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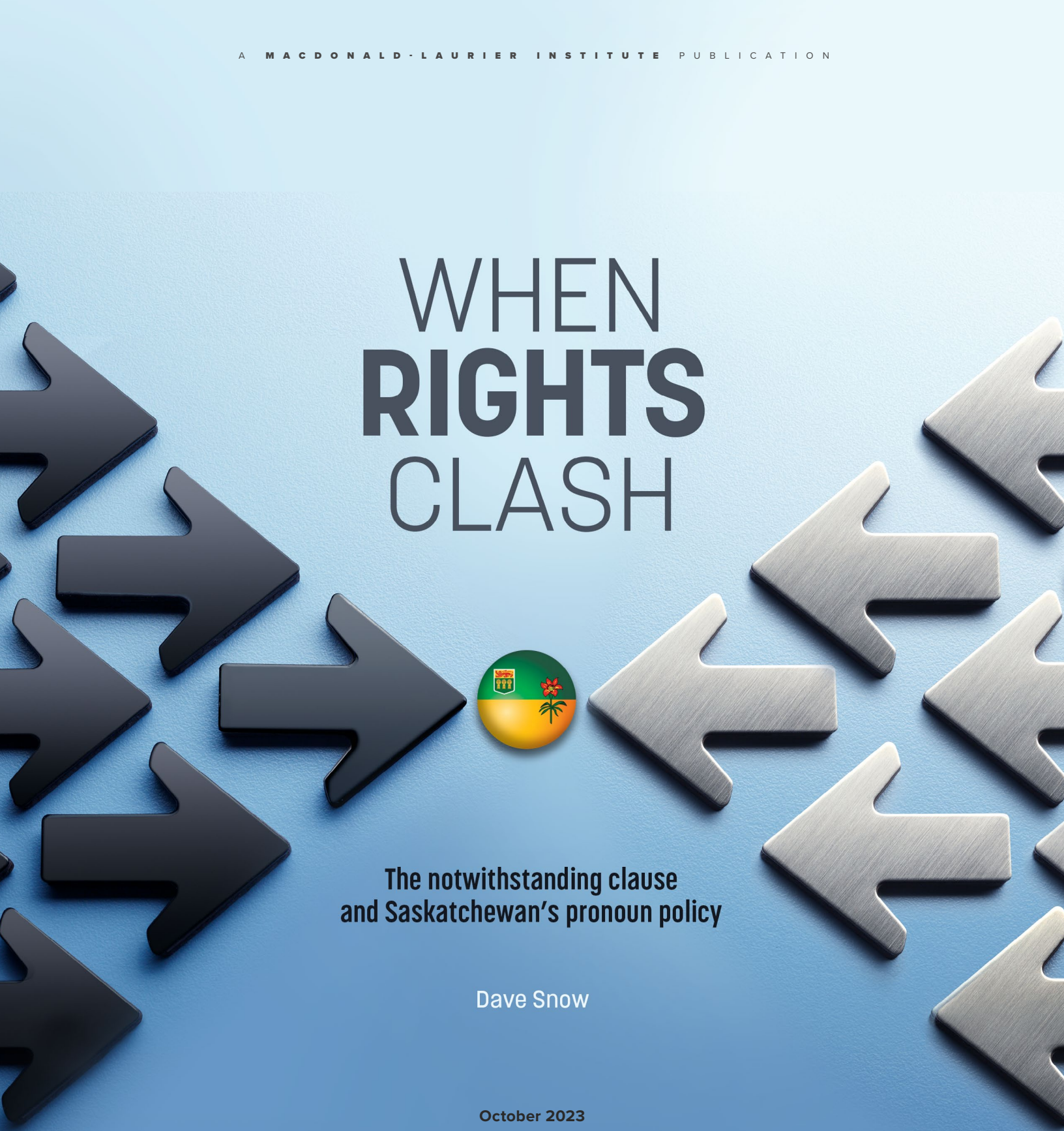
WHEN RIGHTS CLASH



The notwithstanding clause and Saskatchewan's pronoun policy

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Saskatchewan Premier Scott Moe recently announced that he will introduce legislation invoking Canada's notwithstanding clause (NWC) to require parental consent when schools authorize name and gender pronoun changes for students under age 16. In this paper, I argue that the conflict over parental consent and children's pronouns is precisely the type of issue for which the NWC was envisioned: reasonable disagreement with a judicial decision, in an area of provincial jurisdiction, over a "clash of rights" not directly enumerated in the text of the *Charter*. In this case, the core dispute – whether parents should be informed and, if so, provide consent when students change their names or gender pronouns at school – implicates foundational questions of parenthood, identity, privacy, and consent.

