

The Notwithstanding Clause: An Impediment to the Practice of Judicial Review

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Abstract

This paper was originally written for Clare McGovern's Political Science 151 course *Justice and Law*. The assignment asked students to write a short argumentative essay focused on a debate concerning Canada's legal or justice system. The paper uses APA citation style.

The Charter of Rights and Freedoms (the Charter) is arguably one of the most important documents in Canadian history. The Charter is internationally respected and lay the foundation upon which Canada's values and reputation has been built. However, the inclusion of the notwithstanding clause undermines the power of this document. The notwithstanding clause (section 33) compromises Canadians' guaranteed rights and freedoms by giving governments' the ability to disregard judicial review. Through examination of both the historical context for the inclusion of section 33 and its modern use, it is apparent that this clause undermines the judiciary's ability to effectively apply the Charter.

If we consider the historical reasons for this clause's inclusion in the constitution it becomes clear that section 33 is, as Howard Leeson writes in *Section 33: A Paper Tiger?*, "...the quintessential Canadian compromise...", which was a necessary step in the creation of the Charter of Rights and Freedoms. However, this compromise has since been a constant source of conflict and debate where it concerns the role of the judiciary in interpreting the Charter. Leeson explains that the period of charter negotiations coincided with a time of political turbulence in Canada. In 1980 and 1981, Canada faced a series of events which led to instability in the nation's federalism. During these two years, Quebec faced a referendum on sovereignty and the nationalist Parti Quebecois was re-elected. Out west, the

highly controversial National Energy Policy was unwelcome and to make matters more challenging there were no MPs from the party in power elected in BC, Alberta, or Saskatchewan. Resultingly, sentiments of western alienation and frustration were high (Leeson, 2001). All this is to say, that divisions within Canada were strong. This proved to be a particularly challenging reality for the Trudeau government, as patriation of the constitution required a high degree of provincial cooperation. The eventual passing of the Charter was the result of tireless debate and many compromises, section 33 being one of them.

Essentially, this clause eased the concerns of many provinces who felt that the Charter threatened parliamentary supremacy by allowing the judiciary too much independence (Leeson, 2001). As Bayerfsky points out in *The Judicial Function under the Canadian Charter of Rights and Freedoms* “[Canada has not] achieved the impossible of having two supremacies. We have instead created in Canada a new form of the doctrine of parliamentary sovereignty, what may be called a... ‘modified doctrine of parliamentary sovereignty’.” In other words, both parliament and the judiciary are crucial components of modern Canadian democracy. Section 33, however, undermines this essential opportunity for the independent, non-partisan protection of rights and freedoms that the judiciary provides.

Through its modern use, the notwithstanding clause remains a compromise of fundamental rights and freedoms. The use of this clause makes it possible for Canadians in a single province to lose rights and freedoms afforded to the rest of the country. This situation is particularly evident in Quebec’s recent use of section 33 to impose Bill 21, the secularism law. Quebec is now the only province in Canada where public employees cannot wear religious symbols (Sahi, 2019). By nature, this practice undermines the validity of the Charter, whose purpose is to afford all Canadians, regardless of their home province, the guaranteed rights and freedoms.

Those who support the notwithstanding clause argue that section 33 is a form of check and balance for the judiciary; a measure of ensuring that unelected judges will never have supremacy over democratically elected parliamentarians (Grover, 2005). However, within section 1 of the Charter there are already limitations to the interpretation of rights and freedoms, where it states that they are subject to “reasonable limits prescribed by law as is demonstrably justifiable in a free and democratic society” (Johansen et al., 2008). This in itself, should be enough of a provision to allow the legislative body the ability to move forward

with legislation that may infringe rights, if it is deemed to benefit society as a whole.

Quebec's passing of Bill 21 also demonstrates that the use of the notwithstanding clause makes room for discriminatory laws. This bill is discriminating against those who wear religious symbols, particularly those who wear very visible symbols, such as the niqab or the hijab. Nevertheless, it must be acknowledged that the implementation of this clause is not a permanent measure. The legislation in question must be revisited after 5 years, a so-called "sunset clause" (Leeson, 2001). The eventual expiration of this clause does not undercut the reality that certain Canadians will be subjected to a discriminatory law. In this case, any amount of time for such a bill to be in effect is much too long. Section 33 has permitted a single province to pass a bill which severely infringes on the rights of individual citizens while undermining the validity of Canadians' constitutional rights. Judges should be able apply the Charter to protect Canadians from this genre of discriminatory policy, which evidently infringes on Quebecers' freedom of religion and expression. However, section 33 has seriously diminished Quebecers' ability to utilize the Canadian legal system in their defence.

The mere existence of the notwithstanding clause invites government to ignore the practice of judicial review (Johansen et al., 2008). In 2018, Ontario Premier Doug Ford planned to reduce the size of city council by half, but a judge's ruling blocked him based on charter violations (CBC News, 2018). In response, Ford planned to invoke the notwithstanding clause. This was a widely criticized act, which is believed by many to have been politically motivated (CBC News, 2018). Although Ford did not ultimately employ section 33, "his threats of its future use, have set a dangerous precedent that will not be easily undone" (De Luca, 2018). Ford's planned use of the clause completely undermined the democratic process of judicial review, which serves to prevent the passing of bills based on partisan motivations.

Those who oppose the practice of independent judicial review will often employ the term "judicial activism", implying that the judiciary's decisions are based on political or personal motivations. As Frederick Vaughan points out in *Judicial Politics in Canada: Patterns and Trends*, what some consider as judicial activism is often simply the process of democratic judicial interpretation and review, which serves to strengthen our democracy rather than weaken it. Additionally, the practice of judicial review often facilitates a dialogue between parliament and the judiciary. By its' nature, dialogue leads to legislation that requires more

cooperation, debate, and compromise, resulting in a more democratic process overall. As Peter Hogg and Allison Thornton write in their piece *The Charter Dialogue between Courts and Legislatures*, “Judicial review is not ‘a veto over the politics of the nation,’ but rather the beginning of a dialogue on how best to reconcile the individualistic values of the Charter...for the benefit of the community of a whole.” While the line between judicial review and judicial activism has become less defined since 1982, it remains clear that judicial interpretation is crucial in ensuring that Canadians’ fundamental rights are not sacrificed to advance partisan mandates.

In summary, the debate about section 33 of the constitution is far from over. Future use of this clause will inevitably open the question of parliamentary supremacy and judicial review again. However, we must acknowledge that this clause is essentially a historical compromise which currently facilitates the passing of discriminatory bills, while allowing government to avoid crucial judicial review. Simply by its recognition in the Charter, the notwithstanding clause undermines the judiciary’s ability to apply the rights and freedoms upon which Canada prides itself on upholding.

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