COURTS, CLAUSES AND THE CONSTITUTION: IS THE TIMING RIGHT FOR A MEANINGFUL CONVERSATION?

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INTRODUCTION

For 150 years, the Supreme Court of Canada has been a fundamental part of Canada's institutional landscape. Over that period of time, many decisions made by the highest court in the land have contributed immensely to the defining of Canadian identities. The court has played a critical role in its deliberations around gender, sexual orientation, indigeneity, immigration, religion, race and ethnicity, minority language rights and more.

Such issues are frequently the subject of important societal debates with great political ramifications. Consequently, the court's interventions in these realms sometimes give rise to questions about the lines or boundaries between the responsibilities and authority of members of the judiciary and that of the legislators who appoint them.

As it marks its 150th anniversary in 2025, the Supreme Court of Canada is encountering one of its most important historic challenges. Section 33 of the Canadian constitution, commonly referred to as the Notwithstanding Clause, allows federal, provincial or territorial legislatures to pass a law that operates notwithstanding its contravention of certain provisions in the Canadian Charter of Rights and Freedoms for up to five years. Such a law can also be renewed thereafter.

The controversial clause was included as Section 33 of the Charter as part of a compromise struck at the 1981 First Ministers conference convened

by then-Prime Minister Pierre Trudeau in order to secure support from the country's provincial leaders for the 1982 Constitutional Act.

Since then, its invocation has had a critical impact on Supreme Court decisions, most notably on rulings that affect the protection of minorities. In September 2025, Canada's Attorney General, Sean Fraser, filed a factum with the Supreme Court outlining the federal government's concerns about the use of the notwithstanding clause and asked the court to identify appropriate parameters or limits to its use.

Observers contend that the opinion issued by the Supreme Court will shape the way both federal and provincial governments could use the notwithstanding clause in the years ahead. What follows is a consideration of the possible consequences of the federal government's recent intervention on the matter and what it might imply for the future of the Supreme Court in light of the mounting challenges to the protection of minorities in Canada.

FEDERAL FACTUM FILING

The federal government filing was a response to the Supreme Court's hearing of a case concerning Quebec's secularism law, Bill 21. The bill was designed to prevent a Charter challenge to the province's highly controversial ban on public sector workers in positions of authority (such as teachers, judges and police officers) from wearing religious symbols. Adopted in 2019, the bill preemptively invoked the notwithstanding clause to forestall any Charter challenge to the provincial prohibition.

The federal government is calling on the Supreme Court[1] to recognize that courts may invalidate the use of the clause should it result in "irreparable impairment" of Charter rights or freedoms violated by Section 33.

To date, the court has done little more than assess whether its invocation by Quebec's legislature properly followed due process. Fraser noted that the case is about much more than some of the immediate issues before the court and that – more broadly – the Supreme Court judges should be able to state that rights have been clearly violated by a law where the notwithstanding clause has been deployed, even if its use implies that the law cannot be struck down.

THE USE OF THE NOTWITHSTANDING CLAUSE

The notwithstanding clause was initially conceived of as a measure for exceptional or emergency use in response to judicial decisions that were deemed to insufficiently acknowledge an imminent public security or safety need. To date, no federal government has ever invoked the notwithstanding clause. On the provincial side, however, it is Quebec that has most frequently deployed the clause with the intention of symbolically expressing its "sovereignty" by preemptively shielding legislation from constitutional challenges. Hence, the sovereigntist Parti Québécois government applied the clause to almost all provincial laws adopted between 1982 and 1985.

But the Quebec Liberals looked to stop to the

1 www.canada.ca/en/department-justice/news/2025/09/statement-from-minister-fraser-on-canadas-intervention-before-the-supreme-court-of-canada.html

automatic invocation of the clause when it took power in 1985. Yet shortly thereafter, in 1988, in a controversial move, the provincial Liberal government made recourse to the clause to override a Supreme Court decision that had struck down parts of a law that called for unilingual, French-only commercial exterior signs (under Bill 101), which the Supreme Court had described as an unreasonable limit on freedom of expression. The public outcry in Quebec against the court decision saw the Liberals invoke the clause in the name of what then Premier Robert Bourassa described as the preservation of social peace.

