

CONFIDENTIAL

November 17, 1981

THE NOTWITHSTANDING CLAUSE

- 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, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.
- (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.
- (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.
- (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

DEFINITION

The notwithstanding or override clause included in the Charter of Rights and Freedoms enables a legislative body (federal or 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. The notwithstanding clause will only apply to certain Charter rights - Fundamental Freedoms, Legal Rights and Equality Rights. Democratic Rights, Mobility Rights and Language Rights are not subject to the notwithstanding clause.

APPLICATION

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.

SAFEGUARDS

Any legislative override is of a limited duration -- five years -- to ensure that it is reviewed by a subsequent legislature to determine if its continuation is warranted. To remain in force the notwithstanding enactment would have to be renewed by the legislature.

The Charter reflects norms of our society which are fundamental and governments will hesitate before breaching these rights. Overriding the courts' interpretation of the Charter will not be done lightly by any Canadian government. Politically there would have to be very sound and widely accepted reasons for such a provocative act.

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BACKGROUND

The notwithstanding principle has been recognized and is contained in a number of bills of rights in Canada:

- The Canadian Bill of Rights (1960)
- The Alberta Bill of Rights (1972)
- The Alberta Individual's Rights Protection Act (1972)
- The Quebec Charter of Rights and Freedoms (1975)
- The Saskatchewan Human Rights Code (1979)
- Ontario's Bill 7 to amend its Human Rights Code (1981)

To our knowledge, the legislatures of Alberta and Saskatchewan have never enacted laws which would have required that the notwithstanding provision be used.

The government of Canada has used the notwithstanding clause on one occasion, The Public Order (Temporary Measures) Act, 1970 which expired on April 30, 1971 contained a non-obstante clause as required by section 2 of the Canadian Bill of Rights. However, the non-obstante clause was restricted to certain legal rights of the Canadian Bill of Rights (those provisions dealing with arbitrary detention or imprisonment and denial of bail without just cause) despite the fact that under the provisions of the War Measures Act all the rights in the Canadian Bill of Rights were subject to the override clause.

Quebec has used the notwithstanding provision on seven occasions (Appendix I). Most limitations imposed by the Quebec government likely stem from the fact that the Quebec Charter contains no specific "reasonable limits" clause and the government was therefore fearful that without the override the courts might construe the Charter provisions as being without any limits. Under the Canadian Charter overrides similar to those enacted by the Quebec government would likely be unnecessary since section 1 would permit these types of limits. Also, in some cases, the Quebec overrides deal with rights not included in the Canadian Charter of Rights and Freedoms, e.g. protection for the doctor-patient relationship, lawyers in small claims courts, etc.

PROVINCIAL CONCERNS

Some provinces felt that including a notwithstanding clause in the Charter of Rights and Freedoms would preserve the idea of the supremacy of Parliament. Furthermore, some provinces had specific concerns regarding certain sections of the Charter and wished to have the notwithstanding clause applied to these sections:

- Section 2 - Fundamental Freedoms

Some provinces were concerned about how the courts might construe certain of the freedoms such as freedom of conscience. Also some provinces were concerned about the effect of certain freedoms on provincial legislation, such as freedom of expression and provincial control over advertising or provincial laws regarding pornography.

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- Sections 7 to 14 - Legal Rights

Some provinces were concerned about including certain legal rights (search and seizure) as they felt this could result in Canadian courts adopting undesirable American jurisprudence relating to exclusion of all illegally obtained evidence.

Some provinces felt that applying rights beyond criminal and penal proceedings to include civil and administrative proceedings would extend legal protections to areas where such protections are not now applicable and, in some cases, would be unwarranted.

Also, some provinces were concerned that the test of "reasonable" or "arbitrary" which qualifies some rights could result in unforeseeable and undesirable court decisions.

- Section 15 - Equality Rights

Some provinces felt that equality rights or non-discrimination rights are a developing area of the law where new grounds are being developed in federal and provincial human rights legislation and where certain grounds such as sex, age or mental or physical disability still require exceptions or limitations.

Even with the three year delay provision included in the Charter, some provinces were concerned with the impact these rights would have on provincial legislation. Entrenchment of these rights would require extensive legislative amendments and some provinces felt they would not be able to offer protection against discriminatory practices in some areas because the Charter would require that protection once offered could not be conditioned to meet social realities.

Also, some provinces were concerned about how the courts would interpret these rights.

A separate note is attached with respect to Equal rights for both sexes (section 28).

FEDERAL GOVERNMENT POSITION

The federal government felt that a notwithstanding clause was both unnecessary and undesirable. The clause was unnecessary because section 1 of the Charter gives sufficient guidance to the courts as to the limits on the rights included in the Charter. The clause was undesirable because it is a provision that could seriously undermine the efficacy of the Charter if it were invoked too frequently.

