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Ruminations of a Labour Lawyer About the Notwithstanding Clause

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ABSTRACT: This article examines the growing controversy surrounding Section 33 of the Canadian Charter of Rights and Freedoms, commonly known as the "notwithstanding clause." As the Supreme Court of Canada considers key questions about its scope and limits, debates have intensified over whether its use by governments constitutes legitimate democratic authority or a threat to constitutional rights. Critics argue that recent invocations by provincial leaders suggest a troubling willingness to bypass judicial oversight and pre-empt rights-based challenges, particularly affecting vulnerable groups. They contend that the clause was intended for rare and exceptional circumstances and should be subject to judicial scrutiny, possibly even prior to its use. By contrast, these debates often rely on hypothetical abuses of power, alongside real-world examples, to justify expanding the courts' role. The article situates these arguments within broader tensions between parliamentary sovereignty and constitutionalism, questioning whether constraining Section 33 ultimately strengthens or undermines democratic governance.

KEYWORDS: State; Notwithstanding Clause; Working Class; Canadian Charter of Rights and Freedoms;

Introduction

Section 33 of the Charter of Rights and Freedoms, known as the "Notwithstanding Clause", is at the centre of a lively public and legal debate. At the time of writing, the Supreme Court of Canada is hearing arguments as to how section 33 should be deployed, if it should be used at all. The issues before that court are whether the clause has been abused or might be abused by elected governments which have no respect for the precious freedoms and rights guaranteed by the Charter of Rights and Freedoms (hereafter, the Charter). Some of the many parties to the case argue that the notwithstanding clause was always intended to be used sparingly, on rare and special occasions. They go on to argue that courts should determine whether such circumstances had arisen, preferably before a government had invoked section 33 to Charter-proof its contested law.

To bolster their arguments, advocates who want to put serious restraints on the use of the notwithstanding clause invoke hypothetical situations. What if a tyrant, a bully, an anti-civil libertarian, leader emerged as the head of a procedurally properly elected government? The Trump name is channelled for this argument. But they do not need to rely on Trump-ism for their argument. They can point to real live local potential tyrants. Scott Moe, Danielle Smith, Doug Ford, François Legault, have used the notwithstanding clause to stop obviously vulnerable people from going to the courts to have their Charter rights acknowledged and enforced. They are elected leaders who are turning out, so goes the argument, to have bad instincts, maybe even evil intentions. We must have power to rein them in, say the advocates who want to constrain the use of the notwithstanding clause. The bulk of them are looking to the judiciary for assistance.

Freedoms into Rights: From Politics to Law

It is largely the people who see themselves as liberal and more progressive who are arguing for more judicial discretion and lessened power for elected governments. In effect, the opponents of the unregulated use of the notwithstanding clause are asking the judges to give themselves more

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power to review a decision to use the notwithstanding clause. They are asking the judges to give themselves more scope for judicial review over political decisions made by properly elected governments.

To a working class-favouring labour lawyer this is passing strange, so strange that it has led me to work out what the logic and ideas which underpin this legal/political debate might be.

The first question that arises is: how did section 33 get into the Charter? After all, the Charter was offered as a, perhaps, the, big plus we were going to get from making the Constitution our very own. It was going to be used to convert political freedoms and process rights we had won after many struggles into enforceable rights. This should arrest our attention.

The drafters of the Constitution were acknowledging that Canadians already had political freedoms and safeguards to ensure fair and due processes. Thus, if Canadians had been asked in 1980 whether they were free, they surely would have said: ”Yes”. I would have. We could believe what we chose to believe, say what we felt like saying, could get together with other like-minded people to pursue a social or political goal, we could associate with those we chose, we could vote, we had the right not to incriminate ourselves, our governments could not invade our houses or businesses, and so on. They were not abstract ideas for those who were here before the Charter came into our lives. We would have claimed to enjoy those freedoms and securities because they were an inherent part of our lived experiences as Canadians.

Of course, everyone was aware that these claimed freedoms were a contested terrain because our predecessors had had to fight to gain them. At no stage was it all that clear when and how the asserted freedoms protected us, precisely because they were still contestable. Procedurally properly elected governments might dilute one or other of these freedoms if they thought it politically astute and/or if they believed it would advance the greater good. This is where the promise of the Charter made during those 1980-1982 Constitutional debates comes in.

