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A PrimaryDocuments.ca Commentary

"Mapping the Limitations of the Notwithstanding Clause: The PrimaryDocuments.ca Drafting History for Section 33 of the *Canadian Charter of Rights and Freedoms*"

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Introduction:

We are at a pivotal juncture for the notwithstanding clause's future.[4] With upcoming hearings at the Supreme Court of Canada in *English Montreal School Board, et al. v. Attorney General of Quebec, et al*, the stakes are high. In that case, the Supreme Court of Canada may reexamine the limitations on Section 33. Since *Ford v. Quebec (Attorney General)*, the court has largely steered clear of the controversial clause. When this case was heard at the Quebec Court of Appeal in *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, *Ford* was upheld, and the drafting history of the Charter came into particular focus.

The purpose of this commentary is to showcase the new archival record available on PrimaryDocuments.ca and its importance to this issue.[5] This includes not only new cabinet documents and drafts from November of 1981, but new documents of the whole Charter period from 1980 leading up to its royal ascent in 1982. Because the documentary record constituting the drafting history of the "Notwithstanding Clause" is so detailed and intricate, we were compelled to re-organize it into a simpler commentary, focused on the drafting history of the limitations written in the text of Section 33.

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4 At the time of writing this entry, the notwithstanding clause has been invoked or threatened to be invoked nine times since 2018 by the provinces of Saskatchewan, Ontario, Quebec, and New Brunswick. This represents a notable increase in the frequency of use of the notwithstanding clause by the provincial governments.

5 While there is an extensive second literature on Section 33 (and Section 28), the purpose of this commentary is to focus exclusively on the archival materials that is publicly available on PrimaryDocuments.ca website. This material has been consolidated, with commentary in Michael Scott and Charles Dumais, "The Drafting History of the *Canadian Charter of Rights and Freedoms*" available at PrimaryDocuments.ca website. Please also consult the Primarydocuments.ca *Book in Progress on the Notwithstanding Clause* (2025).

To be clear, the purpose of this commentary is to exclusively guide the reader through the most important resources available on the PrimaryDocuments.ca website. For this reason, we provide lengthy quotations and a focus on the chronology. The purpose is to give a general curation of the material of this extraordinarily complex history. We have done this to facilitate access to what amounts to well over hundreds of pages of unprecedented access to new documents which shine a light on the development of the notwithstanding clause.[6]

Our access to this new archival record has helped make, in this paper, the claim that the limitations (some might wish to call them safeguards) against abuses of the notwithstanding clause were exhaustively and intently considered across the entire 1980 and 1981 drafting periods.

- This drafting history of the limitations also shows that the procedural logic of Section 33 is supported by this drafting history and why *Ford* has so much credence.
- This documentary history also supports the view that when Section 28 was removed from the text of Section 33 in late-November 1981 (precisely in the post-November 20, 1981 period), Section 28 was understood by all nine provinces, federal government and the opposition in the legislatures, to be restored to its initial April 24th, 1981 federal draft position as a freestanding clause over the whole Charter, including all categories of rights enumerated in Section 33. (See section c. in Part III below.)
- And finally, it also suggests a way to approach the competing languages or paramountcies between:
    - i.) the text of Section 33 (paramountcy of parliamentary sovereignty and the plain text of Section 15 enumerated in Section 33) and,
    - ii.) the substantive terms and the paramountcy clause found in Section 28 as understood in the post-November 20, 1981 agreement with the nine provinces, federal government and the opposition in the several legislatures.

It shows that while Section 28 should have paramountcy over the whole Charter, there are however interpretive difficulties that still need to be resolved in the text of Section 33 regarding the plain wording of Section 15. The drafting history shows that the crux of the problem lies in part with how to read Section 15 in Section 33, and what now appears to be the paramountcy of Section 28. This view is supported by the pattern that emerges in November 1981. With each succeeding draft from the "Working Draft" November 5, 1981, to the supplantation of the Tassé November 16, 1981 amendment to Section 33 with the post-November 20, 1981 agreement, each amendment further limited Section 33, and further strengthened Section 28. This is just one example of the limitations on Section 33 demonstrated in this commentary.

The archival record for the period shows that limitations on the override were exhaustively and intently considered over at least three main periods of time, encompassing the following drafting phases:

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[6] This includes a mountain of publicly available material on the Charter found in the Jean Chrétien, Eddie Goldenberg, and Michael Kirby Fonds which had not previously been organized and published. We were also granted access through the Pierre Trudeau Estate to files closed to the public on the drafting of the Charter. Finally, we have filed an ATIP request through the Library and Archives to access the Mary Dawson fonds, which may contain additional drafts. The following were accessed at Library and Archives Canada: Jean Chrétien Fonds: R11344, Vols. 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 775, 1659, 1660, 1661; Edward S. Goldenberg Fonds: MG 32 – G15, Vols. 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21; Michael Kirby Fonds: R12685-50-1-E, Vol. 4, R12685-51-3-E, Vol. 4, R12685-52-5-E, Vol. 4, R12685-53-7-E, Vols. 4-5, R12685-54-9-E, Vol. 5, R12685-56-2-E, Vol. 5, R12685-57-4-E, Vol. 5, R12685-60-4-E, Vol. 5, R12685-62-8-E, Vol. 6; Walter Surma Tarnopolsky Fonds: MG31 E 55, vols. 55, 57, 64, 65, 66 69, 70 and 76; Pierre Elliott Trudeau Estate: R11629-20-3-E, MG26 O 20 Vols. 23 & 24.

1. The summer of 1980 until the First Ministers Conference (FMC) in September 1980 to the end of the year;
2. Discussions beginning in Parliament in January 1981 to October 1981 leading up to the FMC in November 1981;
3. The post-FMC November 1981 period, including the final amendments passed by Parliament in December 1981.

The first drafting phase began in the summer of 1980, especially in the preparatory work for the FMC in September 1980. This September FMC was signaled by the Trudeau government as a make-or-break moment for the negotiations with the provinces. Otherwise, the federal government would proceed unilaterally. Several cabinet documents and confidential briefing books outline the federal government's strategy on the override. Discussions again picked up during preparations in October 1981 for (and also during) the FMC in November 1981 after the Supreme Court of Canada decision which brought the First Ministers back to the negotiating table. An intense period of discussions then occurred post-FMC in November 1981. As a whole, the limitations written in Section 33 were *exhaustively* and *intently* contemplated through several alternatives and drafts across all three periods of time. None of them (those adopted and abandoned) were hastily conceived to simply reach a deal.

Throughout 1980-1982, there were nine (9) types of "limitations" contemplated for the override, and roughly half of them were abandoned.[7] These nine (9) "limitations" were:

1. Categories of rights the override can apply to,
2. 5-year max (or sooner) sunset clause,
3. Requirement of renewal available every 5-years max (or sooner),
4. Expressed declaration of an override,[8]
5. The initial reference to Section 28 and the text of Section 28 itself [abandoned/adopted],
6. The 60% or 66% (⅔) of the legislature voting in favor of an override [abandoned],
7. A special sub-clause to Section 33 for Quebec carving out a 2-tier override on mobility and language rights [abandoned],
8. The override applies only to the provinces [abandoned],
9. The override applies to fundamental freedoms only for the first 5 years, after which an objective body will review whether it's still necessary [abandoned].

Strikingly, all these limitations to Section 33 lend the override to a consistently procedural reading. There were never any substantive terms or procedures of judicial review contemplated in its drafting. In fact, at several points in the drafting history, a procedural reading was necessary to grab the intended meaning and safeguards written in the override (see Tassé Memorandum, November 19, 1981). In this sense, this drafting history supports the kind of procedural reading given to it in *Ford*.

However, this drafting of Section 33 also comes into conflict with the drafting phase in late-November

[7] Those abandoned (i.e., the last four on the list) were for several reasons. For example, the sixth limitation (the ⅔ majority requirement) was largely a provincial proposal abandoned during negotiations when other limitations were accepted in November 1981. The seventh limitation (the Quebec carve out) was presented in post- FMC November 1981 at a time when it was believed Quebec could still be brought onside to sign a revised November Accord, 1981. The eighth limitation (that the override would only apply to the provinces) surfaced more often in 1980, and appears to have been abandoned in 1981, perhaps when it became apparent that it may have its uses as the Trudeau federal government perhaps became conscious that it had relied on an override during the "October crisis" in the 1970s. And the ninth limitation (an independent review body), presented during the FMC Conference, was also abandoned when it was simply a non-starter given the provincial concerns.

[8] Some of these adopted limitations, for instance those applying the override only to legal rights and equality rights, and the requirement of expressed declaration go back to the pre-1980 negotiations (see for instance the "Best Efforts Draft" 1979).

(post-November 20th, 1981) when Section 28 was removed from the text of Section 33, where Section 28 was understood to be restored to its April 24, 1981 drafting, as a freestanding clause that would have paramountcy in the *Charter*. It appears that everyone from the nine provinces, the federal government, as well as the parties in the provincial legislatures and Parliament understood this fact. (See section c. in Part III below) As the drafting history suggests, the problem is that the language of Section 33, with its procedural terms, comes directly into conflict with the evidence and language of the drafting of Section 28, and its substantive terms and paramountcy clause, agreed post-November 20, 1981 and understood pre-November Accord.

This problem (regarding the plain reference to Section 15 without the reference to Section 28) is encapsulated by the kind of reading that Roger Tassé's gives in his memorandum on November 19, 1981. The latter focuses on the plain text of Section 33, *Ford*, but at the exclusion of the post-November 20, 1981 documentation that shows the provinces accepted Section 28's paramountcy. The latter is encapsulated in the telexes and in the parliamentary discussions that disclose the provinces had agreed to remove Section 28 from the ambit of Section 33 entirely, thereby making Section 28, in the words of some premiers a "freestanding" clause, and in the general consensus, a limitation on all categories of rights in Section 33. The drafting history suggests that the court now needs to reconcile, as we have put it above, the competing languages in regard to paramountcy between i.) the procedural logic of Section 33 (paramountcy of parliamentary sovereignty over certain categories of rights, especially section 15) and ii.) the paramountcy of Section 28 over the entire *Charter* agreed post-November 20, 1981.

