SECTION 33 OF THE *CHARTER*: WHAT'S THE PROBLEM, ANYWAY? (OR, WHY A FEMINIST THINKS SECTION 33 DOES MATTER)

Patricia Hughes*

Introduction

It is tempting to believe that "[i]n practice, section 33 [of the *Canadian Charter of Rights and Freedoms*] has become relatively unimportant, because of the development of a political climate of resistance to its use."[1] Much, indeed, suggests that this is so. But, in the aftermath of the Supreme Court of Canada's decisions in *Vriend*[2] and *M. v. H.*,[3] the shadow of section 33 of the *Charter* – the notwithstanding clause – has once again been cast across the land. Although no *government* as yet has actually invoked section 33 with respect to the perceived implications of these cases, the reasons underlying the demands by public and members of legislatures alike for its use indicate why we cannot be complacent about section 33.[4] Whatever merits it might have, dressed up as a means to represent the will of the people against the follies of unelected courts, recourse to section 33 may actually legitimate the continuation of prejudice.

The Constitutional Framework

On its face, section 33 is typically Canadian, integrating a remnant of one constitutional regime – legislative supremacy – within the framework of another – constitutional supremacy. In 1982, the Canadian Constitution adopted many of the

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* Mary Louise Lynch Chair in Women and Law, Faculty of Law, University of New Brunswick.

[1] P.W. Hogg and A.A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)," (1997) 35 O.H.L.J. 75 at 83.

[2] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493; rev'g (1996), 132 D.L.R (4th) 595 (Alta. C.A.); rev'g (1994), 18 Alta. L.R. 286 (Q.B.).

[3] *M.* v. *H.*, [1999] 2 S.C.R. 3; aff'g (1996), 31 O.R. (3d) 417 (C.A.); aff'g (1996), 27 O.R. (3d) 593 (Ont. Gen. Div.).

[4] Although representatives of Alberta's government threatened to invoke section 33 to safeguard marriage for the exclusive use of opposite-sex couples, the vehicle by which this was achieved was a Private Member's Bill which, unusually for a private bill, passed the Alberta legislature: see *infra* note 26.

indicia of constitutional supremacy, including an entrenched charter of rights.[5] Faced with opposition to constitutionalized rights, however, the *Charter's* supporters gave ground, permitting the governments opposed to hedge their bets by the inclusion of section 33 to provide for an override of certain rights in the following way:[6]

> **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 of this Charter.
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> (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.

The section goes on to provide that any declaration becomes ineffective after five years but may be re-enacted; likewise, the re-enactment also becomes ineffective after five years.

Whether one considers section 33 a "good thing" or not depends on how one characterizes our constitutional regime and the role of the *Charter*. This, in turn, requires an appreciation of the constitutional shift which occurred in 1982. An ultimate assessment of section 33 must take into account the moral implications of its use, regardless of its constitutional validity.

The *Constitution Act, 1982*, and the *Charter of Rights and Freedoms* in particular, were not merely added on to an existing constitution; rather, fully integrated into the then existing constitutional framework, they introduced to it a whole new purpose. Constitutional supremacy (or constitutionalism) has the *potential* to result in a fuller exercise of "citizenship" by more people than occurred

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[5] *Canadian Charter of Rights and Freedoms*, being Part I of Schedule B to the *Constitution Act, 1982*.

[6] It is generally believed that section 33 is the price paid for an entrenched charter of rights. See, for example: M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1992) at 75. On the process generally, see: R. J. Sharpe & K. E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 55; R. Sheppard & M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982).; P. Kome, *The Taking of 28: Women Challenge the Constitution* (Toronto: Women's Educational Press, 1983).; R. Romanow, J. Whyte & H. Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984); D. Coyne & M. Valpy, *To Match a Dream: A Practical Guide to Canada's Constitution* (Toronto: McClelland & Stewart, 1998).

when the legislatures had, more or less, the last word.[7] Martha Jackman suggests that "judicial review on *Charter* grounds has the potential to contribute to democratic objectives."[8] Other commentators, perhaps most notably Alan Cairns, contrast the previous constitution of governments and elites with the current constitution and its citizens' base.[9]

One of the purposes of a written constitution which contains a bill of rights, as is now the case in Canada, is that it serves as a counterbalance to the majoritarian nature of the legislatures.[10] While legislators are expected – and actually may – take into account the requirements of a bill of rights, the real responsibility for determining whether those requirements have been met lies with the courts. This combination of responsibilities in the legislatures and the courts, I suggest, may result in enhanced participation by certain members of the society and therefore in an increased realization of democracy. This involvement must take into account the different needs and self-definitions of these communities.

