clause." For more on the nomenclature associated with section 33, see Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons From the Ignored Practice of section 33 of the *Charter*" 44 *Can. Pub. Admin.* 3 at 255-291 at note 3.

3 As stated in "Reconciling Rights and Democracy: the Notwithstanding Clause Strikes a Distinctively Canadian Balance" *The Globe and Mail* (4 February 1999), online: InfoTrac Web: CPI.Q., the notwithstanding clause "represents an entirely Canadian tradition of legitimate compromise and fine balancing of competing principles, in this case of the primacy of rights and the sovereignty of parliamentary institutions."

and, in particular, when, how, and why the giant might awake. Overall, my thesis is that, both because of and in spite of its low rate of use since 1982, section 33 remains a formidable force in the *Charter* and houses the potential to seriously change Canada's *Charter* experience in the future. As with most sleeping giants, section 33 should not be ignored or forgotten.

II. SECTION 33 AS A GIANT

There are several ways in which section 33 is a giant within the *Charter*. Each derives from section 33's unique status as the only substantive *Charter* provision which does not promote or champion the protection of individual rights and freedoms.[4] This unique feature has made section 33 a giant in the role it played in the history of the *Charter*'s enactment, in the degree of power it offers to legislatures, in the potential political challenges its use poses for legislatures, and in the implications its mere existence has for Canada's libertarian philosophy.

A. A Giant in the *Charter's* Enactment

There is little doubt that section 33 is a giant that helped slay the political deadlock which preceded the *Charter*'s enactment. In 1981, by agreeing to include the notwithstanding clause in the *Charter*, then Prime Minister Pierre Elliot Trudeau made the *Charter* more palatable to the provincial Premiers, who feared that a constitutionally entrenched *Charter* would unduly threaten legislative sovereignty. While this concession certainly was not the only compromise which permitted patriation of the constitution,[5] without this concession the *Charter* would likely not have been included in the final constitutional package.[6] The inclusion of the notwithstanding clause was

4 Arguably, section 1 of the *Charter*, *supra* note 1, also fails to advance the cause of individual rights and freedoms because it confines the scope of the *Charter*'s rights and freedoms to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The fundamental difference between section 1 and section 33, however, is that section 1 simply requires the rights and freedoms identified in the *Charter* to be balanced against the needs and values of a free and democratic society. Apart from recognizing that individual rights and freedoms cannot be absolute, however, section 1 still supports and maintains the existence of the enumerated rights and freedoms "subject only" to reasonable limits. In contrast, section 33 enables governments to circumvent any restrictions imposed on government action by the rights and freedoms listed in the *Charter*. In short, while section 1 limits the scope of *Charter* rights, section 33 allows for the total avoidance of *Charter* protections.

5 The other major concession dealt with the amending formula. For further discussion on the elements of compromise, see Russell, *infra* note 7 at 107-126.

6 The importance of section 33 in securing the Charter's constitutional status is commonly recognized: see note 7. For example, Peter Lougheed, Premier of Alberta at the time of patriation, was recently quoted as saying that the notwithstanding clause was "very important" to the success of the constitutional negotiations of 1981: "We never would have signed the Constitution without the notwithstanding clause." L. Chwialkowska, "Maybe They Went a Bit Too Far" *National Post* (17 April 2002) A1 at A6. See also *supra* note 3: " . . . without the notwithstanding clause, we would not have had a *Charter* at all, because that was the price that several key premiers demanded for agreeing to the Trudeau package of constitutional reforms."

therefore instrumental in the patriation of the constitution with an entrenched *Charter*.[7]

B. A Giant Dose of Legislative Power

The most obvious aspect of section 33's giantess is the power which this provision provides to legislatures to pass laws which violate basic *Charter* principles and to ensure that these laws operate in spite of any inconsistencies with the *Charter*. In particular, section 33 permits lawmakers to enact legislation which contradicts the fundamental freedoms (section 2), legal rights (sections 7-14) and equality rights (section15) set out in the *Charter*.[8] This substantial power is further magnified by the relative ease with which lawmakers can legally employ the notwithstanding clause: section 33 requires only that legislatures "expressly declare" that a certain statute or part of a statute is intended to operate in spite of one or more of the listed *Charter* provisions. This means that section 33 can be invoked pre-emptively (that is, without waiting for a court to decide that a particular law violates the *Charter*), with a simple majority vote, and without necessarily specifying which provisions of the law in question are thought to be in violation of the *Charter* and why.[9]

The ability of legislators to utilize section 33 preemptively means that a

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7 Much has been written about the history of Canada's negotiations surrounding the patriation of the Constitution. For brief discussions of the final negotiations leading to the passage of the *Charter* and the inclusion of the notwithstanding clause in particular, see: P.H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press Incorporated, 1993) at 107-126; C.J. R. McMurtry, "Historical Considerations in Relation to the Constitution" (Autumn 1999) 18:3 *Advocates Soc. J.* 6; G. Dickson, "Alberta and the Notwithstanding Clause" (August-September 2000) 25:1 *Law Now* 41 at 41-42; and T. Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52 *U.T.L.J.* 221 at 223.