The first part of this PrimaryDocuments.ca commentary chronicles the drafting history of Section 33 in 1980. The second part chronicles the several shifts that occurred in 1981 prior to and during the FMC meeting in November. The third part reviews the period following the 1981 FMC meeting. We conclude with a brief conclusion on how the drafting history is helpful to appreciate the text of Section 33 in the *Charter*.

Readers should note that this commentary does not review or takes a stand on the extensive secondary literature on Sections 28 and 33. Nor does it provide a review of the extensive jurisprudence on Section 33. Our aim is only to showcase the extensive documentary record available on the PrimaryDocuments.ca website that help map out the limitations on the override. We believe this will be helpful for the upcoming Supreme Court of Canada in *English Montreal School Board, et al. v. Attorney General of Quebec, et al*.[9]

Part I. The Period of 1980

a.) The Summer of 1980: Rejecting the "Best Efforts Draft": Rejecting Categories of Rights, Application to the Provinces only and Expressed Declaration Requirement

The year 1980 began with two remarkable events. The first was the return of Pierre Trudeau from retirement and his victory over Joe Clark's Progressive Conservative government in the unexpected February 1980 federal election. The second major event was the federalist victory in the Quebec secession referendum in May 1980.

Emboldened by the federalist win over the Quebec sovereigntists, the Trudeau government immediately

[9] Some of the authors of this commentary are also preparing a critique of the secondary literature and jurisprudence on Sections 28 and 33. While this literature and jurisprudence of course informed our understanding of the history, it is simply not featured in this commentary. This commentary is focused exclusively on the documentary evidence available on PrimaryDocuments.ca website.

proceeded with constitutional reform. A secret memorandum to cabinet authored by Jean Chrétien, dated June 16, 1980, "Federal Position on the Priority Items" re-examined the priorities expressed in the "Best Efforts Draft", the most recent draft created by the Continuing Committee of Ministers on the Constitution (CCMC). The "Best Efforts Draft" had been authored by provincial and federal ministers of justice and intergovernmental affairs composing the CCMC. It was called the "Best Efforts Draft" because it had obtained the support of nearly all governments, including on matters of specific importance. On the subject of the override, Chrétien's memorandum concluded that the override should be rejected in any future proposed Charter.

The cabinet memorandum read, on page 11,

> "Another general issue is that of the 'override clause'. This idea, originally raised by Premier Lougheed at the October, 1978, Conference, was to the effect that some or all provisions of the Charter might be more acceptable to the provinces if provincial legislature would have the right to override such Charter requirements by ordinary legislation as long as they did so explicitly, i.e., 'notwithstanding the provisions of the Charter…'. This idea has not attracted much support for the Charter from reluctant provinces, who see it as an escape mechanism which would be politically difficult to use. Certainly, it commands no support from civil libertarians. Question: Should this concept be dropped in any revised proposal?"

The answer that Chrétien recommended to cabinet, to not include an override, is found later in the memorandum: a succinct "Yes." We might say with near certainty that Chretien's recommendation was followed. The override was taken out of all federal drafts during July and August 1980,[10] and, in addition, at the FMC in September of 1980. Although the issue of an override did not go away. It was raised on several occasions at the CCMC by both provincial and federal officials in the summer of 1980.

During the summer of 1980, in most cases, officials emphasized the "reasonable limits clause" in locations where an override had existed in the "Best Efforts Draft".[11] For instance, where there was once a "general override" for "Legal rights", now there featured "justifiable derogation" clauses.

However, the "Revised Discussion Draft with Memo", dated August 5, 1980, noted how the override continued to be raised as a possibility in discussions.

> "There remains, however, one further important issue which is not raised by the draft, but which will likely be discussed further at the federal-provincial meetings later this month. One of the matters referred by Ministers to the committee of officials was the possibility of including a 'notwithstanding' clause in the Charter thereby permitting a legislative body to enact a law override one or more rights by an express provision in the enactment to that effect. This approach, you may recall, was considered in some detail during the 1978-79 negotiations, but most provinces finally had considerable doubts about its political acceptability. It is, however, an approach that could alleviate to some extent provincial concerns about the rigidity of the Charter in the face of 'bad' court decisions. On the other hand, it is a provision that could seriously undermine the efficacy of the Charter if it were invoked too frequently.
>
> On the basis of preliminary discussions with provincial officials, it would appear that a 'notwithstanding' clause has some appeal to the provinces. We, however, continue to have considerable reservations about its desirability and, indeed, its necessity, particularly if the legal rights are more clearly defined. Thus we propose

[10] The following drafts are discussed below. They include the August 22, 1980: Discussion Draft (Federal) and August 28, 1980: Provincial Proposal (In the event that there is going to be entrenchment). A September 3, 1980: Revised Discussion Draft was also circulated for the purpose of the FMC September 1980. As we note, none of these drafts have an override provision.

[11] This was the case in the July 4 document. In several other documents, general limitations were conceived for several provisions, see July 16th, August 5th, 22nd, 28th, and Sept. 3 1980.

> at this point to continue to press for a Charter without a 'notwithstanding' clause, while at the same time not foreclosing the possibility of a decision being taken at an appropriate time to include such a provision if this would bring a substantial number of provinces into the Charter." (see pdf p.9)

b.) Later in the Summer of 1980: Exploring the 60% vote requirement, 5-year Sunset, Categories of Rights and Expressed Declaration Limitations

In the summer of 1980, the override was continually raised. In each instance, several limitations (or safeguards) on the override were contemplated.

1. August 29, 1980: "Charter of Rights. Report to Ministers by Sub-Committee of Officials". This document responded to a proposal by the provinces that summer. The sub-committee recommended that "[o]ne mechanism that was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, e.g., five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply." (see pdf p. 3)
2. August 30, 1980: "Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond". This report noted that "at the direction of CCMC Ministers, a sub-committee of officials met during the week of August 25 to consider: … an override (non-obstante) clause in an entrenched Charter". This document recommended a "possible inclusion of an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding certain Charter Rights. Fundamental freedoms, democratic rights and language rights would not be subject to this override clause. In the event that it is decided to include an override clause, it could be made subject to such requirements as a 60% majority vote of the legislative body and an automatic expiry of any law enacted after a specified time period, e.g., five years". (see pdf p. 7)

At the FMC in September 1980, the following drafts were circulated and formed the basis of discussion. This included the August 22, 1980: Discussion Draft (Federal) and the August 28, 1980: Provincial Proposal (In the event that there is going to be entrenchment). A September 3, 1980: Revised Discussion Draft was also circulated for the purpose of the FMC September 1980.[12] None of these drafts have an override provision.

The only draft at the FMC in September 1980 that had an override, in our possession, was a provincial draft circulated by Quebec. It was titled "A Proposal for a Common Stand of the Provinces," September 13, 1980. The override in this provincial draft appears to follow the "Best Efforts Draft" 1979. It provided a "general override" for "Legal rights" and "Non-discrimination rights" and the override was only for the provinces.

In a "Memorandum from Barbara Darling to Eddie Goldenberg, Notes on a Package for Agreement", dated September 10, 1980, officials entertained a "general override" as one of two possible "bargaining chips". The memorandum stated

[12] September 3, 1980: Federal-Provincial Conference of First Ministers on the Constitution, Charter of Rights and Freedoms: Commentary on Revised Discussion Draft: This commentary document lays out changes and deletions from the August 22, 1980 CCMC draft.

> "[t]o meet the provincial concerns and reservations a) about the workability of a Charter of Rights, and b) particularly about the pressure they may immediately face from interest groups regarding the implementation of non-discrimination and language rights at the provincial level, and mobility rights, the following, rather strange offer (juxtaposed against entrenchment) might be along the following lines: "Certain Charter provisions might be given the force of law for say, a five-year period, to determine their appropriateness in the Canadian context. At that time, these provisions would either sunset (alternative 1) or, remain unless expressly over-ridden before then (on all or nothing basis) by six provincial legislatures with 60% of the population (alternative 2). [...] The unusual 'temporary' feature would have to be explained as necessary to persuade the provinces that entrenchment of these rights is workable…" (pdf p. 2)

A September 1980 deadline was issued by the federal government. As part of its desire to seek a compromise, the federal government issued an ultimatum to the provinces to come to an agreement, or it would proceed unilaterally with patriation and constitutional reform. When an agreement on constitutional reform was not achieved at the FMC in September 1980, and with the Canadian public warming up to an entrenched Canadian Charter, the federal government went forward alone.

In the post-FMC September 1980, unilateral phase, the only major effort to accommodate provincial concerns can be found in an early draft of Section 1 'reasonable limitations' which more explicitly expressed the paramountcy of parliamentary sovereignty. This can be found in the federal draft titled "Resolution for joint address to Her Majesty the Queen respecting the constitution of Canada", dated September 24, 1980. This draft was amended and submitted to the federal Parliament titled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" on October 2, 1980. This provision was debated between federal officials and eventually removed.[13]

With a few exceptions with direct discussions with the provincial Premier of Saskatchewan (largely on an amendment formula),[14] federal efforts focused on the creation of a Special Parliamentary Joint Committee on the Constitution open to and televised to the public. The first session was held on November 6, 1980, and had until February 13, 1981 to report its recommendations and conclusions to the House of Commons and Senate. During this period, no federal drafts contained any override mechanism. There are certainly debates in the Canadian House of Commons in this period that may speak to the government's intentions on the override, but for the purpose of this commentary, none of these interventions changed the government's stance on rejecting it. On the other side, provincial efforts focused on challenging the constitutionality of unilateral patriation in Canadian courts.[15] The provinces appear focused entirely on the legality of unilateral federal patriation of the Canadian constitution and finding consensus on a constitutional amendment formula.

