

ARTICLE

33 YEARS LATER: REVISITING SECTION 33 IN THE CONTEXT OF THE NEWLY CONSTITUTIONALIZED RIGHT TO STRIKE

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INTRODUCTION

Finding a new constitutional right is a delicate task, one that the Supreme Court of Canada (“Supreme Court”) must cross a high threshold to justify. The task is delicate because when the bench does so, the legislative branch must abide by that judge-made decision, even if it concerns an issue that an individual legislature, with its own unique struggles, might be better positioned to tackle. Restraint in creating a new constitutional right is particularly important in the field of labour relations, where legal certainty is not only desirable, but indeed a keystone in ensuring stability and balance with respect to employer and employee rights.

The Supreme Court’s decision in *Saskatchewan Federation of Labour v Saskatchewan* (“SFL”)¹ engages the ongoing public debate about which branch—the legislative or the judiciary—is most appropriate to create law. In *SFL*, the Supreme Court constitutionalized a new right to strike under *Charter* section 2(d). This follows very recent Supreme Court jurisprudence that constitutionalized a right to collective bargaining, also under section 2(d), in *Mounted Police Association of Ontario v Canada (Attorney General)* (“*Mounted Police*”).² Both decisions impose positive duties on employers to bargain in good faith and signify a new direction in Canadian labour law, one that has sparked considerable controversy. A particular concern is that public sector employees (and the government’s mobilization of public sector employees) perform a key role in ensuring public safety. When these workers have a constitutional right to strike, the government’s ability to legislate on such matters may be unduly restrained.

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1 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 3 WWR 1 [SFL].

2 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, 380 DLR (4th) 1 [Mounted Police]. A Supreme Court majority (Chief Justice McLachlin and Justices LeBel, Abella, Cromwell, Karakatsanis and Wagner concurring; Justice Rothstein dissenting) affirmed *Health Services* and *Fraser* and declared a new constitutional right to engage in meaningful collective bargaining under s. 2(d) of the *Charter*. By striking down the *Public Service Labour Relations Act*, SC 2003, c 22, s 2, which prevented members of the RCMP from forming unions or engaging in collective bargaining, the court moved Canadian labour law in the direction of a “generous and purposive approach” from the “restrictive approach” previously followed (para 30).

In light of these current issues, critics such as Asher Honickman,³ Andrew Coyne⁴ and Conrad Black⁵ have discussed the role of the courts in constitutionalizing new rights. While there is little doubt that the Supreme Court is empowered to recognize rights as they develop in society,⁶ interpret the constitution and determine whether statutes are valid,⁷ much of the current criticism addresses how the Supreme Court majority came to their decision in *SFL*. While Justice Rothstein and Justice Wagner's dissent in that case attacks it most directly, University of Saskatchewan constitutional law professor Dwight Newman calls the majority decision an "unjustified departure from precedent"⁸ and criticizes it for falling short of the standard the public ought to expect from such a monumental decision. Indeed, he suggests that such an impoverished decision may warrant use of *Charter* section 33, the rarely invoked legislative override provision.

Also called the "notwithstanding clause", section 33 is not without controversy and was hotly debated both before and following its inclusion in the *Charter*.⁹ In 1990, John Whyte and Peter Russell debated the merits of section 33. Whyte considered it an impediment to constitutional democracy, an anachronistic holdover from British Imperial times whose removal from the *Charter* is at least as well supported as its retention.¹⁰ Russell supported section 33, arguing that in a constitution that had the potential for making

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- 3 Asher Honickman, "A Troubling Decision on the 'Right to Strike'", *National Post* (5 February 2015), online: <<http://news.nationalpost.com/2015/02/05/asher-honickman-a-troubling-decision-on-the-right-to-strike>> archived at <<https://perma.cc/9ZWA-439U>> [Honickman].
 - 4 Andrew Coyne, "Imperious Conservatives and runaway Supreme Court set to collide", *National Post* (9 March 2015), online: <<http://news.nationalpost.com/2015/03/09/andrew-coyne-imperious-conservatives-and-runaway-supreme-court-set-to-collide>> archived at <<https://perma.cc/FT5F-NLS2>> [Coyne].
 - 5 Conrad Black, "Supreme Court on the loose", *National Post* (14 February 2015), online: <<http://news.nationalpost.com/2015/02/14/conrad-black-supreme-court-on-the-loose>> archived at <<https://perma.cc/YLL9-RVJ9>> [Black].
 - 6 *Vriend v Alberta*, [1998] 1 SCR 493 at para 198, 156 DLR (4th) 385 [Vriend].
 - 7 Peter Hogg, *Constitutional Law of Canada*, student ed (Toronto: Thomson Carswell, 2010) [Hogg] at 12-7.
 - 8 Dwight Newman, "A court gone astray on the right to strike", *National Post* (26 February 2015), online: <<http://news.nationalpost.com/2015/02/26/ed022715-newman>> archived at <<https://perma.cc/93NH-HNST>> [Newman]. Newman is not the only critic who has suggested the use of the override clause. See also Coyne, *supra* note 4 and Black, *supra* note 5.
 - 9 Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol 2 (Toronto: McGraw-Hill Ryerson Limited, 1989). Early drafts of the *Charter* proposed an override clause for each particular freedom, as evidenced in Bill C-60 of the 1979 Federal-Provincial First Ministers' conference (568). In a July 1980 report, the Sub-Committee of Officials on a Charter of Rights considered "the practicability of including an override (non-obstate) clause in an entrenched *Charter*, thus allowing jurisdictions to enact laws that would expressly supersede particular rights" (661). Most jurisdictions opined that a suitable override clause, when found, might be an acceptable compromise to an entrenched *Charter*. In November of 1981, during the First Ministers' Agreement, the governments of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, and the Federal Government agreed to add the notwithstanding clause to the nascent *Charter* "[i]n an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments" (904-905). Soon after, in the November 23, 1981 House of Commons debates, subsection 33(1) in its present form was added to the Amendments to the Proposed Resolution for a Joint Address to her Majesty the Queen Respecting the Constitution of Canada. The decision passed unanimously with 222 yeas (921).
 - 10 John Whyte, "On Not Standing for Notwithstanding" in Christian Leuprecht & Peter H Russell, eds, *Essential Readings in Canadian Constitutional Politics* (Toronto: University of Toronto Press, 2011) at 373-381.

fundamental rights ultimately justiciable,¹¹ the override gives the elected Parliament and Legislatures the necessary flexibility to govern.

