The Pre-emptive Use of Section 33 of the *Charter of Rights and Freedoms* (Notwithstanding Clause)

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Alberta Civil Liberties Research Centre

2025

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By the

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Acknowledgments

Dedication

This project is dedicated to the memory of Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director (1992-2024), whose vision, dedication, and contributions were integral to this report.

The Alberta Law Foundation

The Alberta Civil Liberties Research Centre is supported by a grant from the Alberta Law Foundation.

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I. INTRODUCTION

(A) Parliamentary Supremacy

Parliamentary supremacy in Canada dates to the late 17th century and means that all governmental power derives from Parliament.[1] This doctrine is derived from a long established British constitutional principle that curtails the executive's encroachment on or displacement of the legislative power of parliament.[2] Consequently, Parliamentary supremacy is not absolute. It is limited by the Constitution which creates a system of limited government by restricting the jurisdiction of both federal and provincial bodies and dividing power between them.[3]

Within this framework, Parliament and the provincial legislatures may act freely within their constitutional boundaries, without interfering with judicial power or the functions of the other branches of government.[4] Parliamentary supremacy also outlines the relationship between the legislature and the judiciary, with the legislature's power to make laws and the executive's duty to implement them.[5]

(B) Constitutionalism and the Rule of Law

Constitutionalism and the rule of law apply in Canada. The former mandates that all government actions comply with the rule of law, while the latter requires compliance with all of Canada's legal principles, including the Constitution.[6] The predominant view in Canada holds that government actions must comply with both the written and unwritten elements of the constitution.[7]

The Supreme Court of Canada (SCC) tested the scope of constitutional supremacy in 1979 in *Att. Gen of Quebec v Blaikie et al.,*[8] a challenge to Quebec's French-only commercial signage provisions. Three Quebec lawyers filed an action against the provincial government seeking a

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[1] Craig Forcese & Aron Freeman, "The Laws of Government: The Legal Foundations of Canadian Democracy" (Toronto: 2nd ed: Irwin Law, 2010); Craig Forcese, "The Executive, The Royal Prerogative, and the Constitution" in Peter Oliver, Patrick Mackelm and Nathalie Des Rosiers, The Oxford Handbook of the Canadian Constitution (New York: Oxford University Press, 2017) at 152 [Forcese].
[2] Stanley M. Corbett, *Canadian Human Rights Law and Commentary* 2nd ed. (Lexis Nexis: Markham, 2012) at 75 [Corbett].
[3] Forcese at 152.
[4] *Babcock v Canada*, 2002 SCC 57; Forcese at 152.
[5] Forcese at 152.
[6] Ryan Alford "An Oak Whose Leaf Fadeth: The Barreness of Constitutionalism Without Constitutional History" in One Maxime St-Hilare et al., *Unwritten Constitutionalism* (Toronto: LexisNexis, 2023) at 3 [Alford].
[7] *Schachter v Canada,* 1992 CanLII 74 (SCC), [1992] 2 SCR 679.
[8] *Att. Gen of Quebec* v. *Blaikie et al*. [1979] 2 SCR at 1017 [*Quebec v Blaikie et al.*].

declaration that sections 7-13 of the *Language of the Legislature and the Courts* (*Charter of the French Language)*, which prohibited public signage and advertising in any other language than French, were *ultra vires* of the *British North America Act*, 1867[9] ("BNA *Act*").

Section 133 of the *BNA Act* read:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature in Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages**.**

The Superior Court of Quebec held in favour of the plaintiffs on the grounds that sections 7 - 13 of the *Charter of the French Language* contravened section133 of the *BNA Act.* The Quebec legislature had no jurisdiction to modify the *BNA Act* with respect to the *Charter of the French Language*.[10] The Government of Quebec appealed to the SCC after unsuccessfully appealing to the Quebec Court of Appeal.[11] The SCC dismissed Quebec's appeal and confirmed that the challenged provisions of the *Charter of the French Language* were unconstitutional.

(C) Liberal Democracy and Judicial Authority

The historical classification of Canada as a liberal-democratic society is marked by the entry to a constitutional democracy, thereby granting the courts, not parliament, the final word on the newly introduced constitutional rights. [13] Sections 52 of the *Constitution Act*, 1982, and 32 of the *Charter of Rights and Freedoms* (*Charter*) empower Canadian courts to sever, read in, or strike down legislation entirely.[14]

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[9] *The British North America Act*, 1867.
[10] *Quebec v Blaikie et al*.
[11] *Quebec v Blaikie et al*.
[13] Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Threats Outweigh Individual Rights" Revue générale de droit (2017) 47 R.G.D. 343-431 [Rousseau & Côté].
[14] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act*]; Alford at 3-4.

II. INTERNATIONAL LAW'S INFLUENCE ON CANADIAN LAW

(A) International Human Rights Obligations and Their Impact on Canadian Law

United Nations research shows that most domestic human rights documents worldwide, including Canadian human rights law, were influenced by the *United Nations Charter* ("*UN Charter*").[15] Canada, a member of the UN, is obliged to comply with the *UN Charter*. The *UN Charter* imposes an obligation on member states to respect, observe, and enforce human rights and fundamental freedoms without discrimination on the basis of sex, religion, language, or other factors. [16]

In addition, the l l Declaration of Human Rights[17] and the International Covenant on Civil and Political Rights (ICCPR)[18] largely influenced the Canadian *Charter*. It is arguable that overriding the *Charter* to protect federal or provincial laws that are contrary to the letter and spirit of international instruments could raise questions about a disregard for foundational principles morality.[19]

(B) Judicial Interpretation: International Human Rights and Canadian Human Rights Law

The importance of international law in interpreting human rights has been recognized by the Canadian courts. In *Slaight Communications*, the SCC referenced Canada's international treaty obligations to protect labour rights.[20] Dickson C.J., writing for the Court stated:

> The content of Canada's international human rights obligations is, in my view, an important indicium of the meaning of the "full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[21]

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[15] The United Nations "Member States" online: UN < https://www.un.org/en/about-us/member-states>; United Nations Charter, 25 April 1945, 104 Stat. 3725, art. 2 *[UN Charter*].
[16] Errol P Mendes, "Interpreting the Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20:3 Alta L Rev 383 at 385 [Mendes].
[17] Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
[18] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].
[19] Rousseau & Côté at 355-356.
[20] *Slaight Communications Inc. V Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 *[Slaight Communications*].
[21] *Slaight Communications*.

Similarly, in *Suresh v Canada (Minister of Citizenship and Immigration)*,[22] the SCC examined the right to freedom from inhumane treatment or torture through both domestic and international human rights principles, noting that Canada has a duty to prevent such treatment under section 12 of the *Charter.* The SCC also referenced Canada's obligations under international law.

(C) Strict Application of *Charter* Exceptions

Although international human rights law plays only a limited role in interpreting the *Charter* and human rights, it supports the view that exceptions to the *Charter* and human rights must be applied rarely and strictly.[23] Provisions such as the NWC, discussed fully below, should not be used to circumvent international human rights standards, as international organizations condemn such practices.[24]

III. THE HISTORY AND PURPOSE OF THE NWC

(A) Constitutional Patriation

Constitutional patriation arose from the fusion of constitutional discussions and debates spanning two decades on topics such as the review of constitutional rights, the judicial power to strike down parliamentary and executive action, and the foreseeable effects on constitutional rights, culminating in the inclusion of the *Charter*.[25]

The constitutional patriation process in Canada spanned from 1980 to 1982.[26] Participants in these discussions were divided into two groups.One group supported judicial review as a means to prevent the majority from infringing fundamental human rights.[27] The second group favoured

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[22] *Suresh v Canada* (*Minister of Citizenship and Immigration*), 2002 SCC 1 (CanLII), [2002] 1 SCR 3.
[23] Stéphane Beaulac, "International Law and the Notwithstanding Clause: Resorting to the Forest, not the Trees, to Help Interpret Section 33 of the *Charter*" (2025) 29:1 Review of Constitutional Studies/Revue d'études constitutionnelles 40 at 76.
[24] Rousseau & Côté at 356.
[25] Charles Maxime-Panaccio, *The Justifications of Rights Violations* in Peter Oliver, Patrick Mackelm and Nathalie Des Rosiers, The Oxford Handbook of the Canadian Constitution (New York: Oxford University Press, 2017) [Panaccio].
[26] David Johansen et. al., "The Notwithstanding Clause of the Charter", (February 1989, Rvs September 1997) online: Government of Canada <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp194-e.htm#(8)end> [Johansen, The Notwithstanding Clause].
[27] Panaccio at 658.

parliamentary democracy and urged limiting judicial power.[28] Arguments from both groups flowed into several mechanisms that could help preserve parliamentary supremacy.

