

## Legislation

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CANADIAN CHARTER OF RIGHTS AND FREEDOMS—OVERRIDE CLAUSES UNDER SECTION 33—WHETHER SUBJECT TO JUDICIAL REVIEW UNDER SECTION 1.—Under section 33 of the Canadian Charter of Rights and Freedoms,<sup>1</sup> Parliament or a provincial legislature may enact a clause exempting legislation from the application of certain Charter provisions. It is commonly assumed that an override clause complying with section 33 takes effect automatically and is not subject to judicial review under the Charter. However, respectable arguments can be made to the contrary. I will set out one such argument here and briefly review the main objections to it.

Let us look first at the terms of section 33.<sup>2</sup> The section states that Parliament or a provincial legislature may expressly declare in an Act that the Act as a whole or a particular provision thereof shall operate notwithstanding a provision found in any of sections 2 or 7 to 15 of the Charter. Where such a declaration is in effect, the Act or provision covered “shall have such operation as it would have but for the provision of this Charter referred to in the declaration”. A declaration automatically ceases to take effect after five years, but is subject to reenactment.

The Charter provisions affected by section 33 contain some of the document’s most important guarantees. Section 2 deals with “fundamental freedoms”, including the freedoms of conscience, expression, assembly

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<sup>1</sup> The Charter is embodied in ss 1-34 of the Constitution Act, 1982, Schedule B of the Canada Act 1982, 1982, c. 11 (U.K.).

<sup>2</sup> The complete text of the section is as follows:

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.

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

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

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

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

and association. Sections 7 to 14 cover "legal rights", most notably the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 15 embodies "equality rights", that is the guarantee of equality before the law without discrimination based on race, ethnic origin, religion, sex, age or mental or physical handicap.

The question is this. Assuming that an override clause meets the requirements of section 33, is it immune to judicial review under the Charter no matter how extreme the statutory provision it protects? Can a person in Canada be arbitrarily arrested, detained, and tortured to death by executive fiat under anti-terrorist legislation, so long as appropriate override clauses are present? At first blush, the answer appears to be affirmative. The right to life, liberty and security of the person, the right not to be arbitrarily detained, the right to *habeas corpus*, the right to be tried within a reasonable time, and the right not to be subjected to cruel and unusual treatment are all subject to declarations under section 33. Where an override clause exists, the legislation takes effect notwithstanding the Charter provision specified, apparently regardless of the statute's character. The paradoxical conclusion is that, while the Charter enshrines the right of Canadian citizens to vote in a section immune to override clauses, it ultimately fails to shield citizens from arbitrary imprisonment and torture for their political beliefs.

The issue is whether this conclusion is compatible with the basic guarantee found in section 1 of the Charter. This section states:

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

The provision affirms that the Charter as a whole *guarantees* the rights set out in it, that is, shields those rights from violation and ensures their exercise. The guarantee is not absolute. It is stated to be subject to limits prescribed by law. But the limits must be reasonable and demonstrably justified in a free and democratic society. No other types of limitation are allowed for. Limits which do not satisfy these criteria are invalid. This sanction flows from section 52 of the Constitution Act, 1982, which provides that any law inconsistent with the Constitution of Canada is, to the extent of the inconsistency, of no force or effect.

It seems plain that a declaration enacted under section 33, if it has any effect at all, serves to limit rights guaranteed by the Charter. Such a clause prevents a Charter provision from applying to a statute which it would otherwise govern. It presupposes a conflict between the Charter and the statute and provides that the statute shall operate notwithstanding the Charter provision in question. If no conflict actually exists, the clause is merely a superfluous precaution and does not place any real limits on Charter rights. But where the statute actually infringes the Charter provi-

sion in question, the declaration prevents the Charter from nullifying the statute and consequently limits the right guaranteed. It seems to follow that such a declaration is a limit prescribed by law within the meaning of section 1, and so must satisfy the criteria laid down there before taking effect. That is, it must be "reasonable" and "demonstrably justified in a free and democratic society". In brief, section 33 represents an elaboration of the scheme envisaged in section 1 rather than an exception to it.

