No. 20306

IN THE SUPREME COURT OF CANADA

(On Appeal from the Quebec Court of Appeal)

B E T W E E N:

THE ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

LA CHAUSSURE BROWN'S INC.
VALERIE FORD, McKENNA INC.,
NETTOYEUR ET TAILLEUR MASSON INC.
and LA COMPAGNIE DE FROMAGE NATIONALE LTEE.,

Respondents

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF NEW BRUNSWICK

Intervenors

FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF ONTARIO

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**FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF ONTARIO**

I THE FACTS

1. The Attorney General of Ontario makes no submissions on the facts of this case.

2. The Attorney General of Ontario intervenes in this appeal pursuant to his Notice of Intention to Intervene filed on June 3, 1987.

II THE POINTS IN ISSUE

3. By order of the Honourable Mr. Justice Lamer dated May 11, 1987, three constitutional questions were set down, as follows:

1. Are section 214 of the Charter of the French Language, R.S.Q. 1977, c. C-11, as enacted by S.Q. 1982, c. 21, s.1., and section 52 of An act to Amend the Charter of the French Language, S.Q. 1983, c. 56, inconsistent with section 33(1) of the Constitution Act, 1982 and therefore inoperative and of no force or effect under section 52(1) of the Act?

2. If the answer to question 1 is affirmative, to the extent that they require the exclusive use of the French language, are sections 58 and 69, and sections 205 to 208 to the extent they apply thereto, of the Charter of the French Language, R.S.Q. 1977, c. C-11, as amended by S.Q. 1983, c.56, inconsistent with the guarantee of freedom of expression under section 2b) of the Canadian Charter of Rights and Freedoms?

3. If the answer to question 2 is affirmative in whole or in part, are sections 58 and 69, and sections 205 to 208 to the extent they apply thereto, of the Charter of the French Language, R.S.Q. 1977, c. C-11, as amended by S.Q. 1983, c. 56, justified by the application of section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

4. The Attorney General of Ontario intervenes in this appeal to make submissions only in regard to the first question. The Attorney General respectfully submits that this question should be answered in the affirmative.

III THE ARGUMENT

A. Introduction

5. The "institutional framework" of the Charter is located in two different institutional settings. The first is the two stage function of the courts under section 1. The second is the legislative power authorized under section 33. It is this "institutional framework" that carries forward the Charter's ultimate promise of a free and democratic society.

6. Three questions as to the nature of the legislative authority afforded by section 33 arise in this appeal. The first is the retrospective use of the override; the second is non-specific use of the override; the third is routine reliance upon the override.

7. It is respectfully submitted that the text of section 33 is to be subject to the same kind of judicial interpretation by this Honourable Court as are all other provisions in the Constitution of Canada that allocate legislative authority. This approach has been developed through the elaboration of principles of government inherited from the United Kingdom, Canada's distinctive federalism, and the Charter's other features. When the mode of interpretation adopted by this Honourable Court for constitutional analysis generally, and Charter analysis in particular, is applied to section 33, it is respectfully submitted, the conclusion follows that retrospective, non-specific and/or routine exercise of the power to override Charter rights and freedoms is ineffective.

8. For the reasons which follow, the Attorney General respectfully submits that the power afforded to legislatures under section 33 is to be understood as an exceptional power, affording a temporary reprieve from adherence to specified, enumerated rights and freedoms. By means of the special conditions imposed upon the normal process of law-making, section 33 creates a democratic mechanism finely tuned to a specific purpose and not a return to pre-Charter legislative sovereignty. According to this interpretation, section 33 is one of a number of features in the Charter text, and in its interpretation, that avoids "government by judges" while providing judicial review of guaranteed rights. Understood in this way, section 33 forwards the Charter's ultimate promise of a free and democratic society.