Sigalet and Snow (2025) point out that Canada's notwithstanding clause has been invoked in six different provincial laws since 2018. They contend that the resurgence is explained as a reaction to the growing judicial invalidation of provincial statutes as well as increasingly frequent federal-provincial partisan conflicts, particularly between conservative provincial governments and the Liberal federal government.

In 2019, Quebec's governing party, the conservative Coalition Avenir Québec (CAQ), preemptively invoked the notwithstanding clause in Bill 21, its secularism law. The CAQ used the clause again in the case of Bill 96 (2022), which reinforced the province's language law, including important amendments aimed at strengthening and extending provisions in Bill 101 protecting the French language.

In Ontario, Premier Doug Ford's Progressive Conservative government deployed the clause in 2021 to re-establish legislation that had curbed third-party election advertising in the 12 months prior to an election. In the following year, the government used the clause to prevent teachers from going on strike. Similarly, in October 2025, the Alberta government used the notwithstanding clause to end a teachers' strike by adopting back-to-work legislation.

THE NOTWITHSTANDING CLAUSE AND GENDER IDENTITIES

The latest provincial front in the deployment of the notwithstanding clause is in the area of gender identities. In October 2023, Saskatchewan invoked the clause to adopt a law that requires parental consent for students under 16 to change their name(s) or their pronouns at school. Following suit, the Alberta government introduced legislation accompanied by the clause to prevent legal challenges to measures affecting transgender youth and adults. Laws were passed in Alberta in 2024 to prevent youth under 16 from accessing, including puberty blockers and hormone therapy. The legislation also prohibits gender surgery for minors. Alberta Premier Danielle Smith contended that it could take years to resolve potential legal challenges to what were described as gender-based policies in health care and education, thus causing too much uncertainty.

Other legislation in Alberta required school staff to inform parents or guardians of any students under 18 who wish to be addressed by a name or pronoun of a different gender identity. Parents of students under 16 must give permission for school staff to use the student's chosen name and pronouns. A third bill called for anyone participating in female-only competitive sports in Alberta to have been assigned female at birth.

Opponents of these laws have described them as

"cynical and chilling" and insist that they call the rule of law into question. Public opinion is split on such issues. According to an Angus Reid survey, about two-in-five Canadians (43%) say parents should be informed and must give consent if a child wants to change their gender identity. About one-in-seven Canadians (14%) say that the parent should have no role in this decision. About one-in-three (35%) feel that parents should be made aware of any changes that are happening at the school but that these changes should not require parental consent. Finally, those Canadians with children younger than 18 feel more strongly about consent than those without school-aged children (48% compared to 41%).

While elected officials may justify their actions on the basis of public opinion, the courts need to be able to determine whether the rights of minorities are being violated regardless of where the public stands at a given point in time.

THE FEDERAL GOVERNMENT AND THE NOTWITHSTANDING CLAUSE

Over the years, federal politicians have spoken out against the use of the notwithstanding clause. Former Prime Minister Justin Trudeau criticized its use by Ontario as well as in the cases of Quebec's Bill 96 and earlier Bill 21. In an interview in January 2023, Trudeau stated his intention[2] to ultimately regulate the use of the clause. He insisted that the use of the clause must have political consequences and warned against minimizing the suspension of fundamental rights.

In the Bill 21 case, the Supreme Court of Canada is hearing a legal challenge in which appellants are asking the court to restrict the preemptive use of the clause and/or to consider whether courts can still weigh in on the constitutionality of a law when the clause is invoked. As noted above, the federal government is intervening in the case to determine whether the court can set limits on how governments use the notwithstanding clause to override Charter rights.