There seems to be nothing in the wording of either section 1 or section 33 to negate this interpretation. If override clauses were meant to be wholly exempt from the standard of reasonableness in section 1, it would have been simple enough to indicate this. That section could have been drafted to read: ". . . subject only to declarations under section 33 and to such reasonable limits prescribed by law. . .". Alternately, section 33 could have been fortified with the phrase "notwithstanding section 1" or "notwithstanding anything in this Charter", such as one finds in section 28. It seems noteworthy that, while section 33 authorizes the override of sections 2 and 7 to 15, it does not even mention section 1.

On this view, section 1 covers two different sorts of statutory limits on Charter rights. The first is that imposed by a statute standing alone, without an override clause. The second type is that effected by a declaration under section 33. Both kinds of restrictions are subject to the standard of reasonableness laid down in section 1. But the standard operates differently in the two instances.

In the first case, where no override clause exists, the question is simply whether the limitation imposed by the statute is reasonable and demonstrably justified in a free and democratic society. The court must make up its own mind on the matter and, if its view differs from that of the legislature, strike down the offending provision. Where a declaration under section 33 is present, the issue will be different. What the court must now decide is whether it is reasonable and demonstrably justified in the circumstances that the statute *should be exempted from judicial review* for non-compliance with the relevant Charter provision. Given that section 33 expressly empowers a legislature to shield a statute from judicial scrutiny, is this an instance where that power can reasonably and justifiably be exercised? Several criteria might be suggested for resolving this issue. One important criterion, if not necessarily the only one, would be whether it is *reasonably possible* to interpret the relevant Charter provision, considered together with section 1, as consistent with the statute. If, on some sensible reading of the Charter, the statute can be sustained, then the override clause should normally be held to bar further judicial inquiries, even where the court itself does not consider that reading correct. But if the statute cannot on any reasonable view be reconciled with the Charter, then the override declaration should be struck down.

Suppose that the Canadian Parliament revives the death penalty as a mandatory punishment for murder.<sup>3</sup> The provision is challenged in the courts, and the Supreme Court of Canada rules in a majority decision that a compulsory death penalty, without any allowance for judicial discretion, is a cruel and unusual punishment within the meaning of section 12, and that its imposition is not justified under section 1.<sup>4</sup> Parliament then reenacts the same provision, but adds a declaration under section 33. The matter once more comes before the Supreme Court. What the court must now assess is not the merits of the provision as such but the propriety of the override clause. Is this a case where the legislature's view of the scope of the Charter can properly be substituted for that of a court? The court would, I expect, hold that the question of the death penalty's conformity with the Charter was one on which reasonable persons, sharing the same commitment to a free and democratic society, might well disagree. On that basis alone, the override clause should be upheld.

Another example may sharpen the point. Shortly after the outbreak of war, Parliament passes legislation subjecting the press and other media to censorship for the war's duration. The statute contains a declaration that the Act will operate notwithstanding section 2(b) of the Charter, which guarantees freedom of expression. Here a court could well hold that, even if the statute could not on any reasonable view be reconciled with section 2(b) itself, it represented the kind of limitation on freedom of expression which reasonable people could consider justified under section 1, and sustain the override clause on that basis. In other words, the test of reasonable conformity entails consideration of both the Charter right itself and the limits permitted by section 1. The question is: could a reasonable individual, reading the Charter provision in the light of section 1, conclude that the statute in question is justified? If the answer is affirmative, the override declaration will be effective and protect the statute from further judicial scrutiny.

A majority of statutes covered by declarations under section 33 will probably satisfy the test of reasonable conformity, and be accepted by the courts on that basis. But one can imagine examples of a different character. In a time of severe economic depression, the tide of popular feeling in a Canadian province turns against the members of a minority racial group. A weak provincial government, harried by the inflammatory rhetoric of an opposition party and fearing defeat in forthcoming elections, passes legislation confiscating the major property holdings of members of the group, without touching the property of any other persons. The statute is covered by an override clause ousting section 15 of the Charter, which guarantees equality under the law without discrimination based on race. Here the

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<sup>3</sup> Abolished in 1976; see S.C. 1974-75-76, c. 105.