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[13] Debates over the phrase "parliamentary system of government" occurred in November, 1980, where it was eventually changed to "free and democratic society". This and other changes were only presented publicly at the Special Joint Committee by Minister of Justice Jean Chrétien on January 12, 1981. The wording of Section 1 would not change again after that presentation.

[14] See October 16, 1980: Memorandum from Michael Kirby for the Prime Minister Re Discussions with Saskatchewan Officials on Patriation Resolution; October 17, 1980: Memorandum from Michael Kirby for the Prime Minister Re Discussions with Saskatchewan Officials on Patriation Resolution; October 28, 1980: Memorandum from Michael Kirby for the Prime Minister; and October 28, 1980: Memorandum from Michael Kirby to Prime Minister Trudeau incl. Meeting with Premier Blakeney (Oct. 27, 1980).

[15] There were four provincial court of appeal references in 1981: Manitoba Court of Appeal Reference sided with the federal government in February 1981; the Quebec Court of Appeal also sided with the federal government in April 1981; Newfoundland Supreme Court decided against the federal government in March 1981.

Part II. The Period of 1981

a.) January 1981: Rejecting an Override at the Special Joint Committee on the Constitution

The premiers that appeared at the Parliamentary Special Joint Committee on the Constitution in 1980 and 1981 reiterated the view they had taken in 1979 and had brought with them into the FMC in September 1980. This was the case with Premier MacLean of Prince Edward Island on November 27, 1980,[16] and Premier Blakeney of Saskatchewan on December 19, 1980.[17] At the Special Joint Committee on the Constitution, they both claimed that except language and political rights that are unique to Canada, other human rights should be given an override.

Jean Chrétien's appearance on January 12, 1981 tabled a new Federal Draft that proposed an overhaul of the federal government's earlier resolutions. These changes were based on the presentations that various groups had made to the Special Joint Committee to date.[18] None of these changes included an override. In a federal Briefing Book, dated January 9-12, 1981, there was only one reference to the override. The section titled "The Constitution Act: Part I: Canadian Charter of Rights and Freedoms: Limitation Clause: Section 1," stated that because the federal government's proposed amendments to Section 1 would now "provide that certain non-discrimination and legal rights are not derogable under any circumstances," (pdf p. 80) they expected that a general "legislative override" would be counter-proposed in committee, one that would "provide that a legislature can override a court decision on rights by, say ⅔ majority vote" (pdf p. 81). "This approach," the document said,

> "would be attractive to those provinces concerned that entrenchment of a Charter would result in the courts usurping the legislatures. They might see it as a preferable alternative to the Government's new proposal. In the earlier version, the provincial concern was lessened by the acknowledgment of Canada's parliamentary system of government, with its implied recognition of parliamentary supremacy. There have been indications the P.C. members may make a motion along these lines." (pdf p. 81)

For the federal response, the document stated that "[t]his approach should be opposed since it would effectively undermine the central purpose of entrenchment, namely to prevent legislatures from abrogating basic rights." (pdf p. 81)

In March 1981, a scholarly paper on the override received cabinet attention. G.P. Browne's paper titled "Another way of Entrenching A Charter of Rights in the Canadian Constitution" was summarized and taken up for discussion in the federal briefing paper titled "Legislative Override of Charter of Rights" dated March 5, 1981. The memorandum summarized Browne's argument for a Charter with 'priority status' over ordinary legislation as opposed to full entrenchment requiring an amending formula. The essay explored the incompatibility between entrenchment of a Charter and the principle of parliamentary sovereignty. The document largely took issue with the idea of a special legislative majority vote – a provision that the cabinet document found in the existing Canadian Bill of Rights (1966) and that most provinces and federal

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[16] Angus Maclean (Premier for Prince Edward Island) presented on November 27, 1980. 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 14 (27 November 1980)

[17] Blakeney (Premier of Saskatchewan) presented on December 19, 1980. 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 30 (19 December 1980)

[18] Chrétien proposed amendments on January 12, 1981 on section 1, section 15, and various legal rights, section 23 (minority rights on language and education), 24 (enforcement), 25 (indigenous), 26 (multiculturalism at the time), and 28.

government found "undesirable", noting in particular the last three years of discussion at the CCMC. The memorandum is an important source for understanding the federal government's criticism of the ⅔ vote requirement by saying "a 'legislative override' mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure." The memo continues,

> "[R]ights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and/or a free vote might make the override of a court decision more difficult, it would not prevent the outcome." (pdf p. 4)

Between January and April 1981, no override clause was found in any of the subsequent federal drafts. The federal draft titled "Consolidation of proposed constitutional resolution" tabled on April 24, 1981, culminated several new amendments, notably a new provision further entrenching equality between men and women in Section 28, drafted in light of concerns expressed by women's equality advocates with the new Section 1 "reasonable limitations" clause. This would be the federal draft that would go before the Supreme Court in *Re: Resolution to amend the Constitution*.

In the same period, there were no new provincial drafts circulated at this time. The provincial constitutional accord titled "Canadian Patriation Plan" and signed on April 16, 1981 by eight provinces (also called the "Gang of Eight") contained no Charter and therefore no override proposals. The accord focused entirely on Patriation and an amendment formula, which was accepted later in the "November Accord, 1981". The provincial accord is also notable because in it, Quebec gave up its long claim to a veto in exchange for financial compensation when opting-out of the Constitution. Compensation would become part of the drafting amendments that occurred after the November Accord, even with Quebec's withdrawal from the negotiations.

In April 1981, oral hearings at the Supreme Court of Canada began in the *Re: Resolution to amend the Constitution* [1981], challenging the constitutionality of the federal plan for unilateral patriation. For our purpose, the Court's decision in September 1981 that substantial provincial consent was conventionally required, led to preparations for a FMC in November 1981.

b.) In October 1981: Rejecting any override, if possible seek time delays; if not, put safeguards on an override

The cabinet documents preceding the FMC November 1981 outline the Federal strategy for the upcoming conference. The Federal Draft dated April 24, 1981 appears to be the federal starting negotiating position. This now included:

- Section 1 no longer referenced parliamentary sovereignty.
- Section 15 (2) recognized affirmative action programs.
- Section 32 imposes the Charter on all provinces, however, subsection (2) puts a delayed start for Section 15.
- Section 39 permits opt-in for Charter language rights in several institutional capacities.

The April 24, 1981, federal draft provided a fully entrenched Charter. Sexual equality between women and men was guaranteed in Section 28 as a freestanding clause. And to amend provisions of the Charter

the provinces disagreed with, they would be required to successfully navigate an amending formula that featured stringent federal resolution, provincial representation in different regions and a referendum (Sections 46-47). While several important concessions were embedded in this draft (namely a limitation clause in Section 1 and affirmative programs in Section 15, denominational school guarantees in Section 29, and a 3-year delayed start to Section 15 in Section 32), the Charter would be unilaterally imposed on the provinces. And, as before, there is no override mechanism.

There are five cabinet documents in this pre-FMC November period that tackle the choices the federal government faced in further consultation with the provinces after the *Re: Resolution to amend the Constitution* [1981]. The federal government considered the best option was full entrenchment as outlined in the April 24, 1981 federal draft which included, notably, Section 28's guarantee of sexual equality between men and women. Nevertheless, the documentary evidence below shows that Prime Minister Trudeau appeared to be willing to go as far as delayed start time for certain provisions along the lines of Section 15's 3-year delay. The worst option for the federal government was an opt-out / opt-in for contentious Charter rights. This approach was eventually proposed by the Saskatchewan Draft at the FMC in November 1981. The documents outlined below do however contemplate what appears to be a middle approach centered on an override if it could produce provincial consensus at the FMC in November 1981. While the federal government initially believed most provinces would not find the override appealing given the political difficulty in using it, this changed. There is no clear evidence in the documentary record as to why the override was once again contemplated, except perhaps a hint by the federal Minister of State, the Hon. Judy Erola, in a speech in the House of Commons on November 20, 1981, conceding that the political consequences of the Supreme Court of Canada judgment in *Re: Resolution to Amend the Constitution* [1981] lent itself to the adoption of the override.

The following documents outlined the evolving federal position. The official federal stance for the FMC November 1981 was first outlined in the "Memorandum to the Hon. Jean Chrétien re First Ministers Conference" dated October 27, 1981. The federal government would reject an override as well as any "opting-in" for any Charter rights. It would, at most, be willing to pursue a time delay for coming into effect for certain rights (notably equality rights) given public opinion.

The second document is a "Memorandum for the Prime Minister from Michael Kirby re Possible Changes that might be Acceptable if they Result in a Provincial Consensus" dated October 24, 1981. This document outlined what the federal delegation could accept in regard to an override provision and a number of safeguards. It suggests that agreeing to an override would be one way to get a constitutional package through. The document theorized that an override "meets the argument that many Premiers have made that an entrenched Charter is not consistent with the principle of Parliamentary supremacy" and would also "not affect or diminish the powers and rights of provincial legislatures." It hypothesized that it could lead to "a flood of derogations enacted by provincial legislatures." But it quickly dismissed the risk by comparing the uses of a "notwithstanding" clause in other legislation in Canada. This experience showed "that governments are very reluctant to pass legislation that is in conflict with what their electorate consider to be the fundamental values shared by all. To do otherwise would be done at great risk and peril." Later in the document, the override is compared to "a most demanding form of opting-out." The safeguards discussed would also reduce abuses and make it politically difficult.

To ensure that an override be used only "in the most exceptional and deserving situation," the document lays out a series of what it calls "safeguards":

1) "A 'notwithstanding' clause would be valid for five years only. It could be renewed for

another five years, which would mean that the legislature would need to debate the question before the clause would be passed again."

