Constitutional forum constitutionnel

Ford *Focus: Constitutional Context and the Notwithstanding Clause*

Eric M Adams*

I. Introduction

Among the few certainties shared among Canadian constitutional lawyers and scholars is that the constitutional issues surrounding section 33 of the *Canadian Charter of Rights and Freedoms* will return to the Supreme Court of Canada. When that occurs, likely in the litigation concerning Quebec's use of the clause in Bill 21 (the *Laicity Act*), or in the case involving Ontario's use of section 33 to shield its electoral spending limits,[1] the Supreme Court will confront the recent literature sparked by renewed scholarly interest in the clause, and the Court's distant treatment of section 33 in *Ford v Quebec*.[2]

In *Ford*, the Supreme Court considered the constitutionality of Quebec's omnibus invocation, and retroactive application, of section 33 to every existing Quebec statute.[3] In doing so, a unanimous Court dismissed the relevance of constitutional context in determining whether a legislative decision to use section 33 was constrained by substantive limits, famously declaring that the notwithstanding clause "lays down requirements of form only."[4] Although the Court interpreted section 33 as prohibiting retroactive application, it upheld Quebec's blanket use

* Professor of Law, University of Alberta, Faculty of Law. My thanks to Noah Weisberg, as well as Margot Young, Hoi Kong, Richard Mailey, and all of the participants at the section 33 workshop at Allard Hall, University of British Columbia.

1 *Hak v Quebec*, 2021 QCCS 1466; *Working Families Coalition (Canada) Inc v Ontario*, 2023 ONCA 139.

2 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [*Ford*].

3 *Act Respecting the* Constitution Act, 1982, SQ 1982, c 21. The Act amended every existing statute to include the following provision: "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982."

4 *Ford*, *supra* note 2 at 740.

of the clause. Quebec's legislature had, the Court held, fulfilled the textual requirements of expressly declaring that an "Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] *Charter*."[5] While some may be tempted to read *Ford* as broadly settling all constitutional questions raised by section 33, a close reading of the judgment, analysis of the complex constitutional context from which it emerged, and appreciation of the text, context, and purpose of section 33, reveals the expansive terrain of unsettled constitutional issues that remain in the decision's wake.[6]

Ford does tell us, correctly in my view, that judicial review has no role to play in adding extraneous substantive preconditions to the legislative *decision* to invoke the clause beyond the requirements set out in the provision itself. That holding extends not only from the text of the provision, but also from the separation of powers in a constitutional democracy. The judicial inability to review the wisdom or folly of invoking the notwithstanding clause, however, does not answer the question of whether there remains a judicial role in relation to the legislative provision that is the *subject* of the notwithstanding clause. Neither does *Ford* address how section 33 may interact with other *Charter* provisions, notably section 28, which guarantees *Charter* rights "equally to male and female persons." Finally, the *Ford* decision's relatively sparse treatment of section 33 does not fully account for the distinctive relationships section 33 fosters between legislatures, courts, and the public in the broader constitutional project concerning deliberative protection of rights and their reasonable limits.

If the notwithstanding clause is going to fulfill its objective of ensuring the protection of rights and their reasonable limits remain a shared responsibility among courts, legislatures, and the public, then each of those actors has an important, distinct, and mutually reinforcing role to play when section when section 33 is invoked. I share the view advanced in recent scholarship that section 33, appropriately interpreted as a matter of text, purpose, and context, provides a limited role for courts in assessing, but not remedying, whether a particular legislative provision unreasonably infringes the *Charter* notwithstanding the notwithstanding clause.[7] Such a circumscribed, but crucial, judicial role promotes the notwithstanding clause's purpose to promote deliberative engagement concerning the protection of rights. The felicitous mechanism of the sunset clause deliberately perpetuates a role for the public in weighting and passing electoral judgement on the reasons a legislature advances for invoking the clause. The judicial articulation of potential rights infringements provides the public with the necessary information to fulfil its responsibility in assessing whether or not to support the legislative use of section 33. Properly evaluating the legislative use of section 33 requires more than partial political justifications, but also requires the reasons and reasoning only an independent court can provide by listening to the arguments of those particularly impacted, dispassionately weighing evidence, stating facts, and applying precedent to determine and describe the poten-

5 *Canadian Charter of Rights and Freedoms*, s 33, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

6 See especially Grégoire Webber, "The Notwithstanding Clause and the Precedent in *Ford*: *le dit et le non-dit*" in the present volume. But see also Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Erich Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum Const 38.