In the context of myriad rights claims and counterclaims, one might think the jurisprudence on the issue is settled. Indeed, Premier Moe's decision to invoke the NWC surely indicates that he thinks it highly likely that his policy will not survive a *Charter* challenge. However, the high likelihood of judicial invalidation does not mean that the policy is a violation of a longstanding and internationally recognized human rights. Whatever policy a government decides in this area, it will involve a limitation on someone's rights. Children's rights to privacy are important, as are the rights of parents to be informed of their children's choices. Reasonable people disagree, and there are myriad good-faith reasons to support or oppose the Saskatchewan government's policy.

The NWC was included in the *Charter* for situations like the gender pronouns issue: to protect rights beyond those enumerated in *Charter* case law and to disagree with judicial interpretations of those rights, especially in areas of provincial jurisdiction. Far from undermining the *Charter*, the NWC is a crucial part of it.

For good or ill, our democratically elected representatives are often constrained in making policy on issues over which there is a wide range of reasonable disagreement – including among Supreme Court justices themselves – such as abortion, hate speech, prisoner voting, and the right to strike. The NWC was put in the *Charter* precisely to prevent legislatures from becoming so constrained. It empowers legislatures to take a side in reasonable disagreements, but it ensures that those disagreements will continue

over time. Unlike a judicial decision, the NWC is likely to promote and extend debate in the legislature rather than prevent it. The clause's five-year expiry ensures that governments that invoke it must face voters before doing so again.

As part of the *Charter* itself, the NWC was designed precisely for policy disputes like the debate over parental consent and pronouns in schools – those with multiple competing interests, no easy answers, and rights claims from all sides. Regardless of the final policy outcome, one thing is certain: the NWC will not be the final word on this issue – which is just what its framers intended. **MLI**

Le premier ministre de la Saskatchewan, Scott Moe, *a récemment annoncé qu'il présenterait un projet de loi invoquant la clause « nonobstant » pour exiger, de la part des établissements scolaires, d'obtenir l'accord des parents en ce qui concerne tout changement du nom et du pronom sexué de leurs enfants de moins de 16 ans à l'école. Dans le présent document, je soutiens que le conflit au sujet du consentement parental et du pronom des enfants est précisément le type d'enjeu pour lequel on a prévu cette clause : un désaccord raisonnable avec une décision judiciaire, dans un domaine de compétence provinciale, sur un « conflit de droits » qui n'est pas directement recensé dans le texte de la* Charte*. En l'espèce, le litige principal – à savoir si les parents doivent être informés et, le cas échéant, donner leur consentement lorsque les élèves changent de nom ou de pronom sexué à l'école – soulève des questions fondamentales sur la parentalité, l'identité, la protection de la vie privée et le consentement.*

Étant donné les multiples revendications et contre-revendications, on serait tenté de penser que la jurisprudence sur la question est établie. D'ailleurs, la décision du premier ministre Moe d'invoquer la clause nonobstant indique certainement qu'il estime très probable que sa politique ne survive pas à une contestation fondée sur la Charte*. Toutefois, la forte probabilité d'une invalidation judiciaire ne signifie pas que la politique constitue une violation d'un droit humain reconnu de longue date à l'échelle internationale. Quelle que soit la politique de tout gouvernement dans ce domaine, elle imposera des restrictions sur les droits d'une personne. Le droit des enfants à la vie privée est important, tout comme le droit des parents à être informés des choix de leurs enfants. Des gens raisonnables désapprouvent, et il y a une myriade de bonnes raisons pour soutenir la politique du gouvernement de la Saskatchewan ou s'y opposer.*