2) "We could provide that a 'notwithstanding' clause would need to relate specifically both to a specific clause of the derogating legislation and the specific section of the Charter that it is in conflict with."
3) "There could be a refinement that a 'notwithstanding' clause must be passed by 60% or 66% of the members of the legislative assembly." (pdf p. 4)

The third document is a "Memorandum from Deputy Minister of Justice to Michael Kirby re Non obstante clause" dated October 29, 1981. This memorandum was likely intended for the Prime Minister. It outlined the historical use of override provisions in Canadian law. This included, notably, Prime Minister Trudeau's own use of an override when he invoked the War Measures Act in the 1970. It also cites Prime Minister Trudeau's use of override in the Public Order (Temporary Measures) Act, 1970 during the October Crisis. The laws cited in this document showcased to the federal Government the importance of expressed declaration (e.g., Alberta Bill of Rights (1972), Saskatchewan Human Rights Code (1979), and the Quebec Charter of Rights and Freedoms (1975) – although the override in the Saskatchewan Human Rights Code only applied to a specific category of rights such as fundamental liberties or discriminatory practices). The Quebec Charter of Rights and Freedoms (1975) was also discussed in surprising terms. The memo emphasizes that while the use of the override in Quebec was curbed by "public outcry" in 1977 in an early version of Bill 101, and that while the uses of the override in other cases could have been addressed by a Section 1 reasonable limits, the override in many other uses had not been controversial.

This memorandum was, however, particularly insistent on needing stronger safeguards than these acts provided. Citing the Quebec Charter of Rights and Freedoms, it noted that it "permits an override to continue indefinitely without subsequent review by the legislature. A sunset provision would on the other hand provide a degree of control on the use of an override clause and allow public debate on the desirability of continuing the derogation further. This would allow those who feel aggrieved by the derogation to come forward and make their case".

The fourth document is a "Memorandum to the Minister, Charter of Rights" dated October 29, 1981. The override was again contemplated as a way to reach agreement at the FMC in November 1981. The limitation of "a two-thirds majority in a legislature" and a sunset of 5-year max would be acceptable safeguards. While the memorandum reinforced the federal preference for no override mechanism at all, it still entertained the notion of an override for Section 15 (equality rights) as opposed to an "opting-out" mechanism. It contemplated this to address Premier Blakeney's concern with how the courts will interpret words like discrimination based on sex, age or disability.

The fifth is a document titled "First Ministers' Conference on the Constitution, Prime Minister's Briefing Book – Meeting of First Ministers – November 2, 1981". It contemplated once again several limitations on a potential override. First, the federal willingness to accept an override was grounded in the view that an override had not been used by the provinces in any controversial way. But there also appears to have been much hope in the efficacy of Section 1 in the federal draft of April 24, 1981 in dealing with these sorts of controversies. In this briefing book, the federal government adopts a twofold strategy for the FMC November 1981: 1) reject an override, if possible full entrenchment, but with delayed starts to certain contentious Charter rights; and if not possible, 2) adopt several safeguards against potential override abuses. Should delayed starts not be found acceptable to the provinces, and,

> "[i]f the provinces do not have a sufficient degree of faith in the ability and good reason of our courts [i.e.,

> Section 1 reasonable limitations], we could, of course, place a provision in the Resolution which would enable a legislature, in enacting a particular law, to expressly override specific provisions of the Charter. This would preserve the idea of the supremacy of Parliament, while at the same time ensuring that the fundamental nature of Charter rights is maintained. Any such legislative override should therefore be of a limited duration such as five years, to ensure that it - was reviewed by a subsequent legislature to determine if its continuation was warranted. In addition, we would want to consider if any such override clause should not be available in any circumstances with respect to certain categories of rights -- such as fundamental freedoms and democratic rights, and perhaps others such as institutional language rights and mobility rights -- which form the cornerstones of our democratic union as a single economic and political union. I personally doubt the need for an override clause, but if the provinces are convinced that such a provision is absolutely necessary, I am prepared to consider an amendment to the Charter under the limited conditions which I have outlined above." (pdf p. 24)

c.) The FMC in November 1981: Accepting an Override, Even on Fundamental Freedoms and Section 28

The FMC began in Ottawa, on November 2, 1981. Several federal and provincial drafts for a Charter were tabled. It appears that at least three were circulated. First, British Columbia's "Canada Act (B.C. Position)," dated November 3, 1981. The second was Saskatchewan's "Canada Act (Saskatchewan Position)" dated November 4, 1981. And there was of course also the "Federal Parliamentary Draft" from April 24, 1981. There were also numerous proposals put forward by Brian Peckford's Newfoundland Government in consultation with the other provinces in order to try to reach a consensus. These can be found in the "short drafts" sessions mentioned below.

The "Canada Act (B.C. Position)", dated November 3, 1981is a copy of the "Federal Parliamentary Draft", dated April 24, 1981. While it adds several new elements to provisions like mobility rights, its most notable feature is the 'notwithstanding clause'. The latter is inserted in longhand written: "Non-obstante" "32.a Section 2 and 7 to 15 is this part shall not apply to an Act of the Parliament of Canada or the Legislature of a province which specifically provides that any or all of these sections does not apply thereto." This provincial draft is also significant for several other reasons. Mainly, because it shows both the federal and provincial officials were ready and open to discuss an override with several limitations. This signaled a new step forward in provincial-federal negotiations, which moved beyond the dichotomy of an entrenched Charter (federal officials) and an opt-in/opt-out Charter (provincial officials). The B.C. attempt was the first in draft format, to contemplate the override as a potential third way forward. It was also significant because later in the House of Commons and several legislatures, statements were given that Section 28 was *not* initially discussed at the FMC in November 1981. And while it is certainly not found in the list above, Section 28 appears however to have been mentioned in Premier Hatfield's opening speech on November 2, 1981 as subject to a three year time delay. Section 28 would also appear later to be included in Section 33's purview as an insurance policy requested by the provinces to ensure that the non-obstante could override Section 15 with regards to sex discrimination without a potential clash with Section 28.

The "Canada Act (Saskatchewan Position)" dated November 4, 1981, does not provide any override. It advocated the position "adopted by the federal government's policy of June 1978 in Bill C-60" allowing the provinces to "opt-in" the Charter. It is also the draft that is believed to have broken Quebec from the "gang of eight" regarding compensation for opting-out.

The federal strategy at the FMC November 1981 follows that which was outlined in the cabinet briefing book discussed above (the "Prime Minister's Briefing Book – November 2, 1981"). And the middle ground entertained is what we see emerge in the Jean Chrétien, Roy Romanow, Roy McMurtry "The Kitchen

Accord" dated November 4, 1981. On these loose pages, we can see the outlines of an agreement for an override that was contemplated by the federal government above. That is, an override as a middle position, with several specified limitations. The most vital limitations or safeguards were written down on loose pages. The provinces and federal governments agreed to a fully entrenched Charter (the Federal Draft April 24, 1981, often referred to the "resolution" – the federal resolution tabled in Parliament at the time), except "the 2nd half of it as stated by Premier Hatfield – non-obstante". The Kitchen Accord appears to be referring to, substituting the three-year delayed start for this "second half" with a 'non-obstante' clause.[19] In the November 5, 1981: Accord Papers, on November 2, 1981, Premier Hatfield had said:

> "I have, as I said, a proposal to make with regard to the Charter of Rights. I will refer to it now. New Brunswick proposes that the resolution [i.e., the federal April 24, 1981 draft] be altered in the following respects: only certain provisions of the charter would come into force immediately. These include: Guarantee of Rights and Freedoms, Fundamental Freedoms, Democratic Rights, Mobility Rights, Official Languages of Canada New Brunswick, Minority Language Educational Rights and General Rights that included in Section 25, 26, 29, 30 and 31 of the proposed resolution. The remaining provisions of the Charter of Rights would be enacted, but would not come into force for three years. These include: rights which a fair number of Premiers and ministers and people in Canada have suggested more time is needed to consider them and to improve them. These include: Legal Rights, Equality Rights, Enforcement and General matter that are included in Sections 27 and 28 of the proposed resolution". (pdf p. 42)

Section 27 (multiculturalism) was included in the Kitchen Accord, but it appears to be intentionally removed at a later date. Unfortunately, there are no documents that record when Section 27 was in fact removed. Because Section 28 is mentioned in conjunction with Section 27, and the latter was removed, we can reasonably conclude that Section 28 was intentionally kept.

The November Accord 1981 was finalized on November 5, 1981, signed by the nine provinces. Before this occurred, however, several short drafting sessions tried to articulate a full set of safeguards for the override. At least seven (7) short drafting texts were circulated, amended and eventually adopted a text featuring limitations on the override.[20] The first of these 'short drafts' expanded the limited categories of rights of the override from the "Best Efforts Draft" 1979, which initially focused exclusively on legal and equality rights, to now include the provincial request to include fundamental freedoms. Once this was accepted, the federal limitation of 5-year max sunset clause for both invocation and renewal was then inserted and agreed to. There is one short draft that stands out. The draft titled "Compromise on Fundamental Freedoms" dated November 4-5, 1981, featured a federal proposal to limit the override on fundamental freedoms only for the first 5 years, after which an "objective group will review whether it is appropriate for it to continue to apply". This proposal was abandoned, and no justifications can be found for its abandonment. It may have simply contravened the spirit of "parliamentary sovereignty" that had set the process in play.

Despite this drafting session and its agreements, the text of the override was not featured in the

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[19] See also First Ministers' Conference on the Constitution, New Brunswick Proposals concerning The Charter of Rights, Doc 800-15/004 (Ottawa: 2-5 November 1981).

[20] November 5, 1981: Constitutional Proposal Submitted by the Government of Newfoundland at the First Ministers Conference. This document below suggests an override on legal and equality rights. No other safeguards proposed, only that the override would apply only to certain circumstances. The November 5, 1981: Proposal [No Title], Version 1, Copy 1 and November 5, 1981: Proposal [No Title], Version 1, Copy 2 add an override to fundamental freedoms, legal rights, and equality rights. No other safeguards. The November 5, 1981: Proposal [No Title], Version 2 with Notes is the same as above, but the 5-year safeguard is added. There is a question mark or attention given to fundamental freedoms. Maybe this refers to the 5 year time period for fundamental rights in the doc below. The November 5, 1981: Proposal [No Title], Version 3 with Notes is the same as above, but the word non-obstante / override is changed to notwithstanding. The text also shows now 5 year sunset and renewal, and shows all three categories. The November 5, 1981: Proposal [No Title], Version 4 reflects the changes made above doc.

