



Section 33

PrimaryDocuments.ca Report



THE NOTWITHSTANDING CLAUSE

Compilation of primary documents to assist in interpreting the public
meaning of Section 33 of the *Constitution Act, 1982*

Fourth Edition: July 2023

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SECTION 33
The Notwithstanding Clause

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meaning of Section 33 of the *Constitution Act, 1982*

Fourth Edition

August, 2023



Preface to the Fourth Edition

This fourth edition continues our efforts to create a universally accessible archive of public documents relating to the debates and legislative history surrounding the *Constitution Act, 1867*, the *Constitution Act, 1982*, and each one of the other statutes, which together constitute the organic constitutional law of Canada. Part 1 of this edition features new drafts of Section 33, *Constitution Act, 1982*, and a new Part 3 containing a list of recommended secondary readings. The formatting throughout the report has also been revamped. Further changes are expected later this year with new materials currently being acquired, in regard to the charter drafts for 1979-1980 period and materials in regard to the “Kitchen Accord” in 1981. A new edition will be forthcoming later in 2023.

The purpose of “section reports” is to assist readers in scaling an otherwise enormous mountain of documents available on PrimaryDocuments.ca. Section reports are chronological compilations of primary materials compiled from archival sources (Library and Archives Canada, and various provincial archives), intended to make the record on the website disseminatable by section of the constitution. Section reports take the form of compilations of “primary” and “historical” materials, organized into three parts: (1.) the drafting history, (2.) an abridged summary of the entire history on primarydocument.ca, and (3.) a recommended reading list; each carefully curated for relevant substantive content. Each section report consists of a process that compiles all relevant archival materials available on PrimaryDocuments.ca and measured against secondary academic and legal literature. The primary documents reproduced in the section reports comprise of drafts of the constitution, including abandoned drafts, correspondence, records of public remarks, including those by critics of what was being proposed. All the materials made available on PrimaryDocuments.ca and in these section reports are in the public domain.

The reconstruction of pre-confederation history often includes but not limited to a reconstruction of the Official Journals of the provincial legislature, contemporary newspaper reporting of legislative debates, and other materials (if relevant, British debates) that illuminate the public meaning of these provisions. Each “section” of the constitution is interpreted broadly so as to include as large a universe of primary material as possible, with an effort made to select sources that speak substantively to the meaning of the provision.

It is only if these primary documents are available for consultation, can it be possible for scholars to be certain that they understand what the framers and the contemporary public intended each part of the constitution to achieve.

As this fourth edition attests, section reports are a provisional and imperfect snapshot of the relevant part of the universe of primary documents. It is always possible that in future years further records will be recovered, which are not included in the present report. Scholars are therefore advised to consult the regularly updated collection at the PrimaryDocuments.ca website.

PrimaryDocuments.ca



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The Drafting History of the Charter of Rights and Freedoms Pertaining to Section 33's Public Meaning

Drafts of the Charter of Rights and Freedoms:

July, 1980: Provincial Draft [Saskatchewan]

September 11, 1980: Provincial Draft [Quebec]

October, 1981: Provincial Draft

November 4, 1981: The "Kitchen Accord", Draft from the Federal-Provincial Conference of First Ministers on the Constitution (November 2-5, 1981)

November 18, 1981: House of Commons Draft

November 24, 1981: House of Commons Draft

November 26, 1981: House of Commons Draft

December 2, 1981: House of Commons Draft & Vote

Precursor Non-Obstante Clauses in Drafts of the Charter of Rights and Freedoms

January 8, 1979: Canadian Charter of Rights & Freedoms, Federal Draft, tabled at Meeting of Officials on the Constitution, (January 11-12, 1979)

January 22, 1979: Proposed Charter of Rights & Freedoms, Ontario Draft tabled at the Continuing Committee of Ministers on the Constitution (January 22-24, 1979)

February 2, 1979: Federal Draft Proposals at Federal-Provincial Conference of First Ministers on the Constitution (February 5-6, 1979)

October 17, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Continuing Committee of Ministers on the Constitution (October 22-23, 1979)

November 5, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Meeting of Officials on the Constitution (November 15-16, 1979)

July 4, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Continuing Committee of Ministers on the Constitution (July 8-11, 1980)

August 22, 1980: The Canadian Charter of Rights and Freedoms, Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

August 22, 1980: Revised Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

August 28, 1980: Charter of Rights and Freedoms, Report to Ministers by Sub-Committee Officials [Provincial Draft], Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

Part 1

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September 3, 1980: The Charter of Rights and Freedoms, Revised Discussion Draft, Federal, tabled at the Federal-Provincial First Ministers' Conference (September 8-12, 1980)

October 2, 1980: Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

January 12, 1981: Draft submitted to the Special Joint Committee on the Constitution of Canada

February 13, 1981: Draft Tabled in House of Commons from the Special Joint Committee on the Constitution [Final Report]

April 23, 1981: House of Commons Draft, used in *Reference Re: Resolution to Amend the Constitution*

November 18, 1981: House of Commons Draft

November 24, 1981: House of Commons Draft

November 26, 1981: House of Commons Draft

December 2, 1981: House of Commons Draft & Vote

Statutes and International Agreements:

1960: Canadian Bill of Rights, S.C. 1960, c. 44, s.2.

1966: *International Covenant and Civil and Political Rights*

1969: American Convention on Human Rights

1970: European Convention on Human Rights

1972: Alberta Bill of Rights, R.S.A. 1972 2000, C. A-14, s. 2.

1975: The Quebec Charter of Rights and Freedoms

1979: The Saskatchewan Human Rights Code, S.S. 1979, C. S-24.1, s. 44.

1981: Ontario's Amendments to Human Rights Code

The Primary Record (Debates, Papers, Committees...) Pertaining to Section 33's Public Meaning

November 2-5, 1981, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript

November 6, 1981, Debate in the House of Commons

November 9, 1981, Debate in the House of Commons

November 16, 1981, Debate in the House of Commons

November 18, 1981, Debate in the House of Commons

November 20, 1981, Debate in the House of Commons

November 20, 1981, Debate in the House of Commons

November 23, 1981, Debate in the House of Commons

November 24, 1981, Debate in the House of Commons

November 25, 1981, Debate in the House of Commons

November 26, 1981, Debate in the House of Commons

November 26, 1981, Debate in the House of Commons

November 27, 1981, Debate in the House of Commons

November 30, 1981, Debate in the House of Commons

December 1, 1981, Debate in the House of Commons

February 23, 1982, Debate in the House of Commons (U.K.)

March 3, 1982, Debate in the House of Commons (U.K.)

March 29, 1982, Debate in the House of Commons

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The Constitution Act, 1982
Part I. Canadian Charter of Rights and Freedoms
Application of Charter

Exception where express declaration

Section 33(1) 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.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operations as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect in five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applied in respect of a re-enactment made under subsection (4)



Prefatory Note

The purpose of this note is to single out for a lay audience the most significant documents in this report. First, readers will find the most exhaustive drafting history to date of Section 33, in Part I below. It is far more extensive than Robin Elliot's (1982) and more extensive than Bayefsky's (1989). It reflects an exhaustive and up-to-date review, and one that also exceeds the existing literature.

Secondly, according to the academic and legal commentary, a significant shift in the drafting history occurred at the Special Joint Committee of the House of Commons and the Senate on the Constitution in 1980-81 (Weinrib, 1992, 2002). A significant amendment to Section 1 became supported by public groups and legal experts, strengthening the Charter's protection of rights, and led provincial premiers opposed to this new language to shift their attention to a notwithstanding provision. Readers will find this Special Joint Committee an important moment in the drafting history, and the work of the committee itself of exceptional value. Walter Tarnopolsky's testimony in committee, as well as other legal experts, is of singular importance.

Third, readers should note the documentary record on the so-called "Kitchen Accord" between the federal and Provincial Premiers negotiating the notwithstanding clause. For comparative purposes, readers will find a sub-section in the drafting history that features a detailed breakdown of previous attempts at *non-obstante* clauses in other provisions. This previous drafting history might be of interest for those tracing the broader history of attempts to build an override into the *Charter of Rights and Freedoms*. The Supreme Court of Canada decision in *Re. Resolution to Amend the Constitution in 1981* in support of the federal government's proposed reforms is another key reason why there is a shift in 1981.

Finally, readers should look at the recommended reading list at the end of this compilation report. One may skip Anne F. Bayefsky's *Canada's Constitution Act 1982 and Amendments: A Documentary History* (1989) since this "Section Report" (Fourth Edition) is more up-to-date and more comprehensive than that work. But readers will find Lorraine E. Weinrib's and Adam Dodek's work as perhaps the leading experts on the Notwithstanding Clause today.

PrimaryDocuments.ca
July, 2023

PART 1:

Drafting History of the Charter of Rights and Freedoms Pertaining to Section 33's Public Meaning

Drafts of the Charter of Rights and Freedoms:

July, 1980: Provincial Draft [Saskatchewan]

September 11, 1980: Provincial Draft [Quebec]

October, 1981: Provincial Draft

November 4, 1981: The "Kitchen Accord" Draft from the Federal-Provincial Conference of First Ministers on the Constitution (November 2-5, 1981)

November 18, 1981: House of Commons Draft

November 24, 1981: House of Commons Draft

November 26, 1981: House of Commons Draft

December 2, 1981: House of Commons Draft & Vote

Precursor Non-Obstante Clauses in Drafts of the Charter of Rights and Freedoms

January 8, 1979: Canadian Charter of Rights & Freedoms, Federal Draft, tabled at Meeting of Officials on the Constitution, (January 11-12, 1979)

January 22, 1979: Proposed Charter of Rights & Freedoms, Ontario Draft tabled at the Continuing Committee of Ministers on the Constitution (January 22-24, 1979)

February 2, 1979: Federal Draft Proposals at Federal-Provincial Conference of First Ministers on the Constitution (February 5-6, 1979)

October 17, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Continuing Committee of Ministers on the Constitution (October 22-23, 1979)

November 5, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Meeting of Officials on the Constitution (November 15-16, 1979)

July 4, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Continuing Committee of Ministers on the Constitution (July 8-11, 1980)

August 22, 1980: The Canadian Charter of Rights and Freedoms, Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

August 28, 1980: Charter of Rights and Freedoms, Report to Ministers by Sub-Committee Officials [Provincial Draft], Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

September 3, 1980: The Charter of Rights and Freedoms, Revised Discussion Draft, Federal, tabled at the Federal-Provincial First Ministers' Conference (September 8-12, 1980)

October 2, 1980: Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

January 12, 1981: Draft submitted to the Special Joint Committee on the Constitution of Canada

February 13, 1981: Draft Tabled in House of Commons from the Special Joint Committee on the Constitution [Final Report]

April 23, 1981: House of Commons Draft, used in *Reference Re: Resolution to Amend the Constitution*

November 18, 1981: House of Commons Draft

November 24, 1981: House of Commons Draft

November 26, 1981: House of Commons Draft

December 2, 1981: House of Commons Draft & Vote

Statutes and International Agreements:

1950: European Convention on Human Rights

1960: Canadian Bill of Rights, S.C. 1960, c. 44, s.2.

