What is the Notwithstanding Clause?

This article was written by a law student for the general public.
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33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

What is the Notwithstanding Clause?

Section 33 of the *Charter of Rights and Freedoms* is commonly referred to as the "notwithstanding clause".[1] Provincial or federal governments can use section 33 when they want to protect a law that violates fundamental freedoms, legal rights, or equality rights. The clause is an acknowledgement that there can be situations where a government will want to pass a law, or maintain an existing law, that disregards *Charter*-protected rights or freedoms.

Why do we have a notwithstanding clause?

When the *Charter* was drafted, federal and provincial lawmakers were divided on including section 33 in the *Charter*.[2] Its supporters believed the clause would protect democracy by giving elected law-makers control over important issues and preventing the unelected judges from having too much power. Those opposed, including then Prime Minister Pierre Elliott Trudeau, thought that the clause could jeopardize the *Charter*'s purpose of protecting individual rights against the government.[3]

Supporters included provinces such as Alberta, Saskatchewan, and Manitoba, who were worried the *Charter* would limit their power to make necessary laws. Having section 33 in the *Charter* preserved provincial sovereignty.[4] Including the notwithstanding clause secured these provinces' support of the *Charter.*

When can it be used?

The notwithstanding clause is rarely used, and only when the government has powerful public policy reasons to justify it.[5] The clause can only be used for laws that affect fundamental freedoms in section 2 of the *Charter*, such as freedom of expression or freedom of religion, legal rights in sections 7-14 such as the right to life, liberty and security, and equality rights in section 15.[6]

For example, in 2000, Alberta tried to apply the clause to override same-sex marriage in the province. The Supreme Court had ruled that same-sex marriage was constitutional but the

Alberta government did not want to follow this decision. Therefore, they added the notwithstanding clause to the Alberta *Marriage Act* to make it clear that marriage was only legal between a man and a woman. However, this use of the notwithstanding clause was found invalid because marriage is not in provincial jurisdiction.[7] Only the federal government can decide what marriages are legal.

How can it be used?

When a government decides to use the notwithstanding clause it must clearly state that its law will operate despite its potential to violate sections of the *Charter*.

The use of the notwithstanding power can only last for five years, after which it can be renewed for additional five-year periods.[8] A practical effect of the five-year limit is that it generally coincides with the length of electoral terms. As a result, the public has an opportunity in an election to challenge their government's decision to use the notwithstanding clause if they so wish.[9]

When has it been used?

As of May 2017, the notwithstanding clause has been used 17 times by the governments of Quebec, Alberta, Saskatchewan, and the Yukon.[10] Here are a few examples:

Quebec

- Quebec did not sign the *Constitution Act 1982* and subsequently passed legislation that added a standard notwithstanding clause to every law in force at the time.[11] The clause was added to every new law passed until December 2, 1985, when a new government stopped the practice.[12]
- In 1988, Quebec used the clause in response to a Supreme Court of Canada decision that the province's law allowing French-only on commercial signs offended freedom of expression because companies could not express themselves in their language of choice. Quebec passed a new version of the same law with the notwithstanding clause attached. This new law allowed the French-only signs to continue. The law was not renewed when the five-year limit ran out.

Saskatchewan

- Saskatchewan added the clause to protect strike-ending legislation in 1986. The government used the clause because they thought the law forcing strikers back to work would violate freedom of association. However, the clause was removed when the Supreme Court said that the law would not affect *Charter* rights.[13]

- In 2017, Saskatchewan Premier Brad Wall announced his decision to use the notwithstanding clause to protect school choices for students and parents, regardless of their faith.[14] The Premier's announcement was in response to a Saskatchewan court decision that would possibly jeopardize the funding for non-Catholic students who attend Catholic schools. Using the notwithstanding clause will allow the province to continue funding students regardless of their faith and school choice. The Ministries of Education and Justice are tasked with drafting the new law.[15] The court's decision is currently on appeal.

Alberta

- In 1998, Alberta tried to use the clause to limit compensation to victims of a forced sterilization program. Forced sterilization had infringed the victims' right to life, liberty and security of the person. However, the proposed bill was withdrawn due to public protest against it.[16]
- As mentioned earlier, Alberta also tried in 2000 to apply the notwithstanding clause to override same-sex marriage in the province.

For more information:

- Peter Lougheed, "Why a Notwithstanding Clause?" (Inaugural Merv Leitch QC Memorial Lecture delivered at the University of Calgary, 20 November 1991), (1998) *Points of View* no 6.
- Allan E. Blakeney, "The Notwithstanding Clause, the Charter and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1, 2 & 3 Const Forum Const 1.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 33 .

[2] Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) (loose-leaf 2010 supplement) at 39.2. [Hogg].

[3] Peter Lougheed, "Why a Notwithstanding Clause?" (Inaugural Merv Leitch QC Memorial Lecture delivered at the University of Calgary, 20 November 1991) at 4.

[4] *Ibid* at 2; Barbara Billingsley, "Section 33: The *Charter's* Sleeping Giant" (2002) 21 Windsor YB Access Just 311 at 333; Hogg, *supra* note 2 at 39.2.

[5] Hogg, *supra* note 2 at 39.8.

[6] *Charter*, supra note 1, s 33(1).

[7] Hogg, *supra* note 2 at 39.2.

[8] *Charter*, supra note 1, ss 33(3)– (5).

[9] Hogg, *supra* note 2 at 39.5.

[10] Billingsley, *supra* note 4 at 339.

[11] Hogg, *supra* note 2 at 39.1.

[12] *Ibid*.

[13] *RWDSU v Saskatchewan*, [1987] 1 SCR 460.

[14] Stefani Langenegger, "Sask. to use notwithstanding clause to override Catholic school ruling", *CBC News* (01 May, 2017), online: <www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-catholic-1.4093835>

[15] *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212 and The Government of Saskatchewan,* 2017 SKQB 109.

[16] Billingsley, *supra* note 4 at 341.