WHEN SHOULD THE SECTION 33 OVERRIDE BE USED?

The recent decision in Sharpe (1999), 40 W.C.B. (2d) 507, [1999] B.C.J. No. 54 (S.C.) striking down the offence of possession of child pornography as an unjustified violation of freedom of expression set off an interesting debate about the use of the override in s. 33 of the Constitution Act, 1982. Given the political popularity of the offence it was not surprising that many Parliamentarians, including Liberal backbenchers, called for the re-enactment of the offence with the override. Fortunately, this movement was defeated by Attorney General Anne McLellan's courageous and correct decision not to pre-empt the appeal of Justice Shaw's decision.

The override should not be a taboo subject and we should welcome public debate about its use. In my view, the ability of legislatures to enact legislation for a five-year period notwithstanding fundamental freedoms or legal and equality rights is an important balance in our constitutional democracy. It would require excessive confidence in our courts to believe that five judges of the Supreme Court could never make such a fundamental and dangerous mistake that the override was not required. The courts alone cannot guarantee respect for our rights and the threat of the override may be a useful antidote to complacency about our freedoms. The override must, however, be used with caution and deliberation.

Unfortunately, the Supreme Court of Canada in Ford (1988), 54 D.L.R. (4th) 577, [1988] 2 S.C.R. 712, has upheld pre-emptive and blanket uses of the override. As always, however, Charter decisions only establish minimum standards. Attorneys General should only allow the override to be used in response to Supreme Court decisions. The appeal process, with its ability to stay judgments that effectively suspend the operation of a law and its ability to hear from a full range of interveners, should be allowed to run its course. If the appeal process is too slow, quick references can be directed to the Supreme Court. Overrides should not be wasted on the decisions of trial courts or courts of appeal. Waiting until the Supreme Court has ruled should help ensure that the override is never used too quickly or with too little debate.

Attorneys General have a special obligation with respect to the override. They are not simply elected politicians, but law officers of the Crown who have constitutional and statutory duties to ensure that government is conducted
in accordance with law. They are obliged to ensure that their governments respect the courts and the structure of the constitution. In short, the Attorney General should be the Cabinet’s gatekeeper to the override. In cases such as Sharpe, this requires saying “no” to premature uses of the override. In cases of “in your face” replies to the Supreme Court, however, it will require demanding that the override be used.

If the Cabinet decides that it must reverse a decision of the Supreme Court, the structure of the constitution requires that it pay the political price of alerting citizens by invoking the override. Only the Attorney General can be expected to know when candour and respect for the court’s ruling and the Constitution requires that the override be used. The federal Attorney General has a duty under s. 4.1 of the Department of Justice Act, R.S.C. 1985, c. J-2, to ensure that all bills are consistent with Charter purposes and provisions, and to report any inconsistencies to Parliament. A bill that reverses a Supreme Court’s Charter ruling is inconsistent with the Charter, unless, of course, the override is invoked.

Use of the override will not be necessary in the majority of cases in which Parliament replies to court decisions, as where Parliament frequently replied to Supreme Court decisions holding warrantless searches to be unconstitutional. The court contemplated the enactment of new warrant procedures and statutory authorizations of warrantless searches could arguably be justified as reasonable limits under s. 1 of the Charter. Although a Parliamentary sub-committee on the status of women called for its use to re-enact the rape shield law, no override was necessary with respect to Bill C-49. Parliament respected the court’s concern in Seaboyer (1992), 66 C.C.C. (3d) 321, [1991] 2 S.C.R. 577, about the previous s. 276 and expanded the terms of the debate by engaging in a comprehensive reform of sexual assault law.

In-your-face replies that only reverse court decisions are another matter. Parliament should have used the override when it enacted Bill C-72 and especially Bill C-46 in response to Daviault (1994), 93 C.C.C. (3d) 21, [1994] 3 S.C.R. 63, and O’Connor (1995), 103 C.C.C. (3d) 1, [1995] 4 S.C.R. 411. In these cases, Parliament essentially sided with the logic of the dissenters in the court and did not expand the terms of the debate beyond the court’s decisions.

The Alberta government’s recent decisions to back away from the use of the override underlines the political price that will normally be paid for its use. There will be a real temptation at the Cabinet table to avoid criticism and scrutiny that will follow the use of the override. Nevertheless, Attorneys General have a special obligation not to participate in stealth overrides enacted in the guise of ordinary legislation. They should explain court decisions to their colleagues and implore them to respect the court and the Constitution by using the override. If the Cabinet persists in wanting a stealth override, the Attorney General, in recognition of his or her duties to the Constitution and the court, should resign. An in-your-face reply that reverses a Supreme Court Charter decision is permissible under our Constitution, but only if the override is used and the public alerted to the legislature’s momentous decision.

K.R.