What is the Notwithstanding Clause?

- Section 33 of the Charter of Rights and Freedoms permits governments (including the federal Parliament, and/or provincial/territorial legislatures) to override certain rights and freedoms that are guaranteed by the Charter
- gives elected officials the ability to overrule the courts, should they determine that the need to do so exists

Wording of Section 33
Section 33 contains five clauses. The wording of each clause is as follows:

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.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

The Charter and Its Impact on the Courts
Canadian courts play an important role in this relationship between individual claims and government duties. The courts interpret Charter rights and freedoms and ensure that government laws and actions do not violate them. If a government passes a law that violates a particular right or freedom, the courts will declare the law void, or ask the government to change the law accordingly so that it does not violate the right or freedom in question. Often governments themselves will ask the courts to review a law before it is enacted to ensure it is consistent with the Charter.
What Does it Mean to Override the Charter?
Section 33 of the Charter, the notwithstanding clause, permits governments to override parts of the Charter, and corresponding court decisions concerning Charter rights and freedoms.

- Charter rights and freedoms are legal entitlements that individuals possess vis-à-vis governments. Individuals are entitled to make certain claims of governments that, in turn, require governments to perform certain duties (such as to respect an individual's freedom to practice his or her religion). The courts interpret and enforce these individual claims in the context of government decisions and actions.
- Normally, governments respect these claims and follow the orders of the courts
- Elected politicians are subject to the decisions of judges
- however, governments may invoke Section 33 as a means of passing legislation or taking state action, even if taking passing such legislation or taking such action violates Charter rights and freedoms.

Example:
- the federal government passes a law that requires public employees to dress a certain way when at work. A group of employees, who wear a particular piece of clothing at all times for religious reasons, protests this law. As such, they challenge the government’s dress code in court, arguing that the imposition of said dress code violates their Charter right to freedom of religion
- the courts agree with the employees, saying that imposition of the dress code in question does indeed violate their right to freedom of religion
- the court would declare the law null and void, requiring that the government respect the right of each individual in the group to freedom of religion, and thus, the freedom of each individual to choose whether or not to wear his/her religious clothing when at work
- The government may invoke the notwithstanding clause, declaring that the law will stand – even though it violates the Charter right to freedom of religion. In using the “free pass card” accordingly, the government legally protects itself from any further claims that the group may make against its action by using the Charter, in addition to any stipulations that the courts might seek to impose in this same regard.
- invoking Section 33 does not take away a Charter right or freedom completely. All it does is protect a particular law or government action from being struck down by the courts because it is deemed as a violation of the Charter. In the above example, public employees would still enjoy their religious freedom in all respects, save for what they are legally able to wear to work.
How is the Notwithstanding Clause Invoked?
In invoking the notwithstanding clause, governments must follow specific procedures. They are as follows:

• Use of Section 33 involves the passing of legislation by the government that explicitly states that the Section is being invoked to protect a particular law or government action.
• Any use of Section 33 only has a lifespan of five years or less. After that period, the courts can strike down the law or government action that was previously protected by Section 33.
• If the government wants to extend the period past the five-year term, it must re-enact the legislation, stating that Section 33 is being invoked again (the extension is only valid for a further period of five years, or less).
• To use Section 33, governments are thus required to pass legislation explicitly stating their intentions. Accordingly, in order to successfully invoke the clause, governments must have at least a majority of support in the legislature.
• Given that the lifespan of the notwithstanding clause is a maximum of five years, and that governments must call elections within five years, governments would have to face the judgment of the voters before re-invoking Section 33. Consequently, protracted use of Section 33 would be unlikely, unless it had significant popular support.

The Notwithstanding Clause & Charter Rights and Freedoms
• The Charter provides Canadians with a bundle of rights and freedoms including fundamental freedoms; equality rights; democratic rights; legal rights; and, minority language rights.
• Governments can use the notwithstanding clause to override only some of the rights and freedoms in the Charter.
• Some Charter rights and freedoms are beyond the notwithstanding clause.
• When the Charter was agreed to, it was decided that some rights were too important to allow governments to override them using the notwithstanding clause.
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<th>Section of Charter</th>
<th>Type of Right or Freedom</th>
<th>Particular Rights and Freedoms</th>
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| Section 2         | Fundamental freedoms     | • Freedom of conscience and religion  
|                   |                          | • Freedom of thought, belief, opinion and expression (including media)  
|                   |                          | • Freedom of peaceful assembly  
|                   |                          | • Freedom of association  |
| Sections 7-14     | Legal rights             | • Right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice  
|                   |                          | • Right to be secure against unreasonable search or seizure  
|                   |                          | • Right not to be arbitrarily detained or imprisoned  
|                   |                          | • Right on arrest or detention to (a) be informed promptly of the reasons; (b) retain and instruct counsel without delay and to be informed of that right, and (c) have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful  
|                   |                          | • Several rights relating to criminal proceedings such as to be informed of the offence without reasonable delay, to be tried in a reasonable time, to be presumed innocent, and so forth  
|                   |                          | • Right not to be subjected to any cruel and unusual treatment or punishment  
|                   |                          | • Right against self-incrimination  
<p>|                   |                          | • Right to the assistance of an interpreter in legal proceedings  |
| Section 15        | Equality rights          | • Right to be equal before and under the law and the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability  |</p>
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| Sections 3-5       | Democratic rights        | • Every citizen has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein  
• No House of Commons and no legislative assembly shall continue for longer than five years  
• There shall be a sitting of Parliament and of each legislature at least once every twelve months |
| Section 6          | Mobility rights          | • Every citizen of Canada has the right to enter, remain in and leave Canada  
• Every citizen of Canada and every person who has status of permanent residence has the right to (a) move and take up residence in any province and (b) pursue the gaining of a livelihood in any province |
| Sections 16-22     | Language rights          | • English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada  
• English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges, this includes their use in all institutions of the legislature and government of New Brunswick, and the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities  
• Right of a member of the public to communicate with and receive services from federal government institutions or agencies in either English or French (some limitations) Right of a member of the public to communicate with and receive services from New Brunswick government institutions or agencies in either English or French (some limitations) |
| Section 23         | Minority language education rights | • Right of a citizen to have their children receive primary or secondary education in either English or French (some limitations) |