B. Retrospective Operation of a Declaration under s.33

9. The National Assembly of Quebec has purported to enact a declaration pursuant to section 33 of the Charter to override Charter guarantees respectively. For the reasons that follow, it is respectfully submitted that such a retrospective use of the declaratory power under section 33 is inconsistent with the Charter's text and with the principles by which that text is to be interpreted.

10. Section 33(1) empowers Parliament or a legislature to declare expressly that an enactment or provision thereof shall operate "notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter". It is respectfully submitted that the word "shall" in subsection 33(1) refers to the future, that is, it indicates that the Act or provision may begin to operate notwithstanding the named guarantees only after the express declaration has been made.

11. It is respectfully submitted that the text of subsection 33(2) supports this interpretation of the previous subsection. Subsection 2 states that the Act, or provision of an Act, which is to take priority over a named Charter provision, "shall have such operation as it would have but for the provision of this Charter referred to in the declaration" (emphasis added). It is respectfully submitted that these words suggest that the override may only take effect after it receives Royal Assent, or proclamation into force.

12. It is respectfully submitted that the maximum 5 year duration of the override also undermines the possibility that it can be used retrospectively. The override is to lapse at intervals which coincide with election frequency. Retrospective use of the override could extend its operation back 5 years and forward 5 years for a total of 10 years. If the override were used in this way the sensitivity of legislators and voters to Charter guarantees would be decreased with the effect that the override would become not the exception but the rule. Indeed, reliance interests upon use of the override might arise.

13. It is respectfully submitted that even if the bare text of section 33 did not suggest that the effect of a declaration is to be prospective, reference to other sections of the Charter would lead to the same conclusion. If a section 33 declaration could be made retrospectively, Charter rights would be in jeopardy at any time. They would be especially vulnerable after adjudication by a legislature able to reach back, through a declaration under section 33, to validate the infringement. In consequence, the supremacy accorded the rights and freedoms in the Charter by section 52 of the Constitution Act, 1982 would be undermined, the access to the courts for review of Charter infringements and remedial relief assured by section 24 would be rendered meaningless and the force of section 32 weakened.

14. The statement in the preamble of the Charter that Canada is founded on the rule of law may also be relied upon to support the view that section 33 cannot be invoked retrospectively. In Reference Re

Manitoba Language Rights, this Honourable Court pointed out that the rule of law is not merely stated to be a foundational principle in the preamble but is "clearly implicit" in the very nature of a Constitution. This Honourable Court relied upon the rule of law in shaping remedial authority for infringement of constitutional guarantees.

> The "rule of law" is a highly textured expression... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. Reference Re Amendment to the Constitution of Canada (Nos. 1, 2 and 3), [1981] 1 S.C.R. 753 at 805-6.
>
> Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 750.

15. It is respectfully submitted that when the rule of law operates as a constitutional principle within a system of constitutional rights, an individual must be able at any particular time to ascertain his or her constitutional rights and the correlative restrictions or duties upon the legislatures and the executive. The requirement that the declaration be made "expressly", in subsection 33(1), suggests that an override of constitutional rights is to be a public act. If the Parliament of Canada or the legislatures of a province were permitted to direct that a declaration under section 33 take effect in the past, then the individual would be wholly unable to evaluate the content and scope of his or her constitutional rights at any given moment. The individual could not gauge the extent of government power precisely when the need to know was most acute. It is respectfully submitted that such a possibility is repugnant to the

understanding of the rule of law set out in the cases noted in the previous paragraph and for that reason should be rejected as an unacceptable interpretation of s.33.

