LES DROITS FONDAMENTAUX
ET LA DISPOSITION DE DÉROGATION

MULTI-LOCATION WORKSOP (NOV 29, 2024): FINAL REPORT

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REPORT

on the outcomes of the Pan-Canadian Event

"A Call to Action: Fundamental Rights and the Notwithstanding Clause"

held on 29 November 2024 in Ottawa, Montreal and Edmonton

by the International Commission of Jurists, Canada, the Faculté de droit, Université de Montréal, the Centre for Constitutional Studies at the University of Alberta, the uOttawa Professional Development Institute, and the uOttawa Public Law Centre

EXECUTIVE SUMMARY

The following report provides a summary of a one-day workshop that was hosted by the four organizations listed above. The workshop took place on November 29, 2024, and was hosted across three locations: Edmonton, Montreal, and Ottawa. In addition to its novel multi-location format, the workshop also stood out by being fully bilingual, with real-time translation provided for more than 150 participants following the proceedings online. The aim was to bring together a diverse assemblage of scholars, lawyers, journalists, and others to discuss the challenges posed by the evolving culture around the notwithstanding clause, formally known as section 33 of the *Canadian Charter of Rights and Freedoms*. This provision, which allows Canada's federal and provincial governments to derogate from some of their key *Charter* commitments for renewable five-year periods, has been invoked with unusual frequency in the last half decade, ending a period of relative dormancy. In light of this shift from dormancy to activity, the workshop grappled with a set of insistent questions about how political and legal actors (among others) might navigate the changing landscape of rights protection in Canada, including questions about the types of legal arguments and political action that might be deployed in response to more concerning uses of section 33.

In what follows, we provide short summaries of the comments by presenters at the workshop, dividing these summaries by location. In some cases, edited and abridged versions of workshop presentations have been prepared; in others, short summaries of presentations have been drafted by workshop organizers. A full video of the workshop proceedings will be made available in due course.

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Introduction — Section 33: Normalized or More Taboo than Ever?

(Edited and Abridged Remarks by Ms. Marion Sandilands, ICJ Canada Board Director, Conway Litigation Partner)

Marion Sandilands, a Board Director with the International Commission of Jurists (Canada) and a Partner with Conway Litigation, opened the symposium with a summary of recent actual and contemplated invocations of section 33 in Ontario. Below is an edited and abridged version of her remarks.

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Ontario is one of the leaders of the pack in terms of section 33 invocation these days. Prior to 2018, the notwithstanding clause had never been used in Ontario. In 2018, Ontario starts to flirt with the use of the notwithstanding clause, and it does so in the run up to the City of Toronto's municipal election. The provincial government passed legislation to cut the size of Toronto's city council in half. The shocking thing was that they did this in the middle of the municipal election campaign, throwing the campaign into disarray. The City of Toronto challenged that legislation on the basis that it violated the freedom of expression, winning at first instance.

Ontario appealed and at the same time tabled legislation invoking the notwithstanding clause. The Court of Appeal stayed the decision and Ontario eventually won their appeal, so the legislature never actually adopted the legislation invoking the clause because it was moot. The public reaction in response to the 2018 possibility of invocation was big: there was a lot of discussion in the media, and a group of more than 80 law professors signed an open letter urging Doug Ford not to go through with it. At the time, I'm not sure the public would have had much understanding of what the notwithstanding clause is, because it had never been used before in Ontario.

Next, in 2021 the Ontario legislature made a change to legislation about election spending. This law added more restrictions to what third parties can spend on political advertising in the pre-election period, extending that period from 6 months to 1 year. Such election spending limits are subject to challenge on freedom of expression grounds — and that's exactly what some civil society groups did. A group of unions challenged the law as an unjustified restriction on free expression, and they won at first instance. But instead of appealing that decision, which is what a government normally would do, the Ford government instead re-enacted the same legislation using the notwithstanding clause — a "short-cut" to keep the legislation in place and put a hard stop to the constitutional challenge. The public reaction this time was less drastic than it was in the City of Toronto instance. Some members of the legal and academic communities spoke up, but this time their criticism didn't have nearly the same clout. This seems to be part of a trend in recent years: the more the notwithstanding clause is used, the less big of a deal it is each time.

