The Notwithstanding Clause:
Why Non-use does not Necessarily Indicate Compliance with Judicial Norms

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The Canadian Charter of Rights and Freedoms includes the notwithstanding clause in section 33, which allows provincial and federal parliaments to pre-empt judicial review or set aside the effects of a judicial ruling for most of the Charter’s protected rights on a temporary but renewable basis. The notwithstanding clause was agreed to in the late stages of federal/provincial negotiations to broker agreement for a complex set of constitutional proposals to patriate the Canadian constitution, adopt an amending formula and entrench a constitutional bill of rights. A majority of provincial premiers rejected the merits of a constitutional bill of rights and the judicial remedial powers it authorized. However, by 1981 they were on the defensive when arguing against the Charter and envisaged the notwithstanding clause as a mechanism to temper the effects of judicial rulings on the legal validity of legislation. The notwithstanding clause is also the Charter’s most explicit recognition of federalism; another fundamental pillar of the Canadian constitution. By invoking this power, provincial legislatures can temporarily give priority to local or provincial interests that conflict with judicial interpretations of the Charter.

Despite the importance of the notwithstanding clause in securing agreement for the Charter, it has emerged as one of its most controversial provisions. The notwithstanding clause was not the product of any grand normative theory about constitutional design and was given so little attention in negotiations that the framers were initially of different opinions as to whether it could be invoked to both pre-empt judicial review, as well as set aside the effects of a judicial ruling.

Critics of this power worry its use could frustrate what they believe is the primary purpose of the Charter; to ensure that judicial interpretations of rights prevail over political judgment and, by implication, to prevent majority opinion infringing upon minority rights. So potent has criticism of the notwithstanding clause become that many believe it is important to solicit from political leaders a commitment to never invoke the notwithstanding clause; as if the ideas of respecting the Charter and using the notwithstanding clause are mutually exclusive. The clause was also subject to a war of words between former Liberal Prime Minister Pierre Trudeau and then Progressive Conservative Prime Minister Brian Mulroney. Mulroney, no doubt bristling from Trudeau’s highly polemical criticism of his promotion of the Meech Lake Accord and assertion that the proposed distinct society clause would undermine the Charter, responded in an equally polemical manner by blaming Trudeau for agreeing to the
notwithstanding clause, which he characterized as constituting such a fatal flaw to the Charter as to render it ‘not worth the paper it is written on’.6

Strong criticism of the clause does not mean it has not had its defenders. Scholars have championed it as constituting a ‘distinctive constitutional partnership’ between the judiciary and parliament;7 a safety valve to allow parliament a lawful way to temporarily overturn the effects of judicial rulings for which they strongly disagree;8 a way to protect equality rights should judicial rulings reflect gender bias;9 an opportunity to benefit from judicial review without abandoning parliamentary processes for settling difficult questions of social policy;10 and as an element of inter-institutional dialogue that allows parliament to insist on the primacy of its judgment in cases of profound disagreement with courts.11 Yet, support is likely tenuous for the idea that the notwithstanding clause is an important element of a dialogic conception of the Charter. Many subscribe to a court-centric version of dialogue and anticipate that the notwithstanding clause will only be used rarely; thus it is questionable how many would continue supporting this power (or its inclusion in their dialogic conception of the Charter) if politicians were to regularly invoke the notwithstanding clause after legislation is declared invalid.

This paper analyses the political life of the notwithstanding clause. It begins in part one by examining the origins of the notwithstanding clause and its uses. Part two analyses the influence of the notwithstanding clause on constitutional ideals beyond Canada. The final part discusses important consequences associated with deeply entrenched political reticence to use the notwithstanding clause.

1. Origins of the Notwithstanding Clause and its Uses

Despite the earlier introduction of the statutory Canadian Bill of Rights in 1960, the idea that a Westminster-based parliamentary system would adopt a constitutional bill of rights that authorizes strong judicial remedial powers represented a substantial challenge to the constitutional principle of parliamentary sovereignty in place before the Charter’s adoption (even as modified in Canada by federalism upon judicial review displacing federal government reliance on disallowance). Strong remedial power to strike down or refuse to apply inconsistent legislation contradicts the principle that parliament has the final word on the legality of otherwise duly enacted legislation. From the time a constitutional bill of rights was included on the Canadian constitutional agenda in 1967 by Pierre Trudeau (then Federal Justice Minister) the provincial premiers expressed strong opposition to altering constitutional principles in this way, indicating their preference to retain the principle of parliamentary supremacy (subject to federalism-based review by the courts).

