

THE ADMINISTRATIVE LAW OF SECTION 33 OF THE *CHARTER*

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TOPIC AND IMPORTANCE

The *Canadian Charter of Rights and Freedoms* guarantees certain fundamental rights under the Canadian Constitution. Generally, when the legislature—the body of elected officials who introduce and pass laws—enacts laws that unconstitutionally limit these rights, a court can strike them down. However, section 33 of the *Charter* provides for an exception.

Section 33, which is also known as the “notwithstanding clause” or the “override clause,” empowers the legislature to enact certain laws even if they go against certain *Charter* rights, namely those under sections 2 or 7 to 15 (like the right to free speech and the right to equality). This paper asks about the extent to which the legislature can lend (or “delegate”) this power to administrative actors, like government boards and administrative agencies, who implement legislation.

When the legislature uses this section 33 power by enacting laws that expressly declare that they “shall operate notwithstanding a provision included in section 2 or sections 7 to 15,” the legislation “shall have such operation as it would have but for” the relevant provisions. What this means is that a court cannot strike down the legislation, which is something courts are *generally* able to do when they find a law unconstitutionally limits *Charter* rights. This renders the extent to which the legislature can delegate this power to administrative actors an important—but underexplored—issue, as laws do not implement themselves. Rather, they require implementation by administrative actors. Yet, administrative actors can and do implement laws only within the scope of the powers the legislature delegates to them. So, the question arises: Can the legislature give administrative actors the power to override certain *Charter* rights, just like it can override those rights itself, thereby impacting Canadians’ constitutional rights even more?

MAIN ARGUMENTS

First, the paper argues that this delegation is indeed possible: the legislature can, in principle, delegate its section 33 power to

administrative actors. This is because the legislature has a broad power of delegation. Second, the paper argues that the extent to which the legislature can in fact delegate its section 33 power to administrative actors depends on a distinction in the case law between *Charter* rights and *Charter* values. While *Charter* rights are directly grounded in the text of and directly protected by the *Charter*, *Charter* values are only indirectly grounded in the text of and are only indirectly protected by the *Charter*.

CONCLUSION AND ADDITIONAL CONSIDERATIONS

The paper concludes that to understand the extent to which the legislature can delegate its section 33 power, a better understanding of the difference between *Charter* rights and *Charter* values is required. A deeper grasp of this nuance is essential not only for accurately understanding the scope of section 33 within the law, but also for recognizing its growing impact on Canadians amid an evolving legal and political landscape that has seen greater exercise of the provision in recent years.