La Charte *comprend une clause nonobstant précisément pour des situations comme celle des pronoms sexués : afin de protéger les droits au-delà de ceux recensés dans la jurisprudence relative à la* Charte *et pouvoir s'opposer aux interprétations judiciaires de ces droits, en particulier dans les domaines de compétence provinciale. Loin de miner la* Charte*, la clause nonobstant en est un élément essentiel.*

Pour le meilleur ou pour le pire, nos représentants démocratiquement élus sont souvent contraints d'élaborer des politiques sur des questions au sujet desquelles il

existe un large éventail de désaccords raisonnables – y compris parmi les juges de la Cour suprême eux-mêmes – comme l'avortement, les discours haineux, le droit de vote des prisonniers et le droit de grève. La clause nonobstant a été intégrée à la Charte *précisément pour éviter que les législatures ne deviennent étriquées. Elle permet aux législateurs de prendre parti en présence de désaccords raisonnables, mais fait en sorte que ces désaccords continuent d'évoluer au fil du temps. Contrairement à une décision judiciaire, la clause nonobstant est susceptible de promouvoir et d'étendre le débat au sein du corps législatif plutôt que de l'étouffer. Le délai de cinq ans dévolu à cette clause garantit que les gouvernements qui l'invoquent feront face aux électeurs avant de le faire à nouveau.*

En tant qu'élément de la Charte *elle-même, la clause nonobstant a été conçue précisément pour régler les conflits en matière de politiques tels que le débat sur le consentement parental et les pronoms à l'école – ceux qui révèlent de multiples intérêts concurrents, pas de réponses faciles et des revendications de droits de toutes parts. Quelle que soit l'issue politique finale, une chose est sûre : la clause nonobstant, ce n'est pas le mot de la fin, ce qui était précisément l'intention de ses auteurs.* **MLI**

Introduction

Over the last five years, Canada's notwithstanding clause (NWC) has never been far from the headlines. After decades of dormancy, the clause was invoked in seven bills across four provinces between 2017 and 2022, five of which have passed into law. Recently, Saskatchewan Premier Scott Moe announced he will introduce legislation invoking the NWC to require parental consent when schools authorize name and gender pronoun changes for students under the age of 16 (Alphonso 2023).

Premier Moe's announcement came after the Saskatchewan Court of King's Bench issued an injunction pausing the government's policy, pending a full hearing over whether it violates the *Canadian Charter of Rights and Freedoms*. However, Premier Moe might not be the only first minister to invoke the clause on this issue: New Brunswick Premier Blaine Higgs has refused to rule out using the NWC to protect a similar policy in his province, while Ontario Education Minister Stephen Lecce has indicated his own support for parental consent policies. Provincial policy interest over parental consent and pronoun changes has come after news reports of Canadian education boards, education ministries, and teachers keeping students' social transitioning a secret from parents of children as young as 11 (Blackwell 2023). Meanwhile, public opinion polls show widespread support for requiring parental *notification* when children change their pronouns at school, with the public split on whether parental *consent* should also be required (Angus Reid Institute 2023).

In this paper, I situate the controversy over Saskatchewan's pronoun policy within the broader historical debate over the use of the NWC. I do not take a position on the merits of Saskatchewan's policy, though I do take the position that both proponents and opponents of the policy are approaching the issue in good faith. In this vein, I argue that the conflict over parental consent and children's

pronouns is precisely the type of issue for which the NWC was envisioned: reasonable disagreement with a judicial decision, in an area of provincial jurisdiction, over a "clash of rights" not directly enumerated in the text of the *Charter*.

The NWC and the *Charter*

To understand the rationale behind the NWC, it is first important to understand that Canada's 1982 *Charter* did not, for the most part, "give" Canadians new rights. Canadians' most fundamental rights and freedoms had long been protected through common law and parliamentary institutions. Canada had an admirable record of rights protection prior to the *Charter*.

Even today, constitutional democracies with strong human rights records like Australia, New Zealand, and the United Kingdom lack a constitutional bill of rights which empowers the judicial branch to strike down democratically enacted laws. (In the UK and New Zealand, courts can flag that a law violates rights, but it is up to Parliament to change it; see Harding 2022). Drawing from the American experience, the framers of the *Charter* knew that it would lead to an enhanced judicial role in rights protection that would extend to many areas of social and political life. The NWC was, accordingly, seen as a mechanism to enable legislatures to overrule the judiciary so as to maintain the tradition of parliamentary rights protection.

