

## *Is the Notwithstanding Clause an Ouster Clause?*

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Thirty-seven years after its decision in *Ford*, the Supreme Court of Canada granted leave to appeal in 2025 against the Quebec Court of Appeal’s ruling in the *Work Sikh Organization* case. This appeal is poised to be the most significant development in the Court’s jurisprudence on section 33 since the 1988 *Ford* decision. The case, now known as *English Montreal School Board*, raises important issues and invites the Court to reconsider its stance in *Ford*. This article takes *Ford* as a starting point but addresses a question neither raised nor settled in *Ford* — whether the notwithstanding clause functions as an ouster clause. The Quebec Court of Appeal answered this question in the affirmative, but I argue that the Court was wrong. The notwithstanding clause does not oust the jurisdiction of a court to substantively review an impugned law or provision for *Charter* compatibility. This point is separate and distinct from the decision of the Supreme Court in *Ford* that the legislature’s use of section 33 cannot be reviewed substantively. Interpreting the notwithstanding clause as an ouster clause needlessly outlies section 33 by departing from standard principles of *Charter* interpretation, ignoring clear constitutional wording, and undermining the *Charter*’s purpose of protecting rights.

### I. Introduction

The notwithstanding clause is a distinguishing feature of the *Canadian Charter of Rights and Freedoms* (“*Charter*”),<sup>1</sup> occupying the fluid boundary of Canada’s often colliding identities as a state with a sovereign legislature (federal Parliament and provincial legislative assemblies)

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

and a supreme Constitution over which the judiciary serves as custodian and guardian. Much has been written about the history of the clause.<sup>2</sup> It is well established that it is the product of compromise and deserves Canadians' gratitude for the eventual acceptance of the 1982 *Constitution Act* by provinces concerned about what the judiciary's new judicial review powers meant for their powers under the 1867 *Constitution Act*. The clause has, however, also been severely criticized for as long as it has existed. Six years after the *Charter* came into force, these criticisms were reflected in a legal challenge that made its way to the Supreme Court of Canada ("SCC"), resulting in the most consequential judicial pronouncement on section 33 to date in *Ford v Quebec (AG)*.<sup>3</sup> About four decades after *Ford*, the SCC has another opportunity to advance section 33 jurisprudence, having recently granted an application for leave to appeal the decision of the Quebec Court of Appeal in *World Sikh Organization* (now known as *English Montreal School Board*).<sup>4</sup> This appeal concerns the preemptive usage of section 33 in Quebec's *Laicity Act*, which, among other things, banned the wearing of religious symbols and apparel in designated government institutions and while obtaining of certain government services.<sup>5</sup>

There are several principles in *Ford* — principles that were re-stated and applied by the Quebec Court of Appeal — that are deserving of detailed critique, a venture which has been and continues to be undertaken by others.<sup>6</sup> The focus of this paper, however, is on the more discrete issue of whether section 33 of the *Charter* ousts the jurisdiction of Canadian courts to consider and pronounce on whether laws with explicit notwithstanding clauses derogate from sections 2 and 7 to 15 of the Canadian *Charter*. For now, it is accepted, as established in *Ford* and *World Sikh Organization*, that: section 33 contains formal not substantive requirements; no justification for the legislature's use of the notwithstanding clause is required; and section 33 insulates laws from some effects of section 52 of the *Constitution Act, 1982* which normally renders unconstitutional laws "of no force or effect."<sup>7</sup>

However, none of the foregoing elevates the notwithstanding clause to the status of an ouster clause.<sup>8</sup> Indeed, there is no explicit ouster clause anywhere in the Constitution of Canada. While there are internal constraints in the *Charter* as to the scope of *Charter*

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2 The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" (1998) 6 Points of View 1; The Honourable Allan E Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 Const Forum Const 1; Eric Adams & Erin Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022) 26:2 Rev Const Stud 121.

3 *Ford v Quebec (AG)*, [1988] 2 SCR 712 [*Ford*].

4 *English Montreal School Board, et al v Attorney General of Quebec, et al*, 2025 CanLII 2818 (SCC); *World Sikh Organization of Canada et al v AG, Canada et al*, 2024 QCA 1 [*World Sikh*].

5 *Act respecting the laicity of the State*, CQLR c L-0.3, 2019, s 34 [*Laicity Act*].

6 Lorraine Eisenstat Weinrib, "Learning to Live with the Override" (1990) 35 McGill Law Journal 541; See also generally, Peter Biro ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024).

7 *Ford*, *supra* note 3; *World Sikh*, *supra* note 4.

8 "An ouster clause is a clause in legislation (or constitution) which seeks to deny, or 'oust' the courts' supervisory jurisdiction over the exercise of public power. This means that the subject matter of the ouster clause cannot be challenged in the courts." UK Joint House of Commons and House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Judicial Review and Courts Bill — 10th Report of Session 2021–22* (House of Commons, 2021) 18.

application,<sup>9</sup> no constitutional provision empowers the legislature to make laws that effectively delineate juridical no-go-zones. The absence of ouster clauses in the Canadian Constitution is another hallmark distinguishing it from jurisdictions where the Parliament is sovereign (jurisdictions that allow for statutory ouster clauses).<sup>10</sup> The explicit absence of an ouster clause also distinguishes Canada from other jurisdictions where the Constitution is supreme but itself contains explicit ouster provisions (constitutional ouster clauses).<sup>11</sup> The Quebec Court of Appeal (“QCA”) has, however, effectively equated the notwithstanding clause with an ouster clause, a position that this article contests. This issue was not before the SCC in *Ford* or any other decision thereafter; indeed, the QCA’s reliance on the SCC’s jurisprudence on this point was mostly through extrapolation or acknowledged invocation of the SCC’s *obiter dicta*.

