Toronto Law Journal

The Charter: A remedy notwithstanding s. 33

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What can be done to protect our Charter rights and freedoms now that the taboo against using the notwithstanding clause has evaporated? This is a pressing problem facing Canadians today, frequently debated in national newspapers.[1] Thankfully, a close reading of the Charter offers a route to meaningful remedies that has not been taken before: when the government invokes s.33 to prevent courts from overturning a law because it is inconsistent with enumerated sections of the Charter, s.24(1) empowers courts to grant a wide range of remedies to hold the government accountable for choosing to declare that its present priorities are more important than our fundamental rights.

The Supreme Court of Canada has frequently stated that no part of the Constitution can abrogate or diminish another part.[2] The SCC has often ruled that every word in a statute must have a meaning, and courts make every effort to read statutes as internally consistent. The Charter deserves the same treatment, so it is critical to look at the interplay of s.33 and s.24, and to consider what s.33 does and does not say. Section 33 reads:

> **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.
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> **33(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.

Section 33 clearly limits the powers of courts to overturn laws where governments declare they will operate notwithstanding our Charter rights. Among other things, a Court cannot rely on s.52 of the *Constitution Act, 1982* to strike down, read down, or read into such laws anything that would prevent those laws from breaching enumerated Charter rights. Once the

[1] Recent suggestions include revisiting *Ford v Quebec (AG)*, [1992] 2 SCR 679 [*Ford*] to find ways to prevent governments from invoking the notwithstanding clause pre-emptively. See A. Dodek, "It's time for the Supreme Court, and the federal government, to stand up for the Charter" *Globe and Mail* (Nov 8/22, updated Jan 4/22) https://www.theglobeandmail.com/opinion/article-liberals-supreme-court-charter-notwithstanding-clause/. Mr. Dodek's approach would require the legislature to wait until a court has ruled on the constitutionality of law before declaring that law operative notwithstanding the Charter. But it is hard to see how requiring s.33 declarations to be reactive is anything more than a costly detour through the courts easily rendered moot by a government intent on getting its way. It may even discourage affected parties from seeking any remedy at all. Consider the reactive use of the notwithstanding clause in relation to the Toronto City Council size in *Toronto (City) v Ontario (AG)*, 2021 SCC 34. Canadians need better ideas. I owe the impetus for the idea described in this note to a conversation with Paul Sweeney.

[2] See, e.g., *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [*Doucet-Boudreau*] at para 42, and the cases cited therein.

notwithstanding clause has been invoked, there is nothing a court can do to prevent the government from infringing or denying our constitutional rights.

Section 24 of the Charter enables courts to grant a broad range of remedies to compensate the victim, vindicate the right, and deter future breaches in circumstances where Charter rights are infringed or denied,[3] and s.24(1) applies notwithstanding a s.33 declaration. The most well-known remedy is the exclusion of evidence obtained in contravention of Charter rights. But s.24(2) is just an example of an extraordinarily broad range of remedies available under s.24(1) to address Charter right infringements:

> **24 (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Examples of 24(1) orders include: government must pay damages;[4] government must build schools and report on progress;[5] government must seek repatriation of a prisoner;[6] government must grant an exemption under a regulatory regime.[7] When faced with a s.33 declaration, courts can fashion comparable remedies that vindicate Charter rights without overriding Charter-infringing laws.[8]

A government intent on using the notwithstanding clause might object: s.24(1) only protects rights and freedoms "as guaranteed by this Charter", and s.33 effectively means that Charter rights are only guaranteed if no s.33 declaration is made. In other words, our Charter 'rights' are not guaranteed by the Charter at all – they are only there by the grace of our elected representatives.

The very title *The Canadian Charter of Rights and Freedoms* should be enough to answer this objection – it's not called *The Canadian Charter of Hints and Suggestions* and it clearly contains a list of fundamental rights. But we can do better than pointing at the title.