The freedoms we enjoyed before the Charter were, at best, loosely defined. Their scope and legitimacy were subject to change when political power changed hands. The Charter was going to guarantee that we would have an unimpeded right to enjoy those freedoms. They were intended to be a component of that part of our social infrastructure which could not be changed. This was contrasted with the impermanence of elected governments which come and go, but which, during their time in office, have the power to do as they like. The guarantee that our Charter rights were going to be enforced was to protect us from this potential downside of our notion of Parliamentary sovereignty. Governments were to be handcuffed. To some extent. There were going to be difficulties. Many, but just to name one: the freedoms to be turned into guaranteed rights still had no definition, no specific content.

Attempting to Protect Government Power while Protecting Individuals from Government

The freedoms, now turned into enforceable rights, reflect the ideals that colour the conventional view of the nature of our system of social relations. That conventional view is that Canada is a liberal democracy. The ideals on which our view of ourselves are posited need a short elaboration.

The political philosophy of liberalism asserts that each and every individual is to be treated as equally sovereign, equally autonomous. Some of us are tall, others short; some smart, some not so smart, some are physically strong and flexible, some not so much; some are black, others are brown, still others have different skin pigmentation; some have wealth, others do not. Liberal

philosophy and our legal system celebrate these differences because that is what makes us individuals.

Each of us has traits and attributes others do not have. But, politically and legally, all of us, with all our individual resources, attributes and talents, are equals for the purpose of politics and law. We are sovereign beings with the right to govern our own lives. We are all equally entitled to think as we like, to act as we like. All the differences in resources, traits and attributes we enjoy (or lack) cannot alter the fact that, in a liberal polity, all of us are autonomous. We are entitled to make decisions as we choose. No one can tell us what to think, what to do.

Coercion is the enemy of these fundamental political and legal ideals. But some coercion is necessary. Because we live in social settings, a regulatory system that governs our thinking and acting to some extent must evolve. As each of us thinks and acts as we choose, we might cause others to lose some of their ability to think and act as they choose. The idealized liberal framework demands that the necessary restrictions on individuals are to be tailored so that all individuals can retain as much of their sovereignty as is consonant with other individuals retaining theirs. A difficult balancing act to say the least. It is made even more problematic by a paradox which now comes into view.

First limb of the paradox. We see ourselves not only as a liberal polity but also a democratic one. Canada is a federated nation. We all have a right to vote, a right to elect representatives to the legislatures of the province in which we live and to vote for representatives to the federal entity. We all have a right to be candidates to become representatives. The federal entity and the provinces have been assigned distinct responsibility to exclusively regulate certain areas of social interaction. They are free to pass laws and implement policies within the jurisdictional boundaries so created. Sometimes it is not clear whether a proposed law falls within federal or provincial jurisdiction. The arbiter of such disputes is the judiciary. Otherwise, a properly elected government, for the time that it holds power, can enact laws and implement policies within its purview as it sees fit. This may very well lead to unappetizing restrictions. The restrictions may be unduly coercive. There are no formal criteria to help us say when a restriction is unduly coercive. However this is resolved, it is undeniable that governments might coerce some individuals in some sectors of the community. From their perspective, governments may be seen to have abused their plenary powers.

The government becomes the enemy. This creates agitated responses. Recent examples include the insensitive use of legislative power to interfere with gender identity issued confronting young people and the Quebec enactment of a law to boost secularism by prohibiting individuals in public services from displaying religious symbols such as keffiyehs, yarmulkas, hajibs, sword insignias, and so forth. These uses of governmental power provide fodder for the many people who contend that there is a palpable need to curb Parliamentary sovereignty, at least to some extent. In sum: There is an unresolved tension between liberal political philosophy and electoral democracy. Government is seen as legitimate plenary law-making institution, as an institution which reflects our democratic decision-making. Yet government is also seen as a potential enemy because it has the power to coerce. The Charter is justified on the basis that it will keep elected governments in check.

Second limb of the paradox. The need to contain legislative powers is understandable from a liberal democratic political philosophy perspective. But the same reasoning advanced by people who call themselves liberals is not applied to all potentially coercive relations. Canada is not just a liberal democracy. It is a liberal market capitalist democracy. One of the most obvious aspects

of our society is that many transactions are based on inequality. The wealthy, the few, have way more wealth than the many. When an owner of wealth enters into a commercial arrangement of any kind with an individual with little wealth or no wealth (about 80% of us), the wealth owner will dictate the terms of the arrangement. The wealth owner will be in a position to coerce. Consider a contract between Rogers (which for law is an individual!) and the thousands of individuals it "serves": who dictates the terms? Or, when you buy insurance: how many terms are dictated by the purchaser?

