

### What Exactly is the Notwithstanding Clause, and Why Does it Matter?

Canada's Constitution includes an 'entrenched' bill of rights; the [Charter of Rights and Freedoms](#). Our Charter comprises 34 sections of the Constitution Act, 1982. Thus, it enshrines our fundamental freedoms and rights. These include our democratic, mobility, legal, equality, and official language rights.

With Confederation, the doctrine of parliamentary sovereignty (or supremacy) in the Westminster tradition of government was adopted by Canada and the provinces. In its purest form, a legislature can enact or repeal any law it chooses. From the beginning, this doctrine has been limited by Canada's federal framework, which [allocates legislative powers](#) between the national government and the provinces.

The Constitution of Canada is the supreme law of Canada, and the Charter places limits on Parliament, the provincial legislatures, and our federal and provincial governments. The courts can order remedy for anyone whose rights or freedoms have been infringed or denied by government action. Any law that is inconsistent with the Constitution can be declared as having no force or effect. This provides a clear check on the doctrine of parliamentary sovereignty since Parliament and the provincial legislatures are obliged to respect the rights and freedoms entrenched in the Charter.

The provinces were wary of the impact of the new Charter on parliamentary sovereignty. They were hesitant to accept the Charter as part of repatriating the Constitution. The solution was found: to insert a 'notwithstanding clause' into the Charter. This permits Parliament or the provincial legislatures to "expressly declare" that an Act will operate notwithstanding the rights and freedoms conferred in Section 2 (fundamental freedoms), Sections 7 to 14 (legal rights), and Section 15 (equality rights) of the Charter.

Limits were imposed on the use of the notwithstanding clause. It cannot be used, for instance, to infringe democratic rights (Section 3 — the right to vote or Sections 4 and 5 — the sitting of the House of Commons or other Canadian legislatures). Nor can it erode mobility rights (Section 6) or language rights (Sections 16 to 23). It can only be invoked for five years (although it can be renewed). It can only be applied to new legislation.

For example, with Bill 21 the Government of Quebec shielded [An Act respecting the laicity of the State](#) from (provincial) human rights complaints by amending Quebec's Charter of Human Rights and Freedoms, which has the legal status of an ordinary provincial statute. The National Assembly simultaneously invoked the notwithstanding clause to keep Bill 21 from Canadian Charter judicial review, in an effort to shield the legislation from examination by the courts over claims that it violates freedom of religion.

There's quite a twist here. Two separate legal cases are now under way tackling Bill 21. One case centres on whether Bill 21 interferes with the exclusive powers under s.23 of the Charter (minority language educational rights) for English schools boards to hire staff (remember, the notwithstanding clause does not affect s. 23). The second case attack on Bill 21 focuses on section 28 of the Charter (also out of the

reach of the notwithstanding clause), which guarantees the rights and freedoms contained in the Charter equally to “male and female persons”. Quebec Superior Court is expected to issue decisions in these two cases shortly. We will update you with developments.