

Special Issue Foreward: The Notwithstanding Clause

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No issue is more important to the future of the Canadian constitutional and political firmament than the interpretation of section 33 of the *Constitution Act, 1982*, popularly known as the notwithstanding clause. It thus with deep satisfaction that I write this forward to this collection of papers on the notwithstanding clause.

The *Charter of Rights and Freedoms* became part of the Canadian Constitution in 1982. The *Charter* guaranteed basic rights and freedoms of Canadians and changed Canada from a parliamentary democracy to a constitutional democracy. This meant that courts would have the final say on the ambit of the newly recognized rights, not Parliament. To ease concerns about this, the notwithstanding clause was introduced, allowing Parliament or a legislature to declare that an Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter*.

During the first four decades of the *Charter*, the notwithstanding clause was not much used and not much studied. But recent invocations of section 33 by provincial premiers have renewed interest in the provision. What was once regarded by many as a simple formula for suspending rights appears increasingly complex. New questions have been raised. How does section 33 fit with other provisions of the *Charter*, like the section 28 guarantee of gender equality rights and the section 52(1) supremacy clause which provides that any law that inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect? What light does historical investigation shed on the intention behind the notwithstanding clause? When does section 33 apply — must there be a court decision interpreting the

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right before the legislature can invoke it? Can a legislature invoke section 33 as a pre-emptive shield to preclude any judicial consideration of the rights at issue, potentially negating a whole range of rights and freedoms guaranteed by the *Charter*? Given that section 33 has only been invoked by provinces, what are the implications on the federal-provincial balance of power? How does the pre-emptive use of section 33 by legislatures fit with the norms of accountability that underlie our constitution? And, last but not least, what are the implications of the use of section 33 in the current political climate?

These are but some of questions tackled by the essays in this collection. They are important questions, vital to Canada's constitutional and democratic future. It is my hope that the collection will stimulate searching consideration and deep discussion on how section 33 should be interpreted and applied as we move forward on the Canadian constitutional journey.