November Accord itself. The November 5, 1981: Accord, signed by the nine premiers and federal officials simply outlined the principles articulated in the "Kitchen Accord" and the agreement across these short drafts. The Accord read simply: "A 'notwithstanding' clause covering sections dealing with Fundamental Rights, Legal Rights and Equality Rights. Each 'notwithstanding' provision would require reenactment not less frequently than once every five years." A "Fact Sheet: The Notwithstanding or override clause as applied to the Charter of Rights & Freedoms" was attached and outlined the several safeguards and legislative precedents that override agreement is modeled on. This sheet also features an explanation as to "how it would be applied". The drafting provision agreed up to this point is only found in the drafting that occurred immediately after the November Accord, in the document "Working Draft", dated November 5, 1981. This newly discovered draft is a consolidation of the federal April 24, 1981 draft and the November Accord, 1981. It was drafted by provincial and federal officials in attendance at the FMC November 1981.[21] The override provision now features for the first time its descriptive marginal "Exception where express declaration." And the text read:

> "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, section 7 to 15 or section 28 of the Canadian Charter of Rights and Freedoms.
>
> (2.) An Act or a provision of an Act of Parliament or of the legislature of a province in respect of which a declaration is made under subsection (1) shall have such operation as it would have but for the provision of the Canadian Charter of Rights and Freedoms 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 under subsection (4)." (pdf p. 12)

Section 28, in the November 5, 1981 "Working Draft", was also amended. The marginal description reads: "Rights guaranteed equally to both sexes." The text read: "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."

The consistency in the safeguards that had existed since the beginning of the discussions in 1980 are evident in both the November Accord 1981 and the "Working Draft" (November 5, 1981). By and large, the text and the subclauses of Section 33, had been the categories of rights which the premiers had expressed concern for the years leading up to this landmark agreement. The limitations deliberated and agreed at the FMC November 1981 had been discussed over the 1980 and 1981 period. The text of the override was not a half-hazard drafting to reach an agreement. It included several provisions with clear intentions that required expressed declaration, limited categories of rights (notably legal and equality rights, in addition to fundamental rights and women's equality rights), and a 5-year max sunset and renewal limitations. There is even an implicit foreseeability of perpetual use of the override, which was discussed several times but played down.

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[21] See this speech in the House of Commons given by Miss Jewett: " [...] 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."

Section 33's relation to Section 28 is new, however. Of course, Section 28 did not exist prior to April 1981 period in any draft where the override was contemplated. For the first time, they both come together in this "Working Draft" (November 5, 1981). Readers will see below why it was included in Section 33's ambit as some kind of insurance policy to ensure that Section 33 could override fully Section 15. As the drafting history shows, however, from this version onward, Section 28 is increasingly strengthened in each successive draft until it is fully restored as a free-standing clause that limits Section 33 on November 24, 1981. Documentary evidence (See section c. in Part III below) supports the view that Section 28 prohibits an override of any charter right, including those listed in the text of Section 33.

Part III. The Post-FMC Period

a.) November, 1981: A Special 2-Tiered Override for Quebec (and for the other provinces should they opt-in within a year)

A week after the November Accord, 1981 was signed by nine out of the ten provinces, there appears to have been communication that signaled to federal officials that Quebec would, in a certain scenario, sign onto the November Accord. The cabinet "Memorandum from the Deputy Minister to the Minister of Justice", dated November 12, 1981 suggests so.

Federal officials first drafted, in response to this possibility, a special provision in Section 33 tailored to Quebec's concerns for linguistic and cultural protections. The draft text of this special override is the central topic in the document mentioned above. The new subsection in Section 33 would allow Quebec to override Charter linguistic and mobility rights when a certain population changes. The government contemplated four (4) new tests for its invocation:[22]

1) decrease in (Francophone) population percentage by at least 5 per cent,
2) decrease in (Francophone) school population percentage by at least 5 per cent,
3) alteration of majority--no metric given,
4) alteration of majority--declared by legislature.

On November 16, 1981 a draft of the provision was circulated, which settled on the first of these tests. Once these conditions were met, it would make this special override available. The draft provision read:

> "The legislature of a province may expressly declare in an Act of the legislature that the Act or provision thereof shall operate notwithstanding subsections 6(2) and (3) of the Charter where the exercise of any of the rights referred to in those subsections would (seriously threaten to substantially alter the linguistic equilibrium of the population in that province". And "(3) The legislature of Quebec may expressly declare in an Act of that legislature that the Act or a provision thereof shall operate notwithstanding paragraph 23 (1) (a) of the Charter. [note in the margins: 'mother tongue']" (see pdf p. 3)

This document also put particular emphasis on the 5-year max sunset and renewal – a feature the federal drafters believed would help pro-federalist forces in the province fight in legislative debates. The clause, however, could only be renewed if the 5% metric had continued. The "Various Drafts of Clauses", November 16, 1981, provided that the special override could either "come into force for all provinces at

[22] The memorandum dated November 12, 1981 contemplates the first two tests as objective tests. The third is subjective but gives the "test" to the court. The fourth is a legislative notwithstanding provision, with a 5-year sunset clause, and required 2/3 majority vote for override.

once, or could initially apply only to Quebec, with other provinces having a year in which to opt-in". There are no documents that we are aware of that explain why the special override was suddenly abandoned. None of the other provinces objected, as shown in the various Telex responses after November 16, 1981.[23] However, it is not clear what Quebec's response to the proposal was, nor is there any evidence that it was ever formally submitted to Quebec officials for its consideration.[24]

b.) Post-FMC Drafting, November 1981: Federal Note on "Resolving" the Reference to Section 28 in the Text of Section 33

In this section, we review what appears to be the federal effort to clarify the relationship between Section 28 and Section 33 in the "Working Draft" dated November 5, 1981. Roger Tassé would eventually put forward a proposal to the provinces which would seek to narrow the scope of the override on sex discrimination only to Section 15. The provinces would agree to this constrained version. However, all nine provinces would agree in private and in public after November 20, 1981 to remove section 28 entirely from the ambit of Section 33. This rendered section 28 post-November 24, 1981 a free-standing clause, prohibiting an override of all Charter rights, including those enumerated in the text of Section 33 over the basis of sex equality (See section c. in Part III below).

For the Provinces, Section 28 had to be included in the override for two reasons. First, Premier Hatfield in his opening speech on November 2, 1981, had included Section 28 in a group of Charter rights where "more time is needed to consider them and to improve them." Second, a set of "Charter of Rights Loose Notes", dated November 19, 1981, revealed that "a number of provinces felt that section 28 had to be included in the section 33 override to ensure that a law overriding section 15, protection against discrimination based on sex, would not be struck down because it was in conflict with the guarantee of rights equally to men and women."[25] It was therefore an insurance policy to ensure that, as Nova Scotian officials noted in a Telex later on November 18, 1981, the paramountcy clause in Section 28 did not prevent the override from going into Section 15 on instances regarding sex discrimination.

It is possible that while preparing for the special override for Quebec, discussed above, federal officials noticed an issue with the text of Section 33 and its conflict with 28. The "Memorandum to Roger Tassé from Eddie Goldenberg re Draft changes to the constitutional Resolution" could be read as Goldenberg discovering this possibility where the note "can we resolve this" is found next to the reference of Section 28 in the text of Section 33 (see pdf p. 3). Several provinces (Ontario, Newfoundland, Alberta and British Columbia) openly voiced their preference to remove Section 28 entirely from the text of Section 33 *after* November 16, 1981. They did so after Tasse's proposed amendment to Section 33 on November 16, 1981. It's not clear who initiated this further limitation on Section 33. While some provinces were sympathetic to limiting the override's reach, it appears that this limitation was initiated by federal officials.[26]

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[23] Two examples can be found in November 17, 1981: Telex from Thomas Wells (ON) to Jean Chrétien Re: Proposed Amendments to New Constitutional Resolution and November 17, 1981: Telex from Neil Crawford (AB) to Jean Chrétien re: Proposed Amendments to New Constitutional Resolution.

[24] Various possibilities exist. First, it is possible that Quebec would not sign on regardless. Second, it may simply have been a proposal that Pierre Trudeau may have changed his mind about given his strong desire to protect linguistic rights, and was therefore never submitted to Quebec for consideration. This is unlikely since it appears that Jean Chrétien signed off on it. Third, it may have also been rejected by Quebec because it did not contain a veto (which it had abandoned in the "gang of eight" April 16, 1981 Accord, but had reclaimed it in the FMC in November 1981 discussions.

[25] Later, post-FMC in November 1981, some provinces (Nova Scotia and Saskatchewan) maintained that Section 28 should be retained in the text of Section 33.

[26] This Telex from Newfoundland to the Federal Government, dated November 18, 1981, might suggest further context and perhaps the view that British Columbia was the originator of the request to have Section 28 removed from Section 33. This Telex from

A resolution to this problem would soon be proposed by federal officials. In a "Note for the Prime Minister re Override of Section 28 of the Charter of Rights incl. Telex from Roger Tassé re: Override of Section 28 in Section 33 of Charter and Wording of Mobility Rights Derogation under Section 6(4)", dated November 16, 1981, suggests evidence that it was perhaps Roger Tassé's telex that initiated the issue of clarifying Section 28. Based on this memorandum, it appears that the section 28 from April 24, 1981 federal draft was revised in the "working draft" November 5, 1981. The text of Section 28 was made subject to Section 33 as an 'insurance policy' of sorts to fully permit override of Section 15.

In the note, Tassé outlines his reason for amending Section 33.