8 Section 2 guarantees fundamental freedoms, including freedom of religion, expression, assembly and association. Sections 7-14 protect legal rights, including under Section 7 "the right to life, liberty, security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15 guarantees equality before and under the law and equal protection and benefit of the law "without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

9 See *Ford* v. *Quebec* [1988] 2 S.C.R. 712 at 33-36 [*Ford*]. In *Ford*, at 33, the Supreme Court confirmed that section 33 does not impose any obligation on a legislative body to substantively justify or explain its use of the notwithstanding clause, as long as the requirement of an express declaration is met:

> A legislature may not be in a position to judge with any degree of certainty what provisions of the Canadian *Charter* of Rights and Freedoms might be successfully invoked against various aspects of the Act in question. . . . The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Charter. With great respect for the contrary view, this Court is of the opinion that a s. 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision or provisions to be overridden. Of course, if it is intended to override only a part of the provision or provisions contained in a section, subsection or paragraph then there would have to be a sufficient reference in words to the part to be overridden.

government can rely on section 33 to ensure that a law will operate notwithstanding *potential* as well as actual *Charter* violations.[10] In effect, section 33 thereby empowers governments to prevent a law from ever being scrutinized by the courts on *Charter* grounds.[11] From the point of view of balancing libertarian interests with Parliamentary sovereignty, there is an enormous difference between allowing a government to respond to a court decision by publicly declaring that a specific law operates notwithstanding the court's finding of a *Charter* violation (where those complaining of a *Charter* violation have had their day in court) and allowing a government to make the same declaration on speculation of a potential *Charter* violation (thereby avoiding a court hearing on the *Charter* violation). In short, by permitting legislators to invoke the notwithstanding clause in the absence of a court ruling, section 33 tips the balance of power toward the legislative sovereignty position.[12]

The balance of power is further weighted in favour of legislative sovereignty by the government's ability to invoke section 33 on a simple majority. This minimal standard means that, from a legal perspective, any government with a bare majority of seats can expect to be able to pass a law which overrides the *Charter* protections listed in section 33. Further, the majority vote requirement means that a government ordinarily does not need to convince opposition members to support use of the notwithstanding clause and can pass the law with minimal fanfare. (As will be discussed later, the amount of public attention directed at a government's decision to invoke the notwithstanding clause can have great implications for its successful employment). Further, the Supreme Court has determined that section 33 does not require the government to specify the components of the legislation which might violate the *Charter* or to explain the *Charter* violations at issue apart from identifying the *Charter* section numbers which are implicated.[13] Again, the government is able to invoke section 33 with minimal explanation or discussion of its rationale for doing so.

Of course, according to the express wording of section 33, the legal power conferred on legislators by this provision is not entirely without restriction. First, as already noted, the government must clearly express its intention to have a law operate notwithstanding the *Charter* by including a provision to that

10 While the legal ability of legislators to utilize section 33 preemptively was clearly established in *Ford, ibid.*, discussion continues amongst legal commentators as to whether, as a matter of policy, section 33 should be used in this manner. For example, see T. Kahana, *supra* note 2 at 276-281.

11 When a notwithstanding clause is operating, the issue of whether the law in question violates the *Charter* is moot: the law remains operative regardless of a *Charter* violation. Thus, while in theory a court may still hear arguments and render a decision regarding the constitutional validity of the law in the absence of the notwithstanding clause, a court is unlikely to expend the resources necessary to do so because the ruling would be of no practical effect.

12 For a detailed discussion of this issue, see Kahana, *supra* note 2. Kahana also notes that the absence of a court ruling preceding the government's decision to employ section 33 may mean that this decision attracts less public awareness and discussion and may thereby reduce any negative political reaction to the use of the notwithstanding clause. A lack of public awareness and scrutiny of the government's decision further increases the government's power in using section 33 to override *Charter* rights.

13 *Ford, supra* note 9 at para. 33.

effect in the legislation in question. Second, the government can only rely on section 33 to avoid sections 2 and 7-15 of the *Charter* and the government must specify which of these *Charter* provisions is to be affected by a notwithstanding clause. Third, under the "sunset" provision in section 33(3), every use of the notwithstanding clause automatically expires within 5 years of its enactment.