The analysis is in three substantive parts. I begin by considering the facts, decision, and reasoning of the QCA on whether section 33 shields laws with notwithstanding clauses from judicial review. Second, I highlight the flaws in the Court’s reasoning. Third, I justify why it is necessary for courts to carry out a complete *Charter* analysis while stopping short of applying section 52 of the *Constitution Act, 1982* when notwithstanding clauses are incorporated into laws.

## II. The Notwithstanding Clause as an Ouster Clause

According to Quebec, its *Laicity Act* is a legal codification of its values of secularism and religious neutrality.<sup>12</sup> The *Act* prohibits designated persons, including judges, lawyers serving as prosecutors and with legal services of contract, and teachers in Quebec from wearing reli-

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9 The *Charter*, for example, only applies to government actors and actions. Courts, therefore, lack the jurisdiction to entertain private disputes based on the *Charter*. See *Charter*, *supra* note 1, s 32.

10 Even in such jurisdictions, courts have interpreted ouster clauses restrictively in recognition of the tension between parliamentary sovereignty and the rule of law. In the United Kingdom, for example, ouster clauses will not apply if the public body is acting outside its jurisdiction. In which case, there is nothing for the clause to be attached to (*ex nihilo nihil fit*). See *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147; *R (Privacy International) v Investigatory Powers Tribunal*, [2019] UKSC 22. See also Philip Murray, “Reconsidering Ouster Clauses: The High Court’s Decision in *Oceana*” (5 July 2023), online: *UK Constitutional Law Blog* <<https://ukconstitutionallaw.org/2023/07/05/philip-murray-reconsidering-ouster-clauses-the-high-courts-decision-in-oceana/>>.

11 For example, section 6(6)(c) of the 1999 Constitution of the Federal Republic of Nigeria states: “The judicial powers vested in accordance with the foregoing provisions of this section ... shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”

12 The *Act* was informed by a 2008 report on the reconciliation of cultural differences in Quebec. A key theme in the report is the concept of “laïcité” which is “understood in the context of the broader ideal of neutrality to which the State must aspire if it wishes to treat citizens fairly.” The report proposed an “open state secularism” which is based on the moral equality of persons, freedom of conscience and religion, state neutrality towards religion, and the separation of church and state. The *Act* adopted these four principles in its definition of “laicity.” See Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* (Quebec: Government of Quebec, 2008); see also *Laicity Act*, *supra* note 5, s 2.

gious symbols in the exercise of their functions.<sup>13</sup> Personnel members of government departments, budget-funded bodies, government agencies, municipalities, public transit authorities, public institutions, childcare centers, and private institutions under the agreement respecting health and social services are also forbidden from wearing any religious symbol.<sup>14</sup> Persons who receive services from relevant personnel must also have their face uncovered if necessary for identification or security reasons.<sup>15</sup> That these restrictions engage various *Charter* rights, particularly those guaranteed by sections 2(a) and (b) (freedoms of conscience and religion, and expression) and section 15(1) (equality rights), is uncontroversial.

The *Act* was, therefore, fated to be legally challenged. Indeed, such was the case when various religious, human rights, non-governmental, and educational organizations and individuals initiated various proceedings against the *Act*.<sup>16</sup> In one of these cases, *Hak v Attorney General of Quebec*, the Superior Court of Quebec declared provisions of the *Act* that unjustifiably limited section 3 rights of members of the Quebec National Assembly and other voters invalid.<sup>17</sup> The Quebec Court of Appeal, in a consolidated judgment, endorsed the lower court's invalidation but held that other provisions of the *Act* are insulated from being challenged for violating sections 2 and 7 to 15 of the *Charter*.<sup>18</sup>

The *Laicity Act* incorporates a standard notwithstanding clause. The *Act* states that it and its amendments “shall have effect notwithstanding sections 2 and 7 to 15 of the *Constitution Act, 1982*.”<sup>19</sup> By waving this constitutional wand, the Court discountenanced the possible violation of the right to religious freedom (among others), one of the “original” rights described as a necessary attribute and mode of self-expression,<sup>20</sup> which is “integrally linked with an individual’s self-definition and fulfilment.”<sup>21</sup> To a large extent, parties opposing the *Laicity Act* attempted to overcome this constitutional magic trick by rehashing arguments previously rejected by the Supreme Court about four decades ago in *Ford*.<sup>22</sup> In particular, the QCA followed the *Ford* by holding that the judicial review of section 33 is limited to the consideration of its formal requirements.<sup>23</sup> The flipside of this, in the Court’s view, is that courts cannot review the wisdom or justice of the legislature’s invocation of section 33, or whether section 33 has any meaningful connection to sections 2 and 7 to 15.<sup>24</sup>

Various novel arguments were also raised, considered, and rejected at the QCA. These include whether section 33 should be interpreted in light of section 1 of the *Charter*, the appli-

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13 *Laicity Act*, *supra* note 5, s 6, Schedule II.

14 *Ibid*, s 7, Schedules I & III.

15 *Ibid*, s 8.

16 The QCA consolidated twelve appeals from actions brought by organizations including the World Sikh Organization of Canada, National Council of Canadian Muslims, Corporation of the Canadian Civil Liberties Association, English Montreal School Board, etc.

17 *Hak v Attorney General of Quebec*, 2021 QCCS 1466.

18 *World Sikh*, *supra* note 4. Similar arguments and conclusion were made in respect of section 52 of the *Quebec Charter of Rights and Freedoms*.

19 *Laicity Act*, *supra* note 5, s 34.

20 *Saumur v City of Quebec*, [1953] 2 SCR 299 at 329.

21 *Syndicat Northcrest v Amselem*, 2004 SCC 47 at 42.

22 *Ford*, *supra* note 3.

23 *Ibid*.

