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OJEN's Spring 2023 Twitter Moot

The Notwithstanding Clause

Should section 33 of the Charter be repealed?

About section 33

Section 33 of the [Canadian Charter of Rights and Freedoms](#) reads as follows:

“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.”

There are a few things to focus on in that provision. First, the section allows the federal government (i.e. the House of Parliament, sometimes just referred to as Parliament) as well as the laws of any provincial government, to use this clause. Second, the rest of the text basically means that an Act or piece of legislation from one of these governments may supersede specific sections of the Charter thanks to this clause.

Section 33 lets these governments override some Charter-protected rights. It can only be used to override rights found in s. 2 (fundamental freedoms), and ss. 7-15 (legal rights and equality rights). It cannot be used to override any other sections.

This clause gives Parliament and the provinces a limited ability to pass laws that conflict with particular Charter-protected rights and freedoms. Any government relying on this clause must expressly declare that it will override the Charter and can only use it for five years at a time. They have to apply to renew it if they want to keep it in force.

Its History

Let's back up a little, though. How, and why, did this provision come to be? This clause was basically a compromise between then Prime Minister Pierre Elliott Trudeau and the provinces in order to get them on board as he was bringing the Charter forward in the early 1980s. Both

Alberta and Saskatchewan wanted an “out” if they disagreed with a judicial decision.¹ So Section 33 became one of the main negotiating pieces of the famous “Kitchen Accord” that was a private meeting between three attorney generals, federal Justice Minister Jean Chrétien, Saskatchewan’s Roy Romanow and Ontario’s Roy McMurtry, in the kitchen off of a conference centre in Ottawa.²

Its inclusion was a big part of why the Charter was able to come into being at all.

Its Uses (and “non-uses”)

Outside of Quebec, the clause has only been used on a handful of occasions since the Charter was enacted in 1982. Recently, however, provinces have begun using it far more often, raising debates about how the clause should be applied today.

- In the Yukon Territory in 1982, it was planned to be used in the Land Planning and Development Act, but the act was never passed, so the clause was not used.
- In 1988, Saskatchewan used the clause in a law that forced striking workers back to work, but this law was later found not to violate workers’ freedom of association, so the use of s. 33 had been unnecessary.
- In 2000, Alberta used the clause in an attempt to change Alberta’s Marriage Act to limit the definition of marriage to opposite-sex couples. This attempt failed, however, when the Supreme Court of Canada ruled that the definition of marriage is decided by the federal government, not the provincial governments.
- Quebec is the province that has used it the most by far, using it multiple times in the 1980s, once in the 90s and then again in 2005. The early uses of it were a type of protest against the Charter from the then-premier and government, not necessarily to override any specific rights.
- Recently, in the spring of 2022, Quebec used the clause before any court case to preemptively protect its Bill 96, a controversial language law that limits the use of English in its public service.
- Additionally, Quebec’s Court of Appeal is currently hearing arguments on Bill 21, which prohibits the wearing of religious symbols at work by those in the public service. Quebec had similarly used section 33 in this circumstance as a “shield” to prevent any challenges to its law.
- In Ontario, Premier Ford has used section 33 on a few different occasions, first in 2018 relating to their changes to the Toronto City Council’s make-up. The Court of Appeal dismissed the lower court’s ruling, meaning section 33 didn’t have to be used.

¹ <https://www.cbc.ca/news/canada/toronto/ontario-notwithstanding-explainer-1.6065686>

² <https://www.thecanadianencyclopedia.ca/en/article/notwithstanding-clause>

- In 2021, Ontario actually employed the clause for the first time in the province's history to pass its bill concerning third-party political advertising.
- This past year, in 2022, Ontario used the clause again in order to prevent education workers from striking. The bill was quickly repealed after public outcry and replaced with another that passed...without the inclusion of the notwithstanding clause.
- The federal government has never used the clause.

Discussion

Although the inclusion of s.33 into the Charter and its use have always been controversial, its repeated and recent uses by the Quebec and Ontario governments have elevated the discourse. This is because a primary argument *against* repealing it is that it was generally used sparingly. As it is used more, this argument becomes less persuasive. That being said, in every instance of its application, it is only valid for five years, having to be renewed after this expiration.

Another argument used by those who think the clause should stay is that it keeps power in the hands of governments, and not the courts. To counter this, courts in Canada are generally understood to be far less politicized than, say, those in the United States, so courts inappropriately or unreasonably wielding their power or overstepping are often thought of in Canada as less of a risk.

With that stated, what's the point of having basic, guaranteed freedoms if they can be trumped by political power; can they even really be considered "rights"?

As you can see, there are interesting, persuasive and complex arguments on both sides of this debate. In your preparation to debate the relevance of section 33 and the notwithstanding clause in Canadian law, think about the following questions:

1. What might be lost or at risk should section 33 be repealed?
2. Are there specific groups or individuals that have been specifically harmed by the notwithstanding clause in the past and may be in the future (think about the section and rights that *can* be overridden with the clause)?
3. Is it a threat to rights and freedoms that the Charter can still be overridden via s. 33?
4. What does it mean that the notwithstanding clause applies only to certain rights but not others? Does this create rights that are more important than others?
5. What do you think about the reason for having originally included section 33 in the first place? Is it still relevant today?
6. How do the recent uses of the clause by the Ontario and Quebec governments either make the case for keeping the section in the Charter or repealing it?
7. Is there another way to address some of the criticisms of the section without repealing it (say, a [Supreme Court reference](#))?
8. Were the recent uses by Quebec and Ontario justified? What makes them more or so or less so?

Additional Reading

Canadian cases:

[*Ford v. Quebec \(Attorney General\)*, \[1988\] 2 SCR 712](#)

News articles and websites posts³:

[Chartperdia, Section 33 – Notwithstanding clause](#)

[Doug Ford’s Use of the “Notwithstanding” Clause: Keeping Ontario’s Schools Open](#)

[I thought the Charter protected Canadians’ fundamental rights, but I was wrong](#)

[In defence of the notwithstanding clause: Why Canada should hold onto it](#)

[“It’s time for the Supreme Court, and the federal government, to stand up for the Charter”](#)

["It’s time to ditch the notwithstanding clause"](#)

[The Notwithstanding Clause: Is It Time for Canada to Repeal It?](#)

[The notwithstanding clause — what it is, why it was used and what happens next](#)

[Notwithstanding judicial benediction: Why we need to dispel the myths around section 33 of the Charter](#)

[Overdoing the override clause](#)

[Preventing use of the notwithstanding clause is a bad idea — and unnecessary](#)

[What Ottawa should say to the provinces: See your notwithstanding clause, raise you disallowance](#)

³ The opinions expressed in these articles and on these websites are not representative of those of participating school boards, Ontario courts or the Ontario Justice Education Network.