The Ford government's re-enacted legislation was challenged anyway, with the claimants reframing their challenge on section 3 (voting rights) grounds, since these rights can't be overridden by section 33. The claimants won at the Court of Appeal, and the case (*Working Familes v Ontario*) has now

made its way to the Supreme Court of Canada. It was heard in the spring and it's currently on reserve.

In 2022, Ontario again tried to use the notwithstanding clause, this time in a dispute with teachers. This was a labour dispute concerning education support workers, who were about to go on strike. The government responded to the prospect of a strike by enacting back-to-work legislation and pre-emptively invoking the notwithstanding clause, ostensibly to shield the law from challenges based on the freedom of association. The legislation was enacted late in the pandemic, when schools had been sporadically opening and closing for two years — hence why the government desperately wanted to keep schools open.

Unlike with the Toronto city council and the election spending cases, this time there was a huge and immediate public backlash against the government's actions, which included threats of a general strike and denunciations all the way up to the Prime Minister. The protest was successful: the provincial legislature repealed the legislation, and the strike was resolved through negotiations. Thus, in some sense, the democratic function of section 33 worked in this case: there was a public outcry, and the government backed down.

Then, a month ago, the Premier of Ontario returned to section 33 once again, suggesting that it should be used to clear homeless encampments across major Ontarian cities, which prompted a formal request to this effect from 13 Ontario-based mayors. This move was apparently in response to a Superior Court decision that found that eviction of encampment residents will violate section 7 of the Charter if there is not enough shelter space available. In this context, section 33 would be "needed" if a city wanted to clear an encampment and didn't have another place for its inhabitants to go. In response, Diana Chan McNally, a front-line worker supporting unhoused people in Ontario, wrote this in the Toronto Star:

If we fully remove the right to life for one group of people, who's next? What does the Charter mean if the elected leaders of the day can blithely abuse the notwithstanding clause — which was meant to be used in the rarest circumstances — to take away the very rights the Charter protects?

The very next week, the Premier of Quebec suggested that section 33 could help with Quebec's doctor shortage, specifically as a way of forcing Quebec-trained doctors to remain in the province, at least for a certain amount of time after they qualify. The timing of these statements is hardly coincidental — indeed, Ontario and Quebec have often dovetailed on timing of section 33 invocations (or threats of invocation).

The above events demonstrate that section 33 invocations have become (or are becoming) "normalized" in Ontario and Quebec. This stands in stark contrast to the common perception, supported by historical practice, that section 33 is an "exceptional" measure, to be used only when absolutely necessary.

PANEL 1 SUMMARY: EDMONTON, ALBERTA

The Alberta panel took place at the University of Alberta's Law Faculty in Edmonton and focused on the history of the notwithstanding clause in Alberta with a view to drawing lessons from this history. In particular, the panel focused on two aspects of this oft-neglected history. First, Professor Eric Adams (University of Alberta, Faculty of Law) provided an in-depth engagement with the constitutional thought of Peter Lougheed, the former Alberta premier who was a key supporter of the notwithstanding clause during the patriation talks in the early 1980s. Second, Professor Anna Lund (University of Alberta, Faculty of Law) and Dr. Richard Mailey (Centre for Constitutional Studies, University of Alberta) reflected in different ways on the legacy of Ralph Klein's provincial government, which flirted with the notwithstanding clause several times in the late 90s and early 00s, including as a way of limiting the rights of LGBTQ+ persons. The Klein government's legacy is accordingly of particular interest in the present context, given Saskatchewan's recent use of the notwithstanding clause in relation to the rights of trans youth, and the apparent openness of the Alberta government to this type of invocation.

While each of these three contributions was distinct, the thread that seemingly linked them was a serious concern with how the power of political accountability can be harnessed to achieve rights-protecting outcomes when the notwithstanding clause is in play. On Adams' reading, this was Lougheed's overriding hope for the notwithstanding clause, which was arguably redeemed on two notable occasions during the Klein years (per Lund and Mailey). Haunting and complicating these thoughts, however, was the question of how this hope maps onto our current political situation. More specifically, the key question is whether political accountability is as strong a bulwark against unjustified government action today as it was in the years of Lougheed and Klein, or whether key facets of Canadian democracy have been weakened in ways that undermine the rights-protecting potential of political institutions and other actors.