Far from undermining the *Charter*, the NWC is a crucial part of it. Section 33(1) permits Parliament and provincial legislatures to "expressly declare in an Act of Parliament or of the legislature... that the Act or a provision thereof shall operate notwithstanding" the *Charter's* fundamental freedoms (section 2), legal rights (sections 7-14) and equality rights (section 15). Sections 33(3) and 33(4) provide that every law invoking the clause "shall cease to have effect five years after it comes into force," but that such laws can be re-enacted. The NWC is thus a legislative instrument rather than an executive one: a bill invoking the clause must pass through Parliament or a provincial legislature and receive Royal Assent before coming into effect.

The idea of a NWC was proposed during the constitutional conferences over Patriation from 1979-1981, with Alberta Premier Peter Lougheed (PC) and Saskatchewan Premier Allan Blakeney (NDP) as its strongest proponents. As Dwight Newman has summarized, Lougheed and Blakeney saw the clause as existing for two main reasons: to protect "rights beyond those enumerated in the *Charter* when *Charter* case law interferes with those rights" and "to engage with and disagree with judicial interpretations of rights" (Newman 2019, 219). It was always anticipated that the clause would be used more frequently by provincial legislatures than the federal Parliament, as it is the only true counterweight to the centralizing tendencies of the *Charter* (Sigalet 2022).

> *"The NWC has often been mischaracterized in Canadian media, particularly with respect to the number of times it has been invoked.*

The NWC has often been mischaracterized in Canadian media, particularly with respect to the number of times it has been invoked (see Nicolaides and Snow 2021). Although never invoked by the federal Parliament, the NWC has been used many times by provincial legislatures. In 1982, to protest the *Constitution Act, 1982,* Québec's National Assembly repealed and replaced every provincial statute with an identical law invoking the NWC; Québec subsequently applied the clause to every new bill from 1982 to 1985 as part of what became known as its "omnibus" use of the clause. In addition to Québec's omnibus use, the NWC has been inserted into 22 unique statutes in Canadian history, 16 of which were also in Québec. The clause has, in fact, seen a resurgence in recent years; it has been invoked in seven bills since 2017, five of which became law. That number will rise to eight bills and six laws if Saskatchewan follows through on its plans to introduce a pronoun bill invoking the NWC and subsequently passes that bill into law.

Rights talk and pronouns

It is not surprising that the NWC is being deployed for a law addressing the contentious issue of gender identity in schools. The core dispute – whether parents should be informed and, if so, provide consent when students change their names or gender pronouns at school – implicates foundational questions of parenthood, identity, privacy, and consent. But above all, the matter implicates *rights*. The issue is a quintessential example of what Sniderman et al. (1996) referred to as the "clash of rights" so common to post-*Charter* Canada, as it pits parental rights on the one hand against the rights of children to privacy and autonomy on the other.

Since the *Charter* became part of the Canadian Constitution in 1982, scholars have raised concerns that it has led to a growth of "rights talk" – a tendency to cloak one's policy preferences in the language of rights, frame an issue using uncompromising absolutist rhetoric, and paint the other side as evil (Glendon 1991; Macfarlane 2008; Morton and Knopff 2000: 156; Russell 1983). The Canadian tendency towards rights talk is facilitated not only by the rights-based framing that has infused our political culture, but also by the winner-take-all venue through which such claims are decided: the courtroom. Politics may be the art of compromise, but as Rainer Knopff once wrote, "courts don't make good compromises" (Knopff 2001).

