Constitutional forum constitutionnel

The Notwithstanding Clause and the Precedent in Ford: le dit et le non-dit

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I. The Precedent in *Ford*

On December 15, 1988, some thirteen months after concluding three days of hearings as a seven-member panel in the matter of *Ford v Quebec (Attorney General)*, five Supreme Court justices issued a unanimous opinion in the name of the Court.[1] Part V of the *Ford* judgment, spanning fourteen paragraphs,[2] remains the Court's only authoritative ruling on the meaning of the notwithstanding clause of the *Canadian Charter of Rights and Freedoms*.[3] Perhaps because it has remained undisturbed in our law reports as the only precedent on the clause,

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1 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [*Ford*]. The unanimous judgment was in the name of Chief Justice Dickson and Beetz, McIntyre, Lamer, and Wilson JJ. Two members of the panel retired in the period between hearing and decision and took no part in the judgment: Justice Estey retired in April 1988 and Justice Le Dain retired in November 1988. See *Supreme Court Act*, RSC 1985, c S-26, s 27(2).

2 *Ford*, *supra* note 1 at 733–45.

3 *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Given the reliance below on some passages in subsections 33(1) and (2), they are here reproduced for ease of reference:

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.	33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

the *Ford* case is sometimes taken to have settled more than the propositions of law affirmed in that judgment.

There are, it sometimes seems, two *Fords* alive in the legal mind: one is the case as decided, with its legal propositions then settled (*le dit*); the other is the case as it has grown in the legal imagination, with propositions not then settled (*le non-dit*).[4] Among those later propositions is this one: the notwithstanding clause is subject to requirements of form only, there being no substantive limitations on the legislature's recourse to the clause. That is close to what was settled in *Ford*, but it is a proposition that reaches beyond the questions there and then asked and answered.

To say this is not to deny that propositions like this one may be worthy of being affirmed; it is only to say that the precedent in *Ford* does not settle their legal merits. In the light of increasing calls by counsel and others for the precedent in *Ford* to be overturned to allow for substantive limitations on the use of the notwithstanding clause,[5] there is reason to review *le dit et le non-dit* of the famous case of 1988: what did *Ford* say and what did it leave unsaid?

II. Three Questions and Answers

The Court in *Ford* raised and answered three questions with respect to the Quebec legislature's recourse to the notwithstanding clause. A first question examined the statutory formulation required of a legislature to invoke the clause, including whether such formulation should carry a communicative burden to signal clearly to the public the legislature's recourse to the clause and the rights and freedoms targeted by such recourse. A second question explored whether the notwithstanding clause may be invoked by way of omnibus legislation, such that a single Act of the legislature may invoke the clause for a great many other Acts. A third question sought to determine whether the notwithstanding clause may be invoked with retroactive effect or only with prospective effect from the moment of its invocation.

The first question was asked with reference to following "standard override provision" employed by the Quebec legislature: "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the *Constitution Act, 1982* (Schedule B of the *Canada Act*, chapter 11 in the 1982 volume of Acts of Parliament of the United Kingdom)."[6] This statutory formulation makes reference to every right and freedom of the *Charter* subject to the notwithstanding clause, including those rights and freedoms that, for any given enactment, have no conceivable relationship with the legislation in which the clause is invoked.

The Court noted that, for some, the standard override provision "did not sufficiently specify the guaranteed rights or freedoms which the legislation intended to override" and that,

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(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.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

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5 See the discussion in *Hak v Quebec*, 2021 QCCS 1466 at paras 722ff, and several of the arguments on appeal to the Quebec Court of Appeal.

