Can the Federal Government Disallow Québec's 'Anti-Religious Symbols' Act?

Introduction: The Call to Disallow Québec's Bill 21

On June 17, 2019, the government of Québec passed Bill 21 into law – the Act bans some public sector workers from wearing religious symbols while on the job.[1] Further, the law requires that people must have their faces uncovered when receiving government services. The law impacts religious and racial minorities who wear religious attire by forcing individuals to decide between exercising their faith and gaining employment in the public service. These discriminatory effects have led to calls for the federal government to kill the law by using a little-known section of the *Constitution Act, 1867* – the disallowance power.[2]

The disallowance power allows the federal government to kill a provincial law by requesting the Governor General to do so.[3] It is distinct from the federal government's reserve power, though the two are similar.In the early years of Confederation, disallowance was used most often when the federal government believed that a provincial law was encroaching on federal jurisdiction – the power was also occasionally used when the federal government thought a provincial law was unjust.[4] It is important to note that some framers of the Constitution believed that the disallowance power should be used to protect minorities from discriminatory provincial laws.[5] Disallowance was commonly used by the federal government in the 19th century – however, it's use drastically declined and the power has not been used since 1943.

The federal government's power to disallow provincial laws has not been used in more than 75 years – this has led to academic debate about whether the power is still a legitimate constitutional tool. Despite calls for the federal government to kill Québec's Bill 21, it is likely that, even though disallowance appears in the written Constitution, it is a historic relic that will not be used in modern Canada.

History: Declining Disallowance

The disallowance power has been used 121 times in Canada's history, though most uses were under Canada's first Prime Minister, John A. Macdonald.[6] Use declined as later Prime Ministers began to refuse to disallow laws where the courts could determine if provincial laws were in federal or provincial jurisdiction.[7] The last law disallowed by the federal government was a World War II Alberta law titled *An Act to prohibit the Sale of Land to any Enemy Aliens and Hutterities for the Duration of the War*.[8] It is important to note that this law was disallowed not because it infringed human rights but because the federal government believed that it was in their authority to make laws affecting "enemy aliens"

during the war. Since World War II, no federal government has seriously considered using the disallowance power.

The Supreme Court of Canada [SCC] has commented on the disallowance power on multiple occasions. In 1938, prior to the last use of the power, the Court said that it was "still subsiding" and that it "remains in full vigour."[9] In 1981, the SCC stated that while disallowance "in law [is] still open," the Court acknowledged that it had "fallen into disuse."[10] Expanding further in 1986 the SCC stated that disuse arose because the "courts emerged as the ultimate umpires of the federal system."[11] This would suggest that in modern Canada, it is the courts and not the federal government that should decide if a provincial law respects the Constitution.

Is Disallowance Still a Valid Constitutional Power?

The extended period of non-use has led to academic debate as to whether the disallowance power has become void from lack of use, like a muscle that has atrophied from lack of exercise.

Legal scholar James Hurley Ross framed the debate as such: "there is a debate in Canada on whether provisions of the Constitution can become spent or void… over time if they are not exercised in practice."[12] Ross notes that provincial governments have taken the position that the disallowance power is "spent and cannot be invoked."[13] However, Ross does not accept this interpretation because "the federal government has consistently rejected" it.[14] Ross notes that the last Prime Minister to discuss the disallowance power was Pierre Trudeau in 1975; he stated that he would only use the disallowance power in "rare cases."[15] Since the disallowance power remains in the written text of the *Constitution Act, 1867*, to be of no force, it would need to have lapsed through convention. For a convention to arise, all parties affected must consider the convention to be binding on them. Since no Prime Minister has declared the disallowance power to be obsolete, Ross believes that it is still a legitimate part of Canada's Constitution.