On the issue of parental consent and school pronouns, we see rights talk on full display. On one side are those fighting for parental rights. Premier Moe explicitly invoked parental rights in his NWC announcement (Warick 2023), as have parents' groups advocating for these policies. Among opponents of the policy, the language of rights is even more pervasive, encompassing LGBTQ rights (Ling 2023), privacy rights (Hunter 2023), the rights of children or "non-voting youth" (Broda 2023; Salvino and Des Rosiers 2023), international human rights agreements (Benchetrit 2023), and what Education Professor Jen Gilbert refers to the rights of LGBTQ parents to have their "child educated in a school that affirms [their] family" or the "rights of the child to have access to a curriculum that represents all sorts of possibilities for their future" (quoted is Mosleh 2023). In an archetypical example of "rights talk," the Canadian Civil Liberties Association (2023) has called the use of the NWC "the nuclear option" and claimed it was being used "to destroy the rights of students."

Of course, rights can be framed as "positive" affirmations ("we have these rights") and "negative" denials ("those other rights do not exist"). The latter formulation has been especially prominent from opponents of Saskatchewan's pronoun policy, many of whom have taken to putting scare quotes around "parental rights" while using no such quotes to describe other rights (see Macfarlane 2023; Salvino and Des Rosiers 2023). In recent weeks the phrase "so-called parental rights" had been used by an author in the *Globe and Mail* (DeLeskie 2023), a journalist with the Canadian Press (Passafiume 2023), and two professors in the academic publication *The Conversation* (Mason and Hamilton 2023). Political scientist Emmett Macfarlane claims "the entire idea of absolute parents' rights is a mirage, propagated by the type of 'rights talk' the premiers are engaged in" – before subsequently engaging in a similar form of rights talk by calling Saskatchewan's policy "blatantly unconstitutional" and contrary to the "equality rights and inherent dignity of any child's self expression" (Macfarlane 2023).

In the context of myriad rights claims and counterclaims, one might think the jurisprudence on the issue is settled and that the rights in question have been set in stone for decades. However, the truth is far more complicated.

What does the Charter say? What have the courts said?

In its submission at the Court of King's Bench, the UR Pride Centre for Sexuality and Gender Diversity argued that Saskatchewan's policy (officially entitled "Use of Preferred First Name and Pronouns by Students") unjustifiably infringes sections 7 (life, liberty, and security of the person) and 15 (equality) of the *Charter*. Justice Megaw's injunction did not actually make a pronouncement on the *Charter* questions in play; its purpose was to prevent, for the time being, "the potentially irreparable harm and mental health difficulty" for students "unable to find expression for their gender identity" (*UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan* 2023, para. 132). The relevant *Charter* implications will be adjudicated after a full hearing, though if a law

invoking the NWC is passed, the current policy will stand irrespective of that decision.

As it stands, the *Charter* contains no textual basis, and the Supreme Court has no obvious jurisprudence, that would apply directly to either parental rights or the rights of LGBTQ children to have their pronouns recognized at school without parental consent. Parental rights do have a limited legal basis, some of which stems directly from the Supreme Court's *Charter* jurisprudence (see Carter 2008). Even New Brunswick's Child and Youth Advocate, while arguing that New Brunswick's pronoun policy violates the *Charter*, recognizes that parental rights "certainly do exist at law" (Lamrock 2023, 13). The federal Department of Justice's *Charterpedia* website cites Supreme Court jurisprudence when outlining that "Parents have the right to rear their children according to their religious beliefs, including choosing religious education and choosing medical and other treatments," but that "such activities can and must be restricted when they are against the child's best interests" (Canada 2023; see also *B. (R.) v. Children's Aid Society of Metropolitan Toronto* 1995; *P.(D.) v. S.(C.)* 1993; *S.L. v. Commission scolaire des Chênes* 2012; *New Brunswick (Minister of Health and Community Services) v. G. (J.),* 1999). In sum, parents have rights in certain contexts, some of which stem from judicial interpretation of the *Charter*, and all of which are subject to reasonable limits.

> *In sum, parents have rights in certain contexts, some of which stem from judicial interpretation of the Charter, and all of which are subject to reasonable limits.*

There is also a lack of a direct connection between *Charter* jurisprudence and the other set of proposed rights – namely, the rights of children under 16 to have their name and pronoun changes formally recognized in school without notifying parents or obtaining parental consent. As legal scholar Wayne MacKay said, "There's not much in the way of case law because it's new territory and sort of a new frontier" (quoted in Mosleh 2023). While the Supreme Court has recognized the existence of "mature minors" capable of making decisions

without parental consent, a leading precedent is a case that involves a life-saving blood transfusion ordered by a court on behalf of a doctor against the wishes of the parents *and* the child (*A.C. v. Manitoba* 2009, paras. 82-83).