Against this backdrop, the moral legitimacy of section 33 must be questioned. Section 33 has the potential to remove from the equation the premise which underlies the partnership between the courts and the legislatures. Constitutional supremacy is not only about this relationship, but also – and perhaps mostly – about those whose rights in part define it as a particular kind of constitutional regime. This is not the same as saying that section 33 is inconsistent with our post-1982 constitutional regime. As John Whyte has pointed out, opposing the override on the basis that it is inconsistent with a rights regime "begs the question of the nature and

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[7] This is not to say the potential is always realized. But I believe the exercise begins with premises different from those underlying a system of legislative supremacy. In this opinion, I cannot consider how successful "majority" women, differently abled persons, gays and lesbians, visible minority men and women and aboriginal peoples have been in advancing their interests within this new constitutional paradigm, or about the financial and other costs of adjudication or lobbying, all of which are also relevant to the discussion of the relative merits of legislative and constitutional supremacy with respect to enhancing citizenship.

[8] M. Jackman, "Separate but not Apart: The Role of the Courts in Canada's Post-Charter Democracy" in D. N. Magnusson & D. A. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston, Ont: Institute of Intergovernmental Relations, 1997) 31 at 32.

[9] A.C. Cairns, "The Constitutional World We Have Lost," in D. E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change. Selected Essays by Alan C. Cairns* (Toronto: McClelland & Stewart, 1995) at 97.

[10] It is hard to avoid the thought that the counterbalancing of majoritarian decision-making underlies the objection of some critics to the enhancement of the courts' jurisdiction: they bemoan in reality less the increase in the courts' power than the perceived loss of their own power or centrality to policy-making.

extent of the actual constitutional commitment" to a rights regime, which must be seen as characterized by the override. Thus, "arguments from constitutional principle, based on the claim that Canada had adopted the principle of entrenched human rights, proceed on an inaccurate premise."[11] Rather, it is an argument based on what it means to talk about *legitimate* decision-making in a rights regime. In a democracy, the law must accord with moral values which play a part in determining whether action has been legitimate: "It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[12]

Those who remain troubled by this shift in the constitutional framework usually identify the decreased authority of the legislatures and the increased jurisdiction of the judiciary as the source of their discomfort. The major criticism is that unelected judges are making policy decisions, usurping the proper role of the elected legislators. This perceived dichotomy confuses the mechanics of democracy with its substantive meaning and, even at the level of mechanics, overstates the extent to which Canadian legislatures are "democratic." The flaw in the contra-*Charter* argument, in other words, is not that judges are representative – they are not – but that legislatures are less representative than the proponents of this view would like us to believe. At the mechanical level, it is notorious that in our winner-take-all system the party forming the government often does not represent the majority of voters.[13] In another respect, however, one may speak of the legislatures as being "majoritarian," because the need to win support for legislation results in compromises and deals which leave unrepresented groups in the cold or which have been influenced by considerations other than fairness or equity.

It is important to appreciate that it is not because of any inherent virtue in the courts that one might conclude that judicial review contributes to democracy. Both

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[11] J. D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta. L.Rev. 347 at 350.

[12] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 67.

[13] A significant example of this is the Quebec election held on November 30, 1998; although the Liberal Party won slightly more votes than did the Parti Québecois, it won far fewer seats because its vote is more concentrated than that of the PQ. The Liberals won 43.7% of the popular vote, compared to 42.7% for the PQ (and 11.8% for the Action Démocratique), yet the Liberals won only 48 seats compared to the PQ's 75 (and the AD's 1): R. Mackie, "PQ Lagged in Getting Out Vote, Pollsters Say" *The Globe and Mail* (2 December 1998) A12. Seen another way, even though 55.5% of the voters did not want the PQ, that party still enjoyed a margin of 26 seats over the other two parties. This is, of course, a particularly significant example because of the ramifications for the holding of a referendum and the pursuing of Quebec sovereignty.