1966: International Covenant and Civil and Political Rights

1969: American Convention on Human Rights

1972: Alberta Bill of Rights, R.S.A. 1972 2000, C. A-14, s. 2.

1975: The Quebec Charter of Rights and Freedoms

1979: The Saskatchewan Human Rights Code, S.S. 1979, C. S-24.1, s. 44.

1981: Ontario's Bill 7 to amend its Human Rights Code

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Drafts of the Charter of Rights and Freedoms¹

July, 1980: Provincial Draft [Saskatchewan]²

Document currently unavailable. We hope to include it in our next report.

(Source: N/A)

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September 11, 1980: Provincial Draft [Quebec]³

Document currently unavailable. We hope to include it in our next report.

(Source: N/A)

-----oOo-----

October, 1981: Provincial Draft⁴

Document currently unavailable. We hope to include it in our next report.

(Source: N/A)

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November 4, 1981: The “Kitchen Accord” Draft from the Federal-Provincial Conference of First Ministers on the Constitution (November 2-5, 1981)

Patriation
+
Vancouver Amending Formula
(No Fiscal equivalents)

¹ To our knowledge, there are no drafts containing a Charter “override” provision prior to 5-6 February, 1979. Last verified 24 July, 2023.

² According to Roy Romanow, John White and Howard Leeson in *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Carswell/Methuen, Toronto, 1984) p. 45, Saskatchewan introduced an override in its provincial draft on this date.

³ According to Robert Sheppard and Michael Valpy in *The National Deal: The Fight for a Canadian Constitution* (Fleet Books, Toronto, 1982) pp. 60-62, Quebec circulated a document proposing an override for legal and non-discrimination rights, although not applicable to fundamental freedoms and democratic rights. Quebec backed away from document after discussion. The document is submitted on 11 September, and discussed on the 11 and 12, September. It's called "A Proposal for a Common Stand of the Provinces"

⁴ According to Johansen & Rosen in *The Notwithstanding Clause of the Charter* (Library of Parliament, 2008), p. 4, Alberta, British Columbia, and Saskatchewan proposed an override provision in their proposed provincial draft

+
All the Charter
But the 2nd Half of it
as stated By Hatfield—
Non Obstante

[...]

(Source: Jean Chretien, Roy Romanow, Roy McMurtry, The Kitchen Accord, 4 November 1981 (R12830-0-9-F). Click [HERE](#))

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November 18, 1981: House of Commons Draft

[Marginal note: “Rights Guaranteed equally to both sexes”]

28. Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[Marginal note: “Exception where express declaration”]

33. (1) 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, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

[Marginal note: “Operation of exception”]

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

[Marginal note: “Five year limitation”]

(3) A declaration made under subsection (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.

[Marginal note: “Re-enactment”]

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

[Marginal note: “Five year limitation”]

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 12983-13011. Click [HERE](#))

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November 24, 1981: House of Commons Draft

[Marginal note: “Rights Guaranteed equally to both sexes”]

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[Marginal note: “Exception where express declaration”]

33. (1) 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.

[Marginal note: “Operation of exception”]

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

[Marginal note: “Five year limitation”]

(3) A declaration made under subsection (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.

[Marginal note: “Re-enactment”]

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

[Marginal note: “Five year limitation”]

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 4128-4130. Click [HERE](#))

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November 26, 1981: House of Commons Draft

[Marginal note: “Rights Guaranteed equally to both sexes”]

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[Marginal note: “Exception where express declaration”]

33. (1) 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.

[Marginal note: "Operation of exception"]

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

[Marginal note: "Five year limitation"]

(3) A declaration made under subsection (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.

[Marginal note: "Re-enactment"]

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

[Marginal note: "Five year limitation"]

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13338-13346. Click [HERE](#))

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December 2, 1981: House of Commons Draft & Vote

[Marginal note: "Rights Guaranteed equally to both sexes"]

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[Marginal note: "Exception where express declaration"]

33. (1) 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.

[Marginal note: "Operation of exception"]

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

[Marginal note: "Five year limitation"]

(3) A declaration made under subsection (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.

[Marginal note: "Re-enactment"]

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

[Marginal note: "Five year limitation"]

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13632-13663. Click [HERE](#))

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Precursor Non-Obstante Clauses in Drafts of the Charter of Rights and Freedoms

January 8, 1979: Canadian Charter of Rights & Freedoms, Federal Draft, tabled at Meeting of Officials on the Constitution, (January 11-12, 1979)

[Section] Fundamental Freedoms

[Marginal note] Fundamental freedoms

[Marginal note] Justifiable freedoms

6. (2) The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals, or the rights and freedoms of others.

[Section] Legal Rights

[Marginal Note] Legal rights

10. (2) In time of serious public emergency, the existence of which is officially proclaimed through the invocation of the War Measures Act or by specific reference to this subsection, the rights mentioned in this section other than the right to life and those mentioned in sub-paragraph (d) (ii) and (e) (v) and paragraphs (h), (i) and (j) may be derogated from to the extent strictly required by the circumstances of the emergency.

[Marginal note] Idem

(3) Nothing in this section shall be interpreted as precluding the enactment of or rendering invalid a law that authorizes the holding of all or part of a proceeding in camera in the interest of national security, public safety or order or morality, in the interests of the privacy of one or more of the parties or where, in the opinion of the tribunal, publicity would prejudice the interests of justice.

[Section] Mobility Rights

[Marginal note] Rights of citizens]

[Marginal note] Justifiable limitations

12. (3) The rights declared by this section may be made subject only to such limitations as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or where there exist overriding economic or social considerations.

(Source: Meeting of Officials on the Constitution, *Canadian Charter of Rights & Freedoms, Federal Draft*, [January 8, 1979] (Ottawa: 11-12 January, 1979). Click [HERE](#))

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January 22, 1979: Proposed Charter of Rights & Freedoms, Ontario Draft tabled at the Continuing Committee of Ministers on the Constitution (January 22-24, 1979)

[Section] Fundamental Freedoms

[Marginal note] Fundamental freedoms

[Marginal note] Justifiable limitations

6. (2) The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or any rights and freedoms of others.

(**Source:** Continuing Committee of Ministers on the Constitution, *Proposed Charter of Rights & Freedoms, Ontario Draft*, Doc 830-70/042 (Vancouver: 22-24 January, 1979). Click [HERE](#))

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February 2, 1979: Federal Draft Proposals at Federal-Provincial Conference of First Ministers on the Constitution (February 5-6, 1979)⁵

[Section] Fundamental Freedoms

Limitation Clause

Those prescribed by law as are reasonably justifiable in a free and democratic society in the interests of

- nation security
- public safety, order, health or morals
- any rights and freedoms of others.

Override Clause

None

[Section] Democratic Rights

Limitation Clause

⁵ The source quoted and linked to in our report is merely a summary of the draft proposals. We hope to include the draft itself in the next report.

On first two⁶ only: same as under fundamental freedoms.

Override Clause

None

[Section] Legal Rights

Limitation Clause

Same as under fundamental freedoms

Override Clause

None

[Section] Non-Discrimination Rights

Limitation Clause

Same as under fundamental freedoms

Override Clause

None

[Section] Mobility Rights

Limitation Clause

Same as under fundamental freedoms.

Override Clause

None

[Section] Property Rights

Limitation Clause

Same as under fundamental freedoms.

Override Clause

⁶ The first two are, "1. Principles of universal suffrage and free and democratic elections. 2. Right of citizen to vote and to qualify for election in House of Commons or legislature without discrimination based on race, national or ethnic origin, language, color, religion or sex."

None

[Section] Language Rights

Limitation Clause

Same as under fundamental freedoms

Override Clause

None

(**Source:** Federal-Provincial Conference of First Ministers on the Constitution, *Federal Draft Proposals Discussed by First Ministers*, Doc 800-010/037 (Ottawa: 5-6 February, 1979). Click [HERE](#))

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October 17, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Continuing Committee of Ministers on the Constitution (October 22-23, 1979)

[Section] Fundamental Freedoms

[Marginal note] Fundamental freedoms

[Marginal note] Justifiable limitations

2. (2) The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or the rights and freedoms of others.

[Section] Legal Rights

[Marginal Note] Legal rights

[Justifiable derogation]

6. (2) In time of serious public emergency, the existence of which is officially proclaimed by or pursuant to a law enacted to deal with such circumstances or by a law specifically referring to this subsection, the rights mentioned in this section other than the rights to life and those mentioned in subparagraphs (1) (d) (ii) and (1) (c) (v) and paragraphs (1) (h), (i) and (j) may be derogated from to the extent strictly required by the circumstances of the emergency.

(**Source:** Continuing Committee of Ministers on the Constitution, *Rights and Freedoms within the Canadian Federation Federal Draft*, [October 17, 1979] (Halifax: 22-23 October, 1979). Click [HERE](#))

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November 5, 1979: Rights and Freedoms within the Canadian Federation, Federal Draft, tabled at the Meeting of Officials on the Constitution (November 15-16, 1979)

[Section] Fundamental Freedoms

[Marginal note] Fundamental freedoms

2. The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of the defence of Canada against subversive or hostile acts, public safety, order, health or morals or the rights and freedoms of others.

(Source: Meeting of Officials on the Constitution, Rights & Freedoms within Canadian Federation, *Federal Draft*, [November 5, 1979], Doc 840-177/005 (Toronto: 15-16 November, 1979). Click [HERE](#))

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July 4, 1980: Rights and Freedoms within the Canadian Federation, Discussion Draft, Tabled at the Continuing Committee of Ministers on the Constitution (July 8-11, 1980)

[Section] Fundamental Freedoms

[Marginal note] Fundamental freedoms

[Marginal note] Justifiable Limitations

2. (2) The manifestation or exercise of the freedoms declared by this section may be made subject only to such limitations prescribed by law as are reasonably justifiable in a free and democratic society in the interests of national security, public safety, order, health or morals or the rights and freedoms of others.