These issues are just as relevant today as they were in 1990. In this paper, I side with Russell and argue that section 33 is not a dead letter, and explore, in the context of *SFL*, what may justify its use and how that might draw away from the distracting, misunderstood and misapplied issue of judicial activism.¹² Instead of lambasting the institution of the judiciary,¹³ I suggest that the notwithstanding clause is best used in two circumstances. Firstly, it may be helpful to invoke it where a court judgment demonstrates improper use of legal principles or is questionably reasoned, with the result that it is incongruous with clear, established precedent from which there does not appear to be sufficient rationale to depart. In the wake of a ruling such as *SFL* that introduces grave uncertainty into a sensitive and delicate area of the law, section 33 may be an effective way to sustain public dialogue regarding the issue and can help shed light on the scope of a newly found constitutional right.

Secondly, the override clause may be used where the government perceives such a pressing public need that it decides that the impugned legislation shall operate notwithstanding a *Charter* right in order to achieve this objective. From a practical perspective, section 33 gives a government the required flexibility to tackle and resolve issues quickly (such as public safety) that other measures (such as constitutional amendment) would be too slow to ameliorate.¹⁴

SFL presents an opportunity to test an application of the override clause: the majority decision contains puzzling judicial decision-making and an unjustified departure from precedent. Uncertainty results from this and the issue concerns a pressing need, namely public safety and essential services. Plainly, *SFL* does not appear to be a good example of the “living tree” doctrine in action. “Living tree” is an interpretive doctrine arising from the 1930 *Edwards v Canada (“Persons”)* case that proposes to strike a balance between two seemingly paradoxical goals of constitutional lawmaking: predictability and flexibility.¹⁵ Simply, the constitution is “a living tree which, by way of progressive interpretation,

11 For a lengthier discussion of the term “ultimately justiciable”, see Peter Russell, “Standing Up for Notwithstanding” in Christian Leuprecht & Peter H Russell, eds, *Essential Readings in Canadian Constitutional Politics* (Toronto: University of Toronto Press, 2011) at 383 [Russell].

12 Some commentators have embellished their criticisms of *SFL* and other recent Supreme Court decisions with the term “judicial activism”. This is not particularly useful, since over time the term has taken on many different, competing meanings. Like the word “terrorism”, persons asserting a strong political point and wishing to generate outrage often wield it. Calls to restrain or overthrow a Supreme Court “gone wild” are not productive, particularly since in circumstances such as these, section 33 remains a legitimate tool of governance that can alleviate concerns of the court overreaching its authority. For an example, see Andrew Coyne, “Supreme Court euthanasia ruling marks the death of judicial restraint”, *National Post* (13 February 2015), online: <<http://news.nationalpost.com/2015/02/13/andrew-coyne-supreme-court-euthanasia-ruling-marks-the-death-of-judicial-restraint>> archived at <<https://perma.cc/VD3F-CVFD>>.

13 For a blistering criticism of the Supreme Court, see Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined our Law and Our Democracy* (Montreal: McGill-Queen’s University Press, 2003).

14 For example, Jean Chrétien suggests a use of the notwithstanding clause: “Under the *Charter*, for example, Canadians have freedom of speech [...] But what if the Supreme Court were to rule that freedom of speech took precedence over any laws against hate literature or child pornography? I would have no problem if the government of the day used the notwithstanding clause in order to prevent the spread of discrimination or to protect the innocence of children.” Jean Chrétien, *My Years As Prime Minister* (Toronto: Knopf Canada, 2010) at 392.

15 Centre for Constitutional Studies, “Living Tree Doctrine” (2016), *University of Alberta*, online: <<http://ualawccsprod.srv.ualberta.ca/ccs/index.php/i-o/795-living-tree-doctrine>> archived at <<https://perma.cc/ZKU8-QEA6>>.

accommodates and addresses the realities of modern life”.¹⁶ When deciding whether the constitution should evolve or not, the court must seek to further the *Charter* framers’ intent and not hold dogmatically to the strict formality of the legislative text.¹⁷

Among other things, *SFL*’s dissenting opinion states that the *Charter* framers did not intend to embed a constitutional right to strike in the constitution.¹⁸ This observation, in conjunction with others detailed below, supports the contention that the majority decision is a sharp departure from precedent instead of a carefully pruned and cultivated outgrowth of the constitutional “living tree”. I begin by discussing section 33 itself and follow with an examination of *SFL*. I then analyze the impact of the decision and present some conclusions regarding the use of section 33 in the modern, Canadian legal context in light of *SFL*.

I. WHAT IS SECTION 33?¹⁹

When Canada adopted the *Charter* in 1982, it limited the power of the federal Parliament and the provincial legislatures²⁰ to intrude on certain civil liberties. These liberties include freedom of religion, freedom of expression, freedom of assembly and association, voting and mobility rights, and new language rights. The constitutional entrenchment of the *Charter* transformed Canada from a system of parliamentary sovereignty into one of constitutional supremacy.²¹ In short, with respect to the civil libertarian values constitutionally protected by the *Charter*, theoretically the last word rests with the courts and not with the legislative branch.

