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Seismic Shift: The Notwithstanding Clause and Litigation on the Rights of Trans and Gender Diverse Youth

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Case Commented On: *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23 (CanLII)

ABlawg has been following the introduction of government restrictions aimed at trans and gender diverse youth since last fall (see [here](#) and [here](#)). The latest development comes from Saskatchewan, where on February 16, the Court of King’s Bench permitted a constitutional challenge by UR Pride to proceed despite the government having invoked the notwithstanding clause in section 33 of the [Canadian Charter of Rights and Freedoms](#).

By way of background, in August 2023 Saskatchewan introduced the “Use of Preferred First Name and Pronouns by Students” policy, which required parental consent if students under the age of 16 years sought to use gender affirming names or pronouns at school. In September 2023, UR Pride initiated a challenge to the Policy, arguing that it violated the rights of trans and gender diverse youth under section 7 (life, liberty and security of the person) and section 15 (equality rights) of the *Charter*. UR Pride obtained an interlocutory injunction against the implementation and enforcement of the Policy from Justice Michael Megaw later that month (see *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, [2023 SKKB 204 \(CanLII\)](#)). The Saskatchewan government then passed legislation, *The Education (Parents’ Bill of Rights) Amendment Act*, [SS 2023, c 46](#), which effectively incorporated and displaced the Policy. The government used section 33 of the *Charter* in s 197.4(3) of the Act to declare that the law applied notwithstanding sections 2 (freedom of expression), 7, and 15 of the *Charter*.

Following this “seismic shift” in the legal basis of the restrictions (*UR Pride 2024* at para 15), UR Pride applied to amend its pleadings. It sought to add a claim under section 12 of the *Charter* (cruel and unusual treatment), which had not been made subject to section 33 in the Act. UR Pride also applied to amend its requested remedies to seek a declaration that the Act violates sections 7, 12, and 15 of the *Charter*, and in the case of the section 12 violation, that it cannot be justified under section 1 of the *Charter* and should therefore be ruled of no force or effect under section 52 of the [Constitution Act, 1982](#). In response, the Saskatchewan government argued that the proceedings should be dismissed entirely due to its invocation of the notwithstanding clause. On February 16, 2024, Justice Megaw allowed the application to amend, with costs to the applicant.

This post will set out Justice Megaw’s reasoning with brief commentary on the significance of his decision. My aim is largely to make a summary of the 99-page decision available, as it not yet posted on CanLII.

The Decision

Introductory Comments

Justice Megaw commenced his reasons by indicating what was not at issue at this stage of the proceedings: the existence of any *Charter* violations; the appropriateness of the government's Policy, the Act, or the decision to invoke section 33; or the validity of the government's use of section 33 (at paras 21-24). He also responded at the outset to the government's argument that if the Court were to render a decision in this matter, that would amount to "judicial activism" (at para 25). Justice Megaw dismissed this as a "veiled attack" that was "unwarranted and inappropriate" (at para 32), noting that it was the proper role of the courts in a constitutional democracy to render decisions on constitutional matters and to uphold the rule of law. He noted checks on judicial power, namely that trial courts follow legal precedents and that their decisions can be reviewed and corrected by appellate courts (at paras 29-30). Moreover, in controversial litigation such as this, "it is critically important that the parties, and the public, understand the roles occupied by each of the actors in the constitutional democracy" (at para 32). This is not to say that judicial decisions cannot be critiqued, but "criticism must also be focused on legal doctrine and not doctrinal excess" (at para 33).

Moving to the test for applications to amend pleadings, Justice Megaw noted that courts must consider the purpose of the proposed amendments and whether they clarify the true issues for determination, whether they constitute proper pleadings, and whether they would result in prejudice to the other party (at paras 37-38, citations omitted).

With respect to the addition of a section 12 argument, the government argued that this claim would be prejudicial and result in injustice, that it does not disclose a reasonable cause of action, that it imputes bad faith to the government and is therefore scandalous, frivolous, or vexatious, and that it amounts to an abuse of process (at para 43). It also made a procedural argument about the proper pleadings for raising this claim, which I will not address here (see paras 45-58).

Prejudice/Injustice?

The government's prejudice/injustice argument was that if it had known UR Pride would raise a section 12 *Charter* claim, it would have included this section in its invocation of the notwithstanding clause in the Act. Justice Megaw noted that this argument "attack[ed] the *bona fides* of both the applicant and the pleading" and that it suggested "in a less than veiled way" that UR Pride was acting improperly (at para 59). This contention of bad faith was firmly rejected by the Court, which found it was not the actions of UR Pride, but of the government itself in pre-emptively (and perhaps underinclusively) invoking the notwithstanding clause that led to the application to amend (at paras 60-62). He also rejected the argument that the section 12 amendment should be denied because it is "materially different" than the other *Charter* claims raised by UR Pride and that it would require "substantially different evidence to be marshalled" (at para 63). Even if the section 12 claim would require different arguments and evidence than the section 7 and 15 claims, the Court noted that the litigation was in its infancy, such that no prejudice or inordinate delay would flow from the amendments (at paras 69-70). Justice Megaw was also puzzled by the government's stance that the section 12 argument could be raised in a

different action by different parties, finding that this recognition “identifies quite clearly the absence of injustice or prejudice” to the government (at para 72).

