

Transcript

Episode 3: The Notwithstanding Clause — Hero or Villain?



[00:00:00] **Warda Shazadi Meighen:** I would actually say that the notwithstanding clause is a bit like a Wolverine in X-Men because it's part of the team.

[00:00:07] **Peter Biro:** It would be embodied in the character of the Joker. The Joker is the bad boy.

[00:00:18] **Sabreena Delhon:** Hi, I'm Sabreena Delhon. Welcome to Group Chat where we make sense of what's happening in our democracy with a few friends.

[00:00:26] **Karin Galldin:** It's definitely in its toddler stage right now, and we are seeing like tantrums and acting out and like really unlikable behavior.

[00:00:37] **Sabreena Delhon:** There's been a lot of debate about the notwithstanding clause lately in Canadian legal and political circles, and among the rest of us too if the number of Reddit threads about it is any indication. Is the clause a villain, a hero, a temperamental toddler? Is it hurting our rights or protecting them? Also known as Section 33, the notwithstanding clause is described as a uniquely Canadian compromise. It lets governments override some of our Charter rights for five years.

[00:01:13] When Prime Minister Pierre Elliot Trudeau introduced it back in the early 1980s, he did it to get the support of provinces that were unsure about the Charter and the power it gave the courts.

[00:01:26] **Peter Biro:** In a way it stacks the deck on this question of who gets the last word when it comes to rights.

[00:01:33] **Sabreena Delhon:** Peter Biro is a lawyer and editor of the book, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*.

[00:01:42] **Peter Biro:** The question being, should it be the judiciary through a process of judicial review? Or should it be Parliament or the legislature? And the notwithstanding clause essentially says, look, when it comes down to it, we're a democracy. We should give the last word to the people through their representatives.

[00:01:59] **Sabreena Delhon:** But is that what's happening? Here to help us wade through these questions and why we should care is Karin Galldin—a human rights and labor lawyer.



[00:02:10] **Karin Galldin:** Yeah, you should care about the notwithstanding clause because it could be employed against you one day.

[00:02:15] **Sabreena Delhon:** And Warda Shazadi Meighen, an immigration and refugee lawyer.

[00:02:19] **Warda Shazadi Meighen:** You should care about the notwithstanding clause because it helps us think through what kind of society we want to be.

[00:02:31] **Sabreena Delhon:** I know we defined it in the introduction, but I'm going to challenge both of you to help us clearly understand what the notwithstanding clause is. I want you to picture your younger selves, your teenage selves. Warda, what's your teen self doing? Just like a quick sketch.

[00:02:49] **Warda Shazadi Meighen:** What is my teen self doing? I'm in my bedroom listening to the radio, recording all the songs that come out so that I can get the lyrics down.

[00:02:59] **Sabreena Delhon:** And do you have a station?

[00:03:00] **Warda Shazadi Meighen:** Was it Hits 103.5? Yeah.

[00:03:04] **Sabreena Delhon:** I'm from Edmonton, so I don't know. I was recording 92.5. But Karin, how about you? What's your teen self doing? Give us a sketch.

[00:03:13] **Karin Galldin:** Oh, I'm definitely very earnestly writing in my journal in my bedroom.

[00:03:17] **Sabreena Delhon:** Okay, now you think about these young girls and in one line, describe the notwithstanding clause to your teenage self. What does it do?

[00:03:26] **Warda Shazadi Meighen:** It says, I know you have these things you really want to do and these rights that are really important to you, but I have this other aim and I think it's important enough to put your rights on pause or override your rights for five years.

[00:03:40] **Karin Galldin:** It suspends the operation of the Charter, without much meaningful process prior to that suspension.

[00:03:49] **Sabreena Delhon:** So, for example, there's Quebec's Bill 21 that bans public servants from wearing religious symbols on the job. The clause was used to override the Charter right of freedom of religion because the province said the bill's goal was religious neutrality.

[00:04:07] So that leaves me with a question—is the notwithstanding clause a good thing or a bad thing? A hero or a villain? I wanna hear what you both have to say, but first we asked Peter Biro, the lawyer we heard from off the top, a version of this question. We asked him, if the clause were a figure in pop culture, who would it be?