Provincial resistance engaged a two-track strategy, with positions moving between the two positions. The dominant track was to reject the proposal for a constitutional bill of rights in its entirety, engaging parliamentary supremacy and principles of democracy as opposing arguments. Many provincial premiers also insisted that more pressing constitutional amendments warranted attention, including changes to the division of powers, Senate reform, and appointment procedures to the Supreme Court of Canada. The second track focused on how to mitigate the effects of judicial review on
legislation in the unlikely event that the provincial premiers agreed to a constitutional bill of rights. Provincial premiers predicated their possible support for a bill of rights, in part, on the adoption of a broadly constructed limitation clause explicitly conceived as an instrument to encourage judicial deference to legislation that might restrict rights. However, by the final round of formal constitutional negotiations in November 1981, many of the premiers were no longer confident that they could continue rejecting the Charter and were under increased pressure to engage the second-track of their strategy: to conceive of ways to mitigate the effects of rights-based judicial review on provincial legislative agendas. Although the idea of a notwithstanding clause had been raised earlier and supported by provincial opponents of the proposed Charter, by 1981 its inclusion in the Charter had become more important to the opposing provincial premiers as federal government changes to the proposed limitation clause promised to make it considerably more difficult for governments to justify legislation that restricts rights. In the late stages of constitutional negotiations, the notwithstanding clause was considered the best option available to moderate the impact of judicial review on legislative decision-making.\textsuperscript{12}

To date, the notwithstanding clause has been invoked in an omnibus and retroactive fashion as well as in 16 specific instances.\textsuperscript{13} Most uses fall into one of four categories: i) a form of political protest; ii) an exercise of risk aversion in the face of constitutional uncertainty about how protected rights would be interpreted; iii) an exercise in risk aversion as a result of uncertainty about how s. 1 arguments would be interpreted; and iv) an expression of political disagreement with Supreme Court jurisprudence.

\textit{i) Political Protest of the 1982 Constitutional Changes}

The first use of the notwithstanding clause was as political protest of the decision to adopt the Charter and other constitutional reforms without Quebec’s consent. A strongly held view in Quebec is that constitutional changes that affect Quebec, as a founding partner, should not be made without that partner’s consent. However, as the Bélanger-Campeau Commission reported, “far from revising” the original Canadian Constitution of 1867, the 1982 constitutional reforms contain “a new definition of Canada which has altered the spirit of the 1867 Act and the compromise established at the time.”\textsuperscript{14} Within three months of the Charter’s adoption, the Quebec National Assembly invoked the notwithstanding clause in a retroactive as well as omnibus fashion to repeal and reenact all legislation passed before the Charter was enacted, so as to make a symbolic statement that this legislation would operate notwithstanding the Charter, and also to ensure that all future legislation would contain this provision. As Christopher Manfredi characterizes Quebec’s response, the invocation of the notwithstanding clause in this manner “forcefully confirmed Quebec’s continued opposition” to how the Charter was adopted as well as its substance.\textsuperscript{15}

Although the omnibus use of the notwithstanding clause ended after the Liberal government of Robert Bourassa replaced the Parti Québécois in 1985, both the retroactive and omnibus uses of the notwithstanding clause were subject to constitutional challenge in \textit{Ford v. Quebec};\textsuperscript{16} a case better known for its treatment of the Quebec’s
controversial signs law legislation. The Quebec Court of Appeal ruled that the omnibus manner in which s. 33 was invoked was not valid. However, the Supreme Court rejected this argument, along with the position that there is a substantive requirement for invoking s. 33. Although the Supreme Court ruled that the retroactive nature of the use of this power was not valid, the Supreme Court’s judgment was surprisingly thin on normative requirement for invoking the notwithstanding clause.

**ii) Risk Aversion because of Constitutional Uncertainty about the Scope of Protected Rights**

Several uses of the notwithstanding clause were to protect legislation from constitutional uncertainty when case law on the subject matter in question was underdeveloped. In the early days of the Charter, a serious challenge for legislative decision-making was to anticipate how the Supreme Court would interpret equality and, in particular, to predict when a distinction with respect to social policy benefits constitutes constitutionally invalid discrimination under section 15. The equality rights did not come into force for three years after the Charter was adopted, and it would not be until 1989 that the Supreme Court would first outline its method for interpreting equality; a method that continues to be revised. Quebec invoked the notwithstanding clause five times in a pre-emptive manner with respect to pension eligibility.

Saskatchewan also invoked the notwithstanding clause in 1986 with respect to back-to-work legislation for the public sector after a series of rotating strikes. At the time the Supreme Court had not dealt with whether the Charter protects the right to strike. The Court’s rulings two years later confirmed that the use of this power would not have been required at the time, as the Court then rejected the right to strike is constitutionally protected; a position subsequently reversed.

These pre-emptive uses of the notwithstanding clause can be interpreted as a form of risk aversion to protect legislation in the face of constitutional uncertainty about how equality would be interpreted and also whether there is a constitutional right to strike.