16. The authority of courts to find incursions upon rights to be "limits" justifiable under section 1 does not undermine this argument. As long as "limits" upon rights must be justified according to the standards set out in section 1, as interpreted by this Honourable Court, the rightsholder has a principled means of ascertaining both the right and the limit upon it. Since a declaration under section 33 is based on process and not on principled justification, it cannot be reliably predicted beforehand, when the need to know is most acute. While justification can be judicially articulated ex post, because it invokes a vision of society committed to rights-based values, an override that rests on majoritarian process cannot.

see para 29 to 31, infra

17. The features of section 33 that accentuate political accountability would also be undermined by retrospective reliance upon it. When the override is considered prospectively, all legislators and all voters engage in the ensuing debate as potentially affected by its outcome. When retrospective use of the override is contemplated, however, debate may be restricted to those whose past actions would be affected. If retrospective declarations were directed at politically unpopular or unfamiliar claims, rightsholders would be subject to possible oppression by the majority, a situation which the Charter was

designed to eliminate. In the extreme, declarations could be used to avoid political embarrassment or, at a change in government, to incur political obligations from the party ousted from power. While these examples are admittedly hypothetical, that hypothetical possibility - or the threat of it - would be sufficient to undermine the Charter as part of the supreme law.

18. The option of retrospective resort to section 33 is also repugnant to the principle of the supremacy of the Constitution because it would undermine the guarantee of those rights to which section 33 applies by clouding the guarantee of these rights with the possibility of retrospective nullification. The supremacy of the guarantee would accordingly be weaker than for the other rights, to which section 33 does not apply, on a totally unpredictable basis. The resulting "hierarchy" of some rights over others might encourage governments to be less careful to avoid infringement of the rights that are subject to section 33. The power to authorize infringements retrospectively, it is submitted, is so inimical to the Charter as a whole that s.33 should be interpreted to preclude it.

C. The Specificity of the Declaration under s.33

19. The text of subsection 33(1) provides that a declaration may override a specified constitutional protection if the legislative body expressly stipulates in its enactment that the Act or a provision thereof shall operate notwithstanding a provision included in section 2

or sections 7 to 15 of this Charter. The Attorney General of Ontario respectfully submits that a general reference to all the constitutional provisions subject to s.33 does not satisfy the specificity requirement which the text imposes. For the reasons set out by the Quebec Court of Appeal in Alliance des Professeurs de Montreal v. A.G. Quebec (1985), 21 D.L.R. (4th) 354, and for the reasons that follow, it is respectfully submitted that the impugned declaration under s.33 is not valid.

Alliance de Professeurs de Montreal v. A.G. Quebec
(1985), 21 D.L.R. (4th) 354 (Que. C.A.)

i) Principles of Interpretation

20. Sections 1 and 33 of the Charter set out the institutional roles by which the guarantee of the named rights and freedoms is carried into effect. These sections reflect the resolution of extensive pre-Charter debate as to the propriety of judicial review of constitutionally guaranteed rights by unrepresentative and unaccountable judges. It is respectfully submitted that the Charter text that emerged from that debate should not be understood to entrench rights in section 1 and then revert to legislative sovereignty for some of those rights under 33. While the two sections do effect a compromise between absolute rights and legislative sovereignty, the compromise is embedded in both sections 1 and 33. This complex institutional framework is as important and distinctive a component of the Charter as are the specific rights and freedoms guaranteed. Moreover, the interpretation of the legislature's role under section 33 must be tied to the seamless web of Canadian constitutionalism.

Against this background, the significance of the specificity of the declaration required under s.33 may be fully understood.

Dubois v. The Queen, [1985] 2 S.C.R. 350 at 365 per Lamer J:

> Our constitutional Charter must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts"... The courts must interpret each section of the Charter in relation to the others... (References deleted)

Reference Re s.94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 495 to 499 (per Lamer J.)

Hunter v. Southam, [1984] 2 S.C.R. 145 at 155-6 (per Dickson J., as he then was)

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 344 (per Dickson J., as he then was)

Fletcher, "Two Modes of Legal Thought" (1981), 90 Yale L.J. 970 at 994

> The implication of a structured code is that the whole conveys more meaning than the collected messages of its separate parts. Meaning is encoded, as it were, in the structure of the code. The coherence of the whole and the interrelatedness of the parts enable us to derive principles from the particular provisions.

