

[S2E2 - Section 33: The Notwithstanding Clause]

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Cheryl M.: Hello, and welcome back to Charter: A course. A podcast created by the David Asper Centre for constitutional rights, at the University of Toronto, faculty of law. I'm Cheryl Milne, the executive director of the Asper Centre.

Our podcast focuses on leading constitutional cases and issues highlighting strategic aspects of constitutional litigation, and some of the accomplishments of U of T's faculty and alumni. It is our hope that over the course of this episode, whether you are a law student, a lawyer or thinking of launching your own constitutional challenge, that you learn some aspect of constitutional law and litigation that interests you.

Today's topic is section 33, otherwise known as the notwithstanding clause. I will be handing over hosting duties for our first segment to Caitlin Salvino, the Asper centre's summer research assistant, and somewhat of an expert on the topic. I will let her introduce herself to you.

Caitlin S.: Thank you, Cheryl, for the introduction. Welcome again to Charter a course podcast. My name is Caitlin Salvino, I'm a JD candidate at the University of Toronto and a summer research student at the Asper Centre. Prior to this, I pursued masters and doctoral studies in law at the University of Oxford researching the notwithstanding clause.

My research examined both the unique vulnerability of minority groups to the notwithstanding clause, and proposing a new interpretive approach for the judiciary. Today, we will focus on section 33 of the Charter, also known as Canada's notwithstanding clause.

Known as a distinctive Canadian legal invention, the notwithstanding clause creates a legislative tool that permits federal, provincial or territorial legislatures to declare an act or provision of an act to operate notwithstanding sections 2 and 7 to 15 of the Charter.

Any notwithstanding clause declaration must be passed by a legislative simple majority, and expires after five years. Upon expiry, the notwithstanding clause is perpetually renewable.

This podcast examines the notwithstanding clause, and its unique role within Canada's constitutional democracy. We will discuss its development, its operation, the political implications thus far, and the existing jurisprudence on its application. Our practice corner, we will be speaking to two lawyers involved in the legal challenge against the invocation of the notwithstanding clause in Quebec's bill 21.

But first, let's introduce our guest for the discussion on section 33. Professor Lorraine Weinrib, is a Professor Emerita at the University of Toronto, faculty of Law and Department of political science. She holds law degrees from the University of Toronto and Yale University, and completed undergraduate studies at York University. Professor Weinrib taught constitutional law at the University of Toronto, including advanced courses on the Charter, constitutional litigation and comparative constitutional law.

Prior to teaching at the University of Toronto, she worked in the Crown Law Office, holding the position of deputy director of constitutional law and policy. In that capacity, she represented Ontario in the only case in which the Supreme Court of Canada has delivered on the validity of an invocation of section 33. Her submissions resulted in the only judicial restriction on its exercise.

She is published extensively on the Canadian Charter, including the notwithstanding clause. So welcome Lorraine, and thank you very much for joining us. Let us begin by talking about how section 33 came to exist in the first place. The notwithstanding clause was often referred to as a political compromise necessary for the patriation of Canada's constitution in 1982. How did it get added to the Charter, and why is it considered a political compromise?

Lorraine W.: The main feature of the Charter from the legal perspective is that it's an exceptional. It's an exception to the exceptionally strong rights guarantees in the Charter, and the exceptionally narrow and normative limitation clause that the courts evaluate in the second stage of Charter litigation. The Charter, we have the strong rights protection is

narrow limitation clause, and its override clause, emerge from truly many decades of political controversy and deliberations, which were often antagonistic.

One of the elements of the constitutional package was to transfer the power to amend Canada's written constitution from the United Kingdom parliament, to Canadian institutions, for which there had to be a formal amending formula, to provide the requisite agreement between the federal government and the provinces for domestic amendment of our constitution.

When that patriation exercise was performed, Canada would become totally constitutionally and legally and politically independent from the United Kingdom. So that was one part of the reform package. The other part was to bring Canada in conformity with its obligations under the international human rights system.

The amending formula discussions were antagonistic between the federal government and the provinces, because they couldn't figure out an acceptable amending formula. There were two times when all 11 governments agreed, and then Quebec backed out. So this is the beginning of Quebec being an outlier in our constitutional reform process.

The Charter was supported by social movement groups that initiated their work in the immediate aftermath of the war continued, and by a strange combination of events turned out to be the strongest force in writing the Charter, and also in breaking provincial opposition to the Charter. This is a fascinating story, and I've written about it in some of my articles, and I'd be happy to share links to my articles on this public participation.

And also, other people's writings, it's a very important and I think sadly neglected part of the development of the Charter. So we have, when we get to the late 70s and 80s, a complicated set of constitutional proposals that included a patriation, a new amending formula to be used domestically, to alter the terms of our written constitution and the Charter. With the provinces and the federal government standing in opposition.