**iii) Risk Aversion because of Uncertainty about how Section 1 arguments would be interpreted**

Similar to the above use as a form of risk aversion because of uncertainty about the scope of protected Charter rights, the notwithstanding clause has also been used as a form of insurance given uncertainty about how the Court would interpret a government’s s. 1 arguments to justify restrictions on rights. The Charter has significantly enhanced the role of government lawyers who, amongst other responsibilities, advise governments on the likely risks of litigation and the potential consequences of possible judicial remedies, and also advise departments on how to minimize that risk. Over time, the popularity of the Charter and broad public disdain for the notwithstanding clause have discouraged reliance on the notwithstanding clause as a means for dealing with potential consequences of Charter litigation. Nevertheless, in the early days of living with the Charter, the notwithstanding clause was used in several instances to avoid Charter
litigation because of uncertainty of about how a government’s argument that legislation should be upheld would fare under s. 1.

The notwithstanding clause was invoked in this manner in Quebec six times with respect to education policy that offered Catholic or Protestant moral and religious instruction in public schools. In so doing, Quebec, insulated legislation from the kinds of challenges that occurred in other provinces, as to whether the denominational character of Canadian public education violates Charter guarantees of religious freedom or equality in a manner not justified under s. 1.

iv) Political Disagreement About Judicial Interpretations of the Charter

The most controversial use of the notwithstanding clause is as a form of political disagreement with respect to how the Supreme Court has interpreted the Charter. The best-known example occurred during the midst of the ratification process for the Meech Lake Accord, which was initiated by the desire to redress Quebec’s earlier grievances with the 1982 constitutional changes that were passed without its consent. Quebec invoked the notwithstanding clause to insulate new signs law legislation from judicial review following a Supreme Court ruling that declared a more extreme and earlier version of that policy unconstitutional. In the Ford ruling, the Court struck down part of Bill 101, enacted by the earlier Parti Quebecois government, which banned on public signs the use of languages other than French. A new Liberal government led by Robert Bourassa had promised English voters that his government would allow bilingual signs. However, following the Supreme Court ruling in Ford, Bourassa was under intense pressure to set aside the effects of the Court’s ruling. Faced with a divided cabinet and caucus, Bourassa decided to restore French-only requirements for commercial signs outdoors, but to allow multilingual signs indoors as long as they were out of sight from the street. This new law, Bill 178, invoked the notwithstanding clause in a pre-emptive fashion. This use of the notwithstanding clause triggered significant public furor and a weakening of political support for the Meech Lake Accord, to the point of there being “virtually no chance that the Meech Lake Accord would be ratified.”

A second example of use of the notwithstanding clause to protest judicial interpretations of the Charter occurred in Alberta in 2000 when the legislature passed the Marriage Amendment Act, which invoked the notwithstanding clause to signal that the Alberta legislature did not approve of altering the definition of marriage so as to comply with equality. This action can be considered a largely symbolic gesture as Alberta (like other provinces) lacks jurisdiction over marriage.

Potential Use of the Notwithstanding Clause

Although not yet used in this manner, a potential use of the notwithstanding clause is to allow parliament to revise legislation following a suspended judicial declaration of invalidity. Often when legislation is found to be inconsistent with the Charter, instead of declaring legislation as invalid immediately, the Court will suspend the effect of this ruling for a period of time, usually 12 months, to allow parliament to address the identified Charter deficiencies. However, this time frame may be insufficient for
parliament, particularly if the government has been unwilling to act promptly (likely due to political disagreement with the Court’s ruling), if the issue involves extensive consultation with the provincial governments, or if an election has delayed the effective period for legislative redress. When unable to legislate within the time frame granted by the Court, governments have gone to the Court to request additional time to pass the revised legislation. Two prominent examples occurred following the rulings of *R. v. Feeney*\(^{30}\) (involving new rules for warrantless police searches of domestic residences) and *Carter v. Canada (Attorney General)*\(^{31}\) (that an absolute prohibition on physician assisted suicides is unconstitutional).\(^{32}\) However, the Court may be unwilling to grant extensions to remedy Charter invalidities. Declarations of invalidity can be controversial because they suspend the remedial effects of judicial review.\(^{33}\) By seeking yet more time, a government is effectively asking the Court to bear institutional responsibility for further delaying remedies. Yet, depending on parliament’s response, it is entirely possible that the revised legislation would be declared constitutionally valid, in which no remedy is owed.\(^{34}\) When federal Justice lawyers were seeking an extension of the declaration of invalidity to enact a regulatory framework for physician assisted suicide, Supreme Court Justice Russell Brown suggested that the government ask parliament to invoke s. 33.\(^{35}\) Nevertheless, a divided Supreme Court agreed to give the federal parliament an additional four months.