[00:04:29] **Peter Biro:** It would be embodied in the character of the Joker in the Batman series, although that's not a perfect representation of the clause in popular culture, but it's an interesting one. The Joker is the bad boy. The Joker is also, to some extent, the truth teller, but in a mischievous way. And so the Joker is all about disrupting and causing a measure of chaos, but doing it with impunity.

[00:04:59] It's the impunity piece really that I'm referring to because I'm not wanting to suggest that those who invoke the notwithstanding clause endeavor to cause chaos or to do harm, but where perhaps there is some parallel to be drawn with the Joker, it's that there is this measure of impunity for doing something that is certainly gonna hurt someone.

[00:05:23] **Sabreena Delhon:** So Warda, Karin, Peter says the Joker, I wanna ask you both—what pop culture figure would you pick?

[00:05:31] **Warda Shazadi Meighen:** So I'll go first but I do wanna, just before I answer that question, just talk about this impunity and this concept of being somewhat of an agent of chaos, it seems like it's being described as. And there's something to that, but I would sort of push back a little bit more because I think it's part of the system, properly understood, hopefully not in its toddler tantrum stage for much longer. There's actually—there's a place for it. And so there's this common theme of a nuclear option, and that this nuclear option guts these fundamental rights that are subject to the notwithstanding clause. But legislatures and Parliament won't push for this notwithstanding clause for fear of a backlash from the electorate. And that in fact is how it's played out for years. And it's only quite recently that we see in Quebec, and Ontario, and Saskatchewan, and New Brunswick, and with the federal Conservative Party statements that they're saying that they'll invoke it with this level of, what some have described, as impunity, and this causes debate.

[00:06:40] **Sabreena Delhon:** Jumping in here for some context to what Warda is saying. Here are a few ways the notwithstanding clause has been used in the last five years or so. We've already mentioned Bill 21, Quebec's secularism law. In Saskatchewan, the clause was used to pass a law that doesn't let children under 16 change their pronoun or name related to gender identity at school without parental consent. The government says the bill strengthens the right of



parents to be involved in their children's education. Critics say it goes against several Charter rights, like the right to liberty, security of the person, and equality rights—we'll be talking about this one in more detail. In these examples, the clause was leaned on, without debate or input from the courts or from us, the people. For some, that's an issue. The original intent of the clause was that it be used as a last resort, but as Warda says, currently it's being used as a first one.

[00:07:47] **Warda Shazadi Meighen:** This causes the current debate we're looking at, and so, I would actually say that the notwithstanding clause is a bit like a Wolverine in X-Men because it's part of the team and it's intended to be part of the team. But he's also this anti-hero and he's complex, and he uses his power to go against accepted morals and laws. But you know, he's also realistic and he represents this internal struggle. And I think that if we situate the notwithstanding clause how it ought to be situated, it can be this anti-hero—that it won't always be the bearer of the rights that, you know, so many of us hold so dear, including myself. But it hopefully will get us to a point in society that is cohesive and is cognizant of the checks and balances we have in our system.

[00:08:37] **Karin Galdin:** Yeah, I'm unfortunately gonna go in a different direction and I'm gonna liken the notwithstanding clause to comedians like Dave Chappelle or Roseanne Barr—cultural figures, who once, you know, were viewed as edgy, made a lot of interesting contributions in terms of asking us to consider what our makeup is, you know, who we view as community. All of that was at one point really useful and helpful, and Dave Chappelle has not aged well and it's no accident that he is, as people will say, punching down on trans people at the same time as like one of the most, you know, specific applications of the notwithstanding clause currently also is being applied against, you know, trans and gender diverse kids. So yeah, we've got these cultural figures that once did a lot for us and they're not aging well. And I would say the same for the notwithstanding clause.

[00:09:41] **Sabreena Delhon:** So I wanna get into this kind of tension 'cause it's not quite a hero, it isn't quite a villain, it's sort of something in between. Warda, you said that the clause can be a hero if it's used right. Can you speak to that?