Likewise, the Supreme Court and provincial courts of appeal recognized LGBTQ rights (more specifically, rights for gays and lesbians) in a series of cases beginning in the 1990s, but those cases primarily concerned rights to government entitlements, the right to be free from discrimination in employment, and the right to same-sex marriage (*M. v. H.* 1999; *Vriend v. Alberta* 1998; *Halpern v. Canada* 2003). By contrast, the rights of trans and non-binary individuals have typically been adjudicated by human rights tribunals rather than courts (Kirkup 2018). In a recent case, the Supreme Court did note that "the transgender community is undeniably a marginalized group in Canadian society" and that "judicial recognition of the plight of transgender individuals in Canada is growing" at lower courts (*Hansman v. Neufeld* 2023, paras. 84, 88). However, this was a case concerned with defamation, fair comment, and free expression rather than equality rights. In short, there is no obvious settled Supreme Court case that can be automatically applied to a parental consent policy for children's pronouns in public education.

Thus, when Justice Megaw of the Saskatchewan Court of King's Bench rules on the *Charter*, he will be breaking new ground, applying a potentially wide array of Supreme Court jurisprudence to a new fact situation. In his injunction, Justice Megaw was careful to "refrain from making any further comment on the merits or the ultimate outcome" of the *Charter* questions, though his injunction's purpose – to prevent "potentially irreparable harm and mental health difficulty" of children – suggests the Saskatchewan government will have an uphill battle (*UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan* 2023, paras. 114, 132). Both New Brunswick's Child and Youth Advocate and Saskatchewan's Advocate for Children and Youth have made credible cases that their provinces' pronoun policies will violate the *Charter* based on Supreme Court jurisprudence (Broda 2023; Lamrock 2023), while many experts, including Joanna Baron of the Canadian Constitution Foundation and political scientist Emmett Macfarlane, expect that courts will strike down parental consent requirements for pronouns in schools (Russ 2023; Macfarlane 2023). Indeed, Premier Moe's decision to invoke the NWC surely indicates he considers there to be at least a high degree of likelihood that his policy will not survive a *Charter* challenge.

The NWC: a tool for reasonable disagreement

However, the high likelihood of judicial invalidation does not mean that the policy is a clear violation of a longstanding and internationally recognized human right. Children's rights to privacy are important, as are the rights of parents to be informed of their children's choices. Whatever policy a government decides in this area, it will involve a limitation on someone's rights. Reasonable people disagree, and there are myriad good-faith reasons to support or oppose the Saskatchewan government's policy (for anyone interested in those reasons, Justice Megaw's summaries of affidavits from Dr. Travis Salway and Dr. Erica Anderson on opposite sides of the issue are a good place to start; see *UR Pride v. Saskatchewan* 2023, paras. 75-77 and 87-95 in).

The NWC was included in the *Charter* precisely for situations like the gender pronouns issue: to protect rights beyond those enumerated in *Charter* case law and to disagree with judicial interpretations of those rights, especially in areas of provincial jurisdiction (Newman 2019, 219). The Saskatchewan government is signalling disagreement with the anticipated judicial interpretation of the *Charter* in this particular "clash of rights," substituting its own interpretation that values parental consent more highly. Other recent provincial laws invoking the NWC can be similarly depicted as protecting rights not enumerated in the Charter in an area of provincial jurisdiction. Saskatchewan invoked the clause in 2018 to protect the rights of non-Catholic students to attend Catholic schools. With Bills 21 and 96, Québec is protecting its own right to maintain its uniquely secular and French-language traditions. Ontario's 2021 campaign finance law privileges the rights of citizens to have an election not dominated by outside money over the rights of third parties to spend on political speech; its 2022 back-to-work legislation – repealed not long after it passed as part of labour negotiations – likewise privileged the rights of students to be in class over the rights of public sector unions to strike.