Echoing Trudeau's concern, Canada's current Prime Minister Mark Carney said he opposes the "anticipatory" or routine use of the notwithstanding clause, which he regards as undermining the Canadian Charter of Rights and Freedoms. He believes decisions about rights should be made by the courts, not bypassed through the pre-emptive use of the clause.

And while saying he supports the goal of Quebec's Bill 96 in seeking to protect and promote the French language, Carney opposes the Quebec government's decision to preemptively use Section 33 to shield the law from constitutional challenges.

In reaction to the federal government factum to the Supreme Court calling for limits on the clause, the premiers of Ontario, Quebec, Alberta, Saskatchewan and Nova Scotia have demanded[3] the immediate withdrawal of the federal submission. The premiers insist that the federal government's arguments constitute a formal disavowal of the constitutional bargain that brought the Charter into being in the first place. They add that the factum "proposes an unclear and unworkable legal standard with no basis

2 www.lapresse.ca/actualites/politique/2023-01-21/disposition-de-derogation/trudeau-envisage-de-se-tourner-vers-la-cour-supreme.php

3 www.cbc.ca/news/politics/premiers-carney-withdraw-court-submission-notwithstanding-1.7653648

in the text of the Constitution," and which would "amount to indirectly amending the Constitution."

The front established by the five provinces ultimately ends up providing tacit support for Quebec legislation curbing religious symbols in parts of the public domain, and for gender-based policies in Saskatchewan and Alberta, through the premiers' insistence that provincial authority must prevail over other considerations.

On the other hand, the Manitoba government introduced a bill that seeks to curtail future use of the notwithstanding clause by provincial administrations. Bill 50, the Constitutional Questions Amendment Act, would require that the rationale for the use of the clause be laid out before the judiciary. Although the clause has never been invoked in Manitoba, Premier Wab Kinew suggested that the extra step would serve as a safeguard against its use to "trample" on the rights of vulnerable groups.

TRUST IN COURTS, LEGISLATORS AND PUBLIC OPINION

The use of the notwithstanding clause reflects a wider societal problem around institutional trust in particular as it pertains to the courts and to elected officials. If laws potentially violating minority rights can be defended in support of provincial autonomy, it implies an inherent problem when it comes to Constitutional protections that, on occasion, appear to undercut public trust.

How do Canadians view the Supreme Court? A majority of Canadians[4] (62%) believe the Supreme Court is "impartial", about three times the number who instead call it "biased" (22%). Despite the majority belief in the court's impartiality, overall, only about half (49%) of Canadians say they have confidence in the country's top court, while about two-in-five (42%) say they do not.

Trust in the judiciary is widely seen as vital for democracies that value the rule of law. This trust, in turn, is regarded as essential in fostering societal cohesion. One would assume that politicians want the public to trust the judges they appoint to the highest court(s). Yet politicians are accountable to their electorate and are therefore more directly affected by policy outcomes. A survey conducted in October 2025 by the firm Leger for the Association for Canadian Studies reveals that by comparison, the Supreme Court earns greater trust from the population than do either federal and provincial governments. The survey data in the Table below point to a rise in trust of the Supreme Court amongst persons over the age of 45.

Surveys confirm that many Canadians are concerned with the increased use of the notwithstanding clause. About three-in-five (58%) say they fret over the recent popularity of the clause, which has been considered or invoked frequently after not being deployed since 2005. About one-quarter of respondents (27%) are not concerned. In Quebec, about as many say they are concerned (41%) as not concerned (40%) with the clause's return to prominence.

