

# The Lamest Loophole

## Social conservatives flirt with the Notwithstanding clause, again

Province | by Gregory Beatty

Brad Wall cut his political teeth as a junior staffer in Grant Devine's Progressive Conservative government that held office from 1982-91. As he winds down his 10-plus year stint as Saskatchewan premier he's set to join his mentor in pretty elite company. In fact, he and Devine will be the group's only two members.

What group is that?

They will be the only two premiers outside of Quebec to have invoked the Notwithstanding clause since the Canadian Charter of Rights and Freedoms was enacted in 1982.\*

The Notwithstanding clause (s.33) was drafted during constitutional negotiations with the Pierre Trudeau-led federal Liberals in the early 1980s at the insistence of several provinces — including Saskatchewan and Alberta — who were nervous about giving the courts too much power to review government actions. That could thwart the democratic will of the people, they argued.

Ottawa's counter argument was that majority rule has limits, and every citizen has certain inalienable rights and freedoms that must be protected.

As a compromise, they created s.33 which gave governments wiggle room to get around a court ruling declaring a particular law/practice unconstitutional by saying "Notwithstanding that ruling, we're going to keep doing it." The feds insisted on a five-year limitation, so a government would have to face the electorate before it could extend a restriction on constitutional rights beyond five years.

The clause has been available to governments for 35 years, and in that time only one premier (again, outside of Quebec) has invoked it. That would be Devine, who, in 1986, used it to force public sector employees back to work during a labour dispute. The Supreme Court of Canada ultimately found his government's legislation constitutional, so the clause was only in effect for a year. Still, it was invoked.

Now, Brad Wall is set to join him. In November, his government introduced Bill 89 to amend the Education Act to get around an April 20 ruling by Queen's Bench Justice Donald Layh that fully funding non-Catholic students attending Roman Catholic separate schools is unconstitutional.

It's a controversial manoeuvre. Here's why.

## CASE HISTORY

In 2003, it looked like the town of Theodore would lose its school. Thanks to dwindling enrolment, the (public) Yorkton School Division (now the Good Spirit School Division) voted to close the school.

Then Theodore applied to join Christ the Teacher Roman Catholic Separate School Division in Yorkton. Although Theodore School only had a few Catholic students, the move meant it would get the funding to stay open.

Good Spirit subsequently sued, arguing the arrangement was just a convenient way to do an end-run around a necessary closure and, legally, contravened the guidelines governing parochial schools in s.93 of *The Constitution Act (1867)*.

While the case started with one community's clever move to save its seemingly doomed school, it's now about a lot more than that.

In multicultural and secular 21st century Canada, s.93 and its strict focus on Catholic and Protestant religious minorities is an anachronism. Some provinces, such as B.C., New Brunswick, Nova Scotia and P.E.I. have never had separate school systems while others, such as Quebec and Newfoundland, have done away with them. Now, only Saskatchewan, Alberta and Ontario have publicly funded religious school systems.

Justice Layh's ruling doesn't address the constitutional right of separate schools to exist. Rather, it focuses on the government's practice of providing full funding for non-Catholic students in separate schools.

"One part of his decision was based on the Supreme Court's *Saguenay* decision in 2015 that the state has to be neutral, that it can neither 'help nor hinder' religion," says University of Saskatchewan law professor Ken Norman. "In this case, Saskatchewan, by allowing a separate school with 100 per cent taxpayer funding to reach out to students who are not of that

denomination, is helping a [faith] in a way that Jewish, Hindu, Muslim and other schools are not helped.”

Saskatchewan is one of only five provinces that provides operational funding to independent religious schools. There are currently 32 of them and they receive between 50 and 80 per cent of the average student rate which amounts to \$27 million a year.

Unlike the fully funded Catholic Separate schools, independent religious schools don't receive capital funding for building acquisition and repair.

Following Justice Layh's decision, Saskatchewan Catholic School Boards Association announced its intention to appeal. The Saskatchewan government has joined the appeal, where it will litigate against the Public Section of Saskatchewan School Boards Association. Separate and public school boards in Alberta have applied for intervener status too.

Regardless of how the Saskatchewan Court of Appeal rules, the case seems destined to reach the Supreme Court.

So yeah, this is big. It's complicated, too, as in recent years non-Catholic students (some for convenience, many others because of a shared Christian faith) have flooded into the separate system. Estimates place the number as high as 10,000, which translates into 30 per cent of the separate school population.

That trend, said Justice Layh, is creating a “parallel and competing” public system that far exceeds the parameters of s.93.