From a practical perspective, however, each of the legal limits on section 33's use is largely a matter of form rather than substance.[14] While the government has an obligation to expressly declare its reliance on section 33 within the statute to which it applies, the government can technically comply with this requirement by burying a notwithstanding clause in a lengthy statute. section 33 does not expressly require the government to take any other steps to draw the public's attention to the use of the notwithstanding clause. Further, the *Charter* protections which can be circumvented by the use of section 33 are among the most significant individual rights and freedoms safeguarded by the *Charter*. The *Charter* provisions which do not fall under section 33's power such as democratic rights, mobility rights, and language rights pertain more to protecting the way of life of Canadians rather than to protecting the personal freedom of Canadians. Finally, despite the automatic expiry of each notwithstanding clause, section 33 expressly permits a government to re-enact a notwithstanding provision, apparently with unlimited repetition, at each 5 year expiry point. Accordingly, at most the sunset clause simply forces a government to publicly restate, every 5 years, its intention to pass legislation notwithstanding certain *Charter* provisions.[15] In short, then, the legal restrictions on the use of section 33 reduce the giant status of the notwithstanding clause by mere fractions, if at all.

C. Giant Political Challenges for Legislators

While on one hand section 33 is a giant because it provides Canadian legislators with broad legal power to pass legislation notwithstanding fundamental *Charter* protections, on the other hand section 33 is a giant because it carries a potentially enormous political risk for any government which utilizes this provision. By invoking section 33, a government is, in effect, stating that its legislative agenda comes before the constitutionally guaranteed rights and freedoms of Canadians. Moreover, a government employing section 33 is forced to precisely identify the law or aspects of the law which take precedence over *Charter* rights and to specifically list the *Charter* sections which are being avoided. In doing so, a government may suffer political fall-out, either in the form of negative publicity and pressure prior to the notwithstanding legislation being passed, or in the form of unfavourable results at election time whether or not the notwithstanding legislation is ultimately passed. These potentially giant political challenges for legislators were intentionally built into section 33 to counter-balance the weighty legal power section 33 provides to

14 In *Ford*, *supra* note 9 at para. 33, the Supreme Court of Canada explicitly states that section 33 sets down "requirements of form only."

15 According to Kahana, *supra* note 2 at 259-272, the requirement that a government expressly state its intention to include or renew a notwithstanding clause in legislation has not typically drawn media focus or public attention to the use of the notwithstanding clause.

governments by allowing them to circumvent particular *Charter* protections.[16]

In practice, the adverse political effects of using section 33 have been of limited significance in the *Charter's* twenty year history,[17] however the potential remains for unfavourable political fall-out associated with the use of section 33. This potential may account, at least in part, for the relatively rare use which has been made of section 33 during the life of the *Charter* to date.[18] The potential for negative political fall-out arising from section 33's use is also likely responsible for the Alberta government's suggestion that a referendum should be held before the government passes legislation which employs the notwithstanding clause.[19] This process would presumably defuse any negative political ramifications arising from section 33's use, assuming that the government would not invoke the notwithstanding clause unless this move was supported by the referendum results.[20]

D. Giant Philosophical Implications

In addition to its practical impact on Canadian history, legislative power and politics, the existence of the notwithstanding clause in the *Charter* makes giant statements or raises giant questions about the Canadian philosophy of individual rights and freedoms. A constitution, it has been said, reflects the "national soul" and "recognizes[s] and protect[s] the values of a nation."[21] If this

16 See for example, C.J. R. McMurtry, *supra* note 7 at 9: "In 1981 we believed that the federal and provincial parliaments would be very reluctant to override any decisions of the courts for fear of 'paying a heavy political price.'" and G. Dickson, *supra* note 7 at 41 where Mr. Alan Borovoy of the Canadian Civil Liberties Association is quoted as saying in a 1981 media interview that "The notwithstanding clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to override the *Charter*. Political difficulty is a reasonable safeguard for the *Charter*."

17 No government has ever been voted out of office directly as a result of its use of the notwithstanding clause. In fact, the most significant negative political repercussions arising from a government's use of section 33 was the Alberta government's decision in 1998 to withdraw Bill 26, the *Institutional Confinement and Sexual Sterilization Compensation Act*, *infra* note 40, an Act designed to limit the province's legal liability for forcibly confining and sterilizing several individuals and which included a notwithstanding clause. For further discussion of this and other uses of the notwithstanding clause to date, see Part III.A of this paper.

18 According to P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue Between the Courts and the Legislatures" (1997) 35 *Osgoode Hall L.J.* 75 at para. 16: "In practice, section 33 has become relatively unimportant, because of the development of a political climate of resistance to its use."

For a brief but nonetheless more detailed discussion of the possible reasons for section 33's limited use to date, see Part III.B. of this paper.

19 See Bill 38, *Constitutional Referendum Amendment Act*, 1999, 3rd Session, 24th Legislature, 1999 (received 1st reading April 29, 1999; 2nd reading May 3, 1999; died on the order paper) and note 44.

20 Of course, as noted by Kahana, *supra* note 2 at 275, a referendum on a government's plan to use the notwithstanding clause would also virtually guarantee public awareness and discussion of this plan. Such awareness and discussion may itself have negative political repercussions for the government if voters are sufficiently offended by the mere suggestion of the notwithstanding clause being used.

