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# Here's why it would be so hard to get rid of the controversial notwithstanding clause

Jacques Gallant

**T**he Ontario government's decision to shield back-to-work legislation from court challenges by invoking the Constitution's "notwithstanding clause" to override Canadians' protected rights has sparked widespread outrage, including from the federal government.

The bill, which passed Thursday, imposes contracts on approximately 55,000 education workers in the province and bans them from going on strike. The Canadian Union of Public Employees has said it plans to fight the legislation and go on strike anyway.

Prime Minister Justin Trudeau told Premier Doug Ford in a phone call this week that his pre-emptive use of the clause — before a court could even weigh in on whether the legislation is constitutional — was "wrong and inappropriate."

The New Democrats, meanwhile, are pushing Trudeau to take action. Justice Minister David Lametti has said there are "a number of different things one might do," without committing to an op-

tion.

So what can be done about the controversial use of the clause? The short answer is that while there are certainly options the federal government could explore, experts believe none of them would be successful.

## First, what is the clause and why does it exist?

The clause is found in section 33 of the Constitution's Charter of Rights and Freedoms. It allows Parliament (which has never used it) and provincial and territorial legislatures to pass legislation that overrides certain rights for a fixed period — which can be renewed — of five years. Those rights include what the Charter calls "fundamental freedoms" of expression, association and religion.

The clause was a political compromise in order to get the provinces on board with the package of constitutional reforms in the early 1980s that led to the Charter's creation, said University of Waterloo law professor Emmett Macfarlane.

The notwithstanding clause was "de-

Premier Doug Ford sits in the Ontario Legislature during Question Period on Tuesday November 1, 2022, as members debate a bill meant to avert a planned strike by 55,000 education workers.

vised for a specific reason," Macfarlane said — to address a concern that courts might deliver decisions "that were extreme enough to fly in the face of reasonable interpretation." The solution, he said, was to allow "a degree of parliamentary sovereignty so that legislatures could disagree with judicial decisions" when it came to the rights protected by the Constitution.

He argues the principal use of the clause should be for laws that have been rejected by the courts, and not pre-emptively, as the Ford government is doing.

The notwithstanding clause has been used a number of times since it was created, notably by Quebec, including in its 2019 law banning certain public sector workers from wearing religious symbols.

The Ford government invoked the clause for the first time in Ontario's his-

tory last year to restore parts of its Election Finances Act that had been declared unconstitutional by the courts.

Ford also threatened to use it in 2018 to maintain a law slashing the size of Toronto city council that had been declared unconstitutional by a lower court, but it became unnecessary when the government successfully appealed that decision.

### Could the Supreme Court change the rules for using the notwithstanding clause?

NDP Leader Jagmeet Singh has called on the federal government to ask the Supreme Court — in what is known as a “reference case” — for a ruling on the notwithstanding clause’s use.

A reference is absolutely a possibility, experts say. But would the top court add limits to the clause’s use? Unlikely.

“You’d have to depend on an attitude from the court that we traditionally haven’t had because the courts traditionally see this as something in the legislative domain,” said University of Ottawa law Prof. Carissima Mathen. “It’s there, in fact, to give the final word to the legislature in a way that doesn’t have much space for the courts.”

Macfarlane said it’s not “particularly plausible” that the Supreme Court would impose conditions on the clause’s use.

“That would amount to the courts inventing new rules that simply aren’t present in the text of the clause,” Macfarlane said. “I think a reference would be ultimately futile.”

### What about the federal government

### disallowing Ontario’s law?

Singh also called on the federal government to use its long dormant power of “disallowance” to strike down Ontario’s law. Disallowance dates back to Confederation, and allows the federal government to delay or overrule provincial legislation. Although the power remains in the Constitution, it has not been used in almost 80 years.

“It would immediately invoke a huge crisis in federal-provincial relations,” Mathen said. “I cannot foresee easily a circumstance where a federal government would be willing to disallow.”

She said the power was put in at a time when constitutional disputes involved battles between the federal and provincial governments over their powers. In the current case, Mathen pointed out, Ontario very much has the power to invoke the notwithstanding clause.

“It would really be the federal government saying, ‘We don’t like your exercise of your powers, even if it has nothing to do with our powers,’” Mathen said. “So it’s a conception of disallowance that might even be seen to be so different from the original one that it’s perhaps not encompassed in the umbrella of disallowance.”

Macfarlane said “there’s no way the current federal government would even think about” using it.

“It’s like responding to a constitutional crisis by instigating a constitutional crisis,” he said. “It would provoke such an outcry from the provinces that I don’t see Justin Trudeau seeing the political possibility of using the disallowance power.”

### Could the notwithstanding clause be removed from the Charter of Rights and Freedoms?

That would require a constitutional amendment, which takes the agreement of Parliament and at least seven provinces representing at least 50 per cent of Canada’s population — and that’s extremely unlikely, given the reticence of federal governments over the years to reopen the Constitution, not to mention that some of the big provinces would almost certainly disagree.

Politicians have generally shied away from touching the Constitution since major attempts at reform in the late 1980s and 1990s failed, and led to Quebec almost leaving the country.

“So since the ’80s and ’90s, we really haven’t had any appetite in Canada for that kind of mega-constitutional change and I just don’t see that changing any time soon,” said Andrew McDougall, professor of Canadian politics and public law at the University of Toronto.

McDougall said a province could technically pass a law stating it will not use the clause, “but they could repeal that any time they want.”

And, of course, the threshold to amend the Constitution in most situations is also high, Macfarlane said. The threshold to amend is even higher in a select few other cases, such as abolishing the monarchy, which requires Parliament and all 10 provinces to be on board.

“We are in a bit of a constitutional crisis at the moment because of the unamendability of the Constitution,” he said.

### So can anything be done?

“There’s actually not much that can be done, other than we need to elect better politicians,” Macfarlane said.

Mathen said she hopes the pre-emptive use of the notwithstanding clause doesn’t become a more regular occurrence.

“The way to guard against it is for the people in the particular jurisdiction to care about its use even if it doesn’t affect them personally,” she said, “for people to care about the coherence as a whole of the Constitution and to make clear that they don’t like casual invocations of the notwithstanding clause.”

With files from The Canadian Press

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