24 *Ibid*.

cation of the presumption of conformity with international law in interpreting section 33, and whether section 28 (equal guarantee of the *Charter* to male and female persons) grounds a freestanding sex equality right. These arguments are not addressed here. Rather, I focus on the QCA's rejection of the argument that section 33 does not strip the court of its power to review whether the *Laicity Act* is in violation of the freedom of conscience and religion and equality rights. On this point, the QCA concluded that:

When the legislature, relying on s. 33 of the Canadian Charter, decides to derogate from that Charter's ss. 2 or 7 to 15 (doing so as a preventive measure in the case at bar), not only does it protect or exempt the statute from their application, but it also thereby limits the judicial review of the statute's constitutionality. As a consequence, the courts can no longer engage in the process of verifying whether the statute complies with the provision or provisions being overridden, and any notion of redress — including declaratory relief — is excluded.<sup>25</sup>

The QCA, in framing the notwithstanding clause as an ouster clause (or a “constitutional privative clause”),<sup>26</sup> acknowledged that this issue was neither before the Supreme Court nor pronounced on in *Ford* or any other decision.<sup>27</sup> The Court, however, based its decision on an implicit reading of previous *obiter dicta* of the Supreme Court.<sup>28</sup> The “repetition and convergence” of the comments of the Supreme Court on the ousting effects of section 33, according to the QCA, are not insignificant and cannot be ignored.<sup>29</sup>

Substantively, the QCA invoked “constitutional logic” to support its conclusion.<sup>30</sup> The Court held that it is illogical to permit legislation to operate notwithstanding sections 2 and 7 to 15, “and at the same time, allow judicial review of their compliance with those provisions.”<sup>31</sup> To the Court, this would be tantamount to indirectly doing what cannot be done directly.<sup>32</sup> The Court also worried about the “kind of penalty” that substantive review would impose on the legislature, which would have to “explain itself before the court” despite invoking section 33.<sup>33</sup> Further, the Court supported its position with a political choice argument, noting that the five-year limit in section 33(3) and (4) of the *Charter* made the decision to invoke section 33 solely subject to “political review.”<sup>34</sup> Finally, the Court canvassed what could be described as a “what-if” argument, a derivative of the political choice argument. Drawing from the scholarship of Adams and Bower (among others),<sup>35</sup> the Court endorsed the position that in the event that a court reviews a law and finds it to be *Charter* consistent, the government will

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25 *World Sikh*, *supra* note 4 at para 315.

26 *Ibid* at para 358.

27 *Ibid* at para 338.

28 The QCA's first reference was Wilson J's dictum in *R v Hess; R v Nguyen*, [1990] 2 SCR 906 at 926, where the Court held that “whenever legislation is not insulated from judicial review by s. 33 of the Charter infringes on Charter rights or freedoms, the government is fully entitled to try to justify the legislation under s. 1 of the Charter.” On this “authority,” the QCA concluded at para 340 that “the words are unequivocal: by using s. 33 of the Canadian Charter, the legislature insulates legislation from judicial review ... it being understood that this refers to judicial review of the statute's conformity with the provisions being overridden.”

29 *World Sikh*, *supra* note 4 at para 347.

30 *Ibid* at para 349.

31 *Ibid* at para 350.

32 *Ibid* at para 349.

33 *Ibid*.

34 *Ibid* at para 351.

35 Adams & Bower, *supra* note 2 at 142–143.

let the sun set “without having to pay the ongoing political cost for a deliberate infringement of *Charter* rights.”<sup>36</sup>

The QCA responded in the negative on whether it can declare under section 24 of the *Charter* that a law that includes a notwithstanding clause violates sections 2 and 7 to 15 without making the law inoperative.<sup>37</sup> Given the ousting effect of section 33, the Court held that “no judicial review of the Act’s compliance with the constitutional provisions from which it was validly exempted can be exercised and no remedy, even a declaratory one, can be granted under s. 24(1) of the Canadian *Charter*.”<sup>38</sup> The QCA took this position in spite of the position of Chief Justice McLachlin that a court can make declarations on the infringing nature of a statute even if the law or a provision thereof cannot be invalidated by the courts.<sup>39</sup> The QCA argues that Chief Justice McLachlin’s position was stated in *obiter*. Never mind that the only judicial statements the QCA relied on to frame the notwithstanding clause as an ouster clause are themselves mostly *obiter dicta*.<sup>40</sup>

### III. The Notwithstanding Clause is Not an Ouster Clause

I do not directly respond to the arguments of the QCA on the above points. Instead, I argue that the contentions of the Court and its framing of the notwithstanding clause as an ouster clause are underlaid by and predicated on a trifecta of errors — function, interpretation, and conflation errors. Addressing these errors would invariably lead to a conclusion that while the notwithstanding clause could be deemed an override clause or an exception clause, it falls short of being an ouster clause (or in the QCA’s words “a constitutional privative clause”).

#### A. The Function Error

In construing the notwithstanding clause as an ouster clause in *World Sikh Organization*, the QCA failed to address its mind to the essence of the *Charter* and the role of the courts, and overly essentialized political discourse. These flaws make up what I call the Court’s function error.

As the Supreme Court stated several years after the passage of the *Constitution Act, 1982*, the overarching purpose of the *Charter* is the “unremitting protection of individual rights and liberties,”<sup>41</sup> with the courts serving as the constitutionally assigned guardians and guarantors of this “unremitting protection.”<sup>42</sup> However, citing the dictum of the Supreme Court in *Vriend*, the QCA held that, courtesy of section 33, the legislature has the last word vis-à-vis rights issues “in our constitutional structure,” and can even deploy section 33 from the outset to

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36 *World Sikh*, *supra* note 4 at para 352.

37 *Ibid* at para 364.

38 *Ibid*.

39 *Ibid* at para 366.

40 Similar to the section 24 argument is the QCA’s invocation of the doctrine of mootness, arguing that since the *Act* would still have force and effect notwithstanding the infringement of rights, such determination (of infringement) would have no concrete legal effect. *Ibid* at paras 379, 396.

41 *Hunter v Southam*, [1984] 2 SCR 145 [*Hunter*].

42 *Ibid*.

effectively give itself the *only* word (via a preemptive use of the notwithstanding clause).<sup>43</sup> This is incorrect.