21 P.W. Hogg, *The Constitutional Law of Canada*, loose-leaf edition (Toronto: Carswell Thomson Professional Publishing) at 1-1.

is true, section 33 raises at least two serious issues about our national values. First, like section 1, section 33 reflects the understanding of Canadians that civil liberties and basic human rights are not absolute. Even more overtly than section 1, which requires legislators to demonstrate an appropriate balance between legislative goals and the infringement of *Charter* rights, section 33 serves as an acknowledgement that certain instances may arise where the overriding of individual rights and freedoms by government action may be necessary or desirable. Thus, "the presence of the notwithstanding clause in the *Charter* begs a fundamental question: is Canada's predominant democratic philosophy that the majority rules or that majority rule is constrained by some protection for minority rights?"[22] Second, because section 33 applies to only certain *Charter* protections, the notwithstanding clause arguably implicitly creates a hierarchy of constitutionally protected rights. The liberties not impacted upon by section 33 appear to have greater constitutional status than those which fall under section 33's power the *Charter* provisions not mentioned in section 33 are closer to being absolute rights than those which are identified in the section.[23]

III. THE GIANT IS SLEEPING

Charter history does not clearly indicate how the drafters of the *Charter* intended section 33 to be used. Was the notwithstanding clause to be used regularly, never, periodically or rarely? Some negotiators of the *Charter* apparently predicted that section 33 would be rarely used because of the potential negative political ramifications associated with its use.[24] Others appear to have anticipated or hoped that section 33 would be used with some regularity to reign in judicial rulings on *Charter* matters.[25] In reality, the quantity and the quality of section 33's use over the last two decades seems to defy any single prediction or description. Its use has been at once periodic,

22 B. Billingsley, "Canada's Triangle of Democracy" (June/July 2001) 25:6 *Law Now Magazine* (Edmonton, Alberta: Legal Sutdies Program, Faculty of Extension, University of Alberta Faculty of Extension) 15 at 15. Nevertheless, Kahana, *supra* note 7 at 223, points out that, from a practical perspective, the existence of section 33 has had little impact on individual rights and freedoms in Canada:

> While the courts have found many laws unconstitutional due to *Charter* infringement, the legislature has rarely invoked the [notwithstanding clause]. In other words, even if Canada does not enjoy a full rights protection regime *de jure*, it clearly enjoys such a regime *de facto*.

23 D. Johansen & P. Rosen, "The Notwithstanding Clause of the Charter" (Government of Canada, Parliamentary Research Branch, September 1997), online: Government of Canada <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm> (date accessed: 14/12/2002).

24 See Chwialkowska, *supra* note 6 at A6 wherein former Attorney-General of Ontario Roy McMurty is quoted as recently saying that: "Having been one who strongly advocated the inclusion of the notwithstanding clause to Mr Trudeau, I can recall predicting that it would be very rarely used." See also *supra* note 16.

25 See L. Chwialkowska, *ibid.* at A6 wherein both former Alberta Premier Peter Lougheed and former Saskatchewan Premier Allan Blakeney are reported as expressing surprise and disappointment at the lack of use which section 33 has received.

episodic, effective, ineffective, rash, purposeful, irrational, expected, surprising, and political. On one hand, section 33 has certainly not dominated Canada's *Charter* experience: the giant has not been very active. On the other hand, section 33 has not been completely ignored by legislators: the giant has not died. In fact, owing at least in part to its limited use to date, section 33 has retained all of its giant-like qualities, including its potential to greatly impact the balance between legislative goals and *Charter* values. Generally, over the last twenty years, section 33 has played an under-stated role in the *Charter*, occasionally but almost unconsciously impacting on *Charter* matters: the giant has been sleeping.

A. Section 33's Use to Date [26]

The extent of section 33's use over the last twenty years is not generally well known.[27] In total, the notwithstanding clause has been used 17 times since 1982: 14 times by Quebec, once by Yukon, once by Saskatchewan, and once by Alberta. Currently, the notwithstanding clause is in effect in a total of 8 statutes: 7 in Quebec and 1 in Alberta.

In Quebec, section 33 was used on two occasions which received widespread recognition. First, section 33 was initially employed immediately after the passage of the *Charter* in an omnibus statute which amended all existing Quebec legislation by adding a notwithstanding clause to each law in the province.[28] The purpose of this omnibus use of the notwithstanding clause was to demonstrate the extent of Quebec's displeasure at the constitutional consensus which had been achieved by the federal government and the other provinces; this move was political and was not motivated by a substantive legal concern that Quebec legislation did not comply or should not comply with the values set out in the *Charter*. Ultimately, section 33's sunset provision resulted in the expiry of this omnibus invocation of the notwithstanding clause, the last use expiring in 1987. In 1985 the Quebec Liberal government discontinued the attendant practice of automatically invoking the notwithstanding clause in each new piece of legislation. Second, in 1988, the Quebec government used the notwithstanding clause with regard to its *Act to Amend the Charter of the French Language*.[29] This Act protected the legislative requirement for French-only outdoor signs, a policy which the Supreme Court of Canada had found to violate freedom of expression and equality rights.[30] The statutory provisions which were affected by the notwithstanding clause were repealed in 1993.