The *Charter* is a cousin of the American Bill of Rights, which emerged in 1789 from the ten amendments to the American Constitution.²² As with the *Charter*, the executive and legislative branches protect the rights enumerated within the Bill from abridgment. Unlike the *Charter*, however, the rights in the American Bill of Rights cannot be altered except by constitutional amendment,²³ practically giving the United States Supreme

16 *Reference Re Same Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*Same-Sex*]. See also Centre for Constitutional Studies, *supra* note 15.

17 Centre for Constitutional Studies, *supra* note 15.

18 *SFL*, *supra* note 1 at para 158.

19 The section states:

Section 33.

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

20 Hereafter, where the words “legislature” or “legislatures” are used, they will refer to both the provincial and territorial legislatures.

21 Hogg, *supra* note 7 at 12-5.

22 *Ibid.*

23 *Ibid.*

Court “final adjudicatory power in interpreting the constitutionality of legislative acts”.²⁴ Thanks to the notwithstanding clause, this is not the Canadian experience. Section 33 states that the Parliament and any legislature can enact legislation notwithstanding sections 2 and 7 to 15 of the *Charter*. This gives an elected government the power to override a substantial portion of the *Charter*, so long as it expressly declares within the statute that it is overriding the *Charter* rights enumerated in section 33.²⁵ If a government meets these low threshold requirements, that statute is subject to a five year “sunset clause”. Since an election will invariably be held by the end of the five years, the public can express its opinion of the *Charter*-infringing law by voting. Additionally, it allows the government to observe how that statute impacts society. As Peter Hogg notes, the notwithstanding clause “thus preserves parliamentary supremacy over much of the *Charter*”.²⁶

In practice, however, the notwithstanding clause has rarely been used. The federal Parliament has never invoked it.²⁷ Outside of Quebec, only the Yukon Territory, Alberta and Saskatchewan have invoked it, and these hardly qualify as examples.²⁸ Of the three, Saskatchewan’s invocation of section 33 is the most relevant for this paper. In a 1985 case,²⁹ the Saskatchewan Court of Appeal struck down a piece of back-to-work legislation, ruling that it infringed a constitutional right to strike. Soon after, the government of Saskatchewan anticipatorily invoked the notwithstanding clause in *The SGEU Dispute Settlement Act* to protect it from the Court of Appeal’s adverse decision in *Dairy Workers*. Considering *SFL*, it is ironic that in 1987, the Supreme Court eventually upheld³⁰ the government’s position, overturning the finding of the Court of Appeal and affirming their ruling in *Reference re Public Service Employee Relations Act (Alberta)* (“*Reference re Public Service*”)³¹ that the *Charter* did not protect such a right. While section 33 ultimately proved unnecessary to achieve the government’s aim, this example nonetheless illustrates the notwithstanding clause countering what the passing of time revealed was bad law.

II. SECTION 33 AND WHO HAS THE “ULTIMATE SAY”

Without the value of such hindsight, it can be difficult to tell which of the two branches, the legislative or judicial, is ultimately “right” in a given situation. There are competing perspectives on this. Alexander Bickel argues that “the pressure for immediate results” in legislative governance leads legislators to act “on expediency rather than take the long

24 Caroline S Earle, “The American Judicial Review Quagmire: A Canadian Proposal” (1993) 68:4 *Ind LJ* 1357 at 1358. This illuminating paper proposes adding an override clause similar to section 33 to the American Constitution. Concerning section 33, Earle asserts that it “represents an appealing solution to the American debate of judicial finality” (1359) [Earle].

25 Hogg, *supra* note 7 at 39-6 to 39-7.

26 *Ibid* at 12-6.

27 David Johansen & Philip Rosen, “The Notwithstanding Clause of the Charter” (17 May 2012), *Library of Parliament*, online: <<http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.pdf>> archived at <<https://perma.cc/M8B5-CJZ5>>.

28 *Ibid*. Although Yukon was the first to use the clause, it ultimately never brought into force the statute that included it. Alberta invoked section 33 to legislate an opposite-sex only definition of marriage, but the Supreme Court in *Reference re Same-Sex Marriage* ruled that only the federal Parliament can define the term “marriage”.

29 *RWDSU, Locals 544, 496, 635, 955 v Saskatchewan*, [1985] 5 *WWR* 97, 19 *DLR* (4th) 609 (WL Can) [*Dairy Workers*].

30 *RWDSU v Saskatchewan*, [1987] 1 *SCR* 460, 38 *DLR* (4th) 277 (WL Can).

31 *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 *SCR* 313, 38 *DLR* (4th) 161 (WL Can) [*Reference re Public Service*].

view”.³² The bench is better equipped to establish principles, values and rights and can apply them consistently.³³ This instinct generally forms the backbone of the argument that constitutional issues should be ultimately justiciable.

However, the fact that the legislative branch is more suited to deal with matters in an expedient manner is also valuable in governance. Canada is not a homogenous society, utterly uniform in each of its provinces and territories. Federalism acknowledges the diversity among provincial and territorial boundaries and gives rise to laws suited for each discrete population. We also have an overarching constitution, interpreted by the judiciary, which sets out the core rights and freedoms belonging to each person, regardless of provincial or territorial borders. As the electorate, we have decided that we must balance these two competing sources of power by empowering local governments to determine policy that, to the fullest extent possible, reflects the protections guaranteed by the constitution.

Section 33 is part of that constitution. By including it, the electorate has also conceded that Parliament and the legislatures may decide if special circumstances or a greater social need require abrogating a liberal right. In circumstances where public safety is at risk, for example, seeking constitutional amendment in order to enact necessary but *Charter*-adverse legislation would be too slow. In this case, an elected government has the expertise and the intimate connection with the issue that one could not expect a court to have, and accordingly can pass the legislation to resolve that problem.

