



# THE NOTWITHSTANDING CLAUSE: IS IT JUSTIFIABLE?

---

*Dr Richard Mailey, University of Alberta*



# SOME BASIC FACTS

---



- The notwithstanding clause is part of the *Canadian Charter of Rights and Freedoms*, which is the first part of the *Constitution Act, 1982*;
- The *Charter* empowers Canadian courts to **NULLIFY LEGISLATION** that violates certain fundamental rights;
- A number of provinces — especially in the West — objected to this change;
- They pressured the Prime Minister, Pierre Trudeau (left), into accepting the notwithstanding clause as a compromise.

“

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*.”

*-The Charter of Rights and Freedoms, Section 33(1)*

“

A declaration made under section (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.

... Parliament or the legislature of a province may re-enact a declaration made under section (1).”

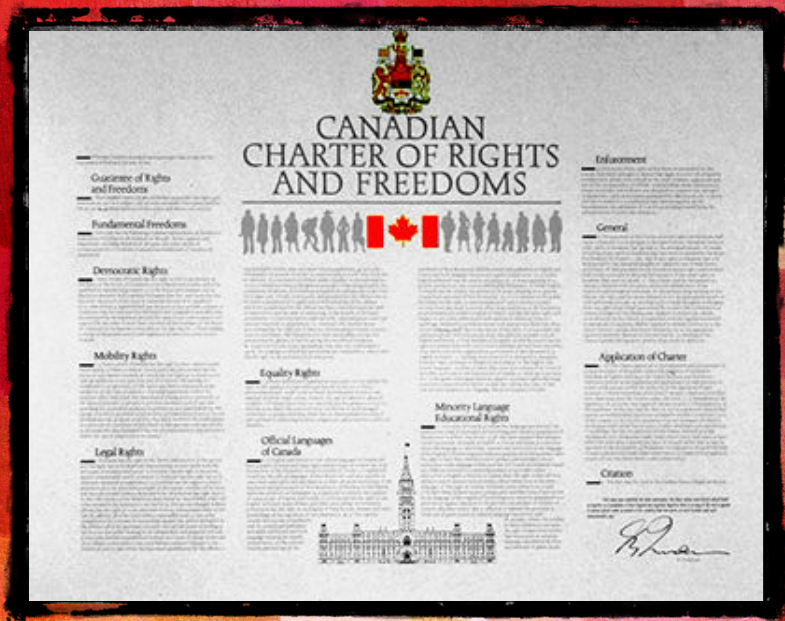
*-The Charter of Rights and Freedoms, Section 33(3) & (4)*



# SUMMARY

---

- The notwithstanding clause allows Parliament and provincial legislatures to **SHIELD** laws from judicial invalidation, subject to two limitations;
- Limitation 1: It can only shield laws that infringe rights in sections 2 and 7-15 of the *Charter*, not laws that infringe other *Charter* rights;
- Limitation 2: The clause has to be reinvoked every **FIVE** years.

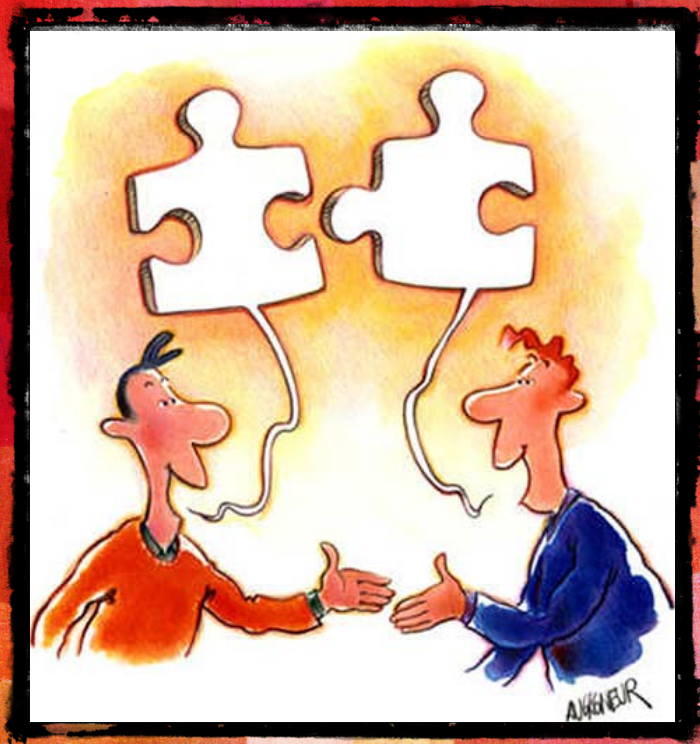




The background of the slide is an abstract composition of various shades of red, orange, and pink. These colors are applied in broad, overlapping strokes and geometric shapes, creating a textured, painterly effect. The central text is set against a white rectangular area that bisects the image horizontally.

# **FIRST JUSTIFICATION: DIALOGUE BETWEEN COURTS AND LEGISLATURES?**





## COUNTERPOINT

---

- Does a “dialogue” really exist when one party is basically choosing to ignore what the other party says?
- There is (usually) an alternative: Judicial decisions provide guidance to legislatures on how to **TWEAK** invalidated laws to make them compliant with the *Charter*;
- Isn't it more “dialogic” for legislators to make minor revisions that factor in judges’ reasons for invalidating the law?



The background of the slide is an abstract composition of various shades of red, orange, and pink. These colors are arranged in overlapping, semi-transparent geometric shapes, primarily rectangles and squares, creating a layered, quilt-like effect. The central portion of the slide is a solid white rectangle where the text is located.

**SECOND JUSTIFICATION: LET “THE PEOPLE” HAVE  
THEIR SAY?**





## COUNTERPOINT

---

- Claiming that a legislature's use of the notwithstanding clause amounts to "letting the people decide" involves two (problematic) conflations;
- 1) Conflating elected representatives with the people they represent;
- 2) Conflating a majority of the voting public with "the People" as a whole;
- Isn't the point of a **CONSTITUTIONAL** democracy like Canada to allow for the effective representation of majorities *and* minorities by protecting the basic interests of the latter?



The background of the slide is an abstract composition of various shades of red, orange, and pink. These colors are arranged in a series of overlapping, semi-transparent geometric shapes, primarily rectangles and triangles, which create a layered, textured effect. The central portion of the slide is a solid white rectangle where the text is located.

**THIRD JUSTIFICATION: DOESN'T SOMEBODY NEED TO  
CORRECT JUDGES' MISTAKES?**



# COUNTERPOINT

---

- What counts as a judicial “mistake”?
- Presumably it’s not just a decision that we disagree with, but one that is **GROSSLY UNREASONABLE** in some sense;
- The rise of **POPULISM** in Canada could be a problem here;
- Populists generally dislike institutional checks on elected government, and are likely to sometimes view judgments as “grossly unreasonable” just because they limit their own legislative power.

