

The Honourable Doug Ford  
Premier of Ontario  
Legislative Building  
Queen's Park  
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December 2, 2024

Sent via email

Dear Premier Ford:

You have recently proposed using section 33 of the *Canadian Charter of Rights and Freedoms* – the *Charter's* 'notwithstanding clause' – to proactively strip people who are homeless or experiencing mental health or substance use challenges of their most basic constitutional rights, including rights to life, security of the person and freedom from discrimination. As members of the Ontario legal community, bound to uphold the constitution and the rule of law, we urge your government not to take such action.

The notwithstanding clause in the *Canadian Charter* is unique. No other constitutional democracy allows legislatures to override constitutionally protected human rights. This means that, in Canada, we rely on an ongoing commitment by our elected representatives to respect and uphold the fundamental principles underlying a constitutional democracy – that governments may not immunize themselves from constitutional accountability or undermine the independent role of the judiciary in safeguarding *Charter* rights.

For forty years, that commitment has largely held. Even when strongly disagreeing with judicial decisions in *Charter* cases, federal, provincial, and territorial governments have not invoked the notwithstanding clause. The Supreme Court of Canada's decision requiring the inclusion of sexual orientation as a prohibited ground of discrimination under Alberta's *Individual Rights Protection Act*, despite the Alberta government's strong objections at the time, is one of many examples. The federal government has never used the notwithstanding clause and no Ontario government, prior to yours, has ever taken this extreme measure.

The notwithstanding clause was never intended to be used to deprive vulnerable groups of constitutional protection. It was to be rarely, if ever invoked, and for the opposite purpose. The notwithstanding clause was to operate as a safety valve in the exceptional event of a judicial decision that was clearly contrary to the public interest. For example, then Justice Minister Jean Chretien suggested that section 33 might be used if a court struck down limits on child pornography in the name of freedom of expression.

What is more, the *Canadian Charter* explicitly provides an opportunity for governments to limit *Charter* rights where there are compelling grounds for doing so. Under section 1 of the *Charter*, governments can impose reasonable limits on *Charter* guarantees, provided such restrictions are demonstrably justified in our free and democratic society. For example, the Supreme Court

agreed that *Criminal Code* prohibitions on hate speech, which limited freedom of expression, were justified under section 1.

Section 1, and Canadian courts, recognize the positive role governments must play in protecting fundamental rights and in determining appropriate responses to pressing social issues. As a rule, courts defer to government policy choices, but such choices should promote, not undermine, the *Charter* rights of disadvantaged groups. Using the notwithstanding clause to allow governments to violate *Charter* rights rather than addressing systemic problems of poverty, mental health, substance use, and homelessness in compliance with the *Charter*, and depriving those whose rights are at stake of the chance to be heard in court, tramples on our society's commitment to fundamental rights. It also deprives all Ontarians of the valuable accountability mechanism that *Charter* review offers, and that your government should welcome, not spurn.

Rather than undermining the very foundations of Canada's commitment to constitutional democracy and depriving one of the most vulnerable groups in our province of constitutional protection, we call on you to stand by Ontario's historic commitment to *Charter* rights. Our province must respond to the current homelessness crisis in a way that respects the *Charter* and secures our constitution's promise of equal protection and benefit of the law to everyone in Ontario, without exception.

Yours sincerely,

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