The Southwest Case, 1 BVerfGE 14, West German Constitutional Court (translated in part in Murphy & Tanenhouse) Comparative Constitutional Law: Cases & Commentaries (1977) at 208-9:

> ... An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain over arching principles and fundamental decisions to which individual provisions are subordinate.

ii) Judicial role within Canadian constitutional history: principle not policy

21. Within the Canadian constitutional tradition, the judiciary has performed the function of guardian of the constitution, leaving the formulation of substantive policy to the elected representatives of government. Before the Charter was adopted, the judiciary monitored the exercise of legislative jurisdiction granted to Parliament and the legislatures by the Constitution Act, 1867 and did not engage in an evaluation of the policy or wisdom of the power impugned.

A.G. Ontario v. A.G. Canada, [1912] A.C. 571 at 583, 589

Amax Potash Ltd. v. Govt. of Saskatchewan, (1977) 2 S.C.R. 576 at 590

Anti-Inflation Reference, [1976] 2 S.C.R. 373 at 424-5.

22. Our constitutional system draws a bright line between the policy or wisdom of legislation, vested in elected representatives on the one hand, and judicial authority to decide disputes between private parties and to act as guardian of constitutional principles vested in our courts, on the other hand. This distinction has been maintained through a doctrine of separation of powers derived from section 96 of the Constitution Act, 1867. By way of interpretation of section 96, this Honourable Court has permitted the legislatures to vest in their own appointees authority to decide questions of policy but not to deliberate solely or finally upon issues of legal or constitutional

principle. The latter role has been left to the independent judiciary, appointed under section 96, and protected by the judicature provisions of the Constitution Act, 1867.

> Reference Re Residential Tenancies Act, [1981] 1 S.C.R. 714 at 735, per Dickson J. (as he then was):
>
> > ... the judicial task involves questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole. (references deleted)
>
> Crevier v. A.G. Quebec, [1981] 2 S.C.R. 220
>
> A.G. Quebec v. Farrah, [1978] 2 S.C.R. 638
>
> Hunter v. Southam, supra, at 162-164, per Dickson J. (as he then was)

23. It is respectfully submitted that this Honourable Court's approach to section 96 reflects the idea that the legitimacy of judicial power to decide legal disputes and to interpret the Constitution is based on the independence of section 96 appointees from the world of political compromise and reward. It is further submitted that the contrast which this Honourable Court has made on a number of occasions between the judicial roles under section 1 and the legislative role under section 33 continues to be faithful to this constitutional principle. Implicit in this contrast is the view that even under the Charter, courts retain the responsibility to measure the content of legislation against the requirements of the Constitution according to legal principle - leaving to the legislatures the arena of policy formation.

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24. This distinction between the judicial and legislative functions under our Constitution, a core principle of the Canadian constitutional framework, is now the foundational principle of this Honourable Court's interpretation of the Charter's guarantee of rights under section 1. And since section 33 was added to the Charter to complement this guarantee, by filling out the Charter's "institutional framework", to interpretation of the legislative role under section 33 is closely connected to the role of the courts under section 1. The following analysis of the dual judicial function under section 1 will then provide a basis for elucidating the reasons for the degree of specificity demanded of a declaration under s.33.

> Beauregard v. Canada, [1986] 2 S.C.R. 56 at 69-73, per Dickson, C.J.C.
>
> Ref. Re. s.94(2) of the Motor Vehicle Act, supra, at 495-499, per Lamer J.