One might respond that these "so-called" rights are fictitious: the *Charter* does not explicitly protect parental rights, a Québécois right to retain certain traditions, the rights of non-Catholics to attend Catholic schools, or the rights of students to remain in class. However, there are all sorts of values, policies, and

even "rights" not protected by the *Charter* that nevertheless remain important. The *Charter* does not enumerate a right to education, housing, private property, or health care; it did not even protect a right to strike until this right was given "judicial benediction" by the Supreme Court in 2015 (Sigalet 2022). And on the thorny issue of whether students under the age of 16 have a right to change their pronouns at school without parental consent, the text of the *Charter* is silent. Existing Supreme Court jurisprudence can be predictive, and there is good reason to have a general expectation that today's judiciary will err on the side of a progressive rather than conservative legal interpretation on issues of reasonable disagreement. But such predictions, and even judicial decisions, should not determine policy outcomes forever. In such contexts, the NWC is an entirely appropriate mechanism – in fact the only mechanism – for a legislature to express its alternative interpretation of rights.

Conclusion

The judicial interpretation of the *Charter of Rights and Freedoms* as a "living tree," capable of growth within limits, has become the dominant justification for the extension of *Charter* rights to areas beyond those contemplated by the framers of the *Constitution Act, 1982*. However, as Manitoba Court of King's Bench Chief Justice Glenn Joyal once noted, by "constitutionalizing" an increasing number of issues via *Charter* decisions, "the courts have 'frozen' those issues in time, and thereby immunized those issues from future and evolving civic engagement, discussion and debate" (Joyal 2018, 647). For good or ill, our democratically-elected representatives are often constrained in making policy on issues over which there is a wide range of reasonable disagreement – including among Supreme Court justices themselves – such as abortion, hate speech, prisoner voting, and the right to strike (*R. v. Morgentaler* 1988; *R. v. Keegstra* (1990); *Sauvé v. Canada (Chief Electoral Officer)* 2002; *Saskatchewan Federation of Labour v. Saskatchewan* 2015). The winner-take-all nature of courtroom politics has fueled "rights talk" and encouraged us to think about many complex policy issues as beyond the scope of legislative authority.

The NWC was put in the *Charter* precisely to prevent legislatures from becoming so constrained. In this context, it is worth remembering the words of the clause's main proponent, Alberta Premier Peter Lougheed. For Lougheed, the NWC meant Canada had chosen a *Charter* in which there was a "constitutionalization of rights, subject to a final political judgment in certain instances, rather than a final judicial determination as to the extent of all rights" (Lougheed 1998, 14). Or as Dwight Newman has written, Lougheed's defence of the clause "is that it permits a certain responsiveness to interpretations of rights with which there is ultimate democratic disagreement" (Newman 2019, 218).

The NWC empowers legislatures to take a side in reasonable disagreements, but it ensures that these disagreements will continue over time. Unlike a judicial decision, the NWC is likely to promote and extend debate, rather than prevent it. As a legislative instrument, it ensures that a law will be subject to the cut-and-thrust of parliamentary discussion and to scrutiny from the media, politicians, and the public. The clause's five-year expiry ensures that governments that invoke it must face voters before doing so again. As part of the *Charter* itself, it was designed precisely for policy disputes like the debate over parental consent and pronouns in schools – those with multiple competing interests, no easy answers, and rights claims from all sides.

In our judicialized political culture, it is rare to see governments get involved in political disputes involving such an obvious clash of rights. For forty years, the political incentives outside Québec have pointed our elected representatives in the direction of fealty to judicial decisions (and to the legal experts who purport to know what future judicial decisions will contain). Recently, other provincial governments have bucked this trend, indicating a willingness to disagree with the judiciary and to offer their own interpretations of which rights best need protection. Regardless of the policy, one thing is certain: the NWC will never be the final word on the issue – just as its framers intended. MLI

About the author

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Prior to moving to Guelph, Professor Snow completed his PhD in political science at the University of Calgary, and was a Killam Postdoctoral Fellow in the Faculty of Medicine at Dalhousie University from 2014-2015. He currently holds a Social Sciences and Humanities Research Council (SSHRC) Insight Grant to empirically evaluate the way the Supreme Court of Canada permits reasonable limits on rights. MLI

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