2. The Influence of the Notwithstanding Clause Elsewhere

Despite considerable controversy within Canada about the merits of the notwithstanding clause, reformers elsewhere and many comparative constitutional scholars look more favourably upon it; or more accurately, on the ideas they associate with this power. Elsewhere, many conceptualize the notwithstanding clause as effectively rebutting more conventional orthodoxy that a bill of rights necessarily requires or presumes that judicial rulings will operate as binding constraints on democratically elected legislatures.\(^{36}\) This idea of constraining the effects or scope of judicial remedial powers is not only considered an essential way of bridging what has long been thought of as competing and mutually exclusive constitutional paradigms – those of parliamentary vs. judicial supremacy – for some it also represents an alternative model of a bill of rights characterized in varying ways including the Commonwealth model,\(^{37}\) hybrid approach,\(^{38}\) weak-form model,\(^{39}\) and parliamentary rights model.\(^{40}\)

It is difficult to pinpoint when this idea of constrained judicial remedial powers gained currency. Unlike the Charter debate, where Canadian political participants struggled with the question of how to temper the impact of judicial remedial powers within the compressed and intensely political terrain of a looming political deadline in a late spurt of constitutional negotiations, and in an intellectual and comparative context that situated the choices as being mutually exclusive (either parliamentary supremacy or judicial supremacy), reform minded politicians elsewhere have had the luxury of time and the Charter’s example when considering the appropriate scope of judicial remedial power.
Unlike Canada, these other Westminster-based systems have adopted statutory rather than constitutional bills of rights that do not allow courts to set aside the legal effects of legislation. In New Zealand, the UK, the Australian Capital Territory and the state of Victoria, political reluctance to conceive of strong judicial remedial powers negated the need for an explicit mechanism such as the notwithstanding clause to reverse the effect of a judicial ruling. For this reason, the trigger mechanism for legislative disagreement with judicial rulings differs. Unlike in Canada, where parliament is required to act affirmatively to lawfully dissent from a judicial ruling by passing legislation that invokes the notwithstanding clause, or to invoke this power in a preemptive manner to (temporarily) insulate legislation from judicial review when reasonably confident of losing in a Charter challenge, these other parliaments can voice their disagreement with judicial rulings passively: by ignoring them or refusing to amend legislation to comply with judicial interpretations of rights (either as inferred in those rulings where the New Zealand judiciary is unable to render a rights-compliant interpretation of legislation or more directly indicated through a judicial declaration of incompatibility or inconsistency in the UK, ACT or Victoria).

Disagreement will inevitably occur on where final legal authority should reside for determining the validity of legislation that restricts rights. Such disagreements reflect philosophical assumptions about the reasons for preferring a more juridical or political form of constitutionalism. However, whatever position one takes in this debate, it is important to recognize that bills of rights are not self-enforcing. Compliance will occur under bills of rights that constrain the scope of judicial remedies if political behaviour assumes that compliance with judicial rulings is an important norm, and non-compliance can occur regardless of the scope of judicial remedial powers when legislatures genuinely or intentionally misinterpret whether new legislation is compatible with relevant jurisprudence. The latter point is demonstrated by Martin Sweet’s assessments of how American legislatures have ignored, evaded or overridden judicial rulings on a range of issues such as affirmative action, flag burning, hate speech and school prayer, even though the U.S. Bill of Rights is thought to be the quintessential example of a strong form system of judicial review and does not contain a notwithstanding mechanism. As will be argued below, non-compliance with judicial norms about the meaning of constitutional principles likely occurs in Canada despite a failure to invoke the notwithstanding clause.

3. Impact of public disdain for the notwithstanding clause on government strategies

Strong political reticence to invoke the notwithstanding clause has effectively removed use of this power from federal political consideration. Interviews with federal government lawyers confirm that the notwithstanding clause is not considered an option when developing legislative initiatives and approving the government’s legislative agenda.

One way of interpreting this presumption against invoking the notwithstanding clause is to assume that legislative initiatives are evaluated and revised to ensure they are compliant with judicial norms of the Charter (thus negating the need to invoke the
notwithstanding clause). However, as argued below, this is not a compelling interpretation because it falsely equates failure to invoke this power with a commitment to ensure that legislation, as passed, complies with judicial norms.

The federal government is well equipped with the necessary resources to appreciate whether and how proposed legislative initiatives implicate protected rights. Legislative initiatives are systematically subject to risk-based assessments of their chances of being litigated, the policy and fiscal consequences that would arise from an adverse judicial outcome, and the expected litigation costs. The regularity of this exercise and the crucial role government lawyers play has led James Kelly to characterize the Department of Justice’s general influence on legislation as analogous to that of a central agency. In short, the centrality of Charter vetting makes it difficult to believe that government is unaware of the risk level that legislation will be declared unconstitutional, or that it lacks the necessary advice to revise these initiatives to ensure that they stand a much stronger chance of withstanding a Charter challenge.