Reference may also be made to:

> Hunter v. Southam, supra at 168-9

25. It is respectfully submitted that the extent of the judicial role under section 1 may serve to elucidate the nature and extent of the legislative role under s.33. As this Honourable Court noted in R. v. Oakes, section 1 both guarantees and permits limits upon certain rights and freedoms enumerated in the other sections of the Charter. Those two features, the guarantee and the limit upon what is guaranteed, mandate a dual judicial function. First, the court is to engage in a purposive analysis of the right - to distil its content and scope - and to determine whether on the facts of a given case the right

has been infringed. The court's second function is to decide whether the policy or decision, already found to infringe a guaranteed right or freedom, is justified. This traditional role of the judiciary as guardian of the constitution and elaborator of principle rather than policy, implicit in the text of section 1, was made explicit in R. v. Oakes where Chief Justice Dickson stated that the exclusive basis on which limits on rights may be justified is the standard of a "free and democratic society" and that:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter... (at 136)
>
> R. v. Oakes, [1986] 1 S.C.R. 103 at 135-136

26. The dual function of section 1 may thus be characterized as affording a dual guarantee. The first guarantee is to the right, as the courts elaborate its content. The second guarantee is to a justified limit on that right, according to the principled elaboration by the judiciary of constraints upon rights, which are themselves rooted in the concept of a free and democratic society. The guarantee is thus initially to a constitutional right and, in the alternative, to a constitutional limit upon that right. Exceptions to those rights find their place not in the courts but in the legislatures, effected either by declaration under section 33 or by constitutional amendment.

see para. 29 to 31, infra

27. This distinction between the roles of courts and legislatures is reflected in this Honourable Court's understanding of the

requirement that limits on Charter rights and freedoms be "prescribed by law". This precondition marks off the principled nature of the judicial role from the legislative responsibility of policy development because it does not permit the courts to fashion limits on constitutional rights out of whole cloth. A Charter infringement must have been previously formulated as "law", by the policy-creating arms of government, before a court can consider the possibility that the infringement is justified under section 1. Otherwise the policy falls pursuant to section 52 of the Constitution Act, 1982.

> R. v. Therens, [1985] 1 S.C.R. 613 at 645 per LeDain J.

28. This distinction between the role of courts and legislatures under the Charter is also reflected in this Honourable Court's statement that the proponent of the infringement as a "limit" must put before the courts the actual historical purpose underlying the impugned policy and may not manufacture new reasons at the time of adjudication. The purpose of the impugned action for section 1 analysis must be the one passed through the law-making process. The policy-making function, therefore, is restricted to the representative, accountable arm of government. The role left to the courts is that which has traditionally occupied judicial attention in our legal system: to examine, in a reasoned and principled way, whether the values underlying the infringement meet an articulated legal standard, i.e., the constitutional concept of a "free and democratic society".

> R. v. Big M. Drug Mart, supra, at 334-335, per Dickson J. (as he then was):
>
> > A number of objects can be advanced to this "shifting purpose" argument. First, there are

> the practical difficulties. No legislation would be safe from a revised judicial assessment of purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations. (emphasis added)

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 374, per Dickson C.J.C. and Wilson J. dissenting

iii) "Limits" and "denials" under the Charter

29. In considering the justification of limits under section 1, this Honourable Court has consistently distinguished between judicial and legislative concerns. The frequently noted distinction between section 1 "limits" on rights and section 33 "denials" of rights delineates the Charter's "institutional framework": in "limits" the courts forward the values inhering in the Charter rights while by "denials" of the legislatures override those values by a particular process. The following decisions in this Honourable Court express this understanding of the judicial role under section 1 and the legislative authority under section 33.

A.G. Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66 at 86:

> the real effect of s.73 of Bill 101 is to make an exception to s.23(1)(b) and (2) of the Charter in Quebec; yet those subsections are not provisions to which exceptions can be made under s.33(1) and (2) of the Charter ...

and at 88:

> The provisions of s.73 of Bill 101 collide directly with those of s.23 of the Charter, and are not limits which can be legitimized by s.1 of the Charter. Such limits cannot be exceptions to the rights and freedoms guaranteed by the Charter nor amount to amendments of the Charter. (emphasis added)

R. v. Big M Drug Mart, supra, at 352, per Dickson J. as he then was:

> [The argument that choosing the Christian majority's day of rest as the most practical]... is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s.2(a).