Another benefit to section 33 is its potential to “maximize citizen participation in the processes of government”.³⁴ Caroline S. Earle supports the notwithstanding clause from an American perspective (where constitutional supremacy truly reigns supreme). She asserts that a legislative override like section 33 “suggests that the task of interpreting the Constitution is as fundamental a citizenship duty as voting; constitutional analysis is too important to leave in the hands of a select few”³⁵—regardless of how skilled those hands are. This sentiment has a strong appeal, as it emphasizes the influence that each citizen should wield in a democracy.

At the same time, when promoting section 33 as a potentially useful democratic tool, it is important that a defence of its continuing merit is not based on the argument that an elected body must *always* be able to trump the will of appointed judges. As Russell states in “On Standing Up For Notwithstanding”, such a conception of democracy is “most simplistic and illiberal”, ignores the need for “checks and balances as a condition of liberty” and is oblivious to “the injustices which a majority may wish to inflict on a minority”.³⁶

Instead, a defence of section 33 should acknowledge that judges are not infallible. While tasked with interpreting and applying the constitution in a case before them, they must exercise considerable care to ensure that their decisions are grounded in proper authority and that they correctly interpret the law. As Bickel states, judges have “the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well”.³⁷ Courts, through judicial review, play a

32 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986) at 25 [Bickel].

33 *Ibid.*

34 Earle, *supra* note 24 at 1360.

35 *Ibid.*

36 Russell, *supra* note 11 at 382.

37 Bickel, *supra* note 32 at 25-26.

valuable role in lawmaking, especially since it is in the courts that statutes take on “flesh and blood”, and judicial review “provides an extremely salutary proving ground for all abstractions”.³⁸

Despite their best efforts, however, judges invariably approach cases with particular biases and preformed notions.³⁹ One need only observe the dissents and split decisions of the Supreme Court to see that the bench does not always operate with one mind. Although educated and often well-informed approximations are possible, from the perspective of a particular judgment the bench is unable fully to grasp the social and economic consequences of its decisions.⁴⁰ Another concern is the politicization of the courts. The United States, further along in the democratic experiment than Canada, is currently experiencing that troubling phenomenon.⁴¹ When the courts make a questionable decision, whether or not it is politically motivated, section 33 provides a process that is “more reasoned than court-packing and more accessible than constitutional amendment, through which the justice and wisdom of these decisions can be publicly discussed and possibly rejected”.^{42,43} This rationalization of section 33 is a pithy summary of the notwithstanding clause’s contemporary value. As Paul Weiler adds,

Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle “rights” issues as they regularly arise. At the same time, however, the *Charter* reserves for the legislature a final say *to be used sparingly in the exceptional case where the judiciary has gone awry*.⁴⁴

These observations regarding section 33 place the courts and the elected governments on the equal footing of governing power they are meant to share under the constitution.

III. CHARACTERISTICS OF SECTION 33 THAT EMERGE FROM JURISPRUDENCE

For the most part, when evaluating whether section 33 has been properly exercised, the court will simply ensure that the government followed the formal requirements for invoking it.⁴⁵ A few cases, however, have briefly commented on its utility and purpose. In *Black v Law Society (Alberta)* (“*Black*”),⁴⁶ the Alberta Court of Appeal acknowledged

38 *Ibid* at 26.

39 Hogg, *supra* note 7 at 12-8 and 39-11.

40 *Ibid* at 39-11.

41 Earle, *supra* note 24 at 1362. See also note 39.

42 Russell, *supra* note 11 at 382.

43 Hogg, *supra* note 7 also discusses the dangers of court packing: “In the United States, where the Bill of Rights is unqualified by an override power, the political response to a decision considered unjust or harmful is to attack the Court, and to attempt to change its composition” (39-10). For example, in 1937, President Franklin Roosevelt threatened to pack the Supreme Court in order to motivate it to favour his New Deal. More recently, Republican Presidents have appointed judges expressly in order to reverse some of the Warren Court’s controversial civil libertarian decisions. Such actions obviously cast doubt on the institutional independence of the judiciary.

44 Russell, *supra* note 11 at 384 [emphasis added].

45 Hogg, *supra* note 7 at 39-8 to 39-9. Since *Ford v Quebec (AG)*, a government does not need to show reasonableness or demonstrate justification apart from following the undemanding, formal requirements enumerated in section 33.

46 *Black v Law Society (Alberta)*, [1986] 3 WWR 590, 27 DLR (4th) 527, 1986 CarswellAlta 48 (WL Can) [Black]. The plaintiffs (a group of Ontario lawyers) were barred by the Alberta Law Society from entering into a partnership with practicing members of the Alberta bar who were resident in Alberta. The plaintiffs argued that their section 2(d) *Charter* rights were infringed and successfully brought their appeal to the Alberta Court of Appeal.

that with section 33, majority rule in Canada remains, but suggested that its use could have an undesirable political outcome.⁴⁷

In *R v Ushkowski* (“*Ushkowski*”)⁴⁸ the Manitoba Court of Appeal seems to agree with the spirit of section 33 in preserving what some have labeled “co-operative federalism”.⁴⁹ Among other things, the bench evaluated whether the uneven application of law between provinces violated the *Charter*’s section 15 equality rights. Justice Lyon stated that section 33 was intended by the *Charter* framers to allow governments to decide whether federal and provincial legislation could be excluded from *Charter* operation, even when other provinces remained subject to it. In short, “phasing in or opting out of [...] constitutional provisions or amendments which may result in the uneven application of laws”⁵⁰ is not unconstitutional on its face.