courts and legislatures are "fallible."[14] Courts are not necessarily more progressive than legislatures;[15] as someone committed to advancing equality, I would not disagree that the judiciary's record under the *Charter* has been erratic.[16] Rather the *partnership* imposed on the legislatures and courts by constitutionalism and the combination of individual rights and constitutional principles found in the Constitution feed this judicial inconsistency. The reality is that neither institution can be *relied* upon to advance in a consistent manner the rights of excluded groups, yet in particular contexts one can find equality furthered by the decisions of both institutions.[17] For the most part, our courts are cognizant of the part they play. They do not, as a matter of principle, avoid "political questions," but they have shown restraint in striking down legislation (sometimes, some may think, too much so). At the same time the legislatures have usually accepted the courts' decisions, at least by the time the Supreme Court has ruled. Existing within a culture of commitment to

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[14] The override, says Peter Russell,"establishes a prudent system of checks and balances which recognizes the fallibility of both courts and legislatures and gives closure to the decisions of neither:" Peter H. Russell, "Standing up for Notwithstanding," (1991) 27 Alta. L. Rev. 293 at 301.

[15] F.L. Morton, "The Politics of Rights: What Canadians Should Know About the American Bill of Rights" in Marian C. McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective* (Calgary: University of Calgary, 1993)107 at 113. Morton believes that those who favour the increased power of the courts are operating on the faulty premise that the courts are more likely to be progressive than legislatures based on a misreading of the history of American jurisprudence in the area: *ibid. at* 122. Regardless, he apparently "favour[s] the invocation of Section 33 to prevent recognition of same-sex partnerships: T. McFeely, "Where to build the fence? After Ontario's retreat, pro-family groups debate how to protect marriage against gay activism," *Canadian Business and Current Affairs* (22 November 1999) 42.

[16] D. Schneiderman & K. Sutherland, "Conclusion: Towards an Understanding of the Impact of the Charter of Rights on Canadian Law and Politics" in Schneiderman & Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 343 at 344. In the same volume, see D. Herman, "The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the Charter" at 200; K. A. Lahey, "The Impact of the Canadian Charter of Rights and Freedoms on Income Tax Law and Policy," at 109; and J. Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics," at 169.

[17] With respect to sexual assault, for example, one might say that Parliament has been in advance of the courts, amending the *Criminal Code* in response to (from the perspective of victims, at least) unsatisfactory decisions. On the other hand, the extension of public benefits and family rights and obligations to gays and lesbians has been rather like a see-saw; sometimes the courts extend benefits, at other times, either before or in response to judicial decisions, governments (such as British Columbia and Quebec) redress the discrimination against same-sex couples. The federal government also began a review of its legislation to extend benefits to same-sex couples: Daniel LeBlanc, "Civil service to get same-sex benefits" *The Globe and Mail* (16 March 1999) A1, A8. On the way in which legislatures have responded to the Supreme Court's striking down of legislation, see Hogg and Bushell, *supra* note 1. Hogg and Bushell's thesis is that often the legislatures have enacted new legislation that is able to achieve the same objectives as the unconstitutional legislation.

constitutionally recognized and *enforceable* rights, the courts and the legislatures provide in a sense a check for each other, and the courts are able to provide relief for legislatures dominated by more conservative majorities.

The Complexity of Section 33

Simply Redressing the Imbalance?

Seen in this light, section 33 provides a cushion, a comfort zone to which there can be a retreat when the balance in the partnership seems to lean too far towards the courts. Thus Peter Russell wants to be sure that when the judiciary make "extremely questionable" decisions,"[t]here [is] some process, 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."[18] Russell portrays the use of the override as a reasoned process, one used occasionally when "the citizenry through a responsible and accountable process concludes that a judicial resolution of a rights issue is seriously flawed and seeks to reverse it."[19]

Support for section 33 also derives from cynicism about the whole *Charter* project on the basis that it hides the political choices that are made in abstractions; it is anti-democratic and dishonest.[20] Accordingly, while "superficially" section 33 "appears to invest the politicians with the power to shield themselves from answerability for their rights abuses," in reality "we can see it in a much more favourable light, as reserving for elected politicians the right of keeping selected legislative programs out of the clutches of the legal profession and *its* form of politics."[21] Even though I am sceptical of "rights discourse," and even though I have ground my teeth at some *Charter* decisions, I tend to the view that possessing a vehicle for advancing equality claims other than lobbying legislators seems a good

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[18] Russell, *supra* note 14 at 295.

