

CANADIAN  
CIVIL LIBERTIES  
ASSOCIATION



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CANADIENNE DES  
LIBERTES CIVILES

December 5, 2024

The Right Honourable Justin Trudeau  
Office of the Prime Minister  
80 Wellington Street  
Ottawa, ON K1A 0A2

Via email: [justin.trudeau@parl.gc.ca](mailto:justin.trudeau@parl.gc.ca)

Dear Prime Minister:

**Re: Misuses of the Notwithstanding Clause Are a Threat to Our Charter**

We are writing today to express serious concern over the threat that misuses of the notwithstanding clause pose to the fundamental rights and freedoms of everybody in Canada. In recent years, some provincial governments have increasingly used this clause to override basic rights and freedoms, and try to prevent courts from striking down horrendous rights violations as unconstitutional.

If some of our most important rights and freedoms can so easily be overridden, our *Canadian Charter of Rights and Freedoms* (“*Charter*”) is in danger. While the Canadian Civil Liberties Association (“CCLA”) is actively fighting abusive uses of the notwithstanding clause before courts, your government should not wait for the outcome of judicial challenges to protect people’s rights. We are reaching out to suggest how your government can—and must—act today to help save our *Charter*.

The CCLA is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental freedoms. Key aspects of our mission include fighting for democratic accountability and against government overreach.

Buried deep in the *Charter* is a provision which most people would be surprised to discover: an override clause. When invoked, this notwithstanding clause prevents courts from striking down laws despite serious *Charter* violations. This gives lawmakers the ability to shrug off important rights and freedoms protected under the *Charter*. The rights subject to the notwithstanding clause include many of the most basic, essential principles needed for a free and democratic society, such as freedom of expression, freedom of religion, the right to life, and the right to be treated equally under the law.<sup>1</sup>

Several elected officials directly involved in the 1981 negotiations on repatriation have indicated that they never saw this clause as being meant to circumvent normal court process, or to be used regularly to override the rule of law. Rather, they understood it would be used in exceptionally rare

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s. 2 and 7-15.

circumstances, and only as a last resort, for initiatives like establishing a specific program for a part of the population that might have seemed discriminatory under the *Charter*.<sup>2</sup>

For forty years, almost every province refrained from using the notwithstanding clause. Alarming, this is no longer the case. In recent years, some provincial governments have used or attempted to use the clause to prevent education workers from striking;<sup>3</sup> ban provincial government employees from wearing religious symbols;<sup>4</sup> prevent non-French speakers from receiving public services in other languages;<sup>5</sup> prevent trans youth from using their chosen names and pronouns in schools;<sup>6</sup> and limit organizations from sharing their political views a year ahead of elections.<sup>7</sup>

These horrendous violations might very well be just the beginning, with provincial and federal political leaders voicing an increasing willingness to use the notwithstanding clause to deprive people of their rights.<sup>8</sup> While everybody in Canada should be wary of normalizing the use of this dangerous clause, government leaders like yourself have a moral obligation to take concrete action to protect the *Charter*.

Lawmakers should not wait for the outcome of ongoing court challenges to explicitly limit how the notwithstanding clause can be used. While a constitutional amendment would be one way of solving the issue, this option would only work if the exacting amendment requirements provided for by our Constitution were met. Another more practical option exists. Each and every federal and provincial legislature in Canada could—and should—enact a law explicitly limiting its own use of the notwithstanding clause within specific parameters. Not only would such a law limit a government’s use of the notwithstanding clause when enacting legislation in relation to a matter

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<sup>2</sup> “Chretien, Romanow and McMurtry attack Ford’s use of the notwithstanding clause”, MacLean’s (14 September 2018), online: <https://macleans.ca/politics/ottawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause/>; “Former premier Bill Davis speaks out against Doug Ford’s use of the ‘notwithstanding’ clause”, Toronto Star (12 September 2018), online: [https://www.thestar.com/politics/provincial/former-premier-bill-davis-speaks-out-against-doug-ford-s-use-of-the-notwithstanding-clause/article\\_cd983086-e4a9-5d24-9ad5-a89c1644ba49.html](https://www.thestar.com/politics/provincial/former-premier-bill-davis-speaks-out-against-doug-ford-s-use-of-the-notwithstanding-clause/article_cd983086-e4a9-5d24-9ad5-a89c1644ba49.html).