The SCC was clear in *Vriend* that the Constitution conferred *Charter* trusteeship on the courts.<sup>44</sup> Only the courts are constitutionally commanded to interpret the *Charter* and declare laws inconsistent therewith as invalid.<sup>45</sup> The portion of the decision in *Vriend* referenced by the QCA was in the context of the dialogue that occurs between the judiciary and legislature, and how the legislature can play the section 33 trump card in the course of that dialogue.<sup>46</sup> This is very different from the position of the QCA that section 33 could be used to “cut short the discussion.”<sup>47</sup> This is tantamount to suggesting that by the waving of the section 33 wand, the interpretive and trusteeship roles of the judiciary regarding the *Charter* are automatically relinquished. Indeed, such a reading undermines the very dialogue to which section 33 is supposed to contribute. After all, if the preventive use of section 33 means that the courts can be preemptively left out of the dialogue, how can there be a dialogue?

Again, there is a clear distinction to be made between the form of both constitutional and statutory ouster clauses and a notwithstanding clause. The constitutional notwithstanding clause is native to Canada, a unique innovation to reconcile the differences between unwilling provincial governments and a federal government committed to a constitutionalized bill of rights.<sup>48</sup> In this sense, the core goal of the notwithstanding clause was the preservation of legislative power, hence why it was directly and specifically framed in terms of the power of Parliament and the legislatures, with its effect on judicial power remaining implicit.

Ouster clauses, by contrast, are framed in terms that target the judiciary, and that expressly purport to narrow judicial power. For example, the UK *Regulation of Investigatory Powers Act* contains an ouster clause, which provides that the decisions of the tribunal shall not be “liable to be questioned in any court.”<sup>49</sup> Such clauses had existed in other jurisdictions prior to 1982, and the *Charter*’s framers could therefore have used clear language, borrowing from existing examples, to indicate that this is what they intended to do through the notwithstanding clause. The fact that they did not use such language, and did not direct the notwithstanding clause to the courts, is telling. As noted by the SCC in a different context, “we must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.”<sup>50</sup> In this case, the terms used do not point in the direction of an ouster clause.

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43 *World Sikh*, *supra* note 4 at para 356.

44 *Vriend v Alberta*, [1998] 1 SCR 493 at paras 134, 135 [*Vriend*].

45 *Ibid*, para 132.

46 *Ibid*, paras 137–139.

47 *World Sikh*, *supra* note 4 at para 356.

48 A notwithstanding clause was also incorporated into the 1960 Canadian Bill of Rights: see *Canadian Bill of Rights*, SC 1960, c 44, s 2; see also Adams and Bower, *supra* note 2 at 126–128, on the historical connection between statutory notwithstanding clauses and the role they play in resolving conflicts in statutes and the notwithstanding clause in the Canadian *Charter*. The notwithstanding clause in the *Charter*, however, does not resolve conflicts between *Charter* provisions. At best, it confers temporary operational priority on statutes vis-à-vis enumerated rights.

49 *Regulation of Investigatory Powers Act 2000*, s 67(8). See also the Nigerian Constitution, *supra* note 9.

50 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 32.

There is no disputing the position that by inserting the five-year sunset clause in section 33, there is a connection with the five-year electoral cycle in section 4(1) of the *Charter*.<sup>51</sup> Quoting Leckey and Mendelsohn, the QCA held that this five-year mechanism confers a democratic role on citizens.<sup>52</sup> Following this logic, the QCA seems to suggest that the “people” through their votes are the police of section 33. Nothing in section 33 confers on “the citizens” the role of *Charter* guardianship that has been constitutionally given to the courts. At best, “the citizens” are, in addition to the courts, co-protectors of *Charter* rights, since to argue that section 33 makes the citizens sole guardians of the *Charter* under certain circumstances would be completely inconsistent with the counter-majoritarian nature of the *Charter*.<sup>53</sup>

The controversy over Quebec’s *Laicity Act* speaks to this point, given that the persons whose rights are adversely impacted are in the minority (in fact, the government that enacted the *Laicity Act* in 2019 returned with an even larger majority in 2022).<sup>54</sup> If the *Charter* is supposed to protect the minority from the tyranny of the majority, it makes little sense to place ultimate trust in a majority of the electorate.<sup>55</sup> Moreover, the essentialized notion of political discourse and the presumption of electoral rationality discountenance the reality that voters generally vote on multiple issues and would rarely base their votes solely on a government’s indiscriminate use of the notwithstanding clause.

## B. The Interpretation Error

The canons of *Charter* interpretation are well established.<sup>56</sup> The *Charter* must be interpreted purposively, generously, and contextually.<sup>57</sup> *Charter* provisions should, generally, not be read or interpreted in isolation.<sup>58</sup> Conflicting *Charter* provisions should also be reconciled in such a way as to achieve their underlying purposes,<sup>59</sup> and *Charter* interpretation must be predominantly governed by the purpose of the *Charter* — the protection of rights.

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51 Section 33 does not apply to democratic rights (ss 3–5), mobility rights (s 6), and language rights (ss 16–23).

52 *World Sikh*, *supra* note 4 at para 226; See Robert Leckey & Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate” (2022) 72:2 UTLJ 189 at 198.

53 See Brian Dickson, “Madame Justice Wilson: Trailblazer for Justice” (1992) 15:1 Dal LJ 1 at 16: The *Charter* mandates judges to “ask themselves which groups are disadvantaged and therefore likely to be ignored by the majority ... [I]t is because the poor, the oppressed, the powerless and racial minorities, among other disadvantaged groups, are typically shut out of the political process that in assessing the rights of individuals who belong to these groups, one [judges] ha[ve] to be particularly vigilant.”

54 Antoni Nerestant, “CAQ Sails to Victory in Quebec with Largest Majority in Decades”, (3 October 2022), online: *CBC News* <<https://www.cbc.ca/news/canada/montreal/quebec-election-2022-results-1.6603562>> [<https://perma.cc/59RG-K9WM>].