One such mechanism was the limitations clause (later framed as section 1 of the *Charter*). One group favoured no limitations clause or, at most, a very restrictive one, while the other favoured a broad limitations clause.[29] Another focal point was the notwithstanding clause ("NWC") now section 33 of the *Charter.*[30]

(B) Legislative Implication

Also known as the non obstante clause, the NWC operates as an exception to the rule that the judiciary can strike down legislative action that contravenes the *Charter*, because it allows parliament to circumvent *Charter* limitations.[31]

The NWC was designed to empower parliament or provincial legislatures to declare an entire piece of legislation, or any part of it, fully operational for a renewable five-year period, regardless of sections 2 and 7 to 15 of the *Charter*.[32] Before the inclusion of the NWC in the *Charter*, several legislative instruments in Canada already contained override provisions[33],

including the *Canadian Bill of Rights,*[34] the *Quebec Charter of Human Rights and Freedoms,*[35] the *Saskatchewan Human Rights Code,*[36] *and* the *Alberta Bill of Rights.*[37] Former Alberta Premier, Peter Lougheed, recalled proposing the NWC for inclusion in the *Charter* in September 1980 at the Federal-Provincial Continuing Committee of Ministers in Ottawa Conference, following a side discussion with Alberta Attorney General Mervin Leitch, , with

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[28] Panaccio at 658.
[29] Panaccio at 659.
[30] Janet L. Heibert, *The Notwithstanding Clause* in Peter Oliver, Patrick Mackelm and Nathalie Des Rosiers, The Oxford Handbook of the Canadian Constitution (New York: Oxford University Press, 2017) at 695 [Heibert, The Notwithstanding Clause].
[31] Mary Eberts, "Notwithstanding v. Notwithstanding: Sections 28 and 33 of the *Charter* of Rights and Freedoms" in Peter L. Biro, *The Notwithstanding Clause and the Charter* [Montreal & Kingston: McGill University Press, 2009] at 339 [Eberts].
[32] Eberts at 339.
[33] Johansen, The Notwithstanding Clause.
[34] *Canadian Bill of Rights* SC, 1960, c.44.
[35] *Quebec Charter of Human Rights and Freedoms, 1975, c.6.*
[36] *Saskatchewan Human Rights Code*, SS 1979, c. S-24.1, s.44.
[37] The *Alberta Bill of Rights* RSA 1980, c. A-14.

whom he had drafted the NWC for the Alberta Bill of Rights nine years earlier.[38] Saskatchewan also proposed including the NWC, but differences in perspective among participants made a compromise impossible.[39]

(C) The NWC: Final Negotiations

The NWC again came up for discussion when Canada's former prime minister, Pierre Elliot Trudeau, met with ten premiers in November 1981 to negotiate three milestones that had been looming large since 1927:[40]formalizing Canada's constitutional independence from Britain, creating mechanisms for constitutional reform, and addressing the needs and aspirations of Canadians.[41] An important question that arose was the implication of including a bill of rights to be interpreted and applied by judges who were not accountable to democratically elected governments on parliamentary sovereignty.[42] This significant shift of power from legislatures to the courts raised concerns about judges ruling on matters of public policy and morality.[43]

The SCC had earlier concluded that Canada lacked the legal power to seek a constitutional repatriation without the agreement of all provinces, as required by constitutional conventions.[44] In response, Allan Blakney and Peter Lougheed proposed the inclusion of section 33 in the *Charter*.[45]

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[38] The Honourable Peter Lougheed, "Why A Notwithstanding Clause*?"* (1998) 6 Points of View (Emonton: Centre for Constitutional Studies Occasional Paper, University of Alberta) No. 6 at 2-3 [Lougheed].
[39] Johansen, The Notwithstanding Clause.
[40] Thomas S. Axworthy, "An Historic Canadian Compromise: Forty Years after the Patriation of the Constitution, Should We Cheer a Little?" in Peter L. Biro, "The Notwithstanding Clause and the *Charter* (Montreal: McGill-Queen's University Press, 2021) [Axworthy, Canadian Compromise]. Pierre Trudeau and the ten premiers present at the meeting were: Bill Davis (Ontario), Richard Hatfield (New Brunswick), Peter Lougheed (Alberta), Allan Blakeney (Saskatchewan); Sterling Lyon (Manitoba), Rene Levesque (Quebec), Angus MacLean (Prince Edward Island), Bill Bennett (British Columbia), John Buchanan (Nova Scotia) and Brian Peckford (Newfoundland) See: Brigid Phillips "The 10 premiers emerged from a daylong meeting deeply…" <https://www.upi.com/ajudiciary's authority to review and invalidate legislative action. This authority was strengthened by the enactment of the *Charter of Rights and Freedoms* (*Charter*) in 1982 which became part of the Constitution.[40] The *Charter* was transforming Canada from a parliamrchives/1980/10/14/The-10-premeiers-emerged-from-adaylong-meeting-deeply/3086340344000>;Henry Giniger, "Canadian Premiers Gather for Parley" (November 2, 1981), online: The New York Times <https://www.nytimes.com/1981/11/02/world/canadian-premiers-gather-for-parley.html#:~:text=Canadas%2010%20provincial%20premiers%20gathered%20here%20today,Trudeau%2C%20who%20has%20warned%20them%20that%20this>.
[41] Axworthy, Canadian Compromise at I.
[42] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis, 2017) at 603 [Régimbald & Newman].
[43] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. Legal Studies 17; Régimbald & Newman at 603.
[44] *Re: Resolution to amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 SCR 753.
[45] Régimbald & Newman at 604.

After a four-day debate on November 5, 1981, all the premiers, except Quebec, reached a working compromise.[46] Participants in the federal and provincial negotiations eventually agreed to the NWC as a tool to implement a broader set of constitutional reforms, including patriation of the Canadian Constitution, the establishment of a bill of rights, and the creation of a formula for constitutional amendments.[47] Subsequently, the *Constitution Act*, 1982 was passed by the British Parliament, as requested by the Government of Canada following a joint address by the Senate and the House of Commons.[48]

Although the text of section 33 (also known as the "Notwithstanding Clause" or "NWC") refers specifically to federal and provincial legislatures, its use is not beyond the reach of Canada's territories.[49] The section, which flows from the *Charter*'s applicability to parliament and provincial legislatures, states:

> 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.
>
> Operation of exception
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> Five-year limitation
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.[50]

Sections 2 and 7-15 of the *Charter* to which the NWC applies state:

2. Everyone has the following fundamental freedoms

> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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[46] Lougheed at 2.
[47] Heibert, The Notwithstanding Clause at 695.
[48] Louis Massicotte, "Québec and the 1982 Constitution Act" Zeitschrift für Kanada-Studien 28,1 (2008) 32-45.
[49] Caitlin Salvino, *The Notwithstanding Clause in the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2025)
[50] *Constitution Act,* s. 33.

(c) freedom of peaceful assembly; and

(d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

15 . (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. SCHOLARLY INTERPRETATIONS

(A) Prioritization of Provincial Interests

Section 33 remains the most controversial provision of the *Charter*, despite its important role in laying the groundwork for its coming into force.[51] Several legal scholars have attempted to clarify the purpose and scope of this section. Janet Heibert, a Professor of Political Studies at Queensland University, argues that the NWC explicitly recognizes federalism, a cornerstone of the Canadian Constitution, and grants provincial legislatures temporary authority to prioritize provincial interests when thesei conflict with judicial interpretation of the *Charter*.[52]

(B) Theoretical Foundation and Deliberative Disagreement

Three Canadian authors - Lorraine Weinrib, Paul Weiler, and Brian Slattery - approach interpretation through a theoretical foundation.[53] Weinrib argues that the NWC enables the

[51] Heibert, The Notwithstanding Clause at 695.
[52] Heibert, The Notwithstanding Clause at 695.
[53] Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 U Toronto LJ 221 at 224 [Kahana, The Notwithstanding Mechanism].

invoking government to create an exception to *Charter* rights. Weiler contends that when a court strikes down a law the legislature erroneously interpreted, the NWC affords the legislature an opportunity to redress its error.[54] Slattery, by contrast, views the NWC as the opposite of Weiler's interpretation; it helps the legislature to avoid enacting a law that the judiciary would otherwise declare unconstitutional.[55] Slattery further believed that section 1 of the *Charter* does not apply to any enactment that invokes the override clause, thereby removing it from the ambit of judicial review.[56]

Kahana disagrees with Slattery and Weiler completely in his deliberative disagreement approach, which somewhat aligns with Weinrib's view. He argues that the *Constitution Act, 1867* was never intended to grant courts supervisory oversight of legislatures through judicial review. Courts are meant to interpret laws independently; legislatures, for their part are expected to deliberate extensively before enacting legislation. f a law is later brought before the courts and deemed unconstitutional, the legislature must then decide whether to accept the ruling or invoke the NWC to maintain the law. [57]

Generally, critics view the NWC as a safety valve for governments in Canada with the inherent ability to self-destruct.[58] However, Professor of Law at the University of British Columbia, Geoffrey T. Sigalet, thinks otherwise. He opines that the inception of the NWC already solidified what was already enshrined in Canada's unwritten constitution - from the country's revolutionary origins to the enactment of the Bill of Rights, which made statutory provisions paramount over conflicting laws. The inclusion of the NWC in the *Charter* simply solidified parliamentary sovereignty, and there is no reason to consider its use abnormal, exceptional, or routine. [59]

The constructive approach to interpreting the NWC's meaning and intent indicates that invoking the clause does not suspend *Charter* rights themselves, but rather the judicial interpretation of those rights as they applyto the legislation in question.[60] Sigalet further argues

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[54] Kahana, The Notwithstanding Mechanism at 224.
[55] Kahana, The Notwithstanding Mechanism at 224.
[56] Brian Slattery, "Canadian Charter of Rights and Freedoms - Override Clauses Under Section 33---Whether Subject to Judicial Review Under Section 1" (1983) 61.1 Can. Bar Rev. 391.
[57] Kahana, The Notwithstanding Mechanism at 225.
[58] Geofrey T. Sigalet, "The Truck and the Brakes: Understanding the *Charter*'s Limitations and Notwithstanding Clauses Symmetrically" (2022) 105 S.C.L.R. [Sigalet].
[59] Sigalet at 207.
[60] Sigalet at 213.

thatthat the belief that the framers intended the NWC to be used only as a measure of last resort is a significant misconstruction. Instead the NWC was initially intended as a safeguard to prevent the judiciary from undermining parliamentary supremacy.[61]