Justice Megaw noted that while he understood the Act could be amended to add section 12 of the *Charter* to the scope of the notwithstanding clause, this was a matter for the legislature, and it was not the role of the Court to make any assumptions about this possibility (at paras 74-78). He rejected the government’s argument that the order to allow the amendment “must” be stayed or that the litigation should be adjourned to allow the government to consider its options, again relying on the separation of powers between courts and legislatures as well as the rule of law (at paras 79-82).

No Reasonable Cause of Action?

The next issue was if the proposed amendments failed to disclose a reasonable cause of action, which was to be assessed according to whether it was “plain and obvious” that the claim would necessarily fail – a “low bar” (at paras 84-85). The government’s first argument here was that the Act did not engage “treatment” by state actors as required by section 12 (at para 89). UR Pride’s response was that the Act would result in educators being forced to misgender or out trans and gender diverse youth under 16, which does amount to “treatment” by state actors. Justice Megaw found that the interpretation of this requirement was a live issue that was open for consideration at the hearing on the merits (at para 94).

The government’s second argument on this issue was that the parental consent requirement could not be seen as “cruel or unusual” treatment because it was not “grossly disproportionate” or “incompatible with human dignity” (at para 95). In response, the Court cited the Supreme Court of Canada’s recognition that trans and gender diverse persons are members of a marginalized group in Canadian society that has experienced unique disadvantage (at para 96, citing *Hansman v Neufeld*, [2023 SCC 14 \(CanLII\)](#) at paras 84-87). It also cited Supreme Court case law interpreting section 12’s requirement of “cruel and unusual treatment” (at paras 97-98). While noting that UR Pride’s section 12 argument may be difficult, novel, or a “steep climb”, Justice Megaw ultimately held that this was a matter for determination based on the evidence led by the parties, rather than a claim that would necessarily fail (at para 103).

Scandalous, Frivolous, or Vexatious?

On the issue of whether the proposed amendments were scandalous, frivolous, or vexatious, the government pointed to language in UR Pride’s amendment application that it argued was “solely designed to annoy, embarrass, and harass” the government (at para 107). The impugned wording included allegations that the government’s passage of the law was “brutal” and “devastating” and that it was seeking to “escape legal accountability and liability” (at para 106). Here, Justice Megaw found that the language, “while direct and perhaps ... less than delicate”, was not vexatious, scandalous, or inappropriate (at para 109). This propriety of UR Pride’s position was again a matter to be decided in light of the evidence, arguments, and case law tendered at the hearing on the merits.

Abuse of Process?

On the final issue regarding the section 12 amendment, the government alleged that UR Pride was abusing process by engaging in “litigation by installment”, attempting to get around its use of the notwithstanding clause, and introducing an “intense delay” with its new section 12 claim (at para 112). The Court rejected the “litigation by installment” allegation, as the litigation is in its early stages and – unlike the precedents relied on by the government – there has been no resolution of any issues on the merits (at para 116). Justice Megaw also disagreed with any inference that the government’s use of the notwithstanding clause created an end to the proceedings. While its invocation of section 33 “will most certainly affect the litigation between the parties”, the Court held that “only a judicial pronouncement” following a hearing on the merits “is of any moment” with respect to the implications of the notwithstanding clause in this case (at para 117). Justice Megaw repeated his earlier point that the parties and the Court had to take the legislation as it was at the time of the application, such that there was no “impropriety in a litigant seeking to advance arguments seemingly not covered by the legislation in question” (at para 118). As for the argument of delay, the Court noted again that the action was in its early stages with no evidence of delay by the applicant (at paras 120-121).

There was no abuse of process in the application to amend the pleadings to add a section 12 claim.

Effect of the Notwithstanding Clause

The next issue was whether the Court could still hear the section 7 and 15 claims that had been made subject to the notwithstanding clause, or alternatively, whether the government had the “sole prerogative to decide to do away with any and all forms of judicial oversight” (at para 124). Justice Megaw also had to decide if this application was the appropriate time to decide this question, or if it should be postponed to the hearing on the merits. Considering the relevant rules of court, he held that this “threshold issue” should be ruled on at this stage so that the parties could properly plan for the ultimate litigation and to reduce its complexity (at para 127).