<sup>3</sup> [In 2022](#) Ontario pre-emptively used the notwithstanding clause to prohibit education workers from striking, even though courts have determined that freedom of association includes the right to strike and the right to collective bargaining. Many individuals, unions, and organizations (including the [CCLA](#)) raised the alarm, and following a wave of popular discontent, the Ontario government repealed this controversial bill.

<sup>4</sup> [In 2019](#) Quebec pre-emptively used the notwithstanding clause in Bill 21 to ban public sector workers such as teachers, lawyers, and police officers, from wearing religious symbols.

<sup>5</sup> [In 2022](#) Quebec pre-emptively used the notwithstanding clause to limit the use of English in the public service.

<sup>6</sup> [In 2023](#) Saskatchewan pre-emptively used the notwithstanding clause to ban transgender students from using their chosen names and pronouns in schools without formal parental permission.

<sup>7</sup> In 2021 Ontario imposed limitations on third-party political expression for a full year prior to an election. This limit on criticism of the government was struck down by the Ontario Superior Court as an unjustifiable infringement on freedom of expression. [Also in 2021](#) the Government of Ontario used the notwithstanding clause in an attempt to maintain the restriction.

<sup>8</sup> In [May 2024](#) the leader of the official federal opposition party hinted that he would use the notwithstanding clause to override rights that ensure a person charged with an offence is not denied their liberty until they have their day in court and people do not face cruel and unusual punishment.

In [October 2024](#) the Ontario Premier called on Ontario’s Big City Mayors to request in writing that the provincial government use the notwithstanding clause to legislate measures that will harm the rights and freedoms of unhoused people in the province.

In [November 2024](#) the Quebec Premier stated that, if necessary, he was ready to use the notwithstanding clause to force doctors trained in Quebec universities to practice within the province’s public system for a number of years. Also in [November 2024](#), the Advisory Committee on Quebec’s Constitutional Issues within the Canadian Federation tabled a report stating that it may be adequate for the province to use the notwithstanding clause in respect of all Quebec laws.

within their competence, it would also send a strong message to the voting public and to other governments on the importance of *Charter* rights in Canada.

The CCLA is urging your government to enact such a law, which should include at a minimum the following explicit limitations on the use of the notwithstanding clause:

1) No pre-emptive use

Lawmakers should not use the notwithstanding clause until *after* receiving a final decision from a court on the constitutionality of an impugned law. In other words, lawmakers should aim to enact laws that comply with the *Charter*, and should let courts review the constitutionality of these laws. The public deserves to know if governments are infringing on their fundamental rights and freedoms.

2) Supermajority requirement

As you know, legislation usually requires support from a standard majority—greater than one half—of the legislature. Our fundamental rights and freedoms are too important to allow the notwithstanding clause to happen by a simple majority vote. A supermajority should be required to invoke the notwithstanding clause. This requirement would echo the severe consequences that flow from overriding *Charter* rights.

3) Egregious rights violations should not be allowed to stand

Courts should have the explicit duty to review the use of the notwithstanding clause, so that egregious rights violations are not allowed to stand. This means that, even if the notwithstanding clause has been used, courts could still review a law’s purpose when core rights and freedoms are at stake. Where that purpose is incompatible with our constitutional structure, the courts should be explicitly allowed to strike down the law. This would be the case when a law directly attacks a core fundamental right, freedom or legal protection that existed well before the *Charter* was enacted.

Respect for human rights and civil liberties is a bedrock of democracy. No democratic society can thrive without robust protection of these rights. The recent, rampant and growing use of the notwithstanding clause has put important *Charter* rights—and our society as a whole—under threat. We are asking you to step in and help save our *Charter*.

We would welcome the opportunity to meet with you or members of your team to discuss this important situation further.

Sincerely,



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