The Director of the Centre for Constitutional Studies, Richard Mailey, notes that two popular justifications of the NWC exist. The first is that it facilitates dialogue between the legislature and the judiciary, helping to smooth tensions over supremacy. The second is that it serves as a mechanism to protect parliamentary supremacy.[62]

Constitutional law author Monahan argues that the NWC does not destroy freedom but creates it.[63] Section 33 does not create an opposition between the state and freedom.[64] If the NWC can be used to protect freedoms guaranteed by efficient governance—for example, by providing crucial public services during labour protests or by enacting criminal laws to protect the public through general deterrence, section 33 could arguably enlarge rights in Canada rather than limit them.[65]

The perspective of Queen's Land University Law Professor John Donaldson Whyte is in stark contrast to that of Monahan and Sigalet. For Whyte, section 33 is not a tool for thoughtful deliberation or ideological balance. Instead, it generates concern that the political will expressed through its use may become oppressive, imposing disproportionate burdens on minority groups without rational justification. [66]

(C) Implication of the Sunset Clause

Constitutional law authors Régimbald & Newman argue that Section 33(3) ("sunset clause") permits legislators who disagree with the judicial interpretations of certain rights to prioritize the parliamentary view of those rights, a purpose for which the clause was not originally intended. The original intent of the clause was to allow parliament to debate issues involving constitutional rights within the legislative chambers and, where necessary, substitute the judiciary's interpretation of those contested rights with that of the legislators.[67]

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[61] Sigalet at 208.
[62] Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Const F 9 at 10 & 13.
[63] Patrick J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21: 1 UBC Law Review 87 at 157 [Monahan].
[64] Monahan at 155.
[65] Lougheed at 12-13.
[66] John D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta L Rev 347 [Whyte].
[67] Régimbald & Newman at 604.

V. ARGUMENTS FOR AND AGAINST THE NWC

(A) Pre-inclusion Arguments

Political scientist Peter H. Russell described the rationale for the NWC as "the substance of decision making," emphasizing its role in preventing questionable decisions that might limit rights and freedoms based on the assumption of judicial infallibility.[68] Proponents argued that a more accessible mechanism than leaving interpretation solely to judges - or requiring constitutional amendments - was necessary, and the NWC offered precisely such a process.[69] Similarly, Paul C. Weiler, former Professor of Law at Harvard Law School, argued that the NWC Clause frequently served as a check on parliamentary and legislative abuse of *Charter* rights.[70]

(B) Post-inclusion Arguments

In 1990, law Professor John Whyte of Queen's University, weighed in on the usefulness of the NWC from the perspective of which approach could lead to a more effective governance and a fairer society, rather than demonstrating the need to repeal the legislature's override power in section 33.[71]

Whyte expressed optimism that legislatures would use the NWC only to protect laws carefully crafted to balance competing public interests.[72] He hoped that the use of the NWC would be primarily reactive - limited to circumstances where legislation had already been reviewed and struck down by the courts - thereby preserving judicial oversight over its application.[73]

Leading Canadian scholar Professor Russell, on the other hand, advocated for section 33, arguing that the *Charter* was included in the Constitution as a check and balance on the judicial interpretation of constitutional rights. He noted that, politically, the NWC provided the Trudeau-led government with a means to secure support from the nine provincial premiers to patriate the

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[68] Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293 at 295 [Russell].
[69] Russell at 295.
[70] Axworthy, Canadian Compromise at 26.
[71] Whyte at 355.
[72] Whyte at 349.
[73] Peter H. Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Supremacy" (February 2007) Policy Options at 66 (Russell, Policy Options).

Constitution from Britain. From Russell's perspective, section 33 represented an effort to balance parliamentary supremacy with judicial authority.[74]

Russell stated:

> "It was included in the Charter for a very good reason: a belief that there should be a parliamentary check on a fallible judiciary's decisions on the metes and bounds of our fundamental rights and freedoms." Russell adds that "it was indeed a 'dealmaker.' Without it, Pierre Trudeau would not have had the support of nine premiers for his patriation package, and we would not have had the Charter in 1982."[75]

Retired Supreme Court Justice, Justice McLachlin, opined that the NWC was introduced to allay fears about the new situation in which the judiciary, rather than Parliament, had the last say on constitutional rights. Parliament intended the NWC to provide a mechanism whereby it could declare that a law would remain operative notwithstanding certain *Charter* provisions.

Ten years after the *Constitution Act* came into force, Lougheed reflected on the NWC's original purpose and its application to determine its continued relevance.[76] He explained that Canada has always had a history of parliamentary supremacy and that, prior to the *Charter*, the courts interpreted and applied the law within that context.[77] The judiciary had a limited role in judicial review, confined to matters concerning the division of powers between the federal and provincial governments. The framers of section 33 were of the view that the changes introduced by the *Charter* should not effectively erode the supremacy of Canada's Parliament over an appointed judiciary.[78]

Lougheed maintained that the NWC was required to uphold parliamentary supremacy, noting that the NWC's application so far had been found unsatisfactory.Consequently, Lougheed proposed three amendments to section 33: mandating that Parliament or provincial legislatures indicate the purpose of legislation invoking the NWC; replacing the simple majority vote with a supermajority of sixty percent, given the significant power conferred by the NWC; and prohibiting governments from using the NWC to pre-empt judicial review, as such pre-emptive measures

[74] Russell, Policy Options.
[75] Russell, Policy Options.
[76] Lougheed.
[77] Lougheed at 5.
[78] Lougheed at 17.

would undermine both parliamentary supremacy and the judiciary's role in statutory interpretation.[79]

On this point, Lougheed proposed the following text:

> Parliament or the legislature of a province is prohibited from making a declaration under section 33(1) until such time that all rights of appeal are exhausted and a final determination is rendered.

Over time, there have been several debates about the constitutionality and legitimacy of the NWC. For example, in 2019, Quebec invoked the clause to protect Bill C-21 from *Charter* and fundamental freedoms infringement challenges.[80] Ontario subsequently followed suit, invoking the clause in Bill 307: *Protecting Elections and Defending Democracy Act*, 2021, to prohibit challenges to all portions of the law covered by the clause, including *Charter* rights.[81]

Authors, Bahkt and Collins, argue that the NWC is not unlimited in scope.[82] They contend that unwritten constitutional principles, particularly the principle of respect for minorities, restrict the application of section 33 and should be treated as such. Both authors add that, since the NWC is embedded within the *Charter,* its use - and the exercise of any constitutional powers - must always respect the fundamental principles that underpin Canadian society.[83]

VI. THE RELATIONSHIP BETWEEN THE NWC, THE REASONABLE LIMITS CLAUSE AND GENDER EQUALITY

(A) The Reasonable Limits Clause

Another *Charter* provision that limits constitutional rights is section 1 (known as the "reasonable limits clause") which reads:

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[79] Lougheed at 17.
[80] Alford at 22.
[81] Bill 307, *Protecting Elections and Defending Democracy Ac*t, 2021, 1 S.O. 2021, C.31; Alford at 23.
[82] Natasha Bakht & Lynda Collins, "Notwithstanding the Notwithstanding Clause: A Case for Constitutional Guardrails on Section 33 of the Charter of Rights and Freedoms"(2024) 33:2 Const F 1 at 15 [Bakht & Collins].
[83] Bakht & Collins at 15.

> "The Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 1 is arguably the most consequential part of the *Charter*, the essential provision that tells us what rights can be limited by government interests. It also activates *Charter* rights and can be described as a "constitutional light switch."[84] The key distinction between the NWC (section 33) and the limitations clause (section 1) is that section 1 upholds government infringement of the *Charter* so long as the said infringement is demonstrably justifiable.[85] In this way, section 1 serves a dual function, it both guarantees rights and establishes the conditions under which they may be limited.[86]

Analyzing a limit under Section 1 involves two steps:[87] assessing whether the limit is prescribed by law and evaluating the reasonableness of the limit.[88] Courts determine what constitutes justiciable infringement with regard to the importance of the objective and the proportionality of the measures taken.

In *R v Oakes*, the constitutional question before the SCC was whether section 8 of the now-repealed *Narcotics Act*, which reversed the presumption of innocence enshrined in section 11(d) of the *Charter*, was reasonable and justiciable in a free democratic society, or whether it was void.[89] The Court applied two-step tests. First, it considered whether the need for which the government sought to override the right was vital and significant.[90] Second, it assessedwhether the method chosen to achieve that objective were proportional.[91] The Court held that the *Narcotics Act*, which required an accusedin possession of narcotics to prove that the substance was not intended for trafficking, violated section 11(d) and failed the proportionality test, rendering the provision null and void.[92]

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[84] Brian Bird & Derek Ross, eds. "Rights Freedoms and their Limits: Reimagining Section 1 of the Charter" (Lexis Nexis Canada: Toronto, 2023) at 1 [Brian & Bird].
[85] Brian & Bird at 3.
[86] Régimbald & Newman at 586
[87] Régimbald & Newman at 585.
[88] Régimbald & Newman 585.
[89] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103; paras 68-71[*Oakes*].
[90] *Oakes* at para.73.
[91] *Oakes* at para 73.
[92] *Oake*s at paras 80-81.

