

Saskatchewan to invoke notwithstanding clause over school pronoun policy

[CAROLINE ALPHONSO](#) EDUCATION REPORTER

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Saskatchewan Premier Scott Moe will use the Constitution's notwithstanding clause to override a judge's decision to pause his government's policy that requires parental permission for students under 16 who want to change their names or pronouns at school.

Earlier in the day Thursday, Court of King's Bench Justice Michael Megaw granted a request from an [LGBTQ](#) advocacy group for an injunction to put the policy on hold until a constitutional challenge could be heard in court.

Mr. Moe said in a statement that he was "extremely dismayed by the judicial overreach" concerning a policy that he felt had strong support in the province, including among parents.

He said that his Saskatchewan Party government would recall the legislative assembly on Oct. 10 and use the notwithstanding clause, which would exempt pending legislation on the issue from sections of the Charter of Rights and Freedoms for up to five years.

"The default position should never be to keep a child's information from their parents," Mr. Moe said. "It is in the best interest of children to ensure parents are included in their children's education, in their classrooms and in all important decisions involving their children."

In a 56-page decision, Justice Megaw wrote that the public interest expressed by the government in introducing the policy "is outweighed by the public interest of not exposing that minority of students to exposure to the potentially irreparable harm and mental health difficulty of being unable to find expression for their gender identity."

Further, he wrote: "I find this to be one of those clear cases where injunctive relief is necessary to attempt to prevent the irreparable harm referred to pending a full hearing of this matter on its merits."

Advocates in the LGBTQ community worry that policies by conservative governments requiring parental consent for students to change their names or pronouns could put the lives of children at risk.

"The reality is that some 2SLGBTQI youth might not be safe to be themselves at home, making it even more crucial to ensure that school environments are safe and inclusive places," said Ariana Giroux, executive director of UR Pride Centre for Sexuality and Gender Diversity at the University of Regina. UR Pride sought the court injunction.

Several provinces, including Quebec, Alberta and Ontario, have used – or threatened to use – the notwithstanding clause. More recently, Ontario invoked the clause to take away an education workers' union's constitutional right to strike. The province [retracted the piece of legislation](#) after widespread condemnation in the labour movement.

In the United States, Republicans in several states have restricted students using preferred pronouns in schools and challenged school library books on gender identity. These issues are gaining a foothold in Canada.

The policy in Saskatchewan follows changes in New Brunswick this summer, where an updated version of school policy makes it mandatory for schools to get parental consent before using the chosen names and pronouns of students under 16 in the classroom.

In Ontario, Premier [Doug Ford](#) recently said parents should be informed about their child's gender identity and said school boards should not "indoctrinate" students on issues of gender.

Saskatchewan children's advocate Lisa Broda recently said that she understood the government's desire to have parents more involved in the education system. But "this objective can be achieved without imposing such strict rules around consent, which could result in a violation of a young person's rights under provincial, constitutional and international human-rights laws," she said.

The province's new policy also includes a requirement that parents be informed about sexual-health curriculum and have the option to decline their child's participation. For students 16 and older, parental or guardian consent to change names or pronouns is not required.

UR Pride, along with Egale Canada, an LGBTQ advocacy organization, called it "unconscionable" for the government to invoke the notwithstanding clause.

"It is frankly shocking that, in the face of the court's ruling that this policy will inflict irreparable harm on children, the government of Saskatchewan intends to invoke the notwithstanding clause to impose it anyway," Adam Goldenberg, lawyer for UR Pride, said in a statement on Thursday.

Rarely used Charter provision a Trudeau concession

REGINA — Saskatchewan Premier Scott Moe has pledged his government will use the notwithstanding clause of the Constitution and pass legislation this fall to ensure the province's school pronoun policy remains in place.

He made the comment shortly after a judge granted an injunction to pause the policy, which requires parental consent when children under 16 want to go by different names or pronouns at school. Lawyers for UR Pride sought the injunction, arguing the policy could cause teachers to out or misgender children, violating the Charter of Rights and Freedoms.

Court of King's Bench Justice Michael Megaw ordered the injunction until a constitutional challenge can be heard in court, a decision Moe called "judicial overreach."

Here is a look at the rarely used clause:

WHAT IS IT?

The notwithstanding clause — or Section 33 of the Charter of Rights and Freedoms — gives provincial legislatures or Parliament the ability, through the passage of a law, to override certain portions of the Charter for a five-year term.

ITS ORIGINS

The clause in its current form came about as a tool to bring provinces onside with then-prime minister Pierre Trudeau's signature piece of legislation. With Charter negotiations ramping up in the early 1980s,

Trudeau didn't see the need for the clause, but provinces such as Alberta and Saskatchewan wanted an out should they disagree with a decision of the courts. In the end, Trudeau reluctantly agreed.

ITS STRUCTURE

The clause only applies to certain parts of the Charter. For instance, it can't be used against provisions protecting the democratic process — that would create a pathway to dictatorship. It also can't be used for more than five years at a time. This ensures that the public has the chance to challenge a government's use of the clause in a general election before it can be renewed.

ITS USE

The notwithstanding clause usually comes up whenever there is a controversial court ruling. For instance, former prime minister Stephen Harper's Conservatives were asked about, but refused to use, the clause on a court decision involving assisted dying. While often debated, its use is much rarer. Quebec, as the only provincial government to oppose the Charter, passed legislation

in 1982 that invoked the clause in every new law, but that stopped in 1985. In 1986, Saskatchewan used the clause to protect back-to-work legislation and Quebec used it again in 1988 to protect residents and businesses using French-only signs. Alberta tried to use the clause in a 2000 bill limiting marriage to a man and a woman, but that failed because marriage was ruled a federal jurisdiction.

RECENT NOTABLE USES

Last year, the Ontario government invoked the notwithstanding clause to pass legislation imposing contracts on approximately 55,000 education workers in the province — including librarians, custodians and early childhood educators — and ban them from going on strike.

In 2021, Ontario's Progressive Conservative government used the notwithstanding clause to restore parts of the Election Finances Act that had been declared unconstitutional. It means third parties can only spend \$600,000 in the 12 months before an election is called.

Quebec proactively used the notwithstanding clause when it passed a major reform to its signature language law last year. Bill 96 reasserts the right of Quebecers to live and work in French and toughens sign laws and language requirements for businesses, governments and schools.

Quebec also pre-emptively used the clause in passing its religious symbols law. Bill 21 was adopted in June 2019 and prohibits public sector workers who are deemed to be in positions of authority, including teachers, police officers and judges, from wearing religious symbols such as hijabs and turbans on the job.

— **The Canadian Press**