

THE NOTWITHSTANDING CLAUSE: SWORD OF DAMOCLES OR PAPER TIGER?

Thomas S. Axworthy

Twenty-five years after its inclusion in the Charter of Rights, the notwithstanding clause has never been invoked by the federal government and risks, like the power of disallowance, falling into disuse. Tom Axworthy, who was principal secretary to Prime Minister Trudeau, acknowledges that it was “one of the key components of the 1981 political compromise that led to the Charter and amended the Constitution,” and writes that it should be retained, rather “like giving Odysseus a dagger so he can cut his ropes when the sirens sing loudest. Better to keep the dagger.” Axworthy also takes us behind the scenes at the First Ministers’ Conference of November 1981, and describes the making of the deal that became an historic Canadian compromise.

Vingt-cinq ans après son adoption, la clause dérogatoire n’a jamais été invoquée par le gouvernement fédéral et risque, à l’exemple du droit de désaveu, de tomber en désuétude. Malgré tout, estime Tom Axworthy, qui était à l’époque secrétaire principal de Pierre Elliott Trudeau, on doit maintenir cette disposition qui constitue l’un des « éléments clés du compromis politique ayant mené à l’adoption de la Charte et à la révision de la Constitution ». Un peu comme « on offrirait à Ulysse une dague pour trancher ses liens et échapper aux Sirènes. Mieux vaut pour lui disposer de cette dague ». L’auteur nous transporte aussi dans les coulisses de la Conférence des premiers ministres de novembre 1981 et décrit comment fut négociée l’entente qui allait sceller un compromis historique.



In the January 2006 leaders’ debate, Prime Minister Paul Martin stunned the country with his pledge that if re-elected, the Liberal Party’s first order of business would be to remove from the federal Parliament the ability to use section 33, the “notwithstanding clause,” to override court rulings on Canada’s Charter of Rights and Freedoms. Martin described section 33 as “a hammer that can only be used to pound away at the Charter and claw back any one of a number of individual rights.” Martin’s pledge, coming after a long and acrimonious national debate over same-sex marriage in which many had argued for use of the notwithstanding clause to overturn the Supreme Court’s ruling that gay couples had the right to marry, remained moot since he lost the election. But debate over the notwithstanding clause rumbles on: in June 2006, Preston Manning and Mike Harris, two of Canada’s best-known Conservatives, released a study on federalism for the Fraser Institute that recommended rehabilitating the use of section 33 and, in order to give its use more legitimacy, employing provincial referendums to ask the people “to choose between the Court’s policy and the government’s policy.” Not to be outdone, the Liberal Party’s Renewal Commission issued its own report

proclaiming that “citizen rights must always trump legislative rights and the courts are the best protection of civil liberties.” It reaffirmed Paul Martin’s position that “the Liberal Party work toward the abolition of the notwithstanding clause in the Charter.” Twenty-five years after the introduction of the Charter, controversy still surrounds section 33.

Divisive at its birth, yet one of the key components of the 1981 political compromise that led to the Charter and amended the Constitution, section 33 is, writes Brian Slattery, “perhaps the most fundamental distinguishing feature of the Canadian Charter.” And if not the most fundamental, it is certainly the best-known, the one feature of the Charter that has engaged public debate beyond judicial factums and legal scholarship. Robert Bourassa’s use of the notwithstanding clause in 1988 in Bill 178, to overturn the Supreme Court’s decision that prohibition of the use of languages other than French was an unreasonable limitation on the freedom of expression guaranteed by the Charter, was perhaps the single most important act in eroding support for the proposed Meech Lake package of amendments to the Constitution. In 1985, Herbert Marx, then the

Liberal opposition justice critic in Quebec, stated that “the danger of having a ‘notwithstanding clause’ will become evident when we need protection most — we will not have it.” So it proved in 1988 when Marx was one of three Quebec anglophone cabinet ministers to resign over Bourassa’s use of the notwithstanding clause. Clifford Lincoln, Bourassa’s minister of the environment, shot to national prominence with his eloquent resignation speech:

In my belief, rights are rights are rights. There is no such thing as inside rights and outside rights. No such thing as rights for the tall and rights for the short. No such thing as rights for the front and rights for the back, or rights for the East or rights for the West. Rights are rights and will always be rights. There are no partial rights. Rights are fundamental rights.