[Section] Legal Rights

[Limitation Clauses]

6. (3) In times of serious public emergency threatening life of country limits strictly required by circumstances may be placed on right to liberty and security, right against unreasonable searches and seizures, right against arbitrary interference with privacy, right against unauthorized detention or imprisonment, right to habeas corpus, right to reasonable bail, and right to fair hearing for determination of rights and obligations, but all other rights protected.

(4) Right to legal proceedings in public may be curtailed in interests of

-- national security or public

- public order or morality
- protection of individual privacy.

[Section] Non-Discrimination Rights

[Marginal note] Limitation Clause

7. (2) Those limits provides by fair and reasonable test. Those programs or activities designed for “affirmative action” on behalf of disadvantaged persons or groups.

[Section] Mobility Rights

[Marginal note] Limitation Clause

8. (3) Those prescribed by law as are reasonably justifiable in a free and democratic society in the interests of

- national security
- public safety, order, health or morals.

[Section] Property Rights

[Marginal note] Limitation Clause

9. (2) Those which control or restrict use of property in public interest or to secure payment of taxes, duties or penalties;

(3) Those prescribed by law as are reasonably justifiable in a free and democratic society in the interest of

- national security
- public safety, order, health or morals.

(Source: Meeting of the Continuing Committee of Ministers on the Constitution, *Rights and Freedoms within the Canadian Federation, Discussion Draft. Tabled by the Delegation of the Government of Canada, 4 July 1980, Doc 830-81/027 (Montreal: 8-11 July 1980). Click [HERE](#)*)

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August 22, 1980: The Canadian Charter of Rights and Freedoms, Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

[Marginal note] Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.

[Section] Non-Discrimination Rights

[Marginal note] Exception

17. (2) Those programs or activities designed for “affirmative action” on behalf of disadvantaged persons or groups.

[Section] Mobility Rights

[Marginal note] Rights of citizens

[Marginal note] Rights of citizens and permanent residents

[Marginal note] Limitation

16. (3) The rights specific in subsection (2) are subject to any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence.

(Source: Continuing Committee of Ministers on the Constitution, *The Canadian Charter of Rights and Freedoms, Federal Draft*, [August 22, 1980] Doc 830-84/004 (Ottawa: 26-29 August 1980). Click [HERE](#))

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August 22, 1980: Revised Federal Draft, Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)⁷

[Section] Mobility Rights

[Marginal note] Rights of citizens

[Marginal note] Rights of citizens and permanent residents

[Marginal note] Limitations

16. (3) The rights specific in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any other laws referred to in subsections (4) or (5) of section 121 of the British North America Act.

⁷ The editors of this report believe this “Revised” provision was simply an addendum to the August 22, 1980 draft.

(Source: Continuing Committee of Ministers on the Constitution, *The Canadian Charter of Rights and Freedoms, Federal Draft, "Revised Federal Draft on Mobility Rights,"* [August 22, 1980] Doc 830-84/004, (Ottawa: 26-29 August 1980) in Anne Bayevsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (1989), p. 673.

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August 28, 1980: Charter of Rights and Freedoms, Report to Ministers by Sub-Committee Officials [Provincial Draft], Tabled at the Continuing Committee of Ministers on the Constitution (August 26-29, 1980)

[Marginal note] Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free society living under a parliamentary democracy.

(a) freedom of religion;

(b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media; and

(c) freedom of peaceful assembly and of association.

(Source: Continuing Committee of Ministers on the Constitution, *Charter of Rights, Report to Ministers by Sub-Committee of Officials, Annex* [August 28, 1980], Doc 830-84/031 (Ottawa: 26-29 August, 1980). Click [HERE](#)

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September 3, 1980: The Charter of Rights and Freedoms, Revised Discussion Draft, Federal, tabled at the Federal-Provincial First Ministers' Conference (September 8-12, 1980)

[Marginal note] Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

[Section] Mobility Rights

[Marginal note] Rights of citizens to move

[Marginal note] Limitations

14. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any other laws referred to in subsection (4) or (5) of section 121 of the British North America Act.

(Source: Federal-Provincial First Ministers' Conference, *The Canadian Charter of Rights and Freedoms, Revised Discussion Draft, Federal*, [September 3, 1980] Doc 800-14/064 (Ottawa: 8-12 September 1980). Click [HERE](#))

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October 2, 1980: Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

[Section] Mobility Rights

[Marginal note] Rights of citizens to move

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" in *Sessional Papers* (1980). Click [HERE](#))

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January 12, 1981: Draft submitted to the Special Joint Committee on the Constitution of Canada

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Rights of citizens to move

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 36 (12 January 1981). Click [HERE](#))

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February 13, 1981: Draft Tabled in House of Commons from the Special Joint Committee on the Constitution [Final Report]

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 57 [Final Report] (13 February 1981). Click [HERE](#))

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April 23, 1981: House of Commons Draft, used in Reference Re: Resolution to Amend the Constitution

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 9470-9471. Click [HERE](#))

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November 18, 1981: House of Commons Draft

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 12983-13011. Click [HERE](#))

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November 24, 1981: House of Commons Draft

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 4128-4130. Click [HERE](#))

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November 26, 1981: House of Commons Draft

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

(Source: Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13338-13346. Click [HERE](#))

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December 2, 1981: House of Commons Draft & Vote

[Section] Guarantee of Rights and Freedoms

[Marginal note] Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[Section] Mobility Rights

[Marginal note] Limitation

6. (3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

(**Source:** Canada, *House of Commons Debates*, 32nd Parl, 1st Sess, 1981 at 13632-13663. Click [HERE](#))

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Statutes and International Agreements

1950: European Convention on Human Rights

ARTICLE 15 Derogation in time of emergency 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

(Source: *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950). Click [HERE](#))

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1960: An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (The Canadian Bill of Rights)

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

(Source: *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, SC, 1960, c 44. Click [HERE](#))

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1966: International Covenant and Civil and Political Rights

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

(Source: U.N., *International Covenant on Civil and Political Rights* Click (16 December 1966). Click [HERE](#))

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1969: American Convention on Human Rights

Chapter IV Suspension of Guarantees, Interpretation, and Application

Article 27 Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that

such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to 160 Documents Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension

(Source: *American Convention on Human Rights*, Inter-American Specialized Conference on Human Rights (22 November 1969). Click [HERE](#))

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1972: The Alberta Bill of Rights

Construction of law

2. Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding The Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

(Source: *Alberta Bill of Rights* (15 November 1972). Click [HERE](#))

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1975: The Quebec Charter of Rights and Freedoms

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

(Source: *The Quebec Charter of Rights and Freedoms* (1975). Click [HERE](#))

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1979: The Saskatchewan Human Rights Code

Part VI. General

Act takes precedence unless expressly excluded.

44. Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

(Source: *The Saskatchewan Human Rights Code* (1979). Click [HERE](#))

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1981: Ontario's Amendments to Human Rights Code

Act binds Crown

46 .—(1) This Act binds the Crown and every agency of the Crown.

Act has primacy over other Acts

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act.

Application

(3) Subsection (2) does not apply to an Act or regulation heretofore enacted or made until two years after this Act comes into force.

(Source: *An Act to revise and extend Protection of Human Rights in Ontario* (11 December 1981). Click [HERE](#))

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PART 2:

**The Primary Record (Debates, Papers, Committees...) Pertaining to
Section 8's Public Meaning**

November 2-5, 1981, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript (click [HERE](#)), pp. 141, 145

November 6, 1981, Debate in the House of Commons (click [HERE](#)), p. 12594

November 9, 1981, Debate in the House of Commons (click [HERE](#)), pp. 12634, 12635

November 16, 1981, Debate in the House of Commons (click [HERE](#)), p. 12777

November 18, 1981, Debate in the House of Commons (click [HERE](#)), p. 12890

November 20, 1981, Debate in the House of Commons (click [HERE](#)), p. 12978

November 20, 1981, Debate in the House of Commons (click [HERE](#)), pp. 13042, 13045, 13047, 13049, 13054, 13057

November 23, 1981, Debate in the House of Commons (click [HERE](#)), pp. 13114, 13120, 13123, 13129, 13144

November 24, 1981, Debate in the House of Commons (click [HERE](#)), pp. 13195, 13197, 13216

November 25, 1981, Debate in the House of Commons (click [HERE](#)), p. 13243

November 26, 1981, Debate in the House of Commons (click [HERE](#)), p. 13295

November 26, 1981, Debate in the House of Commons (click [HERE](#)), pp. 13362, 13368

November 27, 1981, Debate in the House of Commons (click [HERE](#)), p. 13428

November 30, 1981, Debate in the House of Commons (click [HERE](#)), pp. 13506, 13516, 13528

December 1, 1981, Debate in the House of Commons (click [HERE](#)), p. 13589

February 23, 1982, Debate in the House of Commons (U.K.) (click [HERE](#)), col. 777

March 3, 1982, Debate in the House of Commons (U.K.) (click [HERE](#)), col. 369

March 29, 1982, Debate in the House of Commons (click [HERE](#)), p. 15897

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Note: The following is a selection of excerpts, not intended to be an exhaustive summary. The reader is encouraged to view the document as a whole.

November 2-5, 1981 – Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, (click [HERE](#)), p. 141

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:...

(3) Charter of Rights and Freedoms:

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

[...]

(b) a “notwithstanding” clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each “notwithstanding” provision would require re-enactment not less frequent than once every five years.

p. 145

A notwithstanding clause is one which enables a legislative body (federal and provincial) to enact expressly that a particular provision of an Act will be valid, notwithstanding the fact that it conflicts with a specific provision of the Charter of Rights and Freedoms. The notwithstanding principle has been recognized and it contained in a number of bills of rights, including the Canadian Bill of Rights (1960), the Alberta Bill of Rights (1972), the Quebec Charter of Rights and Freedoms (1975), the Saskatchewan Human Rights Code (1979), and Ontario’s Bill 7 to Amend its Human Rights Code (1981)

How it would be applied

Any enactment overriding any specific provisions of the Charter would contain a clause expressly declaring that a specific provision of the proposed enactment shall operate, notwithstanding a specific provision of the Charter of Rights and Freedoms.

Any notwithstanding enactment would have to be reviewed and renewed every five years by the enacting legislature if it were to remain in force.

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November 6, 1981, Debate in the House of Commons (click [HERE](#)), p. 12594

Miss Pauline Jewett (New Westminster-Coquitlam): Mr. Speaker, in the absence of the minister responsible for the status of women my question is for the Prime Minister. As the Prime Minister knows, Clause 28 of the constitutional resolution is a paramountcy clause outside the charter. I remind him that Clause 28 is the one saying

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

What I would like to ask the Prime Minister is if he can tell the House whether Clause 28 will continue to have paramountcy. That is, will it override any attempts made to deny equality to women?

