

CASE STUDY:

Imperfections in our Law Making: The Notwithstanding Clause as a “last resort”

The Notwithstanding Clause is part of Canada’s *Charter of Rights and Freedoms*. It gives the government the right to override certain Charter rights. However, there is no written rule saying when it is appropriate for the government to use it. As the Charter is written, governments have the constitutional power to use the Notwithstanding Clause when they please.

Nevertheless, the existence of a constitutional power is not an invitation to use that power carelessly. Jean Chrétien, Roy McMurtry, and Roy Romanow, three architects of the *Charter of Rights and Freedoms*, wrote that the Notwithstanding Clause:

was designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration. It was not designed to be used by governments as a convenience or as a means to circumvent proper process.

Because the Notwithstanding Clause is a power that allows governments to take away rights, it should be used carefully, and only after every other process has been exhausted. To use the clause frivolously would devalue the very rights the Charter is meant to protect.

Downsizing Toronto City Council and the Notwithstanding Clause

The idea that the Notwithstanding Clause should only be used in “exceptional situations, and only as a last resort” was tested in the summer of 2018.

In a surprise move, Ontario’s newly-elected provincial government passed legislation that cut the size of Toronto’s city council nearly in half, from 47 to 25 councillors. The move sparked an immediate backlash.

Some voters felt betrayed. The policy was not mentioned during the provincial election campaign. It simply appeared out of the blue, only weeks after the new provincial government was sworn in.

Other voters believed that the law was motivated by vengeance. Ontario’s new premier, Doug Ford, was a former Toronto city councillor. He and his brother, former Toronto mayor Rob Ford, had an acrimonious relationship with many Toronto city councillors. Reducing the size of council would take away the possibility for several councillors to return to city hall.

However, what many observers found most disturbing was that the size of council was slashed during the nomination period for Toronto’s



fall civic election. Put another way, the legislation changed the rules of an election that was already in progress.

The law was challenged in court. The court ruled that the council-cutting legislation violated the candidates' rights to freedom of expression. As such, it was ruled contrary to the *Charter of Rights and Freedoms*.

Many legal scholars believed that the court's ruling was on shaky ground. The Ontario government shared this view. Only a few hours after the judge delivered his decision, the government said it would appeal the decision to a higher court.

However, the Ontario government did not want to wait to see how the appeal court would rule. Instead, it announced it would use the Notwithstanding Clause to change Toronto city council. A special sitting of the legislature was called to rush through notwithstanding legislation.

Undermining the Rights and the Rule of Law?

Everything that the Government of Ontario did followed the *Constitution Act* and the *Charter of Rights and Freedoms*, as they are written. The government has the right to use the Notwithstanding Clause, and the government has the right to call a special sitting of the Legislature to pass its legislation.

However, there is a debate about whether or not the government was keeping with the spirit and the intent of the Charter. The Notwithstanding Clause was not being used as a last resort, after all other options had been exhausted.

Adding to the perception that the Government of Ontario was not worried about respecting Charter rights, Premier Ford said the government would continue to use the Notwithstanding Clause if “unelected judges” continued to overturn his government's laws.

In the End

In the end, there was no need to use the Notwithstanding Clause. The appeals court agreed that the lower-court decision appeared to be on shaky ground. The lower court decision was “stayed.” This meant that the changes to Toronto city council could go ahead, while the appeal was being heard. Notwithstanding legislation did not need to be passed.

Nevertheless, the rush to use the Notwithstanding Clause demonstrated how easily and quickly a majority government could suspend Charter rights.

DISCUSS

1. The rule of law requires that society has orderly ways to create and change laws. A key part of this is having orderly elections.
 - a) What is the danger to the rule of law if the rules of a civic election are changed while the election is already under way?
 - b) Are there times when it may be necessary to change the rules of an election when it is already under way?
 - c) Did the Ontario government have good reason to change the rules governing Toronto's civic election?

2. What happens to rights when governments habitually suspend them?

3. Some commentators have suggested that there was a double standard with the uproar over Ontario's attempted use of the Notwithstanding Clause. They pointed out that Saskatchewan used the Notwithstanding Clause in 2017, and the national media remained relatively quiet.

However, there are differences between the Saskatchewan and Ontario situations.

In Saskatchewan, a court ruled against a long-standing school funding practice. The court decision, if immediately implemented, could uproot 10,000 students from their schools. The province appealed the decision, and also invoked the Notwithstanding Clause. The use of the Notwithstanding Clause allowed thousands of students to stay at their current schools while the appeal was heard. As well, the government had general support for their actions from the opposition NDP.

In Ontario, there was widespread opposition to the use of the clause. All opposition parties opposed the move, as did a very vocal segment of the public. Further, unlike Saskatchewan's attempt to preserve the status quo, Ontario used the clause to push through disruptive changes to Toronto's city council. The decision was so rushed, an emergency overnight sitting of the Ontario legislature was called to force the notwithstanding legislation through in time for the civic election.

- a) When is it appropriate for government to rush through legislation?
- b) When should legislation be created through slow, deliberative processes?