Justice Megaw relied on *Hak c Procureur général du Québec*, [2021 QCCS 1466 \(CanLII\)](#) for the proposition that a court continues to have jurisdiction in the face of the government’s use of section 33, but then “determines not to exercise its discretion to grant the declaratory relief requested” (at para 129). *Hak* concerns Quebec’s invocation of the notwithstanding clause in the context of a law banning public sector employees from wearing religious symbols, and Justice Megaw noted that the Court “conducted a full hearing into the constitutionality of the legislation”, while ultimately declining to grant a declaration as to the law’s invalidity (at para 134; see also para 138). The other cases relied on by the government to deny the Court’s jurisdiction in the face of the notwithstanding clause were distinguished, on the basis that their pronouncements were either obiter (see the discussion of *R v Horner*, [2013 SKQB 340 \(CanLII\)](#) at paras 130-132) or not on point (see the discussion of *Ford v Quebec (Attorney General)*, [1988 CanLII 19 \(SCC\)](#), [1988] 2 SCR 712 at paras 139-140).

Justice Megaw rejected the government’s argument that because its invocation of section 33 was valid, it could not be questioned by the Court. He distinguished between the formal validity of an

invocation of the notwithstanding clause, which was at issue in *Ford* and not in the case at hand, and the substantive ousting of judicial review, which does not logically follow from a valid use of section 33 (at para 141). He also gave little weight to the government's reliance on the intent of the drafters of the *Charter* and section 33 in particular, stating that this evidence was of historical interest but not interpretive significance (at para 142, citing *Re BC Motor Vehicle Act*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 SCR 486).

Justice Megaw did note that *Hak* was not a binding decision on his Court, as well as acknowledging the academic debate about the impact of the notwithstanding clause on judicial review (at paras 144-146). He therefore conducted his own analysis of section 33's impact and concluded that he retained jurisdiction to hear UR Pride's claim on its merits. This conclusion was based in part on the wording of section 33 and its lack of explicit limitation of courts' powers to review the constitutionality of legislation (at paras 149-151). The notwithstanding clause prevents a court from invalidating or limiting the operation of legislation, thus affirming parliamentary supremacy, but it does not follow that "the judicial arm is to be rendered extraneous and powerless" (at para 151). Justice Megaw also relied on several Supreme Court of Canada decisions and academic commentary recognizing the fundamental principle of access to the courts and judicial review of government actions, supporting the rule of law (at paras 152-157). Lastly, he cited authorities establishing that superior courts have inherent jurisdiction to render declaratory judgments even if they have no legal effect (at paras 158-165). Such declarations can still be of utility in providing constitutional analysis and judicial oversight of government actions, promoting citizens' participation in our democracy (at para 165).

In conclusion, the Court found that it retained jurisdiction to assess the constitutionality of *The Education (Parents' Bill of Rights) Amendment Act* and that a decision on whether to grant a declaration would best be made after hearing all of the evidence and arguments (at paras 167-169). Leave was granted to UR Pride to amend its pleadings accordingly.

Commentary

The notwithstanding clause has not been invoked very often by governments since the *Charter* came into effect in 1982, but its use is increasing. Traditionally, courts reserved their review for whether section 33 had been validly implemented in procedural terms (see e.g. *Ford*, *supra*). However, more recent use of section 33 to allow laws to apply notwithstanding the rights of *Charter*-protected minorities has itself resulted in a "seismic shift" that requires courts to reconsider their role. This issue is now before the Quebec Court of Appeal in *Hak*, and many observers expect that case to be heard by the Supreme Court eventually.

It is significant that Justice Megaw centres his reasons in the respective roles of the court and legislature, maintaining scope for judicial review of the government's use of section 33 in a constitutional democracy. But this is also a case about the government's non-use of section 33 with respect to section 12 of the *Charter*. Although it is not mentioned by the Court, the government also subjected section 2 of the *Charter* to the notwithstanding clause in the Act, even though UR Pride's original claim did not rely on a freedom of gender expression argument. This approach to the notwithstanding clause suggests that the government contemplated other

litigation based on other *Charter* arguments and ultimately undercuts its attempts to block the addition of a section 12 claim as something it should not have anticipated.

Alberta recently announced similar name and pronoun policies, along with restrictions to the availability of gender-affirming medical treatment and sports participation for trans women. The constitutionality of these policies was the subject of an [open letter by law professors and legal researchers to Premier Danielle Smith](#) that was recently posted on ABlawg. It remains to be seen whether the government of Alberta will pre-emptively invoke the notwithstanding clause when those policies are formalized in law, as Saskatchewan did. The open letter provided reasons why Alberta should not invoke section 33, but even if it does, Justice Megaw's decision signals an important role for the courts in reviewing those laws for their compliance with *Charter* rights.

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