7 See Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189; Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510.

tial rights infringement at stake. Indeed, the judicial role will be just as crucial when judicial reasons disclose to the public that the legislature has invoked section 33 unnecessarily in circumstances where the statute has not violated any of the applicable *Charter* rights. *Ford* left the door ajar for future cases to delineate the productive constitutional roles played by legislatures, courts, and the public when section 33 operates.

In this short article, I return to the broader constitutional perspectives *Ford* temporarily pushed aside. Examining the notwithstanding clause's early academic reception, pre-*Ford* judicial treatment, and the arguments the Supreme Court considered and left unattended in *Ford* reveals the deep currents of constitutional argument and thought that have always characterized the notwithstanding clause. Excavating the plural perspectives that formed the background of the *Ford* litigation about the constitutional law of section 33 demonstrates the tangled weave of constitutional law and politics and the inchoate theories surrounding the clause's meaning that defined the notwithstanding clause from the outset. Section 33 has always inspired multiple, sometimes conflicting, aspirations, accusations, and ideas about its function in Canada's constitutional arrangements.[8] Appreciating and navigating the balance points among these diverse constitutional perspectives helps to illuminate the full context of the notwithstanding clause in a way that matters in generating a constitutional law attentive to section 33's distinctive place in Canada's constitutional arrangements.

II. Early Academic Impressions of the Notwithstanding Clause

The extent and manner to which the notwithstanding clause would be used after its enactment was an unknowable feature of the momentous constitutional changes brought about by the *Constitution Act, 1982*. As Minister of Justice Jean Chrétien assured Parliament that section 33 would function only as a "safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the charter." Muddying the waters, Chrétien elaborated that the "purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy."[9] However, Chrétien also quoted Gordon Fairweather's prediction that the notwithstanding clause would become "as dead from lack of use" as the disallowance power.[10] Two days after the patriation of the *Constitution Act, 1982*, René Lévesque proved them wrong, announcing his intention to use the notwithstanding clause to "make it as complicated, legitimately, and as difficult as we can for some aspects of that bloody charter … to be applied to Quebec."[11] Some two months later, Quebec attached section 33 to all existing Quebec statutes to protest the patriation of the *Charter* without Quebec's consent.[12] From that moment, the constitutional uncertainties surrounding the meaning and operation of section 33 became active questions of constitutional law.

8 See 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.

9 *House of Commons Debates*, 32-1, vol 12 (20 November 1981) at 13042 (Hon Jean Chrétien).

10 *Ibid* at 13043.

11 "Will fight language rights in charter, Levesque says", *The Globe and Mail* (20 April 1982) at 10.

12 *Act Respecting the* Constitution Act, 1982, *supra* note 3; Section 52 of *An Act to Amend the Charter of the French Language*, SQ 1983, c 56 also invoked section 33 for every new piece of legislation passed.

At first impression, scholars tended to view the notwithstanding clause as a straightforward continuation of a limited form of parliamentary sovereignty that had served as a central organizing principle of Canadian constitutional law before the *Charter*. Writing in 1982, Henri Brun and Guy Tremblay argued that the existence of the notwithstanding clause ensured that the *Charter* "n'a pas supplanté entirèment le principe de la souverainteté parliamentaire," stressing that legislatures could derogate from select rights by following "certaines conditions formelles."[13] Herbert Marx, a constitutional scholar and member of the National Assembly of Quebec, suggested that section 33 meant "Parliament and the legislatures are therefore supreme with respect to ss. 2, 7-14, and 15" of the *Charter* and "have retained the last word."[14] Peter Hogg's text characterized section 33 as a "concession to Canada's long tradition of parliamentary sovereignty" given that "with respect to most *Charter* issues, the last word remains with the competent legislative body, and not the courts."[15] Hogg pointed out that Quebec's omnibus use of the clause "certainly contravenes the spirit of s. 33," but nonetheless could point to nothing in the textual requirements that would preclude it.[16] For Dale Gibson, "there seems little doubt that the politicians who devised section 33 as a compromise between the competing claims of judicial review and legislative supremacy intended that it would be the legislative branch that had the final say under section 33."[17]