Similarly, in *Toronto (City) v Ontario (Attorney General),* the issue was the constitutionality of the *Better Local Government Act*, 2018,[93] which reduced Toronto's municipal wards from 47 to 25.[94] Two groups of private individuals and the city of Toronto challenged the law. The Ontario Supreme Court held that the law infringed both the freedom of expression of municipal candidates and the right of municipal voters to effective representation guaranteed by section 2(b) of the *Charter,* and these infringements could not be justified under the justiciable limitations clause (section 1).[95]

This case raised two questions regarding the connection between sections 1 and 33 of the *Charter*: whether the NWC exempts a law from the application of section 1, and whether it also legalizes a law that would otherwise be deemed unconstitutional under section 1.[96]

(B) Equality Rights

An argument regarding the relationship between sections 33 and 28 of the *Charter* addresses whether section 28 takes priority over section 33 to the extent of imposing limits on its use. Professor, Keeri Froc, argued that section 28, which states that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons," requires interpretation through gender equality.[97] Section 28 is akin to section 15 in that both address equality, but they operate differently.[98] Governments can override section 15 using the NWC, and may justify infringements under section 1. Section 28 cannot be affected by either section 33 or section 1. Its inherent NWC, places it in a special category, giving it supremacy over section 33.[99]

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[93] Bill 5, *Better Local Government Act*, 2018, S.O. 2018, c. 11.
[94] *Toronto (City) v Ontario* (Attorney General), [2018] O.J. No. 4596, 142 O.R (3d) 336, 2018 ONSC 5151 (Ont. S.C.J.) [*Toronto City].*
[95] *Toronto City*.
[96] David Jo, "The Structure of Invalid but Operative Legislation: Why the Notwithstanding Clause Does Not Preclude Judicial Review" (MA Thesis, McGill University, Department of Political Science, 2023) [Unpublished] at 8.
[97] Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018) 38(1) NJCL. 35 at 84 [Froc, a prayer].
[98] Froc, A Prayer at 84.
[99] Kerri Froc, The Untapped Power of Section 28 of the Charter of Rights and Freedoms (PhD Thesis, Faculty of Law, Queen's University, 2015) [unpublished] at 34–59 [Froc, Untapped Power].

Dwight Newman, KC, disagrees with Froc's analysis on the grounds that section 28 does not overpower the NWC.[100] Section 28 safeguards equality rights only for male and female persons, and the invocation of the NWC can affect how section 28 of the *Charter* applies.

VII. THE INFLUENCE OF THE NWC IN OTHER JURISDICTIONS

Canada is the only constitutional democracy in the world with the NWC, and its influence has spread to other countries, including Israel. In 2014, a member of the Jewish Home Party in Israel proposed a bill to include an override provision in the Basic Law: Human Dignity and Liberty. This provision would have allowed the legislature to override any Supreme Court decision striking down a law for violating basic human rights.[101] The sponsoring Minister, MK Shaked, alluded to Canada's NWC as a template for the proposed override mechanism.[102] The override provision in the bill replicates Canada's NWC, specifically in its reactive use. Under the proposal, the legislature would first enact a law; if the Supreme Court struck it down under a constitutional challenge, the legislature could then reenact it with an override clause. Critics, however, cautioned that relying on Canada's experience was problematic: Canada's intended reactive use of the clause has been largely ineffective, raising concerns that Israel's version could also shift toward pre-emptive use and undermine the purpose of the override mechanism.[103]

Ultimately, the Bill never became law.

In 2023, Justice Minister Yariv Levin advanced a bill that sought to abolish the Supreme Court's power to review and overturn government decisions.[104] The Bill was later struck following a challenge in the *Israel v Knesset* case.[105]

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[100] Dwight Newman, KC, "The Interaction Between the Section 33 Notwithstanding Clause and the Section 28 Sex Equality Clause" (27 May 2025) SSRN: < http://dx.doi.org/10.2139/ssrn.5397992 > at 8.
[101] Adam M. Dodek, "The Canadian Override: Constitutional Model or Bête More of Constitutional Politics?" (2016) 49 Israel Law Review 45. [Dodek].
[102] Dodek at 47.
[103] Dodek at 55 & 64.
[104] Bethan McKernan, "Israeli parliament votes in Netanyahu's controversial Supreme Court changes" (24 July 2023) online: *The Guardian* <https://www.theguardian.com/world/2023/jul/24/israeli-parliament-votes-in-netanyahu-controversial-supreme-court-changes>.
[105] HCJ 5658/23 *Movement for Quality Government in Israel v Knesset* (2024).

VIII. INVOKING THE NOTWITHSTANDING CLAUSE: OPERATIONAL STRATEGIES

(A) Statutory Invocation

Section 33 preserves the role of legislators in the constitutional interpretation process and the power to override judicial interpretation if required, thus leaving no room for extensive judicial review. *Ford v Quebec*,[106] discussed in more detail in this work, shows that the constitutional requirements for invoking the section are primarily formal. Legislators are not required to meet any public disclosure requirements on the purpose or reason for invoking the clause; they need only include a statement invoking it within the legislation itself. This lack of public disclosure requirements enables legislatures to enact amendments affecting multiple laws without retroactive implications, as was the case in *Ford v Quebec*.[107] Consequently, the clause can be invoked through normal statutory means without special requirements.

From 1982 to 2017, the NWC was invoked 16 times in an omnibus and retroactive ways, falling into four categories:[108]

(a) prevention of political protests
(b) risk prevention in the likelihood of constitutional ambiguity in the interpretation of the *Charter* rights.
(c) risk prevention from the interpretation of section 1 of the *Charter*.
(d) political opposition to Supreme Court precedents.

These four categories can be broadly grouped into pre-emptive and reactive uses.

(B) Preliminary Uses of the NWC

(a) An Act respecting the Constitution Act, 1982 ("Omnibus Override Act")

Following the passage of the *Constitution Act*, 1982, significant dissatisfaction arose in Quebec regarding the *Charter's* perceived inadequacy in protecting minority rights; language rights appeared to be the only provision addressing such concerns.. As a means of protest against the *Constitution Act*, Quebec's immediately rejected the applicability of the *Charter* within the

[106] *Ford v Quebec (Attorney General),* 1988 CanLII 19 (SCC), [1988] 2 SCR 712
[107] Régimbald & Newman at 605
[108] Kahana, The Notwithstanding Mechanism.

province by including the NWC as an "*omnibus clause*" in all provincial statutes through *An Act Respecting the Constitution Act*, 1982. This pre-emptive and retroactive invocation served as a political statement against the new constitutional framework.

This *Act Respecting the Constitution Act* provided:

> 1. Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:
>
> "*This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom*)."[109]

(b) The Aftermath of the Omnibus Override Act

The practice of inserting the omnibus clause continued until December 2, 1985, when a newly elected government halted it. Since then both the Liberal and Parti Québécois governments have used the NWC in several other legislation.[110] Between 1982 and 1985, the Quebec government continued to insert the NWC into all legislation. In 1986, Quebec used the NWC in five pension laws that, on their face , appeared to favour Catholic teachers over others. The first was *An Act Respecting the Teachers' Pension Plan ("The Teachers' Pension Plan")*[111] which stated:

> The provisions of this Act apply notwithstanding the provisions of section 10 of the Charter of Human Rights and Freedoms (chapter C-12).
>
> The provisions of this Act have effect despite section 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom**).**[112]

The other Acts involved were : *An Act Respecting the Civil Service Superannuation Plan* ("*CSSP*") and *An Act Respecting the Pension Plan of Management Personnel* ("PPMP").[113]

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[109] *An Act respecting the Constitution Act*, 1982, SQ 1982, c. 21 [Omnibus Override Act].
[110] Laurence Brosseau & Marc-Andre Roy, "The Notwithstanding Clause of the Charter" (May 7, 2018) Publication No. 2018-17-E, Legal and Social Affairs Division, Background Paper.
[111] *An Act Respecting the Teachers' Pension Plan*, 1983 c. 24, s. 2 [*An Act Respecting the Teachers' Pension Plan*].
[112] *An Act Respecting the Teachers Pension Plan*, s.33.
[113] *An Act Respecting the Civil Service Superannuation Plan*, 1986, RSQ., chapter R-12; An *Act Respecting the Pension Plan of Management Personnel,* 2001, c.31, s.1.

(c) An Act to Amend the Charter of the French Language ("AACFL")

Bill 178, *An Act to Amend the Charter of the French Language* ("*AACFL*")[114], introduced by Guy Rivard, Minister of Cultural Affairs and assented to on December 22, 1988, replaced certain sections, including section 58 of *the Charter of the French Language*. The *AACFL* required that outside public signs and posters for commercial advertising to be in French.[115] It also provided, amongst others, that public signs, posters and commercial advertising may be in French and another language or solely in another language, in circumstances prescribed by regulation.[116] The *AACFL* invoked the NWC.[117]

The amendment was challenged under the *Charter* in *Ford v Quebec*. The questions before the SCC were whether Quebec's French-language policy infringed section 2(b) of the *Charter*, which protects freedom of expression, and if so, whether the law could be saved under section 33.[118] The SCC struck down the law requiring French-only on outdoor commercial signs as not justifiable in a free and democratic society. However, the SCC upheld the constitutionality of the NWC, noting that its requirements were satisfied as long as the invoking authority declared the provision expressly.[119] Section 33, however, cannot be invoked retroactively.

(d) The Yukon Land Planning and Development Act

The NWC was also used in Yukon in connection with land planning legislation, specifically, the Yukon *Land Planning and Development Act*[120] ("Yukon *Land Planning and Development Act*'') where section 39 provided:

> The provisions of this Act relating to the nomination of persons to be members of the Board or Committees by the Council for Yukon Indians operate notwithstanding the Canadian Bill of Rights and section 15 of the *Charter* of Rights and Freedoms**.**

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[114] *An Act to Amend the Charter of the French Language*, RSQ 1988, c.54 [*AACFL*].
[115] *AACFL*, s. 58.
[116] *AACFL*, s. 58.2.
[117] *AACFL,* s.10.
[118] *Ford v Quebec*.
[119] *Ford v Quebec*.
[120] *Land Planning and Development Act,* Statutes of the Yukon 1982, c.22.