These ills are supposed to be corrected by competition in the appropriate markets. How many such significant markets are there in Canada? Very few. While occasionally there are feeble efforts to make our markets less oligopolistic, they have proved to be of no avail (see *The Royal Commission on Corporate Concentration;* The Bryce Commission, 1978; Clement, 1984; *Caroll,* 1986). Yet, the persistent failure of markets to redress these gross imbalances, these coercive relations, are not considered to lead to coercions of the kind that rent the liberal democratic philosophical model to which we claim we are devoted.

Strange, is it not? Why is the Charter not protecting us when we are not dealing with the government? Why is liberalism shrugged aside where most of us find ourselves most of the time? Say, when we work. As individuals, the owners of the means of production and those who need jobs to provide for themselves, are in a curious relationship if one looks at it from the liberal philosophical perspective. Workers, like the employers, are autonomous persons (the baneful presence of corporations muddies these waters without disturbing them) who supposedly can think and act as they like.

Workers are selling some of their attributes to employers, some of the things which make up their individuality. These attributes can now be used by their employers to satisfy their needs rather than those of the individuals who have been forced by their lack of disposable wealth to offer them up in order to survive. This leads to tension in workplace relations as workers want to give up as little of themselves as possible. Law, which strenuously claims to support the political philosophy of liberalism, decides to help out employers. The way in which this is done was nicely captured by Hugh Collins, a highly respected liberal and labour law scholar out of England.
Collins imagined a government that announced to its subjects that

"You must obey all our instructions to the letter and always act in the best interests of the government, including always praising it and never criticizing it; senior members of staff of the government such as the President must always be treated with deference and uncritical obedience; and to ensure compliance with this instruction, the government will use every means of surveillance available, in order to monitor behaviour to ensure that you follow the letter and spirit both when you are in public places such this as your workplace and also at home".

Such a scenario, the liberal Hugh Collins wrote, describes an authoritarian government.
Being a labour law scholar, Collins noted that the scenario's instructions closely mirrored the explicit and implicit terms of every single contract of work for wages known to our law. Workers must obey (hence 'obey now, grieve later'), are obliged to be loyal and act in good faith which, legally, signifies they must put their employers' interests above their own and they must not criticize their employers (hence the need to protect whistleblowers). These workers' duties are maintained by continuous surveillance. Violations of these duties lead to disciplinary action by their employers. There is, of course, no way in which workers are given the right to discipline their employers.

It is an authoritarian relationship. It is illiberal. So Collins concluded. He might have added that it is also anti-democratic as workers have very little control over what happens in the workplace, even though they contribute to the attainment of the goals of the undertaking and even though they are forced to accept a great number of risks (from bad managerial decisions , leading to a worsening of terms including the spectre of unemployment, and to the potential infliction of physical injuries).

The employers make coercive decisions, supported by law. Do the owners of the means of wealth have something like a (hidden) notwithstanding clause which enables them to avert responsibility for undue coercion? More, wealth owners are relied on to produce our welfare by investing their capital. Their right to refuse to do so gives them coercive powers vis-à-vis the government. The slew of subsidies, incentives, de-regulations, privatizations, are the highly visible result of coercion. Yet, law does not regard this kind of coercion to undermine the electoral democratic system to be a wrong, or to be an assault on the liberal political philosophy it sets out to protect by means of the Charter.

The Machinations which Make s.33 a Democratic Component of the Charter

The Charter's role is to prevent abuses of power by democratically governments. It is to play no role in the abuses by the dominant economic class. This raises questions about how true we are to liberalism and to democracy of the electoral representation kind.

This underlying uncertainty came to play a crucial role during the politicking over the nature of the new Constitution Canadians were going to draft. After the judges had declared that, to amend the Constitution, only a substantial number of governments (no number specified, but not requiring Quebec to be a member of that substantial number) need to agree to the proposed amendment, the parties were ready to deal.

The federal government offered a Charter to make the home-made Constitution more palatable to the public. Undoubtedly, the provincial leaders, understanding the art of political salesmanship, saw the embedding of a bill of rights as a fine ploy. But they did not want this ploy to cost them anything. They contended that they had long enjoyed a set of legislative powers which permitted them to enact laws which were politically legitimate and legally enforceable. No buts. No ifs. The provinces did not want to lose these historic rights which they saw as fundamental to the workings of a federal democracy. While they may not have said so aloud, the undefined scope of the freedoms to be turned into enforceable rights frightened them. These Charter freedoms (unlike the same prior unprotected freedoms) might be read by the judiciary to temper the reach of elected governments.

