

Peter Lougheed and the Constitution, Notwithstanding

By Jennifer Koshan

Commenting on:

The legacy of section 33 of the *Charter*

I am not a conservative, as anyone who knows me or reads Rate My Professor is already aware. But notwithstanding my political stripes, I was a fan of Peter Lougheed. My kids were charmed when they heard him read Christmas stories at the Lougheed House many years ago, and my daughter and I once met him at an opera at the Banff Centre – again, we were charmed. More pertinent to the law, he was the premier who repealed Alberta’s sexual sterilization legislation (the [Sexual Sterilization Repeal Act](#), 1972, SA 1972, c 87) and brought in our first human rights act (the [Individual’s Rights Protection Act](#), SA 1972, c 2), showing a strong commitment to the protection of individual rights. But it is one of his contributions to constitutional law that I will comment on in this post.

Peter Lougheed was, of course, Alberta’s premier at the time the *Constitution Act, 1982* was patriated. It has been widely noted in recent tributes that he was one of the main drivers behind section 33 of the *Charter* (the notwithstanding clause) and section 92A of the *Constitution Act, 1867* (which broadened provincial powers over natural resources). I will leave the legacy of section 92A to others; my interest here is the legacy of section 33.

Many books have been written about the negotiations leading to the *Constitution Act, 1982*, and I will only hit the highlights relevant to section 33 in this post. A clause entrenching the power of legislatures to override *Charter* rights was first raised at the First Ministers’ Conference on the Constitution in September 1980 by Quebec. This type of clause was seen as “a way to overcome the objections of those governments [all but Ontario and New Brunswick] that saw an entrenched charter as a threat to the parliamentary system of government.” (Roy Romanow, John Whyte, and Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell / Methuen, 1984) at 200). At that time, it was still unclear whether provincial consent to the patriation of the constitution, including the entrenchment of a bill of rights, was required. In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, the SCC decided that it was a matter of constitutional convention that patriation of the constitution required a substantial level of provincial consent. At a subsequent First Ministers’ Conference in November 1981, where the provinces had more bargaining power, they raised again the possibility of a notwithstanding clause when the *Charter* was on the table. There was intense debate about whether such a clause was necessary and what it should cover, with Peter Lougheed taking a strong position that provinces should be able to override fundamental freedoms as well as legal rights and equality rights (Romanow et al, *supra* at 208-9). This is the position that ultimately prevailed in the agreement reached by the federal government and all provinces but Quebec on November 5, 1981: “in a classic example of raw bargaining, Trudeau was persuaded

to accept the override on fundamental freedoms on the condition that the entire override mechanism be limited to a five-year period” (Romanow et al, *supra* at 211). After the notwithstanding clause was agreed to, women successfully mobilized to have the sex equality guarantee in section 28 of the *Charter* exempted, which now provides that “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons” (See Penney Kome, *The Taking of 28: Women Challenge the Constitution* (Toronto: Women's Press, 1983); Romanow et al, *supra* at 213-14).

As enacted in 1982, Section 33 of the *Charter* provides that:

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

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

Ford v A.G. Quebec, [1988] 2 SCR 712, was the first Supreme Court of Canada case to consider the constitutionality of the use of section 33 of the *Charter*. The Court reviewed Quebec’s invocation of section 33 in a statute, *An Act respecting the Constitution Act, 1982*, SQ 1982, c 21, which re-enacted all Quebec legislation adopted before the *Charter* came into force, with the addition in each statute of a standard override provision. This legislation was seen as a protest against the entrenchment of the *Charter* without Quebec’s support. The Court held that section 33 imposes requirements of form, and its use could not be reviewed for substance. In addition, while section 33 could be invoked in relation to multiple *Charter* rights and multiple enactments, it could not be used retroactively (at para 36).

Ford confirmed that section 33 was a potentially powerful tool for legislators. Leading constitutional scholar Peter Hogg predicted that *Ford*’s ruling against the retroactive operation of section 33 might encourage its prospective use, as legislators might be inclined to include section 33 override provisions in legislation out of caution, to prevent the situation where legislation was struck down by the courts as contrary to the *Charter* but the judicial decision could not then be overridden retroactively (Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, looseleaf), Section 39.6).