55 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 96.

56 *Ibid*; *Hunter*, *supra* note 41.

57 *Hunter*, *supra* note 41.

58 See *Big M Drug Mart*, *supra* note 55 at para 117: “[T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself ... to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the *Charter*.”

59 See Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2023) vol 2 at 950. Hogg and Wright argue that the Supreme Court has mostly dealt with conflicting rights under section 1 in what they described as *ad hoc* balancing. In special circumstances, however, the SCC narrows the scope of a substantive *Charter* right to accommodate the exercise of another

Evidently, section 33 is like no other *Charter* provision and the foregoing canons cannot be entirely applied in its interpretation. Nevertheless, the text of the *Charter* provision being interpreted remains a fundamental factor in interpretation. However, recognizing the *sui generis* nature of section 33 is not the same as entirely discounting all canons of *Charter* interpretation as the QCA did in *World Sikh Organization*. While engaging with the foregoing interpretive principles on other issues and refusing to apply the presumption of conformity to section 33, the QCA did not address how section 33 should be interpreted to ensure its consistency with the *Charter* as a whole. Rather, the Court interpreted section 33 as a stand-alone *Charter* provision.

While unique, section 33 remains part of the Canadian *Charter*. It must, therefore, not be interpreted in a way that could, in theory, obliterate other *Charter* rights and provisions. The interpretation challenge therefore is how to interpret section 33 in a way that respects its text while accommodating other *Charter* provisions. The textual provisions of section 33 are clear: the express declaration in an Act that it shall operate notwithstanding a provision in sections 2 or 7 to 15 means that such law shall operate despite its impact on these provisions. The operative word here is “operate.” I will return to this when discussing the QCA’s conflation error, but for now it is relevant to note that section 33 did not provide that “the law shall be valid.” The declaration of validity remains the exclusive preserve of courts and nothing in the text of section 33 strips the court of that authority. In fact, to construe “operate” as “valid,” whether explicitly or implicitly, would be to do violence to the express text of section 33.

Importantly, and consistent with the overarching purpose of protecting rights and how this objective must underpin *Charter* interpretation, the limiting provisions found in the *Charter* have been strictly interpreted by the courts.<sup>60</sup> Like section 33, section 1 is also a limiting provision in the *Charter*, and has been understood to mean that legal provisions that violate *Charter* rights can be upheld only insofar as they are prescribed by law and demonstrably justified in a free and democratic society. Regarding section 1, the Supreme Court held that given the violation of constitutionally guaranteed rights and the fundamental principles of a free and democratic society, section 1 analysis must entail a “stringent standard of justification.” Arguably, section 33 has an even more far-reaching impact on rights, and must therefore be interpreted even more strictly to guarantee the protection of rights while still respecting its text.

Interpreting section 33 purposively does not require an artificial grafting of an ouster clause into the provision. Again, Canadian courts have rejected an originalist approach to constitutional interpretation. While history might assist with discerning the purpose of section 33, section 33 must not become the one dead *Charter* provision amid analogically living provisions. The QCA’s judgment underlines a historically-aligned purpose of section 33 — compromise, reconciliation of the tension between constitutional supremacy and parliamentary sovereignty, and the addition of a hyphen between political and legal constitutionalism.<sup>61</sup> However, even if this purpose were to be accepted at face value, it does not and should not translate the notwithstanding clause into an ouster clause. Balancing the powers

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(definitional balancing). While not a substantive right, section 33 is an extraordinary *Charter* provision. It must be interpreted in a way that does not entirely neuter the rights to which it applies.

60 This is in contra-distinction to the generous interpretation of substantive rights in the *Charter*.

61 *World Sikh*, *supra* note 4 at paras 228–234, 481.

of the court to uphold the supremacy of the Constitution with parliamentary supremacy does not require the neutering of the former. Hence, section 33 adopts the lower legal consequence of temporary operability of potentially errant law rather than the temporary validity of such law. If the legislature gets the last word at all, then it is a last word on the temporary operability of a law, not its validity, even if temporary. Indeed, a progressive interpretation of section 33 that is consistent with the times and does no violence to its text<sup>62</sup> would emphasize the dialogical nature of the clause. This, at the minimum, means that until the court has its say, the legislature cannot have a last word.

### C. The Conflation Error

The QCA failed to draw clear lines between substantive *Charter* and section 33 analyses and the legal realities of validity and operability. These conflations were muted undercurrents responsible for the ultimate conflation of the notwithstanding clause with the concept of an ouster clause.

According to the QCA, conducting a *Charter* analysis of the validity of a piece of legislation with a notwithstanding clause means asking the legislature to explain and justify its law under section 1, which is tantamount to arguing, “paradoxically,” that section 33 is unnecessary.<sup>63</sup> Substantive *Charter* analysis and section 33 are, however, distinct and separate. In *Ford*, the SCC rejected attempts to link the use of the notwithstanding clause and substantive *Charter* provisions.<sup>64</sup> The requirements for section 33 analysis are strictly formal, focusing on whether the overriding statute satisfies the minimal requirements of section 33 (express declaration in valid legislation).<sup>65</sup> As such, there is no requirement that the government “explains” itself on why section 33 has been deployed. A substantive *Charter* review, on the other hand, has no reason to engage whatsoever with section 33. A section 1 analysis has no legal effect on section 33. Even if a law were to be found to constitute a reasonable and demonstrably justified limit on *Charter* rights, that does not “paradoxically” amount to section 33 not being necessary. Section 33 will still protect such law from being rendered inoperative, and the legislature is not required to justify the use of section 33. Therefore, there is a distinction between a judicial review of the substantive provisions of a law and a substantive review of the use of section 33 within the same law. The latter is prohibited, while the former is permitted.