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-19, per Wilson J.:

> ... I have considerable doubt that the type of utilitarian consideration brought forward... can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s.1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7, implicitly recognized that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.1, it seems to me that the basis of the justification for the limitation of rights under s.7 must be more compelling than any advanced in these appeals.

Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 518 per Lamer J.:

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s.1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s.7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

The distinction between limits and denials was also relied upon in the following two cases:

> R. v. Mannion, [1986] 2 S.C.R. 272 at 282 per McIntyre J. (a limit under section 1 cannot "nullify completely" the right in question)
>
> Jones v. The Queen, [1986] 2 S.C.R. 284 at 297 per La Forest J.

30. The idea of a judicial role which can authorize "limits" on rights but not their abrogation is not new to the Charter. It was included, for example, in the Victoria Charter (1971) and Bill C-60 (1978) preceding the Charter's final text.

> Victoria Charter (1971) Art 1, 2 and 3 (see appendix)
>
> Bill C-60 (1978), s.23 and 25 (see appendix)

Reference may also be made to:

> Christian, "The Limited Operation of the Limitations Clause" (1987), 25 Alta. L. Rev. 264, at 272:

> ... the "direct collision" approach has proven to be a fundamentally important fetter on the power of the state to justify legislative action which conflicts with Charter guarantees. If the limitations clause could justify the denial of rights and freedoms, the express override provision in s.33 would be redundant. Where there is a direct conflict in purpose s.33 must be employed - with the attendant political risks for a government which seeks to deprive citizens of constitutional rights or freedoms. As guardians of the constitution the courts have shown themselves to be alert to attempts to disguise the denial of rights as mere limitations of rights.

Professor Hogg, in ostensibly rejecting this distinction, appears unable to escape from it:

> There is no need to interpret the word "limit" in section 1 of the Charter as excluding a denial (or a direct collision or direct conflict). The word "limit" is sufficiently broad that it can easily accommodate a restriction on entry to minority language schools or any other restriction on a guaranteed right, save, perhaps, a total abrogation of the right. (emphasis added)
>
> "Section One of the Canadian Charter of Rights and Freedoms", in The Limitation of Human Rights in Comparative Constitutional Law, eds. de Mestral et al (1986), at 10

iv) Legislative power under s.33: specificity

31. This Honourable Court has stated that the words "in a free and democratic society" in section 1 embody both the values in the rights and the principles for justification of limits upon them. Beyond that frame of values lies the possibility of denial of Charter rights, effected either through the invocation of section 33 or, in concert with other legislatures, by constitutional amendment. A declaration

under section 33 does not depend for its legitimacy on principled justification but on compliance with prescribed procedures. However, it is submitted, the Charter's ultimate purpose as stated by the Chief Justice in R. v. Oakes, "that Canadian society is to be free and democratic", is carried forward by section 33, not belied by it. For the text of section 33 empowers a legislature to introduce, or return, a chosen policy to the political arena if it is marked as an incursion of a very specific Charter right. Legislative sovereignty does not simply reassert itself when a declaration under section 33 is proposed. On the contrary, the strictures of section 33 require the legislative body to approve or reject the policy not merely on its own merits, but as an infringement of a particularized Charter guarantee.

R. v. Oakes, supra at 136

32. The specificity requirement in subsection 33(1) shapes the nature of the public debate by democratically elected representatives by requiring that the declaration stipulate which specific provision included in section 2 or sections 7 to 15 is to be overridden in order to bring home the significance of overriding constitutional protections. This intensification of the democratic process would be altogether evaded by failure to specify the right which is to be superseded.