Apart from the two widely publicized uses described above, Quebec has also used the notwithstanding clause on twelve separate occasions: five times in pension legislation, six times in education legislation, and once in an agriculture statute. The pension laws invoked the notwithstanding clause to deal with concerns that the laws' differentiation between men and women and between certain types of employees might violate the *Charter*'s equality protections. The

26 I am indebted to Kahana, *supra* note 2, for the data summarized in this section.

27 See Kahana, *supra* note 2 at 255-256 & at 259-272 for further discussion of this point.

28 *An Act Respecting the Constitutional Act*, 1982, S.Q., 1982, c. 21.

29 S.Q. 1988, c. 54.

30 *Ford*, *supra* note 9.

notwithstanding clause was used in the education statutes to protect religious provisions from challenge on the basis of equality rights and freedom of religion. The agriculture law invoked the notwithstanding clause to protect age restrictions from being challenged on equality grounds. Currently, the notwithstanding clause remains in effect in 5 of Quebec's pension statutes and 2 of its education statutes.[31] Nevertheless, none of these twelve uses of the notwithstanding clause received public attention.[32]

Section 33 was employed by the Yukon government in a statute dealing with nominations to land planning boards and committees by the Council for Yukon Indians.[33] The notwithstanding clause was included in this statute to address the concern that the statutory nomination requirements would violate equality rights under the *Charter*. Although this statute, including the notwithstanding clause, was passed in 1982, the statute has never been proclaimed in force.[34]

In 1986, Saskatchewan used the notwithstanding clause to shield back to work legislation.[35] The decision to use section 33 was made while the law in question was being reviewed by the Supreme Court of Canada on *Charter* grounds. The argument before the court was that the legislation violated the right to strike and that this right was protected under the *Charter*. After the Saskatchewan legislature had amended the statute to include the notwithstanding clause, the Supreme Court ruled that the statute did not violate the *Charter* in any case, thus making unnecessary the legislature's decision to invoke the notwithstanding clause. The clause expired in 1991 and was not renewed.[36]

In Alberta, the notwithstanding clause was used in conjunction with an amendment to Alberta's *Marriage Act* in 2000.[37] The definition of marriage in this statute was amended to expressly state that marriage is a union of opposite sex individuals and the notwithstanding clause was used to prevent this definition from being challenged on the basis of equality rights. The statute, as amended and including the notwithstanding clause, remains in place.[38]

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31 For a more detailed discussion of the use of the notwithstanding clause in these statutes, including renewals, see Kahana, *supra* note 2 at Table 1.

32 Kahana, *ibid.* at 259, 266 & 268.

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

34 For a more detailed discussion of these use of the notwithstanding clause in this statute, see Kahana, *supra* note 2 at 258-259 & at Table 4.

35 *An Act to Provide for Settlement of a Certain Labour-Management Dispute between the Government of Saskatchewan and the Saskatchewan Governments= Employees Union*, S.S. 1984-85-86, c.111.

36 For a more detailed discussion of the use of the notwithstanding clause in this statute, see Kahana, *ibid.* at 258-259 & at Table 5.

37 *Marriage Amendment Act*, S.A. 2000, c. 3.

38 See *Marriage Act*, R.S.A. 2000, c. M-5. A question remains, and has not yet been placed before the courts, as to whether Alberta's heterosexual definition of marriage falls within the provincial jurisdiction over the solemnization of marriage, or whether the definition of marriage is a matter which falls exclusively under the federal government's power over marriage and divorce. If the definition of marriage in this Act is ever found to be outside of the province's jurisdiction, the definition will be struck out despite the existence of a notwithstanding clause, which applies only to *Charter* violations.

There have also been a number of occasion when the use of section 33 has been called for, but not attempted and at least one occasion when the use of section 33 was attempted, but not successfully implemented. In recent years, calls for the use of the notwithstanding clause have often coincided with concerns over judicial activism, particularly with respect to social policy issues. Generally, legislators have not attempted to implement the notwithstanding clause in response to such calls.[39] In 1998, however, the Alberta government made a serious attempt to include a notwithstanding clause in Bill 26, the *Institutional Confinement and Sexual Sterilization Compensation Act*.[40] This legislation was designed to limit the compensation payable by the Alberta government to claimants suing the province for damages arising from state-imposed sterilization and confinement. The public outcry against this use of the notwithstanding clause was so overwhelming that the provincial government withdrew the Bill within a day of its introduction. Following this political debacle, the Alberta government launched a proposal to amend Alberta's *Constitutional Referendum Act* to require a provincial referendum before the government could use the notwithstanding clause.[41] This bill died on the order paper and was not pursued further.