Desperate to salvage the Meech Lake Accord, Prime Minister Brian Mulroney attempted to deflect criticism of Bourassa by attacking section 33 and those leaders who had initially agreed to its inclusion. Mulroney described section 33 as “that major fatal flaw of 1981, which reduces your individual rights and mine.” Any constitution, he concluded, “that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on.”

Eugene Forsey, perhaps Canada’s foremost constitutional authority, also was driven by Bourassa’s action to weigh in against section 33:

The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Although it does not apply to the whole Charter of Rights, it

does apply to a very large number of the rights and freedoms otherwise guaranteed...

Clearly, then, it gives federal and provincial legislators very wide powers to do as they see fit in limiting or denying those rights and freedoms. The Charter would not have protected the Japanese-Canadians who were forcibly interned during World War II. Nor will it protect anyone advocating against an unpopular cause today.

Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter of Rights.

Twenty years later, this time over the threat that a legislature might use the notwithstanding clause to overturn the Supreme Court’s ruling on same-sex marriage, Paul Martin invoked the same kind of warnings that Mulroney and Forsey had made over language.

Defence of the override as a desirable balance between judicial activism and majoritarian excess represents a consensus among Canadian legal scholars. Lorraine Weinrib, for example, declares that “our constitutionalism is a seamless web, made up of constitutional text, convention and judicial pronouncement. The override can be understood as intensifying and strengthening its patterns of respect for democracy, difference and individual dignity.”

But if Canada’s debates over language and sexual preference have led many — especially politicians — to attack section 33 robustly, Canada’s legal scholars paint a very different picture. Some, like Anne F. Bayefsky, make the stark point that because of section 33, the Charter of Rights and Freedoms is not entrenched. She writes:

“Entrenchment” is a term which in the long Canadian debate was consistently used to

mean placing individual rights and freedoms beyond the reach of ordinary legislatures by putting them in a Constitution whose provisions could only be avoided by Constitutional amendment...In Canada we have a Constitutional Charter of Rights, but not an entrenched one.

Peter Russell makes a similar point, though he draws a different conclusion: “Perhaps only Canada, still teetering uncertainly between British and American models of government, could come up with legislative review of judicial review.” Russell believes this is a strength because it combines the strengths of both legislatures and the judiciary: “Weird as such a system may seem to the purists on both sides, it just might help us wring the best that can be hoped for from a Charter of Rights without totally abandoning our reliance on the processes of parliamentary government to settle difficult issues of social policy.”

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The principal issue in an overwhelming majority of Charter

cases is not legislative abrogation of rights, but the constitutional validity of a shifting balance in the relative importance attached to competing rights... Section 33 does not authorize legislatures to override rights per se, but to override the judicial interpretation of what constitutes a reasonable balance between competing rights.

Janet L. Hiebert and Peter W. Hogg have defended the override not as a threat to rights, but as part of an overall system that has promoted rights by creating a dialogue between courts and legislatures. Hiebert makes the valid point that "before the Charter was adopted in 1982, human rights were not often a focal point for Canadian political debates." The Charter, she argues, has introduced a new framework "for facilitating conversations between Parliament and courts about the importance that should be attached to rights claims and the justifications of state actions that conflict with protected rights."

To improve that conversation, Hiebert has suggested a parliamentary Charter committee to review proposed legislation to assess compatibility with the Charter and improve the "conversation." Peter W. Hogg and Allison Bushell, in a famous 1997 article, surveyed 65 cases where legislation was invalidated for a breach of the Charter and found that in two-thirds of them, the "competent legislative body amended the impugned law." This "Charter dialogue," therefore, rarely blocks legislative objectives but helps influence the design of implementing legislation.