In their own way, each contribution to the Alberta panel wrestled with the tension between this concern and the necessary role that politics plays in preventing rights infringement. If the panel had one overriding message, it was surely that overcoming this tension — and in particular, finding ways to restore trust in (and the efficacy of) political checks on government — is one of the defining challenges of the present moment.

Constitutional Principles and Pragmatics:
The Impact of Peter Lougheed on the Notwithstanding Clause

(Summary of Remarks by Professor Eric M. Adams from the University of Alberta Faculty of Law)

The panel began with remarks by Professor Eric Adams from the University of Alberta's Faculty of Law, who carried out research in the Provincial Archives of Alberta — along with his research assistant Chiara Concini — on the thought and work of Peter Lougheed, the Premier of Alberta when the *Charter* was enacted. Adams began by discussing the *Alberta Bill of Rights*, the first bill introduced by Lougheed's (then new) government in 1972. The *Alberta Bill of Rights* was in many senses a copy of the *Canadian Bill of Rights* of 1960, and notably included a notwithstanding clause that permitted derogations from the Bill's protections if this was done by express declaration in

provincial legislation. The point of this, Adams said, wasn't to allow the legislature to steamroll rights when desired; rather, the need for express language and legislative debate was supposed to ensure that legislators would approach questions of rights and their limits carefully and deliberately, knowing the public scrutiny that they would invite.

Subsequently, Lougheed became a staunch proponent of a pan-Canadian notwithstanding clause, and was one of the provincial leaders most closely associated with the clause's adoption as part of the *Charter*. According to Adams, archival records confirm that Lougheed's support for the clause in constitutional negotiations dates back to at least 1978, and was largely motivated by the worry that an entrenched bill of rights would Americanize Canadian politics, empowering judges at the expense of elected (and publicly accountable) officials. For Lougheed, this would be deeply problematic; in his view, effective rights protection requires the vigilance of *all sectors* of the political establishment, and making the courts an unchecked authority on the interpretation of rights could reduce the vigilance (and responsibility) of elected officials.

Crucially, Lougheed's concerns about "Americanization" were not abstract, but were anchored in his understanding of American constitutional history. In this regard, when Peter Lougheed defended the notwithstanding clause against some of its early critics, he often pointed to the infamous *Lochner* era in the United States, when the US Supreme Court routinely used constitutional rights to invalidate social welfare laws and to undermine workers' rights. In Lougheed's view, the value of the notwithstanding clause was precisely that it could safeguard against such situations, where courts use the language of constitutional rights, counter-intuitively, *to undermine rights*.

The final twist in Adams' story was that despite being one of its staunchest supporters during the patriation negotiations and debates, Lougheed's view of the notwithstanding clause became more subtle in the decades that followed. More specifically, Adams noted, by the early 90s Lougheed had come to believe that the clause should require supermajority support to be invoked, and should not be used preemptively, as Quebec and Saskatchewan had used it in the 1980s. Even one of the clause's most ardent defenders, then, was concerned about the risk that it could be used too quickly and easily, raising questions about whether the recent uptick in usage is consistent with the clause's intended purpose (or at least, the purpose that was envisaged by one of its architects).

Eugenics, Leilani Muir, and Bill 26:
A Case Study in Democracy and the Notwithstanding Clause

(Summary of Remarks by Professor Anna Lund, from the University of Alberta Faculty of Law)

As is well known, the notwithstanding clause has a five-year sunset period, meaning that it has to be re-invoked every five years or it expires. In theory, this gives the electorate a chance to vote out governments that have invoked the clause in a way that the electorate considers sufficiently objectionable, which in turn may have a disciplining effect on governments that wish to invoke without meaningful public support.

Professor Anna Lund's contribution to the panel examined one crucial example of this disciplining effect in Alberta's recent history: the Klein government's ultimately faltering attempt to use the notwithstanding clause to pass the *Institutional Confinement and Sexual Sterilization Compensation Act* in 1998. This story began in 1995, when Leilani Muir sued the Alberta government. Muir had been sterilized in 1959, while confined at the Provincial Training School. After leaving the School, Muir got married and wanted to have a child, but was unable to conceive. At that point she discovered she had been irreversibly sterilized, and opted to sue the government.

