

## The “Notwithstanding” Clause

### **Unique to Canada, Override Clause Has Good Points**

OTTAWA – The compromise agreement among Canada’s first ministers establishing a national charter or rights binding on all governments is peculiarly Canadian in more ways than one.

By inserting a “notwithstanding clause” in the charter to allow legislatures to override certain basic rights in exceptional circumstances, the two levels of government have struck a compromise on the issue of who would have final say on many fundamental issues – politicians or the non-elected judiciary.

The clause is peculiarly Canadian, legal scholars and justice officials noted yesterday. To the best of anyone’s knowledge it does not appear in the bill or rights of any other country...

“Experience has shown that this kind of clause is used very seldom,” Mr. McMurtry says. “These clauses are usually not faced up to because of the political pressures.”

Indeed, federal justice officials are considerably happier with the inclusion of such a clause ... because it allows for more flexibility and direction to the courts in lawmaking. The clause will also eliminate the possibility of Supreme Court decisions becoming enshrined in the constitution, requiring a difficult constitutional amendment to change...

The expected reluctance of legislatures to pass override clauses means that the courts could still decide important issues of public policy, but parliaments will have an opportunity to redress the situation if they don’t agree with the decision and it is in their power to do so.

For example, if the courts should decide that retirement plans or old-age pensions violate the charter’s provisions prohibiting discrimination on the basis of age, Parliament or legislatures can pass an immediate amendment to these acts inserting the required override clause.

Under the compromise of the first ministers, the override clause would have to be re-enacted every five years. That could be routinely done in some instances, but federal drafters will be working the clause so it can apply only to individual pieces of legislation; a legislature could not pass an omnibus [comprehensive] bill exempting it from all provisions of the charter of rights...

The proposed Canadian Charter of Human Rights and Freedoms contains a number of categories, but the override provision applies only to the three main ones: fundamental rights, legal rights, and equality rights...

The “notwithstanding” clause cannot be used to override the other categories of rights in the charter, such as democratic and mobility rights, those aboriginal rights still in the charter, official language rights and minority-language education rights.

- Robert Sheppard

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