As there was a need for a substantial number of the provinces to agree before a new Constitution could be enacted, the provinces had a powerful bargaining position. They used it to win the Notwithstanding Clause. It is section 33 of the Charter. The deal was done without Quebec being told that this discussion was taking place.

This brief sketch of how things happened (there are many longer accounts readily available) makes it clear that the drafters set out to offset the reach of the Charter. The conceit was that this was necessary because an unrestrained Charter would erode the precious democratic institutions we enjoy as a liberal and democratic society. To underscore that their devotion to electoral democracy was central to their drive for section 33, note that it is not to be available should a government's intended legislation undermine any of the electoral and voting rights guaranteed by section 3-5 of the Charter. Any such democracy-attacking legislation cannot be

saved. No government may decree that, notwithstanding the violations of ss 3-5 of the Charter, the legislation is constitutionally valid and enforceable

For the sake of completion, let me note that the notwithstanding clause also does not apply to any incursion by a government on mobility rights (section 6) or any laws dealing with official language questions and minority language education. Quebec's drive for independence and the necessity of nation building projects forced these exceptions into the Charter (section 23). An elaboration as to why the notwithstanding clause does not apply in these settings would take me down another rabbit warren, not germane to this discussion of the current debates about section 33.

To return: Thus it is that Section 33, the notwithstanding clause, applies only to selected provisions of the Charter: sections 2, 7-15, the sections which talk about freedoms to believe, speak, assemble, associate, the protection of overreach by the enforcement of law departments of our polity and novel (and, at the time, unarticulated) provisions about equality according, before and under the law. In short, it turns out that the Charter was only meant to guarantee rights and freedoms to some extent.

Integral, Not Exceptional: Section 33's Constitutional Role

It is clear that there is nothing in the Charter which says that section 33 is not an integral part of it. There is nothing which says that it must be used rarely. There is nothing which says it is a secondary, a less important provision. It is there for a well-established and perfectly defensible reason: to protect a major aspect of Canadian-style electoral democracy. The arguments to blunt the notwithstanding clause's reach are not grounded either in the history of its inclusion in the Charter or in the very clear verbal formulation setting out how it might be used by a government to prevent the application of some Charter provisions to its enactment of a law. Not all Charter rights apply all the time. And not at all to private, for-profit activities.

My exploration has led me to the view that, legally, it ought to be very hard to get the judiciary to see the notwithstanding clause the way in which many liberal and progressive activists would like the judges to see it. Their hope is to get the judges' support by appeals to their own judicial interests and by pleas to look to their better selves as they deal with vulnerable, politically disempowered people trying to protect their identity. These are the kinds of issues which have caught the public's attention as they watch the battle between the legislatures and the courts about the reach of the notwithstanding clause. It is a framework which positions some elected governments as oppressors, as pig-headed, out of date, social reactionaries.

Saskatchewan and Alberta are invoking the notwithstanding clause to protect legislation which does not respect the autonomy of individuals who are dealing with very personal issues such as gender identity and fluidity. Similarly, it is easy to be concerned about Quebec's law which bans the use of religious symbols in public spaces. This does not sit well with many people who see such harmless displays as the least we should tolerate in a supposedly multicultural society.
The historic context of the struggle for legal supremacy and the apparently increasing legislative disrespect for the autonomy of politically marginalized, vulnerable, persons who are trying to establish their identity, their right to be different, may well motivate some judges to finesse the plain reading of the notwithstanding clause.

The courts might declare that the notwithstanding clause should only be used in extraordinary circumstances and that courts should decide whether such circumstances prevailed. To pay respect to the very specific wording and well-known origin of section 33, the judiciary would have to accept the fact that, even after it found that the notwithstanding clause should not

be used, the legislature would still be free to do so to save its proposed legislation. But this would change things dramatically as now the deployment of section 33 would have become more politically more fraught, more politically dangerous, for the elected government.

The pressure to hamstring governments, especially insensitive ones, is powerful. Hence, the likelihood of the emergence of ploys, like the one suggested above, is real. The artificiality of such arguments means that they may not be applicable universally, that they will only work in some settings.

While the instances of use of notwithstanding to protect legislation by Scott Moe, Danielle Smith and François Legault, offend the more sophisticated Canadian, the modernized, more socially progressive Canadian, and therefore are good cases on which to base arguments for a confined notwithstanding clause, not all assertions of government legislative power which might violate a Charter right raise similar disgust. For instance, in a recent judicial decision, the court asserted that it was not abiding by a statute which imposed a set minimum sentence for a sex offence. The court said that different cases required different outcomes and it needed discretion.

