



Section 33 – Notwithstanding clause

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Provision

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 section (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 section (1).

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

Similar provisions

Section 33 is unique among the constitutions of countries with constitutional democracies. However, certain international human rights conventions contain more limited notwithstanding clauses. Article 4 of the *International Covenant and Civil and Political Rights*, which is legally binding on Canada, contains a notwithstanding clause.

See also the following regional instruments that are not legally binding on Canada but include notwithstanding clauses: article 27 of the *American Convention on Human Rights*; article 15 of the *European Convention on Human Rights*.

Analysis

Section 33 allows Parliament or the legislature of a province to derogate from certain sections of the Charter, namely section 2 (fundamental freedoms), sections 7 to 14 (legal rights) and section 15 (equality rights). It does not apply to democratic rights (section 3 — the right to vote or sections 4 and 5 — the sitting of the House of Commons or other Canadian legislatures), mobility rights (section 6) or language rights (sections 16 to 23). The unavailability of s. 33 in respect of those rights reflects the special importance attached to them by the framers of the Charter (*Frank v. Canada (Attorney General)*, [2019] 1 S.C.R. 3, at para. 25; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 148). It remains unsettled whether section 33 applies to section 28 of the Charter (equality of men and women) (*Hak c. Procureure générale du Québec*, 2019 QCCA 2145, at paras. 39-52; 93-94; 133-134, application for leave to appeal dismissed by the Supreme Court on April 9, 2020).

Once invoked, section 33 effectively precludes judicial review of the legislation under the listed Charter sections. A section 33 declaration is only valid for 5 years. After this time period, it ceases to have any effect unless it is re-enacted.

Section 33 lays down a requirement of form only. In invoking section 33, the legislature does not need to identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights and/or freedoms, nor does the legislature need to provide a substantive justification for using the override (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, paragraph 33).

A declaration under section 33 is valid if it generally names all of sections 2 and 7 to 15, without specifying the possible provisions to which the override may apply. Omnibus legislation will not affect the validity of the declaration (*Ford, supra*).

Where the legislative intent is to override only part of the provision or provisions contained in a section, subsection or paragraph of the Charter, there must be a sufficient reference in words to the part to be overridden (*Ford, supra*).

The general rule of interpretation against retroactive and retrospective operation applies to section 33 of the Charter: section 33 has been interpreted by the Supreme Court as permitting prospective derogation only. If enacting legislation purports to give retrospective effect to an override of the Charter, the legislation is, to that extent, of no force or effect. (*Ford, supra; Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927).

Use of section 33 by the government

To date, the federal government has not invoked the notwithstanding clause.

Section 33 has been invoked on occasion by provincial governments. The clause was first invoked in 1982 when Quebec passed an omnibus enactment that repealed all pre-Charter legislation and re-enacted it with the addition of a standard clause that declared the legislation to operate notwithstanding section 2 and sections 7 to 15 of the Charter. The legislation also inserted the standard clause into all post-Charter enactments. The declaration in the omnibus legislation purported to have retroactive effect to April 17, 1982. This omnibus legislation was the subject of the decision in *Ford, supra*. It was not re-enacted when it expired.

Saskatchewan, the Yukon, Ontario, and Alberta have also made section 33 declarations. Not all of the laws in which these declarations were made were brought into force.

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Date modified:

2022-04-14