A January 2023 Angus Reid survey reveals that

4 https://angusreid.org/supreme-court-appointment-impartial-bilingualism

TABLE 1. WHEN IT COMES TO THE FOLLOWING DO YOU VERY MUCH TRUST, SOMEWHAT TRUST (NET TRUST)

	TOTAL	MALE	FEMALE	18–24	25–34	35–44	45–54	55–64	65+
Supreme Court	65%	66%	63%	59%	53%	58%	71%	71%	70%
Federal Government	47%	47%	47%	48%	47%	40%	47%	50%	51%
Provincial Government	45%	47%	43%	49%	49%	36%	43%	48%	45%

Sources: Leger Marketing for the Association for Canadian Studies.

sentiment on the notwithstanding clause is largely unchanged over the past three decades, with some 55% who favour abolishing it and 45% who would keep it. In Quebec, however, since 1992, the share that favour retaining the clause has risen from 53% to 63%.

CONCLUSION

A healthy democracy will possess checks and balances against abuses of power and influence that may adversely affect minorities. Often, in the Canadian context, a province's recourse to the notwithstanding clause is a tacit admission by the legislature that there is a rights violation in a proposed law.

Yet supporters of the notwithstanding clause contend that it is an indispensable tool in a free and democratic society as it curtails unchecked judicial oversight. For their part, critics of the clause insist that it undermines fundamental rights and suggest that if a government is unhappy with a court judgment it should amend legislation rather than overriding and censoring the judiciary.

As the Supreme Court of Canada marks its 150th anniversary, the federal government asking the court to look at establishing limits on the use of the notwithstanding clause risks exposing Canada's top judges to the politics of this thorny issue. As the clause is part of the Canadian Constitution itself, optimally an amendment would be required to secure the changes the federal government envisions.

Notwithstanding the factum and the pushback on the part of the provinces, there are limits on effecting meaningful changes without reopening discussions on the Constitution. Rather than placing the Supreme Court in the middle of a federal-provincial clash, the political gambit of constitutional talks – with a view to negotiating some amendment that sets clear limits on the use of the notwithstanding clause – may be worth considering.

REFERENCES

Angus Reid Institute, "SCOC: Most say Canada's top court is impartial, but one-third say politics play into judicial appointments, Nov. 14, 2024". https://angusreid.org/supreme-court-appointment-impartial-bilingualism

Angus Reid Institute, "Saskatchewan: Majority support government's gender & pronoun policy but half also say exceptions needed," Dec. 6, 2023. angusreid.org/wp-content/uploads/2023/12/2023.12.04_Sask_gender.pdf

Angus Reid Institute, "Notwithstanding Clause: Majority see increased use problematic, would pursue abolition" January 26, 2023. https://angusreid.org/canada-constitution-notwithstanding-clause-bill-96-bill-28

Brian Bird, "The notwithstanding clause needs more nuanced debate," Nov. 5, 2025. https://policyoptions.irpp.org/2025/11/notwithstanding-clause-debate

Bryce Hoye, "Manitoba NDP says bill will prevent use of notwithstanding clause to 'trample' rights of vulnerable groups" *CBC News*, Oct. 16, 2025. www.cbc.ca/news/canada/manitoba/ndp-notwithstanding-clause-legislation-9.6941041

Department of Justice Canada, "Statement from Minister Fraser on Canada's Intervention before the Supreme Court of Canada," Ottawa, Ont., Sept. 18, 2025. www.canada.ca/en/department-justice/news/2025/09/statement-from-minister-fraser-on-canadas-intervention-before-the-supreme-court-of-canada.html

Geoffrey Sigalet and Dave Snow, "Notwithstanding Centralism: The Resurgence of the Notwithstanding Clause and the Conservative Provincial Rights Movement" *Canadian Journal of Political Science*, (2025), 516–537

Jim Bronskill, "5 premiers urge Carney to withdraw court submission on notwithstanding clause," *Canadian Press*, October 7, 2025. www.cbc.ca/news/politics/premiers-carney-withdraw-court-submission-notwithstanding-1.7653648

Joel-Denis Bellevance, "*Trudeau envisage de se tourner vers la Cour suprême*". www.lapresse.ca/actualites/politique/2023-01-21/disposition-de-derogation/trudeau-envisage-de-se-tourner-vers-la-cour-supreme.php

Leger for the Association for Canadian Studies, October 24–26, 2025.