[19] *Ibid.* at 297.

[20] Mandel, *supra* note 6 at ix, 4. Writing six years after the *Charter's* enactment, Mandel concluded that the Charter "has weighed in on the side of power and, in both crude and subtle ways, has undermined popular movements as varied as the anti-nuclear movement, the labour movement, the nationalist movement in Québec, the aboriginal peoples' movement and the women's movement. Filtering democratic opposition through the legal system has not only failed to reduce Canada's already great social inequalities but has actually strengthened them."

[21] *Ibid.* at 75 (emphasis in original).

thing. These are big "even though's," but since they cannot be addressed here, I premise my comments on the view that, on the whole, the existence of the *Charter* is a good thing. Or, perhaps to put it more accurately, given what I see the purpose of the *Charter* to be, I find the potential of section 33 to be more dangerous than its exclusion from the *Charter* would be.

The Practice

One of the safeguards of section 33 is an expectation that any government seeking to invoke it would have to be prepared to face political opposition, inside or outside the legislature. The fact that the legislature, not the government, makes this determination indicates that the invocation of section 33 should be a matter of public debate. In some cases, certainly, a government's intention to employ section 33 will be perceived as ill-conceived and for improper motives. This was the case with the Alberta government's intention to use the override to limit compensation to victims of involuntary sterilization; public outrage was sufficient to make the Government change its mind.[22] In other cases, however, it will be exactly the "majority's" lack of tolerance and openness that will lead to the use of the override. Normally, there would be an election during the five years after the enactment or re-enactment of the declaration (the limitation of the life of a legislature in section 4 of the *Charter's* not being subject to the override), providing another opportunity to debate the override.[23]

The value of the "public" nature of the invocation of section 33 was somewhat diminished, however, by the Supreme Court of Canada's determination that the only requirements an invocation of section 33 must meet are those of form.[24] The Court held that Quebec's override omnibus bill, by which it exempted all its legislation from all sections of the *Charter* permitted under section 33 (sections 2, 7-14 and 15), met the requirements of section 33. Quebec's bill was meant to signify its non-acceptance of the constitutional deal of 1982 and there was no attempt to relate the operation of section 33 to any particular purpose. Given the nature of the bill, there

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[22]"Alberta backs down on sterilization compensation" (11 March 1998) online: CBC Newsworld <http://www.newsworld.cbc.ca> Accessed in January, 2000.

[23] I say "normally" because subsection 4(2) of the Charter does provide for an extension of the life of the legislature "[i]n time of real or apprehended war, invasion or insurrection;" it requires a two-thirds majority.

[24]*Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712. The Court did hold that the omnibus bill could not be applied retrospectively. For a critical analysis of the decision, see Lorraine Weinrib, "Learning to Live with the Override," (1990) 35 *McGill L.J.* 541.

was no possible relevance of the affected *Charter* guarantees to much of the legislation which had been exempted from their application. The omnibus bill was not re-enacted after five years and Quebec has since used the override only with respect to specific legislation.[25]

In practice, the only government other than Quebec to have used the override is Saskatchewan, which exempted labour legislation from the freedom of expression guarantee.[26] Section 33 may therefore seem to be a relatively innocuous contribution to the equilibrium of the legislative-judicial partnership. Indeed, it may indirectly serve a role in the preservation of confederation, as a valve for releasing some of the pressure. Quebec's use of the override permits it to retain some measure of control over those matters of significance to its identity as a "distinct society." It has been argued, for example, that the *Ford* case "poses a fundamental issue of political justice" with respect to the relationship between two minorities; and the balance between these concerns is not an issue that should be withdrawn from "Quebec's legislature for *ultimate* determination by the Supreme Court." Russell goes as far as saying, "it is extremely doubtful that the unity of Canada could survive an insistence by the rest of Canada that Quebec's legislature be denied a continuing role in deciding what is necessary to preserve Quebec's French character."[27]

Russell's argument does give me pause: now that section 33 exists, would its removal be seen as another attempt to diminish Quebec's control over its own house? Quite possibly it would; nevertheless, there are two points of rebuttal which I make to this argument, not lightly, but without being able to develop them further in this comment. First, section 33 was not included specifically to respond to *Quebec's Charter* concerns, but rather as one of several compromises designed to obtain the agreement of all eight provinces (other than Ontario and New Brunswick) opposing Prime Minister Trudeau's constitutional objectives. Second, the issue

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[25] Most significantly, Quebec used section 33 to counteract the Supreme Court's decision finding that the denial of any language other than French on commercial signs, one aspect of Quebec's sign language law, Bill 101, was unconstitutional: see *Ford, supra* note 24. The province then enacted revised legislation less stringent than that which the Court had held to be invalid.