In *Vriend v Alberta* (“*Vriend*”), Justice Major for the Supreme Court (dissenting only on that case’s remedy issue) noted that,⁵¹ as per *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc* (“*Southam*”), it is “the legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements”,⁵² and should a legislature decide that a law operate notwithstanding the *Charter*, the choice of invoking section 33 ultimately lies with the Legislature. After all, “[t]hey are answerable to the electorate of that province and it is for them to choose the remedy whether it is changing the legislation or using the notwithstanding clause”. Lastly, “[t]hat decision in turn will be judged by the voters”.⁵³

These cases illustrate three enduring aspects of section 33: the government must exercise diligence and political responsibility in invoking it; our federal system admits of the inherent variability of law across jurisdictional borders; and section 33 is an acceptable tool for governance in our constitutional system, promoting dialogue between the courts and the public (represented by their elected representatives). Having noted the continued usefulness of section 33, I will now discuss some characteristics that make a case like *SFL* a good candidate for applying the override.

47 “If the majority wish to prevail over individual liberty in such a way, they should be required to face up to it and accept the unequivocal political responsibility which comes upon invocation of section 33.” *Ibid* at para 151.

48 *R v Ushkowski*, [1989] 6 WWR 725, 62 DLR (4th) 155, 1989 CarswellMan 188 (WL Can) [*Ushkowski*].

49 *Ibid* at para 32. See also para 29: “[T]he federal nature of the country must be taken for granted as the foundation around which the whole structure and system of government was conceived and implemented in Canada. While individual rights and freedoms are and always have been an integral part of that system, it is impossible to believe that it was ever the intention that the *Charter*, or any provision of it, would override the systematic federal nature of our parliamentary system of government.”

50 *Ibid* at para 32.

51 *Vriend*, *supra* note 6 at para 196.

52 *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, [1984] 2 SCR 145 at para 44, 11 DLR (4th) 641 (WL Can) [*Southam*].

53 *Vriend*, *supra* note 6 at para 197.

IV. *SFL*, THE IMPUGNED LEGISLATION AND WHAT THE MAJORITY DOES HERE

The *Public Service Essential Services Act* (“*PSESA*”)⁵⁴ is part of a labour services regime implemented in 2007 by the Saskatchewan government. Essentially, it regulates and limits the striking ability of unionized public sector employees providing essential services. The workers affected by *PSESA* are designated as “essential service employees” unilaterally by the government. If their union strikes, they are prohibited (by threat of a summary conviction offence) from joining in strike action and must continue working under the terms and conditions of their last collective bargaining agreement.

The definition of “essential services” provided in *PSESA* is quite broad, as is the definition of “public employer”. When there is a work stoppage, a public employer and the union must negotiate an essential services agreement that will govern how public services will be maintained. If these negotiations themselves break down, the public employer is authorized under the statute to, with notice, unilaterally designate which public services will be considered essential, including the number and names of employees affected. While the Saskatchewan Labour Relations Board, an independent tribunal, can review the numbers of such employees required to work during a strike, it cannot review whether a service is essential or whether the employees chosen to work have been selected reasonably.

In the introduction to the *SFL* majority decision, Justice Abella summarizes the majority’s holding in one sentence: “Because Saskatchewan’s legislation abrogates the right to strike for a number of employees and provides no such alternative mechanism, it is unconstitutional”.⁵⁵ In light of current jurisprudence, most notably *Mounted Police*, an employer fails to fulfill its constitutionally mandated duty when it does not engage in a good faith bargaining process. Arguably, in *SFL* (1) unilateral decision-making on the part of a public employer (2) with no adequate review mechanism (3) combined with no alternative dispute resolution mechanism when parties reach an impasse constitutes

54 *The Public Service Essential Services Act*, SS 2008, c P-42.2 [*PSESA*]. *PSESA* sets out a broad definition of “essential services”:

s. 2(c)

(i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:

- (A) danger to life, health or safety;
- (B) the destruction or serious deterioration of machinery, equipment or premises;
- (C) serious environmental damage; or
- (D) disruption of any of the courts of Saskatchewan; and

(ii) with respect to services provided by the Government of Saskatchewan services that:

- (A) meet the criteria set out in subclause (i); and
- (B) are prescribed; [...]

Likewise, a “public employer” is defined as:

s. 2(1)

- (i) the Government of Saskatchewan;
- (ii) a Crown corporation as defined in *The Crown Corporations Act, 1993*;
- (iii) a regional health authority as defined in *The Regional Health Services Act*;
- (iv) an affiliate as defined in *The Regional Health Services Act*; (v) the Saskatchewan Cancer Agency continued pursuant to *The Cancer Agency Act*;
- (vi) the University of Regina;
- (vii) the University of Saskatchewan;
- (viii) the Saskatchewan Polytechnic;
- (ix) a municipality;
- (x) a board as defined in *The Police Act, 1990*;
- (xi) any other person, agency or body, or class of persons, agencies or bodies, that:
 - (A) provides an essential service to the public; and
 - (B) is prescribed; [...]

