SUBMISSION TO HUMAN SERVICES STANDING COMMITTEE , SASKATCHEWAN LEGISLATURE

MEETING OF MAY 23, 2018: CONSIDERATION OF BILL No. 89: THE SCHOOL CHOICE PROTECTION ACT

SUBMISSION BY: John D. Whyte

QUALIFICATIONS: Former Deputy Minister of Justice and Deputy Attorney General, Government of Saskatchewan; Former Dean of Law, Queen's University; Professor of Constitutional Law at Queen's University for 25 years, visiting professorships held at York University, University of Toronto, University of British Columbia and University of Saskatchewan; author of a number of law journal articles and book chapters on the *Charter of Rights'* "Notwithstanding Clause".

SUBMISSION:

1. Section 33 of the *Canadian Charter of Rights and Freedoms* confers on the federal Parliament and provincial legislatures the power to enact a law providing that section 2 and sections 7 to 15 of the *Charter* shall not apply to identified legislation of the legislative body exercising the override power. Provisions of the *Charter* that may be overridden include sections recognizing and protecting freedom of conscience and religion and guaranteeing the right to equal protection and equal benefit of the law without discrimination based on religion.

2. Quebec used this power in 1982 to express, to the extent possible, its rejection of the *Constitution Act, 1982* and in 1989 to override the Supreme Court decision that had struck down the Quebec language law that restricted the use of English on commercial signs. The only other effective use of this power was the 1986 Saskatchewan legislation designed to stop the application the *Charter's* protection of freedom of association to its back-to-work legislation. Saskatchewan feared (erroneously, as it happened) that its legislation would be held to be unconstitutional.

3. The effect of using the section 33 power is either to stop any constitutional challenge based on a human right that legislation may violate, or to nullify a judicial decision that one of the designated constitutional rights has been violated. It is the latter result that Saskatchewan seeks with respect to the rights that were found to be violated in the 2017 Queen's Bench decision in *Good Spirit School Division v. Christ the Teacher Roman Catholic Separate School Division.* This decision is now under appeal to the Saskatchewan Court of Appeal.

4. Constitutional protection of human rights has become a standard, and virtually uniform, element of the world's liberal democratic constitutions. Allowing the legislative override of the constitutional protection of the basic human rights of liberty, due process and equality is

a denial of this essential element of liberal democracy. Section 33 created constitutional incoherence in that the constitution requires that legislatures act in compliance with basic human right standards – but not if they don't want to. It is not surprising that, apart from the instances of apparent failure of accommodation of one of Canada's "founding nations", only once in 36 years has a legislature effectively resorted this anomalous arrangement.

5. Section 33 of the *Constitution Act, 1982* is a result of two misconceptions that were held during constitutional negotiations. First, some provincial premiers supported an override clause because they believed that parliamentary supremacy was the foundation of democratic constitutionalism. This was wrong. The protection of vulnerable minorities through constitutional protections – the precise idea that was central to the founding of Canada at Confederation in 1867 – is constitutional democracy's real foundation. Second, some thought that giving constitutional protection for human rights would lead to judicial attacks on social justice and development legislation. This was based on American constitutional decisions from the early 20th century in which the U.S. Constitution's protection of the right to property was used to strike down labour standards legislation. But property rights were not proposed for Canada's *Charter.* Furthermore, since those American decisions, the world had experienced a widespread human rights revolution directed to protecting minorities and vulnerable persons; it was not likely the Charter would give rise to regressive decisions – and, indeed, it has not done so.

6. Saskatchewan's future economic success depends on attracting investment and a highly skilled work force. These two drivers of economic growth significantly depend on a provincial community's social capital. There are, of course, many drains on social capital but being the one Canadian province to resort to using a badly conceived constitutional instrument to reverse judicial decisions that protect basic rights represents political attitude that islikely to be seen by investors, employers and employees (especially young skilled employees) as antithetical to ideas about the good state and the good society which attracts commitment and investment to the province.

7. The use of the override clause is now being considered in the context of conflict between communities. It will lead, over and over again, every five years, to the need to put at the centre of education planning the public education/Catholic education relationship. This quinquennial re-visiting of inter-community difference and completion can only contribute to social polarization at a time that stable democratic society's greatest threat is the rise of identity politics.

8. Once the override power is used, the clear political lesson will be that majoritarian, or popular, political forces whose interests have been restricted through judicial recognition and protection of a basic human right can best avoid the inconvenience of having to

accommodate to the rights claim through mobilizing a political campaign to reverse the court's recognition of that right. Using the notwithstanding clause has the civic effect of encouraging dominant political forces to exercise their political power to override rights granted in the *Charter* and recognized by courts. It is hard to imagine a a process that more denies justice and nurtures division.

9. While it is not possible to be certain about the course and the timelines of a nationally significant constitutional case, it is not inconsistent with the past record of constitutional litigation to anticipate that the end date for the completion of appeals (assuming an appeal to the Supreme Court of Canada) and the usual one-year adjustment period from the final court decision will be Fall, 2022 or Winter 2023. Since this will be the middle of a school year the operational effect of any decision would be September, 2023. This will be after the expiry of the effect of Bill 89. Enacting a legislative override of the *Charter* at this point is entirely likely to have no effect.