



BCCLA Policy Position regarding s. 33 of the Charter (the Notwithstanding Clause)

Executive Summary: BCCLA does not support the inclusion of s. 33 in the *Charter*, nor any invocation of it, because its existence and use conflict with the objectives of the organization. Recognizing the current futility of advocating for constitutional amendments, BCCLA will direct its attention towards those lawmakers who are invoking s. 33, and advocate against its use.

Background

BCCLA's constitution provides that:

The object of the Society is to promote, defend, sustain, and extend civil liberties and human rights. We recognize that such rights are fundamental and inalienable for the well-being of human society. Among these liberties and rights are those which have been embodied in such documents as the *Canadian Charter of Rights and Freedoms*, the *Declaration of the Rights of Man and the Citizen*, the *American Declaration of Independence*, the British, American and Canadian *Bills of Rights*, and the *Universal Declaration of Human Rights*.

Section 33 is incompatible with this understanding of rights and liberties as inalienable.

Section 1 of the *Charter of Rights and Freedoms* ("*Charter*") exists as a mechanism for Parliaments and Legislatures to enact laws that violate *Charter* rights and freedoms ("*Charter* rights"). This first section of the *Charter* subjects the guaranteed rights and freedoms to reasonable limits so long as they can be demonstrably justified in a free and democratic society. Governments are therefore able to defend any laws that are challenged through litigation by *Charter* rights claimants so long as they can persuade the Court that the limitation(s) on *Charter* rights are reasonable. The state can do this by providing evidence that the impugned law has a pressing and substantial objective, is rationally connected to that objective, that the law minimally impairs the *Charter* right, and must demonstrate that the beneficial effects of the law are not outweighed by its negative effects on the *Charter* right in question (this is known as the *Oakes* test).

Section 1 therefor allows for conflicts between different rights and between rights and other societal interests to be resolved.

In allowing for such interests to be balanced and resolved, section 1 denies the absolute and inalienable nature of *Charter* rights. Given the recognition embedded in BCCLA's constitution that "civil liberties and human rights...are fundamental and inalienable for the well-being of human society," the organization opposed the inclusion of section 1 at the time that BCCLA was consulted



about the draft provisions, taking the position that the rights and liberties proposed in the *Charter* should be absolute.

Section 33 was not included in the draft *Charter* at the time that BCCLA was consulted, but we can extrapolate and assume that the organization would have vehemently opposed its inclusion, based on our submissions about s. 1 at that time. Given the effectiveness of *Charter* litigation in advancing individual rights in the intervening years, and the recent worrying uses of s. 33 to the opposite effect, there are no new contextual factors to point to in support of moving away from this position.

With the availability of section 1, violations of *Charter* rights that rely on s. 33 are particularly egregious by their very nature, because they seek to circumvent the *Charter* without justification, including the s. 1 *Oakes* test analysis described above (i.e. pressing objective, rational connection, minimal impairment, and proportionality).

The invocation of s. 33 is in and of itself an affront to our democratic processes, because it diminishes transparency about the state's underlying policy objectives and potentially obstructs any judicial analysis of the law. BCCLA has consistently urged courts to apply strict evidentiary and legal burdens on governments who seek to justify limits on *Charter* rights. Section 33 insulates governments from these requirements.

When viewed from an individual rights perspective, the notwithstanding clause can only be seen as in conflict with democratic principles. It unduly privileges the will of the majority over the rights of individuals to meaningfully participate in our democracy and to enjoy equality before the law. Addressing this issue by excluding s.33 democratic rights from the ambit of the notwithstanding clause is illusory, as political minorities remain without redress.

As BCCLA's constitution holds that human rights are fundamental and inalienable, it is particularly unconscionable that s. 33 could be interpreted to override rights such as the right to be free from torture (s.12), which is considered an international legal norm (*jus cogens*) that cannot be derogated from.

Recognizing how impractical it is for BCCLA to advocate for constitutional amendments to remove section 33 from the *Charter*, the organization will use its resources to advocate against its invocation by any government to ensure that *Charter* rights are not violated through its use.