> "We [federal government] are continuing our discussions with provincial officials with a view to their agreeing that there be no override possible in respect of section 28, except to the extent that an override might be adopted in respect of non-discrimination on the basis of sex found in section 15." "[...] I [Roger Tassé] hope that the approach that I have suggested will commend itself to my provincial counterparts as a means of implementing what I understand to be the decision of the First Ministers on November 5, that is: 1) an override be possible in terms of equality rights set out in section 15 including the right to non-discrimination on the basis of sex, and 2) that otherwise it be impossible to have an override in respect of section 28." [...] "As drafted, section 33 with section 28 included would allow laws which could override categories of rights which are not otherwise subject to section 33 override" (pdf p. 1)

Roger Tassé here is seeking an agreement to change the "Working Draft" November 5, 1981, text to prevent a misreading of Section 33 which could have, in Tassé's view, permitted 28 to override clauses not intended in the override such as voting rights. After elaborating several examples, he writes, "[t]his was not the intention of the first ministers accord nor of the officials who developed the working draft. […] As I understand the desire of a number of provinces to have Section 28 included in Section 33 override, it is to ensure that a law overriding Section 15 protection against discrimination based on sex will not be struck down because it is in conflict with the guarantee of rights equally to men and women in section 28".

Pushback on Tassé's proposed amendment occurred from some provinces (perhaps Saskatchewan and Nova Scotia). In a Memorandum dated November 19, 1981, Tassé writes that "[t]he difficulty that we faced, after the November 5, 1981 meeting of officials, was that most provinces were insisting that it should be possible to override section 28 in its application to all of the rights guaranteed by the Charter and not only the equality rights of section 15 in respect of sex." (*Tassé's emphasis*.) Tassé's proposed amendment however was agreed to without much controversy by the provinces via telex within the following days. The Telex from Roger Tassé Re: Application of Section 23 – Manitoba and Wording of Sections 28 and 33(1) of Charter, dated November 18, 1981, confirmed this agreement:

> "With respect to the wording of section 28 and 33(1) of the Charter, in light of discussions yesterday and today with provincial ministers and officials the following wording is being inserted in the Charter:
>
> Section 28 – Notwithstanding anything in this Charter except 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
>
> 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." (pdf pp. 1-2)

Alberta to the Federal Government dated November 18, 1981 could corroborate this view. And one could also look at a Telex from Ontario to the Federal Government dated November 17, 1981 as well.

As Tassé would reveal in this November 19, 1981 Memorandum (readers can skip below to page 20 of this commentary), he succeeded in having a limitation clarified on the reference to Section 15 in Section 33. The override would be able to derogate sex equality only in section 15, but none of the other rights in the Charter, including those listed in Section 33.

While the amendment was being approved by the provinces, several federal documents featured Tassé's amendment and provided brief explanations of what it meant. The first is the document "Confidential: Charter of Rights and Freedoms", dated November 19, 1981, features this amendment, as it states, "[t]he override clause will apply to Fundamental Freedoms, Legal Rights and Equality Rights. It will also apply to section 28 (equal rights to both sexes) in respect of discrimination based on sex referred to in section 15 (equality rights)".

Another is the "Memorandum on Notwithstanding Clause, consolidation of notes", dated November 17, 1981, also outlined the proposed amendment. This cabinet memorandum spoke to the several safeguards written in Section 33. It also emphasized the two main limitations in Section 33: the sunset clause and the political cost of using the override. It emphasized that both of these elements were part of what made the override acceptable to the federal government. The memorandum even suggests that the override will be only used in the event that a government disagrees with a court interpretation, not proactive derogation. "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".

The memorandum continues, as it discloses, that the provinces accepted an override because "some provinces felt that including a notwithstanding clause in the Charter of Rights and Freedoms would preserve the idea of the supremacy of Parliament" and "had specific concerns regarding certain sections of the Charter and wished to have the notwithstanding clause applied to these sections." Section 2. Fundamental Freedoms was a concern because of "how the courts might construct certain of the freedoms such as freedom from conscience… [and] the effect of certain freedoms on provincial legislation, such as freedom of expression and provincial control over advertising…". Sections 7 to 14 Legal Rights were driven by a concern of the "Canadian courts adopting undesirable American jurisprudence relating to exclusion of all illegally obtained evidence", and extend "legal protections to areas where such protections are not now applicable, and in some cases, would be unwarranted". There was also a concern with how the "test of 'reasonable' or 'arbitrary'... could result in unforeseeable and undesirable court decisions". And with Section 15 Equality Rights the concern was with "the impact these rights would have on provincial legislation" and concern with "how the courts would interpret these rights".

The November 17, 1981 memorandum we have been discussing also outlined the federal government's intentions with Section 33. "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".

In a separate note on Section 28, titled "Charter of Rights Loose Notes", dated November 19, 1981, we

find a "confidential" federal note on both Sections 28 and 33 concluding that it is the intention behind the federal amendment that "[...] while section 28 will be subject to the override provision on all non-discrimination rights, it will not permit other provisions of the Charter to be construed as permitting discriminatory practices against women."

On November 20, 1981, a new federal draft was then tabled in Parliament. It was titled "Resolution Respecting Constitution Act" dated November 18, 1981, tabled on November 20, 1981. In this Parliamentary draft, Tassé's amendment is now the text of Section 33. The text of section 28 is still referring to 33 (as the Working Draft, November 5, 1981 had it). The marginal description reads: "Rights guaranteed equally to both sexes 28." And the provision reads: "Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons." But the text of Section 33 now reflects the amendment requested by Tassé and accepted by all the Provinces by November 19, 1981. Its marginal description reads: "Exception where express declaration". And the provision read: "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 therefore 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."

The Federal Draft, tabled in the House of Commons on November 20, 1981, featured these changes to Section 33. To review, the change in Section 33 (which clarified not just Section 28's relation to Section 33, but also articulated the view that Section 33 permitted a derogation of sexual equality only in regard to Section 15, and not to any other rights in the Charter, including those enumerated in Section 33) was initiated by Roger Tassé. It was communicated by Telex to the nine signatories of the November Accord. Tassé's amendment was agreed by all provinces by November 19, 1981. The consent of the provinces for the amendment was required because it effected a meaningful amendment to the "Working Draft" of November 5, 1981. The consent of the provinces was also required because Section 28 as subject to the override had been a particular provision requested by the provinces as an insurance policy of sorts. During these latest communications provinces supporting the federal government also appear to have insisted on achieving unanimous consent for the amendment.[27] For the provinces, the inclusion of Section 28 was seen as necessary to ensure that that Section 28 would not be read by the courts as limiting Section 33 in regards to Section 15. According to Roger Tassé's November 16, 1981 cabinet "Note for the Prime Minister re Override of Section 28 of the Charter of Rights incl. Telex from Roger Tassé re: Override of Section 28 in Section 33 of Charter and Wording of Mobility Rights Derogation under Section 6(4)", Tassé's amendment to the text of Section 33 was to clarify that "1) an override be possible in terms of equality rights set out in section 15 including the right to non-discrimination on the basis of sex, and 2) that otherwise it be impossible to have an override in respect of section 28."

There are two documents that further help explain the meaning of Tassé's amendment now featured in the federal draft November 20, 1981. Understanding this meaning is important to contextualize and understand the significance of further changes later in the House of Commons. The document titled "Rights Guaranteed to both sexes" dated November 19, 1981, in the package "Charter of Rights Loose Notes" explains that the text in section 33 now permits, if one takes a procedural reading, a derogation of sex discrimination *only in relation to section 15*. In other words, the override can derogate sex discrimination only in relation to Section 15. As the memorandum explains, however, the override cannot derogate on the basis of sex not just on all the provisions *outside* the override, but in *all* the provisions laid in the text of the override (i.e., those of sections 2 or 7 to 14). It states "[o]n the other hand, if a province wished to limit

[27] This appears significant in light of the Supreme Court of Canada decision in *Re: Resolution to amend the Constitution* [1981].

freedom of association on the basis of sex, using the override clause, this could not be done. Freedom of association is a Charter right and is guaranteed equally to both sexes." Yet Section 2 is *written* in the notwithstanding. This seems to place a limit on *how* the override can be invoked. It implies that Section 28 had been *strengthened* considerably allowing it now to constrain the override much more so than the previous text of the "working draft", dated November 5, 1981 envisioned.

This seems to corroborate what Tassé himself suggests in his "Memorandum from Deputy Minister to Minister of Justice re Override Clause in Relation to Section 28 of Charter", also dated November 19, 1981. Tassé writes that

> "[t]he override in section 33 with respect to section 28 is strictly confined to discriminatory laws enacted in relation to section 15… This does not undermine the equality guarantee in section 28 with respect to all other rights guaranteed by or referred to in the Charter. Thus, all fundamental freedoms, democratic rights, legal rights, mobility rights, language rights, or other right which may flow from the construction rules (section 25, 26, 27) respecting aboriginal people and multicultural heritages remain guaranteed equally to men and women and cannot be overridden on the basis of sex." (Tassé's emphasis) (pdf p. 1)

Note here "fundamental freedoms" (section 2) and "legal rights" (sections 7 to 14) are listed as "cannot be overridden" on the basis of sex. Tassé explains that "section 28 can only operate to prevent a right in the Charter from being denied equally to males and females if that particular right is not specifically subject to the override clause". To repeat, "section 28 is strictly confined to discriminatory laws enacted in relation to section 15." To see his meaning, one must take a strictly procedural reading of Section 33.

Later in the memorandum, Tassé further confirms this reading by writing that his amendment to the override "severely" restricted "the scope of the override".