B. Analysis of section 33's Use to Date

Based on the history of section 33's use, it is clear that, from both a legal and a practical perspective, section 33 is not dead. From a legal standpoint, the provision has not been amended since 1982 and accordingly retains its original constitutional status and legal effect. Further, the provision has received minimal judicial consideration and the case authority which does exist does not restrict section 33's use beyond prohibiting its retroactive application.[42] Legislatures may rely on section 33 infrequently and even reluctantly, but section 33 nevertheless retains its status as a viable legislative tool. From a practical viewpoint, the fact that section 33 has been employed at all since Quebec's defiant omnibus use of the provision in 1982 is also evidence that section 33 is not dead. Moreover, the employment of the notwithstanding clause outside of Quebec as recently as 2000 and the continued existence of notwithstanding clauses in eight Quebec statutes conclusively demonstrates that section 33 remains a living force in the *Charter*. But what kind of a life has section 33 had in the *Charter* era? Several aspects of section 33's history indicate that its life has not been particularly active or dynamic.

Most obviously, from a purely quantitative perspective, section 33 has received relatively little use over the last twenty years. Seventeen uses over twenty years is a dismal record, particularly when compared to the thousands

39 For example, the Supreme Court of Canada's decision in *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 to remedy a *Charter* breach by reading in "sexual orientation" as a prohibited ground of discrimination in Alberta's *Individual Rights Protection Act* resulted in widely reported calls for the government to avoid this remedy by invoking the notwithstanding clause. (See for instance P. Donnelly, "Once Burned, Twice Shy?" (March 30, 1998) 9:30 *BC Report* at 25). The government did not propose any legislation to do so.

40 2nd Session, 24th Leg., Alberta, 1998.

41 *Supra* note 19.

42 *Ford*, *supra* note 9 is the only substantive judicial consideration of section 33.

of *Charter* cases which have come before the courts since 1982 and the controversies which many of the *Charter* decisions have raised regarding the respective roles of the legislatures and the courts. Further, section 33 has not been used at all by most governments in Canada. Specifically, it has never been used by the federal government, by the Northwest or the Nunavut Territories, or by any provinces other than Alberta, Saskatchewan and Quebec. Moreover, since the use of the notwithstanding clause by Saskatchewan and the Yukon had no practical effect in either case,[43] Alberta and Quebec are arguably the only jurisdictions to utilize section 33 in a meaningful way.

From a qualitative viewpoint, most of section 33's uses have received little or no public attention.[44] This lack of public awareness and discussion means that we have learned little about our national understanding of how and when this provision should be used. Although legislators may fear public disapproval associated with the use of section 33, in reality we have insufficient experience with this provision to determine how Canadians feel about its use. Further, because section 33's use has not attracted much public attention, the section has received little judicial consideration: since *Ford*,[45] no one has challenged its use. Accordingly, many legal and theoretical questions regarding the appropriate constitutional role of section 33 remain unanswered and continue to be debated. For example; what is the relationship between section 33 and Section 1? Is the use of section 33 somehow more legitimate if used in response to a court ruling rather than to avoid a court ruling? How does section 33 interact with the four fundamental principles of our Constitution?[46] In sum, twenty years after its birth, we know little about the character of the notwithstanding clause.

Thus, both quantitatively and qualitatively, to date section 33 has played a rather reposing role in the *Charter*'s history. Despite its giant potential, the notwithstanding clause has not been a dynamic force in the *Charter*. The giant has been sleeping present and alive, available for use, but not being called into

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43 As already noted, Saskatchewan's employment of section 33 proved unnecessary and the Yukon statute invoking section 33 was never proclaimed in force. See Part III. A. of this paper.

44 Kahana, *supra* note 2 at 259, 266, 268-272. As noted by Kahana, notable exceptions to the lack of attention given to the employment of the notwithstanding clause are Quebec's initial omnibus use of section 33 following the *Charter*'s enactment, Quebec's use of section 33 regarding the *French Language Charter* and Alberta's proposed use of section 33 with regard to Bill 26. For a brief discussion of possible explanations for the lack of attention, see Part III.C of this paper.

In the case of the recent inclusion of a notwithstanding clause in Alberta's *Marriage Act* (see note 37 & note 38), the lack of awareness about section 33's use appears to extend to the members of the legislature which passed this Act. On the *Charter*'s twentieth anniversary on April 17, 2002, Alberta's Minister of Justice, Dave Hancock, was quoted as saying that the only circumstance in which the Alberta government would consider using the notwithstanding clause without a referendum would be to protect a heterosexual definition of marriage. (A.Jeffs, "Opting Out is Getting Harder to Do: Politicians Shy Away from Abhorrent 'Big Gun' Clause" (April 17, 2002) *Edmonton J.* A1 at A10) Mr. Hancock's comment suggests that he did not realize that his government had already taken this step.