6 *Ford*, *supra* note 1 at 733–34.

instead, specific rights or freedoms should be "referred to in the words of the *Charter* and not merely by the number of the section or paragraph in which it appears."[7] It was argued that such a requirement followed from the notwithstanding clause's textual reference to "*a provision included in* section 2 or sections 7 to 15 of this Charter" and to "*the provision* of this Charter."[8] More generally, it was argued that "considerations concerning the effectiveness of the democratic process" recommended that "the nature of the guaranteed right or freedom must be sufficiently drawn to the attention of the members of the legislature and of the public" so that the legislative proposal to invoke the clause may be "reacted to through the democratic process."[9] What is more, the Supreme Court had before it the argument that, in order to invoke the notwithstanding clause, the legislature "must indicate the link or relationship" between the Act and "the guaranteed right or freedom to be overridden," which would again help to inform "citizens of the particular rights or freedoms intended to be overridden."[10]

In rejecting these different ways of understanding the statutory formulation required of a legislature under section 33 of the *Charter*, the Court settled the legal proposition for which the case is best known: the notwithstanding clause "lays down requirements of form only" and, on the terms of section 33 of the *Charter*, "there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case."[11] We return below to this proposition of law, the scope of which is narrower than is sometimes assumed. For now, we note that the formal/substantive distinction was relied upon by the Court in rejecting a "requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden," as this would invite "a *prima facie* justification of the decision to exercise the override authority" and so constitute a "substantive ground of review."[12]

Along these same lines, the Court reasoned that a legislature invoking the notwithstanding clause would not "be required to encumber a s. 33 declaration by stating the provision or provisions to be overridden in the words of the *Charter*."[13] A "reference to the number of the section, subsection or paragraph containing the provisions or provisions to be overridden," reasoned the Court, "is a sufficient indication to those concerned of the relative seriousness of what is proposed."[14] The Court thus affirmed that, in these respects and in response to the first question, the standard override provision was "a valid exercise of the authority conferred by s. 33" of the *Charter*.[15]

The second question raised by the Court concerned the "well-established legislative policy and practice [of the Quebec legislature] at the time of including the standard override provision in every Quebec statute," a policy realized in part by the enactment of omnibus legislation that introduced "into all Quebec statutes enacted prior to a certain date" a declaration

7 *Ibid* at 738.
8 *Charter*, *supra* note 3, ss 33(1), (2) [emphasis added].
9 *Ford*, *supra* note 1 at 738.
10 *Ibid* at 740.
11 *Ibid*.
12 *Ibid* at 740–41.
13 *Ibid* at 741.
14 *Ibid*.
15 *Ibid* at 742.

invoking the notwithstanding clause.[16] For the Court, the answer to the first question more or less settled the answer to the second, insofar as objections to such use by the legislature amounted to questioning the "permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override."[17] There was, according to the formal/substantive distinction adopted by the Court, "no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of the authority conferred by s. 33."[18]

The third and final question examined by the Court was whether the notwithstanding clause "allows Parliament or a legislature to enact retroactive override provisions" or "permits prospective derogation only."[19] Exploring the significance of the word "shall" in the expression "shall operate notwithstanding" and the equivalent word "*a*" in "*a effet indépendamment*" in the text of section 33(1), and noting an ambiguity in the legislative use of these words between "either a prospective or an imperative meaning or both," the Court relied on general principles of interpretation as informed by principles of legality to conclude that the clause cannot be given retroactive effect.[20]

III. *Le dit et le non-dit* of Legal Propositions

These three answers to three questions outline the central legal propositions on the meaning of the notwithstanding clause settled by the Supreme Court in *Ford*. In addition, there are some further propositions that, even if not expressly formulated by the Court, can be taken to have been said by implication.

In answering the first question, for example, the Court passed over in silence the fact that the standard override provision made no explicit reference to the *Charter*, employing instead a reference to the *Constitution Act, 1982* of which the *Charter* is a part. And yet, subsection 33(1) would appear to require a legislature to make an express reference to "*this Charter*" as opposed to the more encompassing *Constitution Act, 1982*. Nevertheless, in sanctioning the standard override provision as a valid invocation of the notwithstanding clause, we may understand the Court to have determined that an express reference to the *Charter* is not among the formal requirements that a legislature must satisfy, even if, for many a constitutional lawyer, a reference to "section 7 of the *Constitution Act, 1982*" does not have quite the same communicative salience as a reference to "section 7 of the *Charter*."