A serious sex offender was the beneficiary of this 'flexible' reading of a law enacted by a properly elected government. The outcry was loud and clear: the public was outraged by the judges' decision. The visceral response indicated that a notwithstanding clause, overriding the court's discretion, might well have been appreciated. And so it is when workers in the para-public and public sectors go on legal strikes. Large segments of the public are inconvenienced and complain bitterly. They are not at all upset when a government uses that as a justification to suspend the workers' strike. And many will not be at all perturbed if, to protect its back-to-work order, a government attaches a notwithstanding clause to it. This is what the Alberta government did recently when teachers threatened to prolong a province-wide strike. Sometimes elected governments use ploys to order the workers back by not taking legislative action, that is, by exploiting labour laws in unusual ways, twisting them so that they will have the same impact as a notwithstanding clause has when they order workers back to work. That is being done because, in 2015, the Supreme Court of Canada turned the long ago won freedom to strike into an enforceable Charter right.

As soon as this happened, governments knew they might pay a high cost for suspending the right to strike by enacting legislation which could be tarred as anti-Charter, as illiberal. To get the same result, governments have been bending labour laws into pretzels. Both the Trudeau and Carney-led governments did so in railway, airport, ports and harbour work interruptions. It has been successful (so far) and, unsurprisingly, this finessing is being replicated by other governments. It can be found in Loi 14, Quebec's anti-worker legislation.

The unions affected by these deployments of the notwithstanding clause to support an elected government's order to suspend strike rights or by ruses designed to have the same effect, have been turning to the courts for relief. Their argument is that the Charter-protected right to strike has been violated and it should be returned.

They are demanding that their right to act collectively for economic, social and political purposes be safeguarded. It is a very different kind of demand than that made by weakly organized individuals who claim that a law is interfering with who they are and what they want to be.

Making Strategic Choices: The Evolving Battle Over the Charter

The legislatures and courts are not only mutually reinforcing institutions but also competitive ones. The dispute which led to a compromise when the Charter was drafted is a living illustration. Seen in that light, those who want that compromise re-visited do so because some of

the outcomes of the compromise are displeasing, even though one of the parties, a legislature, is acting within the framework of the compromise. These challenges to the compromise are neither wrong nor right. They are strategic decisions. The struggle over the meaning and scope of the notwithstanding clause is a continuation of the ceaseless tug-of-war for primacy between the judiciary and the legislatures. What matters is whether the same political logic applies when it comes to the question of reading section 33 down in very different kinds of alleged oppression by legislatures. Activists have to determine whether strategies which assume that generalizing a drive to expand the potential of fettering governments by expanding the range of the Charter is a good strategy.

This has brought me to two questions. What is so bad about elected government? What is so good about the judiciary? The universal franchise was only gained by Canadians in 1950. It is not a natural right. It had to be won. The opposition to it was fierce. First, only the lords of the manor and emerging white male capitalists could be members of Parliament; only they could vote. Their Parliament was their defence against an absolute monarchy. They wanted their Parliament to have plenary powers, that is, for them to have and to exercise plenary powers as they saw fit. They did not want this comfortable status quo to be disturbed. Slowly, ever so slowly, the amount of wealth needed to be allowed to participate dwindled; even more slowly, gender and race barriers were torn down.

The resistance to allow legislative participation to anyone but wealthy white men arose from the fact that, once the huge number of people, the vast majority of people, could elect representatives, they might make decisions which were detrimental to the owners of the means of production. Why, said one Lord during a debate on enlargement of the franchise, these non-property owners might even seek to tax the wealthy people. Although this, sadly, has not come true to any significant extent, it tells us what this long struggle was about and why it took so long for a universal franchise to become the norm.

To get there, workers and their allies had to fight restrictive rules enforced by the courts. They had to establish their right to believe what they liked, to speak about their beliefs and opinions to persuade others, to assemble in public places, to associate with others. All these necessary freedoms had to be fought-for in a legal setting designed by the judiciary which repressed any kind of action which affected private property or public order writ large. People lost jobs, were beaten, jailed, deported, for fighting for demanding the political freedoms which we have proudly transliterated into enforceable Charter rights. All these fights were necessitated to place more working class supporters into the legislature.

This fight was complementary to the struggles the working class engaged-in to be allowed to form unions to off-set the power of the owner of the means of production. Obviously, when forced to bargain as individuals, the outcomes were terrible for workers. Their drives to unionize ran into fierce responses. The employing class was aided by the judiciary. The courts held contracts of employment to be voluntary contracts entered into by equally autonomous, uncoerced individuals. This disregard for the coercive potential of wealth legitimated the subjugation of workers. Whereas the ownership of wealth was ignored by the judiciary as giving those owners undue power, the potential coercive power of collectivized workers was seen as illiberal and intolerable.