Although assented to in 1982, the *Yukon Land Planning and Development Act* was never proclaimed; thus, there was no opportunity to monitor its rationale or implementation in practice.

(e) The Public Service Essential Services Act

In 2008, Premier Brad Wall's government in Saskatchewan enacted the *Public Essential Services Act* ("*PSESA*").[121] *PSESA* applied to employees of public employers represented by trade unions and to employees of the Government of Saskatchewan who provided essential services, such as critical care.[122] *PSESA* stripped essential employees of the right to strike and mandated that public service providers without an essential services agreement enter one within specified timelines.[123] In the event of any dispute or conflict with other legislation, *PSESA* would prevail.[124]

PSESA faced a *Charter* challenge in *Saskatchewan Federation of Labour v. Saskatchewan*.[125] The question before the trial court was whether *PSESA* infringed section 2(d) of the *Charter*, and, if so, whether the infringement was justifiable pursuant to section 1.[126] The court held that the *PSESA* was unconstitutional for infringing on the right to freedom of association and could not be justified under section 1. Saskatchewan's appeal was allowed at the Court of Appeal.

On further appeal to the SCC, the Court applied the legislative interference test to determine whether the *PSESA*'s interference with the right to strike was a substantial interference with collective bargaining.[127] The SCC held that *PSESA* prohibited designated employees from striking tonegotiate employment terms and conditions, and thus violating section 2(d) of the *Charter*. On whether the violation was justified under section 1, the Court noted that the means of infringement were not minimal:*PSESA* provided only a unilateral way for employers to determine the maintenance of essential services and went above and beyond to remove any alternative mechanism for redress.

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[121] The *Public Services Essential Services Act*, SS 2008, c. P-42.2 [*PSESA*].
[122] *PSESA*, s.2 & s.7(1).
[123] *PSESA*, s.6(1) & 14.
[124] *PSESA*, s.4(1).
[125] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 [*SFL v Saskatchewan*].
[126] *SFL v Saskatchewan*.
[127] *SFL v Saskatchewan*.

(f) Bill 26, The Institutional Confinement and Sexual Sterilization Compensation Act ("ICSCA")

In 1998, Alberta introduced Bill 26: *The Institutional Confinement and Sexual Sterilization Compensation Act* ("*ICSCA*"), to the provincial legislature. Bill 26 set out to outline compensation mechanisms to resolve present and future claims from individuals s who had been residents of medical institutions in Alberta between 1927 and 1972 and had undergone medical procedures pursuant to the *Sexual Sterilization Act*.[128]

The Bill invoked the NWC, stating:

> This Act shall operate notwithstanding sections 2 and 7 to 15 of the *Charter* of Rights and Freedoms, Part 1, Constitution Act, 1982, Schedule B to the Canada Act, 1982, (U.K.) 1982 c11, and (b) of the Alberta Bill of Rights.[129]

Bill 26 faced stiff opposition and was eventually withdrawn.[130]

(g) Marriage Amendment Act ("MAA")

In 1999, several members of the Alberta legislative Assembly, including representatives for Edmonton-Strathcona and Medicine Hat, questioned the appropriateness of Bill 202: the *Marriage Amendment Act*[131] ("*MAA*"), citing the Assembly's lack of jurisdiction to enact laws on marriage.[132] In its defence, the Alberta Conservative government through Mr. Doerksen, who drafted and introduced the Bill, relied on section 92(12) of the *Constitution Act,* 1867, which grants provinces jurisdiction over solemnization of marriage. The government maintained that Bill 202 was within provincial jurisdiction and that invoking the NWC would shield it from challenges under the *Charter*.

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[128] *The Institutional Confinement and Sexual Sterilization Compensation Act* (*ICSCA)* at preamble, ss 1-2.
[129] *ICSCA* at s. 3.
[130] Gary Dickson, "Alberta and the notwithstanding Clause" (2000) 25:1 LawNow [68].
[131] *Marriage Amendment Act*, 2000, SA 2000, c 3 (*MAA*).
[132] Alberta Legislative Assembly, "Hansard Transcripts 275" (March 7, 2000) online: Alberta Legislative Assembly <https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_24/session_4/20000307_1330_01_han.pdf >

Subsequently, the province enacted the *MAA***,** which prohibited same-sex marriages within the province,[133] and defined marriage as a marriage between a man and a woman.[134] The *MAA* introduced the NWC as a shield for constitutional challenges. [135]

In 2005, Bill C-38, the *Civil Marriage Act* ("CMA")[136], which is a landmark Canadian law, was introduced and passed the same year.[137] Bill C-38 defined marriage as "the lawful union of two persons to the exclusion of all others," thereby expanding the definition of marriage in Canada to include same-sex couples.[138]

In March 2025, the five-year sunset clause on the *MAA* expired.[139] Following the final reading of Bill C-38, Alberta Premier, Ralph Klein, sought to strategize on how to maintain the province's opposition to same-sex marriage, but noted that the NWC could not be used, as the definition of marriage falls under exclusive federal jurisdiction.[140]

Alberta ultimately amended the *MAA* in 2014, substituting the terms "husband and wife" with "spouses" and "or spouse." These amendments became law in May of that year.

(h) An Act Respecting the Laicity of the State ("Laicity Act")

The National Assembly of Quebec introduced Bill 21, *An Act Respecting the Laicity of the State,* [141] on March 28, 2019, passed it on June 29, 2019, and it became effective immediately.

The *Laicity Act* affirmed Quebec's status as a lay state and prohibited identified persons, including administrative justices of the peace, commissioners, the Minister of Justice and Attorney General, arbitrators, peace officers, public lawyers, notaries and physicians, from wearing religious symbols while performing their functions in public spaces.[142] Religious symbols include

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[133] *CBC News*, "Alberta bill would ban gay marriage" (04 December 1999), *CBC News*: <https://www.cbc.ca/news/canada/alberta-bill-would-ban-gay-marriage-1.194619> [CBC News, Alberta Bill].
[134] *MAA*, s.4.
[135] CBC News, Alberta Bill, *MAA*, s. 5.
[136] *Civil Marriage Act*, SC 2005, c 33 (*CMA*).
[137] Bill C-38, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Sess, 38th Parl, 2005 preamble, cls 1, 2 & 4(1)(c) as passed by the House of Commons 20th July 2025 [Bill C-38].
[138] *CMA*, preamble.
[139] Canadian Pride Historical Society "This Week in History: Alberta's Bill 202" online: *CPHS* <https://cphs.ca/on-this-day-in-history-albertas-bill-202/> [CPHS].

[141] *An Act respecting the Laicity of the State*, 2019, c.12, c. I. [*Laicity Act*].
[142] *Laicity Act*, preamble.

clothing, jewellery, and headwear worn in connection with a religious belief or that can reasonably be inferred as affiliated with such a belief.[143]

Regarding the use of the NWC, the *Laicity Act* states:

> This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, Chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).[144]

According to a University of Toronto study examining the impacts of the *Laicity Act* on minority groups, specifically Muslim women, the legislation contributed to workplace discrimination. Affected individulas faced difficult choices between their careers and their faith, as well as heightened levels of occupational stress, mental health degradation, and physical and verbal altercations. [145]

One day after Bill 21 became law, Ichrak Nourel Hak, the Canadian Civil Liberties Association, and the National Council of Muslims filed a *Charter* challenge at the Quebec Superior Court.[146] The applicants sought an injunction to suspend two provisions: section 8, requiring public employees to provide services with uncovered faces, and section 6, restricting government employees from wearing religious symbols. The applicants did not, at that stage, address whether the *Laicity Act* infringed the *Quebec Charter*, the *Charter* (sections 2 and 7-15), or whether the NWC justified the infringement.[147] Instead, they argued that the NWC could not shield the *Laicity Act* from constitutional principles not tied to the *Charter*.[148]

The rationale for the stay application was hinged on three propositions:

- Whether the law contravened the separation of powers between Parliament and the provincial legislatures guaranteed in *the Constitution Act, 1867*;
- The law's vagueness, contrary to the rule of law principles, and

[143] *Laicity Act*, s. 6.
[144] *Laicity Act*, s. 34.
[145] Yfile "Study examines impact of Quebec's Bill 21" (July 10, 2024) online: YorkU <https://www.yorku.ca/yfile/2024/07/10/study-examines-the-impact-of-quebecs-bill-21/>.
[146] *Ichrak Nourel Hak, et al. v Attorney General of Quebec,* 2019 QCCS 2989 (CanLII) *[Hak, et al. v Attorney General of Quebec]*.
[147] *Hak, et al. v Attorney General of Quebec* at para 47.
[148] *Hak et al. v Attorney General of Quebec* at para 48.

- Deprivation of religious minorities of the opportunity to participate in State institutions based on religious principles, thus contravening the constitutional structure.[149]

Justice Michael Yergeau, applied the three-part test formulated in Manitoba *(AG) v Metropolitan Stores Ltd*., assessing whether the claim was non-frivolous, whether irreparable harm was imminent, and whether the balance of inconvenience favoured the applicants or the broader public. [150]

The SCC further acknowledged that the *Laicity Act* violated the *Charter* but found that the province's invocation of the NWC shielded the law from attack. An analysis of the individual's interest versus the public's interest in protecting the province's secular status, culminating in the court's disposition in favour of the latter, also informed the decision. The plaintiffs appealed to the Quebec Court of Appeal. This time, the appellants argued that the law infringed section 28 of the *Charter* (equality of the sexes), a provision they claimed could not be overridden by the NWC.