So too with the Court's answer to the second question, in which the Court does not expressly entertain the possibility that the textual references in subsections 33(1) and (2) to "*an Act* of Parliament or of the legislature," "*the Act* or a provision thereof," or "*An Act* or a provision of an Act" might best be read to require a separate notwithstanding declaration for every Act in which the clause is invoked. Had the Court so decided, it could have questioned the legislative strategy of employing omnibus legislation to add, by way of one Act, a declara-

16 *Ibid* at 736, 742–43.
17 *Ibid* at 743.
18 *Ibid*.
19 *Ibid* at 744.
20 *Ibid* at 744-45.

tion in a great many other Acts.[21] In legally sanctioning the legislature's recourse to omnibus legislation, we can take the Court to have determined that such textual references do not require the legislature to include a formal declaration for each Act, one Act at a time.

Thus, among the things said by the Court in its *Ford* precedent are those propositions expressly formulated as conclusions to answers and those further propositions implied by those conclusions. Yet, no matter the scope of the propositions that may reasonably be said to be implied by the Court's answers to questions, there remain a great many other propositions of law that the *Ford* precedent cannot be said to have settled. Some of these latter propositions, such as the one affirming that there are no substantive limitations at all on invoking the notwithstanding clause, belong to the *Ford* of the legal imagination rather than the *Ford* of 1988.

Consider the Ontario Court of Appeal's recent affirmation in *Working Families Coalition v Ontario* that, once a legislature satisfies the "formal requirements" for invoking the notwithstanding clause, there is, in law, "no other precondition to its invocation."[22] That proposition was not affirmed by the Court of Appeal as a new answer to a new question, but was instead said to be "entailed by the Supreme Court's decision in *Ford*."[23] Yet, the precedent in *Ford* is likely best read to stand for a more modest proposition, one according to which *the notwithstanding clause* imposes no preconditions other than formal requirements for invoking the clause. No part of the *Ford* judgment reaches beyond the text of section 33 or attempts to settle a more general legal proposition about all other possible sources of preconditions or constraints on the use of the clause.

The question before the Ontario Court of Appeal in *Working Families* was whether there is "an internal limit on the ability of the legislature to invoke s. 33 to shield legislation that undermines electoral fairness."[24] That was not a question confronting the Court in *Ford*. Of the three arguments offered in the Court of Appeal in support of such an internal limit — "the text of s. 33(3)," the "structural primacy of [the right to vote] in the *Charter*," and "the norms and conventions for reforming election law affirmed by the unwritten principles of democracy and the rule of law"[25] — only the first, textual argument comes close to the reasoning in *Ford*. To say, with the Ontario Court, that the conclusion sought by the claimants should be rejected because "no substantive justification by a legislature for invoking the notwithstanding clause is required" pushes the scope of propositions settled in 1988 beyond the questions then asked and answered.[26] It is significant that the proposition articulated in *Ford* according to which the notwithstanding clause "lays down requirements of form only" begins with the all-important qualification: "*Section 33* lays down …"[27] It leaves open the possibility that other parts of the Constitution — including its structure and architecture, its unwritten principles, and its many other provisions — lay down more than requirements of form.

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21 *Charter*, *supra* note 3, ss 33(1), (2) [emphasis added].

22 *Working Families Coalition (Canada) Inc v Ontario (Attorney General)*, 2023 ONCA 139 at para 49 [*Working Families*].

23 *Ibid* at para 50.

24 *Ibid* at para 52.

25 *Ibid*.

26 *Ibid* at para 50.

27 *Ford*, *supra* note 1 at 740.

IV. On Precedent and Constitutional Interpretation

To say that the Court in *Ford* left a great many propositions of law unsettled is not to assign fault for not reaching further: every decision raises and answers some questions and leaves others for another day. The evolution of our case law resists the thought that the relationship between one case and the meaning of a *Charter* provision adheres to a principle of "one and done."[28] Many provisions of our *Charter* have their leading precedent and many of these precedents continue today to stand for the propositions settled long ago. But no one precedent purports to ask and answer every question that could be raised with respect to a given provision. *Irwin Toy* did not settle the whole of our understanding of freedom of expression.[29] *Big M* was not the last word on freedom of religion.[30] The *Motor Vehicle Reference* did not definitely fix the principles of fundamental justice.[31] The test laid out in *Oakes* only partially settled the meaning of the limitations clause.[32] Each one of these cases — all decided more or less contemporaneously with the *Ford* case — contributed greatly to our understanding of the *Charter*, all without purporting to settle every legal proposition about the meaning of the provision animating the case.