In 1996, Justice Veit of the Alberta Court of Queen's Bench found the government liable for Muir's sterilization and confinement at the Training School and awarded damages of $750,000. As a result, a significant number of people who had been sterilized as part of Alberta's eugenics program filed lawsuits against the government. In 1998, with over 700 of these lawsuits pending, the government attempted to limit the level of compensation available by tabling Bill 26, the *Institutional Confinement and Sexual Sterilization Compensation Act*. This bill, which would have limited compensation for claimants like Muir to $150,000, included a preemptive invocation of the notwithstanding clause to ensure that it would operate even if it was found to have unjustifiably limited *Charter* rights (or provisions of the *Alberta Bill of Rights*).

The public response to Bill 26 was so overwhelmingly negative, however, that the very next day the bill was withdrawn. As Lund explained, Bill 26 was criticized widely, including by: members of the opposition, who described it as trampling on rights; victims of sterilization (calling it "slap in the face"); lawyers for the victims of sterilization (calling it an "unfair litigation tactic" and "a nuclear bomb"); academics (one prominent law professor called the bill "the nightmare scenario" for human rights protection); prominent members of the government's own party, the Progressive Conservatives (one member, Ron Ghitter, described the invocation of the notwithstanding clause as "a betrayal of Lougheed's legacy"); and key media outlets (critical op-eds ran in both major Alberta newspapers, the Calgary Herald and the Edmonton Journal). This pressure, from a range of sources and societal sectors, ultimately yielded a positive outcome.

Yet, in recent decades many of these sectors and institutions have arguably been weakened, with growing distrust of traditional media and academic expertise serving as just two notable examples. The important question that Lund left hanging is accordingly whether there are other institutions and actors that can fill this avoid, and that can ensure that we hear the voices of those who are most directly affected by the notwithstanding clause — especially vulnerable minorities, who will likely find it hard to make their voices heard through ordinary political channels.

The Promise and Pitfalls of the Sunset Clause:
Delwin Vriend's Case and the Challenges of Democratic Oversight

(Summary of Remarks by Dr. Richard Mailey, Director of Centre for Constitutional Studies, University of Alberta, Faculty of Law)

Dr. Richard Mailey (Centre for Constitutional Studies) provided introductory comments as part of the Alberta panel, but his contribution covered events that closely followed those described by Professor Lund. More specifically, Mailey's comments focused on the government's response to

the Supreme Court's decision in *Vriend v Alberta*, which read sexual orientation into Alberta's *Individual Rights Protection Act* (and found that the government's failure to list it as a prohibited ground of discrimination was unconstitutional).

As Mailey noted, the day that this judgment came down was also the start of an organized, aggressive campaign to get Ralph Klein's government to override it using the notwithstanding clause. While the government ultimately decided against this, it did consider invocation for a week before backing down, revealing a sharp and troubling disjoint between the government and the wider public (polls indicated that approximately two thirds of voters in the Prairies supported the substance of *Vriend*).

In theory, Mailey said, the notwithstanding clause has a solution to this problem: to guarantee that the government will face an election and hence the independent oversight of the electorate before it gets the opportunity to re-invoke. Thus, one way of viewing the notwithstanding clause is as a way of swapping legal accountability for political accountability — a way of ensuring that there will be independent oversight beyond the government of the day, despite the limitation of the courts' role in providing such oversight.

However, Mailey suggested that this is an imperfect solution. As he noted, the post-*Vriend* polling data indicated that only around 10% of Canadians reported hearing a lot about the *Vriend* decision, with a whopping 60% reporting that they had heard nothing at all. This indicates that, regardless of what the public's views were on the substance of the Supreme Court's decision, many people just weren't sufficiently informed about the case to responsibly oversee the government's decision on whether to invoke the notwithstanding clause. This elicits a larger structural problem with inferring a judgment on the notwithstanding clause from the results of a provincial election: a specific invocation of the clause is not actually on the ballot, which means that there's nothing to guarantee that voters know or care about an invocation. Indeed, even if enough members of the public *do* know and care, they may not have a sufficiently rights-sensitive perspective, or may not appreciate the constitutional and hence fundamental status of the rights that are at stake. Thus, the sunset clause offers a promise *and* poses a challenge: the promise of independent democratic oversight, but the challenge of making that oversight sufficiently rich, direct, and attentive to the individual interests at stake.