Defenders of the Canadian override also cite, approvingly, Jeremy Waldron's argument that political participation is "the right of rights," and therefore, a legislative override, which is eventually accountable to

the people, is more legitimate in a democracy than the rulings of a handful of judges.

For Peter Russell, "the attempt to remove rights issues, irretrievably, from the arena of popular politics is to give up on what democratic politics at its best should be — the resolution of questions of political justice through a process of public discussion...For me, the legislative override clause is a way of countering the flight from democratic politics." This scholarly calm, compared to the pyrotechnics of the political debates over section 33, is best conveyed by Howard Leeson, a

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participant in the climactic negotiations over the Charter in 1980-81, who 20 years after the Charter's debut wrote that "section 33 now appears to be a paper tiger." Far from being the dagger feared by Forsey et al., Leeson sees it as "at best a temporary stopgap to enable more dialogue. But it should not be abandoned."

Canadians, therefore, have been debating the worth of the override for the past 25 years. But many of the arguments, both from participants

in the 1980-81 negotiations and by scholars ever since, were enunciated either before or just after the Charter's birth by Paul Weiler, of the Harvard Law School. In three seminal articles, Weiler developed a rationale both for a Charter of Rights (at the time, a controversial innovation in Canada's judicial system) and for a legislative override. Weiler's arguments are important both for Canadian political and legal history and for the larger issue, put well by Jeremy Waldron, that since disagreement on matters of principle are the rule in law and politics, how are such disputes best adjudicated? Does Canada's Charter

experience over the past 25 years fulfill Weiler's hopes when he was the first scholar to argue for the override, not only as a necessary compromise to settle a great constitutional dispute, but as an innovation that had merit in itself?

In the 1979 Killam Lecture, Weiler advocated a constitutional bill of rights with a "non obstante clause." This lecture was printed in a 1980 article in the *Dalhousie Review*. Weiler argued:

We should entrench our fundamental rights in the Canadian Constitution...But we should include in the Constitutional Bill of Rights the kind of non obstante provision which would allow Parliament to enact (or re-enact) a statute which would then be legally valid irrespective of a judicial holding that is incompatible with the Bill of Rights...In typical Canadian fashion, I propose a compromise, between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters.

The concept of a notwithstanding clause was not new. As Weiler



Montreal Gazette archives

René Lévesque's acceptance of Pierre Trudeau's offer to hold a referendum on his patriation package blew up the Gang of Eight dissenting provinces at the November 1981 First Ministers' Conference, which resulted in agreement by nine provinces to the federal Charter of Rights, and Ottawa's agreement to a provincial amending formula and the notwithstanding clause.

himself noted, the 1960 Canadian Bill of Rights had a notwithstanding clause, as did various provincial bills of rights. Peter Lougheed has an amusing story of his attorney general, Merv Leitch, explaining in 1971 what exactly a notwithstanding clause was

to an uncomprehending premier as the new Conservative government was about to introduce the Alberta Bill of Rights. Anne Bayefsky notes that the first notwithstanding clause in a draft of a constitutional bill of rights is to be found in the 1969 fed-

eral paper *The Constitution of the People of Canada*. In the extended constitutional discussions of the Charter between the federal government and the provinces in the 1970s, officials occasionally referred to the concept (notably in the February 1979 meeting of first ministers). The Task Force on Canadian Unity (the Pepin-Robarts report) in January 1979 suggested "including a clause in the constitution which would permit a legislature to circumvent a right (and incurring the odium of so doing), by expressly excepting the statute from respecting that right."