A different thread of the early scholarship sought to reconcile the place of the notwithstanding clause in relation to other rights-protecting features of the *Charter*. What should be made of the notwithstanding clause's existence *within* a *Charter* that "guaranteed" rights and freedoms? Did legislatures have constitutional duties of either substance or procedure to fulfill *before* invoking the notwithstanding clause? Were such duties subject to judicial review? Could courts scrutinize a potential rights infringement even when the notwithstanding clause had been successfully deployed?[18] Proposing what he called a "coordinate model" of constitutional interpretation, Brian Slattery argued that legislatures could not invoke section 33 unless operating under an independent view that the shielded legislation complied with the *Charter.*[19] If so, he argued, such a decision could not then be subject to judicial review unless there was no plausible section 1 justification that a legislature might have to support its use of section 33.[20] "In such a case," Slattery writes, "a legislature would be employing a notwithstanding clause, not to protect its own reading of the *Charter* … but to evade its duty to comply with the *Charter* altogether."[21] Daniel J Arbess would have gone further, insisting that all uses of section

13 Henri Brun & Guy Tremblay, *Droit constitutionnel* (Cowansville: Éditions Y Blais, 1982) at 419.

14 Herbert Marx, "Entrenchment, Limitations and Non-Obstante" in Walter Tarnopolsky and Gérald-A Beaudoin, eds, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 61 at 71. Marx saw early on that "[t]he inclusion of an express notwithstanding clause … is an invitation to its use." Stephen Scott wondered, however, whether Marx's assessment of section 33 sufficiently confronted the reality of its omnibus use: Stephen Allan Scott, "Book Review: The *Canadian Charter of Rights and Freedoms*" (1985) 2 Const Commentary 221 ("The result is of course that most of the *Charter* is, for all practical purposes, [a] waste [of] paper at the provincial level in Quebec. Quebec's use of the override proves that the guarantees of the Canadian *Charter* will be unavailable precisely when they are most needed" at 228).

15 Peter W Hogg, *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985) at 692.

16 *Ibid* at 691.

17 Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 131.

18 Brian Slattery, "A Theory of the *Charter*" (1987) 25:4 Osgoode Hall LJ 701 at 738–39.

19 *Ibid* at 741.

20 *Ibid* at 743.

21 *Ibid*.

33 remain subject to judicial review for compliance with the "reasonable limits" standard of section 1.[22] For their part, Donna Greschner and Ken Norman raised the possibility that the constitutional use of section 33 required the existence of a definitive judicial decision, possibly from the Supreme Court of Canada, before a legislature could respond by invoking the notwithstanding clause in order to override a court's specific *Charter* interpretation.[23]

Uniting all academic perspectives was the sense that the notwithstanding clause touched upon and should be interpreted in light of the deepest principles of Canada's constitutional arrangements — a map that offered several routes but no definitive destination.

III. Pre-*Ford* Judicial Treatment of the Notwithstanding Clause

By the time *Ford* reached the Supreme Court of Canada, a handful of lower court decisions from Quebec had already canvassed some of the competing conceptions of the notwithstanding clause. In *Alliance des professeurs de Montréal v Québec*, professors seeking to commence *Charter* litigation concerning their labour rights first had to challenge the constitutionality of Quebec's blanket use of section 33.[24] Chief Justice Deschêches immediately saw the tensions embodied in the notwithstanding clause. "On the one hand," he pointed out, "the *Constitution Act, 1982* must receive a generous interpretation in favour of the citizens whose rights in guarantees." At the same time, he noted, "[s]ection 33 of the *Charter* permits a legislative body to derogate from these rights and to deprive the citizens of their guarantee."[25] Its interpretation, he reasoned, must emerge from and balance these conflicting interests. The proper interpretation, he held, should be sufficiently narrow given the clause's obvious potential to negatively impact rights, but not be so constrained as to "deprive it of all effect."[26] Although the Chief Justice found that Quebec's "shattering use of s. 33 was not expected," he found no textual basis to require additional considerations to assess its lawful use. "Thus, it is in vain," he wrote, that the applicants, and Government of Canada intervening in support of them, "invoke 'the spirit' of s. 33" in an effort to constrain legislative use.[27] "[N]either the scope of the legislation nor its alleged abusive use can affect its validity," he concluded.[28]

The Quebec Court of Appeal took a different view of the constitutional stakes raised, and requirements imposed, by section 33. In a judgment of three concurring opinions, the Court of Appeal held that Quebec's blanket and omnibus invocation of section 33 had failed to suf-

22 Daniel J Arbess, "Limitations on Legislative Override Under the *Canadian Charter of Rights and Freedoms*: A Matter of Balancing Values" (1983) 21:1 Osgoode Hall LJ 113.

