



THE CANADIAN
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October 15, 2024

Via email: Arif.virani@justice.gc.ca

The Honourable Arif Virani, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8

Dear Minister Virani:

Re: Establishing Guidelines Concerning Use Of The Notwithstanding Clause

We write on behalf of the Constitutional and Human Rights Section, Access to Justice Subcommittee, Sexual and Gender Diversity Alliance and Child and Youth Law Section of the Canadian Bar Association (CBA Groups), to recommend safeguards surrounding the provincial governments' increasing reliance on section 33 (the notwithstanding clause) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to immunize legislation from constitutional scrutiny.

The Canadian Bar Association (CBA) is a national association of 40,000 members, including lawyers, notaries, academics, and law students, with a mandate to seek improvements in the law and the administration of justice. The Constitutional and Human Rights Section examines all constitutional and human rights law issues, including division of legislative powers, judicial review of the Constitution, constitutional reform, the *Charter*, human rights codes and international human rights law. The Access to Justice Subcommittee coordinates and integrates activities of the CBA to improve and promote access to justice for the poor and middle class in Canada and facilitates information sharing about legal aid and pro bono across Canada. The Sexual and Gender Diversity Alliance addresses the needs and concerns of lesbian, gay, bisexual, transgendered and two-spirited members within the CBA, and serves as a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. The Child and Youth Law Section coordinates and delivers professional development activities, advises, and responds to law, policy and legal research developments on matters affecting Canadian children and youth in all legal disciplines.

Recent invocations of the notwithstanding clause, including preemptive use by both the Ontario and Saskatchewan legislatures, suggest a new and alarming trend. While Prime Minister Trudeau has

spoken out against these applications, to varying degrees¹, the CBA Groups call on the federal government to collaborate with its provincial and territorial counterparts to take concrete action and establish guidelines with respect to the use of the notwithstanding clause.²

Historical Observations

The notwithstanding clause states that Parliament or a provincial legislature may expressly declare that an enactment shall operate notwithstanding a provision included in section 2 (*i.e.*, fundamental freedoms) or sections 7 to 15 (*i.e.*, legal and equality rights) of the *Charter*. The inclusion of the notwithstanding clause was not uncontroversial. Notably, the notwithstanding clause was not included in initial drafts of the *Charter* and was inserted in response to concerns by some provincial Premiers about the *Charter's* impacts on the powers of their legislatures.³ It was, in short, a political compromise without which the *Charter* may not have been adopted.

Charter rights and freedoms can be reasonably limited by virtue of section 1 of the *Charter*. Section 1 of the *Charter* plays an important role in safeguarding the government's legitimate and appropriate objectives which may limit *Charter* guarantees so long as the government measures are "demonstrably justified in a free and democratic society." In light of section 1 of the *Charter*, the CBA Groups are of the view that the notwithstanding clause should not be used preemptively.

Historically, the notwithstanding clause has been invoked infrequently outside of Quebec.⁴ The late Peter Hogg, widely recognized as one of the preeminent constitutional law scholars of the *Charter*, described governments' reluctance to invoke the notwithstanding clause as follows:

The inclusion of a notwithstanding clause in a bill performs a "signaling function", alerting critics to the fact that the government believes that its proposed legislation is inconsistent with the *Charter*, and causing a public debate on the issue—a debate that is normally unwelcome to the government. In practice, therefore, it seems clear that s. 33 will be used infrequently and only when the legislating government is persuaded that there are powerful reasons of public policy to justify its use.⁵

The increasing reliance on the use of the notwithstanding clause by provincial legislatures marks a new trend in Canadian constitutional law. We therefore urge the federal and provincial governments to jointly establish clear guidelines for its use.

The Increasing Use of the Notwithstanding Clause

In 2022, the Ontario legislature preemptively invoked the notwithstanding clause in the "*Keeping Students in Class Act, 2022*", which sought to impose a collective agreement and remove education workers' right to strike in the midst of collective bargaining. Federal Attorney General and Justice

¹ In a November 2022 interview, Prime Minister Justin Trudeau said: "Canadians themselves should be extremely worried about the increased commonality of provincial governments using the notwithstanding clause preemptively to suspend their fundamental rights and freedoms". Peter Zimonjic & Jennifer Chevalier, "The notwithstanding clause — what it is, why it was used and what happens next" (6 November 2022), [online](#).

² Canadian Bar Association, "Resolution 20-03-A - Guidelines on Use of the Notwithstanding Clause of the Charter of Rights and Freedoms" (19 February 2020), [online](#).