So the possibility of a *non obstante* clause for legislatures was certainly in the air, though my recollection is that far more time was devoted to examining a limitation clause where the judiciary itself could balance competing rights or needs, rather than a legislature trumping a court. But Weiler's 1980 article was the first that I can recall making a positive case for an override rather than seeing it as a necessary but regretful compromise to gain provincial support. Weiler supported a bill of rights because "there must be some moral limits on the actions of any government, even a democratic government." He also chided the Supreme Court, which "has been anything but an over-zealous defender of Canadian civil liberties," and hoped that a constitutional bill of rights would give Canadian judges the confidence to become more activist. But his advocacy for a *non obstante* clause as part of any Charter was not to settle for "half a loaf rather than none at all" (the Federal government rationale). He argued for the proposal on its intrinsic merits because "constitutionality, like law, is also a matter of degree." Judges should be emboldened but "once the judges have issued their verdict, I would leave Parliament, not the Supreme Court of Canada, with the final say. If Parliament wants to overturn a judicial ruling, it will have to face the issue squarely and commit

itself on the merits. There would be considerable political hurdles to any government choosing to take that step." Legislative oversight of judicial review in Canada, of course, includes both the federal Parliament and the provinces. Though a defender of the override, Paul Weiler has also noted that if the United States had had a similar mixing of judicial review and legislative oversight, on the Canadian model, after *Brown v. Board of Education* in 1954, Mississippi and Alabama could have used a state override to prevent integration of the schools. So the virtues outlined by Weiler for the Canadian invention of the override may not be for everyone.

Samuel V. LaSelle writes, "That the Charter contains a notwithstanding clause may be due, then, in no small part to Professor Weiler." Whether the provincial premiers or their officials were reading academic articles, I doubt, but Weiler also spoke to several of the players in the great constitutional game. The Ontario delegation benefited from his advice and I can testify that Roy McMurtry was certainly vocal in urging a *non obstante* clause on his reluctant federal allies. Twenty-five years on, it seems in retrospect that a constitutional agreement was inevitable. I can assure you that it did not seem inevitable at the time.

The federal plan, agreed to jointly by Ontario and New Brunswick, was to open the discussions by showing signs of flexibility: on the opening day, therefore, Monday, November 2, 1981, Premier Hatfield floated ideas about enacting parts of the Charter immediately but postponing some of the more controversial sections (equality rights). This was the first sign that Trudeau might be prepared to compromise on the full Charter. On Tuesday, November 3, Premier Davis put forward the idea

that would eventually form the basis of the deal — a straight-up exchange with the federal government accepting the provinces' amending formula in exchange for the provinces accepting the Charter of Rights.

On Wednesday, November 4, Prime Minister Trudeau played our third card by raising the possibility of a national referendum to settle the debate once and for all. He was entirely serious that this might be the way to settle the great debate. This tactic broke up the unity of the "Gang of Eight" dissenting provinces by enticing René Lévesque to accept an Ottawa-Quebec entente, to let the matter be decided by the people. Trudeau had instructed me weeks before the conference to start planning for a referendum and/or election on the campaign issue of the Charter of Rights. Facing, on that Wednesday afternoon, the unhappy prospect of campaigning against the Charter of Rights in their home provinces, the seven remaining premiers in the Gang of Eight urgently began to contemplate a negotiated compromise. The *non obstante* clause option then became crucial.

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At different times during the negotiations both Peter Lougheed and Allan Blakeney had raised the possibil-

ity that they might accept a Charter with an override that preserved parliamentary supremacy. (Saskatchewan had also raised the override option during the 1980 summer negotiations between officials and ministers prior

to the First Ministers' Conference of that year.) In a kitchen pantry off the main theatre, Jean Chrétien, Roy Romanow and Roy McMurtry put together the pieces of the compromise. They started with the Davis idea of a swap — a federal Charter in exchange for the provincial amending formula. But there would be additional critical nuances both to gain the necessary buy-in from the majority of the provinces and to persuade Prime Minister Trudeau to accept a negotiated compromise rather than taking his full Charter package to the people in a referendum. The provincial amending formula would be accepted but without fiscal compensation for non-participating provinces. The Charter of Rights would be accepted but with an over-ride clause that would retain legislative supremacy. Chrétien obtained a further compromise within this compromise: the override would not apply to the Charter sections on language, education and mobility rights since language rights were the core of Trudeau's "Just Society." Judicial