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62 For one, Canada is immensely more diverse than in the 1970s and 1980s when the *Charter* was negotiated and agreed to. There are more minority groups in the country and consequently a greater need to protect minority groups. Section 33 must therefore not be interpreted in a way that completely strips the judiciary of its constitutional role as the guardian of minority rights. See Natasha Bakht and Lynda Collins, “Notwithstanding the Notwithstanding Clause: A Case for Constitutional Guardrails on Section 33 of the *Charter of Rights and Freedoms*” (2024) 33:2 Const Forum Const 1; see also Richard Mailey, “The Notwithstanding Clause and the New Populism” (2019) 28:4 Const Forum Const 9: “[T]he rise of populist politics in Canada could eventually create a situational shift that would deeply undermine traditional justifications of the section 33 clause”; see also Robert Leckey, “Advocacy Notwithstanding the Notwithstanding Clause” (2019) 28:4 Const Forum Const 1 at 1: “[There is a shift] from a paradigm of respect for rights to one of majoritarian willingness to override them without justification.”

63 *World Sikh*, *supra* note 4 at para 349.

64 *Ford*, *supra* note 3.

65 *Ibid.*

Canadian constitutional law is clear that a valid law can nevertheless be inoperable.<sup>66</sup> In other words, operability does not have a linear or co-extensive relationship with validity. A court asked to pronounce on the validity of a provincial law in the federalism context does not, for example, refuse to do so simply because the provincial law would be inoperative because it conflicts with a federal law.<sup>67</sup> It is instructive that much like the notwithstanding clause, the paramountcy principle also has a notionally temporary effect as conflicting provincial laws are only put in abeyance rather than being rendered permanently of no force or effect. In conflating invalidity with inoperability, the QCA drew from Hogg's position that by incorporating a notwithstanding clause in a statute or statutory provision, "the statute will operate free from the invalidating effect of the *Charter* provision referred to in the declaration."<sup>68</sup> Thus, the QCA held that statutes with a notwithstanding clause render the relevant *Charter* provisions "inapplicable" and such statutes cannot be "subjected to a declaration of invalidity, or more precisely, of inoperability."<sup>69</sup>

Even a cursory look at section 33 does not support this overreaching decision of the QCA. Section 33 cannot and should not be read as saying a notwithstanding clause disapplies the relevant *Charter* provisions to a statute, or to mean that a declaration of invalidity cannot be issued against a statute. All it provides is that such law "shall have such operation as it would have but for the provision of this charter referred to in the declaration."<sup>70</sup> There are multiple constitutional implications for laws that are relatively or entirely inconsistent with the text and spirit of the Constitution. These include invalidity, inoperability, inapplicability, suspension of declarations of invalidity, severance, etc. Section 33 circumscribes the possible effects of laws which are inconsistent with the *Charter* under sections 52 and 24, but it does not eviscerate every possible effect. The only effect a law with a notwithstanding clause is shielded from is "inoperability."

In other words, such a law can be declared invalid but cannot be declared inoperable.<sup>71</sup> This is akin to a suspended declaration of invalidity. Suspended declarations of invalidity do not directly flow from sections 24 or 52 of the *Constitution Act*. Instead, the remedy is a gap-filling structural doctrine, which the Constitution is silent on, but which is necessary for constitutional coherence.<sup>72</sup> The continued operation of section 33 shielded laws which are

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66 Hogg and Wright, *supra* note 59 at §39:1, 39-2 and 39-3.

67 The application of the paramountcy principle follows the affirmation of an impugned provincial law as valid. The incidence of validity, however, does not automatically translate into the operability of the law. A provincial law could, therefore, be valid yet at the same time inoperable. For other reasons, the reverse can also be true. In *Re Manitoba Language Rights*, [1985] 1 SCR 721, the Supreme Court held that despite the unconstitutionality of Manitoba's unilingual laws, the principle of the rule of law compels the Court to deem the laws "temporarily valid" for a time period that allows the Manitoba legislature to carry out necessary amendments. In effect, this decision mirrors the "invalid but temporarily operable" scenario that section 33 compels.

68 *World Sikh*, *supra* note 4 at para 318

69 *Ibid.*

70 *Charter*, *supra* note 1 at s 33(2).

71 This is similar in effect to a court declaring a law invalid for unjustifiably violating the *Charter* but suspending that declaration of invalidity, allowing the law to operate while the legislature makes effort to align with the decision of the court. The only difference in the context of section 33 is that the effect of any declaration of invalidity is automatically suspended for a maximum of five years except if renewed.

72 *Toronto (City) v Ontario (AG)*, 2021 SCC 34, para 56.

declared invalid is a coherent approach to interpreting and applying section 33 vis-à-vis other parts of the *Charter*. Therefore, the notwithstanding clause does not give the final word on the invalidity of *Charter*-infringing legislation to the legislature. At best, it gives the legislature a temporary final word on the *operation* of the legislation despite possible or actual *Charter* infringements. In this sense, section 33 only attenuates the power of judicial review, rather than stripping the judiciary of that power completely, as an ouster clause would. This is not the function of a notwithstanding clause.

Nothing in the foregoing arguments contradicts the decision of the Court in *Ford*. Reviewing a statute for compliance with the *Charter* despite the statute's inclusion of a notwithstanding clause is not the same thing as a substantive review of the notwithstanding clause itself. It is the latter that is forbidden in *Ford*, not the former.

#### IV. Notwithstanding the Notwithstanding Clause

Applying the doctrine of mootness, the QCA concluded that considering that section 33 excludes a declaration of inoperability, a decision “would have no useful impact on the rights alleged to have been infringed,” since the legal situation of those subject to the law would in any case remain unchanged.<sup>73</sup> The doctrine of mootness is an efficiency mechanism for managing scarce judicial resources,<sup>74</sup> and essentially involves a determination of whether there is a live controversy that impacts the rights of the parties. Regardless of section 33, the “controversy” of whether a law violates a right remains live. Section 33 does not make a *Charter* challenge merely hypothetical or abstract, but only translates into a temporal suspension of the effects of a declaration of invalidity under section 52.<sup>75</sup>

The temporary suspension of a law's effects declared invalid under section 33 does not mean that such decision as to invalidity has “no useful impact.” The key consideration for mootness is whether there is a predicate live dispute, not necessarily the effect of a court's decision. Therefore, courts have pointed out cases involving a repealed law, a court decision resolving related issues, or an executed judgment as examples of predicates leading to a finding of mootness.<sup>76</sup> None of these applies in this case. The predicate substantive challenge on the *Laicity Act* has not been previously determined. The first condition for the application of the doctrine of mootness — the absence of a live dispute — is therefore absent.