> "The difficulty that we faced, after the November 5, 1981 meeting of officials, was that most provinces were insisting that it should be possible to override section 28 in its application to all of the rights guaranteed by the Charter and not only the equality rights of section 15 in respect of sex. What we have succeeded to do yesterday in the resolution that was tabled in the House, is to restrict severely the scope of the override in respect of section 28 by specifically limiting it to sex in section 15. As a result, there can be no doubt that an override can be placed on section 15 in respect of sex, but on no other rights guaranteed in the Charter". (Tassé's emphasis) (pdf p. 2)

In fact, Tassé makes this point when addressing women's equality advocates that opposed his amendment. Tassé suggests that women's equality advocates are missing the point.[28] He writes that women equality advocates claim that,

> "the provision in section 33 of the Charter of Rights which allows for a limited override of section 28 (equality of rights and freedoms between men and women) as it related to non-discrimination based on sex in section 15 destroys the concept of equality of rights between males and females in the Charter. This is simply not the case." (*Tassé's emphasis*) (pdf p. 1)

He then explains by noting how much Section 28 limits Section 33. The override can only derogate sex discrimination only in Section 15, not in the other rights, including those in the override. The passage quoted above is worth repeating. Tassé says,

> "[t]he override in section 33 with respect to section 28 is strictly confined to discriminatory laws enacted in

[28] Note that this is Tasse's point, not the authors' of this commentary.

> relation to section 15… This does not undermine the equality guarantee in section 28 with respect to all other rights guaranteed by or referred to in the Charter. Thus, all fundamental freedoms, democratic rights, legal rights, mobility rights, language rights, or other right which may flow from the construction rules (section 25, 26, 27) respecting aboriginal people and multicultural heritages remain guaranteed equally to men and women and cannot be overridden on the basis of sex." (*Tassé's emphasis*) (pdf p. 1)

Again, it is worth repeating that a procedural reading of Tassé's amendment and his explanation above is required to make Section 33 intelligible. The passage that follows also supports a procedural reading of Section 33.

> "[...] once section 15 equality rights were included in the section 33 override clause (as agreed to by First Ministers on November 5), this specific reference to section 15 enables legislatures to override non-discrimination based on sex, since otherwise the reference to an override of section 15 would have been meaningless" (pdf p. 2)

And he concludes that,

> "Whether there is a specific reference or not to section 28 in section 33 (the override clause) section 28 can only operate to prevent a right in the Charter from being denied equally to males and females if that particular right is not specifically subject to the override clause." (*Tassé's underlines*) (pdf p. 2)

To clarify this last point made by Tassé—this amendment implied that by removing Section 28 entirely from the draft that section 15 would be nonetheless subject to the override. Tassé says that regardless of how this understanding was presented, either explicitly (through Tassé's amendment) or implicitly (Tassé's preference to not mention 28 at all), the status of the negotiations had been now brought to a specific point—that because of the plain reference to Section 15, Section 28 could only be overridden as it applies to Section 15. With that understanding in mind, Tassé says section 33 was severely limited given the ambiguity that existed before. Because of his amendment, now, none of the other categories of rights in Section 33, sections 2 and 7 to 14, could override sex. Section 28 was strengthened. Only Section 15 was subject to Section 33.

c.) Post-November 20, 1981: More Federal Negotiations to Remove Section 28 Entirely from the ambit of Section 33

The documents that follow show that the effort to remove Section 28 entirely from the text of Section 33 began after Tassé's proposal. It appears that while the provinces agreed on Tassé's amendment, discussions continued on whether the text of Section 28 could be removed entirely from Section 33. It is not clear from the documentary archive who initiated this proposal.[29] Some evidence suggests that it may have been British Columbia, perhaps supported by Ontario, Alberta and Newfoundland.[30] It is also clear from Tassé's November 19, 1981, memorandum that the federal government also supported this endeavor, but did not think it was necessary to achieve a narrowed reading of Section 33 (seems to have been agreed at the November FMC). Tassé writes that while the federal preference was to remove the reference to Section 28 entirely from the text of Section 33, for Tassé, it does not ultimately matter given the procedural reading required to make sense of Section 33 in its current form (i.e., with his amendment.)

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[29] See *supra* no. 25.

[30] For example, Telex from Thomas L. Wells to Jean Chrétien (17 November 1981), Telex from Neil Crawford to Jean Chrétien (18 November 1981), Telex from Premier Brian Peckford to Prime Minister Trudeau (18 November 1981).

> "It is our opinion that the ability to override equality rights in section 15 of the Charter, including sex, would have been the same as it is under the present wording of section 33 [i.e., Tassé' amendment], even if there had been no reference in that section to 28". (pdf p. 1)

Two Telexes from Saskatchewan by Roy Romanow, dated November 18, 1981, conveyed Saskatchewan's opposition to the removal of Section 28 entirely from Section 33.[31] Several other Telexes also dated November 18, 1981, from at least Nova Scotia and Saskatchewan charged that the removal of Section 28 from Section 33 would violate the November Accord agreement. For instance, the Nova Scotia Telex dated November 18, 1981 says: "[the inclusion of Section 28] was considered necessary in order for the provisions of section 33(1) to effectively apply to section 15 in respect to discrimination based on sex. … would have the effect of section 28 be free standing and therefore the basis for challenging federal or provincial legislation which provides preferential benefits to women on grounds that such legislation to treat male and female persons equally".

After November 18, 1981, the provincial and federal officials were now moving from a provision where override of sex was only permitted to Section 15 (November 20, 1981 federal draft), to a position of no override being permitted on the basis of sex whatsoever. Now the provinces were considering removing it entirely from the notwithstanding clause, establishing Section 28 as a freestanding section of the Charter. The federal draft tabled in Parliament on November 20, 1981, reflected the agreement on November 18, 1981, that is to say the amendments Roger Tassé suggested on November 16, 1981 that Section 33 could override sex equality only as it pertains to Section 15. The federal government was, however, still working with the provinces on removing Section 28 entirely from the ambit of Section 33. As we will see, this was achieved. All references to Section 28 and Section 33 were removed in each respective provision. This removal, agreed to by the federal government, the nine provinces, and the entirety of the Commons, meant that section 28 was once again a free-standing clause with paramountcy throughout the Charter. It is significant here that this further amendment occurred *after* the clarification of Section 28 in its relation to 15. Thus, while it mirrors the wording suggested by Tassé in his earlier proposal, it had now meant something substantially different because the debate and the public understanding had occurred from a new starting point. Tassé was initially suggesting that by removing Section 28 entirely, Section 15 would still be subject to the clause, but only through his explicit wording of "Section 28 of this Charter in its application to discrimination based on sex referred to in Section 15". Now this new amendment, removing 28 entirely, was changing the understanding of *that* previous understanding—meaning, removing Section 28 even further and completely.

Sex discrimination, now, even in Section 15 can only be prohibited in light of reasonable limitations Section 1. And Section 33 would only be permitted to override Section 15 on grounds other than sex

[31] It appears that one reason why Saskatchewan held out longer than the other provinces against this broader change, is that it was negotiating with the federal government the reinsertion of what became later Section 35 on Indigenous rights. This is confirmed in several documents. This includes a passage given in the Speech from the Throne at the opening of the Saskatchewan Legislature on November 26, 1981. "My government is pleased that the proposal put forward by Telex from the Minister of Intergovernmental Affairs, the Hon. Roy Romanow, to the Hon. Jean Chrétien of the federal government on Wednesday, November 18, has now been accepted. This called for section 28 of the constitutional resolution now before parliament, dealing with equality rights between men and women, to be removed from the ambit of section 33 of that resolution and for the inclusion of a section recognizing treaty and aboriginal rights. My government has been advised that its proposal has been accepted by the other nine governments which were parties to the November 5 agreement. It is clear that there is still work to be done. Governments must honour their moral and constitutional obligation to Canada's aboriginal peoples. Other constitutional issues including such important matters as the Supreme Court of Canada and Senate reform will also require our attention." See Saskatchewan Hansards, November 26, 1981. The two Telexes from Roy Romanow dated November 18, 1981 also lay out these details. See November 18 1981: Telex from Roy Romanow to Jean Chrétien & Allan Blakeney re Proposed Constitutional Changes and November 18, 1981: Telex from Roy Romanow to Jean Chrétien re Proposed Constitutional Changes.

discrimination.[32] The difficulty, of course, is that a plain reference to Section 15 is still (as Tassé noted in his November 19, 1981 memorandum) in the text of Section 33, to cover other grounds other than sex, and the provision Section 15 still refers to "sex", perhaps permitted in light of reasonable limitations Section 1 examined by the courts.

When the federal draft was tabled on November 20, 1981, federal discussions on the removal of Section 28 from the text of Section 33 were ongoing with the provinces. In the House of Commons on November 20, 1981, an exchange between Hon. Flora MacDonald and Prime Minister Trudeau reveals that there was now only one province opposing the removal of Section 28 from Section 33.

> "The 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 override provision 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?"

Later on November 20, 1981, an amendment seeking to remove Section 28 from Section 33 and Section 33 from Section 28 was moved by the Hon. Joe Clark, seconded by Hon. Flora MacDonald (see House of Commons Debates, 32nd Parl., 1st Sess., November 20, 1981, at 13013-13060). Clark's motion read:

> "That the proposed Constitution Act 1981 be amended: (a) by striking out clause 28 and substituting the following: '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; and (b) by striking out subclause 33(1), and substituting the following: '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 section 7 to 15 of this Charter." In response to his motion, Clark said "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."

Removing Section 28 entirely from the ambit of Section 33 was debated not only in federal parliament but also in a few the provincial legislatures. For example, on November 18, 1981, it was confirmed in the Alberta Legislature that the Government of Alberta supported the removal of Section 28 entirely from Section 33 (see Hansard for Nov. 18, 1981).

> MRS. CHICHAK: Mr. Speaker, I'd like to direct my question to the hon. Premier for a matter of clarification dealing with Section 28 of the Charter of Rights. And just to be clear that the Premier is clear on the section I need clarified, I'd like to read it: Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. There seems to be some confusion as to just what that clause means. I wonder if the hon. Premier could make that clarification for us.
>
> MR. LOUGHEED: Mr. Speaker, I'd like to respond this way. That clause, and I'd quote from the words used by the federal member for Kingston, Miss Flora MacDonald, when she introduced it as a proposed amendment: "provides for a straightforward unequivocal statement of purpose that all rights apply equally

[32] The consequence of this is a hierarchy of rights.