33. The need to specify the right or freedom in question demonstrates that the democratic process set by the Constitution for ordinary law-making is insufficient to achieve the subordination of

Charter guarantees. Indeed, section 1 of the Charter provides that ordinary law-making is merely a precondition to the second stage of Charter argument, where the state may attempt to justify the policy if it has been "prescribed by law". Since the Charter stipulates that a limit - which is consistent with the values protected by rights guarantees - must be the product of ordinary law-making, it follows that the Charter exacts a more stringent form of law-making for an override of the same values.

34. The requirement that a declaration overriding named rights be renewed at intervals which correspond with renewed electoral mandates reinforces the suggested interpretation of section 33 as raising the political price for subordinating Charter guarantees. Not only must the elected legislators focus on the specific right to be subordinated, but those legislators must go back to the people for a renewed mandate before they can renew the override.

D. Routine use of the Override in s.33

35. It is respectfully submitted that reliance upon section 33 as a general rule and not as an extraordinary and exceptional exercise of democratic power is inconsistent with both the terms and design of section 33. While section 33 permits a particular Charter right to be subordinated, section 33 cannot be used to subordinate a considerable portion of the Charter. Constitutional amendment is the political mechanism afforded for that purpose. The Charter's ultimate promise of

a free and democratic society would be undercut by indiscriminate use of a mechanism afforded to maintain recourse to the people's representatives - and ultimately to the people - in exceptional circumstances.

36. It is respectfully submitted that routine reliance on section 33 would have the effect of dulling democratic sensitivity to the significance of overriding constitutionally protected interests by invoking it in situations in which there is no actual or potential Charter infringement.

37. It would likely be unduly onerous for a legislative body to invoke section 33 on a routine basis if specific reference to the precise Charter right to be subordinated is necessary. It is only by an omnibus reference to the relevant rights that a global override could be achieved because the task of identifying the precise rights in issue in each instance, and the complexity of the debate which would ensue, would grind government to a halt. It is respectfully submitted that this result reveals the design of the Charter: the paralysis which would result from adherence to the specificity requirement in s.33(1) indicates that the override cannot serve this purpose. Section 33, on this view, is available to override a specific Charter right temporarily when what is at stake is clearly put before the legislators.

38. It is respectfully submitted that routine use of the override undermines the design of the Charter and its supremacy as part of the Constitution of Canada. The judicial articulation of the content of the rights and the principled basis for the limitation would be truncated; the force of the guarantee in section 1 would be undercut for the rights set out in sections 2 and 7 to 15; and the need to resort to constitutional amendment for radical transformation of the constitutional guarantees of rights set out in the Charter would be short circuited.

39. It is respectfully submitted that routine reliance upon section 33 may not fall within the jurisdiction of a provincial legislature on division of powers grounds. This would follow if the declaration under s.33 were classified not as a matter falling with s.92 of the Constitution Act, 1867, but as a matter of national dimension. General enjoyment of constitutional rights, in this view, would be beyond the reach of a declaration under s.33. This argument is bolstered by the guarantee set out in section 6 of the Charter, which is not subject to the override. Since citizens and permanent residents enjoy inter-provincial mobility rights, their interest in the currency of Charter guarantees in other provinces is more than hypothetical. This argument leads to the conclusion, once again, that what would be achieved by routine use of the override may only be effected by constitutional amendment.

E. Conclusion

40. Mr. Justice Lamer stated, in the Motor Vehicle Reference, that section 1 and section 33 not only provide the structural foundation of the Charter, but also endow it with a unique institutional dimension that makes comparison with other constitutions inappropriate. It is respectfully submitted that these two sections are not only unique to Canada but distinctively Canadian. While they provide the institutional structure by which the Charter's new guarantees are carried into effect, they also reflect and refine traditional Canadian constitutional attitudes to the roles appropriate to courts and legislatures.