[00:09:53] **Warda Shazadi Meighen:** Yeah. So I come from an obvious—it may not be obvious to others—but it's a human rights perspective. I'm, for those who can't see me, I'm a woman of color. I'm an immigrant. I'm a lawyer who represents incredibly vulnerable clients, and I often invoke the Charter in the majority of my arguments.

[00:10:11] But I think the system of constitutional democracy is an intricate web of checks and balances, and we have to, as I mentioned, you know, we have to ensure this cohesion. I think the notwithstanding clause has to be used appropriately, not the way it's being used at the moment. I think the way it's being used at the moment is very aptly, as Karin put, is a toddler throwing a tantrum. And it's over three decades later, the notwithstanding clause to be this anti-hero that I was alluding to, has to have some sort of proactive insertion, after dialogue and debate, which is what



was assumed. And so if the notwithstanding clause is to be the anti-hero, I hope it will be one day, we need some substantive constraints to make sure that it's operated as it should be.

[00:10:59] We need debate and we need consultation. So Senator Harder floated this proposal saying, we should have notice each time that the notwithstanding clause is being used, and debate and dialogue. I think those are the types of constraints we need for the notwithstanding clause to operate appropriately.

[00:11:19] **Sabreena Delhon:** Karin, in light of what Warda has said, and your examples of Dave Chappelle and Roseanne Barr, is there room for redemption, rehabilitation, evolution?

[00:11:30] **Karin Galldin:** I mean, certainly, of course, right? I mean, there's been conversations about this since the existence of the notwithstanding clause. And at the same time, there is also a very real acceptance of the fact that because the notwithstanding clause is part of our constitution, in order to repeal, amend, change it, it requires the same kind of sticky, tricky, you know, sort of provincial, territorial, federal consensus that preceded the Charter. And I also wanna say, you know, I think there are debates that we probably aren't gonna be able to get into here about the notwithstanding clause that, you know, sort of the implications around their usage are first of all, very real for people who are impacted by it, and also lead to further complexities.

[00:12:31] And if I may, I'd like to just take a few minutes talking about what's happening in Saskatchewan as a way of sort of exhibiting some of the challenges here. So in Saskatchewan you have a government that decided what seems on the outside, you know, to have been decided without much consultation, to implement a policy in the province's schools, by which children under the age of 16, you know, like if I say, "my name's Karin, but I want you to call me KK," but I'm still a girl, it's like, "no problem, KK." But if I were to say, "call me Henry because my gender has changed," the policy then kicks in and parents have to be notified. So this policy, when it was first, you know, conceived of, it was challenged by a number of groups in Saskatchewan as violations of Section 7 rights to life, liberty, and security of the person.

[00:13:29] And similarly, contrary to the equality rights of trans and gender diverse kids, you know, those kids faced an impossible choice: be outed at home regardless of whether home was a safe place for them or not, or be misgendered at school. So these groups went to the courts and said, "we think there's a real problem with this law, and we'd like you to say that it shouldn't take effect until we've had you determine the constitutionality of this law." So that injunction was granted and very quickly thereafter, the Saskatchewan government passed an amendment to the Education Act and it said, we're putting this policy in no matter what and we are declaring that it operates, notwithstanding Sections 2, 7, and 15 of the Charter. But what the conversation has turned into now in Saskatchewan, is whether a court can, after the passage of that law, whether a court can actually say it's unconstitutional or not.



[00:14:30] So the government is saying we've invoked this, you know, notwithstanding clause. That means that there is no review that a court can do of this law whatsoever. And so that is kind of really the debate that we're going to see play out in a Saskatchewan court over the next couple of years. And these are laws that are now being, you know, employed against minorities.

[00:14:56] So in Saskatchewan, these are children, they don't have voting rights. But also, if you think about who's gonna be implementing this policy, it's going to be teachers and it's going to be education workers. And they may be saying to themselves, "I don't know about this policy. Like it feels like this policy is at odds with our human rights obligations towards our students."

[00:15:17] But you know, in the absence of a court actually affirming that, you know, or offering any clarity on that, you know, all of those workers who are going to be implementing this legislation are gonna be put in very difficult positions. So you know, those same teachers and education workers might say to a court, you know, "you can't strike down this law now, but could you tell us whether it's constitutional or not?"