Legal scholar Richard Albert disagrees with this assessment. He argues that the disallowance power has "fallen into desuetude" and is spent.[16] Albert points out that some political actors do view the disallowance power as obsolete; for example, the Senate's Standing Committee on Legal and Constitutional Affairs stated in 1980 that the power of disallowance is exhausted and is "incompatible with a genuine federation."[17] Well-known constitutional scholar Peter Hogg states that in contemporary Canada it is the court's role, and not the federal government's, to decide if a law is constitutional.[18]Hogg assesses that the disallowance power has "probably been nullified by convention."[19]

Conclusion: "The Nuclear Option"

While academic debate about the viability of the disallowance power is ongoing, the power seems at odds with the federal system in modern Canada. Using the disallowance power would lead to political consequences as well as legal ones. Political columnist Chantal Hébert calls the disallowance power the "nuclear option" since it could inflame and anger

the people of Québec if the federal government killed a provincial law.[20]

Even if disallowance is "probably"[21] eliminated by convention it remains a written provision of the *Constitution Act, 1867*. As long as it remains in the written text there will be uncertainty about its legal effect. However, because use of the disallowance power would be viewed as a federal intrusion on provincial authority, it is unlikely that it would be used for fear of political consequences. This is likely the case even if it could be used to assist discriminated minorities effected by Québec's Bill 21.

[1] *An Act respecting the laicity of the State*, SQ 2019, c 12. The Act is intended to bolster the separation of religion and the state.

[2] Andrew Coyne, "Are we going to do anything to protect Quebec's minorities?" *National Post* (30 March 2019), online: <nationalpost.com/opinion/andrew-coyne-are-we-going-to-do-anything-to-protect-quebecs-minorities>; Andrew Coyne, "Will leaders tolerate religious segregation just because it's Quebec?" *National Post* (17 June 2019), online: <nationalpost.com/opinion/andrew-coyne-will-leaders-tolerate-religious-segregation-just-because-its-quebec>.

[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 55-57, 90, reprinted in RSC 1985, Appendix II, No 5. Sections 55-57 create the now defunct power for the United Kingdom Parliament to disallow Canada's federal laws. Section 90 applies this concept to allow the federal government to disallow a provincial law within one year of enactment.

[4] GV La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Department of Justice, 1955) at 36 [La Forest].

[5] Robert C Vipond, "Alternative Pasts: Legal Liberalism and the Demise of the Disallowance Power" (1990) 39 UNBJL 126 at 127.

[6] La Forest *supra* note 4 at 38, 58, 82.

[7] *Ibid* at 73. Importantly, after Macdonald's tenure as Prime Minister use of the disallowance power to kill "unjust" provincial laws stopped.

[8] *Ibid* at 82.

[9] *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, [1938] 1 SCR 71 at 78, 80.

[10] *Reference re Resolution to amend the Constitution*, [1981] 1 SCR 753 at 802.

[11] *The Queen v Beauregard*, [1986] 2 SCR 56 at 72.

[12] James Hurley Ross, *Amending Canada's Constitution: History, Processes, Problems and Prospects*(Ottawa: Minister of Supply and Services Canada, 1996) at 14.

[13] *Ibid*

[14] *Ibid* at 15.

[15] *Ibid* at 15-16.

[16] Richard Albert, "Constitutional Amendment by Constitutional Desuetude," (2014) 62:3 Am J Comp L 641 at 651.

[17] *Ibid* at 664.

[18] Peter W Hogg, *Constitutional Law of Canada (2017 Student Edition)* (Toronto: Thompson Reuters, 2017) at 5-19 [Hogg]. Hogg states that "the modern development of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance."

[19] *Ibid* at 9-7, n 11.

[20] Chantal Hébert, "Voters deserve to know Ottawa's intentions towards Quebec's secularism law," *Toronto Star* (19 June 2019), online: <thestar.com/politics/political-opinion/2019/06/19/no-good-reason-for-trudeau-to-rush-in-and-challenge-quebecs-secularism-law.html>.

[21] Hogg *supra* note 18 at 9-7, n 11.