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Notwithstanding judicial benediction: Why we need to dispel the myths around section 33 of the Charter

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Introduction

If we are looking for dramatic moments of judicial arrogance in the short history of the *Canadian Charter of Rights and Freedoms*, we need not look further than the case of *SFL v. Saskatchewan*, where then Supreme Court Justice Rosalie Abella decided to bless Canadian organized labour with the constitutionalized right to strike.

In a direct reversal of precedent, Justice Abella wrote that "the right to strike" is "an indispensable component of collective bargaining," which in turn is a concept the Court has related to the Charter's section 2(d) right to freedom of association. Abella then mused that: "It seems to me to be the time to give this conclusion constitutional benediction" (*Saskatchewan Federation of Labour v. Saskatchewan* [2020]).

In Christianity, a benediction is a blessing. The secular task of adjudication is about interpreting rights not blessing their creation *ex nihilo*. As Howard Anglin (2022) has recently argued, it is important to keep Abella's priestly attitude in mind when we consider the Ontario legislature's enactment of

the Ford government's Bill 28: *Keeping Students in Class Act, 2022,* with an invocation of section 33 of the Charter's infamous "notwithstanding clause." The Canadian Union of Public Employees (CUPE) decided to illegally strike anyway, closing schools across the province. The Ford government has now agreed to move to repeal the Act in exchange for the Union workers returning to work and the negotiating table.

In this constitutional skirmish, the notwithstanding clause was clearly invoked to override the ability of CUPE's workers to assert a Charter right to strike in court against any back-to-work legislation. The episode has prompted much Laurentian wringing of hands over yet another provincial use of the notwithstanding clause.

The normative bottom line is that you can disagree with the substance of Ontario's use of the law, and even with the level of justification offered by Ford's government, and yet recognize the reality that the notwithstanding clause is a valid legislative tool for resisting judicial activism. There is also a substantive case to be made that Ontario was justified to use section 33 in this case, although my view is that the Ford government has done a poor job of explaining to Ontarians why the pre-emptive use of the clause was necessary to resist judicial activism. The empirical bottom line is that the Supreme Court's activism in *SFL* made Ontario's use of section 33 quite predictable. There will be many more provincial uses of the clause to come, and possibly even federal uses of the clause

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Notwithstanding two myths

Let's unpack some of the misinformation surrounding section 33. It seems that every time a legislature invokes section 33, there is much weeping and gnashing of teeth, and each of these episodes tends to raise the same myths. As such, in the wake of Ontario's invocation of the clause, it was unsurprising to see commentators once again misrepresenting its significance and history.

The two myths about the clause that responsible commentators should cease repeating are (i) that section 33 was intended by the framers of the Charter to only be used rarely or in emergencies and (ii) that the clause overrides the Constitution itself, or is somehow opposed to the Charter. Even the most ardent critics of section 33 cannot premise their conclusions on either myth without short-circuiting their arguments.

The myth of notwithstanding emergencies

The myth of notwithstanding emergencies is partly perpetuated by selected framers of the Charter. The idea that the clause should only be used in emergencies can be traced all the way back to then-Minister of Justice Jean Chrétien's words introducing the penultimate text of the Charter to Parliament

by saying section 33 was required by "the need for a safety valve to correct absurd situations."

Since then Chrétien has repeatedly stated his view that section 33 was meant for rare emergencies, even going to far as to join Ontario's former attorney general Roy McMurty and Saskatchewan's former premier Roy Romanow (Maclean's 2018) in condemning the Ford government's invocation of section 33 in (unenacted) legislation shrinking Toronto's City Council in 2018. McMurty was Bill Davis' attorney general in those negotiations; Romanow was part of Alan Blakeney's team that advocated for the notwithstanding clause during the constitutional negotiations that led to the Charter.

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Chrétien, Romanow and McMurty were all key players in the "Kitchen Accord" that saw the federal government agree to the notwithstanding clause in exchange for the agreement of all provinces but Quebec to the Charter and the new amendments procedures. All three signed a letter describing the notwithstanding clause as: "designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration" (Maclean's 2018).

