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John Ivison: Lametti lights a match under the notwithstanding clause

John Ivison

David Lametti had the look of a man who had gone looking for a gas leak with a lit match.

As he entered Liberal caucus on Wednesday morning, the justice minister was asked about the Ontario government's pre-emptive use of the "notwithstanding" clause -- Section 33 of the charter -- which it has invoked in its labour dispute with education workers, to prevent them from petitioning a court to restore their right to strike.

"It (Section 33) was meant to be a last word for a legislature to exercise parliamentary sovereignty. If it's used at the beginning, it guts Canadian democracy, it means the charter doesn't exist," he said.

Those are explosive words from a justice minister, and they appear to have committed his government to taking action of one sort or another.

What form that action might take remains unclear. "There are a number of different things one might do but I'm not going to discuss my options," he said.

That may be because he is obliged to choose between a number of evils and he is trying to decide which is least damaging politically.

There have been suggestions that the government invoke disallowance, the historical constitutional power that allows the federal government to override provincial legislation -- a power that has been used by Ottawa on 112 occasions since 1867 but which has been dormant since 1943.

Adam Dodek, a law professor at the University of Ottawa, said disallowance is not a realistic option. "One can only conceive of the federal government using the power of disallowance if there is a threat of the highest order to our democracy."

That is not where we are, although it could prove to be a grave threat to the unity of the country if Ottawa dropped a clunking legislative fist on Alberta or Quebec at the moment.

Dodek said the Trudeau government's problem is that it has "largely sat idly by while hesitancy to use the notwithstanding clause and respect for the char-

ter have been eroded by provincial governments across the country."

Trudeau's intervention into the debate on Tuesday was as forceful as it was surprising -- and initially seemed to be aimed at wrong-footing the Conservatives in the House of Commons.

"The suspension of people's rights is something that you should only do in the most exceptional circumstances. I really hope that all politicians call out the overuse of the notwithstanding clause to suspend people's rights and freedoms," he said, as if an inquiry in invocation of the Emergencies Act that suspended people's rights was not taking place just down the road.

The surprise was that he was vocal in his opposition to Ontario's use of Section 33 after months of effective complicity over Quebec's pre-emptive use.

When asked about Quebec's decision to shield its secularism bill, blocking individuals or groups from challenging the law for violating charter rights, the prime minister said he shared his father's disdain for the notwithstanding clause -- in his memoirs, Pierre Trudeau said

it "violated my sense of justice" -- but said only that his government was "in full reflection on the different avenues that could be taken." He even said he was worried that criticism of the Legault government's use of notwithstanding could turn into "Quebec-bashing".

Ottawa has yet to take any action on the secularism act or Quebec's discriminatory language law, which also received pre-emptive protection through use of the notwithstanding clause. Lametti has said the federal government will intervene in the secularism bill case when it eventually reaches the Supreme Court, and may do so in the case of the language legislation.

But Dodek said one option open to the justice minister that would show leadership would be to seek a reference to the Supreme Court on the constitutionality of the Quebec or Ontario legislation, and to argue for restrictions on the use of Section 33.

That would seem to be a sensible course of action. The override clause was a last-minute compromise during constitutional talks, in order to secure provincial backing for the charter. It has been used infrequently since -- in Quebec, Saskatchewan, Alberta, Yukon and now Ontario.

But until the most recent cases in Quebec and Ontario, it was used by legislatures to correct what they believed to be judicial excess. Now provincial governments are getting their retaliation in first.

There will always be tension between the executive and judicial branches. In 2014, the antipathy between the Harper government and the Supreme Court chief justice, Beverley McLachlin,

broke cover when the then prime minister accused the presiding judge of the highest court in the land of overstepping her jurisdiction. There was a great deal of pent-up frustration in the cabinet after the Supreme Court had struck down laws on prostitution, Senate reform and judicial sentencing. Yet, even at that time of heightened emotions, the prospect of the feds using the notwithstanding clause to assert parliamentary sovereignty was not a serious consideration.

Its critics often cite Eugene Forsey's quote about the override clause as a "dagger pointed at the heart of our fundamental freedoms."

But a more pertinent description may be that drawn by renowned constitutional scholar Peter Russell, who said the notwithstanding clause combines the strengths of legislators and the judiciary and "might help us wring the best that can be hoped for from a Charter of Rights, without totally abandoning our reliance on the processes of parliamentary government to settle difficult issues of social policy."

One study from 1997 showed that, of 65 cases where legislation was deemed by the courts to breach the charter, the law was amended (rather than scrapped) two-thirds of the time.

There is a place for the notwithstanding clause, but it should not be reached for by provincial justice ministers to camouflage the defects in their legislation.

Lametti should stop fretting and fumbling if he truly believes Canadian democracy is being gutted. He should seek a Supreme Court reference and attempt to limit the pre-emptive use of Section 33.

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