Section 33 does not say that Charters right are suspended, that the law does not (or will be deemed to not) infringe or deny Charter rights, that the Crown has no liability to persons whose Charter rights are impacted by a law subject to a s.33 declaration, or that such persons have no cause of action against the government. Many statutes do use words of that kind. For example, the *Crown Liability and Proceedings Act* includes various provisions that say nothing in the statute makes the Crown liable for certain actions and that no proceedings lie against

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[3] The purposes of a s.24(1) remedy per the SCC in *Vancouver (City) v Ward* [*Ward*], 2010 SCC 27, at para 4.
[4] *Ward*
[5] *Doucet-Boudreau*; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 [*Conseil scolaire*]
[6] *Canada (Prime Minister) v Khadr*, 2010 SCC 3
[7] *Canada (AG) v PHS Community Services Society*, 2011 SCC 44
[8] SCC hinted at this in *Ontario (AG) v G*, 2020 SCC 38, where it found that s.24(1) remedies may lie where a s.52 declaration is suspended, and made an exception to the limits on s.24(1) imposed by the SCC in *Schachter v Canada*, [1992] 2 SCR 679.

the Crown for specified matters.[9] Moreover, s.24(1) is not one of the Charter provisions that s.33 says can be overridden by government declaration. The courts should read these differences as intentional and meaningful.

A better reading of the "as guaranteed by this Charter" clause in s.24(1) is readily apparent. Canadians have many rights under statute and common law. Section 24(1) does not create remedies for infringement of any rights, but only for infringement of Charter rights. The French version of s.24(1) bears this interpretation out.

A broad and purposive reading of the Charter, and the specific text of ss.33 and 24, gives Canadians a remedy to the notwithstanding malaise. Where a government has invoked s.33 of the Charter, harmed persons have standing to seek a remedy from the courts. The presiding court can and should examine the impugned law and determine (1) whether the law (or application of the law) breaches Charter rights, and, if so, (2) whether that breach is saved by the application of s.1. In answering these questions, the Court should consider a s.33 declaration as persuasive but rebuttable evidence that the law in question does violate the Charter – why else would the government take the extreme step of overriding the supreme law of the land? Similarly, a s.33 declaration rebuts a claim of limited government immunity from damages (*Mackin*[10] immunity), since the legislature has evinced clear disregard for the claimant's *Charter* rights[11] and s.52 remedy is not available. The court should do what the SCC in *Ford* said that the legislature does not have to do: deliver a *Ford* list explaining in detail what parts of the law violate the Charter, why and how.

If the law violates Charter rights and is not saved by s.1, s.24(1) empowers courts to grant a broad range of remedies under the Charter to compensate Canadians for the infringement of their rights and hold government to account. For example, the court could treat a law that bans persons from wearing religious symbols analogous to conduct causing catastrophic injury, and order the government to (a) study and report on the consequences (e.g., report on the number of people leaving the field, declining enrollment of minorities in educational programs, etc.);[12] and (b) pay the equivalent of lost salary for the life of the affected individuals. The damages could be divided into 5-year increments, with subsequent increments becoming payable only if the government decides to renew the s.33 declaration. Remedies can be fashioned for other uses of the notwithstanding clause. The scope of available remedies is only limited by the creativity of the lawyers and judges in crafting an effective remedy and the text of s.33, which prevents the court from overriding the intended operation of the law.

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[9] RSC 1985, c C-50. See, e.g., s.8: "Nothing in sections 3 to 7 makes the Crown liable in respect of…"; and s.9: "No proceedings lie against the Crown or a servant of the Crown in respect of…"

[10] *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13.

[11] See para 79 of *Mackin*: "the government and its representatives are required to exercise their powers in good faith and to respect the 'established and indisputable' laws that define the constitutional rights of individuals." The SCC has made similar comments elsewhere, e.g., *Ward* at para 43; *Conseil scolaire* at para 171: "the possibility of damages being awarded in respect of *Charter*-infringing government policies helps ensure that government actions are respectful of fundamental rights."; similar comments by the dissent at paras 298 and 300.

[12] Seeking the remedy as a class action is a way around the holding that s.24(1) only creates individual remedies.

The court could give the government a short time to decide whether it wants to rectify the law so that it does not violate Charter rights, using the court's *Ford* list as a guide. But if the government is intent on seeing its law in effect, then it is incumbent on the court to impose meaningful consequences for that decision. The SCC says there is no right where there is no remedy.[13] A broad reading of s.33 ignores too many of the words in the Charter. The notwithstanding clause is not and cannot be allowed to be a blank cheque for governments to abrogate our fundamental rights, or else the Charter is not worth the paper it is written on.

[13] See, e.g., *Doucet-Boudreau* at para 25