55 *SFL*, *supra* note 1 at para 4.

a failure to meet *Mounted Police*'s constitutional standard, and the majority finds that much in its decision. Indeed, at paragraph 81, Justice Abella states that the above three reasons “[justified] the trial judge’s conclusion that the *PSESA* impairs the section 2(d) rights more than is necessary”.⁵⁶ In the majority’s summary denouncing *PSESA*’s constitutionality, Justice Abella concludes that *PSESA* “impairs the section 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services. [It] is therefore unconstitutional”.⁵⁷

However, the majority takes the issue one step further and declares a constitutional right to strike. Considering paragraphs 77 to 79, it appears as though *PSESA* could have been found unconstitutional without needing to rely on a brand new, stand-alone constitutional right to strike. For example, in paragraph 77, the majority sets out their test for infringement of *Charter* section 2(d). One might presume that they do so in light of the right to strike arguments that they formed in the bulk of the decision prior to this point. Instead, Justice Abella merely paraphrases the rule in *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia* (“*Health Services*”)⁵⁸ by stating that “section 2(d) prevents the state from substantially interfering with the ability of workers, acting collectively through their union to exert meaningful influence over their working conditions *through a process of collective bargaining*”.⁵⁹ Immediately afterward, Justice Abella quotes from *Mounted Police*: “[T]he ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining”.⁶⁰

I note two observations about these quotations. Firstly, neither *Health Services* nor *Mounted Police*, two very recent cases in labour law, found that a right to strike is essential to collective bargaining. In fact, *Health Services* denied that such a constitutional right to strike existed.⁶¹ Second, it appears that the majority, in declaring *PSESA* unconstitutional, relied solely on finding that the three problems stated above⁶² constituted a failure to live up to the constitutional imperative set out in *Mounted Police*. By the substance of the majority’s own argument, if the government had only provided an adequate dispute resolution mechanism, it may have been allowed to restrict the public workers’ right to strike. This would have followed logically from the court’s own recent jurisprudence and the reasoning they applied to the particular issue before them.

56 According to Justice Abella, the first problem—unilateral discretion—is problematic because such a scheme removes the discussion of what is an essential service from the negotiation agreement. The second problem, that the Saskatchewan Labour Relations Board cannot review that unilateral discretion, compounds the first in that there is no evidence that “the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority” (para 90). The third problem, the lack of an alternative dispute resolution process, is concerning because of the wide latitude public employers are given under *PSESA* subsection 9(2) to designate which services are essential. This severely limits the leverage these employees have with which to bargain.

57 *SFL*, *supra* note 1 at paras 96-97.

58 *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*].

59 *SFL*, *supra* note 1 at para 90 [emphasis added].

60 *Mounted Police*, *supra* note 2 at para 72.

61 Specifically, *Health Services*, along with *Fraser v Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 SCR 3, 331 DLR (4th) 64 [*Fraser*] rejected a constitutional right to a dispute resolution process. See *SFL*, *supra* note 1 at para 106.

62 See the third paragraph of this section.

Instead, the majority additionally holds that “[t]he right to strike is [...] an indispensable component of [the right to collective bargaining]”.⁶³ This does not follow logically, since it appears that collective bargaining could have been achieved had there been an alternate dispute resolution mechanism in place. It creates a peculiar impression that the majority saw *SFL* as a convenient opportunity to constitutionalize a right to strike, an issue tangential to the case itself.⁶⁴ In the words of the dissenting opinion, what Justice Abella appears to have done is “inflate the right to freedom of association to such an extent that its scope is now completely divorced from the words of section 2(d) of the *Charter*”.⁶⁵

V. THE IMPACT OF *SFL* AND THE PROBLEM OF UNCERTAINTY

Clearly, if *PSESA* fails the standard found in *Mounted Police*, then it should be amended to bring it up to constitutional compliance (or at least amended to invoke section 33). However, by constitutionalizing a new, stand-alone right to strike, the Supreme Court sets an even higher bar. After *SFL*, how can any government enact legislation keeping workers from striking without running afoul of the constitution? Ultimately, what the majority has done in *SFL* is “[introduce] great uncertainty into labour relations”,⁶⁶ raising some troubling, unanswered questions.

For example, does this new right require all governments defend under *Charter* section 1 every limit found in statutory conditions detailing when workers can strike? This is not an insignificant concern, as all labour relations statutes impose such limits.⁶⁷ On the one hand, the scope of the effect of this ruling may be narrow. This case involved public–not private–sector employees, and more specifically, public sector employees providing essential services. Moreover, section 2(d) of the *Charter* protects freedom of association, which applies to unionized employees representing only 17% of the private sector workforce.⁶⁸ In their analysis of these events, Maryse Tremblay and Naomi Chanda assert that *SFL* “is not likely to have a dramatic impact for private sector employers in the absence of some government action”.⁶⁹

63 *SFL*, *supra* note 1 at para 3.

64 Another example of questionable reasoning is the majority’s reliance on international instruments that are non-binding (to Canada) sources of law. The court not only departs from precedent, but also relies on these instruments, some of which have not even been determined by their own administering bodies to be definitive statements on a right to strike. Additionally, the majority claims that the constitutions of other nations that have protected a right to strike must have some bearing on the *Charter*, despite the fact that the *Charter* framers already had access to these constitutions and deliberately left out a right to strike when deciding which liberal rights were to be constitutionally protected (*SFL*, *supra* note 1 at para 158). The brevity of this paper precludes a more detailed analysis of these issues. For a more detailed discussion, see the full dissenting opinion. See also Newman, *supra* note 8 for a summary of these concerns.

65 *SFL*, *supra* note 1 at para 136.

66 *Ibid* at para 123.

67 *Ibid*.

68 *Ibid*.

69 Maryse Tremblay, “Supreme Court of Canada Landmark Decision: The Right to Strike is Now Constitutionally Protected” (2 February 2015), *Borden Ladner Gervais*, online: <http://www.blg.com/en/newsandpublications/publication_3972> archived at <<https://perma.cc/HHP5-JVJ5>> [Tremblay].