23 Donna Greschner & Ken Norman, "The Courts and Section 33" (1987) 12 Queen's LJ 155. José Woehrling agreed, proposing that section 33 be amended to require that it could only be invoked in response to a specific judicial decision: José Woehrling "La 'clause nonobstant': faut-il 'laméliorer ou la suprrimer?", *La Presse* (11 November 1988) B3.

24 *Alliance des Professeurs de Montreal v Quebec* (1983), 5 DLR (4th) 157 (QCCS) [*Alliance QCCS*]. In a case a year earlier, the same trial judge expressed surprise that none of the parties had even raised or acknowledged the notwithstanding clause given the *Charter* claim. Conceding that the constitutionality of Quebec's use of the clause might be a future issue, the judge pointed out that until that occurred, the "court must give it effect." See *Malartic Hygrade Gold Mines Ltd v Quebec* (1982), 142 DLR (3d) 512 at paras 30, 34.

25 *Alliance QCCS*, *ibid* at paras 20–23.

26 *Ibid*.

27 *Ibid* at paras 27–28.

28 *Ibid* at para 32.

ficiently "bring to light" the nature and extent of the derogation of rights in order to satisfy the textual requirement to "indicate which provision of the *Charter* is to be disregarded."[29] Most substantively, the opinion of Justice Jacques probed the meaning of the broader constitutional change brought about by the *Charter*'s entrenchment. Citing John Rawls and Ronald Dworkin on the meaning of constitutional supremacy, and drawing on the Supreme Court of Canada's early purposive *Charter* jurisprudence, Justice Jacques declared that constitutional interpretation under the *Charter* "should favour the protection of fundamental freedoms, protection which is no longer simply political … but which is now also constitutional and legal."[30] In such a system, he reasoned, legislative "supremacy is now the exception rather than the rule."[31] Turning to the textual requirements of section 33, the Court interpreted the provision to require a degree of specificity in order to fulfil its intended purposes. "The fundamental freedoms and legal guarantees which may be disregarded by a statute by virtue of s. 33," Justice Jacques held, "are so important that they should be expressly stated so as to bring into sharp focus the effect of the overriding provisions and the rights deprived."[32] Justice Jacques went on to connect this view of the demands of section 33 to broader currents in the working of constitutional democracy. "Citizens can only exercise their right to discuss legislative and government action freely if the necessary information has been clearly provided," he argued.[33] The very essence of constitutional democracy, he reasoned, is that political desires must comply with, and be constrained by, the imperatives of a supreme constitutional law.

Quebec appealed the Court of Appeal's decision in *Alliance* to the Supreme Court of Canada but did not advance the case, preferring instead to concentrate on the appeals in *Ford*. The constitutionality of Quebec's omnibus use of the notwithstanding clause would be determined there.

IV. The Notwithstanding Clause in *Ford*

Argued at the Supreme Court of Canada in November 1987 and handed down in December 1988, the *Ford* case unfolded against a backdrop of intense constitutional politics. In the period that *Ford* was argued and decided, disagreements surrounding the Meech Lake Accord, especially the distinct society clause, Quebec language laws, and lingering uncertainty about the legitimacy of the notwithstanding clause among Canada's national political parties, some of which had been expressed during the 1988 federal election campaign, continued to deepen Canada's constitutional divides.[34] The *Ford* case directly or indirectly spoke to all three. The case specifically addressed the constitutionality of those portions of Quebec's *Charter of the French Language* requiring French-only commercial signs. The argument that the language restriction infringed section 2(b) of the *Charter* hinged on the invalidity of Quebec's omnibus

