

**Source name**

The Globe and Mail

**Source type**

Press • Newspapers

**Periodicity**

Daily

**Geographical coverage**

National

**Origin**

Toronto, Ontario, Canada

# Ontario to use notwithstanding clause to override election ruling

By LAURA STONE, JEFF GRAY

**P**remier Doug Ford's government is calling back the Ontario Legislature to invoke the Constitution's notwithstanding clause and override a recent court ruling that tossed out new rules limiting third-party political advertising before elections.

The rarely used clause allows the federal, provincial and territorial governments to void parts of the Charter of Rights and Freedoms to pursue their legislative agendas.

The sudden decision to recall the legislature less than a week after it rose for the summer was made in response to an Ontario Superior Court judge's ruling Tuesday.

The judgment deemed the Ford government's recent changes to the province's election rules, which capped thirdparty political ad spending at \$600,000 for a full year before the official campaign period, an unconstitutional limit on free expression.

The ruling left unions, corporations or other interest groups that are not political parties with no spending limits on advertising until the official, 28-day campaign period begins for the next Ontario vote, which is set for June 2, 2022.

A \$100,000 spending limit for such groups during the campaign itself remains in place.

Progressive Conservative House Leader Paul Calandra said Wednesday the decision to introduce a new version of the bill that will include the notwithstanding clause is intended to protect Ontario elections from political influence. The legislature will return on Thursday, but will need to sit for several days to pass the legislation.

"The court's decision earlier this week means a few wealthy elites, corporations and specialinterest groups operating through American-style super PACs would be allowed to interfere in and control our elections with unlimited money, with no rules, no disclosure and with no accountability," Mr. Calandra said in a statement.

Ontario's opposition parties called the move an attack on democracy and free speech.

Opposition NDP Leader Andrea Horwath said the government was trying to "crush its critics" with an abuse of power. She dismissed Mr. Calandra's rationale as hypocritical, adding that the Progressive Conservatives had also doubled the maximum allowable political donation for individuals to \$3,300 a year and regularly hold \$1,000-a-person online fundraisers.

She said other provinces had figured out ways to impose reasonable limits on third-party election spending without



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suspending Charter rights. And she accused Mr. Ford of focusing on his re-election while the province is preoccupied with the pandemic, the recent fatal attack on a Muslim family in London, Ont., and the discovery of unmarked graves at a B.C. residential school.

"They are using the notwithstanding clause in our Constitution to literally shut people's voices down," Ms. Horwath said.

Ontario Liberal Leader Steven Del Duca called Mr. Ford's move "an assault on democracy and our courts."

It's not the first time the Ford government has attempted to use the notwithstanding clause.

In 2018, when a judge ruled Mr. Ford's mid-election changes to Toronto's city council were unconstitutional, the Premier introduced a new bill invoking the override clause.

But an appeal court later sided with the government and granted a stay, rendering the bill moot.

The issue of Mr. Ford's intervention in Toronto's election is now before the Supreme Court of Canada.

Section 33 of the Charter of Rights and Freedoms, commonly referred to as the notwithstanding clause, has been used most frequently by Quebec, including in its new French-language bill and its law prohibiting some public employees from wearing religious symbols or garments.

New Brunswick withdrew its proposed use of the clause last year from a bill on mandatory vaccinations for schoolchildren.

But until the Ford government was elected, Ontario had never attempted to use it.

University of Toronto law professor Lorraine Weinrib said Mr. Ford's latest invoking of the clause goes against the intentions of the drafters of the Charter. She said it was to be used in extraordinary circumstances only - and its use is "particularly outrageous" in rewriting election rules.

"Many people are saying, it's just a power, it's a normal power of the government's," she said.

"But it was intended to be exceptional. The Charter says it is exceptional."

Carissima Mathen, a constitutional law professor at the University of Ottawa, said there are no hard-and-fast rules on when a federal or provincial government can invoke the notwithstanding clause. She said it's fair to note the Ford government has suffered other court losses and not resorted to Section 33.

"The concern is that we are entering a period where the use is going to become much more routine, and normalized, that will sort of detract from the extraordinary nature of this choice," she said.

When Mr. Ford previously moved to use the clause in 2018, three prime architects of the Charter - former Saskatchewan premier and attorney-general Roy Romanow, former prime minister and federal justice minister Jean Chrétien, and former Ontario attorney-general and chief justice Roy McMurtry - condemned his action and urged his cabinet to stand up to him, saying the clause was meant as a last resort and "was not designed to be used by governments as a convenience or as

a means to circumvent proper process."

In this week's court ruling, a judge sided with left-leaning Working Families, a union-sponsored third-party political advertiser that has been prominent in recent elections. The group had challenged the 12-month restriction. (The same group had already challenged the previous government's six-month restricted period.)

In his decision, Justice Ed Morgan said the government had presented no evidence for why its 12-month restricted period - longer than in other jurisdictions - was a necessary infringement on free expression. Critics had accused the government of trying to muzzle unions and other groups expected to target it before next year's vote.

Paul Cavalluzzo, a lawyer for Working Families, called the government's move shocking, saying it could have appealed the ruling or brought in new legislation to comply with the Charter.

"There is no other word for this government than despotic."