It's time for the Supreme Court, and the federal government, to stand up for the Charter

Under Prime Minister Justin Trudeau, the Liberals risk being the party that leads to the Charter's decline

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The Liberals used to be the party of the Canadian Charter of Rights and Freedoms. Now, under Prime Minister Justin Trudeau, they risk being the party that leads to the Charter's decline.

Over the past five years, the political taboo over the use of the notwithstanding clause, which allows governments to override some Charter rights, has been shattered across Canada. This occurred not under former prime minister Stephen Harper, a Conservative who was the favourite lightning rod of Liberal Charter enthusiasts, but under the current Liberal stewardship of Mr. Trudeau.

When Ontario Premier Doug Ford threatened to use the notwithstanding clause in the fall of 2018, as part of a plan to shrink the size of the Toronto City Council in the midst of the provincial election, the Prime Minister did nothing. (Ultimately, Mr. Ford did not use the clause in that instance.)

The next year, Quebec Premier François Legault went ahead with using the notwithstanding clause to insulate Bill 21, which bans certain provincial government employees from wearing religious symbols at work. In 2021, Mr. Ford also used the clause for a law limiting third-party election spending. In both cases, Mr. Trudeau again did nothing.

Earlier this year, the Quebec government used the notwithstanding clause once more, this time to push through Bill 96, its new language law. Yet again, the Prime Minister took no action, though he has said that the federal government would intervene in a legal challenge to Bill 21 at the Supreme Court of Canada.

“This is a matter that matters to all Canadians, regardless of which part of the country they live in,” Mr. Trudeau said in May, when asked if Ottawa would involve itself in the Bill 21 challenge. “This government will continue to be here to defend people's fundamental rights and freedoms.”

I doubt those whose rights have been threatened or stripped away by legislation in Quebec and Ontario find much comfort in the Prime Minister's vague and banal words. They won't help the Muslim women in Quebec who have lost their jobs because they wear a hijab as a declaration of their faith. They won't help non-native French speakers who are barred from speaking another language at work.

While the Ontario government pledged to repeal its most recent use of the clause (as part of Bill 28, which made it illegal for unionized education workers to go on strike), Canadians should still be concerned about the increased use of this clause by provincial governments.

Mr. Trudeau could act right now if he wanted to. If he has the political courage to do so, the Prime Minister could initiate a reference to the Supreme Court challenging the pre-emptive use of the notwithstanding clause in Quebec and Ontario. He could send some of the best legal talent in the country from the Department of Justice down the street to the high court to stand up for the minority rights of Canadians.

Crucially, Ottawa could argue that the Supreme Court should revisit its 1988
Ford v. Quebec (Attorney-General) decision, which gave governments the carte-blanche ability to use the notwithstanding clause.

Supreme Court decisions are not cast in stone. Much has changed in the three decades since it first ruled on the use of the notwithstanding clause, which authorized its use both in reaction to court decisions striking down laws as violations of the Charter, as well as its preemptive use in advance of any such legal challenges.

The rights and provisions set out in the Charter do not define themselves. It is the task of the courts, especially the Supreme Court, to interpret its contents. The political leaders who debated and enacted the Charter knew full well that they would be giving this awesome responsibility to the courts.

Between 1980 and 1981, a special joint committee of the Senate and the House of Commons spent more than 150 hours hearing from Canadians about the draft Charter. The legislators on this committee were warned that the enactment of a constitutionally-entrenched bill of rights such as the Charter would make the courts responsible for its interpretation.

The 1988 Ford decision dates to the early years of Charter interpretation. It is part of the first generation of Charter cases. The high court's interpretation of Charter rights ebbs and flows over time.

A favourite metaphor among Canadian constitutional lawyers and academics is the idea that our Constitution is a "living tree" - one that is capable of growth and expansion within its natural limits. Sometimes, the Constitution needs to be pruned back. In other cases, the courts or governments go too far - in recent years, both have done so on sanctioning and using the notwithstanding clause.

The time is ripe for Canada's highest court to revisit its 34-year-old decision. It is also long overdue for some strong federal leadership to defend the Charter rights of Canadians.

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