Right Hon. P.E. Trudeau (Prime Minister): Mr. Speaker, I can only answer that my impression is that the clause would continue. I have not been involved in the drafting which went on between provincial and federal officials yesterday afternoon and, I believe, during the night as well.

I cannot answer firmly but I want to tell the hon. Member—and this applies also to the Standing Order 43 motion put by the member for Malahat-Cowichan—The Islands—is that we took the draft presented to us by the seven premiers. They had made a lot of deletions from our original draft which is before the House. One of those deletions was precisely the clause concerning aboriginal rights. They are the ones who deleted. If there was any deletion of the clause that concerns the hon. member—

An hon. Member: You agreed to it.

Mr. Trudeau: I understand. I agreed to a lot of things that were not my first choice, yesterday. That must be understood. I was looking for a consensus, and I got a consensus.

Some hon. Members: Hear, hear!

Mr. Trudeau: When the member is finished shaking his fist he can realize that I sought a consensus on the basis of a series of deletions to our charter, the best charter in the world which I believe some of the members over there supported. I accepted a consensus put to me by seven premiers. There were some

[Page 12595]

deletions, and aboriginal rights was one of them. Maybe the other clause was another. I am not sure. I will have to check that, and that is why I say I will see what was done on the drafting overnight.

I cannot conceive how the member from Malahat-Cowichan-The Islands could come out with an untruth as enormous as the one he did when he said that Saskatchewan was supporting aboriginal rights and somehow we were not. It is Saskatchewan and the other six that put to us a draft without aboriginal rights. It is in the discussion that ensued that I said I found that difficult to accept. but if they were facing me with this draft could we at least have a federal-provincial conference agreed where we would try to see what the native people agreed to among themselves, assuming they can agree among themselves, and that is far from certain, but I said let us at least give them a chance to meet with us. That is how it happened.

Some hon. Members: Hear, hear!

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November 9, 1981, Debate in the House of Commons (click [HERE](#)), p. 12634

Right Hon. Joe Clark (Leader of the Opposition): [...] Madam Speaker, I suppose that so long as we have an implicit undertaking from the Prime Minister that he will respect the spirit sought by Mr. Ryan of an honest attempt to include the province of Quebec in this accord, we will have to wait to see the resolution which comes forward.

However, let me ask a specific supplementary question of the Prime Minister in relation to the resolution that is being drafted. Would the Prime Minister confirm that in the original accord, signed by himself and the nine premiers on Thursday, the opt-out or override provisions do not apply to the guarantee of equality of male and female persons which, the Prime Minister will recall, was set down deliberately in a separate section, Section 28, of the original resolution?

[...]

Mr. Trudeau: Oh, well, we know that the Leader of the Opposition has always argued that we should have a charter

[Page 12635]

made in Canada by Canadians. Now that we will have our own Constitution, now will be his chance to have a charter made in Canada by Canadians, and over the next years he will be able to fight to put back in the charter what we had in the original charter which his party combated tooth and nail for the past year.

p. 12635

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, there is a great deal of heckling from the Liberal side, perhaps to stop questions about the equality of male and female persons. However, let me come back to the specific communiqué of the accord tabled in the House of Commons by the Prime Minister which says that there was agreement on the entrenchment of the full charter of rights and freedoms now before Parliament, with the following changes:

(b) A "notwithstanding" clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights.

The Prime Minister will recall that there was a deliberate effort made, when the original resolution was prepared, to put Section 28 in a separate section. That separate Section 28 is not referred to in the list of exceptions I have just quoted.

Is the Prime Minister telling us that the Government of Canada is now changing the accord which was signed by the Premiers? Are we going to have a resolution which has an opting-out or override clause applied to Section 28, when the accord did not have an opting-out or override clause applying to Section 28?

Right Hon. P.E. Trudeau (Prime Minister): No, Madam Speaker, I am not saying that. The Government of Canada did not want to take anything out of the resolution which was before the House; nothing. We wish the Leader of the Opposition had supported it when it was here the first time, but I did say that the officials of the federal and provincial governments did meet on Thursday and Friday, and my understanding of that meeting is that this particular section would be subject to the "notwithstanding" clause.

Mr. Clark: That changes the accord.

Mr. Trudeau: Let me make it clear that everything in the charter now we would want to keep. Anything taken out is taken out because of the accord.

Mr. Clark: No.

Mr. Trudeau: The Leader of the Opposition says "No". I wish he would get hold of the nine premiers and get them to interpret the accord.

I can show a piece of paper too.

Miss MacDonald: Shame on you.

Mr. Trudeau: The lady from Kingston says "Shame". She did not support the charter when it was here.

[...]

Mr. Trudeau: She did not support it when it gave absolute equality to the sexes. Hon. members opposite did not support it when it gave recognition to aboriginal rights.

As a result of the accord last week we have had to take certain things out, not because we wanted to take them out but because we were asked to take them out as the price of an agreement. I will not be saddled now with any weakness of the charter, which the party opposite refused to support and is now crying about because it does not appear in its entirety. They wanted a charter made in Canada. Let them sit down to work now and start making a charter in Canada. That means agreeing with the provinces that they should protect these people.

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November 16, 1981, Debate in the House of Commons (click [HERE](#)), p. 12777

Mr. Edward Broadbent (Oshawa): Madam Speaker, my question is addressed to the minister responsible for the status of women. The minister knows that following certain answers given by the Prime Minister with respect to Clause 28 in the old constitutional resolution, the precise meaning and significance of that clause are unclear. She also knows that there have been discussions taking place, as I understand it, between the federal and provincial officials in recent days. I wonder if she is now in a position to outline to the House the precise meaning of that clause.

Hon. Judy Erola (Minister of State (Mines)): Madam Speaker, I will be happy to answer the question. The precise meaning of the clause as we see it, is that Section 15, where the notwithstanding applies, refers to the specific definition of sexual discrimination for a very specific act. In Clause 28 the broad principle is stated, one in which the women of Canada are very much interested and are very positive about. They wish this to remain within the charter, of course. I should like Oral Questions to advise hon. members that we are optimistic at this stage and hope that Clause 28 in the general section will remain intact. We may know by the end of the day.

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November 18, 1981, Debate in the House of Commons (click [HERE](#)), p. 12890

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, I have a straightforward question that is directed to the Prime Minister, regarding the constitutional proposals. Will the Prime Minister confirm that all of the provinces, except Saskatchewan, have now agreed to the inclusion intact of the equality clause, Section 28, as it was introduced to the House of Commons earlier this year with unanimous approval by all parties of this House?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, the negotiations on this particular subject have been going on for several days because it was a matter of clarifying what the premiers intended when they signed the accord. There has been, effectively, disagreement between them as to what particular interpretation should be given to a particular section. I can only say that to this moment it has been impossible to get all nine premiers who signed the accord, on the same wavelength, and to agree to the same text.

[...]

Mr. Trudeau: Since we told the provinces that we would be tabling the resolution in its final form today, as a direct answer to the hon. lady's question I must say that there is more than one province which disagrees with the complete restoration of the section as it was. Therefore, in the spirit of the accord, I think we will have to go with a modified version of the text that we had originally proposed, not only in the resolution which has been before the House for a year, but also in the drafting sessions. I do not think it is appropriate to point out any particular province. There has been a great deal of negotiations going on, but obviously there is some lack of unanimity among the provinces as to what was intended in the accord.

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November 20, 1981, Debate in the House of Commons (click [HERE](#)), p. 12978

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, my question is directed to the Prime Minister. He will recall that a couple of days ago I asked him how many provinces have not yet given their consent to withdrawing the...

[Page 12979]

override provisions to the equality clause, Section 28. Following question period the Prime Minister will recall that he intimated informally to me across the floor of the House of Commons that there were two such provinces. Then he intimated that, if that number were reduced to one, he might consider reinstating the clause as it was in the original, but that he could not do so if it were two or more provinces.

Seeing that there seems to be only one province now which is withholding its approval, I ask the Prime Minister most sincerely whether he would, in concert with eight provinces, agree to reinstate Section 28 to give full equality to male and female persons as it was in the original resolution?

[...]

Mr. Trudeau: The hon. lady is asking me hypothetical questions because I do not know how many provinces will in the end support the amendments to restore the charter to its original form, the way it had been proposed. I do not know how many provinces, in the end will support, maybe all, maybe not all.

[...]

If the question does arise, we will have to make up our minds on this side of the House if “x” number of provinces is enough or not. I hope we will not have to ask ourselves that question because I am sure the house will let any changes to the accord made on Thursday, two weeks ago, be made with the consent of the provinces. I think that is important.

[...]

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, I would like to put a supplementary question. The Prime Minister will remember, of course, that Section 28 was not in the proposals brought before the House a year ago this October, and presented by the Prime Minister.

Some Hon. Members: Hear, hear!

That section was added in April of this year with the consent and agreement of all parties of this House, because I think we will want to see that section carried out. Therefore, I really want to come back to the question that I posed to the Prime Minister and the information that I understood he conveyed to me the other day that, while two provinces would present some difficulty for him in undertaking to make any change to the clause as it now stands before the House, if that number were reduced to one he might consider it. I am asking him will he not consider that?

Right Hon. P.E. Trudeau (Prime Minister): Madam Speaker, the hon. member make a point that Section 28 was not in the charter when it was first introduced. She is right, of course, and she is right that many other changes in the charter were made following the introduction into this House in October of last year. She should be reminded of the process which caused that to happen.

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November 20, 1981, Debate in the House of Commons (click [HERE](#)), p. 13042

Mr. Chrétien: [...] I want now to turn to the Charter of Rights and Freedoms. It is important at the outset to understand that the entire Charter of Rights and Freedoms will be entrenched in the Constitution and that no province will be able to opt out of any provision of the charter. The agreement signed by the Prime Minister and nine Premiers does not emasculate the charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights and language rights are all enshrined in the Constitution and apply across the land.

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.

The override clause in the Charter of Rights and Freedoms will require that a law state specifically that part or all of it

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applies, notwithstanding a particular section of the charter in the Constitution. Such an override automatically expires after five years unless specifically renewed by a legislature. The effect of this provision is, first, that it will be politically very difficult for a government to introduce without very good reason a measure which applies notwithstanding the Charter of Rights and Freedoms in the Constitution. Second, a sunset provision of five years provides a degree of control on the use of an override clause in allowing public debate on the desirability of continuing the deliberations further.