45 *Supra* note 9.

46 See *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, online: QL, wherein the Supreme Court of Canada set out four "underlying principles" of Canada's constitution.

active duty on a noticeable scale. Occasionally, as when the Alberta legislature proposed using the notwithstanding clause in Bill 26, the giant has been poked and prodded by legislators and by the media, but in the end has been left alone to sleep.[47] At other times, as in Saskatchewan and in the Yukon Territory, when the notwithstanding clause was passed into legislation but ultimately was not relied upon, the giant has flailed around a bit and rolled over, nearly awoken, but then continued to sleep. On still other occasions, as when the notwithstanding clause was passed into active legislation in Alberta and Quebec, the giant has opened its eyes, stood up, prepared to fight, but then hit the snooze button and fallen back asleep (perhaps now on its feet) when its activity went unchallenged and even unnoticed.

C. Why has the Giant Been Sleeping?

Why has the notwithstanding clause received such little meaningful use in the past twenty years? A definitive answer to this question would require a detailed analysis of the motivations, concerns and responses to each use of section 33 a project which is well beyond the scope of this paper. Nevertheless, the above summary of section 33's employment gives rise to several prima facie responses to this query. First, governments have likely shied away from using section 33 because of the potential or perceived political difficulties involved in utilizing this provision. Simply stated, legislators are afraid that a decision to use the notwithstanding clause would not gain widespread support and may, therefore, have negative repercussions at the voting booth. By using the notwithstanding clause, a government is essentially saying that its legislation is more important than the individual rights and freedoms set out in the *Charter.* Obviously, this is a highly charged political statement for a government to make. Second, popularity issues aside, governments may have genuine philosophical concerns with using the notwithstanding clause to circumvent the *Charter* protections. As a matter of policy, governments may not want to pass laws which operate outside of *Charter* values.[48] Third, over the past twenty years Canadian courts have offered a variety of innovative remedies for *Charter* violations, many of which (such as reading in, reading down, and severance) fall short of entirely striking down the offending legislation. While many of these remedies have been criticized as being overly intrusive or indicative of judicial activism, on many occasions these remedies preserve legislation which would otherwise be struck down entirely. By leaving the challenged legislation in place, these lesser remedies arguably reduce the need for legislators to invoke the notwithstanding clause to save legislation. As long as the government can live with the court's alterations to the legislation, the government does not have

47 By withdrawing Bill 26 the government of Alberta prevented a probably challenge to section 33's use, both in the political arena and in the courts.

48 P. W. Hogg, *supra* note 21 at 36-9 argues that the reluctance of governments to use section 33 arises "partly from a principled commitment to the *Charter* (not at present shared by Quebec) and partly from the political resistance that could be expected from opposition parties, the press, the legal bar and civil liberties groups."

to override the court's ruling in order to sustain the legislation as a whole.[49] In other words, section 33 might have seen more use in the last twenty years if courts had been less creative in remedying *Charter* breaches and had simply struck out laws which conflicted with the *Charter*.

IV. THE GIANT'S FUTURE ROLE IN THE *CHARTER*: SLEEPING, DEAD OR DYNAMIC?

At this point, we can expect that the elements which have contributed to the limited use of section 33 in the past political difficulties, philosophical or libertarian concerns, and court remedies other than striking down legislation will remain factors in determining the use of section 33 in the future. As long as these factors remain the dominant concerns regarding section 33's use, chances are that in the future this provision will continue along the same, sleepy course it has taken for the past two decades. If these factors significantly increase or decrease in importance, however, section 33 may take on an entirely different role in the coming years.

For example, section 33 may languish further and die as a meaningful *Charter* provision if future attempts to use the provision fail due to the same sort of intense public pressure that resulted in the repeal of Alberta's Bill 26. Experiences such as this undoubtedly have a chilling effect on government initiatives to use the notwithstanding clause and, if such experiences become more common, governments may completely avoid even suggesting the use of the notwithstanding clause. The more rare the use of section 33 becomes, likely the more difficult it will be for governments to justify its use.[50] In this scenario, the notwithstanding clause may ultimately become a meaningless constitutional provision, much like the federal government=s power of disallowance.[51]

Alternatively, section 33 may take on a more dynamic role if the factors which have limited its use in the past twenty years are superseded by issues which are viewed by legislators in particular and by the Canadian public in general as being sufficiently important to justify passing legislation which overrides the *Charter*. Examples of current issues which might grow to such importance include national security matters (where public safety may require overriding individual rights) and budgetary concerns (where financial constraints may require overriding individual rights which the courts interpret as obligating the government to provide particular funding or programs).

As already noted, as a result of section 33's limited use to date, we have very little jurisprudence addressing how section 33 operates or should operate when it is used. Accordingly, we have little basis for determining what the character

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49 For a discussion of the court's role in "saving" legislation from constitutional failure by employing creative remedies, see K. Roach, *Constitutional Remedies in Canada* (looseleaf), (Aurora, Ontario: Canada Law Book, 2001).