Repeatedly, courts would stymie unionization. Workers, from the 19th century onwards, began to get some influence in the legislative processes. As the judges used one tool to dampen the exercise of solidaristic action by workers, the legislature was asked to respond with a specific ‘fix . The courts would then find another way to hinder unionized actions. Back to the legislature

for relief. And so it went. This is why the working class fought so hard, often extra-legally, to win the political freedoms now in our Charter as rights. They were wanted to enable them to widen the voting franchise.

The story has been told by many historians. I have re-told it at some length in *Law at Work*. Workers had to be able to collectivize to offset the power of property owners. Their politics were not a politics which centred on individualism. This old story is told to make the point that, for nigh on three centuries, the judiciary was the enemy that had to be defeated. The proof is in the eating of the pudding.

Whenever the struggles of the working class allowed them to make gains, they did so by quarantining the judiciary. One singular characteristic of regimes such the minimum standards that must obtain in any workplace (wage rates, hours of work, requirement of notice, paid vacation time, regular payments , etc., none of which existed until legislated-for), the forced recognition of properly formed unions and the duty of an employer to bargain with such a union, leading to an enforceable agreement (which did not exist until 1944 in Canada), a workers compensation scheme which provides income replacement for injured workers, is that they all have minimized the potential for legal actions in the courts.

To make progress as a class, workers had to marginalize the role of courts in social, economic and political relations. The judiciary has internalized the sanctity of private property rights and the cult of the individual. Workers have no property and must therefore fight as a collective. This is why such protections as they have won have sidelined the judiciary. Until now. Peculiarly, it is the union movement which is now looking to the courts for help.

The 2015 Supreme Court of Canada decision in the Saskatchewan Federation of Labor case established that the right to strike was an enforceable aspect of the individual's freedom to associate protected by the Charter. Now, when a government uses its legislative power, sometimes boosted by the attachment of a notwithstanding clause, to suspend workers right to strike, a union goes to court, pleading that its collective right to withhold its members' labour power has been illegally attacked by the government's violation of freedom guaranteed to individuals.
Law is a strange discipline; elasticity is its middle name.

The argument made by some unions that they must go to court to defend themselves is conceptually and politically fraught. Unions are going to their historic enemy to ask for a legitimation of the rights they had won in the political sphere, where numbers and history matter, criteria which courts traditionally ignore. Is this likely to support militance, solidarity or is it, instead, taking the fight inside the framework which maintains and perpetuates capitalist relations of production?

A Question for Labour Activists: Can Courts Serve Collective Interests?

For 33 years, the courts refused to read the freedom of association protected by the Charter to include the right to strike. One of the reasons given was that the freedoms protected by the Charter dovetail with the freedoms which promote liberalism, freedoms to be enjoyed by individuals. As individuals cannot collectively bargain and cannot strike, the freedom to associate did not protect either collective bargaining or striking. The freedom to be recognized as unions, to bargain collectively and to strike had been enshrined in legislation in 1944.It became part of the furniture in Canadian social relations. But it was not seen as legitimate (let alone desirable!) by the courts, the defenders of individualism and private property, until 2015. The courts always have been the fiercest defenders of individualism we have. Is it an institution capable of satisfying the collective needs of the working class?

Let us assume a government enacts a law which leads to a Charter challenge by some people who feel affronted or coerced. First, the court has to find that there has been a violation of a Charter right. Here it is to be remembered this is not always easy because rubrics such as freedom to communicate has no specific definition. A court may avoid the Charter question by holding that it was not about a protected freedom but about something else, for instance that it was about voting, rather than speech (there is such a case) and different principles should be applied. But, on the whole, it is getting easier to predict when a a court will hold that the proposed law violates one or more of the protected freedoms.

Second, the court has to determine whether the government's violation of the Charter was seeking to attain a legitimate goal and if it was, was the government's measure reasonable in a liberal democracy, was its violation of a Charter as minimal an intervention with a freedom while still being an efficient measure? That is, the court has to adjudicate whether, notwithstanding the fact that an act of government is a violation of the Charter, it may still be a valid act.

A question poses itself: how is an institution which gets its authority and respect from being above partisanship, above politics, fitted to make judgments about a highly politicized law which is socially, culturally and politically sensitive? I note again: a court is not accountable for any of its decisions except to a higher court and the Supreme Court of Canada is not accountable to anyone. Let me remind myself of the way in which the more liberal and progressive activists react when they think the Supreme Court of the US has too much political power. It is seen by many to lack neutrality, to be just another partisan institution, one which cannot be held responsible for its decisions. Giving that kind of discretion to the judiciary is dangerous to its legitimacy.