[26] Saskatchewan had invoked it after the Court of Appeal struck down the legislation; in the end, however, the Supreme Court of Canada held that it was constitutional. In addition, the Alberta Legislative Assembly enacted the override on March 15, 2000 when it passed the private member's Bill 202, the *Marriage Amendment Act, 2000*; it amends the Alberta *Marriage Act* to define "marriage" as "a marriage between a man and a woman" and provides that the *Marriage Act* operates notwithstanding sections 2 and 7 to 15 of the Charter.

[27] Russell, *supra* note 14 at 305.

Russell raises is far deeper than section 33 and must be addressed on its own terms, while the difficulties raised by section 33, in my view, are not outweighed by its value to Quebec.[28]

The Risk of Invocation

The problem with section 33 cannot be understood fully until one comes to grips with the enormity of its potential application. It has the capacity to deprive citizens of most of the rights which have been (subject to section 1) guaranteed by the *Charter*: the "fundamental freedoms" in section 2; the "legal rights" in sections 7 to 14; and section 15's equality rights. Because of section 28, there is an argument that sex equality cannot be overridden; this was the interpretation given to it during the constitutional process, but there has never been a judicial consideration of this point.[29] Otherwise, all the rights can be overridden except the democratic rights and "the federal government's familiar 'national unity' bottom line."[30]

Under the "right" (or wrong) circumstances, the use of the override could mean that, in whole or in part, a legislature could remove rights of individuals or groups which define their status as citizens in a democracy. While certain fundamental rights might well be inimical in certain contexts to the enjoyment of equality (as in the case of free expression which encompasses pornography and hate literature), they remain characteristic of a democratic regime. There are other ways to resolve the tensions between rights than to override them, though the reconciliation may not always be totally satisfactory. Why does this matter? It matters because governments are not beyond engaging in oppression and because they are, like all of us, susceptible to prejudice.

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[28] I note briefly that if this is indeed an overwhelming concern, even supporters of section 33 would make it harder to use. Russell, for example, believes that the Supreme Court was wrong in its approach to section 33 in *Ford* and also proposes that there should be two votes on the use of the override, one before and one after an election (although obviously a new or returned government is not prevented from holding a vote even under the current provision): *ibid.* at 301-302. In its 1991 constitutional proposals, the federal Government floated the idea that use of the override would have to be approved, not by a simple majority, as is now the case, but by 60% of the members of Parliament or provincial legislature; however, no such proposal was included in the Charlottetown Accord: Shaping Canada's Future Together (Minister of Supply and Services Canada, 1991) at 4.

[29] Section 28 states, "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." On the process of obtaining section 28 and its impact on section 33, see Kome, *supra* note 6.

[30] Mandel, *supra* note 6 at 75. Section 33 does not apply to the interpretative sections or the application and remedial sections, but these are of value only in the context of rights which can be enforced.

John Whyte rightly reminds us of the extreme cases, those occasions on which governments have exhibited "political passion directed against conspicuous minorities – Japanese Canadians, Hutterites, Doukhobors, aboriginal peoples, Jehovah's Witnesses, the Acadians, Metis, Roman Catholics, communists and separatists" and observes, "[i]n all of these cases the governmental assessment of risk has been facile and overstated. In all of these cases the governmental response has been more than merely disadvantageous to members of these groups. It has been brutal, community crushing, and life destroying."[31] Better that these actions be subject to the demands of legalism under section 1 of the *Charter*, than dictated by the "dominant political winds" as would be the case if the legislature invoked section 33. For example, were the legislature to override section 2 of the Charter, as well as other rights, it could effectively silence any criticism of the government's actions. Thus not only would the actions be removed from judicial review, but also public-spirited citizens, willing to speak on behalf of the oppressed, would lose recourse to their constitutional protections. In this sense, section 33 has the potential to undercut the very purpose of constitutional guarantees. A facile acceptance of section 33 assumes that we are somehow "better" than our predecessors. We are not. Under these circumstances a five year override is a long time.