50 See Kahana, *supra* note 7 at 272. This is because the rarity of section 33's use may be used in argument to suggest that section 33 should only be used in extraordinary situations.

51 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 at s. 90.

of this giant will be if the giant does awake. *Ford*[52] suggests that section 33 is very powerful, that a government wishing to employ section 33 is constrained only by form and that, as long as the government follows the correct procedures in invoking this provision, the notwithstanding clause can be legally used in any legislation and for any purpose. At this point, the unanswerable question is whether increased use of the notwithstanding clause would result in court decisions reinterpreting section 33 to narrow the parameters for its use.

Further, the limited use of the notwithstanding clause has produced inadequate data to determine whether public response and political pressures might add policy considerations to the legal requirements identified in *Ford*. Can section 33 only be successfully applied (outside of Quebec) to legislation which is perceived to be ineffective anyway? As a matter of practice, is public support for the use of section 33 easier to achieve if such use follows a court decision? Would significant change in the quantity of section 33's use either in terms of a significant increase or decrease result in calls for a constitutional amendment repealing the section entirely? Should the public be consulted prior to the use of section 33? Past experience does not provide us with any effective guidance as to how these questions might be answered by the Canadian politic.

To date, it appears that use of the notwithstanding clause is largely accepted by the public in Quebec, likely because Quebec has never ratified the *Charter* in the first place. Outside of Quebec, the public appears to have quietly accepted section 33's use in some circumstances while vehemently opposing its use in other situations. Alberta's experience with Bill 26 suggests that the public is completely unwilling to support section 33's use in legislation designed to protect government interests alone or to relieve the government from liability. But how tolerant would the public be to use of the notwithstanding clause to favour the interests of one section of the public over another? Apart from the unique experience of Bill 26, the remaining examples of section 33's use to date outside of Quebec provide little insight into how the Canadian public views section 33, particularly as a mainstream legislative tool. In the absence of an indication from voters as to the legitimacy of using section 33, governments may continue to rely on section 33 only rarely, if ever. On the other hand, if governments are willing to take an initial risk and secure more unnoticed or unchallenged uses of section 33 (as in the case of Alberta's *Marriage Act*), legislators may be emboldened to invoke section 33 more frequently.

Of course, governments may attempt to alleviate the difficulty of predicting public response to an attempt to invoke the notwithstanding clause by placing in the hands of the public some of the responsibility for the use of section 33. The Alberta government raised this possibility in its attempt to amend Alberta's *Constitutional Referendum Act*[53] to require a referendum prior to the government invoking the notwithstanding clause. Justice Minister Dave Hancock recently suggested that holding a referendum prior to using the notwithstanding clause is a current "policy" of the Alberta government.[54] If a referendum was ever held on the question of using section 33, the character of

52 *Supra* note 9.

53 *Supra* note 19.

54 A. Jeffs, *supra* note 44.

section 33 could drastically change. First, the giant status of section 33 would arguably be reduced because the referendum requirement would pose a serious obstacle to section 33's utilization. Second, the potentially giant political implications of using section 33 would be reduced because the government invoking the section would not do so without being assured of public support. Third, combining section 33 with a pre-emptory referendum, whether this combination is required by legislation or is taken on voluntarily, may result in a constitutional convention mandating such a referendum whenever legislators wish to invoke section 33.[55] Such a convention would again change the constitutional character of section 33 and, to the extent that the referendum requirement diminished the giant status of the notwithstanding clause, the constitutional convention would essentially entrench section 33's reduced status.

V. CONCLUSIONS

The danger in having a giant sleeping in your yard is that you can forget it is there. The giant can wake up and cause serious damage before you are reminded of the risk it poses. This danger is exacerbated when the true character of the giant passive and gentle or aggressive and overpowering has not been determined. Likewise, the major problem with section 33 being a sleeping giant over the past two decades of *Charter* history is that Canadians may become complacent about its existence. The furor and debate over its appropriate role in the *Charter* and over its use by legislators has lessened since the passage of the *Charter*, such that we now have had some laws pass which have included a notwithstanding clause that has gone largely unnoticed by the Canadian public and even by legislators themselves. To some extent, Canadians currently seem to be lulled into the belief that section 33 will not be used the giant is not a threat. In reality, however, the limited history of section 33 demonstrates that the Canadian public as well as its legislators have a significant part to play in determining what role will be played by this giant. Public reaction to the use and proposed use of section 33 will determine whether the giant lives or dies, sleeps or awakes. In order to consciously make this determination, the public must remember that the giant is there sleeping, perhaps, but still very much a giant.

55 For a discussion of the requirements for a constitutional convention, see *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; P. W. Hogg, *supra* note 21 at 1-17 to 1-26.