So, it might be under the Charter. Many judges sense this and will be eager to uphold laws which violate the Charter if there is any reason to think the government was trying to achieve one of its goals in a generally justifiable way. This payment of deference, this upholding of a Charter-violating law, is most likely to occur when a legislature is suspending the strike rights of a union. Back-to-work legislation which provides any kind of alternative dispute settling mechanism will quite often be seen as a law which violates a Charter right but that it should, nonetheless, be upheld. A sub-question poses itself: why do unions put their faith in the courts? Ever?

No Guarantee of Victory: Judicial Deference and the Limits of Charter Claims

Even when there is no notwithstanding clause to defeat, applicants for relief on the basis that their Charter rights have been violated are not guaranteed success. Judges are going to have regard to Parliament's well-based claim that they are best fitted to determine polycentric policy issues. The pressure to pay deference to the legislatures gains weight from the judiciary's need to protect its own legitimacy.

These problems for the judiciary (and, thereby, for all those who seek its aid) arise in an even more acute way when a government attaches a notwithstanding clause to a law which might violate a Charter-protected freedom. In such an instance, the government will argue that it does not have to defend itself. No one should be able to get their foot inside the court room: there is no legal case to be made. The government is accountable to the electorate and that is sufficient protection of people's rights. Until the people reject what it has done, its balancing of the overall interest of the public against the needs and desires of some sectors of the public, is valid.

This may lead to abuses of the needs and desires of vulnerable, politically un-empowered groups. By definition they have no practical way of fighting for respect, for a remedy. A section 33 use denies them what, all too often, is the last available avenue of relief for them: the courts. It

is easy to be sympathetic to their claim that the notwithstanding clause should be used rarely, if at all. Once again, for the courts to read down the plain meaning and well-known intent behind section 33 of the Charter may well imperil their ultimate legitimacy. Much hinges on whether the public believes more in accountable governments or unaccountable but trusted sages on a bench. At the moment, the judiciary is more trusted but, as seen, historically the working class has gone to a lot of bother to get judges out of their hair. That is, opinions and desires change as circumstances change and time passes; much depends on which issues are in dispute.

This brings me back to the plight of the more vulnerable amongst us, those who are not easily organized as a political force and who have been picked on by socially reactionary governments. They need to get to court. But it has just been seen that, even if they get there, they may succeed in having declared a government action to be a violation of the Charter and still be stymied by a finding that, even though their plight is dire and there is sympathy for their cause, policy-making by an elected government should be deferred-to.

Still, they do have a chance, one which is not available anywhere else. Their fight to curb the use of the notwithstanding clause makes good political sense. In the suspended strike circumstance, going to court to have a back-to-work order set aside is an acknowledgment by a union that it feels it cannot resist a legal order from a government. It must have it declared to be illegal, illegitimate by a court. The union will not act illegally to defend what it considers to be its legal right. It is asking judges to set aside an order of an institution through which it has made many of the gains it has made, often after violating orders made by the courts.

I argue that unions should not give in. They are not in the same boat as people who are forced to go to the courts because there is no alternative. Again, the proof is in the eating of the pudding. There are always unions and unionists who reject the repression of the working class by meeting force with force, who engage in class conflict, who are willing to act illegally. They decide for themselves that, notwithstanding a law being validly passed, it may violate everything they hold dear. Recent examples were furnished by the flight attendants' union and by CUPE's educational workers in Ontario. In the first case, the flight attendants firmly rejected a legal order to go back to work. Notionally they could have been punished. But they stood strong and the government backed down, quickly coming to an agreement with the union (albeit a criticized one). The CUPE people faced down the intransigent Ford government, armed with the dreaded notwithstanding weapon. It told Ford that they would strike and, expected to be supported by other unions, even if the back-to-work order was supported by a notwithstanding clause. Ford backed down.

While these uplifting shows of militance (which is how I see them) are rare, they do demonstrate that collectivized workers need not treat a suspension of their right to strike, whether a notwithstanding clause is attached or not, with the respect that a legal instrument usually commands. That respect will drive them to the courts. Given the history of capital-labour conflicts, the judges will either accept the unadulterated impact of the notwithstanding clause if there is one, or if there is no use of a notwithstanding clause, will find it easy to defer to the wisdom and propriety of the government's ban of the strike. They will find it easy to say that, notwithstanding the fact that the government may have violated the right to strike protected by the Charter, it would be improper for the court to second-guess the elected and responsible sovereign government.

