

Court of Appeal upholds Québec's *Act respecting the laicity of the State*

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Québec's *Act respecting the laicity of the State*, sometimes referred to as Bill 21, prohibits the display of religious symbols by certain public employees. In *World Sikh Organization of Canada v. Attorney General of Québec*, Québec's Court of Appeal upheld the legislation, carefully avoiding any commentary on its politics. In a 290-page decision, the Court upheld virtually all aspects of the Act, leaning heavily on the legislature's use of section 33 of the *Charter*—the “notwithstanding clause”—which enables legislatures to override certain *Charter* rights and freedoms, including freedom of religion.

What you need to know

Québec's *Act respecting the laicity of the State* prohibits some public employees, including police officers and teachers, from wearing religious symbols when exercising their public roles, including clothing, jewelry or headwear that is worn in connection with a religious conviction or is reasonably considered as referring to a religious affiliation. The legislation contains a clause, invoking section 33 of the *Charter*, that the Act shall operate “notwithstanding” various *Charter* rights.

In a recent decision, the Court of Appeal upheld the Act. Its decision is lengthy and covers numerous complex and novel topics. The most jurisprudentially impactful aspects of its decision—and the ones that may attract the attention of the Supreme Court of Canada on appeal—include the following:

- The Court of Appeal found that section 33 of the *Charter*—which enables legislatures to override certain *Charter* rights and freedoms, including equality rights, and the freedom of expression and religion—entirely immunized the statute from review on the basis of relevant *Charter* rights. It affirmed that the only basis for the courts to review the use of section 33 would be to ensure that it meets the formal requirements for invocation. It affirmed that legislatures may use the notwithstanding clause in a purely preventative or preemptive nature.
- The Court of Appeal's decision continues a recent judicial trend to minimize the legal effect of unwritten constitutional principles, finding that those principles (e.g., the rule of law) cannot invalidate legislation.
- Section 28 of the *Charter*, which provides that the rights and freedoms contained in the *Charter* are guaranteed equally to male and female persons, confers no independent rights. Rather, it is an interpretative principle for the other rights in the *Charter*.

- The Court of Appeal invalidated one narrow aspect of the Act, which applied secularism rules to members of Québec's National Assembly. It concluded that the Act effectively prohibited those whose religious beliefs compel them to wear a religious symbol that covers their face to run for office in violation of section 3 of the *Charter*, which protects democratic rights and is notably excluded from section 33's reach.

Québec's *Act respecting the laicity of the State* and the religious symbols ban

In June 2019, Québec's National Assembly passed Bill 21, *An Act respecting the laicity of the State*. The Act prohibits certain public employees—including elected officials, the Minister of Justice, members of administrative tribunals, lawyers representing the state, police officers and teachers—from wearing religious symbols when exercising their state functions, including clothing, jewelry or headwear that is worn in connection with a religious conviction or is reasonably considered as referring to a religious affiliation. This would include, for example, a Christian wearing a cross, a Jewish man wearing a kippa or a Muslim woman wearing a headscarf or hijab. It also requires certain public service employees to deliver public services with their faces uncovered.

The Act expressly invokes section 33 of the *Charter*, which permits legislatures to override certain *Charter* rights and freedoms, including freedom of expression (section 2(b)), freedom of religion (section 2(a)) and equality rights (section 15).

Several individuals and public interest groups launched a legal attack on Bill 21, resulting in the Court of Appeal's decision.

The Court of Appeal's decision: the Act survives

The Québec Court of Appeal considered—and largely rejected—attacks on the Act based on a wide variety of constitutional and other arguments, including the division of powers under section 91 and 92 of the *Constitution Act, 1867*; the effect of certain pre-confederation statutes; Canada's constitutional architecture and unwritten constitutional principles; and breaches of section 28 (regarding equal application of *Charter* protections to persons of each sex) and section 3 (which guarantees democratic rights).

While one could design an entire law school course around this decision alone, we have focused below on the most jurisprudentially impactful aspects of this decision from the perspective of Canadian constitutional law that may attract the attention of the Supreme Court of Canada's judges on appeal.