<sup>4</sup> Reversing its holding in *R. v. Miller and Cockriell* (1976), 70 D.L.R. (3d) 324 (S.C.C.).

courts could (and should) properly hold that the confiscatory measures bear no reasonable relation to the Charter guarantee of racial equality read in the light of section 1. That is, under no honest reading of the Charter can the statute be sustained. On this basis, the override clause would be held invalid under section 1, and the legislation voided for non-conformity with section 15.

The argument can be summarized as follows. The Charter is a solemn declaration of basic rights binding not only on the courts but also on the various Canadian governments and legislatures. The courts are, however, placed in a special position. Generally speaking, they are entrusted with determining the scope of the Charter, and can strike down legislation and other governmental acts violating its terms. In the case of most Charter provisions, that determination is final and cannot be revised extrajudicially except by constitutional amendment. With sections 2 and 7 to 15, the position is different. Here the Charter enables the legislature to act as final arbiter of the Charter's meaning, to the exclusion of the courts, by enacting an override clause. Two major limits are placed on that power. The legislature is compelled to review its determination at least once every five years. Secondly, its acts must bear a reasonable relation to the Charter's terms. Enforcement of these limits is left to the courts. In short, section 33 does not authorize Canadian legislatures to overturn or reverse completely the Charter's solemn guarantees. Rather, it gives legislatures the opportunity to act as final judge of the scope of certain Charter provisions, within reasonable limits.

Several objections may be made to this interpretation. One could argue that a section 33 declaration effectively excises from the Charter the rights provision to which it refers for purposes of the legislation protected. Section 1 guarantees only the rights and freedoms set out in the Charter, and so cannot apply to a right effaced from the document by the operation of an override clause. The difficulty with this argument is that it presupposes the very proposition which is itself in question, namely that a given override clause is *legally effective*. If it is effective, clearly the Charter provision named in the clause does not apply to the legislation protected; the provision is, if you will, "excised" from the Charter for a limited purpose. The preliminary question, however, is whether the override clause is valid. In the words of section 33(2) is it "in effect"? No affirmative answer can be given until it is shown that the standard laid down in section 1 has been met. This standard governs all limits on Charter rights. An override clause is one such limit.

A second objection is different in character. It contends that the interpretation advanced here does not conform with the historical intentions of the drafters of the new Constitution of Canada, and in particular with the spirit of the federal-provincial agreement of November 5th, 1981, which gave rise to section 33. The argument raises a number of interesting issues that cannot be fully considered here. One major question is how far

the courts should allow resort to external documentation throwing light on the minds of persons involved in the drafting and enactment of the Charter. There is the further problem of whose historical intentions are relevant in this regard. The new Constitution is formally an enactment of the British Parliament proceeding on a joint resolution of the Canadian House of Commons and Senate, a resolution that itself bears the marks of many hands. Any investigation of the historical objectives lying behind section 33 must deal with a formidable array of contributing parties, including the provincial premiers that lobbied for the section, the federal government which agreed to include it, the civil servants that drafted it, the members of the Canadian House of Commons and Senate which approved it, and the members of the British Parliament which passed it into law. Can any agreement among these diverse individuals and groups be assumed, beyond concurrence on the actual wording of sections 1 and 33?

In any case, the argument from historical intentions must go to some lengths to counter the interpretation presented here. It would not be sufficient to show merely that the parties to the drafting and enactment of the Charter intended that Canadian legislatures should have the final say on the *interpretation* of sections 2 and 7 to 15, for no one disputes that point. It must be demonstrated that the aim was to allow a legislature to suppress entirely the rights enshrined in those sections without any reasonable grounds,—to establish a regime of apartheid, silence political dissent, sanction a policy of state terror. Can any significant body of evidence be mustered to support this view? I draw comfort from the words of the then Minister of Justice of Canada, Mr. Jean Chrétien, in introducing section 33 to the Canadian House of Commons:

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

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.<sup>5</sup>

I suggest that the position advanced here, which allows to legislatures a final say on the interpretation of sections 2 and 7 to 15 of the Charter, but prevents the complete suppression of the rights guaranteed there, conforms better to the spirit of Mr. Chrétien's words than a view under which section

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<sup>5</sup> Canada, House of Commons Debates, Nov. 20th, 1981, Vol. 124, number 260, p. 13042.

33 is a free ticket to religious, political, or racial persecution. What the latter view envisages is less a safety valve than a hole in the bottom of the boiler.

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