The SCC granted leave for the appellants to challenge the legislation, which Quebec had renewed in 2024, pursuant to the sunset clause in January 2025.[151]

(i) Bill 94, An Act to, in particular, reinforce laicity in the education network and to amend various legislative provisions

Bill 94, *An Act to, in particular, reinforce laicity in the education network and to amend various legislative provisions*, was initially sponsored in the Quebec National Assembly by the Minister of Education, Bernard Dramille, and later re-sponsored by his successor Sonia Lebel, on October 1, 2025.[152] The Bill amends *An Act Respecting Private Education*[153] by inserting

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[149] *Hak, et al. v Attorney General of Quebec* at paras 49-53.
[150] *Hak, et al. v Attorney General of Quebec* at paras 54-57.
[151] Matthew Lapierre, "Supreme Court of Canada will hear legal challenge on Quebec secularism law" (23 January 2025) online: CBC News <https://www.cbc.ca/news/canada/montreal/supreme-court-bill-21-quebec-1.7438715 >; Canadian Civil Liberties Association, "Constitutional Challenge to Bill 21 Goes to the Supreme Court of Canada" (23 January 2025) online: *CCLA* <https://ccla.org/equality/constitutional-challenge-to-bill-21-goes-to-the-supreme-court-of-canada>.
[152] Bill 94, An Act to, in particular, reinforce laicity on the education network and to amend various legislative provisions, 1st Sess., 43rd Legislature, 2025 [Bill 94].
[153] *An Act Respecting Private Education* 2013, c. 28, s. 121.

provisions requiring personnel of institutions not accredited for subsidy purposes to deliver services with uncovered faces.[154]

It also amends the *Education Act*, making it compulsory for a homeschooled child and their parents to ensure that their faces are uncovered while receiving services from, or on behalf of, the school service centre and other designated institutions, except for health-related reasons.[155] Children must also have their faces uncovered when on a school's premises, such as a room, or an immovable place at a school or centre's disposal.[156] These amended provisions shall be effective regardless of sections 2 and 7 to 15 of the *Charter*.[157]

Public reception to Bill 94 has not been welcoming. Feminist organizations under the umbrella of the Women's Legal Education & Action Fund (LEAF) oppose the government's rationale, arguing that rather than being geared towards gender equality, the Bill suppresses the rights of women, particularly Muslim women, akin to the situation with the *Laicity Act*.[158] LEAF further criticizes the government for turning a blind eye to the issues caused by the *Laicity Act* and for doubling down on the clear discrimination in the *Laicity Act* and Bill 94.[159] LEAF further expressed disappointment that feminist groups were not invited to present their views before the parliamentary committee studying Bill 94.[160]

In a debate between Minister Drainville and Joe Ortona, president of the Quebec English School Board Association, Ortona disagreed with the minister's assertion that wearing religious symbols sends religious messages. He noted that the Board's hiring practices are based on competency, qualificatison and merit, not religious affiliation. Ortona also emphasized that the government already recognized that Bill 94 violates human rights, hence the pre-emptive inclusion of the NWC.[161]

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[154] Bill 94, cl. 41.
[155] Bill 94, cl. 2.
[156] Bill 94, cl. 4.
[157] Bill 94, cl. 40.
[158] LEAF, "Bill 94, or how to deprive women of their rights" online: *LEAF* <https://www.leaf.ca/submission/bill-94-or-how-to-deprive-women-of-their-rights/> [LEAF, Bill 94].
[159] LEAF, Bill 94.
[160] LEAF, Bill 94.
[161] Philip Arthur, "Bill 94: English school boards blast secularism bill as an abuse of governmental power" (24 April, 2023) online: *The Gazette* <https://montrealgazette.com/news/english-school-boards-blast-bill-94-as-an-abuse-of-government-power > [Arthur, Bill 94].

Supporters Bill 94 include the Mouvement Laïque Québécois.[162] Meanwhile, the Canadian Civil Liberties Association denounces the law for infringing on the religious freedom of students and staff, banning school prayers and prohibiting the wearing of personal religious symbols.[163]

As of the time of writing, Bill 94 is in its amendment stage.[164]

(j) Bill 96, An Act respecting French, the official and common language of Quebec ("French Language Act")

Bill 96, which received royal assent on June 1, 2022[165] affirms French as the sole official language and the common language of Quebec. It amends the *Charter of the French language*, as well as 27 other pieces of legislation in the province.[166] Two heavily criticized provisions of the Bill are amendments to sections 9 and 208.6 of the *Quebec Charter*.

Section 9 of Bill 96 provides:

> **A** French translation certified by a certified translator shall be attached to any pleading drawn up in English that emanates from a legal person. The legal person shall bear the translation costs**.**

Section 208.6 states:

> A pleading to which, in contravention of section 9, no translation certified by a certified translator is attached cannot be filed at a court office or at the secretariat of an agency of the civil administration that

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[162] Arthur, Bill 94.
[163] Canadian Civil Liberties Association, "CCLA Condemns Rights Violations and Urges Withdrawal of Quebec's Bill 94" (May 1, 2025) online: *CCLA* <https://ccla.org/press-release/ccla-condemns-rights-violations-and-urges-withdrawal-of-quebecs-bill-94/>.
[164] Assemblée Nationale Du Québec, "Report on the progress of bills presented to the National Assembly of Quebec" online: *Assemblée Nationale Du Québec* <https://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/rapport/projets-loi-43-2.html>.
[165] *Bill 96, An Act Respecting French, the official and common language of Quebec*, 2nd Sess., 42nd Legislature, 2022. [Bill 96].
[166] Other legislation Bill 96 amends*: Civil Code of Québec;– Financial Administration Act* (chapter A-6.001*);– Tax Administration Act* (chapter A-6.002);– *Act respecting the Centre de la francophonie des Amériques* (chapter C-7.1);– *Charter of the French language* (chapter C-11);– *Charter of Ville de Longueuil* (chapter C-11.3);– *Charter of Ville de Montréal*, metropolis of Québec (chapter C-11.4);– *Charter of human rights and freedoms* (chapter C-12);– *Cities and Towns Act* (chapter C-19); 4– *Code of Civil Procedure* (chapter C-25.01);– Professional Code (chapter C-26);– *General and Vocational Colleges Act* (chapter C-29);– *Executive Power Act* (chapter E-18);– *Act respecting the Institut de la statistique du Québec* (chapter I-13.011);– *Interpretation Act* (chapter I-16);– *Act respecting administrative justice* (chapter J-3);– *Act respecting the Ministère de l'Enseignement supérieur, de la Recherche, de la Science et de la Technologie* (chapter M-15.1.0.1);– *Act respecting the Ministère de l'Immigration, de la Diversité et de l'Inclusion (chapter M-16.1);– Government Departments Ac*t (chapter M-34);– *Act respecting municipal territorial organization* (chapter O-9);– *Consumer Protection Act* (chapter P-40.1);– *Act respecting the legal publicity of enterprises* (chapter P-44.1);– *Act respecting the Government and Public Employees Retirement Plan* (chapter R-10*);– Act respecting the Pension Plan of Management Personnel* (chapter R-12.1);– *Act respecting occupational health and safety* (chapter S-2.1);– *Act to establish the Administrative Labour Tribunal* (chapter T-15.1);– *Courts of Justice Act* (chapter T-16);– *Constitution Act*, 1867.

> exercises an adjudicative function or within which a person appointed by the Government or by a minister exercises such a function. The court clerk or the secretary shall notify the legal person concerned without delay of the reason for which the pleading cannot be filed**.**

Bill 96 pre-emptively includes the NWC in broad language reform, likely anticipating conflicts with freedom of expression by stating that sections 2 and 7-15 of the *Charter* do not affect the amendments introduced.[167]

Shortly before assent, some lawyers applied to the Quebec Superior Court for a stay of the amendments to sections 9 and 208.6.[168] The applicants argued that enforcing both sections would create an access-to-justice issue arising from increased financial costs for translation services, delayed urgent proceedings, a lack of certified translators in parts of the province, and proceedings costs outweighing the value of the outcome.[169] The Court, per Justice Corriveau, relying on the *Macdonald* and *Harper* cases, applied the three mandatory tests for interlocutory injunctive relief: 1) the existence of a serious issue to be tried, 2) irreparable harm, and 3) whether the balance of convenience favoured the applicants.[170] The Court held that the applicants met all the tests and granted a stay on the two sections. Consequently, Bill 94 was enacted with the stay in effect on sections 9 and 208.6, pending appeal.[171]

(k) Bill 28, Keeping Students in Class Act

During the COVID-19 pandemic, the Canadian Union of Public Employees (CUPE) initiated strike actionTo protest education cuts, demand a substantial pay increase, and call for more frontline staff in schools as a matter of urgency.[172] Citing the destabilization of learning already exacerbated by the pandemic, the Ontario Legislative Assembly introduced the *Keeping Students in Class Act* (Bill 28), to end lockouts and strikes involving CUPE-represented school board employees.[173]

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[167] *French Language Act*, s. 120.
[168] *Mitchell v Procureur général du Québec*, 2022 QCCS 2983 (CanLII) [*Mitchell v. Quebec*].
[169] *Mitchell v Quebec*, para 30.
[170] *Mitchell v Quebec*, para 9 – 77.
[171] *Mitchell v Quebec*, paras 83 – 85.
[172] *Canadian Union of Public Employees*, "Education workers vote 'yes" for student success and good jobs" (October 3, 2025) online: CUPE <https://cupe.ca/education-workers-vote-yes-student-success-and-good-j>
[173] *Keeping Students in Class Act,* 2022, S.O. 2022, c. 19 [*Keeping Students in Class Act*].