Courts and Collective Power: Can Judicial Rights Replace Political Action?

If the current struggles lead to the notwithstanding clause being reduced to be used on rare and special occasions, it will be left to the judiciary to determine whether a violation of the Charter will invalidate a law made by a government. This may, occasionally, protect weakly organized sectors of the public whose personal choices are imperilled. The judges' background, their traditions, their role in social relations, will, contrastingly, incline them to confine collective, solidaristic conduct. When unions won their rights in 1944, they defended them the way they obtained them: by collective political action, often extra-legal. Should they alter their approach just because politically won rights in 1944 had been transliterated into a Charter-protected right?

The 20% of wealth owners who own 67% of all wealth remain untouched by any of this. They remain free to use the power and influence to get their way. They remain just as free as they were to coerce. They may, and have done so, use the leverage their wealth gives them to co-opt governments. Despite the fact that the mass of the non-property-owning class may now vote, governments have been cajoled, pressed, even bribed, to buy into the capitalists' overall agenda. This has led to a disenchantment which often translates into mistrust of elected governments. The expectations of voters are low. This is reflected in most elections. Often, the winning party garners less votes than the block of eligible voters who do not vote.

In contrast, faith in the judiciary--despite its anti-working class, anti-collectivist history--is very high. This willingness to trust it has been bolstered by the romance the public has with the Charter. (It rates consistently as the most revered symbol of Canadianism). Progressive activists see their hope to advance causes by politicking in the democratic voting sphere as becoming more and more ephemeral. To their dismay, Canadians are consistently electing very reactionary governments. They seem to be willing to elect politicians with revolting social views and who are supporters of the neoliberal project. The governments we have are all too willing to strip the public services and utilities so that the private sector can profit (eg., Canada Post), to make the public sector leaner and meaner.

Unsurprisingly, progressive activists turn to the courts to help politically unsupported individuals picked on by abusive, reactionary, legislators. They are miffed by section 33, the compromise which dilutes the Charter's large promises. In their struggles to cut down the notwithstanding clause, they are adding to the lack of confidence the public already has in the electoral system as a means to practise democracy.

Workers, especially in the public sectors, have been under continuous attacks by governments helping their austerity programmes along. This has been extensively documented by Panitch & Swartz and the three editions of the book (originally bearing the tell-tale sub-title "from consent to coercion") which have followed its initial publication. Without any legalized weapons to resist governments exercising their plenary powers, unions struggled mightily to turn their freedom to strike (first won by unions in the private sectors in 1944) into an enforceable right protected by the Charter.

Unions, fighting collectively for collective rights, are now relying on the judiciary for help. It is almost surreal. The judiciary has been the most blatant anti-union institution we have had. Unions now frequently go to court when their right to strike is suspended, just as activists in different spheres do. Inevitably, like these other activists, they focus much of their attention on the Charter-destroying notwithstanding clause. They tend to forget that, even if that clause is not invoked, any law suspending their strike might well be upheld when a court exercises its version of a notwithstanding clause, when it finds that the law is an appropriate measure to deal with a problem identified by the elected government.

A Return to Disobedience?

Unions have other ways to deal with repressive government actions. Unlike the vulnerable, non-collectivized people hurt by targeted government laws, they have a weapon with bite. They have the power to withhold their labour power en masse. Recently flight attendants and educational workers did so, illegally. And governments blinked.

The weapon so used is the equivalent use of coercive force used by capital. Because we live under capitalism, the workers' right is not always legal. But it is politically legitimate, morally justifiable. It is not an instrument that is usable by all workers and all unions at any one time, but it is a real weapon. It is the weapon which has won almost everything labour has won in its long and continuing battle with capital. It is a weapon that demands mutuality, solidarity and sacrifice. It is a weapon which can turn demands for immediate relief into demands for system change.

In the end, the 2015 enlargement of the freedom to associate to include collective bargaining and the strike may be more a hindrance than an advance. It distracts union militants. They look to courts first, militance later. That distraction is aided and abetted by the appeal of the understandable defence of Charter rights by non-organized people who are abused by social reactionary governments. Little is to be gained by unionized workers (as opposed to other subjugated segments of our society who are not so well organized) by going to the wall over the notwithstanding clause. Unions must ask themselves whether it makes sense to rely on a politics which involves law as seen and applied by the judiciary. After all, how is the working class 's lot to be improved by acknowledging the legitimacy of an institution that prioritizes the need to protect private property and self-serving individualism? Just asking…

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