Motor Vehicle Reference, supra, 496-8

41. It is respectfully submitted by the Attorney General of Ontario that it is that distinctive institutional framework which must be understood in order to understand the Charter's coherence generally and, more particularly, the nature of the legislative power granted under section 33. In R. v. Oakes, the Chief Justice invoked two contextual principles to interpret section 1, namely the awareness that section 1 justification entails an impairment of rights guaranteed by the supreme law of Canada and also concern that limits upon those rights satisfy the exclusive justificatory criteria set out. According to this approach, the Charter harnesses the traditional strengths of independent, principled judicial analysis to new values in both stages of Charter argument. The exclusive grounds of justification imposed by

the concept of a "free and democratic society" and the stipulation that limits be prescribed by law, define the courts' Charter role as familiarly judicial and also preclude what many commentators predicted: the transformation of courts into super-legislatures.

R. v. Oakes, supra, 136-7

42. These two contextual principles are also of assistance in elucidating the requirements of section 33, with a similar effect. Just as they enable courts to remain courts of law under section 1, they enable legislatures to remain legislatures under section 33. The specificity requirement in section 33 serves to focus the attention of the democratic actors to the significance of overriding interests protected as part of the supreme law of Canada when they invoke a process which subordinates those rights and freedoms to legislative priorities. Attention to these two contextual elements also militates against retrospective or routine reliance upon s.33, so that the constitution of the nation is ordered, knowable, and supreme.

43. The purpose for which the Charter was entrenched, that Canadian society be free and democratic, is realized through the judicial role under section 1 and through the legislative role under section 33. Judicially vindicated "limits" mediate between the enumerated rights and freedoms and the ties that bind all individuals, as equals, into a political community that honours individual liberty and democracy. Because declarations under section 33 need not be consistent with the values protected by rights, and often will not be,

they must be passed through a democratic process more focused than that which the Constitution sets for ordinary law-making. To effect the subordination of constitutionally mandated priorities to other preferences, the Constitution exacts an exceedingly high standard of democracy. Indeed, the conditions imposed on the exercise of the override, it is submitted, support the legitimacy of an override of constitutional protections. These conditions render the legislatures - and not the courts of law - "super-legislatures". The constitution exacts a high political price from legislators who choose to rely upon section 33 because, when they do so, they step out onto the constitutional stage.

Reference may be made to:

R. v. Oakes, supra at 135-7

Ref. re s.94(2) of the Motor Vehicle Act, supra at 498

A.G. Ontario v. A.G. Canada, supra, at 586

Reference may be made to Rawls, "Justice as Fairness" (1985), 14 Phil. & Public Affairs 223.

IV ORDER REQUESTED

44. The Attorney General respectfully seeks an order of this Honourable Court answering the first constitutional question in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

L. Weinrib

Lorraine E. Weinrib
Of Counsel for the Attorney General of Ontario

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LIST OF AUTHORITIES

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14.	Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 374	p. 17	para. 28
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16.	Reference Re s.94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 495-499, 518	p. 11 p. 14 p. 18 p. 25 p. 26 p. 27	para. 20 para. 24 para. 29 para. 40 para. 41 para. 43
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18.	R. v. Mannion, [1986] 2 S.C.R. 272 at 282	p. 19	para. 29
19.	R. v. Oakes, [1986] 1 S.C.R. 103 at 135-137	p. 15 p. 21 p. 26 p. 27	para. 25 para. 31 para. 41 para. 43
20.	R. v. Therens, [1985] 1 S.C.R. 613 at 642	p. 16 p. 21	para. 27 para. 31
21.	Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-219	p. 18	para. 29
22.	The Southwest Case, 1 BVerfGE 14, West German Constitutional Court (translated in part in Murphy & Tanenhouse) Comparative Constitutional Law: Cases & Commentaries (1977) at 208-9	p. 11	para. 20
23.	Christian, "The Limited Operation of the Limitations Clause" (1987), 25 Alta. L. Rev. 264, at 272	p. 19	para. 30
24.	Fletcher, "Two Modes of Legal Thought" (1981), 90 Yale L.J. 970 at 994	p. 11	para. 20