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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.
>
> **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

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The Challenge of Removing an Estate Trustee

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A word of caution to anyone engaged in estate planning – take care when choosing the person who will administer your estate. Since estate trustees are not required to have any relevant experience or expertise,[1] it can be quite difficult to remove a trustee after probate is granted, even if complications arise during an estate administration. Ontario courts have consistently reiterated that they "will not lightly interfere with the testator's choice of estate trustee".[2]

Removing a trustee may be a difficult task, but luckily, it is not impossible. This article addresses the procedure for applying to remove a trustee, the grounds for removal, and also explores potential alternatives.

Procedural considerations

An application to remove an estate trustee is largely governed by the *Trustee Act*[3] and the *Rules of Civil Procedure*.[4] While the *Trustee Act* codifies the court's power to remove a trustee,[5] the actual removal application is brought under the *Rules* – either rule 14.05(3)(c) or rule 75.04(c).[6] The application must be made by an individual who has an interest in the estate,[7] such as a beneficiary, a fellow estate trustee, an alternate executor, or a spouse who has applied for equalization under the *Family Law Act*.[8]

There are no prerequisites to seeking this relief. Unlike a will challenge, it is not necessary to satisfy a minimal evidentiary threshold before the application can be heard, and it is also unnecessary to first seek leave or to bring a motion for directions.[9]

Since a removal application will only be granted if there is "the clearest of evidence that there is no other course to follow,"[10] it is advisable to present a full evidentiary record to the court, including transcripts of cross-examinations.[11] The application may not be granted if, for

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[1] *Meuse v. Taylor*, 2022 ONSC 1436 at para. 43 [*Meuse*].
[2] This principle has been reiterated in a number of cases, including *Re Weil*, 1961 CanLII 157 (Ont. C.A.); *Virk v. Brar Estate*, 2014 ONSC 4611 at para. 48 [*Virk*]; *Radford v. Wilkins*, 2008 CanLII 45548 (Ont. S.C.J.) at para. 100 [*Radford*]; and *Meuse*, *ibid.* at para. 12.
[3] R.S.O. 1990, c. T.23.
[4] R.R.O. 1990, Reg. 194.
[5] *Trustee Act*, *supra* note 3, s. 37. The court also has inherent jurisdiction to remove an estate trustee: see *St. Joseph's Health Centre v. Dzwiekowski*, 2007 CanLII 51347 (Ont. S.C.J.) at para. 25 [*St. Joseph's*].
[6] See *Kasandra v. Satarelli*, 2022 ONSC 185 at para. 33 [*Kasandra*].
[7] *Trustee Act*, *supra* note 3, s. 37(3).
[8] R.S.O. 1990, c. F.3, s. 5. See also Ian M. Hull and Suzana Popovic-Montag, *Probate Practice*, 5th ed (Toronto: Thomson Reuters, 2016) at 250 [*Probate Practice*].
[9] *Kasandra*, *supra* note 6 at paras. 32-34.
[10] *Virk*, *supra* note 2 at para. 48.
[11] See *Kasandra*, *supra* note 6 at para. 39.

example, only conflicting affidavit evidence is before the court.[12] Depending on the grounds for removal, it may also be prudent to apply for removal after the trustee has passed his or her accounts.[13] The applicable standard of proof for the application is the balance of probabilities.[14]

Grounds for removal

When faced with a removal application, the court's main considerations include the welfare of the beneficiaries, whether the estate trustee's acts and omissions are of such a nature as to endanger the administration of the estate, and whether non-removal will prevent the proper execution of the trust.[15]

While the outcome of any application will ultimately turn on the facts before the court, a number of bases for removal are relatively non-contentious, such as when the estate trustee:

- lacks capacity due to illness and/or old age;[16]
- resides outside Ontario;[17]
- is bankrupt;[18] or
- is a convicted felon.[19]

In comparison, the outcome of a removal application argued on other grounds may be difficult to predict. Consider the following examples:

- Delay in administering an estate: While delay certainly can result in removal,[20] the success of the application will depend on whether the delay can be reasonably explained, whether it compromised the estate, and whether such behaviour will be repeated.[21]

- Misconduct: Benign errors, mistakes and breaches of trust may not warrant the removal of an estate trustee,[22] particularly if past misconduct is not likely to continue.[23] However, if an estate trustee has defied the testator's will and his or her conduct demonstrates lack of intention to carry out the terms of the trust, removal will be justified.[24]

