



THE CANADIAN
BAR ASSOCIATION
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BARREAU CANADIEN

May 16, 2024

Via email: mcu@justice.gc.ca.

The Honourable Arif Virani, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8

Dear Minister Virani:

Re: Guidelines Respecting the Use of the Notwithstanding Clause of the *Charter of Rights and Freedoms*

I write on behalf of the Sexual and Gender Diversity Alliance of the Canadian Bar Association (CBA Section) to urge the federal government to create guidelines respecting the use of the notwithstanding clause of the *Charter of Rights and Freedoms (Charter)*.

The CBA is a national association of 38,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Sexual and Gender Diversity Alliance works to address the needs and concerns of two-spirited, lesbian, gay, bisexual, transgender, queer and intersex (2SLGBTQI+) people in the CBA.

As we observe the International Day Against Homophobia, Biphobia, and Transphobia, the CBA Section is alarmed by the unprecedented cadence at which provincial governments have invoked or proposed to invoke the notwithstanding clause, particularly in cases where the clause discriminates against or oppresses marginalized persons or groups on the basis of gender in areas of health care, education, and sport. Such use of s.33 is inconsistent with the values articulated in the *Charter*, including s.28 of the *Charter*.

Other troubling and recent uses of the notwithstanding clause include maintaining electoral boundaries set during a municipal election (Ontario), prohibiting the wearing of religious clothing and symbols by public employees (Quebec), and disallowing conscience or religion-based objections to mandatory vaccination (New Brunswick).

This is an urgent issue of national importance. Lawmakers' cavalier regard for the *Charter* must be addressed without delay. Without immediate action, the CBA Section is deeply concerned that the *Charter* will lose its place as a foundational law that must prevail over all others.

As you reminded us in February 2024: " The first word should not be the last in the dialogue between legislatures and the courts. Every Canadian, no matter their province or territory of residence, should feel confident that the federal government recognizes and respects their rights and freedoms."¹ The CBA Section is encouraged that the government has spoken publicly and clearly about this issue. We now call on the government to take concrete steps to constrain and guide the use of the notwithstanding clause.

The CBA Section recommends that the federal government work with provincial governments to establish the following guidelines for the use of the notwithstanding clause:

- (i) the notwithstanding clause must not be used pre-emptively, i.e., without prior consideration of the legislation by the courts;
- (ii) the notwithstanding clause must not be invoked without prior meaningful and transparent public consultation; and
- (iii) the notwithstanding clause must not be invoked without a two-thirds majority vote in the applicable legislature or parliament.

The CBA Section would welcome an opportunity to meet with you to discuss how we can help achieve these goals. I look forward to hearing from you soon.

Sincerely,

(original letter signed by Véronique Morissette for Kees de Ridder)

Kees de Ridder
Chair, SAGDA Section

cc. Senator René Cormier (email: Rene.Cormier@sen.parl.gc.ca)
Deputy Blake Desjarlais, M.P. (email: blake.desjarlais@parl.gc.ca)
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¹ Statement by Minister Virani on the Quebec Court of Appeal's decision in *Hak et al. v. Attorney General of Québec* (February 24, 2024), [online](#).