Bill 28 required employers to take reasonable steps to resume operations halted by job action once it received royal assent.[174] It also terminated[175] any collective bargaining processes already underway and imposed fines of up to $4,000 for individuals and $500,000 for organizations that contravened the strike and lockout prohibitions. [176] The government invoked the NWC to shield the Bill from *Charter* and Human Rights Code challenges. [177]

Bill 28 received royal assent on November 3, 2022. Organizations such as the Canadian Civil Liberties Association argued that including the NWC ignored jurisprudence, indicating that freedom of association guaranteed by the *Charter i*ncludes collective bargaining and a right to strike.[178] They further contended that the Bill violated freedoms of expression, association, and peaceful assembly under international law, putting Canada in breach of its international obligations.[179]

The law was short-lived.[180] Twelve days after its enactment, the provincial government repealed the legislation when CUPE members agreed to return to work in exchange for the government's commitment to withdraw the legislation.[181]

(l) The Education (Parents' Bill of Rights) Amendment Act

In August 2023, the Saskatchewan government developed the "Use of Preferred First Name and Pronouns by Students" policy requiring schools to obtain parental consent before referring to any student under 16 by a different name or gender pronoun. The policy was distributed to schools on August 22, 2023.[182]

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[174] *Keeping Students in Class Act,* s. 2.
[175] *Keeping Students in Class Act*, s.5.
[176] *Keeping Students in Class Act*, s. 9.
[177] *Keeping Students in Class Act*, s. 13(1).
[178] Canadian Civil Liberties Association, "Why Bill 28 is an Issue" online: *CCLA* <https://ccla.org/major-cases-and-reports/bill-28/ >.
[179] Amnesty International, "Amnesty International Canada welcomes repeal of 'chilling' Ontario anti-strike bill" online: *Amnesty International* <https://amnesty.ca/press-releases/ontario-bill-28/>.
[180] Liam Casey, "Ontario government repeals anti-strike law for CUPE education workers" (14 November 2024) online: CBC News <https://www.cbc.ca/news/canada/toronto/ont-government-repeals-education-bill-1.6650584> [CBC, anti-strike].
[181] CBC, anti-strike.
[182] *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23 at para 9 [*UR Pride*].

Shortly after, the UR Pride Centre for Sexuality and Gender ("UR Pride") filed an originating application at the Court of King's Bench Saskatchewan, seeking a declaration that the policy infringed sections 7 and 15(1) of the *Charter* and could not be justified under section 1.[183]

UR Pride also sought public interest standing and an interlocutory injunction to suspend the policy's enforcement pending a final determination. Saskatchewan challenged the application, claiming that the organization neither had a real stake in the proceedings nor was adequately connected to the case and would not be able to present the necessary evidence. Justice M.T. Megaw, assessed public interest standing by considering UR Pride's longevity, service population, and connection to gender and sexuality issues.[184]

Shortly after UR Pride decision, the Saskatchewan Legislative Assembly introduced Bill 137, *The Education (Parents' Bill of Rights*) *Amendment Act* which received royal assent on October 20, 2023.[185] It amended the *Education Act* to request parental consent before implementing any change to a preferred pronoun or name requested by students under 16.[186] The *Parents' Bill of Rights* invoked the NWC, specifying its operational status regardless of sections 2, 7, and 15 of the *Charter,* as well as the rights to freedom of conscience, protection against arbitrary imprisonment, and to education guaranteed in the *Saskatchewan Human Rights Code*.[187]

(m) Back to School Act

On October 6, 2025, about 51,000 teachers in Alberta's public, separate and francophone schools began a province-wide strike.[188] The action followed a September 10, 2025strike notice from the Alberta Teachers' Association ("ATA") alleging years of poor remuneration, overcrowded classrooms and underfunding.[189]

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[183] *UR Pride*.
[184] *UR Pride*, para 35.
[185] *The Education* (*Parents' Bill of Rights*) *Amendment Act*, SS 2023, c 46 [*Parents' Bill of Rights Act*]
[186] *Parents' Bill of Rights Act*, s. 197.4(1).
[187] *Parents' Bill of Rights Act*, s.197(3); *The Saskatchewan Human Rights Code*, SS 2018, c. S-24.2.
[188] The Canadian Press, "Spotlight on Alberta legislature as teachers strike enters day 12" October 22, 2025) online: *The Calgary Journal*< https://calgaryjournal.ca/2025/10/22/spotlight-on-alberta-legislature-as-teachers-strike-enters-day-12/>.
[189] Kim Clement, "ATA serves strike notice, parties continue to meet" (September 23, 2025) online: Alberta Teachers Association < https://teachers.ab.ca/news/ata-serves-strike-notice-parties-continue-meet>.

On October 23, 2025 MLA Nate Horner obtained leave to introduce Bill 2:*Back to School Act*.[190] Within four days, the Bill passed all five stages of the legislative process in one day, receiving royal assent and coming into force the very next day.[191]

The *Back to School Act*[192] immediately terminated all teachers' strikes and lockouts in the province,[193] required striking teachers to resume their duties immediately, and prohibited future strike action.[194] It applies to the Teachers Employers Bargaining Association, the ATA and individual teachers. Violations constitute an offence, with $500 fines for individual teachers who fail to return to work or participate in future strikes or lockouts, and $1,000 fines for all other entities.[195] The *Back to School Act* invokes the NWC, overriding the *Charter*, *Alberta Bill of Rights* and the *Alberta Human Rights Act*.[196]

The ATA decried the *Back to School Act* as an infringement of collective bargaining, promising that a lawsuit would follow.[197] The New Democratic Party, also condemned the legislation: its leader criticized the use of the NWC as an attack on *Charter* rights,[198] and Heather Sweet described it as "legislative authoritarianism."[199]

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[190] Legislative Assembly of Alberta, "Order Paper" online: *Legislative Assembly of Alberta* < https://docs.assembly.ab.ca/LADDAR_files/docs/houserecords/op/legislature_31/session_2/20251023_1200_01_op.pdf. >

[191] Legislative Assembly of Alberta, "Bill 2 – Back to School Act" online: *Legislative Assembly of Alberta* <https://www.assembly.ab.ca/assembly-business/bills/bill?billinfoid=12087&from=bills>

[192] *Back to School Act*, SA 2025, c. B-0.5 [*Back to School Act*].

[193] *Back to School Act*, ss. 2, 7

[194] *Back to School Act*, ss. 8 – 9.

[195] *Back to School Act*, ss. 5 & 10.

[196] *Back to School Act*, s. 3.

[197] The Alberta Teachers' Association, "ATA to Challenge Bill 2" (October 28, 2025) online: *Alberta Teachers' Association* <https://teaachers.ab.ca/news/ata-challenge-bill-2 >.

[198] Matthew Black, "Alberta introduces back-to-work legislation, imposes new contract to end teachers strike" (October 27, 2025) online: Edmonton Journal <https://edmontonjournal.com/news/politics/alberta-teachers-strike-back-to-work-legislation>.

[199] Michelle Bellefontaine & Kate Teeling, "Striking Alberta teachers forced back to work by fast-tracked legislation, notwithstanding clause" (October 27, 2025) online: *CBC News* <https://www.cbc.ca/news/canada/edmonton/alberta-teachers-back-to-work-bill-9.6955558>.

IX. Analysis: Implications of the NWC on Fundamental Rights and Freedoms

(A) Controversial Status

There is no doubt that the NWC has been controversial since its adoption in 1982, when it garnered significant attention from academia, the media, and the public. Eugene Forsey, described by Axworthy as "perhaps Canada's foremost constitutional authority,"[200] criticized the clause, arguing:[201]

> The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Although it does not apply to the whole Charter of Rights, it does apply to a very large number of the rights and freedoms otherwise guaranteed…
>
> Clearly, then, it gives federal and provincial legislators very wide powers to do as they seem fit in limiting or denying those rights and freedoms. The Charter would not have protected the Japanese-Canadians who were forcibly interned during World War II, nor will it protect anyone advocating against an unpopular cause today [emphasis mine]
>
> Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be so powerless to protect our rights as they were before there was a Charter of Rights.

A thesis research has identified over fifty negative words and phrases used by constitutional scholars over three decades, to characterize the NWC and its perceived misuse.[202] Terms such as "dormant," "taboo," "antiquated," "outlier," "fallen into disuse," "abandoned," "no longer viable," "heretical," "almost impossible," or "impossible" to be used. Surprisingly, the federal government and provinces such as Manitoba, have openly called for limits on its use intervening in the ongoing SCC appeal regarding Quebec's *Laicity Act* .[203] The appeal stems from the Saskatchewan Court of Appeal's decision that courts can issue declarations regarding human rights violations arising from the invocation of the NWC.

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[200] Thomas S. Axworthy, "The Notwithstanding Clause: Sword of Damocles or Paper Tiger", (2007) 28: 3 Policy Options 58, online: <https://policyoptions.irpp.org/wp-content/uploads/assets/po/equalization-and-the-federal-spending-power/axworthy.pdf> [Axworthy, Sword of Damocles].
[201] Charles Buck, "The Desuetude of the Notwithstanding Clause- Fact or Fiction?", Master of Arts, University of Toronto, 2022, 26 -28 [Buck].
[202] Buck, 26-28.
[203] The Canadian Press, "Fraser says request for limits on notwithstanding clause not just about Quebec" (September 18, 2025) online: *The Canadian Press* <*https://www.cjme.com/2025/09/18/fraser-says-request-for-limits-on-notwithstanding-clause-not-just-about-quebec/*>.