However, being forewarned that a proposed legislative bill bears a high risk of being declared constitutionally invalid does not necessarily discourage government leaders from supporting it, despite the political refusal to enact the notwithstanding clause. Government lawyers confirm that political decisions to pursue proposed bills that carry warnings they incur a high-risk of judicial invalidation often boil down to a government’s risk tolerance, and also that governments have proceeded with high-risk bills. The likelihood that successive federal governments have knowingly engaged in high-risk behaviour is also supported by the frequency in which the Supreme Court has found legislation unconstitutional, despite the extensive pre-legislative evaluations for Charter consistency that systematically occur, and that evaluations for Charter compliance were conducted for legislation that pre-dated the Charter. Between 1984-2012, 45 federal (and 27 provincial) acts have been invalidated. High profile federal losses in recent years included sections of the federal anti-terrorist financing law, mandatory minimum sentences for gun crimes; criminal prohibitions against assisted suicide; restrictions on judicial discretion to give offenders sentencing discounts; repeal of early parole; and the government’s attempt to terminate a complex agreement allowing for a safe-injection facility for drug addicts.

Politically, it is not difficult to understand why government leaders are unwilling to invoke the notwithstanding clause to insulate high-risk legislation from a potentially negative judicial ruling. To invoke the notwithstanding clause essentially challenges the primacy of judicial norms about how Charter rights should constrain legislation. However, the Charter’s popularity and public confidence in the Supreme Court’s role interpreting constitutional values ensures that any political Charter judgment to disagree with the Court will likely be controversial and place pressure on the government to explain and justify its reasons; a task made extremely difficulty by the equation many make between invoking the notwithstanding clause and ‘overriding’ rights. It is for this reason that some lament the wording of the notwithstanding clause, preferring instead that it refer to political disagreements with judicial interpretations of s. 1.
Rather than invoke the notwithstanding clause and defend politically what would likely be a highly contested action, federal government leaders apparently prefer to present high-risk legislation to parliament and the public as consistent with the Charter and gamble on its constitutional fate. The gamble is either that the legislation will survive a Charter challenge (even when forewarned that the chances of this are fairly remote) or more likely than not, that the government will benefit politically from pursuing legislation even if it is ultimately declared constitutionally invalid. Politically, it is far easier for a government to ‘roll the dice’ by introducing high-risk legislation than to enact the notwithstanding clause; even if the government ultimately loses. The actual impact of a judicial ruling for a government’s legislative agenda will occur several years after legislation is enacted. When considered against the backdrop of the electoral cycle, this risk-taking is likely considered too far in the future to worry about immediately, particularly as there is no guarantee that the government responsible for introducing rights-offending legislation will still be in office after the many appeal options are exhausted. Even if a government is faced with pressure to pass remedial legislation, it can engage in rhetorical campaigns that blame the judiciary for forcing government to take a position that may be unpopular with its electoral base. A government can also pursue ‘creative’ responses to a prior negative judicial ruling so as to preserve the basic legislative goals that have been impugned, but in ways that do not necessarily comply with the spirit of a judicial ruling (or what James Kelly and Mathew Hennigar refer to as notwithstanding by stealth). This strategy may again lead to legal challenges if individuals or groups believe it is a non-compliant response. However, even if judicial censure occurs, this will be many years away and government leaders might calculate there could be judicial reticence to censure legislation a second time around. In contrast, use of the notwithstanding clause will not only be subject to criticism in the immediate circumstance, but criticism can also resurface in future election campaigns by critics willing to engage in rhetorical insinuations suggesting that a government’s previous support for the notwithstanding clause indicates a lack of support for the Charter.

Although not widely known, the notwithstanding clause is not the only instrument through which the federal government is expected to announce if it intends to pursue legislation that patently contradicts judicial norms about protected rights or what constitutes a reasonable limit under s. 1. The federal Minister of Justice (who in Canada also functions as the Attorney General) has a statutory obligation to alert parliament when government is introducing legislation that is inconsistent with the Charter. This statutory reporting obligation was adopted in 1985, and is authorized by s. 4.1 of the Department of Justice Act. This reporting requirement is similar to an earlier obligation enacted under the Canadian Bill of Rights. As initially conceived, this statutory reporting obligation was expected to serve three purposes: 1) to introduce a more critical focus on rights when evaluating the merits of legislative objectives and identifying compliant ways to achieve these; 2) to influence how government conceives and pursues its legislative agenda; and 3) to encourage parliamentary evaluations of legislation from a rights perspective.