It is important to remember that the concept of an override clause is not new in Canada. Experience has demonstrated that such a clause is rarely used and, when used, it is usually not controversial. The Alberta bill of rights was enacted in 1972 and included an override clause. The Saskatchewan human rights code of 1979 also has an override provision. Neither has ever been used.

The Canadian Bill of Rights, enacted in 1960 by Mr. Diefenbaker, also contains an override provision. In 20 years, it has only been used once.

The Quebec charter of rights and freedoms adopted in 1975 contains an override clause which has been used several times. However, it has never successfully been used in a controversial manner. What is interesting in the Quebec experience is that the first draft of Bill 101 would have applied notwithstanding the Quebec charter of rights and freedoms. In this controversial area public pressure forced the Quebec government to delete the clause from the bill.

It is because of the history of the use of the override clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.

Gordon Fairweather, who is well known in this House and is the Commissioner of the Canadian Human Rights Commission, said this: "I'm in no mood for nitpicking today, I'm feeling tremendously upbeat". That quote is from the Montreal Gazette, November 7, 1981. Mr. Fairweather said that the override clause will become as dead from lack of use as a clause in the British North America Act that, at least in theory, still enables Ottawa to disallow provincial legislation. Referring to long standing provincial opposition to entrenched rights, Mr. Fairweather said: "The gang of no has become the gang of yes!"

Some Hon. Members: Hear, hear!

Mr. Chrétien: Professor Walter Tarnopolsky is a past-president of the Canadian Civil Liberties Association and an international expert on bills of rights. His view is that the override clause "is really not such a bad idea, and could have a great many advantages". That quote is from The Globe and Mail, November 9, 1981.

It should be clear, in conclusion, that the compromise reached by the Prime Minister with the nine Premiers maintains the principle of a full, complete and effective constitutional Charter of Rights and Freedoms. It does not exclude rights which have previously been guaranteed. In fact, the charter has been improved because unforeseen situations will be able to be corrected without the need to seek constitutional amendment. For those who remain concerned about the override clause, let me remind them that it has been said that "The price of liberty is eternal vigilance". Pressure groups must remain vigilant and we are seeing such vigilance now from women who are arguing for the removal of the override clause in Section 28 and the aboriginal people who are fighting for the reinstatement of their rights...

[...]

Fourth, the charter enumerates equality rights. In this area the government is taking bold steps forward in order to ensure the equality of women before and under the law. I know some would have hoped that we could do even better, and I hope we can in the next few days. The ball is now squarely in the court of Premier Blakeney. This government and the party I belong to are confident that we can and must succeed. But we also know that we must not break accord or all will be lost. I am sure that the efforts of the Minister of State for Mines (Mrs. Erola) who is responsible for the status of women will bring about the result that is the desire of every member of this House. [...]

p. 13045

Mr. Chrétien: It is the view of Canadian that having given our word when we signed the accord, we have to keep it. I want to affirm in this House that we will not impose it on the provinces if they do not want it. There is a mechanism that will permit us to do that eventually. Since the Government of Canada gave its word, it has the duty to respect that. I am sure the provinces understand the message of Canadians and are about to tell us that we will go to London with the entrenchment of both the women's rights in Section 28 and the native rights in the Constitution.

p. 13047

Mr. Clark: [...] At this state of the debate of the resolution, there are three specific amendments which my party proposes to introduce. There may be more later after further consideration of the implications of the resolution and consideration of proposals which may come, for example, from spokesmen of the people of Quebec. It is not our intention to extend the debate unduly, but it is our hope that everyone in the House will work constructively to bring the country together.

Our first amendment, which I move later today, will reinstate, without qualification, the guarantee in Section 28 of the equality of male and female persons.

Some Hon. Members: Hear, hear!

Mr. Clark: The House will not be surprised that my amendment in this case will be introduced by my good friend and colleague, the hon. Member for Kingston and the Islands (Miss MacDonald). The present resolution will allow Parliament or a legislature to treat women as less equal than men, or men as less equal than women. We intend that the rights and freedoms set forth in all the provisions of the resolution will be guaranteed equally to male and female persons. I will elaborate on our reasons later.

p. 13049

Mr. Clark: I indicated that the first amendment we wanted to introduce, the one which I will be introducing today, relates the equality of male and female persons. I would like to speak about that for a moment. When representatives of the federal and provincial governments met, they agreed that certain rights set out in the Charter of Rights and Freedoms should be limited by Section 33 of the new resolution by the non obstante clause. In the accord which was tabled in this House of Commons by the Prime Minister on November 5, the non obstante clause did not apply to section 28, which guaranteed the equality of male and female persons. I believe that is an uncontested version of what happened, both in the conference and afterward.

Indeed, what happened, to the best of our ability to reconstruct it, is that after the Prime Minister came to Parliament and the Premiers went home, the officials of both levels of government got together and decided to apply the non obstante clause to Section 28. The government, in this amendment and resolution, has unfortunately accepted the officials' amendment and has not acted on the accord which was reached by 10 of the 11 first ministers when they met here in early November. As a consequence of the change brought to this matter by officials, Section 28 is subject to Section 33. A limit is placed upon the equality of male and female persons which was not explicitly intended to be so placed by the 11 first ministers of Canada when they met in conference in November in the capital of the country,

In recent days there has apparently been some dramatic shifting of opinion on the question. In one case, we learned that at least one Premier had not been informed of the exact nature of the work being undertaken by his officials and the position being ascribed to his government by his officials. My colleague, the hon. member for Kingston and the Islands (Miss MacDonald), brought that matter directly to the attention of the Premier for Nova Scotia. I should say, in passing, that the hon. member for Kingston and the Islands did so at her own initiative and that of her party and, without the benefit of advice from the government, brought that to the attention of the premier of the province of Nova Scotia. When he understood what was at issue, he immediately indicated his

willingness to have Section 28 stand without limitation and expressed his willingness to associate himself, along with other Premiers and certainly along with his party, with the idea of the equality of treatment of male and female persons. Therefore, that changed.

[...]

Mr. Clark: I want to deal with the substance of what we are proposing. The substance of our amendment guarantees that men and women will have equal access to the rights and freedoms set out in the Charter of Rights and Freedoms proposed in this resolution. Some of those rights and freedoms will already be limited by the application of Section 33. However, where they exist they will exist absolutely equally for women and for men. That is the purpose of the amendment I am introducing, seconded by my colleague, the hon. member for Kingston and the Islands, That is an amendment which I hope will commend itself to this whole House, so that this whole House can go on record as supporting the guarantee of equal treatment of male and female persons in Canada.

At this point I would like to move a motion, and I will continue my remarks after having done so. I move, seconded by the hon. member for Kingston and the Islands:

That the proposed Constitution Act 1981 be amended

(a) By striking out clause 28 and substituting the following:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed to male and female persons.

(b) by striking out subclause 33(1), and substituting the following:

33. (1) 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 section 7 to 15 of this Charter

What that does is remove the non obstante clause from Section 28. It restores the guarantee of equality of male and female persons to the position enjoyed when the accord was tabled in this House of Commons by the Prime Minister of Canada after his meeting with the first ministers.

p. 13054

Mr. Broadbent: I will deal with that in a minute. I would be less than honest if I said that my colleagues and I were perfectly happy with all these things. We would have preferred that the original charter be binding universally without exception across Canada. That was our first preference.

Some hon. Members: Hear, hear!

Mr. Broadbent: Nonetheless, as a number of civil liberties authorities have said, over-all in the context of serious compromise what we still have remains a good charter of rights. As the Minister of Justice has said, certain rights will remain absolute. Among those over which legislatures may

pass laws the onus is upon those legislatures to pass specific legislation to justify such transgressions, and such negating laws would have to be renewed every five years. Thus, opposition parties and especially private interest groups in our society must remain vigilant.

In the early part of the last century a great French writer, Alexis de Tocqueville, wrote what was perhaps the most profound study of American society, and one of the distinguishing features he singled out about North American society was the vitality of interest groups and the creative input they had in making a democratic society with individual liberties possible. The kind of charter we now have before us will indeed permit legislatures on a five year renewal basis to undermine certain equalities if they wish, so it is mandatory that all of us who concern ourselves with civil liberties keep the pressure on at all times.

p. 13057

Mr. D. M. Collenette (York-East): [...] There are many purists in the House. I was one who, along with the Prime Minister (Mr. Trudeau), with just about everyone on this side of the House as well as many members on the opposition side, believed that fundamental rights and freedoms were so sacrosanct and so inviolate that they should be entrenched in a constitution beyond the temporal winds of legislators such as ourselves. We have heard many speeches in the debate from hon. members who have described Canadian legislatures and indeed this Parliament—of course I am thinking of the ignominious incident in the Second World War dealing with Japanese Canadians—as not having been the best guarantors of individual rights. This is why the charter which has emerged over the past year in debate in the House and through the participation of thousands of Canadians was such a noble document. It proposed that all basic freedoms and rights would be entrenched in the Constitution free of any legislative qualification.

The constitutional accord which was signed two weeks ago after much deliberation entrenches rights. However, fundamental freedoms, legal rights and equality rights are subject to a provincial or federal legislative override. In addition, as has been pointed out, our original intentions as expressed in the original resolution in the House on the question of native's and women's rights have not yet come to fruition. They were not included in the constitutional accord. Indeed this is a glaring, startling and regrettable omission which we must all resolve to correct, whether it is to be corrected in the days which follow in debate in the House or whether it is to be corrected after patriation with the new amending formula which will be at our disposal.

We must address these questions. It has been argued with some justice that it will be difficult to override the charter, that the charter will provide an imperative for our courts that will make it very, very difficult for any legislature to tamper with the provisions relating to rights or to pass any legislation which would derogate from those rights. I shall not rest, and I am sure there are others in the House and in the country who will not rest until we achieve, once and for all, the complete entrenchment of these rights from any legislative sanction.

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November 23, 1981, Debate in the House of Commons (click [HERE](#)), p. 13114

Mr. Bosley: [...] I mentioned earlier that it is critical that Section 28 apply without limitations—if hon. members will excuse my view of this thing—so that men will at long last be guaranteed equal treatment with women under the law. Without that change let us be absolutely clear that the resolution would be deeply and fundamentally flawed, and without that change at least some will argue that the resolution will not deserve our support. Some will say that in addition to that change the compromise allowing legislatures to override, at least temporarily, court decisions which appear in a legislature’s view to be inappropriate also eliminates a flaw.