But all of this is a kind of selective original intent revisionism. Chrétien and his prime minister, Pierre Elliot Trudeau, opposed the notwithstanding clause and only agreed to it as a compromise with the provinces. They both *hoped* that the clause would only be used in exceptional circumstances because they saw the Charter as a strong centralizing instrument for unifying "Charter Canadians" across their various regional identities. McMurty's boss in the negotiations, Ontario Premier Bill Davis, supported a Charter without a notwithstanding clause and tried to limit the clause so that it wouldn't apply to section 2's fundamental freedoms. Chrétien and McMurty's positions as advocates of a Charter without a notwithstanding clause places an important qualifier on their ability to speak authoritatively about its intended purpose.

Romanow is a more interesting story. Romanow's boss, Alan Blakeney, was opposed to the Charter as an instrument of centralizing federal power that threatened to allow judicial elites to overturn provincial legislation protecting rights left out of the Charter, such as the right to housing. Romanow can say whatever he wants about how he intended section 33 to be used, but he was working for Blakeney and fortunately we have the boss' views in his own words.

In his reflections, Blakeney openly stated that he was a fan of using section 33 to correct activist judicial interpretations of the Charter and "to protect a fundamental right that is not included in the Charter" (Blakeney 2010, 6). When it came to rights relating to the economy, he went further to say:

> The Charter was not intended and should not be interpreted to give the courts a role in the distribution of the economic power in society. Thus, the Charter right of an individual to "security of the person" does not trump the rights of other groups of persons. (Blakeney 2010, 4-5)

There is no hint in Blakeney's writings on section 33, nor in his memoirs, that he thought section 33 would be reserved for "absurd situations" or "exceptional situations." Blakeney's writings cite Franklin Delano Roosevelt, the US president who threatened to pack the Supreme Court to overcome judicial opposition to the "New Deal," as his inspiration for dealing with courts. His reflections are infused with democratic hostility to judicial elites as final arbiters of important rights questions. Indeed, of all the framers, Blakeney seemed the blithest about using section 33 to teach courts lessons about the importance of rights not found in the Charter.

Whatever the motivations for Romanow's statements today, he is contradicting what the historical record says about his boss' intentions in 1981. Blakeney's concern with courts invalidating legislated rights for workers does suggest that he would object to the *substance* of the Ford government's use of the notwithstanding clause in its back-to-work legislation, but Blakeney's arguments make it difficult to say that there is something *procedurally* awry with using the clause to contest judicial interference with "the distribution of economic power in society" in non-emergency circumstances.

The other key supporter of the notwithstanding clause was Alberta's Conservative Premier Peter Lougheed. Lougheed shared Blakeney's skepticism about the centralizing nature of the Charter, but he placed more emphasis on the need for section 33 as a means of contesting particularly activist and mistaken judicial interpretations of rights. Those who think that Lougheed would have disapproved of Doug Ford's invocation of section 33 should consult his reflections on why he advocated for the clause as part of the Charter.

Lougheed announced in 1983 that if the Supreme Court struck down Alberta's back-to-work legislation as violating the right to freedom of association: "we, the Alberta government, would forthwith introduce similar legislation and include the 'notwithstanding' clause as provided by section 33" (Lougheed 1998, 10).

Lougheed did argue for caution in the use of section 33, and he may have objected to the quality of the Ford government's public justification for the clause. But he himself thought it justifiable to use the clause to contest courts inventing the right to strike: it just took 32 years for an activist court

to grant this right judicial "benediction." It's true that Lougheed also argued for amending the Constitution to prohibit pre-emptive uses of the clause, but even that argument revealed how Lougheed did not think the text of the Charter restricted pre-emptive uses. That's why he thought a Constitutional amendment would be required to restrict this use, unlike certain commentators today who seem to think the original meaning of the clause is somehow opposed to pre-emptive uses.

