

The Notwithstanding Clause Explained



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Despite what you may have heard, the Notwithstanding Clause is not unconstitutional.

In fact, it is a core element of the Canadian constitution and has been since the modern constitution was agreed upon in 1982.

It was originally proposed by Alberta Premier Peter Lougheed as a compromise when concerns about the Charter of Rights and Freedoms became a sticking point in constitutional discussions.

Many were concerned that the Charter represented a shift in the power balance from the legislative branches of government to the Supreme Court, giving judges too much power to override laws.

If there was no notwithstanding clause, there likely would not have been a Charter of Rights and Freedoms at all!

So, what exactly is it and what does it do?

In short, the “notwithstanding clause” refers to Section 33 of the Charter of Rights and Freedoms, which allows provincial, territorial, or federal governments to make laws that override Sections 2 and 7-15 of the Charter.

Section 33 essentially nullifies judicial review over specified laws for a maximum of a five-year period - which means the Court cannot intervene to change the law.

Every five years, use of the notwithstanding clause has to be renewed - however, renewals do not require judicial review.

This allows legislatures to act as a check on courts, to prevent activist judges from playing an outsized role in our democracy.

Here’s another way of looking at it:

We all agree that Canadians should have certain rights, and that sometimes those rights need to be protected from governments who might infringe on them.

Traditionally, courts would step in and tell governments to stop infringing on our rights.

But, what if courts are the ones stepping out of line?

What if courts start inventing new rights that conflict with existing rights and then telling governments that they can’t protect our rights because to do so would conflict with the new rights the courts created?

That’s where governments could use the notwithstanding clause to step in and re-assert jurisdiction over the courts.

It isn’t something that happens often, but it does happen.

And, as courts have become more activist, provinces have had to resort to the notwithstanding clause more regularly.

So far, the clause has been used by four provincial governments, and one territory.

From 1982 to 1985, Quebec undertook a blanket application approach, invoking the clause on every piece of legislation they passed, as well as passing legislation to add the clause retroactively to every other law on the books - whether it was necessary or not.

With a change in government in late 1985, Quebec stopped the blanket invocation of the clause, but continued to use it to counter perceived threats to their language and culture.

In 1988, they once again invoked the notwithstanding clause to counter a Supreme Court decision that found its French-only commercial signs law violated freedom of expression.

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They used it again in 2019 to ban religious symbols for certain public sector employees, and again in 2021 with Bill 96 to impose sweeping French-language mandates.

The increased frequency in the use of the notwithstanding in Quebec caught the attention of Prime Minister Justin Trudeau, who told Montreal-based newspaper La Presse that he is worried about the province's use of the notwithstanding clause - and that then-federal Minister of Justice David Lametti was looking into referring the matter to the Supreme Court.

As we've seen time and time again, to the current federal government, any disagreement with their policies is tantamount to insubordination, because they see provincial governments as subservient to their federal power.

This angered Quebec Premier Francois Legault, who accused Trudeau of attacking Quebec's "democracy and people."

"This desire expressed by Justin Trudeau is a frontal attack on our nation's ability to protect our collective rights."

The mistake the Prime Minister was making was conflating opposition to the specific policy the notwithstanding clause is being used on, with opposition to the concept of using the notwithstanding clause itself.

It's possible to have a healthy debate about whether a particular policy passed by a particular government is a good idea or not, but just because you don't like the policy doesn't mean the whole idea of a notwithstanding clause itself is bad.

Think of it like free speech - you don't have to agree with every single thing that's being said, to support the overall concept of free speech.

(Although, I guess this distinction has been lost on many on the left in recent years, too.)

As mentioned above, the use of the notwithstanding clause is not unique to Quebec, either.

In October 2022, Ontario Premier Doug Ford invoked the notwithstanding clause in order to manage a labour union dispute and to keep kids in school, through the aptly named "Keeping Students in Class Act, 2022."

Last fall, the Saskatchewan government invoked the clause on The Education (Parent's Bill of Rights) Amendment Act.

Interestingly, while the federal government has the right to use the notwithstanding clause, it has never done so.

The fact that the federal government gets to appoint the judges is perhaps a large contributor to why federal governments have never deemed it necessary.

At least until now.

In the face of increasing public safety concerns across the country, federal Conservative leader Pierre Poilievre has floated the possibility that a Conservative federal government could use the clause in order to address the situation.

Poilievre pledged to invoke the Charter's Section 33 to overturn a Supreme Court decision that limits the imprisonment of criminals to 25 years before they become eligible for parole.

After proposing this measure during a speech to the Canadian Police Association last month, Poilievre explained to reporters that this promise aims to ensure murderers like Alexandre Bissonnette, the gunman responsible for killing six people in a Quebec City mosque in 2017, remain incarcerated for life.

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"Justin Trudeau thinks it's acceptable for a mass murderer who killed six innocent Muslims to serve concurrent sentences and be eligible for parole after only 25 years. I find that disgraceful," Poilievre stated. "As prime minister, I will ensure such individuals remain behind bars for life, serving consecutive sentences equivalent to six life terms."

It's a good example of how the debate on rights is complicated.

We can all agree that free speech is a right - but is there really a "right" to only be in jail for a maximum of 25 years?

Who knows - maybe there is? Maybe there should be? It's a big philosophical question.

We can debate the pros and cons of a policy limiting maximum time in jail.

And we should.

But that's a debate for the public and their elected representatives to have - not a small clique of appointed judges.

Do we really want a court to just invent a new right, and then ban legislatures from changing it regardless of what the public wants?

A Poilievre government might also consider using the notwithstanding clause to reform bail legislation.

The "revolving door" bail federal policy brought in by Trudeau in 2018 is at the heart of the debate when it comes to crime.

Bill C-75 - An Act to amend the Criminal Code, the Youth Criminal Justice Act, and other Acts, and to make consequential amendments to other Acts - introduced changes to the bail system, addressing what the government described as "unnecessarily complex and/or redundant" rules regarding the detention of suspected offenders.

This has led to an uptick in crime.

As a result of the leniency in bail conditions, many offenders are being arrested in the morning, being released by the afternoon, and re-offending later in the same day.

Again - is there really a "right" to bail?

Maybe that's a debate we should have?

But, do we need the Supreme Court to unilaterally decide that such a right exists, ending the debate?

This is precisely why we have the notwithstanding clause.

It serves as a check on the Supreme Court's decisions, ensuring that governments can implement the will of the people without judicial interference.

In the context of public safety, the importance of this mechanism is becoming even more evident.

As public safety deteriorates, public confidence in the Liberals to provide a basic, safe environment for the people continues to drop.

They continue to ignore growing calls to address the revolving door from provincial governments and police agencies from around the country.

In a statement in March, federal, provincial and territorial Attorneys General and Ministers of Justice and Ministers of Public Safety from across Canada joined together to call on the federal government to fix that revolving door.

The National Police Federation has echoed the calls.

And yet, the revolving doors remain in place.

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It's emblematic of a federal government locked in a spiral of consequences from a poorly thought out public safety experiment that has resulted in unsafe streets, and growing public concerns around general lawlessness in society.

And, when it comes to public safety, that should concern us all.