However, section 33 has not been invoked very often outside of Quebec. In fact, as noted recently by the Supreme Court, “resort to s. 33 by legislatures has been exceedingly rare” (see *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 at para 141, per Rothstein and Charron JJ. in a concurring judgment). This is rather surprising in light of the argument that the *Charter* has resulted in rampant judicial activism (see Ted Morton and Rainer Knopf, *The*

Charter Revolution & The Court Party, Peterborough: Broadview Press, 2000). Even the framers of the *Charter* apparently did not anticipate that the judiciary would play the kind of role in remedying unconstitutional legislation that they have played (see e.g. The Hon. Barry Strayer, Q.C., “The Constitution Act, 1982: the Foreseen and Unforeseen” (2007) 16 Constitutional Forum 51 at 60, citing as examples cases where courts have extended underinclusive benefits provided by government). Morton and Knopf note that Peter Lougheed (amongst others) continued to advocate the use of section 33 in response to controversial court decisions even after his term as Premier ended (*supra* at 17, citing Robert Fife, “Ex-premiers call for use of Charter’s ‘safety-valve,’” National Post, March 1999, A1).

Although it has been employed infrequently, section 33 has been used in Alberta. In 1998, following *Vriend v Alberta*, [1998] 1 SCR 493 (in which the Supreme Court read “sexual orientation” in to Alberta’s human rights legislation after finding that its exclusion violated equality rights under section 15 of the *Charter*), the Alberta government under Premier Ralph Klein considered the use of section 33 to override this decision. It ultimately rejected this option (see Morton and Knopf, *supra* at 164), although it did take the province several more years to explicitly amend the legislation (see Linda McKay Panos’ 2009 ABlawg post [Proposed Amendments to Human Rights, Citizenship and Multiculturalism Act Off the Mark](#)). Two years later, at the height of the debate about same sex marriage, the provincial government amended the *Marriage Act*, RSA 2000, c M-5, to define marriage as that “between a man and a woman” (section 1(c)) and added section 2, which provided that “This Act operates notwithstanding (a) the provisions of sections 2 and 7 to 15 of the *Canadian Charter of Rights and Freedoms*, and (b) the *Alberta Bill of Rights*.” Section 2 of the *Marriage Act* expired in 2005, before there was an opportunity to challenge its validity. The Supreme Court’s decision in *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, confirmed that the power to determine whether same sex couples have the capacity to marry belongs to the federal government under section 91(26) of the *Constitution Act 1867*, not to the provinces. While the Alberta government had tried to shield its definition of marriage by using section 33 of the *Charter*, that provision could not have saved the invalidity of the Act on division of powers grounds – there is no equivalent to section 33 under the *Constitution Act, 1867*. Surprisingly, the current version of the *Marriage Act* still contains the same definition of marriage, but Alberta marriage commissioners have been performing same sex marriages in this province since 2005 regardless.

According to Hogg (*supra*, section 39.2), the only other uses of section 33 outside of Quebec have occurred in the Yukon (in legislation that never came into effect – see the *Land Planning and Development Act*, SY 1982, c 22, section 39(1), concerning nominations to boards by the Council of Yukon Indians) and in back to work legislation in Saskatchewan (see the *SGEU Dispute Settlement Act*, SS 1984-85-85, c 111, section 9).

Although it has been used infrequently, this is not to say that section 33 has been largely irrelevant. It has often been used as an interpretive tool, for example to support the argument that *Charter* rights which are not subject to the notwithstanding clause are particularly important. In *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 65, the Court noted that the principle of democracy was “affirmed with particular clarity” in the *Charter*, in that the requirement for regular elections in section 4 was not made subject to section 33.

Similarly, in *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 at para 11, a case involving the voting rights of federal prisoners, it was noted that the “special importance” of section 3 of the *Charter*, which guarantees the right of every citizen to vote, was “signaled ... not only by its broad, untrammelled language, but by exempting it from legislative

override under s. 33's notwithstanding clause" (at para 11, per McLachlin CJ for the majority). The dissenting justices disagreed with this interpretive approach, stating: "There is little evidence of the intention behind excluding democratic rights (along with mobility rights, language rights, and enforcement provisions) from the ambit of s. 33, nor has this Court ever seriously considered the significance of such exclusion. The Chief Justice's conclusion ... requires examination before it can be used as support for nearly insulating the right to vote from s. 1 limitations." (at para 96 per Gonthier, J., L'Heureux-Dubé, Major and Bastarache JJ. concurring).