And its unclear why it matters here that Ford used the clause pre-emptively, given that the courts had already showed their activist card on this matter, invading policy matters that lie squarely in the jurisdiction of the provincial legislatures. If Lougheed lived to see the Court openly granting "benediction" to rights that he once considered using the notwithstanding clause to disagree with, it's quite possible that he would have changed his mind about restricting pre-emptive uses.

There is no dispositive historical evidence that the framers of the Charter agreed that the clause should only be used in emergencies or treated as a "nuclear option." On the contrary, this is a convenient myth for those who worship at the altar of judicial activism. For those interested in more discussion of the history of the clause I suggest checking out Dwight Newman's scholarship (Newman 2019).

The myth of overriding the Constitution

The second myth surrounding the notwithstanding clause is that it somehow involves overriding the Constitution or suspends the Charter. To my ears, the CBC and other news outlets have become slightly better at describing the legal effect of notwithstanding clause invocations on Charter rights. Perhaps this is partly because prominent recent litigation has made it clear that there is legal disagreement about how to technically understand the clause.

Even so, we see commentators repeating the same old myth that the notwithstanding clause suspends fundamental law, like some embodiment of Carl Schmitt's fantasies. Section 33 is part of the Constitution, it *is part of the* Charter *itself*, and so legislatures that use it according to the clause's own formal requirements are following the Constitution.

The more interesting question is what the technical effect of using this part of the Constitution has on the relationship between the law invoking the clause and the provisions of the Charter it applies to. This is one of the key questions at stake in the litigation concerning Quebec's invocation of section 33 in *Loi 21*, a statute prohibiting some civil servants from wearing religious symbols and all civil servants from covering their faces. The litigation in the *Hak* case raises the question of whether laws invoking section 33 can be declared "inconsistent" with the provisions of the Charter they apply to, even though they are otherwise constitutional.

My own view is that the text of section 33.2 clearly prohibits courts from making declarations about the consistency of a law invoking the clause because such a statute "shall have such operation as it would but for the provision of the Charter referred to in the declaration" (Sigalet Forthcoming). This doesn't just protect the "operation" of an unconstitutional law, but rather tells judges that the law is to be treated as constitutional notwithstanding its relationship with the Charter rights it affects. This leaves the question of the consistency of the law with right up to the political process, at least for the five-year period in which the notwithstanding clause has effect. This interpretation fits with the historical reasons why Blakeney and Lougheed insisted on including the clause in the Charter: it ensures the legislatures have a turn to *disagree* with courts about Charter rights.

Notwithstanding the "Charter Party"

With these myths out of the way, it becomes a bit more obvious that certain reactions to the use of the clause are either the result of misunderstanding the Constitution or calculated virtue signalling. The federal Liberal government's reaction drew on the myths about the clause in a way that is consistent with the Liberal Party's doctrinal antipathy towards section 33, while also constituting a politically rational and low-risk form of virtue signalling.

The federal Minister of Labour, Seamus O'Reagan, responded to Ontario's invocation of the clause by invoking the myth of emergency use: "It's an affront to democracy. The notwithstanding clause is meant to be used in the most extreme of circumstances" (The Canadian Press 2022).

Not so. That was the hope of the Liberal framers who opposed including it in the Charter. It was not the original intent of the framers considered as a group, especially not the framers who advocated for including the clause as part of the Charter package.

The more legally literate federal Minister of Justice, David Lametti, perhaps unwittingly, repeated Lougheed's critique of using the clause pre-emptively:

> The use of the notwithstanding clause is very serious. It de facto means that people's rights are being infringed… the notwithstanding clause is there and it was included to guarantee parliamentary supremacy, but as the last word. If you use it as the first word, it has the impact of reducing political debate, cutting off political debate. It's effectively like a kind of closure, and it completely eviscerates judicial scrutiny. (The Canadian Press 2022)

It's nice to know that the Minister of Justice agrees with my view that section 33 cuts off judicial scrutiny, even if he's wrong that the clause "de facto" infringes and overrides rights (see Sigalet 2022). The latter view indulges in the myth of overriding the Constitution. And it's difficult to see how anyone

could say that Ontario has used the clause to have the "first word" about the right to strike in a way that cuts off political debate. As we've seen, the courts have already had their priestly "first word" by reading the right to strike into the section 2(d) freedom of association.