Among the questions left unasked and unanswered in the *Ford* precedent are many that are being raised today. Does the notwithstanding clause suspend rights and judicial review or may a claimant seek a judicial declaration that legislation invoking the clause is inconsistent with the very rights and freedoms targeted by the legislature's recourse to the clause?[33] Does section 28 of the *Charter* impose substantive limits on the reach of the notwithstanding clause with respect to gender equality rights?[34] Does the Constitution's architecture set substantive limits on legislative power,[35] such that are there some changes to our law that can be secured only by way of a constitutional amendment even if the notwithstanding clause is invoked? Does

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29 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.

30 *R v Big M Drug Mart*, [1985] 1 SCR 295.

31 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

32 *R v Oakes*, [1986] 1 SCR 103.

33 See Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The faulty received wisdom around the notwithstanding clause" (10 May 2019), online: *IRPP Policy Options* <policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause/#:~:text=Invoking%20the%20notwithstanding%20clause%2C%20as,a%20court%20for%20violating%20rights.> [perma.cc/5FWU-LZEQ]; Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510; Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts and the Electorate" (2022) 72:1 UTLJ 189 [Leckey and Mendelsohn]; Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum Const 38; Geoffrey Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review" (2023) 61 Osgoode Hall LJ (forthcoming); Eric M Adams & Erin R J Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the Charter" (2022) 26:2 Rev Const Stud 121; Grégoire Webber, "The Notwithstanding Clause, the Operation of Legislation, and Judicial Review" in Peter Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, forthcoming 2024).

34 See Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum Const 19.

35 See *Reference re Senate Reform*, 2014 SCC 32 at paras 26, 27, 54, 60, 97; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at paras 82, 88.

the notwithstanding clause's five-year sunset provision imply a measure of electoral accountability and some democratic commitments that cannot be displaced by legislation invoking the clause?[36]

As evidence of the evolving nature of constitutional understanding, the Supreme Court has continued to explore the role of the notwithstanding clause within the Constitution after the case of *Ford*. Ten years after 1988, it situated the clause as part of a "dialogue among the branches," reasoning that the clause awards to the legislature "the ultimate 'parliamentary safeguard'" in relation to the exercise of judicial review of legislation for compliance with certain rights and freedoms of the *Charter*.[37] A few years ago, it looked to the clause to constrain the discretion of courts to issue suspended declarations of invalidity, reasoning that the clause awards to legislatures rather than to courts the judgment whether "a suspended declaration is desirable and if so, for how long."[38] More recently yet, the Court looked to the notwithstanding clause and its application to select *Charter* provisions to constrain the role of unwritten constitutional principles on the basis that, should such principles be relied upon to invalidate legislation, the legislature may not "give continued effect to its understanding of what the Constitution requires by invoking s. 33."[39]

These post-1988 developments illustrate how the notwithstanding clause is a part of the *Charter* and the Constitution and its meaning is to be informed by the greater whole, just as the greater whole is informed by the clause. The precedent in *Ford* settled some propositions of law, but left many unexplored, as does any one case exploring the meaning of a legal provision. Every case makes its contribution to our understanding of the law, all without purporting to reach too far beyond the questions it answers. Before inviting a court to overturn the things said in *Ford*, there is merit in determining what was left unsaid and, in so doing, to examine the reach of *le dit et le non-dit* in that most famous case of 1988.

36 See Leckey and Mendelsohn, *supra* note 33; Michael Pal, "Democracy and the Notwithstanding Clause" (2024) Can JL & Jur (forthcoming).

37 *Vriend v Alberta*, [1998] 1 SCR 493 at paras 139, 178.

38 *Ontario (Attorney General) v G*, 2020 SCC 38 at para 240 (in dissent), of paras 136-138 (for the majority).

39 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 60 [emphasis removed].