

Why Does the Canadian Federal Government Want to Destroy the Confederation Bargain?

The Hon. A. Brian Peckford

Former Premier of Newfoundland and Labrador and Last Living Signatory of the 1981 Patriation Agreement

The Federal Government is seeking—through a factum filed with the Supreme Court of Canada—to change a provision of our Constitution, namely Section 33, the notwithstanding clause.

As the last living signatory to the Patriation Agreement, let me state clearly that, without this provision, there would be no Charter of Rights and Freedoms and no Constitution Act 1982. This provision was essential for a majority of the Provinces to agree to the bargain.

Section 33 is clear. Provinces and the Federal Government have the right to introduce measures which override certain provisions of the charter, if their elected Legislatures agree—for five years. And that can be repeated, if their elected Legislatures agree.

Section 33—The Notwithstanding Clause

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.
2. **Operation of exception:** 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. **Five year limitation:** 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. **Re-enactment:** Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
5. **Five year limitation:** Subsection (3) applies in respect of a re-enactment made under subsection (4).

This is not difficult to understand, one would think.

This is a provision like the others that were approved by a majority of Provinces and the Federal Government leading to The Charter and The Constitution Act 1982.

One Government and an unelected Court do not have the power to change this. All the intellectual gymnastics of the Federal Government's factum do not change this. There is no provision in the Constitution to accommodate what the Federal Government is trying to do.

The Federal Gov't and the courts have adopted a bad habit of reading other meanings into the plain language of the Constitution, thereby adding or subtracting from the clear meaning and therefore violating it.

Recent History:

The Federal Government now is following the failed script of Pierre Elliot Trudeau in 1981, who thought that his administration could unilaterally change the Constitution. But such actions were ruled unconstitutional by the Supreme Court. Why?

Mainly because any changes that would affect the powers of the Provinces had to involve the Provinces.

And now this federal action would affect the powers of the Provinces without involving the Provinces in the amendment process—history repeating itself!

The Supreme Court, if they still have some sense, should reject hearing this underhanded move by the Federal Government and highlight the decision of that same court in 1981.

The Court in 1981 made the following statement:

“The Constitution Act, 1981, if validly enacted, would effect two major changes to the existing Constitution of Canada. Part I of the Act contains a Charter of Rights and Freedoms, which would bind both the provincial and federal legislatures. Parts IV and V of the Act contain elaborate provisions for all future amendments to the Canadian Constitution.”

Here, we plainly see how the court recognized the binding nature of the Charter, and that there were new provisions for amendment through the Amending Formula, involving political action, Federal Government and the Provinces, not unilateral action involving the Federal Government and The Supreme Court of Canada.

And that Court explained:

“This issue is unique because in the one hundred and fourteen years since Confederation the Senate and House of Commons of Canada have never sought, without the consent of the provinces, to obtain such an amendment nor, apparently, has that possibility ever been contemplated.”

This comment by the court in this decision foreshadows their later conclusion of a constitutional convention existing, making impossible the Federal Government action of unilateralism. The Provinces must be involved in matters of Constitutional change that affect their powers.

I quote:

“We have reached the conclusion that the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the ‘Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada’ and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.”

And the Amending Formula of the Charter is there, unlike before 1981 when the great stumbling block to Patriation and being able to change our Constitution was that there was no amending formula.

This valid constitutional procedure to change our Constitution is one of the great achievements of the Charter —The Amending Formula.

If the Federal Government is unhappy with how the Notwithstanding Clause is being implemented, then use the appropriate constitutionally available procedure.

But as we have recently witnessed, five Provinces have publicly opposed what the Federal Government is doing, and hence, a legitimate way to change Section 33 is unavailable to the Federal Government, and they refuse to conduct legitimate debate, so undeterred, they twist and turn unconstitutionally with what looks like the willing co-operation of the courts.

Hence, this brazen approach.

To summarize:

1. The Federal Government is attempting to upend the fragile constitutional order of our Nation through unconstitutional means.
2. The Federal Government's factum, if approved by the Supreme Court, violates the constitutional convention and changes our constitution; that affects the powers of the Provinces.
3. There is a legitimate route to change our Constitution and that is the Amending Formula, a vital part of the Constitution 1982.
4. The Federal Government and the court have no business trying to alter Sect 33. That is the job of the Federal Government and the Provinces, the ones who composed Sect. 33 and the other Sections in the first place.
5. I suspect the majority of Canadians do not even know this is being attempted.

If these actions succeed, the country that we have known will be no more and the gradual erosion of the federation and the constitutional bargain will be destroyed, as such actions as these will be the new foundation/precedent to launch even more actions causing the continuing diminution of our democracy.

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The Christian Heritage Party of Canada

www.chp.ca • NationalOffice@chp.ca • 1-888-VOTE-CHP (868-3247)

PO Box 4958, Station E, Ottawa, Ontario K1S 5J1

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