When I started on Friday I made reference to my earlier experience at the municipal level with the Toronto Centre plan and the view of one critic that it must be good because it equally displeased everybody. I think that might be exactly true regarding the override provisions, but this compromise is typically and indisputably Canadian. Those who favour parliamentary supremacy will be able to say that that has been preserved, and perhaps it has been. Those who prefer the coded or entrenched protection of our individual rights will be able to say that that has been achieved, or almost so, and that political pressure will prevent too frequent use of the override. Like the Toronto plan, in other words, the change will equally displease everybody.

This is a difficult issue because it is an attempt to marry two important federalist principles. One is that there should be no constitutional change without the consent of those affected; in other words, our provinces. The other is a desire to separate from government some of our freedoms for which there is in the law no final protection today because Parliaments may do what they wish.

I know my own view, and it is this. When we—and I— argued for the right of the provinces to consent, it never occurred to me that the answer the provinces would find would be the right to override basic freedoms. I would much have preferred, and would still prefer, a negotiated and, if necessary, an abbreviated list of individual freedoms agreed to by the provinces and by the federal government—thereby preserving the Canadian way—adopted by the governments as binding on themselves and therefore not subject to being overridden.

I believe government has now become so big that relying on political pressure to prevent a government from taking away our individual rights—and in this context I think particularly of the government opposite—is naive. Whether wiser negotiation by the federal government or a step by step approach moving simply to patriate with an agreed amending formula would have produced a happier result in this regard appears now to be a question for the historians, but one cannot help but wonder; what if?

p. 13120

Hon. Jake Epp (Provencher): [...] The premiers’ particular contribution was to introduce the concept of a legislative override. This is an important innovation which will strengthen the effectiveness of the charter of Rights and Freedoms. I think it is important that Canadians understand this innovation, particularly because some people are suggesting that this innovation has produced a “watered down” Charter of Rights and Freedoms.

No country in the world, not even Canada, enjoys a system which could perfectly guarantee our rights. The Parliament and legislatures of Canada are not perfect. They have done injustices to individuals and minority groups. But the Supreme Court of Canada is not infallible either. It is

equally capable of making mistakes and doing an injustice to Canadians. In an imperfect world Canadians must choose between frail human institutions and decide which should hold the final authority. A legislative override leaves the final authority, and only the final authority, with the people's elected representatives. You might then ask how that would work. Suppose a future Supreme Court decided that provincial legislation allowing prayers in public schools violated the charter, and specifically the freedom of religion provisions? A provincial legislature would have to decide whether this legislation was so important and so popular that it should still be enacted. It might feel that the court had misinterpreted the intentions of those who drafted the Charter of Rights and Freedoms or the popular will of the people.

Having decided that the legislation was important enough, Parliament or the legislature would have to state publicly that it would pass the legislation knowing that it conflicted with the Charter of Rights and Freedoms. Not only that, it would have to introduce the legislation knowing it would have to be passed and scrutinized again every five years. Obviously, a government would do this only when it felt that the legislation was very important and was supported by most people. This probably explains why legislative overrides have never been used by any of the provinces which include them in their bill of rights in Canada at the present time.

It is important that Canadians understand that Parliament or a provincial legislature would not be opting out of the guarantee of, in this example, freedom of religion. It would only be stating that this single piece of legislation should still be effective even if it conflicts with the freedom of religion. All Canadian governments have affirmed their commitment to protecting our traditional rights, such as freedom of religion and speech. Ten Canadian governments are also committed to guaranteeing more modern rights, and here I am thinking specifically of the rights of the mentally and physically disabled. It is that section which I believe puts our charter in the vanguard of a modern charter, so to speak, and I am pleased to see those provisions included.

The importance of the commitment of Canadian federal and provincial governments to the rights contained in the charter should not be underestimated. This commitment will open the way to progress in including further guarantees in the Constitution over which our party has expressed some concern. More importantly, all the work which was done, all lofty phrases which were inscribed, and all the promises which were made by all parties in this Parliament during the hearings of the Constitution committee would have been worthless without the full commitment of the provincial governments to the Charter of Rights and Freedoms. It was unthinkable, in my view, that we would have a charter of rights and freedoms and then we would have provinces saying from time to time that the charter would not apply in their province. How, for example, would one be able to opt out of rights?

There are a number of members who insist that a charter of Rights and Freedoms is a hollow document, that it cannot protect the rights of citizens. While I am one who cherishes the rights handed down through the English common law, I remain convinced that redress for violations of rights by government is made possible through the inclusion of a charter of rights and freedoms — the example of Japanese Americans who, while not protected by the charter of rights of the United States either, were given compensation after the war. Japanese Canadians have not been compensated to this day. I have one such person in my riding at the present time. What we have to fear is not the violation of our rights by our fellow citizens, but by the government itself.

Additionally, there are those who point to the U.S.S.R. and other dictatorships as having an entrenched charter of rights, and yet, despite this provision, violations of human rights goes on daily. How do we answer this charge?

I said that our government institutions are fallible because we as people are fallible. The difference between the U.S.S.R. and democracies though is apparent. Dictatorships use charters for propaganda purposes. They have no intention, either at home or internationally, to observe the rights they so piously adopt.

p. 13123

Hon. Judy Erola (Minister of State (Mines)): [...] Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. It is that simple. We want the reference to Section 28 in the override clause, Section 33, deleted. The charter will then carry a forceful statement of equality. This will give the courts a strong direction that sex discrimination cases require their strictest scrutiny.

For those who argue that affirmative action programs are jeopardized by the removal of Section 28 from Section 33, I remind them that the present constitutional proposals clearly state that affirmative action programs are not subject to the normal rules barring discrimination on the basis of sex. To go back to some of the things which have happened to women in this country, I am sure there are many who are not aware of the fact that long before the era of the suffragists, women in Quebec, Nova Scotia and New Brunswick had been entitled to vote and hold office. Why? What happened? Simply because it had not occurred to anyone to make laws to prevent them from voting. Of course, you can guess what happened when this existed; legislation was enacted to remove that right.

p. 13129

Miss Pauline Jewett (New Westminster-Coquitlam): Mr. Speaker, I too am grateful to have the opportunity to participate in this debate. I believe this is the third occasion on which I have addressed myself to the question of the role of women in Canadian society and to the future equality of women with men in Canadian society. Therefore, like others, I am distressed to discover that what is called an “override clause” has been put in the equality of rights clause, Section 28. With a lot of my colleagues, I was very glad that many features in the accord that was reached between the first ministers of the provinces and the Prime Minister (Mr. Trudeau) the other day are good ones, are progressive ones, are strong ones and are desirable ones. In that connection I was very happy to read that the new Premier of Manitoba had said that he will certainly not renege on francophone rights in that province or subject them to legislative approval.

Some hon. Members: Hear, hear!

Miss Jewett: There are good things in this resolution, but it is almost heartbreaking to see the legislative override of some of the most fundamental and most important parts of the Charter of Rights and Freedoms. When the proposal was put before the House of Commons I think we all felt that section 15, the equality of rights section outlawing discrimination on grounds of race, colour, religion, sex and so on, and its second component, the affirmative action provision encouraging

legislatures to take affirmative action for disadvantaged groups, was one of the strongest parts of that charter. Perhaps it was because there were no women present, or perhaps it was because there were no black people present that the first ministers of this country crippled that section of the charter. It is all very well to say that a specific act can discriminate only for five years, but to me that almost destroys the intent, the purpose, the symbolism and the substance of that section. To then go on and apparently subject Section 28—which the women of Canada strove so hard to get in the Constitution and which the House unanimously passed in April—to an overriding provision that a legislature or the Parliament of Canada could deny the very rights and freedoms referred to in this charter guaranteed equally to male and female persons and that the government would do this apparently as an oversight, that it had not really thought about Section 28, the section to which Parliament gave a great deal of thought, adds insult to injury.

Hon. members will remember that the very day after the accord was signed I asked the Prime Minister (Mr. Trudeau) whether Section 28, the section guaranteeing women's equal rights with men, was included. I remind you, Mr. Speaker, that the Prime Minister said:

I can only answer that my impression is that the clause would continue. I have not been involved in the drafting which went on between provincial and federal officials yesterday afternoon and, I believe, during the night as well. [...]

p. 13144

Mr. Hal Herbert (Vaudreuil): [...] However, as I said at the outset, I want to make a couple of comments on parts of the resolution on which I have been questioned. first I should like to comment upon the non

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obstante override clause as it applies to the charter of Rights and Freedoms. The entire charter of Rights and Freedoms will be entrenched in the Constitution and no province will be able to opt out of any provision of the charter. The agreement signed by the Prime Minister and the nine Premiers does not emasculate the charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights and language rights are enshrined in the Constitution and apply across the country. What the premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the charter.

The Quebec charter of rights and freedoms adopted in 1975 contained an override clause which has been used several times. However, its use has been non-controversial and is instructive in looking at how the override may be applied in terms of the new constitutional charter. For example, despite the provision in the Quebec charter guaranteeing that everyone is equal before the law, the juries act indicates that a lawyer cannot be a member of a jury. Despite the guarantee of open trials in the Quebec charter, the youth protection act provides for circumstances where juvenile court may hold closed sessions. Despite the protection in the Quebec charter for the privileged doctor-patient relationship, the highway safety act requires a doctor to inform the license bureau of the name of the patient who is medically incapable of driving a motor vehicle. It is because of the history of the use of the override clause and because of the need for a safety valve to correct absurd

situations without going through the difficulty of obtaining constitutional amendments that leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.

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November 24, 1981, Debate in the House of Commons (click [HERE](#)), p. 13195

Hon. Flora MacDonald (Kingston and the Islands): [...] I am glad to say that hope has won the day. I feel a deep and overwhelming sense of relief – and then jubilation – that the amendment before us to be accepted and Section 28 entrenched without qualification and without any override provision in the charter, that section merits repeating:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

p. 13197

Mrs. Mitchell: [...] This morning a member of the ad hoc women’s committee said to me, and I quote:

Last night’s announcements is a good beginning, but we have only won half the battle. We must get rid of the override completely regarding fundamental freedoms in Section 2 and also the Sections 7 to 15 regarding rights and freedoms which must be universally applied across Canada with no override clause for provinces....

[...]

I agree with the ad hoc women’s committee – I am quoting them rather frequently because I have seen them on many occasions in my office – that we have a long way to go that there will be many cases to test those constitutional provisions. But we are pleased that such a good start has been made. By including Section 28 with no override, we expect, for example, that the Supreme Court of Canada will never again be able to rule against women as it did in the Lavell, Bédard and Bliss cases, as well as in other instances mentioned by the hon. member for Kingston and the Islands (Miss MacDonald) and yesterday by the hon. member for New Westminster-Coquitlam (Miss Jewett).

p. 13216

Hon. Ray Hnatyshyn (Saskatoon West): [...] Even though the Prime Minister appears not to like it, at least the notwithstanding clause in the resolution recognizes the reality that the courts are not necessarily more in tune with public opinion and morals than are legislative bodies. At least in this country we will have a mechanism for adjusting court decisions which fall out of step with public opinion. Some may view this as the charter’s downfall; but the argument is that, particularly in the early years of a charter and because of our federal nature, we need a route which will allow Parliament and the provinces to deal with judicial pronouncements without having to resort to a constitutional amendment.