PANEL 2 SUMMARY: OTTAWA, ONTARIO

The Ottawa panel was the final panel held during the workshop and was comprised of four participants: Errol Mendes, Marion Sandilands, Peter Harder, and Althia Raj). The following section of the report contains edited and substantially abridged versions of the remarks by two of these participants: Professor Mendes and Senator Harder.

The Notwithstanding Clause Used to Override *Charter*-Guaranteed Human Rights: The Autocratic Use of Section 33 by the Governments of Ontario and Quebec

(Edited and Abridged Transcipt of Remarks by Professor Errol P. Mendes, University of Ottawa, Faculty of Law, and President of the International Commission of Jurists – Canada)

Key Points:

- ***The notwithstanding clause is being used by the governments in Ontario and Quebec not to uphold the legislative sovereignty, but to impose executive authoritarianism;***
- ***The unwritten principles of the Constitution, especially the democracy, constitutionalism, and rule of law principles, should be used to challenge the constitutionality of the most anti-democratic and anti-human-rights invocations of the notwithstanding clause.***

Those who support the existence of section 33 argue[1] that it provides a democratic check on the judiciary, given the risk that the courts will stray outside their role under our Constitution's separation of powers. However, turning our attention to how section 33 has functioned in Ontario, we see that the Ford government has used the clause *not* to uphold the democratic will of the elected legislature, but to fulfill the unpredictable and autocratic wishes of the executive.

This autocratic trigger became apparent in 2018 when a Superior Court Justice struck down Premier Doug Ford's plan to cut Toronto city council to 25 wards from its original 47 as a violation of the freedom of expression. Almost immediately, Premier Ford said that he would invoke Section 33 to revive the invalidated law**.** Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the new 25-ward structure. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression under *Charter*.[2] Given this ruling, Ford withdrew his threat to use the notwithstanding clause, but the City appealed the decision to the Supreme Court.

By a slim 5-4 majority (and with a strong dissenting opinion), the Supreme Court upheld this election disrupting statute, which was passed in the middle of a municipal election campaign in Canada's largest city. The use of the clause by Ford was the act of a leader who felt he could tamper with the

[1] See e.g. Dwight Newman "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" SSRN paper online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3019781

[2] See the decision of the Court of Appeal at https://coadecisions.ontariocourts.ca/coa/coa/en/item/18178/index.do

democratic wishes of citizens in the largest metropolis in Canada. In fact, in ICJ Canada's preparation for the oral arguments in the *City of Toronto* case, we were prepared to ask the Court the following question: what if instead of reducing from 47 wards to just 25, the government had decided they wanted to reduce it to just 10 wards, or even less? Would there have been any legal limits on the ability the of the Ontario executive to tamper with elections in Canada's largest city?

As interveners, we were prepared to argue that the unwritten principles of the Constitution — especially the democracy, constitutionalism, and rule of law principles — should be used to deny the constitutionality of the anti-democratic reshaping of the nature of the vote in the *middle* of A municipal election. However, a slim majority of the Court decided to limit the force of unwritten principles by defining them as aids for the interpretation of the constitutional text or ways of filling in textual gaps. The majority asserted that *to use the unwritten principles to invalidate legislation would be to trespass into legislative authority to amend the Constitution and would undermine the application of section 1 and 33 of the Charter.*

The strong dissent disagreed and correctly elevated unwritten principles to the most "basic normative commitments" from which the Constitution's specific textual provisions derive. In other words, the constitutional text emanates from unwritten principles — not the other way around. The dissent asserted that "unwritten constitutional principles are a key part of what makes the tree grow," referring to the metaphor of the Constitution as a living tree capable of growth and expansion. In this regard, the dissenting justices left no doubt that the application of unwritten principles could result in the invalidity of legislation. The dissent cited pre- and post-*Charter* cases in support of this position, concluding as follows at paragraph 170:

This leads inescapably to the conclusion — supported by this Court's jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (Secession Reference, at para. 50; OPSEU, at p. 57). This would undoubtedly be a rare case.

This strong dissenting opinion by Justices Abella, Karakatsanis, Martin, and Kasirer should pave the way to a different formula: that there are limits to the autocratic use of the notwithstanding clause, such as the Ontario government's threatened use vis-a-vis Toronto's city council.