29 *Alliance des Professeurs de Montreal v AG Quebec* (1985), 21 DLR (4th) 354 at paras 6, 25 (QCCA) [*Alliance*].
30 *Ibid* at paras 14–17.
31 *Ibid* at para 18.
32 *Ibid* at para 34.
33 *Ibid* at paras 50.
34 Graham Fraser, "PM says 1982 flaws removed 'flexibility' in Meech Lake talks", *The Globe and Mail* (13 June 1988) A1; "Politics and the 'notwithstanding' clause", *The Globe and Mail* (17 October 1988) A6; Susan Delacourt, "Constitutional clause haunting parties", *The Globe and Mail* (7 November 1988) A10; José Woehrling, "La 'clause nonobstant': faut-il l'améliorer ou la supprimer?", *La Presse* (11 November 1988) B3.

use of the notwithstanding clause. If Quebec had lawfully invoked the notwithstanding clause, the statute would have continued to operate regardless of its impact on freedom of expression. Prior to the hearing, however, Quebec's legislature had opted not to renew the omnibus legislation invoking section 33, so by operation of section 33(3) the blanket use of the notwithstanding clause had ceased "to have effect." From that perspective, the specific constitutional issue in relation to section 33 was now an academic one, although the widespread expectation was that Quebec would invoke section 33 to specifically protect its language laws if the Supreme Court found an unjustified section 2(b) *Charter* infringement in *Ford*.

Responsible for arguing Quebec's appeal was Yves de Montigny, the young University of Ottawa constitutional law professor, then on leave with the Quebec Department of Justice. "I had never argued a single case in my life," he recalled.[35] Quebec's factum made the case that the notwithstanding clause was "une contribution proprement canadienne" and a necessary cornerstone which made the existence of the *Charter* possible in the first place.[36] Citing the academic work of Hogg, Gibson, Brun, and Tremblay, among others, Quebec argued that section 33 continued the Canadian tradition of parliamentary supremacy and that the formal textual requirements imposed on legislatures comprised a complete code immune from judicial intervention.[37] Perhaps counter intuitively, Quebec argued that section 33 should embolden courts to protect rights more fully since judges could rest assured that legislatures maintained the last word and ultimate responsibility for the balance between public interest and individual rights under several provisions of the *Charter*.[38] Quebec reminded the Court that the wisdom of legislative decisions had always laid beyond judicial review and that, in the case of section 33, any sanctions for misuse resided exclusively in the electoral system.[39] "Les seules limites," Quebec concluded, "sont celles de pure forme qui découlent du texte de l'article 33."[40]

In its intervention, the Government of Canada agreed that the notwithstanding clause, as a "concession to Canada's long history of Parliamentary sovereignty," enabled legislatures "to override the rights guaranteed by sections 2 and 7 to 15 of the *Charter*, but only in accordance with the formal requirements set out in the section."[41] "The purpose of section 33," Canada explained, "can only be to suspend temporarily the application of certain provisions of the … *Charter* to Acts which otherwise would or could be considered inconsistent with the *Charter*."[42] Relying on the Quebec Court of Appeal's reasoning in *Alliance*, Canada suggested that Quebec's omnibus application of section 33 lacked the required specificity of identifying, with

35 Han-Ru Zhou, "*Ford* and *Irwin Toy* 30 Years Later: A Conversation with Justice de Montigny" (2019) 28:3 Const Forum Const 51 at 52.

36 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (Factum of the Appellant — Attorney General of Quebec at para 8), online (pdf): *David Asper Centre for Constitutional Rights* <aspercentre.ca/wp-content/uploads/2017/06/Ford-Appellant-Attorney-General-of-Quebec.pdf > [perma.cc/J97D-WN3P].

37 *Ibid* at paras 12–13.

38 *Ibid* at para 17.

39 *Ibid* at para 23.

40 *Ibid* at para 28.

41 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (Factum of the Intervener — Attorney General of Canada at para 45), online (pdf): *David Asper Centre for Constitutional Rights* <aspercentre.ca/wp-content/uploads/2017/06/Ford-Intervener-Attorney-General-of-Canada-English.pdf> [perma.cc/G27N-7JGY].