My point is that, important as the entrenched bill of rights is, let us not woo the Canadian people into believing that it is the final solution. The price of freedom is vigilance by individual citizens. We do our country a great disservice by failing to stress that particular responsibility.

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November 25, 1981, Debate in the House of Commons (click [HERE](#)), p. 13243

Mrs. Margaret Mitchell (Vancouver East): Madam Speaker, it is my duty to present a petition to the House sponsored by the Ad Hoc Committee of Canadian Women on the Constitution. This petition asks for the removal of the override section, Section 33, from the Charter of Rights and Freedoms. It is the hope of Canadian women that members of Parliament will delete the shockingly regressive Section 33 in order to guarantee that basic rights and freedoms – and 2 of them are listed – cannot be violated by the provinces or the federal government.

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November 26, 1981, Debate in the House of Commons (click [HERE](#)), p. 13295

Mr. Svend J. Robinson (Burnaby): Madam Speaker, I rise on a matter of urgent and pressing necessity pursuant to the provisions of Standing Order 43. In view of the fact that Section 33 of the proposed Constitution resolution would

[Page 13296]

permit provincial and federal governments to override and deny fundamental rights to Canadians, including freedom of conscience and religion, freedom of the press, freedom of association, and the right to protect from discrimination against the physically and mentally disabled, ethnic and racial minorities, the elderly, and possibly women, and in view of the fact that the federal-provincial accord refused to protect these groups from possible discrimination, I move, seconded by the hon. member for Beaches (Mr. Young):

That this House urge the Minister of Justice to propose amendments to the constitutional resolution, eliminng the possibility of Section 33, the override provision, applying at the very least within federal jurisdiction.

Madam Speaker: Is there unanimous consent for this motion?

Some hon. Members: Agreed.

Some hon. Members: No.

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November 26, 1981, Debate in the House of Commons (click [HERE](#)), p. 13362

Mr. Jean-Robert Gauthier (Ottawa-Vanier): [...] Another aspect of this resolution which reveals even more its real worth, is the presence in the Charter of a great many non obstante clauses. These clauses of course are the result of the negotiated compromise between the federal government and the nine provincial governments. However, if we reflect upon the result of that compromise we realize that this resolution is probably the only federal document which has to rely upon provincial jurisdiction or legislation to become operative. As I pointed out in an earlier speech, that is a good example of a situation where the government of Canada proposes and where provincial governments dispose. How then can we speak of a Canadian constitution? We should instead speak of a constitution of the Canadian provinces made possible through the federal government. Those numerous opting-out clauses leave us in a rather strange situation, Mr. Speaker. I see that you are about to rise. I do not know whether my time is up, but I would seek the unanimous consent of the House to finish my speech because I have only a few pages left to read.

p. 13368

Mr. Baker (Nepean-Carleton): [...] I want to see the Canada clause adopted in that province. I am a Canadian. My children will grow up in this province as Canadians. I would like them to be able to go to that province. My friends on the other side shake their heads, suggesting that it may be impossible, and it may be; but my case is only that that chink of light should be kept alive if it is at all possible. Governments come and go. Public men come and go. As they come and go, attitudes change and societies evolve. Surely, we would want the society in Quebec or elsewhere to evolve so that, as the hon. member for Ottawa-Vanier said, the override clause could be diminished so that rights would be completely entrenched, if they are there at all. This would mean there would be no opting out and there could be no absence from one chair at the table of confederation.

Your Honour can judge from what I say, that I am overjoyed that we have moved from the process of confrontation to one where I feel a great sense of coming together. I think it is important that the resolution go forward with the broadest support we can muster in the House of Commons. We have spent a great deal of time. I believe now, as I look back on it, that time has not been wasted.

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November 27, 1981, Debate in the House of Commons (click [HERE](#)), p. 13428

Mr. Ian Waddell (Vancouver-Kingsway): [...] The fourth flaw is that the charter has been somewhat emasculated. The principal concession that the premiers won from the federal government in the November 5 accord was the provincial override on fundamental freedom, legal rights and equality rights in the charter.

The purpose of an entrenched charter is to give the courts, in an open and direct manner, the authority they need to protect our basic freedoms if legislative and government restraint should fail. If legislatures are given the power to cancel that judicial authority, as they now have been, they are most likely to use it when there is a failure of restraint. Canadian history shows that it has been, by and large, the provincial legislatures and their creatures, the municipalities, that have most often violated fundamental rights.

I am a lawyer, Mr. Speaker, and I have appeared in every level of court in Canada on civil liberties cases and I have seen this pattern emerge very clearly. It is in our history, from Mr. Roncarelli's liquor licence to the Alberta press laws, most recently to the anti-parade by-laws in some of our cities which affect freedom of assembly. It is a sorry picture.

There have been violations of civil liberties in this country and if the legislatures are given an override, they may use it some time when restraint is called for.

A great lady who once represented my riding of Vancouver-Kingsway in this House, Grace MacInnis, told me that her husband, Angus MacInnis, stood up against a tidal wave of public opinion when it was proposed to confiscate the homes and property of Japanese Canadians and move the people away from the west coast during the war. I am afraid that could happen again and that is why I think it is unfortunate that we do not have an entrenched charter. We will have to live with that, however. We expected that some concession would be made to the premiers and this is it. I just want to express my disappointment about that, Mr. Speaker.

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November 30, 1981, Debate in the House of Commons (click [HERE](#)), p. 13506

Hon. Mark MacGuigan (Secretary of State for External Affairs): [...] But complete actualization of potential protections may not be needed at every moment of constitutional life. Professor Walter Tarnopolsky, perhaps the country's leading civil liberties specialist and the director of the new Institute of Human Rights at the University of Ottawa, developed the notion of the override in the Canadian Bar Review in 1975. He said:

I believe a notwithstanding clause ... may be the only restraint we need place on the legislature ... One must be realistic and understand that the most one can expect from a written bill of rights and judicial review is control of administrative and police action . . . Whether the courts do hold legislative or administrative action inoperative or invalid, is not always as important as the fact that they

[Page 13507]

can do so, and as the fact that in rendering their decisions they can amplify the terse terms of the Bill of Rights and infuse them with principles to which society aspires and will compel, even indirectly, the public servants to adhere to. Even in the United States, the Supreme Court has invalidated very few Acts of Congress, but its judgments are guidance of what will be tolerated.

If Professor Tarnopolsky is right in estimating that it is not acts of Parliament or of the legislatures that will from time to time need to be declared invalid, but rather administrative actions under their authority, then perhaps the people have not lost very much through the introduction of the legislative override mechanism. In any event, they can bring into play all their skills in political lobbying. Even if worst comes to worst and an infringing law is enacted, it has a maximum life of five years, thus allowing special interest groups further opportunities of defeating it at five-year intervals.

Our satisfaction on this side is increased by the knowledge that the achievement is owing to our own efforts. It was the principled idealism and the stubborn determination of this Prime Minister (Mr. Trudeau), this government, this caucus and this party that brought about the accord. Can anyone doubt that, without this contribution, there would have been no initiative, no momentum, no result? We would have been at the beginning rather than at the culmination.

p. 13516

Mr. Ron Stewart (Simcoe South): [...] Under Section 28 the notwithstanding clause is really an override. The much vaunted Charter of Rights and Freedoms is really not entrenched or enshrined in the Constitution. It is subject to change at the future discretion of federal and provincial legislators. I happen to disagree with this approach. The draftsmen are attempting to ensure that the custodians of our rights will not be appointed judiciary, but the elected representatives in the federal and provincial arenas.

I happen to be one of those who feel and believe strongly that basic human rights are not negotiable and not amendable. These rights were not given to us by the state. They are inalienable rights which stem from centuries of civil and common law, from confrontations with the monarchs and the barons, and from bloody battles in the defence of liberty and freedom. These are inalienable rights, as has been stated 50 many times; the right to life, liberty and the ownership of property. The state is not giving us any rights we do not already possess. To attempt to formalize these rights in a charter is carrying coals to Newcastle. Anything that is not written down I can do. It is those things that are done backwards that I fear.

The right to freedom of religion does not require any legislation which may permit a "notwithstanding" clause. The right to freedom of speech does not require any legislation which may permit a "notwithstanding" clause. The right to freedom of assembly does not require any legislation which may permit a "notwithstanding" clause. The right to own property does not require any legislation which may permit a "notwithstanding" clause.

By the way, under Section 2, where is the right to possess and enjoy the ownership of private property in the Charter of Rights and Freedoms? You will not find it, and do not give me the ballyhoo about provincial rights.

May only the state own property? The right to own property is a sacred right in this country and in a few others. Its omission from the charter is indefensible in my opinion. Historically we have always had that inalienable right to property. Even Machiavelli, who was championed by the right hon. gentleman across the way, stated:

When neither their property nor their honour is touched, the majority of men live content.

Let me quote from Charles Evans Hughes in a speech at Elmira, New York, in 1907. He said this:

We are under a constitution, but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the constitution.

Pope Leo XIII stated in 1891:

Every man has by nature the right to possess property as his own.

It is ludicrous in my view to propose such a tentative charter. It is an affront to simple justice, equality, liberty and freedom to propose a charter which might be subject to change at the whim or caprice of some legislative body. Freedom of speech, religion, assembly and the right to own property are basic human rights. They are less than secure or safe if they are subjected to a "notwithstanding" clause.

These fundamental freedoms should mean the same throughout each and every province in this country. We have always assumed that our rights are universal and portable. We have never considered for a single moment that they might vary or be subjected to different interpretations depending on what province we are in. If rights must be entrenched, so be it, but let them be entrenched without qualification or override. In my lifetime I

[Page 13517]

have seen too many abuses of the rights of some, ostensibly to protect the rights of others.

I think perhaps it was John Stuart Mill who said literally that every man has the right to go to hell in the manner of his own choosing so long as he does not bother his neighbour. I would prefer to take my chances with the courts interpreting my rights. I do not subscribe to the doctrine of legislative supremacy in all cases. If you prefer to go the route of legislative supremacy, maybe you should talk to, the Japanese-Canadians whose rights were overridden during World War II, or talk to the Jehovah's Witnesses in Quebec.