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[12] *Koglin Estate (Re)*, 2021 BCSC 2525 at para. 56.
[13] See *Byle v. Byle Estate*, 2006 BCSC 1695 at paras. 22-23; *Bull-Noel v. Kebe*, 2010 ONSC 1056 at para. 13.
[14] *St. Joseph's*, *supra* note 5 at para. 37; see also *Schaeffer Estate (Re)*, 2016 ABQB 180 at para. 175 [*Schaeffer*].
[15] See *Virk*, *supra* note 2 at para. 48; *Meuse*, *supra* note 1 at para. 12.
[16] See *Kullman Estate (Re)*, 2022 NLSC 159.
[17] *Probate Practice*, *supra* note 8 at 255.
[18] *Ibid.* at 254, but see *Chambers v. Chambers*, 2013 ONCA 511 at para. 96 [*Chambers*].
[19] *Probate Practice*, *ibid.* at 255.
[20] See, for example, *Kinnear v. White*, 2022 ONSC 2576; *Knight Estate (Re)*, 2014 ABQB 8.
[21] *Radford*, *supra* note 2 at paras. 108-109.
[22] See *Probate Practice*, *supra* note 8 at 259.
[23] *Virk*, *supra* note 2 at para. 48; *St. Joseph's*, *supra* note 5 at paras. 28-29.
[24] See, for example, *Scott v. Scott*, 2022 NLCA 61at para. 22; *Wood's Homes Society v. Selock*, 2021 ABCA 431.

- Conflicts of interest: If an individual's duty as the administrator of the estate is at odds with his or her personal interests, removal may be ordered.[25] Examples of such conflicts include the estate trustee owing unpaid debts to the estate,[26] or challenging the will after probate is granted.[27] However, not all conflicts will merit removal – for example, many beneficiaries are executors of the estate they administer, creating an inherent conflict of interest. A testator may also expressly authorize a trustee to administer the estate notwithstanding a conflict.[28]

- Hostility and friction: Regardless of whether there is hostility amongst an estate trustee and the beneficiaries of the estate, or among multiple estate trustees, friction on its own may not merit removal.[29] It is only if friction will prevent the proper administration of the trust, or make it difficult for the trustee to act impartially, that removal may be ordered.[30] If there are additional grounds to remove an estate trustee, hostility may also tip the scales in favour of removal.[31]

While there are many more grounds available for seeking removal of an estate trustee, these examples demonstrate how difficult it can be to successfully predict the circumstances under which a trustee will actually be removed.

Alternatives to removal

Another point to ponder before applying for removal is whether another, less-costly solution may be available. The removal of an estate trustee can be "bitter, expensive and time-consuming, and is rarely productive of any real positive result," making litigation something of a last resort.[32] Moreover, if the applicant is a fellow estate trustee, there is a real possibility that the court will require the parties to meet to address their issues and explore solutions, rather than grant a removal application.[33]

Even if an applicant is not an estate trustee, it would be prudent to consider whether alternative relief can be sought from the court in addition to removal. For example, an applicant may ask the court to utilize its inherent jurisdiction to limit the scope of the estate trustee's authority if removal is not granted.[34] Another potential solution may be simply asking the estate trustee to retire.

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[25] See *Chambers*, *supra* note 18 at para. 96; *Bereskin Estate, Re*, 2014 MBCA 15; *Greeley Estate v. Greeley*, 2016 NLCA 26.
[26] See *Re Estate of Rose May Hazlitt*, 2017 MBQB 184.
[27] See *Jones (Estate)*, 2017 SKQB 388.
[28] See *Stern v. Stern*, 2010 MBQB 68 at para. 14.
[29] *Radford*, *supra* note 2 at paras. 111-113; *Chambers*, *supra* note 18 at para. 96.
[30] See *Oldfield v. Hewson*, 2005 CanLII 2808 (Ont. S.C.J.) at para 27; *Schaeffer*, *supra* note 14 at paras. 176-177. See also *Meuse*, *supra* note 1 at para. 15.
[31] *Cordeiro v. Kulikovsky*, 2003 CanLII 37094 (Ont S.C.J.) at para. 49.
[32] *Probate Practice*, *supra* note 8 at 263-264.
[33] See *Re Brodylo Estate*, 2022 ABQB 358; *Hill v. McLoughlin*, 2007 CanLII 1334 (Ont. S.C.J.) at para. 23.
[34] *Dempster v. Dempster Estate*, 2008 CanLII 59558 (Ont. S.C.J.); *Assaf Estate (Re)*, 2008 CanLII 23489 (Ont. S.C.J.) at paras. 32-33

Conclusion

While it has been noted that a court should not act "too readily" to remove an estate trustee,[35] as a general rule, a removal application will be warranted if there is clear evidence that the estate trustee is not acting in the interests of the beneficiaries, and there is no other recourse readily available that will respect the testator's choice of trustee. Like anything in life though, success cannot be guaranteed. Given the possibility that a removal application may not be granted and that the applicant will have to continue to work with the trustee, such an application should be approached with sensitivity.

