

## HANDOUT:

# Preventing Mob Rule: The Courts and the Charter of Rights and Freedoms

There are many ways that ochlocracy, or the rule of the mob, is curtailed in Canada. Requiring that legislation be approved by the House of Commons, the Senate, and even the Queen is one of the protections we have against mob rule. The review of proposed legislation by specialised committees of both the House of Commons and the Senate is another way that we try to ensure that our laws respect reason and uphold minority rights.

Yet another way that Canada's liberal democracy is designed to uphold the values of reason and protect minority rights is our constitution. The *Constitution Act* and the *Charter of Rights and Freedoms* are the highest laws in the country. They spell out what the government has the authority to do, and codify the rights and freedoms of all Canadians.

When questions arise as to whether or not the government is respecting the constitution or the Charter, the courts may be asked to decide. Courts are independent of government. They have the power to rule on whether or not legislation respects the constitution and the Charter.

If a court determines that some aspect of a law is contrary to the constitution or the Charter, the non-conforming parts of the law will be of no force or effect.

## ***Tyranny of the Judiciary?***

The power of the courts to rule on whether or not laws are constitutionally valid has led some people to suggest that there is a "tyranny" of the judiciary. They argue that it is unelected judges, and not elected representatives, who ultimately determine Canada's laws. This is not true.

If a court rules that a law is contrary to the *Charter of Rights and Freedoms*, federal and provincial governments have the option of invoking something called the Notwithstanding Clause. The Notwithstanding Clause is a special power written into the Charter. It permits the government to temporarily override parts of the Charter.

Specifically, the Notwithstanding Clause can be used to override the rights guaranteed in sections 2, and 7 through 15 of the Charter. These



sections grant citizens fundamental freedoms, legal rights, and equality rights, such as:

- freedom of expression
- freedom of conscience
- freedom of association
- freedom of assembly
- freedom from unreasonable search and seizure
- freedom from arbitrary arrest or detention
- the right to life, liberty and security

## **Why was the Notwithstanding Clause put in the Charter?**

The Notwithstanding Clause's inclusion in the Charter was controversial. However, it was a needed compromise to get provinces such as Saskatchewan to support the Charter. There was a fear that courts may occasionally make rulings that are contrary to the public interest. If democratically-elected legislatures are powerless to act—save for the complex process of amending the constitution—courts would always have the final say over many of Canada's laws.

By including the Notwithstanding Clause in the Charter, parliament and legislatures have a "safety valve." They retain final control if a court rules that a law is in violation of the Charter.

Any bill that proposes to use the Notwithstanding Clause to override Charter rights must specifically

declare which rights that the law will suspend. If the legislature passes the law, it only remains in effect for five years. After five years, the legislation must be re-introduced to the legislature, where it is considered and voted on again.

The five-year expiration date helps preserve the rule of law, the role of reason, and the protection of minorities. If a government wishes to continue overriding Charter rights, it must again seek the approval of the legislature. This means legislators and the public must re-visit the decision to override rights.

## **Checks and Balances**

In the end, the Notwithstanding Clause gives legislatures higher authority than the courts, in specific regard to fundamental freedoms, legal rights, and equality rights.

That said, governments rarely use the Notwithstanding Clause. Surveys continually show that Canadians place a high importance on their Charter rights. Any government that overrides constitutionally-guaranteed rights almost always will face a public backlash.

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## THINK

1. The power of Canada's courts to rule on the constitutionality of legislation means that the courts can act as a check on elected legislatures, and keep the rule of the mob at bay. And the power of legislatures to use the Notwithstanding Clause means that elected legislatures can act as a check on the courts, if courts begin to issue runaway rulings.
  - a) How does this particular diffusion of power help ensure that authority is balanced across several institutions in Canadian society?
2. Judges are highly-trained experts in the law. Why is it important that judges have the authority to overturn laws created by democratically-elected legislatures?
3. Is it a good idea to give democratically-elected legislatures the ability to override constitutional rights and freedoms?