Constitutional law analyst Tsvi Kahana evaluates the NWC through the lens of potential tyranny.[204] Ascertaining whether the clause, as invoked in legislation, is tyrannical involves two tests: motivation and impact. Three factors that might affect the motivation test:

- The NWC does not apply to the entirety of the *Charter*, which means that an act could be constitutional despite inserting the NWC. For example, a province that uses the NWC to avoid judicial scrutiny.
- A law could ultimately be declared unconstitutional, negating the NWC despite inclusion in provincial legislation.
- Legislatures may pass bills in which they have little to no belief merely to maintain political advantage; such legislation may still invoke the NWC and pass.

Kahana categorizes their research as theoretical rather than prescriptive, and concludes that most uses of the NWC in Canada were not tyrannical, as they were transitional, primarily or temporarily.[205]

Giles seems to have a different view, arguing that the governmental use of the NWC is intended to impose unreasonable limits on rights.[206] These unreasonable limits cannot be reasonably justified in a free and democratic society. Thus, section 33 serves to authorize limitations that would not withstand scrutiny under the section 1 justification test.

(B) Existing Literature Recommendations

(i) Removal from the *Charter*

Robert Diab, of the Faculty of Law at Thompson Rivers University, argues that the NWC is inconsistent with Charter ideology, does not belong in the *Charter* and advocates its removal.[207] A challenge to this proposal lies in the complex constitutional amending procedures discussed in section XII(iii) below, which would significantly affect any attempt to repeal section 33.

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[204] Tsvi Kahana, "Notwithstanding Clause in Canada: The First Forty years." (2023) 60:1 Osgoode Hall Law Journal, 1 [Kahana].
[205] Kahana at 70.
[206] Kahana at 70.
[207] Robert Diab, "What is Most Bothersome About Section 33: Or What Hasn't Been Said'' (2025) 33:3 Constitutional Forum 31, 2025 CanLIIDocs 1179.

(ii) Legislative Referral Pending Effective Date

To date, Manitoba is the only province that has taken legislative steps regarding this recommendation. On October 16, 2025, the government introduced Bill 50: *the Manitoba Government Acts to Protect Democracy and Fundamental Freedoms*.[208] The Bill requires referral of any proposed use of the NWC to the Manitoba Court of Appeal for review within 90 days of the proposed legislation. This approach ensures ongoing judicial consideration of the NWC prior to its adoption and may clarify issues such as potential amendments, distinctions and similarities between section 33 and section 28 notwithstanding clause, in the context of the separation of powers.

(iii) Partnership/ Mutual Recognition

Although the underlying purpose of the NWC persists, the negative public perception associated with its historical use could be mitigated through a partnership or mutual-recognition model. Under this model, courts and governments would engage in respectful dialogue regarding the constitutionality of proposed legislation.[209] Their perspectives would form the basis of a medium agreement, which would be used to determine whether invoking the NWC is appropriate to confer legal effect on the legislation.[210]

A potential drawback, however, is that this model could hinder the ability of Parliament or provincial legislatures to enact new laws efficiently. The need for judicial–legislative consultation prior to passing legislation could introduce delays or be seen as an intrusion on legislative autonomy.[211]

(iv) Parliamentary Bill of Rights Model

Heibert proposes a parliamentary bill of rights model to avoid using the NWC altogether.[212] In this system, Parliament would precisely define the objective of new legislation, and include a clause stating that the legislation upholds all federal laws, unless Parliament expressly declares

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[208] Manitoba, "Manitoba Government Acts to Protect Democracy and Fundamental Freedoms" (16 October 2025) online: *Government of Manitoba* <https://news.gov.mb.ca/news/index.html?item=71199>.
[209] Christian Holloway, "Is the Notwithstanding Clause a Viable Option to Maintain Constitutional Supremacy?" (2014) 15:1 Federalism 52 at 58 [Holloway].
[210] Holloway at 58.
[211] Holloway at 58 - 59.
[212] Janet L. Hiebert. *Charter Conflicts: What is Parliament's Role* (Montreal: 2002), 21, cited in Holloway at 59.

otherwise.[213] In our opinion, this model faces two major challenges. First, it would affect only the federal Parliament. Second, it would immediately remove public scrutiny of the law after enactment, because it gives Parliament the authority to later declare that a law infringes the Charter and then attempt to justify the infringement under section 1.

(v) A Stay on Parliamentary Enactment Pending the Final Outcome of a Legislative Challenge

Another recommendation is that a legislature refrain from enacting any law subject to an ongoing Charter until the court issues a final decision. The judiciary has appeared to exercise some oversight on this point by granting interim injunctions preventing a government from enacting legislation before the court, on a law or on challenged portions of a law, until the final outcome of a case, as seen in *Egale*.[214]

[213] Holloway at 58.
[214] *Egale Canada v Alberta*, 2025 ABKB 394 at para 240.

X. ACLRC'S Recommendations

The challenges inherent in applying the NWC today are the same as those raised by critics both before and after its inception. Recommendations from individuals such as Peter Lougheed, who participated in the debate over its inclusion in the *Charter,* continue to form the foundation of proposed reforms. The problem is that governments have failed to adopt these recommendations. For example, there appears to be no significant difference between how Quebec incorporated the clause in the *Act Respecting the Constitution Act, 1982* and how Alberta used the clause in the *Back to School Act* in 2025. In both cases, the Canadian Bar Association's suggestions, such as public consultation, referral of the legislation to the judiciary before enactment, and a preamble statement, had no role to play in the invocation process.

The recommendations are as follows:

(i) Discontinue the NWC Use

The literature examined here shows that the notwithstanding clause was primarily intended as a last resort in the context of reactive, not pre-emptive, uses. Yet a vast majority of modern invocations are pre-emptive. For this reason, governments should adopt a good-faith commitment to discontinue the use of the NWC. Should a government wish to limit *Charter* rights, there is always section 1 to fall back on.

(ii) Commitment to Meaningful, Effective Public Consultation

Although public consultation is one of the "hallmarks of good governance,"[215] there is no constitutional duty to consult outside the context of Aboriginal and treaty rights.[216] In particular, there is no broad obligation to consult Canadians generally, or even those who would be directly affected by a law.

Two significant challenges to democratic consultation in Canada complicate this process:

[215] Louis-Robert Beaulieu-Guay,"Why public consultations are essential to good governance" (17 June 2025) online: Policy Options <https://policyoptions.irpp.org/2025/06/consultation-regulations/>.
[216] Constitution Act, 1982 s. 35.

- social media misinformation, public distrust, and social polarization.[217] Online toxicity is one consequence of social media misinformation, and public distrust is evidenced by disengagement.[218]
- Underrepresentation, organized-interest dominance, and language and cultural barriers.[219] While public consultation would ensure political accountability, there is reason to question whether widespread allegations that public consultation serves only symbolic purposes, or as tokenism rather than substantive engagement, would undermine any attempt at public consultation before invoking the NWC.

Given these challenges, any proposal to implement mandatory consultation prior to invoking the NWC must include:

- a comprehensive, legally binding consultation framework,
- applicable at both federal and provincial levels, and
- grounded in the principles of deliberative democracy: inclusiveness, representativeness, active participation, and access to clear and reliable information.

(iii) Political Convention as an Alternative to Two-Thirds Majority Vote

The Canadian Bar Association's proposal for a two-thirds majority requirement raises a key question: Should the *Constitution* be amended to require a supermajority for NWC invocation, or could such a requirement be enacted through ordinary legislation?

The obstacle to the first strategy is the difficulty of amending the Constitution.[220] The amending formula requires a proclamation by the Governor General, authorized by resolutions from the Senate and the House of Commons, and by resolutions from at least two-thirds of the ten provinces.[221] Furthermore, such an amendment would require a majority of the members of the Senate and the House of Commons, and a majority of the members of the provincial legislature in

[217] Sabreena in Peter L. Biro, "The Notwithstanding Clause and the Charter*"* [Montreal & Kingston: McGill University Press, 2009] at 423- 424 [Sabreena in Peter L. Biro].
[218] Sabreena in Peter L. Biro at 422- 424.
[219] Keith Culver & Paul Howe. "Calling all citizens: The challenges of public consultation" (2004) 47:1 Canadian Public Administration 1.
[220] Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53 Alberta Law Review 85.
[221] *Constitution Act, 1*982, s. 38(1).

two-thirds of the provinces, to take effect.[222] Such an amendment would be procedurally burdensome, politically contentious, and unlikely to succeed.

The second strategy, embedding a two-thirds requirement within ordinary legislation, is also limited. Legislatures cannot unilaterally alter the constitutional rule of simple majority voting. A statute requiring a supermajority could be overridden by a future legislature acting with a simple majority.

A more feasible counterstrategy is the creation of a political convention that would make clear the government's intention not to use the NWC unless necessary, and only upon a simple majority vote. Although political conventions are not legally enforceable, they can serve as meaningful, publicly accountable commitments.

(iv) Shorter Mandatory Legislative Review

Section 33 requires that any legislation invoking the NWC be reaffirmed every five years. As a show of good faith, governments should adopt a shorter time frame, preferably annually, for any enactment invoking the NWC. The preceding would enhance political accountability, ensure regular assessment of the impact on Charter-protected rights, and underscore governmental responsibility to affected individuals.

We further recommend that this suggestion co-exist with a commitment to meaningful, effective public consultation.

[222] *Constitution Act*, 1982, s. 38(2).

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