[35] *Schaeffer*, *supra* note 14 at para. 175.

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"Special Circumstances" Save Expungement of a Trademark

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The decision of the Trademarks Opposition Board (the "**Board**") in Life Maid Right - 2799232 Ontario Inc. and Maid Right, LLC (2022 TMOB 104),1 Maid Right, LLC[1] ("**Maid Right**") serves to highlight the importance to a franchisor of documenting efforts to launch the franchise system. Specifically, the Board, because of the unique circumstances in which Maid Right found itself, agreed to maintain the franchisor's trademark notwithstanding that there was no evidence that the associated services had been offered to the Canadian public.

FACTS

In April 2018, Maid Right acquired various assets associated with the Maid Right cleaning services franchise system including the trademark registration MAID RIGHT (the "**Trademark**"). Summary cancellation proceedings were commended against the Trademark in December 2020.

To maintain the registration, Maid Right was required to provide evidence of the use of the Trademark in Canada during the 3-year period prior to the cancellation proceeding which included the period between December 2017 and April 2018, during which Maid Right was not the owner of the Trademark.

The Board could not find any evidence of the use of the Trademark in association with the services in Canada during the 3-years prior to the cancellation proceeding. Given the foregoing conclusion, it was thus up to Maid Right to establish that there were "special circumstances" which would otherwise justify the non-use. Absent Maid Right establishing that there were "special circumstances" justifying the non-use, the Trademark would be expunged.

WHAT CONSTITUTES "SPECIAL CIRCUMSTANCES"

Whether or not "special circumstances" exist which would otherwise justify non-use of a trademark by a registrant are determined by reference to the following three criteria: (i) the period during which a registrant had not used the trademark; (ii) whether the reasons for non-use were within the control of the registrant; and (iii) whether the registrant seriously intended to resume use of the trademark within a short period of time.

[1] Life Maid Right - 2799232 Ontario Inc. and Maid Right, LLC, 2022 TMOB 104 (CanLII) (https://canlii.ca/t/jpnfb)

WHAT EVIDENCE DID MAID RIGHT PRESENT TO DEMONSTRATE "SPECIAL CIRCUMSTANCES"

Maid Right was able to demonstrate that:

(i) because of its qualification process and the significant investment required, there was a limited pool of potential individuals who could potentially become Maid Right franchisees;

(ii) Maid Right had an extensive training program involving 40 hours of initial training, 80 hours of online training, 36 hours of classroom training and 4 hours of field training which meant that it would take time for a franchisee to become fully trained and commence operating the Maid Right franchise system;

(iii) Maid Right had expended significant management time and incurred expense in preparing a franchise disclosure document to comply with provincial franchise legislation in Ontario and Alberta. Further, the Board acknowledged that the process between the delivery of a franchise disclosure document and having franchisees execute franchise agreements, was a somewhat slow one;

(iv) although it had made efforts to recruit franchisees during the years 2019 to 2020 (prior to COVID), this effort only resulted in Maid Right executing one franchise agreement (ultimately this franchisee decided not to proceed); and

(v) these challenges were magnified because of the COVID pandemic.

The cumulative effect of the foregoing evidence was that Maid Right was able to establish that it had, in good faith, attempted to commence the Maid Right franchise system during the 3-year period prior to the cancellation hearing, and that its failure to do so were for reasons which were not within Maid Right's control.

Finally, the Board also did not include the period from December 2017 to April 2018 in its determination of the 3-year period, finding that it would be too burdensome on the current owner of a trademark to obtain evidence as to use from a previous owner. Hence the Board determined that the period of non-use ran for only 32 months to December 11, 2020.

CONCLUSION

It is now taking up to approximately 4 years to obtain a trademark registration. It is therefore incumbent upon franchisors to ensure that they satisfy the criteria for registration through the registration process. It is critical for franchisors to ensure that they are documenting their efforts to both establish and to offer the goods and/or services which comprise their franchise system in Canada. Further, in describing the goods and services for which the trademark is to be used, consideration should be given to including language which includes providing information to franchisees via a .ca website, as well as having a .ca website which displayed the Trademark.