On the other hand, *Charter* rights by their very nature apply broadly. The *SFL* majority fails to define the scope of this ruling's application, instead painting the issue with broad brush strokes in paragraphs 4,⁷⁰ 56,⁷¹ 61⁷² and 75.⁷³ This omission adds to the uncertainty introduced when a new *Charter* right is found and further illustrates why constitutionalizing a new right ought to be undertaken with great care and deliberation—something that the majority did not seem to exercise in this case. Indeed, Tremblay and Chanda also caution that “special legislation directed towards *private sector employees (such as back-to-work legislation)* will have to be carefully crafted”.⁷⁴ This implies that this decision, while made in the narrow context of essential public sector employees, may very well impact beyond the niche of the public into the private sector.⁷⁵ A likely consequence of this finding is a future increase of costly constitutional labour law cases before the already overburdened courts.⁷⁶

VI. A DELICATE BALANCE: ECONOMIC RIGHTS AND THE CHARTER

A strike is an attrition-based tool in labour relations that is meant to test whether the employee can last longer without wages than the employer can last without the ability to conduct business.⁷⁷ When the parties involve public-sector workers and the government, a strike takes on a political character. A natural outgrowth of this context is that the additional funds meant to meet employee demands are public funds.⁷⁸ Thus, by its very nature, this type of negotiation tends to be complex, involving consideration of fiscal and budgetary issues in addition to social and political ones. In the widely variable field of labour relations, it is particularly important for the law to be as certain as possible. This is further complicated when the employee services involve essential public services. As the *SFL* dissent points out,⁷⁹ governments properly perform the delicate balancing required for this task: they must, under section 36(1)(c) of the *Constitution Act, 1982*, “[provide] essential public services of reasonable quality to all Canadians”. When the

70 *SFL*, *supra* note 1 at para 4: “The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. [...] This applies *too* to *public sector employees*” [emphasis added].

71 *Ibid* at para 56: “[The dissent’s] reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the *entire history of modern labour legislation has been scrupulously devoted to rectifying*” [emphasis added]. This was in response to the dissent’s claim that “true workplace justice looks at the interests of all implicated parties” (para 125). Note that in this statement the majority does not differentiate between public or private sector labour relations.

72 *Ibid* at para 61: “The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the *irreducible minimum*’ of the freedom to associate in Canadian labour relations” [emphasis added]. Again, note the conspicuous lack of differentiation here. The majority seems to be suggesting that a right to strike is at the very core of labour relations in general.

73 *Ibid* at para 75: “[A] meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement”. To whom exactly does the term “employees” apply?

74 Tremblay, *supra* note 69 [emphasis added].

75 Indeed, the *SFL* dissent points out that, though the majority claims that the right to strike is only protected when it interferes with the right to collective bargaining (a right recognized most recently in *Mounted Police*), in many places it declares the right “essential”, “crucial” and “indispensable” to collective bargaining. This indicates that the majority has created a “stand-alone constitutional right to strike” (para 108).

76 Honickman, *supra* note 3.

77 *SFL*, *supra* note 1 at para 127.

78 *Ibid*.

79 *Ibid* at para 105.

court imposes positive duties on only one side of a labour dispute, it restricts the flexibility the government requires to perform its mandate.

Returning to *Dairy Workers*,⁸⁰ The Saskatchewan Court of Appeal was asked to consider similar issues to the present case. All three judges wrote their own reasons with Justice Brownridge dissenting. In paragraph 46, he stated, “[l]egislation which restricts or abolishes the right of union members to strike does not, for this reason alone, infringe the guaranteed freedom of association”, noting cases such as *Collymore v Attorney-General* (“*Collymore*”)⁸¹ and *Dolphin Delivery Ltd v RWDSU Local 580* (“*Dolphin Delivery*”)⁸² where the court found no constitutionally protected right to strike. In particular, Justice Esson and Justice Taggart of the British Columbia Court of Appeal in *Dolphin Delivery* held that “[i]t does not follow that the *Charter* guarantees the *objects and purposes* of the union, or *the means by which those can be achieved*”.⁸³

Justice Brownridge ultimately found that “section 2(d) of the *Charter* does not affect laws which limit or control strikes and lockouts”.⁸⁴ In other words, while the *Charter* protects the rights of persons to enter into consensual relationships to support one another and pool resources, it does not guarantee the *objects and purposes* and the *means* by which an association or union seeks to achieve its aims. Essentially, “[the freedom of association clause] does not include the economic right to strike”.⁸⁵ Lastly, he quoted with approval Justice Esson in *Dolphin Delivery*, who said, “It is no doubt right to apply the rule of liberal construction to the fundamental freedoms in the *Charter*. *But that does not empower courts to construct edifices of policy without regard for the plain meaning of the words of the Charter*,”⁸⁶ and Lord Reid⁸⁷ in *Jones v DPP* (“*Jones*”) who said, “If problems are created by over-expansive judicial interpretation, they cannot be readily remedied by amendment as they can in the case of a statute”.⁸⁸

Touching on the same themes considered by Justice Brownridge above, Justice McIntyre in *Reference re Public Service*⁸⁹ cautions that the type of principled analysis and application of law that the courts exercise with such skill is nonetheless unequipped to deal with certain questions. These include: considering whether government services are essential; whether alternative arbitration adequately compensates parties for agreeing not to strike; whether harm caused to farmers (such as in *Dairy Workers*) through closure of certain facilities is sufficiently important to justify prohibiting strikes and lockouts; and whether in a particular situation the concern of reducing inflation and growth in government expenses tips the balance between one party and another in litigation. Simply, “[t]here are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the legislature”.⁹⁰

80 *Dairy Workers*, supra note 29.

81 *Collymore v Attorney-General*, [1970] AC 538 [*Collymore*].

82 *Dolphin Delivery Ltd v RWDSU Local 580*, [1984] 3 WWR 481, 10 DLR (4th) 198, 1984 CarswellBC 53 (WL Can) [*Dolphin Delivery*].

83 *Ibid* at para 33 [emphasis added].

84 *Dairy Workers*, supra note 29 at para 47.

