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'A quiet killing of the Charter': experts debate spirit and letter of notwithstanding clause's pre-emptive use

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Despite the federal government's rhetoric, the Liberals may be reluctant to seek limits on the section's pre-emptive use and leave Ottawa 'out of a tool,' says law professor Howard Kislowicz.

Legal and constitutional experts are split on the pre-emptive use of the notwithstanding clause, with some saying it represents "a quiet killing of the Charter," while others said the practice goes against neither the spirit nor the letter of the section granting that power.

The issue has drawn attention in recent weeks following the pre-emptive invocation of Sec. 33 of the Charter of Rights and Freedoms in the Ontario legislature by Premier Doug Ford's Progressive Conservative government. In Quebec, François Legault's CAQ government has also pre-emptively used the clause on its controversial language and culture bills C-21 and C-96 during its time in office.

While Prime Minister Justin Trudeau (Papineau, Que.), has been largely silent on the Legault government's use of Sec. 33 in this way, he issued a sharp rebuke

to Ford over his government's most recent preemptive use of the notwithstanding clause.

"Using the notwithstanding clause to suspend workers' rights is wrong," Trudeau told reporters on Nov. 1, a message he reiterated to Ford in a Nov. 2 telephone call.

The Ford government had included the notwithstanding clause in Bill 28, its back-to-work legislation to prevent thousands of Ontario education workers represented by CUPE from going on strike. The bill passed the legislature on Nov. 2. Still, CUPE members walked off the job for two days in defiance of the law before the Ford government reversed its position in response to public backlash and revoked the legislation containing Sec. 33.

Trudeau and his Justice Minister David Lametti's (LaSalle—Émard—Verdun, Que.) condemnations of the use of the clause sparked suggestions the federal government may want to seek a Supreme Court reference on the pre-emptive use of the clause. Experts consulted by The Hill Times noted it is not

Ontario Premier Doug Ford, left, with Prime Minister Justin Trudeau. Ford used the notwithstanding clause in back-to-work legislation to prevent thousands of Ontario education workers from going on strike. After backlash, the government repealed the anti-strike law. The Hill Times photograph by Andrew Meade

apparent what the Supreme Court would find in such a case or even if the federal government would truly want to seek such an outcome.

Howard Kislowicz, an associate professor of law at the University of Calgary who teaches constitutional law, said though only provincial governments have used the clause to date, the federal government may be reluctant to give up the ability to also use it pre-emptively—despite the prime minister's rhetoric on the issue.

"It would be in any government's interest—provincial or federal—to preserve all of their jurisdiction, to leave all of their options open," said Kislowicz. "It's one thing to take a position in the media. And it's another thing to take a position before the courts and potentially have the courts agree with that position—and

now you're out of a tool."

Experts mostly in agreement on the letter of the law, but divided on its spirit. If the government were to seek a reference on the issue, experts were divided on the spirit of Sec.

33 regarding pre-emptive use.

Errol Mendes, a University of Ottawa law professor who researches constitutional law and human rights, said pre-emptive use "absolutely goes against the spirit" of the Charter, and represents "a quiet killing of the Charter."

Pre-emptive use of the Charter may have a "devastating impact on whether or not people actually are willing to even promote their rights under the clause," said Mendes, who argued that if its use becomes too common, people may be less likely to advocate for their Charter rights.

He said if a federal government were to seek a Supreme Court reference to limit pre-emptive use, there is no guarantee the court would deliver such an outcome.

Mendes said a "common sense interpretation of Sec. 33 seems to be saying," as long as a legislature expressly declares it is invoking the clause, "it doesn't say anything about 'Well, you have to wait first for a court to rule on it.'" However, Mendes said for those who would like to see the use of the clause limited, there may be some viable legal arguments. Mendes had used these options as an intervenor in another case when the Ford government used the notwithstanding clause, dealing with the size of Toronto city council.

"Sec. 33 cannot be held isolated from

other parts of the constitution of Canada and, in my view, there are parts of the constitution of Canada, including the unwritten parts of the constitution," that could limit the use of the notwithstanding clause, said Mendes.

"Some of the women's groups, for example, are saying, 'Sec. 33 cannot be looked at in isolation from another section of the Charter,' which is section 28. Which says that all the rights in the Charter are guaranteed equally to men and women," he said. "The fundamental point that seems to be lost is that all parts of the Constitution are equal to each other."

Dave Snow, an associate professor of political science at the University of Guelph who studies constitutional law and federalism, said pre-emptive use does not violate the spirit of the notwithstanding clause.

He noted that despite recent attention on the matter, it is not a recent phenomenon.

Snow, who is currently researching the Supreme Court of Canada's jurisprudence on reasonable limits on Charter rights, recently published a research paper examining the 23 past uses of the notwithstanding clause.

His study found 19 of the 23 uses had been pre-emptive. Of the five that were reactive, only one came after a law had gone to the Supreme Court.

"I don't think the pre-emptive use is against either the letter or the spirit of the law," said Snow. "I think that the letter of the law is quite clear."

He added that in the most recent court case in which the Supreme Court ex-

plored the use of Sec. 33—a 1988 case called *Ford v Quebec*—"the decision was quite clear, and in my view, correct," in saying there were no restrictions on its use beyond what is written down in Sec. 33.

Snow said the issue comes down to a disagreement on who should have the final say on placing the Charter's "reasonable limits" on rights.

In the case of the Ontario education workers, Snow said the courts have already explored the issue, particularly in a 2015 ruling that found the right to freedom of assembly included the right to strike.

With that precedent meaning it was likely the back-to-work legislation could have been struck down, he said for those who believed keeping students in the classroom was a priority, the pre-emptive use of the clause was the only way for it to have an impact. Otherwise, students would have already missed months of class by the time the clause would be used in reaction to a court ruling.

"In this instance, if we had to wait until it went through the courts, especially through the Supreme Court of Canada, to have a full hearing, then there just wouldn't be an opportunity to use the notwithstanding clause to get students back in the classroom," said Snow.

Kislowicz agreed there are competing arguments on preemptive use, but when a case is not explored in court, a downside is "we potentially lose access to the court's insights on a particular set of facts."

Kislowicz said if a federal government ever were to seek a Supreme Court ref-

erence on pre-emptive use, new legal issues could emerge and lead to surprising outcomes.

“We haven’t had word from the Supreme Court of Canada on Sec. 33 since 1988,” he said. “The law in the Charter has changed dramatically since then, so we might expect that this section is subject to those same kinds of surprises. But until it’s argued, we don’t know.”

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Figure:

Prime Minister Justin Trudeau condemned the Ford government’s recent use of the clause. The Hill Times photograph by Andrew Meade

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