Proof of No Problem – or Near Misses?

But I need not go to extreme cases to show the risks of the override, even in Canada's relatively "tolerant" climate. Let me return, then, to the beginning and the response to *Vriend* and *M. v. H.* While dealing with different issues, one about inclusion of a ground of protection in human rights legislation, and the other about the extension of family law to same-sex couples, these decisions push the same button: recognition of the equality rights of gays and lesbians. The response to these ordinary section 15 cases reveals the underlying capacity in a significant minority of Canadians to deny particular groups the same rights they claim for themselves. This is the same mind-set which resulted in widespread legal prejudice against racialized groups in the late-nineteenth and early-twentieth centuries (indeed, in some cases, lasting almost until the last third of the twentieth century).[32] Some of these laws were challenged and upheld as constitutional, but most of them could not

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[31] Whyte, *supra* note 11 at 356.

[32] Saskatchewan and British Columbian legislation prohibiting the employment of white women by Chinese, Japanese or "other Oriental person[s]" were not repealed until the late 1960s: C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) 136 at 172. Backhouse analyses a number of specific examples of the law's complicity in racism.

be challenged on human rights grounds. Today, however, they would constitute a clear denial of constitutionalized rights. The vast majority of people would be shocked if anyone suggested that a government would resort to section 33 to immunize discrimination of this kind from challenge, as they would be shocked to find that it existed. Yet the exclusion of gays and lesbians and the justification for their exclusion is of much the same sort as these earlier examples. But it is at some level acceptable, it seems, to legitimate this exclusion by recourse to section 33.

It is hard to imagine a Supreme Court justice treating as a legitimate – or at least unproblematic – option the invocation of the override to protect human rights legislation which excluded race as a prohibited ground. In *Vriend*, Major J., although finding that denial of the protection of Alberta's *Individual's Rights Protection Act* to gays and lesbians was contrary to section 15 of the *Charter* (and that Alberta had not attempted to justify the exclusion), did exactly that with respect to gays and lesbians. He would have suspended the declaration of invalidity to permit the government to decide what it wanted to do. Alberta had, he explained helpfully, a number of constitutional options, including the notwithstanding clause, given the extent of the legislature's opposition to the inclusion of sexual orientation as a protected ground.[33] Nevertheless, despite pressure from the caucus, Premier Klein's Government did not resort to section 33.[34] It appears, however, that part of the compromise Klein reached with his caucus was that there would be "fences around certain types of legislation so that certain things are protected."[35]

Following *M.* v. *H.*, there was an added impetus to avoid the extension of family law provisions to same-sex couples in Alberta. In Ontario itself, the only province where *M.* v. *H.* technically applied,[36] the Premier indicated that the province would implement the decision, despite strong opposition from the "family values" segment of the Tory caucus and although he personally disagreed with it, he said, because he

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[33] *Vriend*, *supra* note 2 at para. 197. Major J. adds that elected Legislatures "are answerable to the electorate" and their response to the Court's decision "will be judged by the voters." In the same case, Iacobucci J. comments at para. 137 that section 33 establishes that "the final word" is left to the legislature and not the courts.

[34] B. Laghi, "Alberta to let court ruling on gay rights stand," *The Globe and Mail* (10 April 1998) A5.

[35] *Ibid.*, quoting the Alberta Treasurer, Stockwell Day (as I write in April 2000, a candidate for leader of the new political party, the Canadian Alliance). See *supra* note 26 for the way in which the fence was built.

[36] *M.* v. *H.* concerned Ontario's *Family Law Act* and therefore the ruling actually applied only to its provisions; however, the Court's reasoning would apply to the definition of "spouse" in all family legislation.

was "a big believer in the Constitution."[37] In fact, Ontario quickly enacted omnibus legislation to amend relevant statutes to remove discrimination against same-sex couples in family law.[38] Overall, 56% of respondents in a national survey supported the Supreme Court of Canada's decision in *M.* v. *H.*, although 34% were "strongly opposed." Despite this, only 28% thought that governments should use the notwithstanding clause to avoid making their own laws consistent with the ruling in *M.* v. *H.*.[39] Alberta, however, has said that it would use the notwithstanding clause to ensure that same-sex couples are not treated as common law partners under family legislation.[40] Premier Klein has indicated that "if ever we are to use the notwithstanding clause – it is a very powerful tool – that there would be a full public consultation [or referendum]."[41]