Two streams of Charter assessments occur before legislative initiatives are approved as bills for introduction to parliament. One functions as an advisory role for
policy development purposes (as referred to above). The other is to assist the Minister of Justice’s s. 4.1 statutory reporting obligation for Charter inconsistency. Yet while the statutory reporting obligation for Charter inconsistency has been in place for three decades, no report of Charter inconsistency has ever been made. The absence of any such report amounts to a tacit message regularly given to parliament: that all legislative bills introduced since 1985 have been deemed by successive Ministers of Justice as being consistent with the Charter; that rights are either not implicated or that the prescribed limitations satisfy judicial norms for s. 1. This message of Charter compliance was explicitly delivered under the Conservative government of Stephen Harper following an opposition member’s query about the criteria and processes used for assessing whether this reporting obligation is engaged.  

However, some justice officials have suggested that it would be a serious mistake for parliament to infer from the absence of a s. 4.1 report that there is no need to question Charter compliance or ask about whether legislation is so risky that it is vulnerable to judicial censure. Moreover, according to Department of Justice documents, the criteria used for determining Charter inconsistency for statutory reporting purposes is that “no credible argument exists in support” of the legislative bill in question. Understood in quantitative terms, this constitutes the outer limits of a category of risk of being declared invalid in the range of 81 – 100 per cent. What constitutes the outer edges of this high-risk category suggests virtual certainty the government would have no chance of winning a Charter challenge. This sustained use of what appears to be an exceptionally low threshold for determining Charter consistency prompted a senior Justice lawyer to take his government to court for violating the statutory reporting obligation. 

In a lengthy ruling, the Federal Court ruled against this claim, and upheld the validity of the ‘credible’ Charter argument standard. One of the many arguments the Court made was that parliament itself must assume responsibility to ensure Charter rights are protected, and thus “must not place its duties on the shoulders of the other branches, notably on those of the Minister of Justice”. However, the Court did not address substantial difficulties this responsibility presents for parliament within a political setting where parliament has been explicitly informed that the absence of a s. 4.1 report should be interpreted as a judgment that the legislation is consistent with rights (despite the high tolerance of risk that the Department of Justice Guidelines for interpreting the reporting obligation seemingly allow), is prevented from learning more about the criteria or processes that are used by the Minister for determining that no report of Charter inconsistency is required, and lacks independent legal advice that specializes in issues of Charter compliance.

In short, notwithstanding the Court’s willingness to uphold the standards used by the Minister of Justice when interpreting the s. 4.1 statutory reporting obligation, the political interpretation of this obligation parallels the willingness to pass high-risk legislation without invoking the notwithstanding clause. Both actions suggest government willingness to portray legislation as being constitutionally valid, even when apprised that this judgment involves an interpretation of the Charter that clearly contradicts judicial norms and thus legislation stands a high chance of being declared constitutionally invalid.
Both forms of political behaviour also demonstrate a lack of respect for parliament by placing it in the unfortunate position of unknowingly approving high-risk legislation. Arguably, these forms of political behaviour are also inconsistent with what could be construed as the normative obligation implicit in the Charter – of invoking s. 33 to signal legislative disagreement with judicial norms, thereby inviting debate about the appropriateness of this action – and also inconsistent with the normative ideals that underlie the statutory reporting requirement of s. 4.1 of the Department of Justice Act (as referred to above).

It is certainly not my intent to suggest that government should either avoid introducing legislation whenever uncertain about its chances of successfully defending legislation should it be subject to litigation, or is obliged to invoke the notwithstanding clause whenever it cannot be confident that legislation will survive a Charter challenge. This form of risk-averse behaviour would result in an overly cautious approach to defining a government’s legislative agenda that would have a chilling effect on legislative development and unduly cede to courts sole responsibility to contribute to judgment about the meaning of protected rights or the scope of permissible limitations on rights under s. 1.72

However, a significant and important difference exists between ‘good-faith’ interpretations of the Charter and actions that appear to be more akin to ‘rolling the dice’ by pursuing legislation for which the Minister of Justice has been fully apprised contradicts judicial norms and stands a significant chance of being declared invalid; particularly in situations where case law is reasonably settled. In those circumstances where government leaders knowingly support and promote legislation that is clearly inconsistent with judicial norms, and for which they have been apprised stands an overwhelming chance of being declared constitutionally invalid, they should respect the legal mechanisms intended to support their political judgments to knowingly proceed: by enacting the notwithstanding clause and also informing parliament via the statutory reporting obligation that legislation is inconsistent with the Charter (both actions that, although controversial, appropriately place government in the position of having to defend and convince parliament and Canadians of the merits and justification of its judgment).