The Ford government soon turned to the notwithstanding clause again in another blatant political fashion with the 2022 provincial election approaching. Yet again the trigger for this was a decision of the Ontario Superior Court, which struck down portions of the Ford government's *Election Finance Act* that had the political aim of curtailing third party election spending, most specifically advertising by unions. Justice Ed Morgan had ruled that *it was unnecessary for the government to double the restricted pre-election spending period for third-party advertisements and ruled it was an unjustifiable violation of the freedom of expression.*

Premier Ford recalled the legislature from its summer hiatus to reenact the invalidated law using the notwithstanding clause, blatantly shielding his autocratic limitation on advertising by his chief adversaries — namely the unions — from interference by the courts. The unions appealed to the Court of Appeal, claiming a violation of the democratic rights section 3 of the *Charter*. The Court of Appeal seemed to join the battle against the autocratic use of section 33 by agreeing that the unnecessary expansion of the restricted spending period was a violation of the non-derogable democratic rights in section 3 of the *Charter*, and invalidating the law despite the use of the notwithstanding clause.

Not giving up on the political use of the notwithstanding clause, the Ford government appealed to the Supreme Court. Lawyers for the unions urged the Court to uphold the Court of Appeal's decision, and an intervener — International Commission of Jurists Canada — has urged the Court to understand that since section 3 is one of the few non-derogable rights protected against the use of the clause, the Court should give it large and liberal interpretation, especially given the hanging knife of an autocratic use of section 33 threatening in the background.

A third autocratic use of section 33 by the Ford government then occurred in November of 2022, when the government imposed a four-year contract on over 50,000 education support workers and made it illegal for them to strike. The notwithstanding clause was invoked this time to insulate the government from future judicial scrutiny, given that the Supreme Court had ruled that the *Charter* gives workers the right to strike in pursuit of a collective agreement. However, this time Premier Ford, opted for the pre-emptive use of the clause, rather than waiting for the courts to weigh in.

This type of pre-emptive use is perhaps the ultimate autocratic use of the clause. First, pre-emptive use is itself a betrayal of the foundations of the *Charter*: There is sufficient evidence that the original agreement by the premiers and Prime Minister Peirre Trudeau to have section 33 was that it would be a safety valve against and *in response to* judicial decisions that could undermine the vital interests of society. Second, pre-emptive use also denies the sovereignty of legislatures, since it prevents them from debating the necessity of the clause in light of any overreaching judicial decisions.

The failure to have democratic examination — either inside or outside the legislature — of a law that disregarded the constitutional rights of 55,000 of some of the lowest-paid workers in Ontario's education sector triggered a massive social response from those workers and their supporters. When some of these workers were prepared to pay hefty fines and walk off the job, the government made an offer to repeal Bill 28 if the union called off the strike. Faced with this prospect, the Ford government backed down and repealed the law.

These three instances of the use of the notwithstanding clause by the Ford Government are hardly an example of the *sovereignty of the legislature*; rather, they are more like the expressions of the political desires of an autocratic executive.

However, the misuse of references to legislative sovereignty has been repeated by Québec Premier François Legault, who has used the pre-emptive use of section 33 to cement his political legacy: first with his government's secularism law (Bill 21) and then to deploy the most autocratic methods of promoting the French language in Bill 96 — methods that undermine the privacy and equality rights of all Quebecers. More recently, Legault has even contemplated using the clause against Quebec-trained doctors who wish to leave the province.

On February 29, 2024, after the Quebec Court of Appeal upheld Bill 21, Premier Legault called the decision "a great victory for the nation of Quebec," and stated he would not shy away from using section 33 — which he now prefers to call the "parliamentary sovereignty clause" — to ensure "Canada respects the choices of Quebecers." If this case goes to the Supreme Court, however, Legault's understanding of section 33 will be robustly contested — if not by the present federal government, then by several interveners including possibly some presenters at this event.