I do not favour any loosely worded protection of basic rights which will permit the passage of discriminatory legislation. It has been written by others that the "notwithstanding" clause is a "watering down," a "gutting" and a "disembowelling" of the Charter of Rights and Freedoms. The "notwithstanding" clause weakens the charter, it does not strengthen it. Freedom of religion means just that—no "ifs", "ands" or "buts". The same goes for our other fundamental rights and freedoms.

Will we be better off with a Charter of Rights and Freedoms? Will we be more united? Will this proposed charter divide us? Those are interesting questions.

The United States has an entrenched charter, but its charter was wrestled, fought for and bled for. It was a declaration of independence from another country. That is a vast, vast difference.

On the other side of the Atlantic the United Kingdom does not have an entrenched charter of rights. In fact, the U.K. does not have a formal constitution. The U.S.S.R. has one of the broadest and most humanitarian charters for the protection of civil liberties that exists anywhere in the world. Need I say any more? So much for entrenchment.

We have existed for 114 years without an entrenched charter of rights and freedoms, and I think that, with a couple of obvious exceptions, we have done remarkably well. Most Canadians want an end to this debate, but I do not believe they wish an imperfect charter as the price. I do not believe they want an imperfect Constitution. I would again like to quote from, Senator Forsey who said:

—if we get an entrenched charter of individual and minority linguistic rights, putting them out of the power of Parliament or the provincial legislatures to touch ... Such a charter would give the courts wholly new, and vitally important, powers over a vast new field of subjects; and the history of the United States shows how courts can interpret an entrenched bill of rights to block social progress. So the drafting of such a bill, or charter, will be both delicate and crucial.

For example; a constitutional guarantee for parents to have their children educated in their mother-tongue (French, English, or native) would not protect the freedom of choice which the United Nations has declared essential. An English-speaking Canadian who wanted to have his children educated partly in French, or a French-speaking Canadian who wanted to have his children educated partly in English. or an Indian or Inuit who wanted to have his children educated partly in French or English, would have no constitutional protection whatever.

I do not believe that the people of Canada wish to trade parliamentary law for constitutional law. I feel somehow this evening that my remarks here are redundant. The dye has already been cast. We are all aware of it on this side of the House.

The government is determined to proceed hastily with this inferior product while we suffer the consequences later. It may be news to the government but Canadians do not rate the Constitution very highly in the pecking order. As Canadians perceive it, I am told that it ranks about fifth. It rates below the economic issues.

p. 13528

Mr. Blenkarn: [...] That Bill of Rights is looked upon proudly by my constituents and others who come to my office as an important charter of their rights, even though in that Bill of Rights Parliament reserved the right to restrict rights by specific amendment in a particular section of the statute. The charter before us now allows the same restriction on rights. It provides for a government to override some basic rights on a five-year basis. That means that the political process—not the judges—will determine where rights really stand. It is perhaps more restrictive than the Diefenbaker Bill of Rights in terms of the ability of Parliament or legislatures to alter, control or vary rights.

It has been suggested that the "notwithstanding Section 33" is not a good one. I suggest that while I am not as happy as I might be with "notwithstanding" sections, there is essentially no difference between that "notwithstanding" section and clauses in the Diefenbaker Bill of Rights. Therefore, when people say that they will not support this charter of rights because of Section 33, they should read the Diefenbaker Bill of Rights.

I am proud of the Diefenbaker Bill of Rights. It has flowing language which appeals to people. Perhaps one of the difficulties with the proposal which is before us is that the language could be better, perhaps more poetic.

However, this Charter of Rights and Freedoms is what John Diefenbaker would have liked to have seen entrenched in our Constitution. He tried to get approval for something like this, but found he

could not. After more than a year, we may well be able to entrench basic rights in our Constitution, rights which are much like the rights in the Diefenbaker Bill of Rights.

[...]

In the course of human work nothing is absolutely perfect, so while under Section 33 rights might be curtailed, while there are no property rights and while the rights of the unborn are not protected, this Charter of Rights and Freedoms is a pretty good effort. It may not be perfect. It is not perfect, but neither are we perfect. We should move ahead at this time so that we will have an opportunity to improve as we go. However, let us now move ahead because it is time to move ahead. We have had full discussion. We have had long committee hearings. We now have the agreement of nine of the ten provinces. That in itself is evidence of massive consensus.

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December 1, 1981, Debate in the House of Commons (click [HERE](#)), p. 13589

Mr. Allmand: [...] On the other hand, I am not happy at all with the revised charter, with the new amending formula, the new wording which applies to the charter, and the new wording on aboriginal rights. In particular, I am not pleased with the introduction of the "notwithstanding" clause into the charter, a so-called override clause, and, in particular, as it would apply to Section 2, fundamental freedoms, and Section 15, the equality clause. For me, these two clauses were key ones which I think would have helped protect Canadians on many issues which are not foreseen today.

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February 23, 1982, Debate in the House of Commons (UK) (click [HERE](#)), col. 777

Mr. Powell: [...] I know that there are contexts in which it might be argued that they have that situation already and perhaps are vainly attempting to continue it by the Bill. But that it is the intention of the Canadians that what is a "free and democratic society", what can be "justified" in it, what can "demonstrably" be justified in it and what limits can therefore be "prescribed by law" in that country ought to be taken, not by their elected representatives but by a court, is something which hitherto had not occurred to me. If that is so, then we ought, on behalf of those who have asked us so to legislate, to face the fact that there is, and there will be, little real or natural meaning in the term "guarantees" in paragraph 1 of part I.

I know that the schedule contains provisions which specifically say that the legislative authorities can neglect, and can legislate notwithstanding, portions of the Charter of Rights and Freedoms, notably the portions contained in paragraph 2 to 7. Perhaps the deliberate omission of paragraph 1 of part I from that exclusion could have conveyed the notion to some—and we are talking about real people, many of whom are anxious, and many of whom may be confused as to what is going on—that there is some unique effective guarantee contained in part 1 of the schedule.

It so happens that the schedule is at present drawn to limit the expression "Charter of Rights and Freedoms" to the contents of part I. I cannot, I think, have been the only hon. Member studying this

schedule who, when he read part II, found himself puzzled and disquieted that that part had been excluded from the definition of the Charter of Rights and Freedoms, for part II, headed Rights of the Aboriginal Peoples of Canada happens to be an affirmation—we shall come to certain parts of the wording later on—the aboriginal and treaty rights of the aboriginal peoples of Canada". Therefore, it is a fair question for the House to ask: why was that part of this schedule not thought to be appropriate to be part of the Charter of Rights and Freedoms? It is no use saying that the Charter of Rights and Freedoms is not concerned with the rights of the aboriginal peoples. There are several sections in part I which deal with the rights of the aboriginal peoples. I have looked with some care at those sections to see whether, somehow, they made part II superfluous. I could not conclude that they did. Indeed, if part II is superfluous, then why is part II in the schedule anyhow?

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March 3, 1982, Debate in the House of Commons (UK) (click [HERE](#)), col. 369

Mr. Campbell-Savours: [...] I suggest that section 7 is a danger in that it rules out any protection for the foetus, and that the courts may rule on the basis of the section. However, in section 33 there is an overriding exception, which covers section 2 and sections 7 to 15. At first glimpse that would appear to rule out the section that I have just dealt with and therefore perhaps remove the danger that I have spent the past five minutes referring to. But that is not so, because the moment one rules out that section another section—section 28—arises. It says: Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons". Again, that wicked word "person" returns. We must ask ourselves why it arises again in the Bill. Let me go into the origins of that. It was thought up by the women's movement in Canada. I am told that there was much argument about its inclusion. The Canadian Advisory Council on the Status of Women, in November 1980, stated: The recommendations to include the word 'person' was to prevent the foetus from having protection in the Charter. It is clear that that section has also been interfered with in such a way as to provide good work and income for the courts and the Supreme Court of Canada and, no doubt, it will give them the opportunity, when tested against the background of the charter, to change the law in favour of liberal abortion, which is not the open or explicit intention of the Canadian Parliament. I am convinced that that would not be the intention of this Parliament, if this matter were known to the whole House.

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March 29, 1982, Debate in the House of Commons (click [HERE](#)), p. 15897

Mr. Svend J. Robinson (Burnaby): Madam Speaker, my supplementary question is directed to the Prime Minister. When the Prime Minister invoked the War Measures Act in 1970, he trampled on and overrode the fundamental rights protected by the Canadian Bill of Rights.

Some hon. Members: It was Parliament.

Mr. Robinson (Burnaby): He now proclaims that the Charter of Rights will protect Canadians from abuses under the emergency planning order which, among other things, will allow him to impose sweeping censorship and to commandeer all media for an unlimited period of time.

Is the Prime Minister prepared to assure the House that under no circumstances will his government make use of the “notwithstanding” clause in the Charter of Rights to deny, during times of emergency, the fundamental rights of all Canadians, or is the Charter of Rights to become as useless during times of emergency as was the Canadian Bill of Rights when the Prime Minister said, “Just watch me”, in 1970?

Some hon. Members: Oh, oh!

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, I would first point out to the hon. member that the War Measures Act was adopted in 1970 with the concurrence of hon. members on both sides of this House.

Mr. Clark: With information withheld.

Mr. Trudeau: Second, the “notwithstanding” clause was brought into the Charter, as the hon. member knows, at the insistence of the provinces. The federal government had a Charter which did not have a “notwithstanding” clause. I am sorry that the hon. member, personally, if my recollection is correct, did not support it. However, I do know that one of the leading forces in introducing a “notwithstanding” clause was Premier Blakeney of Saskatchewan. I would hope that that hon. member would use his influence to get Premier Blakeney, along with other premiers, to revert to the original bill that we had.

Some hon. Members: Hear, hear!

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PART 3:

**Secondary Readings (List of Cases, Academic and Legal Commentary)
Pertaining to Section 33**

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List of Cases on Section 33, 1982 Act:

[Re Resolution to Amend the Constitution \[1981\] 1 SCR 753.](#)
[Ford v. Quebec \(Attorney General\), \[1988\] 2 SCR 712.](#)
[Devine v. Quebec \(Attorney General\), \[1988\] 2 SCR 790.](#)
[Irwin Toy Ltd. v. Quebec \(Attorney General\), \[1989\] 1 S.C.R. 927](#)
[Hak c. Procureure générale du Québec, 2019 QCCA 2145](#)
[Frank v. Canada \(Attorney General\), \[2019\] 1 S.C.R. 3](#)
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