42 *Ibid* at para 48.

precision, which Acts of the legislature were overriding which specific provisions of the *Charter*. In conclusion, Canada characterized Quebec's use of section 33 as an unconstitutional attempt to amend the Constitution in order to "preserve [Quebec's] rights and powers" in ways that the *Charter* had deliberately constrained.[43]

Ontario's intervening submissions delved deepest into constitutional theory. In arguments drafted and presented by Lorraine Weinrib, Ontario perceptively noted that Quebec's use of section 33 raised three distinct constitutional issues: 1) "retrospective" use of section 33; 2) "non-specific" use of section 33; and 3) "routine reliance upon the override."[44] Ontario argued that all three uses were unconstitutional under the appropriate purposive interpretation of section 33. Disagreeing with the commonplace assertion that section 33 continued a form of parliamentary sovereignty, Ontario argued that the notwithstanding clause was, instead, "a democratic mechanism finely tuned to a specific purpose," part of a "seamless web of Canadian constitutionalism."[45] Linking the theory of justification inherent in section 1 to the requirements of explicitness embodied in section 33, Ontario argued that the "specificity requirement" of the notwithstanding clause is necessary "to bring home the significance of overriding constitutional protections."[46] By extension, omnibus or routine use "would have the effect of dulling democratic sensitivity to the significance of overriding constitutionally protected interests by invoking it in situations in which there is no actual or potential *Charter* infringement."[47] "Because declarations under section 33 need not be consistent with the values protected by rights," Ontario argued, "they must be passed through a democratic process more focused than that which the Constitution sets for ordinary law-making."[48] In other words, what section 33 enabled was not a pre-*Charter* version of unbridled parliamentary sovereignty, but rather a specific constitutionalized regime of rights protection and limits premised on drawing sufficient public attention to legislative initiatives that threatened certain *Charter* rights.

In its decision, the Supreme Court agreed that the text of section 33 did not allow for retroactive use, implicitly accepting the argument that a narrow interpretation of the notwithstanding clause is appropriate given its capacity to trench on otherwise guaranteed *Charter* rights and freedoms.[49] Rejecting the utility of a deeper analysis into the provision's purpose, or its relationship with other constitutional features, *including* the doctrine of parliamentary sovereignty, the Court simply turned to its interpretation of the textual demands outlined in section 33(1) and found that Quebec had complied with them.[50] The Court rejected the Court of Appeal's reasoning in *Alliance*, preferring the trial judge's findings that the legislative reference to *Charter* provisions by number alone satisfied the text's demands. At least part of this rationale was practical given that a "legislature may not be in a position to judge with any

43 *Ibid* at para 55.
44 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (Factum of the Intervener — Attorney General of Ontario at para 6), online (pdf): *David Asper Centre for Constitutional Rights* <aspercentre.ca/wp-content/uploads/2017/06/Ford-Intervener-Attorney-General-of-Ontario.pdf> [perma.cc/Z7QT-VJ7T].
45 *Ibid* at paras 8, 20.
46 *Ibid* at para 32.
47 *Ibid* at para 36.
48 *Ibid* at para 43.
49 *Ford*, *supra* note 2 at 744–45.
50 *Ibid* at 740–42.

degree of certainty what provisions of the … *Charter* … might be successfully invoked against various aspects of the Act in question."[51] As to democratic considerations, the Court drew on similar procedures used to amend legislation to conclude that references to section numbers "is a sufficient indication to those concerned of the relative seriousness of what is proposed."[52]

What are we to make of the Court's assertion that the broader constitutional issues raised were irrelevant to its determination of the constitutionality of the use of section 33 on these facts? One possibility, of course, is that the background context, constitutional arguments, and larger political dynamics at play *did* matter, despite the Court's protestations. Much as we sometimes pretend otherwise in law, it is not possible for judges to unsee and unhear the world around them. It was a purposive interpretive theory favouring rights protection that led the Court to reject retroactive application of section 33, and it surely was sensitivity to the origins of the notwithstanding clause, and the delicacy of strains within the federation as a result of patriation, that informed the Court's spare reading of its textual requirements. Nonetheless, in the decades since, the Supreme Court has clearly established that purposive constitutional analysis always involves placing the text in "appropriate linguistic, philosophic and historical contexts" in order to give full meaning to the constitutional provision at issue.[53] There is nothing in the existing constitutional law that would suggest individual sections of the *Charter* should be treated any differently, section 33 included. When the notwithstanding clause returns to the Supreme Court, a richer account of constitutional context is likely to play a more significant and explicit role in guiding the Court's assessment of its interpretation.