> to men and women." While I'm on my feet, I would like to confirm again that the position of the government of Alberta is that Section 28 should not have any overriding provisions or qualifications to it, and it should stand as was provided for in the resolution before Parliament this past spring. Accordingly, within the last hour we have reconfirmed our advice to the federal Deputy Minister of Justice, Mr. Tassé, to the effect that that is the case for the province of Alberta on Section 28. Section 28 should stand in the resolution being introduced in the House of Commons today, without qualification, as it was originally prescribed, for the purpose I have mentioned.
>
> MR. NOTLEY: A supplementary question. I believe the Premier mentioned that the resolution is being introduced today. Is the Premier able to report to the House whether there has been consensus among the other provinces with respect to Section 28? Has the Premier been given the advice from the federal government that in fact Section 28 will be introduced as it originally stood, not subject to the notwithstanding clause?
>
> MR. LOUGHEED: Mr. Speaker, all I can say to the hon. member is that I hope so. Obviously, these matters of interprovincial communication and federal/provincial communication have been going on for the past number of days. When that resolution is introduced today in the House of Commons by the federal Minister of Justice, I hope it will in fact provide for an unqualified Section 28, which is the position of Alberta.

Later on November 20, 1981 (see Hansard for Nov. 20, 1981), the Government of Alberta confirmed that the remaining two provinces have agreed in principle to remove Section 28 entirely from the ambit of Section 33.

> "MR. R. SPEAKER: Mr. Speaker, my second question is with regard to the constitutional question. I understand that the premiers of Saskatchewan and Nova Scotia have agreed to remove Section 28, guaranteeing equality of men and women, from the scope of Section 33, the notwithstanding clause. The other provinces and the federal government seem willing to do likewise. At this point in time, is the Premier in agreement with that proposition that Canadian men and women be treated equally, and that it is not a subject of the opting-out clause?
>
> MR. LOUGHEED: Mr. Speaker, I made that as clear as I possibly could in the Legislative Assembly in answer to a question from the hon. Member for Edmonton Norwood on November 18, page 1697 of Hansard. That is clearly the position of the Alberta government."

In the House of Commons on November 20, 1981, the federal government, arguing against its own draft text, also agreed to remove Section 28 entirely from the text of Section 33. It went even further disclosing the implications that this would have. It would make Section 28 a severe limit on Section 33.

> "Hon. Judy Erola (Minister of State (Mines)): [...] I will tell you what we want. We want the rights in the Charter of Rights and Freedoms guaranteed equally to male and female persons. That means the original wording of Section 28: 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." [...] The government agreed to this and a special guarantee, Section 28, was added to the charter in the general clause. In April, 1981 this guarantee of equality for women and men was passed by all three parties in the House of Commons. Women thought that they had a guarantee that all laws in Canada would have to treat men and women in Canada equally. So there it was. We have the charter, standing the way we want it, clearly defined. The battle was won, we thought. However, it was not. Why? Because the provinces, the Supreme Court and the opposition parties put this government in the position of bargaining for consensus. The provinces changed the charter without consulting the people within the provincial boundaries."

An agreement with all provinces was achieved by November 23, 1981 as confirmed by Jean Chrétien in the House of Commons.

> "Mr. Chrétien: On a point of order, Mr. Speaker, I am pleased to be able to inform the House that I have obtained from all provinces which are parties to the accord their agreement that Section 28 on the equality of men and women should apply without the override clause. In addition, I am happy to report to the House that all provinces have agreed to enshrine aboriginal rights in the Constitution."

This is significant for several reasons. The most obvious is that the private correspondences corroborate and enormously clarify the public understanding that emerged late-November 1981. There was a public consensus as to what the meaning and role of Section 28 in the Canadian Charter, and as a limitation on Section 33. The federal government, the nine provinces, and the House of Commons understood that Section 28 would limit Section 33 even further than the Tassé memorandum (dated November 19, 1981) suggested. The further limitations imposed on Section 33 from the Working Draft (November 5, 1981) to the federal draft tabled on November 20, 1981, draft on November 24, 1981 showcases a sequence where privately and publicly Section 33 was being limited in its scope, particularly in regard to Section 28. It is worth noting again however that Tassé argued that removing Section 28 entirely from the text of Section 33 would not change anything his amendment secured. This was now not the case. Those seeking to make Section 28 freestanding and a severe limitation on Section 33 did exactly that – they removed Section 28 from the text of Section 33. This tension goes however to some considerable length to explain the tension we find today between those advocating Tassé's view from November 19, 1981, and women's equality advocates on the paramountcy of Section 28.

Clark's motion was passed on November 24, 1981: Resolution Respecting Constitution Act. And on December 2, 1981 Resolution Respecting Constitution Act, Voted and Passed by House of Commons, the final text of Sections 28 and 33 reflect their final form in Canada Act (1982). "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." "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, section 7 to 15 of this Charter." A cabinet document titled "Memorandum, Differences Between the Old and New Constitutional Resolution" we have dated December clearly confirms that "the over-ride clause does not apply to Section 28 of the Charter [...]".

As suggested, despite the clear private and public meaning of this amendment, there is still a problem. The problem is actually encapsulated in Tassé's memorandum dated November 19, 1981. As of November 24, 1981, Section 28 was now a full limitation on the override prohibiting derogation of all rights on sex discrimination, even those in Section 33. The problem, and as Tassé himself claimed, is that the plain reference to Section 15 in Section 33, even if the reference of Section 28 was removed, made it possible for the override to derogate sex discrimination given the plain reference of Section 15 in the text of Section 33. To emphasize this again, now the amendment made by the House of Commons, with the agreement of all premiers and the prime minister, removing Section 28 in this way actually meant publicly something else: stricter limitation on Section 33.

The difficulty mentioned above – regarding an unspecified Section 15 in the text of Section 33 – was seized upon by the opposition to the Ontario Government on November 30, 1981.

> "MS BRYDEN: [...] Let us suppose there is a court decision under section 28, which the women's lobby

> managed to get back in after the accord and which says, "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." If there is a decision that says our equal pay law does not guarantee no discrimination on account of sex, which is in section 15 of the charter, then the province will have to decide whether it wishes to bring in new equal pay legislation which will guarantee the rights and freedoms equally to male and female persons or whether to bring in an override clause which will say that our kind of equal pay law overrides section 15. Then they have five years to renew that law. That is the situation they will be in if the courts should decide our law is against the charter of rights under section 28."

The lack of clarity in the technical and procedural reading of Section 33 contributed to the confusion in the Ontario Legislature as to its relationship to Section 28 less than a week after it was passed in the House of Commons. On November 30, 1981, Ms. Bryden finished the previous section of her speech with this:

> [...] The women are now subject to the override which also applies to all of those very important areas that I have mentioned -- fundamental freedoms, legal rights and discrimination against women, handicapped and people on grounds of race, religion and age.

The member also said that "during the next few days" further amendments would be attempted. Perhaps personal communications were undertaken, but no record can be found to date.

Conclusion:

There is a clear tension between Sections 28 and 33. Section 28 possesses substantive terms and a paramountcy clause. However, Section 33's has on its face a fairly precise reference to Section 15 and expresses paramountcy of parliamentary sovereignty. The drafting history shows a much different picture about Section 33, especially in how much effort there was to constrain the use of the override. Sections 28 and 33 can appear as something like competing paramountcies. The inclusion of Section 15 and the procedural logic and text of Section 33 (paramountcy of parliamentary sovereignty over certain categories of rights and other limitations) competes with the substantive terms and the paramountcy clause in Section 28. The drafting history shows, however, how to reconcile these competing languages (or paramountcies). The Supreme Court of Canada needs to address this tension. Although legislative amendment of the Charter is possible, but perhaps not realistic at this time. Ironically, this very tension was the reason why the premiers initially insisted on including Section 28 in the text of Section 33 in the "Working Draft" of November 5, 1981. The provinces feared that the lack of clarity would undermine the agreement reached in the November Accord, 1981. By agreeing to remove the explicit clarification, we are back to this state of tension. In short, the Supreme Court of Canada is now faced with a problem of resolving the ambiguity of the text of the Canadian Charter and can now do so with a detailed drafting history available.

This commentary provides this documentary record. Much attention has been focused on the Special Joint Committee proceedings and the November 1981 FMC, and this history can now be added to other works in these areas. By chronologically analyzing the entire timeline of negotiations, from the summer of 1980 to the final resolution in December 1981, this commentary adds this new drafting history. Our access to this new archival record has helped make, in this paper, the claim that the limitations (some might wish to call them safeguards) against abuses of the notwithstanding clause were exhaustively and intently considered across the entire 1980 and 1981 drafting periods. In doing so, a number of observations are worth emphasizing. This drafting history of the limitations also shows that the procedural logic of Section 33 is supported by this drafting history and why *Ford* has so much credence. This documentary history also supports the view that when Section 28 was removed from the text of Section 33 in late-November 1981 (precisely in the post-November 20, 1981 period), Section 28 was understood by all nine provinces, federal

government and the opposition in the legislatures, to be restored to its initial April 24th, 1981 federal draft position as a freestanding clause over the whole Charter, including all categories of rights enumerated in Section 33. (See section c. in Part III) And finally, it also suggests a way to approach the competing languages or paramountcies between: the text of Section 33 (paramountcy of parliamentary sovereignty and the plain text of Section 15 enumerated in Section 33) and the substantive terms and the paramountcy clause found in Section 28 as understood in the post-November 20, 1981 agreement between the nine provinces, federal government and the opposition in the several legislatures. It shows that while Section 28 should have paramountcy over the whole Charter, there are however interpretive difficulties that still need to be resolved in the text of Section 33 regarding the plain wording of Section 15. Together, these insights underscore the value of examining the full scope of the documentary record rather than just snapshots of its most critical moments.