Section 33: the override power creates absolute immunity from judicial review

Section 33 empowers legislatures to enact legislation that applies “notwithstanding” certain rights and freedoms provided by the *Charter*. Its presence in the *Charter* reflects a federal-provincial compromise between those who wanted courts to have the last word over certain fundamental rights and those who believed that the last word should reside with elected representatives. The override only applies to certain rights in the *Charter* (notably, it does not apply to the democratic rights under section 3), and it is time-limited: it must be renewed every five years, which coincides with the maximum term of legislative bodies. The use of this override power has always been politically controversial.

But section 33 is becoming more popular. Ontario has invoked it three times, all since Premier Ford was elected in 2018. Saskatchewan has recently invoked it over legislation requiring parental consent for a child to use their preferred gender-related name or pronoun. Courts in those provinces have taken [differing approaches](#) on the effect of the override. A [Saskatchewan court](#) recently concluded that despite section 33, it could issue a declaration that a statute in question violates *Charter* rights (although recognizing that the rights violation has no legal effect while the legislation's notwithstanding clause was in force).

This decision lands on the other end of the spectrum. The Court of Appeal held that it was bound by the Supreme Court of Canada's decision in [Ford v. Québec \(Attorney General\)](#), a 1988 Supreme Court decision about Québec's French language requirements. In *Ford*, the Supreme Court held that judicial oversight of the use of section 33 is

limited to ensuring that the formal requirements for its enactment were satisfied. The appellants in the cases challenging the constitutionality of the Act urged the Court of Appeal to reconsider *Ford*, but it declined to do so. Legislatures need only invoke section 33: no explanation or policy justification is required. Nor does a legislature need to wait for a court to rule on a statute's constitutionality before invoking section 33. Rather, it can be invoked preemptively. According to the Court of Appeal, section 33 is the beginning and end of the *Charter* analysis.

The limited power of unwritten constitutional principles

Some of the Act's challengers said that section 33 violated certain unwritten constitutional principles, like the rule of law and access to judicial review. The Court of Appeal followed recent [Supreme Court authority](#) which diminished the legal significance of these unwritten principles in favour of constitutional text. However, that case was a sharply divided 5-4 decision, with three of those judges no longer on the Court. This leaves some speculation as to whether the new coalition of judges on the Supreme Court may tilt the balance in the other direction, although we see little in the new composition of the Supreme Court that makes this outcome any more likely.

Section 28: Equal application of rights provision is not a standalone right

Section 28 of the *Charter* states that, "[n]otwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons". The appellants argued that since section 28 applies notwithstanding "anything" in the *Charter*—including section 33—if the Act impaired this guarantee, it would be invalid. The crux of the argument was that Muslim women would be disproportionately affected by the Act's ban on wearing religious symbols and on the requirement to provide public services with their faces uncovered. They argued that using section 33 in a manner that impacts women more than men is an unconstitutional use of the provision.

The Court of Appeal rejected this argument. In a detailed treatment of this under-considered *Charter* provision, the Court of Appeal found that section 28 conferred no independent rights. Instead, section 28 exists only within the other rights and freedoms, "as if it were a paragraph or subsection added to each of them". As a result, if those rights and freedoms do not apply—for example, through the invocation of section 33—then section 28 does not apply either.

Section 3: democratic rights were infringed

Section 33 does not permit legislatures to override all rights conferred under the *Charter*. This includes section 3, which gives citizens the right to vote and to participate in the electoral process, including running for office. Excluding section 3 makes sense: if citizens do not want their government to override civil liberties through section 33, the ballot box is perhaps the only solution in the absence of judicial review. But if governments could restrict those democratic rights—and insulate those restrictions through section 33—they could erase that recourse.

The Court of Appeal finds that the Act violates section 3 by effectively prohibiting citizens with sincerely held religious beliefs that require wearing a religious symbol, like a niqab or a burqa, from exercising the functions of a member of the National Assembly.

To discuss these issues, please contact the author(s).

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