Nevertheless, in reaching a consensus with the provinces with respect to the Charter of Rights and Freedoms, the federal government felt it was preferable to include a notwithstanding clause applicable to certain rights rather than delete or dilute rights. In addition, the notwithstanding

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clause was preferable to an "opting-out" or "opting-in" clause. The notwithstanding clause must be applied to a specific provision of the Charter and it can apply only to individual pieces of legislation. This prevents a legislature from passing an omnibus bill exempting it from all provisions of the Charter.

Therefore, the entire Charter of Rights will be entrenched in the Constitution and 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 all enshrined in the Constitution. Also, the section regarding our multicultural heritage (section 27) and the section regarding the non derogation of aboriginal rights (section 25) remain in the Charter and are not subject to the notwithstanding clause.

The notwithstanding clause is unlikely ever to be used except in exceptional circumstances by Parliament or legislatures to override certain sections of the Charter. It will be politically very difficult for a government without very good reason to introduce a measure which applies notwithstanding the Charter of Rights. All uses of the notwithstanding clause will have to be fully debated in Parliament or the provincial legislatures and this will provide a very considerable degree of protection against the unwarranted use of the clause. In addition, if such a measure is used by a legislative body, the sunset provision of five years provides a degree of control on the use of the notwithstanding clause and allows public debate on the desirability of continuing the derogation further.

There is a certain value in including a notwithstanding clause in the Charter. The notwithstanding clause is a safety valve which will ensure that legislatures rather than judges have the final say on important matters of public policy. By using the override clause unforeseen situations will be able to be corrected without the need to seek constitutional amendments. For the sake of parallelism, the notwithstanding clause can also apply to federal legislation.

NOTE: A similar principle to the notwithstanding clause exists in other countries. In some cases Charters indicate that rights may be suspended for definite or indefinite periods. In other cases, provision is made to pass laws which breach individual rights.

APPENDIX I
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QUEBEC CHARTER OF RIGHTS AND FREEDOMS -
A NON-OBSTANTE CLAUSE

- (1) La Loi sur les jurés, LRQ, 1976, c. J-2, art. 52

Les dispositions de cette loi portant sur les points suivants s'appliquent malgré la Charte des droits: Qualités requises des jurés (ex. la citoyenneté); inhabilité (ex. un avocat, un député ou son conjoint; jury unilingue français ou unilingue anglais).

- (2) La Loi concernant les services de santé dans certains établissements, L.Q., 1976, c. 29, art. 14

Cette loi ordonnait aux salariés des établissements de santé de mettre fin à leur grève et de retourner au travail. Son article 14 prévoyait que nonobstant la Charte des droits, un salarié était présumé avoir contrevenu à l'ordre de retour au travail prescrit par la loi dès qu'il était prouvé prima facie qu'il n'avait pas travaillé au cours de la journée prescrite.

- (3) La Loi sur la protection de la Jeunesse, L.Q., 1977, c. 20, art. 82

Nonobstant l'article 23 de la Charte des droits garantissant une audition publique, les audiences du Tribunal de la jeunesse se tiennent à huis clos sous réserve de certains exceptions.

- (4) La Loi sur la libération conditionnelle des détenus, L.Q., 1978, c. 22, art. 44

Les dispositions traitant de l'octroi de la libération, de sa suspension ou révocation, et de la procédure devant la commission ont effet malgré les articles 23 (audition impartiale par un tribunal indépendant) et 34 (assistance d'avocat) de la Charte.

- (5) Code de procédure civile, articles 997.1 et 955(3), L.Q. 1977

Nonobstant la Charte, l'avocat ou l'agent de recouvrement ne peut agir comme mandataire d'un client devant le Tribunal des petites créances.

- (6) Le Code de la sécurité routière (1981), art. 523

Malgré l'article de la Charte consacrant le droit au secret professionnel, un médecin doit faire rapport à la Régie du nom de tout patient qu'il juge inapte à conduire un véhicule routier.

- (7) Loi modifiant la Loi sur la protection de la jeunesse (1981)

Malgré le droit au respect du secret professionnel dans la Charte, les professionnels doivent signaler les cas d'enfants ayant besoin d'assistance.

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-- QUOTES --

Alan Borovoy - General Counsel to the Canadian Civil Liberties Association said: the accord would strengthen civil liberties in Canada, and bring more civil rights cases before the courts.

"I was concerned they would weaken the terms of the Charter - change the words. But it has emerged relatively unscathed from the Conference. I hope we can use what they've done to advance the cause of civil liberties in this country."

He said many provinces would probably choose not to exercise their opting-out rights because such action would be politically unpopular. "The notwithstanding clauses will be a red flag for opposition parties and the press."

Gordon Fairweather - Chief Commissioner of the Canadian Human Rights Commission said: he can't imagine a province using the opting-out provision. He agrees with Mr. Borovoy's remarks regarding the notwithstanding clause.

Walter Tarnopolsky - Past President of the Canadian Civil Liberties Association said: The compromise clause is "really not such a bad idea, and could have a great many advantages". He notes that in the United States the preponderance of human rights cases deal with the abuses in administrative, executive and police actions -- a non-obstante clause is usually not relevant to these issues.

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