While the NDP supports the government's decision to appeal the Theodore ruling to provide clarity for Saskatchewan students, it has significant concerns about the parallel strategy to invoke the Notwithstanding clause before the appeal has been heard.

“The premier, from the first news conference after the court decision was announced, was already musing about using the clause,” says NDP education critic Carla Beck. “So that really was putting the cart before the horse.”

It's a big cart too, says Norman.

“Bill 89 doesn't just speak to Theodore, it aims to insulate all government support to religious schools. S.2 of the bill says religious-affiliated schools have their own criteria for admitting students, and the state has no say. Then it shelves, for five years, two rights under the Canadian

Charter related to equality and freedom of expression, and permanently shelves three rights under the Human Rights Code related to freedom of conscience and freedom from discrimination.”

Bill 89 received first reading before the Legislature adjourned for the holidays. When the session resumes this spring, says Beck, the NDP will give the bill close scrutiny. “What’s being proposed is setting aside sections of our Charter of Rights and Freedoms. The legislation also sets aside sections of the Human Rights Code. That has to be entered into very carefully, with broad public discussion.”

## **THIN EDGE OF A CONSERVATIVE CHRISTIAN WEDGE?**

Around the time Bill 89 was introduced, you might recall, then– Saskatchewan Party leadership candidate Rob Clarke proposed using the Notwithstanding clause to circumvent women’s constitutional rights to access certain medical services.

That seemed to come out of the blue, but a few days later a Justice Department memo analyzing a proposed law that would force girls under age 18 to get parental consent before undergoing an abortion surfaced. The memo concluded that would violate Charter rights to life, liberty and security of person plus also discriminate on the basis of age and other factors.

Beck says the NDP found the timing of Clarke’s proposal troubling.

“Talk of using the Notwithstanding clause has been relatively silent for many years,” she says. “Then within a few months of the premier raising it, Rob Clarke seemed to think Saskatchewan could also use it to limit women’s reproductive rights.”

In the U.S. and Europe, we’ve seen a rise in recent years in authoritarian-style populist politicians and governments. Judging by the recent federal Conservative, United Conservative Party of Alberta and Saskatchewan Party leadership races, social conservatism seems to be on the rise in Canada, too.

For Norman, that raises concerns that if Bill 89 is ultimately passed, it could embolden other governments to see the Notwithstanding clause as a legitimate tool to advance their agendas.

“Politicians who float the idea of using the clause, as Rob Clarke did, are essentially saying ‘We don’t respect rights as defined by the courts’,” says Norman. “We, as a government, can do what we like.”

The counter argument to that notion, as noted above, is that democracy is more than just majority rule. To protect minority rights, there has to be judicial review of government laws/practices under Charter of Rights and Freedoms and related human rights legislation.

“That’s what’s in play here, and that’s why it’s so important we have a discussion about this so people realize there’s a lot at stake,” says Norman. “People need ask themselves if they like the idea that a whole handful of fundamental rights are going to be put on the shelf in Saskatchewan.” Ω

*\* While they never actually invoked it, Ralph Klein’s PC governments in Alberta threatened to use the Notwithstanding clause at least twice, both times for evil purposes: in 1998 to get out of compensating victims of forced sterilization, and in 2005 to allow marriage commissioners to refuse to marry same-sex couples.*

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## SIDEBAR

### Dollars, Sense And Education

The constitutional wrangling over the status of non-Catholic students in separate schools comes at a critical time for Saskatchewan’s education system, says NDP education critic Carla Beck: “We’ve made a point of outreach with school boards, teachers and parents’ groups in rural and urban communities, and the consensus is that our classrooms need attention.”

Becks says underfunding is a big concern.

“We have a situation where the government has taken an additional \$67 million in education property tax into the general revenue fund and has cut \$64 million from the classroom at a time when we’re seeing thousands of new students, 18 new schools, and just the general impact of inflation,” she says.

If Bill 89 is passed, it could be even harder to run Saskatchewan's education system. Bill 89 opens the door for any public school facing closure, as Theodore did, to switch to the separate system.

"The bill says the government is hands off, so whatever arrangement any school wants to make with regard to registering pupils is none of our business," says University of Saskatchewan law professor Ken Norman. "So anything like the poaching that went on with Theodore would be okay."

When Theodore's school was slated for closure in 2003 it had only 42 students.

Today, it has only 26 students, nine of whom are reportedly Catholic.

"Money doesn't fall out of trees," says Norman. "The question that deserves attention is, how do people feel about the idea that there are subsidies going to religious schools that might otherwise support the public system?"

*Gregory Beatty*