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73 *World Sikh*, *supra* note 4 at para 379.

74 *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

75 For more on suspended declarations of invalidity and section 33, see Brian Bird, “The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity” (2019) 42:1 Man LJ at 23–49.

76 See *Doucet-Boureau v AG of Nova Scotia*, 2003 SCC 62 at paras 16–22 [*Doucet-Boureau*]. In this case, the issue was whether a court could impose on a province a duty to report on its compliance with the court's judgment after the determination of the case and the court is *functus officio*. In holding that the matter was moot, the SCC noted that “the desired effect has been achieved: the schools at issue have been built.” The SCC, however, went ahead to hear the appeal because of the presence of an adversarial context, because of the importance of the issues, and because the court was not departing from its traditional role. Even if the QCA was correct that the case was moot because of section 33, there is nevertheless a strong argument that a court should exercise its discretion towards hearing such a *Charter* dispute for all the reasons mentioned in *Doucet-Boureau*.

In holding that a declaration of invalidity without inoperability strips a *Charter* challenge in a section 33 context of any “useful impact,” the QCA misses the point of what *Charter*-based judicial review is about. The *Charter* is as much a normative gauge as it is a legal instrument with specific legal effects. Chief Justice Dickson notes that the judicial analysis of the *Charter* reflects society’s most fundamental norms.<sup>77</sup> In *Vriend*, for example, the SCC held that the exclusion of sexual orientation from Alberta’s *Individual Rights Protection Act* unjustifiably violated section 15 of the *Charter*.<sup>78</sup> The Court reached this conclusion in part due to the inconsistency of the exclusion of sexual orientation with normative democratic values, including the inherent dignity of the human person, social justice, and equality.<sup>79</sup> The alignment of the Court’s interpretation of the *Charter* with societal values is vital to the conceptualization of the *Charter* as a living tree.<sup>80</sup> When seized of a *Charter* dispute, a court, therefore, does more than an isolated resolution of a discrete dispute. In addition to such dispute resolution, and perhaps more importantly, courts affirm society’s most fundamental norms and ensure that the metaphorical living tree continues to grow. These are concrete benefits of pronouncing on substantive *Charter* challenges to a law even if said law continues to operate temporarily.

Moreover, one may argue that the QCA misapprehended the dialogic essence of the notwithstanding clause, which is furthered rather than hindered by substantive judicial review. Judicial review without declaring the impugned law inoperable allows the judiciary to put its opinion on the law’s compatibility with the *Charter* on record, thereby adding significantly to the public dialogue surrounding the relevant rights dispute. My position on this is in contrast with the work of Dwight Newman, who argues that the legal effect of the notwithstanding clause is that legislative bodies can substitute their view of a particular rights conflict for the view of the courts.<sup>81</sup> However, the dialogue engendered by section 33 has little to do with the parallel interpretive roles of the judiciary and legislature, not least of all because the claim that the legislature possesses this constitutional role has very little support.

Instead of adopting Newman’s two-dimensional notion of dialogue under section 33, it is more helpful to think of this dialogue in three-dimensional terms. This entails a scaled dialogue occurring at different stages, beginning with the legislature’s invocation of section 33. When the legislature takes this step, it is not required to justify its decision to do so or establish any meaningful nexus between the law shielded by section 33 and the substantive right that might be violated.<sup>82</sup> On the contrary, the passage of the law and the use of section 33 are predominantly located in the arena of policy and political considerations, not the *Charter*.<sup>83</sup>

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77 Dickson, *supra* 53 at 17.

78 *Vriend*, *supra* note 44.

79 *Ibid* at paras 140–142; see also *R v Oakes*, [1986] 1 SCR 103 at para 64.

80 *Edwards v Canada (Attorney General)*, [1930] 1 DLR 98 (UK JPC) at 112–113.

81 Dwight Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities” in Geoffrey Sigalet et al, eds, *Constitutional Dialogue: Rights, Democracy and Institutions* (Cambridge: Cambridge University Press) 227.

82 *Ford*, *supra* note 3.

83 While some have argued that the legislature does more than mere policymaking in applying section 33, the history of section 33 suggests that the drafters proposed the provision in the understanding that courts are not the right domain for dealing with policy decisions. Peter Lougheed, who played a leading role in the incorporation of section 33, in his response to the then leader of the opposition in the Alberta Legislative

Although the courts cannot inquire into the policy reasoning behind the triggering of section 33, the courts can inquire into what would have been the *Charter* status of a law but for the use of the notwithstanding clause. This reading is implicit in section 33(2). The “but for” clause in section 33(2) presupposes that there is or will be a determination on *Charter* compliance — a determination that the courts are primarily empowered to make, and which the triggering of section 33 negates. This is not an argument about whether the determination precedes the negation. Indeed, as in the case of Quebec’s *Laicity Act*, legislative negation based on section 33 could be preemptive. This does not mean, however, that a subsequent determination cannot be made. In preemptively triggering section 33, the legislature simply indicates its belief in the absence of *Charter* compliance, and it is then the duty of the court to confirm or disprove such legislative suspicion.

