Notwithstanding Clause

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

What is the notwithstanding clause?

Section 33 of the *Charter of Rights and Freedoms* is commonly referred to as the "notwithstanding clause." Its function is to prevent a court from invalidating a law that violates *Charter* provisions relating to [fundamental freedoms](#) (section 2), [legal rights](#) (sections 7-14), or [equality rights](#) (section 15).

Provincial or federal governments can use section 33 when they want to pre-emptively shield a law from judicial invalidation on these specific grounds, or when they want to revive a law that has already been invalidated by a court on these grounds. While an invocation of section 33 expires after five years (as per section 33(3)), there is no limit on the number of times that the clause can be reused for a given law (section 33(4)).

Crucially, section 33 cannot be used to shield a law from invalidation on the grounds that it violates democratic rights, mobility rights, or minority language rights under the *Charter*. It also can't be used to shield a law from invalidation on the grounds that it violates the Aboriginal and Treaty rights that are "recognized and affirmed" by section 35 of the *Constitution Act, 1982*.

Why do we have a notwithstanding clause?

When the *Charter* was being drafted, federal and provincial leaders were divided on whether it should contain a notwithstanding clause. For the most part, the clause's proponents (such as the premiers of Saskatchewan and Alberta) argued that it was a democratic backstop that would prevent unelected judges from holding too much power vis-à-vis the interpretation and enforcement of the *Charter*. By contrast, those opposed, including then Prime Minister Pierre Elliott Trudeau, thought that the clause could undermine the *Charter* by letting legislatures ride roughshod over rights. In the end, Trudeau was forced to compromise on the notwithstanding clause to ensure that the *Charter* was passed with the support of most provinces (all except Quebec).

When has it been used?

The notwithstanding clause has never been used by most provinces, nor by the federal government. It has, however, been used by Quebec, Saskatchewan, Alberta, and, most recently, Ontario. Here are a few well-known examples:

Quebec

- Quebec did not sign the *Constitution Act 1982* and subsequently passed

legislation that added a standard notwithstanding clause to every law in force at the time. The clause was added to every new law passed until December 2, 1985, when a new government stopped the practice.

- In 1988, Quebec used the clause in response to a Supreme Court of Canada decision that the province's law allowing French-only on commercial signs offended freedom of expression.
- In 2019, the Legault government used the clause preemptively to pass Bill 21, a law that prohibited certain public sector workers from wearing religious symbols in their workplaces.
- In 2021, the Legault government used the clause preemptively for a second time to pass Bill 96, a law that included sweeping amendments to Quebec's *Charter of the French Language*, e.g. the expansion of the investigative powers of Quebec's language office.

Saskatchewan

- Saskatchewan added the clause to protect strike-ending legislation in 1986. The government used the clause because they thought the law forcing strikers back to work would violate freedom of association. However, the clause was removed when the Supreme Court said that the law would not affect *Charter* rights*.

Ontario

- In 2021, the Ontario government used the notwithstanding clause for the first time to revive a law that was struck down by the Ontario Superior Court on free expression grounds. The law placed a $600,000 limit on expenditures for third party political advertising that applied for a full-year before the beginning of an official election campaign.