review reigns supreme over parts of the Charter, legislative supremacy over the rest: a philosophical muddle — why are language rights more important than democratic rights — but a muddle that could attract sup-

of ministers and officials were still hawkish on going to the people, rather than accepting the emerging compromise. Trudeau reflected in his *Memoirs*: “I was definitely leaning on the side of the hardliners. The notwithstanding

formula was no longer part of the package, even more regret that Canadians would not be directly participating in bringing home the Constitution, concern about Quebec losing its veto (which Lévesque had given up in accepting the Gang of Eight amending formula) and a nagging sense of loss that the Charter was not whole because legislative majorities could still trump individual rights.

In April 1982, at a celebration with the Queen before the signing of the new Constitution, Trudeau saw his old friend and intellectual patron, Frank Scott. It was Scott in the 1950s who had stimulated Trudeau’s interest

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port from both sides. This was the deal that Bill Davis and Jean Chrétien pressed upon Trudeau.

Jean Chrétien was indefatigable in promoting the deal that he had brokered and his job was to persuade Trudeau. It was a near-run thing. A year after Trudeau’s 1984 retirement, I wrote about the colliding conceptions of Canada held by the various leaders in the 1981 showdown. For Pierre Trudeau “the Charter was the Ark of the Covenant in the federal vision.” The Prime Minister, much of the cabinet and most of the Liberal caucus were heavily invested in the Charter fight. The initial Charter draft had also been greatly improved during the 1980-81 parliamentary hearings and no one wanted to let down the public who had begun to see the bill as a “people’s charter.” At a cabinet meeting held Tuesday night, therefore, most of the cabinet had supported the option of going to the people on the complete federal package, rather than a compromise. Chrétien could tell his provincial interlocutors in all honesty on Wednesday that if they had no give, the country would face a referendum.

On the evening of November 4, an even more crucial meeting took place at 24 Sussex. There, a smaller meeting

clause violated my sense of justice: it seemed wrong that any province could decide to suspend any part of the charter, even if the suspension was temporary.” Trudeau left the meeting to take a phone call from Bill Davis, and Jean Chrétien lectured his colleagues (including me as I had been forthright in advocating a referendum) that “I won’t put on my running shoes for another referendum.” Davis too urged Trudeau to accept the compromise. That evening, the Prime Minister was non-committal but he encouraged Chrétien to keep working to get a majority of the premiers. By the morning of November 5, Chrétien had the support of eight provinces, and as we reconvened for breakfast, Trudeau told him over the phone, “Jean, if you were here, I would hug you.” In the final negotiations on November 5, Trudeau said he was prepared to accept the override for sections 2 and 7-15, but only if the provinces would agree to a five-year sunset clause. Loughheed said “yes” and the deal was done.

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in entrenching a Bill of Rights. Trudeau said to the Queen, “Madam, if we have a Charter of Rights in this country, we owe it to this one man...Everything I learned about the Constitution, I learned from this man.” But Frank Scott felt that too much had been given away with the notwithstanding clause. As Scott retold the story, he would end with the disclaimer that “he didn’t learn enough!”

The essence of entrenched bills of rights is that a society makes a pre-commitment to protecting minority rights by putting in place judicial barriers to prevent emotions from getting out of control. Like Odysseus lashing himself to the mast so he cannot be wooed by the songs of the sirens, societies that enact charters of rights lash themselves to the mast. But the notwithstanding clause is like giving Odysseus a dagger so he can cut his ropes when the sirens sing loudest. Better to keep the dagger.

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