85 *Ibid* at para 48. Justice Brownridge is quoting Justice Reed in *PSAC v Canada*, [1984] 2 FC 562 at para 64, 11 DLR (4th) 337, 1984 CarswellNat 73 (WL Can).

86 *Dolphin Delivery*, supra note 82 at para 37 [emphasis added].

87 *Dairy Workers*, supra note 29 at para 54.

88 *Jones v DPP*, [1962] AC 635 at 662, [1962] 1 All ER 569 (HL) [*Jones*].

89 *Reference re Public Service*, supra note 31 at para 185.

90 *Ibid*.

Justice McIntyre worried that if a right to strike were constitutionalized, the courts will be tasked with answering these questions much more frequently, a “legislative function into which [they] should not intrude”.⁹¹ He acknowledged that the courts are sometimes called upon to “intrude” into the field of legislation. However, “where no specific right is found in the *Charter* and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. *That is the function of the freely elected legislatures and Parliament*”.⁹² His prescient words reflect the concerns of the present day.

Indeed, in *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558* (“*Pepsi-Cola*”), another Saskatchewan case, a unanimous Supreme Court ruled that balancing the interests of employers and unions is a “delicate and essentially political matter”, and that “where the balance is struck may vary with the labour climates from region to region”.⁹³ In the end, the Supreme Court affirmed that the legislatures, and not the courts, are better placed to deal with these issues.

CONCLUSION

SFL has opened up for debate the continuing merits of the notwithstanding clause. The issue centres on a serious public safety issue similar to when section 33 was last used by Saskatchewan. In fact, *PSESA* came into force following a strike in 1999 involving thousands of nurses and another in late 2006 by highway workers and correctional officers.⁹⁴ The magnitude of such a cessation of essential services is not an issue resolvable by the courts. That being said, this paper has not been a defence of the legislation itself. A reading of the Saskatchewan legislative debates regarding *PSESA*’s second reading reveals legitimate concerns regarding the scope and one-sidedness of the bill.⁹⁵ Instead, I direct my criticism against the *SFL* decision itself, which unjustifiably departs from recent precedent and relies on questionable sources of law, resulting in uncertainty in the realm of labour law with little in the way of direction from the court as to how it will apply. It is not the court’s responsibility to set out detailed policy. That is the legislature’s proper task. However, the constitutional right to strike established here has the potential for such widespread application that it upsets the delicate balance that the legislature must maintain between employers and employees.

The spirit behind invoking section 33 respects that the judiciary is not infallible. Despite their skill and learning, it is still possible for the bench to employ an ends-focused approach and cherry-pick sources of authority to achieve that end, shades of which appear in *SFL*. A judiciary that conducts radical constitutional revision, seemingly without a careful and reasoned rationale for departing from strong and recent precedent (and thus out of line with the proper constitutional interpretation principle formulated in *Persons*), is a judiciary that oversteps its own constitutional limits. If the Canadian constitution is truly a “living tree”, at the very least such drastic pruning may cause it to grow in ways never envisioned by its planters. Invoking section 33 in response to a

91 *Ibid.*

92 *Ibid.* at para 185 [emphasis added].

93 *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558*, 2002 SCC 8, [2002] 1 SCR 156 at para 85, 208 DLR (4th) 385 (WL Can) [*Pepsi-Cola*].

94 Mike Blanchfield, “Public Sector Workers’ Right to Strike Protected by Constitution: Top Court”, *Huffington Post* (30 January 2015), online: <http://www.huffingtonpost.ca/2015/01/30/public-sector-workers-strike-supreme-court_n_6577280.html> archived at <<https://perma.cc/395H-4X9L>>.

95 Saskatchewan, Legislative Assembly, *Official Report of Debates (Hansard)*, 26th Parl, 1st Sess, No 25A (14 April 2008) at 827-865.

case like *SFL* could send a strong message to the Supreme Court that if their rulings are not made according to established principles of judicial interpretation and respect for precedent, they will not be followed.

Use of section 33 encourages, not ends, dialogue around an issue. A cursory read of the January 31, 1986 Saskatchewan Hansard, in which the 20th legislative assembly debated the *SGEU Dispute Settlement Act*'s second reading and use of section 33, reveals topics ranging from the financial hardship imposed on Saskatchewan families by the strike to the overarching goals of the *Charter* in light of the override provision,⁹⁶ demonstrating that a major pronouncement by a court should not stifle public engagement with that issue. Section 33 ensures that an avenue of discussion remains open for persons who disagree with a questionable ruling.

Governments ignore this useful tool at their peril. The American experience, which has resulted in a highly politicized United States Supreme Court, is a warning to Canada that the absence of a legislative override clause tempts the elected branch to pressure the court to interpret the constitution in its favour. This falls far short of the ideal of an institutionally independent judiciary. Far from being a dead letter, the notwithstanding clause provides ample potential for balancing power between the elected and judicial branches—a balance so crucial to a system that cherishes the accountability of those in authority, elected or not. Returning once more to Lord Reid's words in *Jones*, "If problems are created by over-expansive judicial interpretation, they cannot be readily remedied by amendment as they can in the case of statute".⁹⁷ Section 33 provides a much-needed alternative.⁹⁸

96 Saskatchewan, Legislative Assembly, *Official Report of Debates (Hansard)*, 20th Parl (31 January 1986) at 1040.

97 *Jones*, *supra* note 88.

98 The scope of this paper precluded an analysis of the social impact that invoking section 33 may have on Saskatchewan's labour environment. This would be a fascinating study and could add to the strength of an argument supporting the use of the legislative override provision. Such a study could be augmented with social science and political science data that could reveal if there is a correlation between use of the notwithstanding clause and subsequent election and poll results. A more fulsome analysis of media responses to the use of section 33 could be useful as well.