The five-year sunset clause in section 33(3) which, by design, coincides with the five-year electoral cycle provided for in section 4(1) of the *Charter*, implicitly gives the voting public an important role in the section 33 dialogue. While the legislature, on one hand, emphasizes policy and political goals operating within the narrow remit of section 33, and the courts engage in *Charter* analysis apart from section 33, the voting public could consider the entire picture in determining whether a law has been rightly insulated from the effects of *Charter* non-compliance through the use of the notwithstanding clause. In this respect, to interpret section 33 as completely insulating a shielded law from substantive judicial review attenuates the democratic objective and dialogic essence of the notwithstanding clause. Making a similar point, Robert Leckey notes that while a substantive judicial review would not stop an impugned law’s application, it provides citizens with a clearer understanding of the law’s impact on rights. As he puts it: “such understanding matters because, although section 33 allows the democratic branches to have their say, it invites the electorate to evaluate that say.”<sup>84</sup>

Section 33 re-enacts and reinforces parliamentary sovereignty in the context of the *Charter*. A maximalist parliamentary sovereignty conception of section 33 is, however, inconsistent with the principle of constitutional supremacy and the role of the courts as guarantors of a supreme Constitution. The right balance between parliamentary sovereignty and judicially guaranteed constitutional supremacy is only possible if judicial review is permitted regardless of section 33, even if a reviewed law continues to operate. The result of this balanced approach mirrors, albeit imperfectly, the situation in commonwealth countries including Australia, New Zealand, and the United Kingdom, where laws do not cease to operate or be of no force or effect upon their declaration of incompatibility with rights by the courts. This view is consistent with Grégoire Webber’s position that the effect of section 33 only attaches to the effect of a declaration of invalidity: that is, to the question of inoperability.<sup>85</sup>

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Assembly, Grant *Notley*, explains: “we do not want to be in a position where public policy was being dictated and determined by non-elected people ... [section 33 would apply] when major matters of public policy were being determined by the court as a result of an interpretation of the Charter.” See Loughheed, *supra* note 2 at 4.

84 Leckey, *supra* note 62 at 4; see also Eric M Adams, “Ford Focus: Constitutional Context and the Notwithstanding Clause” (2023) 32:3 Const Forum Const 33 at 34.

85 Grégoire Webber, “Notwithstanding Rights, Review or Remedy? On the Notwithstanding Clause and the Operation of Legislation” (2021) 71 UTLJ 510.

In rejecting Webber's position, Leckey and Mendelsohn argue that under section 52, a declaration of invalidity must necessarily result in inoperability.<sup>86</sup> This absolutist view is inconsistent, however, with the SCC's expansive reading and application of the supremacy clause under section 52. In *Schachter*, for example, the SCC highlighted the flexibility allowed by section 52's guarantee that constitutionally inconsistent laws are of no force or effect "to the extent of the inconsistency."<sup>87</sup> The extent of inconsistency has allowed the court to develop a spectrum of section 52 remedies, ranging from striking down an invalid law to reading into it to cure the invalidity. More relevant to this article is the additional relief of suspending the declaration of invalidity.<sup>88</sup>

The possibility of suspending the invalidity of *Charter* inconsistent laws upends Leckey and Mendelsohn's position that a declaration of invalidity must automatically result in inoperability. To declare laws shielded by section 33 as invalid without more has a similar effect as the court's suspension of a declaration of invalidity, with the exception that the delayed effect of the declaration of invalidity is compelled by the Constitution itself rather than the pronouncement of the court. In other words, section 33 becomes an important consideration in determining the extent of inconsistency of a law and what should be the effect of such inconsistency. The answer is in section 33, which simply means that the law continues to operate even if invalid.

## V. Conclusion

Thirty-seven years after its decision in *Ford, English Montreal School Board* provides the SCC an opportunity to advance section 33 jurisprudence and answer various questions that were not at issue in *Ford*. While these unresolved issues have varying degrees of salience and complexity, arguably, none is as straightforward and vital as whether the notwithstanding clause ousts the jurisdiction of the courts to substantively review a section 33 shielded law. This question is distinct and separate from whether the use of section 33 by the legislature can be substantively reviewed. *Ford* answered the question of a substantive review of section 33's invocation in the negative. Rather than challenging this holding, I have addressed the separate issue of whether the notwithstanding clause constitutes an ouster clause, and thereby precludes substantive judicial review of potential violations of sections 2 and 7 to 15 of the *Charter*. The decision of the QCA synthesizes and endorses the main arguments of scholars who argue in favor of the notwithstanding clause as an ouster clause. As I have argued, however, these arguments are unsupported by the text of section 33, depart from well-entrenched principles of *Charter* interpretation, and detach section 33 from the purpose and context of the *Charter*.

Section 33 is a unique constitutional provision which captures Canada's distinct identity as a country with a supreme Constitution and sovereign legislatures, and a constitutional order animated by unwritten principles including democracy and federalism. Section 33 is, however, domiciled within the *Charter*, a constitutional instrument which has the protection of minorities and the vulnerable as an overarching objective. It is not always clear whether the federal and democratic imperatives of section 33 are reconcilable with the unwritten principle of protecting the rights of minorities and the vulnerable. To interpret section 33 as

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86 Leckey and Mendelsohn, *supra* note 52 at 193.

87 *Schachter v Canada*, (1992) 2 SCR 679.

88 *Ibid*; *Ontario (AG) v G*, 2020 SCC 38.

an ouster clause greatly undermines the eminently important principle of minority protection and the dignity of persons underpinning the *Charter*. The point is not that the use of the notwithstanding clause by the legislature cannot lend protection to minority rights. There are, indeed, examples of such positive usage.<sup>89</sup> However, the historical and current use of section 33 suggests that it is more often employed to undermine the rights of minorities and vulnerable groups. The judicial review of substantive rights without substantively reviewing the use of section 33, and the invalidation of section 33 shielded laws while allowing them to operate, balances democracy and federalism with the protection of individual and minority rights. This outcome, albeit imperfect, aligns with the history of compromise that characterizes the notwithstanding clause.

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89 Tsvi Kahana, “The Notwithstanding Clause in Canada: The First Forty Years” (2023) 60 *Osgoode Hall LJ* 1 at 66–67.