The Court later clarified its position in *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 2003 SCC 37, stating that "limits on s. 3 require not deference, but careful examination... . As the Court observed in [*Sauvé*], s. 3 is one of the *Charter* rights that cannot be overridden by the invocation of s. 33 of the *Charter*. This highlights the extent to which s. 3 is fundamental to our system of democracy and indicates that great care must be exercised in determining whether or not the government has justified a violation of s. 3" (at para 60 per Iacobucci, J. for the majority).

In an oft-quoted passage, the Supreme Court also explained how section 33 interacts with section 1 of the *Charter* in *R v Oakes*, [1986] 1 SCR 103 at para 63:

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada.

This passage confirms that governments need not justify violations of *Charter* rights which are the subject of declarations under section 33. Nor is a government's usage of section 33 itself subject to section 1 review, as the requirements of section 1 – "reasonable" limits "demonstrably justified in a free and democratic society" – would entail the sort of substantive review rejected in *Ford*.

The Supreme Court has also noted that Aboriginal rights are not subject to section 33, as they fall outside the *Charter* in Part II of the *Constitution Act, 1982* (See e.g. *R v Sparrow*, [1990] 1 SCR 1075 at para 47). This exclusion has not translated into a lack of power or in fact any particular burden on the part of governments to justify violations of Aboriginal rights. The burden on governments to justify such violations was found in *Sparrow* to flow from the Crown's fiduciary obligations rather than from section 1 of the *Charter* or the exclusion of section 35 from the section 33 override (at para 62).

Section 33 has also been used to explain and justify the scope of judicial review under the *Charter*, as well as to illustrate the notion of a dialogue between the courts and legislatures. For example, in *Vriend*, Justice Iacobucci stated that:

a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the

effect of enhancing the democratic process, not denying it. (at para 139, citing Peter Hogg and Allison Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)* (1997) 35 Osgoode Hall L. J. 75).

Justice Major also cited section 33 in his dissenting opinion on the remedy in *Vriend*. He was of the view that although the omission of sexual orientation under Alberta's human rights legislation was discriminatory, the Court should not read that ground in to the law. Instead, it should be left to the legislature to decide whether to add sexual orientation to the legislation or invoke the notwithstanding clause (at para 197).

What about the role of section 33 in the debate about whether we have moved from a state of parliamentary supremacy to one of constitutional supremacy? In *R v Newfoundland Association of Provincial Court Judges*, 2000 NFCA 46, the Newfoundland and Labrador Court of Appeal stated that: "While theory can be advanced that parliamentary supremacy was not really tempered by the *Charter's* advent because the *Charter*, itself, rests on parliamentary consent and authority, or because of the notwithstanding provision in s. 33 of the *Charter*, there is no need to venture into that avenue here" (at para 571). Section 33 is, of course, part of the constitution, so to the extent it allows a measure of parliamentary supremacy to continue, this is itself an aspect of constitutionalism.

Section 33 may not have been used as often as Peter Lougheed and the other Gang of Eight premiers expected when they advocated the inclusion of this provision in the *Charter*. And they may not have foreseen that it would underpin the courts' view of their strong role in reviewing legislation for compliance with the *Charter* to the extent that it has. Some might argue that, in spite of allegations of judicial activism, the courts have been rather timid in giving *Charter* rights their full force (particularly redistributive / social and economic rights), so that governments have not found the need to resort to section 33 very often. Others might say that the deployment of section 33 powers would be politically risky, although if used rarely, such a deployment might also provide an important opportunity for public debate on contentious issues (see Hogg, *supra*, section 39.8). Another view is that if governments are not using section 33 to the extent they could, it may be because the *Charter* is exerting a strong normative force on law making, regardless of the power to opt out of some sections (for an example of this sort of argument see John Whyte, "Sometimes Constitutions are made in the Streets: the Future of the Charter's Notwithstanding Clause" (2007) 16 Constitutional Forum 79). Whichever way you look at it, section 33 is much more than an artifact of our constitutional history, and the passing of one of its advocates provides a sad, but important opportunity to reflect on its significance.