Supporters of the use of the clause like Professor Guillaume Rousseau, one of the architects of Bill 21, assert that the use of the clause is about national identity and constitutes a victory for democracy in Quebec. In a paper presented at the University of Ottawa's 2024 Public Law Conference, Professor Rousseau argued that there is a need to protect the national character of the state against judicial decisions. Comparing situations in Quebec and Israel, Professor Rousseau argued that in Quebec, Bills 21 and 96 aim promote democracy in Quebec as expressed in the legislature, which protects the national character of the state against judicial decisions that promote supremacy of fundamental rights. In his paper, however, he cites in support of his position a decision of the legendary Israel Supreme Court justice, Aharon Barak, in the *Bank Mizrahi* case. In fact, in this decision, Barak warns about assertions of democracy or legislative sovereignty to override the most fundamental of rights — a warning that applies as much to Quebec and Canada as it does to Israel:

Protecting individual rights, minority rights and the fundamental values of the legal structure against the power of the majority is a democratic act ... ***Indeed "true" democracy cannot exist without limitations of the power of the majority so as to protect the values of the State of Israel as a Jewish and democratic state, and so as to protect the fundamental values, of which human rights are primary. Democracy of the majority alone, unaccompanied by a democracy of values is formal "statistical" democracy. True democracy limits the power of the majority in order to protect the values of society."***[3]

[3] 64 CA 6821/93 United Mizrahi Bank Ltd. V Migdal Cooperative Village 1995 PD 49(4). 221, p. 79-80 cité dans Michael Mandel, « Democracy and the New Constitutionalism in Israel », (1999) 33:2 Isr L Rev 259

The Eventual Use of the Notwithstanding Clause at the Federal level

(Edited and Abridged Transcript of Remarks by Senator Peter Harder)

I come to this issue with a deep worry about the normalization and the trivialization of section 33. We are experiencing, regrettably, in my view, a disregard for institutions and a shift towards populist politics that provides the conditions for the trivialization and the abuse of section 33. In this climate, the hopes that Peter Lougheed expressed over the years regarding the obligations of elected representatives when section 33 is invoked are absent.

I was particularly frustrated with not only the decisions to use section 33 at the province level, but also with the federal leader of the opposition's suggestion, last spring, that he would utilize the notwithstanding clause to further his law and order campaign. By definition, this would be the most egregious attack on the most vulnerable. And I was concerned that there was no appropriate reaction this these remarks from the political class or the media, or amongst civil society, partly because of the vulgarization of politics, but also because the attack was on a group that is difficult to defend in public (prison inmates, especially those facing longer sentences).

I thought I should use the safety of the Senate to try to make a point about this. So, I tabled a motion in May that said the Senate should express the view that it should not adopt any bill that contains a declaration pursuant to section 33, hoping that that would gain some attention (although, ideally, I would have wished that this would have been a House of Commons initiative).

The Supreme Court speaks about the Senate's constitutional representation of people, of people largely underrepresented in the House of Commons, such as Aboriginal, linguistic, ethnic, gender and religious minorities. The Court also suggests that the clear intention of the Constitution's framers was to make the Senate a thoroughly independent body — a body that could canvass dispassionately the measures of the House of Commons. In this respect, the framers sought to endow the Senate with independence from the electoral process, to which members of the House of Commons are of course subject, in order to remove senators from a partisan political arena that required unremitting consideration of short term political objectives. Thus, there is an obligation on the Senate to take on this issue of the notwithstanding clause.

It is also important to note that the notwithstanding clause has *never* been used by any federal administration. Indeed, this is the first time it's been referenced, albeit by a leader of the opposition. Even the previous Conservative Prime Minister Stephen Harper never tried to use the clause.

How should the Senate act in the face of a hypothetical use of the notwithstanding clause by the Government of Canada? Below are some preliminary answers.

First of all, if the use is preemptive, it should absolutely be fought (if it is post-judicial, maybe there are other areas in which the Senate should ensure appropriate consideration). Second, we should ask: did it come to the Senate with an overwhelming multi-party support (e.g. of 60% of votes and

over)? If not, that's worthy of reflection. Third, did the Minister of Justice table, as is now required, a *Charter* statement? Also, did the government in the House of Commons use time allocation and has there been a full public debate? In other words, to use Peter Russell's language, has the act of *citizen involvement* taken place?

It is encouraging that a number of Senators have supported this motion. In the absence of the political class (meaning political parties) taking this up as an issue, it's time for the Senate to take on a stronger role, and to introduce a piece of legislation that would provide a concrete form for the guidelines that are outlined above.