M. v. *H.*, in particular, raises the possibility of legally recognized same-sex marriage. In the survey referred to earlier, the majority of respondents (53%) supported same-sex legal marriage, although this figure varies. For example, in Alberta only 43% of respondents indicated support for legal marriage for same-sex couples and 53% were opposed.[42] Again, Alberta has said that it would use the override if same-sex marriages were recognized and would do so without any public consultation.[43]

Finally, the spectre of the invocation of section 33 by Parliament to override a judicial decision on the unconstitutionality of exclusively opposite-sex marriage was raised in a motion proposed by a Reform member in the House of Commons. This motion, which followed the release of the decision in *M.* v. *H.*, passed by a vote of 216 to 55:

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[37] R. Mackie & J. Coutts, "The Same-Sex Ruling: Harris quickly vows conformity with law," *The Globe and Mail* (21 May 1999) A9.

[38] McFeely, *supra* note 15.

[39] A. McIlroy, "Most in poll want gay marriage legalized," *The Globe and Mail* (10 June 1999) A1.

[40] "MLA's bill to target same-sex marriages," *The Globe and Mail* (4 December 1999) A13.

[41] Jill Mahoney, "Alberta government decides to say no to same-sex marriages," *The Globe and Mail* (19 March 1999) A4. The Premier is quoted as saying, "The moral compass says, 'No.' It says people of the same sex ought not to be married." "Gay rights may be overridden," The Globe and Mail (15 February 1999) A5.

[42] McIlroy, *supra* note 39.

[43] See *supra* note 26.

> That, in the opinion of this House, it is necessary, in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve the definition of marriage in Canada.[44]

While the Minister of Justice voted for this motion, some of her colleagues did not. They feared the wording of the motion may require the House of Commons to use the notwithstanding clause to avoid compliance with any decision of the Supreme Court of Canada which holds that limitation to opposite-sex marriages is unconstitutional. It seems clear that this was the intention. Eric Lowther, the Reform MP who introduced the motion, was reported as having "suggested" that "the government . . . has now taken a firm stand. By adopting his motion, the Reformer asserts, the feds should be prepared to invoke Section 33 . . . ."[45]

In some ways it is less the operation of section 33 which is the problem as what its use reflects. Reading the debate on Lowther's motion, for example, one is left with two impressions: one, that marriage represents a last frontier for many people, one only some people are entitled to cross; two, the utter sense of difference which pervades the debate. The fact that many gays and lesbians do not want to marry is irrelevant. Although many MP's spent considerable time extolling the virtues of marriage – in general and their own – and its importance in Canada, they had no difficulty then saying that these virtues are exactly why it should be maintained as a heterosexual institution. Whether marriage is a good institution is irrelevant; what is relevant is that many of those who spoke in support of the motion portrayed marriage as a very good institution precisely because it excludes gays and lesbians.

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[44] *Hansard* (8 June 1999) 15960. On March 22, 2000, the Government of Canada introduced an amendment to Bill C-23 which received first reading on February 11, 2000, and which amends 68 federal statutes to provide for benefits to same-sex couples on the same basis as opposite-sex common law couples: the amendment reads, "For greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage', [sic] that is, the lawful union of one man and one woman to the exclusion of all others." The bill was passed by the House on April 11, 2000 with this amendment.

[45] W. Gibson, "The last battle: to head off the courts parliament votes to confine legal matrimony to heterosexuals," *Alberta Report* (21 June 1999) 10-12. Lowther is quoted as saying that "The government should be proactive to charter-proof marriage."

Conclusion

Section 33 is explainable in light of Canadian constitutional history and political practice. Most of us would probably want to say, of some judicial decision or another, that the courts ignored the will of the people or even usurped the proper role of the legislature. After all, until 1982 the situation permitted by section 33 was, in effect, our constitutional practice. But at the end of the day, whatever benefits there might be in section 33, it still has the capacity to clothe in constitutional legitimacy the building of fences around those benefits which the "majority" (whoever it might be) wishes to keep for itself. Section 33 has the capacity to legitimate constitutionally the modern version of historical examples of oppression we want to forget.