[00:15:39] So that we can then tailor our behavior accordingly, given that we have to live with this law for the next five years." So, you know, there's the possibility for consequences that, again, take us farther and farther away from what the Charter was actually really, at its inception, meant to do, which is protect minority rights, right? Like, establish this foundational guarantee so that regardless of who's, you know, in power, you always understand that you have these rights and freedoms as a Canadian.

[00:16:13] **Sabreena Delhon:** So the late Benoît Pelletier, politician and major figure in Quebec politics, was a supporter of the notwithstanding clause, and I've got a quote from him. Here he is speaking at a conference at Massey College in 2022.

[00:16:26] **Benoît Pelletier:** "The notwithstanding clause is one of the few instruments within the Canadian federal system that allows Quebec to express its diversity. Many Quebecers are proud Canadians, but they want to be Canadians their way. And the question comes, is federalism flexible enough to allow the expression, the affirmation, of Quebec specificity? My answer is yes. The source of that Canadian diversity is the notwithstanding clause."

[00:17:02] **Sabreena Delhon:** What's your take on how Benoît Pelletier describes the clause as supporting diversity? Either one of you.

[00:17:08] **Karin Galldin:** Well, he's right in that the Quebec government has used the notwithstanding clause in its language laws, right? Which is sort of a uniquely Quebec product, the idea that French language will be prominent there, will be required by law. I mean, he's right in that it can be employed to say, "we are going to differentiate in a way that may compromise what is set out in the Charter, but it sort of serves a purpose that is unique to our province."

[00:17:47] I mean, there's lots of conversations that we can have about the Quebec identity and whether the ways that it is constructed by law is inclusive or respectful. I think that there are lots of conversations around that. But to have a federal politician say, "I think I'm gonna start using the notwithstanding clause too," takes us well beyond this idea of, you know, making space for distinct provincial and territorial identities. And rather, again, this idea that you kind of get to just pick and choose which Charter rights you wanna adhere to, with you know, any kind of legislation. And I think that, again, like that really just shows that in those forty years, I mean, we've gone really, in a very different direction in terms of the usage of, and potential future usage of Section 33.

[00:18:41] **Warda Shazadi Meighen:** What I would say is that we can have the notwithstanding clause be emblematic of provincial differences, distinction, and that's fine. But let's make sure that it actually reflects what the electorate wants. So let's ensure that there's greater public participation. Let's ensure that there is notice given when the Quebec government decides to invoke—you know, with Bill 21, for example, was there adequate notice? Was there consultation to pass a law that violates one of the Charter guarantees? Tell the people what those guarantees are and what that means for people who will have to implement the laws and for people who will have to dress or act a certain way. Facilitate that public deliberation on the merits of the proposed laws. Are there other ways that that identity can be born without limiting these rights to that extent? So have that forethought, have that discussion, and then it will be a measure of reflection of that province's or territory's distinct identity.

[00:20:03] **Sabreena Delhon:** So there is an assumption that the public isn't able to play their part in terms of accountability. And that's a problematic assumption because the public needs more support to do their job, or more communication, or more engagement in what you've both described now is the public kind of being skirted along the way. What is going on in your view in this moment? You know, how would you describe it? What's really at the heart of this? And try to picture your teenage selves again, if you can.

[00:20:32] **Warda Shazadi Meighen:** Well, I'll take a stab at that one, which is, the structure that we had is not fully operational in the way that people may have perceived it, the drafters may have perceived it. And so we found these, it seems like a loophole, a politically expedient loophole to get the result that you want to get.



[00:20:53] And so you can use this instrument to bypass, you know, and get a home run politically, but I think that's a disingenuous use of it. And so now that we know this, and now that you know, some time has passed, and we're seeing this evolve in not just one situation, but in repeat patterns, I think we have to be more considerate, either through the courts, or through parliamentary procedures that are put into place in advance before a law is passed with a notwithstanding clause, that dictate what the requirements are in a more meaningful way.