CONCLUSIONS

Both the origins of the notwithstanding clause and the infrequency of theoretical or normative discussions about its function or use have contributed to unease and suspicion about what role this power plays in a constitutional bill of rights that otherwise authorizes strong judicial remedies. Nevertheless, Canadians are not well served by either ‘wishing away’ this clause or assuming they can equate its lack of use as an indication of compliance with judicial norms about the Charter. Faced with strong apprehension that use of the notwithstanding clause will have long term negative consequences for political parties, government leaders prefer to role the dice by passing high-risk legislation, and face whatever consequences arise from litigation. Although this may be understandable as a form of rational political behaviour, this does not negate the fact that it also reflects
deeply ingrained cynicism about the importance of constitutional and statutory rules; a concern compounded by the extent to which the Attorney-General (who in Canada does double duty as Minister of Justice) is complicit in activities that lend the appearance of constitutional and statutory misbehavior.

It is well beyond time for a thoughtful discussion of the notwithstanding clause to dismantle the myths that its use signals disregard for the Charter, or that its lack of use implies respect and agreement for judicial norms about the Charter. Similarly, it is time to pay more attention to the interpretation and criteria used for the statutory reporting obligation of Charter inconsistency in s. 4.1 of the Department of Justice Act.

These discussions will inevitably have to address the following question: when does the federal government cross the line between uncertainty about how legislation will fare if litigated, and a duty to invoke the notwithstanding clause or engage the s. 4.1 statutory reporting obligation to alert parliament that legislation is not consistent with the Charter? This question in turn invites many others, including: How much influences does and should the Minister of Justice have within cabinet when advising his or her colleagues that legislative bills as approved are inconsistent with the Charter? Should the Minister of Justice be expected to alert parliament or the public that legislation has a relatively high likelihood of being declared invalid, even when he/she believes that legislation is worth pursuing and represents a normatively compelling interpretation of the Charter? If so, what form should this notice take: reporting under s. 4.1 and/or invoking the notwithstanding clause in a pre-emptive fashion? Should the statutory reporting obligation be amended to require explanations for all bills, rather than a bald statement of Charter inconsistency (that for the reasons explained above is unlikely to ever occur?) And should parliament constitute a specialized committee and/or appoint an independent legal advisor to report on whether all bills introduced are consistent with the Charter?

\[\text{\textsuperscript{1}} I would like to thank Erin Crandall and Emmett Macfarlane for their insightful comments and suggestions for an earlier draft. I would also like to acknowledge financial support from the Social Sciences and Humanities Research Council.}\]

\[\text{\textsuperscript{1}} The notwithstanding clause can be invoked with respect to section 2 and sections 7 to 15 of the Charter.}\]

\[\text{\textsuperscript{2}} Janet L. Hiebert, \textit{Limiting Rights. The Dilemma of Judicial Review} (McGill-Queen’s University Press, 1996), 24-26.}\]

\[\text{\textsuperscript{3}} Janet L. Hiebert, “Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts our Understanding,” in James B. Kelly and Christopher Manfredi (eds.) \textit{The Charter at 25} (UBC Press 2009), 129-144.}\]


\[\text{\textsuperscript{5}} In the 2004 federal election, a handful of prominent Canadians published an open letter to then leader Stephen Harper to elicit a commitment to respect rights, which was defined in part by promising not to invoke the notwithstanding clause “Can we trust you, sir, to defend the Charter?” Globe and Mail, June 5 2004, p A21.}\]

\[\text{\textsuperscript{6}} P.E Trudeau, “’Say goodbye to the dream’ of one Canada,” May 27 1987, Toronto Star; House of Commons Debates, Brian Mulroney, 6 April 1989, 153.}\]


Lois G. MacDonald, “Promoting Social Equality through the Legislative Override” (1994) 4 NJCL 1.


Janet L. Hiebert, Limiting Rights, 10-31; ‘Compromise and the Notwithstanding Clause’, 107.


Christopher P. Manfredi, Judicial Power and the Charter; Canada and the Paradox of Liberal Constitutionalism (Oxford University Press 2001), 176.


Lorraine Weinrib is critical of the Court’s willingness to focus solely on the formal requirements of this power, rather than develop more substantive requirements for its use. Lorraine Eisenstat Weinrib “Learning to Live with the Override,” (1990) 35 McGill Law Journal 553, 541.


An Act to Provide for Settlement of a Certain Labour-Management dispute between the Government of Saskatchewan and the Saskatchewan Governments’ Employees Union, s. 9, SS 1984-85-86, c. 111.

Reference re Public Service Employee Relations Act (Alta), (1981) 1 SCR 313

Saskatchewan Federation of Labour v. Saskatchewan (2015) SCC 4

A controversial proposed use of the notwithstanding clause as a way of avoiding litigation (although eventually rescinded because of strong public criticism) was Alberta’s decision to invoke the notwithstanding clause in Bill 26, The Institutional Confinement and Sexual Sterilization Compensation Act. Then Premier Ralph Klein admitted that the government’s consideration of the notwithstanding clause was a mistake, and implied that his government had been badly advised by its own legal advisers. Alberta Government Press Release, March 10 1998; “Alberta, the Notwithstanding Clause and the Weak,” Vancouver Sun, March 12 1998, A10; “Klein backs off on sterilization deal,” Calgary Herald, March 12 1998, A1, 3.