PANEL 3 SUMMARY: MONTREAL, QUEBEC

(Summary of Remarks by Professeur Stéphane Beaulac & Professeure Karine Millaire, Université de Montréal, Faculté de droit, and by columnist Vincent Brousseau-Pouliot, La Presse)

Under the theme "Going back to the basics," the Montreal panel put together contributions by professors Stéphane Beaulac and Karine Millaire, as well as journalist and columnist Vincent Brousseau-Pouliot. Starting it off, Beaulac recalled that former Minister Rémillard once quipped that the notwithstanding clause was not a "decoration," which relates to the interpretative cannon that Parliament (or the constituent) does not speak in vain. It may not be a Christmas decoration, sure, but *Charter* rights on the other hand are not holiday presents given by the State; rather, they are indeed inherent and inalienable features of the human person.

The 1988 *Ford* decision, which favoured a lenient, albeit textual interpretation of section 33, has been deemed comprehensive and untouchable by proponents of the common use of the notwithstanding clause. This idea flies in the face of typical jurisprudence under the *Charter*, where many cases are needed to sort out detailed tests for the provisions. The same is true with *Ford*, which needs to be supplemented by further case law. In that regard a proper reinterpretation of section 33 requires that we update the methodology of constitutional interpretation, especially in light of the trilogy of Supreme Court cases at the turn of 2020s — *Poulin*, *Québec inc.* and *City of Toronto* — that rehabilitated the importance of the constitutional text, but remained focused on the purposive approach aimed at ascertaining the objective of each *Charter* provision.

The aim of section 33, when considered in light of the language used, the heading under which it is found, the immediate contextual element found in section 32, and especially the general purpose of the Canadian *Charter* (to provide a cause of action for human rights violations) points towards a strict and restrictive interpretation of the clause, which acts as an exception to the application of this human rights domestic instrument, at the centre of the function of our courts as guardians of the rule of law in Canada. International law may be used as a pertinent and persuasive source of interpretation to support and confirm this interpretative conclusion, especially when considering the right of access to justice (associated to section 32 of the *Charter*), as well as the right to a remedy (associated to sections 24(1) and 52(2) of the *Constitution Act 1982*).

Professor Millaire, for her part, explained that it is clear now that the *Charter* actually contains two notwithstanding clauses, the second one being section 25, which shields Aboriginal rights from a possible abrogating application of *Charter* rights, as the SCC held in the recent *Vuntut Gwitch'in* case. Sure, the two clauses have different objectives, but the logic behind both section 33 and section 25 ought to be seen as creating a similar dynamic with regard to derogation. The message from *Vuntut Gwitch'in*, simply put, is that the proper interpretation of 25 does not allow for derogation going in all directions, but is rather constrained by the purpose of the clause. This is an extremely important lesson to take from this recent case, which in regard to section 33 would translate into several points. First, the derogation power ought not be applied pre-emptively; just like for 25, invoking 33 would require a *prima facie* violation of a *Charter* right. Second, because 33, like 25, acts as an exception to the application of the *Charter*, its use must be seldom, if not in the

rarest of situations — it must at least not used excessively, or even worse superfluously. Finally, as for 25, the interpretation of 33 must take into consideration other elements, like unwritten constitutional principles, including the principle of the protection of minorities, as well as the interpretation clause found in section 28 of the *Charter*, enshrining the principle that rights and freedoms are guaranteed equally to both sexes. All these elements were dwelled upon by the SCC in *Vuntut Gwitch'in* and, by analogy, they apply *mutatis mutandis* to the notwithstanding clause in section 33.

To close the Montreal panel, *La Presse* journalist Vincent Brousseau-Pouliot looked at the public discourse surrounding the invocation of section 33 — as well as the Quebec *Charter*'s derogation clause in section 52 — especially in the last five years, starting with the laicity law, Bill 21, as well as Bill 96, which amended the law on the protection of the French language. One of the main takeaways is that, at the beginning of the Legault government, there was little to no mention of the intention to resort to the notwithstanding clause, but progressively, politicians' normalization of derogations has meant that it is now part of the relatively normal rhetoric found around public debates over a wide range of issues, including recently to ban prayers in public, which is yet again aimed (although not openly) at the Muslim community.