If wrong in its larger interpretive approach, however, *Ford* is nonetheless right on the merits of the narrow set of questions the Court answered. A more attentive purposive analysis, had the Court expressly conducted one, points to a similar outcome. The judgment tells us that retroactive use of the notwithstanding clause is not constitutional, but that an omnibus pre-emptive application is, so long as the manner and form of the legislative instrument follows the formal textual requirements set out in section 33(1). Such an approach respects the elements of parliamentary sovereignty, partial and modified, that remain part of section 33's structure and purpose, while maintaining important elements of the separation of powers. The question of whether the legislature has complied with these formal elements remains subject to judicial review. That judicial oversight, however, does not extend to reviewing the policy rationale leading to the decision to invoke the clause in the first place. Nor does it involve the court in assessing whether the invocation was properly responsive to a previous judicial decision; a standard beset with uncertainties about the required level of court, appropriate jurisdiction, and the definitiveness of the constitutional issue being responded to, not to mention the absence of such a condition in the text of section 33 itself. *Ford* is right on all of these matters.

The notwithstanding clause, as so many early commentators and the Supreme Court recognized, grants the legislature the last word on certain *Charter* rights. But nothing in section 33 tells us that the legislature should have *the only* word on rights when invoking section 33. Indeed, the text, purpose, and context of the notwithstanding clause and its place in the

51 *Ibid.*

52 *Ibid.*

53 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 14; *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 at paras 8–13.

Charter and role in Canadian constitutionalism more generally pull in the opposite direction. Clearly, in the mechanism of the sunset clause, section 33 envisions a role for the public in passing periodic and ongoing democratic judgement on the legislative decision to invoke the notwithstanding clause. The limited judicial role of assessing potential rights infringements when a legislature employs section 33 protects the integrity of that endeavour by providing full information about the constitutional implications at stake. When courts hear cases about rights, even without a direct power of remedy, they provide important institutional venues for vulnerable minorities, especially for those without much influence in the democratic politics of majority rule, to cast in written reasons a constitutional accounting of the harms a given law or policy may be exacting upon them. The notwithstanding clause grants legislatures a power to temporarily settle certain matters pertaining to certain rights, not the power to silence those rights, nor render them invisible.

Crucially, *Ford* left much unsaid and undecided about section 33, leaving future cases to wrestle with the tensions inherent in its operation. The constitutional issues unanswered in *Ford*, especially the delineation and elaboration of the institutional roles for legislatures, courts, and the public when the notwithstanding clause is invoked, remain with us. When the notwithstanding clause returns to the Supreme Court, its complex constitutional context, underling purposes, and the rich academic literature it has inspired will be crucial in fashioning the constitutional law of Canada's most controversial, and perhaps most important, constitutional provision.

V. Conclusions

If the *Ford* decision left several constitutional questions for the future, so too did it leave the politics of the notwithstanding clause to take their own course, shaped by the inevitable circumstances of life in a complex federation of deep diversity. As expected, the Court's ultimate constitutional finding in *Ford* that portions of the *Charter of the French Language* infringed section 2(b) resulted in Quebec invoking the notwithstanding clause again. Responding to the resulting criticism from various provincial premiers for doing so, Quebec's Intergovernmental Affairs Minister, Gil Remillard, succinctly replied: "Why did the provinces want to put the clause in there — as a decoration?"[54]

Among the legacies of *Ford* is a simple truth: the notwithstanding clause is not a decoration, but a living part of the *Charter* that is not going anywhere. Despite occasional periods of quiet, the notwithstanding clause will always occupy a divisive place in Canadian constitutional law, politics, and culture, more so than any other part of Canada's Constitution. And its life, both as a matter of law and politics, will not be static. Just as Quebec's first omnibus use of the notwithstanding clause gave rise to the particular circumstances leading to *Ford*, its uses in new contexts and the constitutional cases they generate will provide necessary opportunities to engage the rich constitutional contexts *Ford* swerved to avoid. *Ford* answered some questions about section 33, but the conversation, judicial and otherwise, about the notwithstanding clause's role in Canada's constitutional law and life remains an ongoing one.

54 Penny MacRae, "Controversial clause sought by provinces, Quebec minister says", *The Globe and Mail* (23 December 1988) A5.