Patrick Monahan, Meech Lake. The Inside Story, (University of Toronto Press, 1991), 164.

I have Emmett Macfarlane to thank for suggesting this possible use of the notwithstanding clause in a conversation about s. 33.

R. v. Feeney [1997] 2 S.C.R. 13. A 5-4 majority reversed itself on the validity of a common law rule that had allowed police, under certain conditions, to enter a home without a warrant to arrest a suspect. The Court’s new rule required extensive negotiations between all levels of government, complicated by a federal election, and resulted in not only requests for a rehearing to delay the effects of the ruling, but also a further request for additional time to enact legislation. Janet L. Hiebert, Charter Conflicts. What is Parliament’s Role? (McGill-Queen’s University Press, 2002), 148-154.


On February 6 2015, the Court ruled that the complete ban on physician assisted suicide is unconstitutional and suspended the effects of the ruling for 12 months so new legisaltion could be establish regulatory guidelines. However, the Harper Conservative government did little towards developing new
legislation on this issue and the new Liberal government when faced with the nearing deadline, asked the Court in January 2016 to request an extension in the declaration of invalidity.


34 I am grateful to Grégoire Webber for this argument, which occurred in the course of a private conversation in February 2016 about judicial remedies and delayed legislative responses.


36 Although the notwithstanding clause demonstrated to other parliamentary systems the possibility of distinguishing the concept of judicial review from judicial supremacy it is not accurate to equate the notwithstanding clause with the retention of parliamentary supremacy in Canada. Use of this power displaces temporarily, rather than replaces permanently, judicial authority about constitutional validity.


41 The Victoria Charter of Rights and Responsibilities Act does contain a legislative override, despite the fact that courts do not have the authority to set aside the legal effects of duly enacted legislation.

42 This argument was made earlier by Hiebert in “Constitutional Experimentation: Rethinking How a Bill of Rights Functions,” 82 *Texas Law Review* 1963.


47 All interviews were conducted on the basis of anonymity, unless this condition was explicitly waived. The interviews comprised lawyers in the Human Rights Centre at the Department of Justice (Ottawa), between 1999 and 2000, former officials in the Department of Justice (2013-2015), and former Minister of Justice Irwin Cotler (2015). From hereon, Interviews.

48 Interviews.


51 Interviews.


This information, normally highly confidential, became available to the public as a result of the legal challenge by Edgar Schmit of the standards used for determining whether the statutory reporting obligation for Charter inconsistency is engaged under s. 4.1 of the Department of Justice Act. Department of Justice, Extracts from “Effective Communication of Legal Risk”, December 15 2006; Department of Justice, “Legal Risk management in the Public Sector, November 26 2007. Redacted versions of both documents were provided as evidence in Edgar Schmidt v The Attorney General of Canada.

This requirement is: 4.1 (1) . . . [T]he Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity. Department of Justice Act R.S., 1985, c. J-2, s. 4.1(1); 1992, c. 1, s. 144(F).


Statement provided by the Parliamentary Secretary to the Minister of Justice, read into the proceedings of the Justice and Human Rights Committee, Meeting 59, February 13, 2013, Evidence.

These documents state explicitly that the advisory role to assist the Minister of Justice in his or her statutory reporting obligations under s. 4.1 involve a different form of risk assessment that should not be confused with the processes of risk analysis for policy development purposes. Moreover, they indicate that the threshold for triggering advice that a report of Charter inconsistency is necessary for statutory reporting purposes is even higher than when advising a department that Charter risks are so serious that they are manifestly unconstitutional. Department of Justice, Extracts from “Effective Communication of Legal Risk”, December 15 2006.


Edgar Schmidt v The Attorney General of Canada, 2016 FC 269.

Edgar Schmidt v The Attorney General of Canada, 2016 FC 269, para 276.

Standing Committee on Justice and Human Rights, Meeting 59, February 13, 2013, Evidence.

NDP Justice critic Francoise Boivin put forth a motion to the Justice and Human Rights Committee that a “thorough study” be conducted into how s. 4.1 was being interpreted. The Conservative dominated committee defeated the motion, 6-5. A few months later, Brent Rathgeber resigned from the Conservative Party and acknowledged that intense pressure had been exerted on government members to defeat the motion. Standing Committee on Justice and Human Rights, Meeting 59, February 13, 2013, Evidence; “MP Brent Rathgeber’s stand is a principled one that should give the Tories pause,” http://o.canada.com/news/mp-brent-rathgeberrs-stand-is-a-principled-one-that-should-give-the-tories-pause, June 7 2013.