³ Marc-André Roy and Laurence Brosseau, "The Notwithstanding Clause of the Charter", Library of Parliament, Publication No. 2018-17-E (May 7th, 2018), [online](#).

⁴ Government of Canada, Section 33 – Notwithstanding clause, August 13, 2024, [online](#).

⁵ Peter W. Hogg with the collaboration of Wade K. Wright, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2005) (loose-leaf updated 2024, release 1), at 39-15.

Minister David Lametti called Ontario’s pre-emptive use of the notwithstanding clause “exceedingly problematic” and “very serious” and that it “de facto means that people’s rights are being infringed and it’s being justified using the notwithstanding clause.”⁶ The Ontario government ultimately repealed the legislation in response to public criticism over its reliance on the notwithstanding clause.

In October 2023, following a court application challenging a provincial policy that prevented educators from using a student’s chosen name and/or pronouns without parental consent, the Saskatchewan legislature preemptively invoked the notwithstanding clause in the *Education (Parents’ Bill of Rights) Amendment Act, 2023*, which codified the impugned policy into law. The application was then amended to include a judicial review of the legislation, rather than the policy, and to request a declaratory order regarding the *Charter* rights at issue. While that application is still before the courts, Justice Megaw, in his decision on standing, noted that “individuals affected by this Policy, youth under the age of 16 who are unable to have their name, pronouns, gender diversity, or gender identity, observed in the school will suffer irreparable harm”.⁷ The legislation was introduced, with the preemptive invocation of the notwithstanding clause (as well as section 52 of the Saskatchewan Human Rights Code), less than one month after Justice Megaw’s decision.

In Quebec, the National Assembly has likewise invoked the notwithstanding clause to protect legislation that would otherwise be struck down for infringing the *Charter’s* freedom of religion and equality guarantees. The most notable and concerning contemporary example is Quebec’s 2019 statute, *An Act Respecting the Laicity of the State*⁸ (Bill 21), which prohibits certain categories of public employees and government service-providers from wearing religious symbols (like turbans, kippahs and hijabs) or face coverings (like niqabs) while performing public duties. The Canadian Civil Liberties Association has described Bill 21 as an “egregious rights violation” that “harms immigrant and racialized communities in particular” and “a horrendous law that violates human rights and harms people who are already marginalized.”⁹

In response to that *Act*, the CBA adopted the 2020 resolution denouncing religious discrimination and affirming the rights of openly religious lawyers. This was followed by the 2021 resolution expanding the CBA’s definition of “diversity” to include religious groups.

Proposed Safeguards on the Use of the Notwithstanding Clause

This clear trend towards indiscriminate reliance on the notwithstanding clause by governments is greatly concerning, and will remain so until clear guidelines are in place. With a view of promoting robust debate and meaningful accountability, particularly when the rights of minority communities are impacted, the CBA Groups urge the federal, provincial and territorial governments to establish guidelines for the use of the notwithstanding clause, including:

1. The notwithstanding clause not be used preemptively without prior consideration of the proposed legislation by the courts;
2. The notwithstanding clause not be used absent meaningful and transparent public consultation;
3. Use of the notwithstanding clause require a two-thirds majority vote in the legislature or Parliament; and

⁶ Katherine DeClerq, Trudeau calls out Ontario’s use of notwithstanding clause to prevent education strike (November 1, 2021) [online](#): CTV News Toronto.

⁷ UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education), 2023 SKKB 204 at para 98.

⁸ CQLR, c L-0.3.

⁹ Canadian Civil Liberties Association, *Bill 21- Our Fight to Protect Religious Freedom and Equality*, [online](#).

4. All invocations of the notwithstanding clause require a preambular statements explaining why the legislature considers it necessary to invoke the clause. (FN - Resolution).¹⁰ Though this statement would not be subject to judicial review, it would compel legislatures to offer an unambiguous explanation to voters as to why the notwithstanding clause is being invoked and why such legislation ought to be insulated from judicial scrutiny under the *Charter*.

Conclusion

The CBA Groups urge the federal government to lead with action in response to the increasing use of the notwithstanding clause. We welcome an opportunity to discuss our recommendations, to offer additional insights, and to assist with the development and implementation of relevant policies and legislative amendments.

Yours truly,

(original letter signed by Véronique Morissette for Wade Poziomka, Jennifer Aik Yeow Khor, Charles Easton and Michael Zimmerman)

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¹⁰ *Supra*, note 2.