As Professor Dave Snow (2022) has recently argued, because Ontario is responding to past judicial activism that erodes its policy jurisdiction, its use of section 33 hardly counts as a pre-emptive "first word" about the right to strike in anything but a technical sense. And there has been obviously robust political debate since the clause was invoked; the result has been a compromise with CUPE abandoning their illegal strike and Ontario repealing the back-to-work legislation. The clause doesn't cut off political debate but ignites it. And the five-year expiration of the clause is timed to help *reignite* the debate about any invocation.

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Lametti raised the possibility of federal intervention, saying "there are a number of different things one might do, but I'm not going to discuss my options" (Walsh and Mcleod 2022). No federal intervention was possible because the back-to-work law was repealed, but what were the federal options?

The government could have imitated the litigators challenging *Loi 21* in Quebec's *Hak* case by seeking a declaration that the Ontario law is inconsistent with the Charter freedom of association without impacting the law's operation. This would have a dim chance of success because the courts are unlikely to be convinced that section 33.2 protects *only* the operation of laws, rather than their constitutional validity and operation.

The government could have followed Andrew Coyne's (2022) irresponsible suggestion of disallowing the Ontario law. But there is a constitutional convention against the use of the disallowance power (which is why the premiers ignored Pierre Trudeau's attempt to use it as a bargaining chip in the patriation negotiations) and using it would cause a constitutional crisis. Alberta and Saskatchewan are already threatening to enact laws aggressively defending their sovereignty, if the federal government disallowed a provincial law, the consequence would be the fiercest provincial rights movement since the days of Oliver Mowat.

Finally, the government could have initiated talks to amend or repeal section 33 from the Charter with the agreement of at least seven provinces represent-

ing at least half the population. This is obviously not going to happen because the provinces would never agree to give up their only tool to resist judicial activism by federally-appointed courts.

None of the options open to the federal government would have had any hope of stopping Ontario's back-to-work law. This suggests that federal Liberals leapt at a chance to attack the notwithstanding clause because there is more reward than risk in reminding Canadians of the myths of the Liberal Party as the "Charter Party" during a time when the Public Order Emergency Commission is looking into whether the government acted *ultra vires* by invoking the *Emergencies Act* to respond to the 2021 trucker protests in Ottawa.

In recent testimony, Lametti has been unwilling to waive solicitor-client privilege to explain the interpretation of "threat to national security" that justified invoking the Act. He also tried to reassure Canadians that he was joking when he responded to Public Safety Minister Marco Mendicino's text of "How many tanks are you asking for?" with "I reckon one will do!" (Forrest 2022). Even if we grant that he was joking, he was joking about suspending Charter rights by using military force against civilians. That kind of joke doesn't fit well with the myths of the "Charter Party." Attacking the notwithstanding clause does. But it may be that the myths are losing their charm.

As for the courts, the myths of the "Charter Party" will do nothing to prevent provincial legislatures from exercising their right to invoke the notwithstanding clause to protect their jurisdiction from judicial activism. The more federally appointed courts use the Charter to invade provincial jurisdiction, the more laws we will see notwithstanding judicial benediction.

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Geoffrey Sigalet is the Director of the UBC Centre for Constitutional Law and Legal Studies and an Assistant Prof. of Political Science at the University of British Columbia's Okanagan Campus. He held research fellowships at McGill's Research Group on Constitutional Studies, Stanford Law School's Constitutional Law Center, and Queen's Law School. In 2018 he received his PhD in public law and political theory from Princeton University. His research investigates how constitutional principles such as the separation of powers, proportionality in rights adjudication, judicial independence, and parliamentary supremacy relate to democratic politics. His focus is on principles that matter in the Westminster and the US constitutions.

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