[00:21:26] **Karin Galldin:** I'll say it is possible to make a lot of noise about the use of the notwithstanding clause. It is possible. We just aren't seeing it enough. And I would say we saw it in Ontario, fall of 2022, when Doug Ford, you know, after prolonged negotiations with CUPE in terms of a collective agreement for their education workers, passed a law that basically imposed a collective agreement on those education workers and invoked the notwithstanding clause to vitiate their Section 2 rights.

[00:22:04] **Sabreena Delhon:** Sabrina here, in case you aren't familiar with what Karin's talking about, the notwithstanding clause was used to impose a new contract on education workers from CUPE—the Canadian Union of Public Employees. The province took back the decision after protests and public outcry about the right to strike being violated.

[00:22:25] **Karin Galldin:** You know, it was passed one week and it was very quickly repealed two weeks later. And the reason why that legislation, which otherwise would have kind of looked like every other, you know, toy on the shelf if we're talking about usages of Section 33, it otherwise looked the same as all the other examples that we're seeing, is that not only CUPE but major players from the labor movement said, "you cannot do this, you cannot," you know, Warda says, "politically expedient". Sure. You know, Doug Ford's talking point was that he wanted students back in school. You know, he named it, you know, what I'm guessing he thought was the very palatable "keeping students in class" act. Surely everyone will agree that students should be kept in school? But, you know, the union said, "we have the right to bargain with you, and we have the right to go on strike," which was also constrained by that legislation. And so you had union leaders from really across the country flying into Toronto. There was talk of a general strike. There were really impassioned press conferences saying, you know, this union stands behind CUPE, this union stands behind CUPE. That's like our best case example of, you know, how we can create political accountability around the notwithstanding clause. Unfortunately, you know, visibly Muslim niqab wearing women in Quebec don't have that same collective show of support. Trans kids in Saskatchewan similarly, don't have that highly visible, highly influential show of support. We really are, unfortunately, these are situations where the notwithstanding clause is being employed towards groups with much less political power. And so then it falls to the rest of us and it's just really hard to pay attention to such an anodyne term as the notwithstanding clause, you know, and all you hear are politicians talking about it. And that's, you know, like, that's not where I would like to perk up my ears and listen if I'm just, you know, trying to pay attention to something



that's, you know, seems remote from my life. So I know that that's the work that Samara does and I think it's really important work, but I agree with Warda that, you know, part of what's going on here is you have governments doing a lot of these deliberations behind their red curtains and then they come out from behind their red curtains and they're like, "ta-da! Here's this thing, and we're not really gonna be upfront with you about what it is. But we've pressed the red button and, you know, tell us what you think in five years." And like those curtains need to be pulled and exposed, and we need to see what happens like right from the beginning when governments start conceiving of using the notwithstanding clause.

[00:25:17] **Sabreena Delhon:** It does sound like the damage to our democracy is adding up and this is a period of global democratic backsliding where a key trait is challenging the rule of law. And given all that we've explored, you know, the changing times, an alienated electorate, if you could each snap your fingers and get your wish, what would you update to meet today's moment?

[00:25:40] **Karin Galldin:** I've got a snap. My snap would be extending voting rights to younger people.

[00:25:46] **Warda Shazadi Meighen:** My snap just sounds so boring, but my snap is more mandated processes than public consultation.

[00:25:54] **Sabreena Delhon:** Yes! Thanks to Warda Shazadi Meighen, Karin Galldin, and Peter Biro. And thank you for listening to Group Chat. I'm Sabreena Delhon, CEO of the Samara Centre for Democracy. Group Chat is executive produced by Debbie Pacheco. The Group Chat team also includes Farha Akhtar, Andrea Mariko Grant, and Beatrice Wayne. Theme music is by Projectwhatever. The Samara Centre for Democracy is a non-partisan charity that produces groundbreaking research, dynamic events, and educational resources that advance a vibrant culture of civic engagement across Canada. Donate to support our work and check out our other podcasts @samaracentre.ca. If you like us, help spread the word about our show. Subscribe, rate, and review this podcast. If you teach, share it with your class. A special thanks to the Flanagan Foundation and the Rideau Hall Foundation for their support.