Up into the middle of that, it seemed in-resolvable conflict marched the Canadian public, in the form of participation in a special joint committee that was formed in 1980 and 81. This was the only opportunity that ordinary Canadians had in Canadian history, to write the terms of any part of their constitution, and here, it was the great prize of writing the

Charter. At the point that the joint committee began its work, the Charter draft was very weak, the confrontation was.

The public interest groups which had been nurturing this Charter project for decades, they had organized, they had raised funds, they had educated themselves, they had done public education, they had secured experts to support their positions in court, and in parliamentary and legislative proceedings.

But they had never had a national audience. And they came forward with strong, cogent, polished presentations with historical material and empirical material, and many of the groups were expert groups of civil liberties and human rights, and international law. But many of them represented the people and the groups that had suffered in Canada over the years, because they had no rights, and they had very little political power.

The joint committee proceedings, with all of these pro Charter public interest groups presenting, were televised and widely watched. And the result was suddenly, there was very strong public education about the advantages of a Charter, and the advantages of a strong effective Charter, and the advantages of judicial review of Charter rights claims.

Not only that, there was increasingly more and more polling showing that the public was not only listening, but they were more increasingly convinced that Canada should have a very strong Charter, with protecting a wide assortment of rights, and designed to prevent of course the atrocities of the second world war, with skyrocketing public support for the Charter in every province.

The legitimacy of the provincial opposition to the Charter waned. And so this few rights and very deferential judicial review, draft of the Charter was thrown out the window. And in the joint community, clause by clause, the rights were enriched, they were strengthened. The limitation clause was given a strong, normative direction and emulation of the international human rights instruments. And other regional instruments, other post-war national constitutions.

The gender equality clause was added, the multicultural heritage clause was added. There was the strongest affirmation of judicial review with the provision for just an appropriate remedy, and there was a strong statement of the application of the Charter to all levels of government.

At this point, with the popularity of this very strong Charter draft, the prime minister had a much stronger position as against the provinces. And he used that position to offer a referendum. This was an offer that Quebec couldn't refuse. Quebec did accept it, and that broke the bonds of the eight provinces that had promised to each other that they would not make any unilateral move, that they would operate in opposition as a unit, to strengthen its effectiveness.

With the so-called gang of eight opposition now down to seven, the other premiers realized that they had to scramble in order to get what they could, because Trudeau was the kind of prime minister whom one could believe would decide to go ahead with a referendum. It was high-stakes politics. The premiers had the same polling as the federal government had, and so they knew that it would be political suicide to go into a referendum against the Charter.

As then Justice Minister Chretien said, let them come after me, I offer them equality, I offer them liberty. I offer them freedom of religion and freedom of expression, how are they going to argue against those principles? The result was the adoption of the Charter. But the provinces knew that there was still some room to exert pressure, and the pressure they exerted was the demand for the override clause.

So that's how we got the override clause. So this is why I want to stress that it's an exception. Because the premiers had very little political legitimacy in demanding an override clause, for which there was almost no public support.

They had very little legitimacy in celebrating legislative supremacy, when the whole country had just been educated and all of the problems in Canada and elsewhere on the world stage, when majorities ruled without any obligation to respect the equal and inherent human dignity of each person. And the validity of groups, other than the founding groups of the nation.

So what they got in the override was an exception to a very popular constitutional reform package in the form of the Charter, and many other important features. So that's how we got the override.

Caitlin S.: I'm so glad that you mentioned the special joint committee on the constitution, because so often it's overlooked in the development of the Charter, when it was really one of the first opportunities, or the first opportunity where the public got to participate in constitution making. And the civil society organizations had a lot of influence over section one, the limitations clause, and encouraging not to be reformed.

But section 33 wasn't yet in the draft of the Charter, so then there really, the civil society organizations didn't get to comment on it, and didn't know that it was coming until they shared the final draft of the Charter right before it was passed by the house of commons.

Section 33 of the Charter comprises five subsections; a federal provincial or territorial legislature can invoke the notwithstanding cause to declare that an act operates notwithstanding sections 2 and 7 to 15 of the Charter for a period of up to five years. Let us break down section 33 for our listeners. Can you describe the structural elements of the notwithstanding clause?

Lorraine W.: The text of section 33 was drafted in a very short order, because the federal negotiators knew that the provinces had reached an agreement, but they had never held to an agreement in the past. And so there could have been better drafting, and as Caitlin said, that could have been more deliberation on the notwithstanding clause. But these are the features that were nailed down.

First of all, it's a legislative action that declares the override power in effect. So it can be federal government or provincial government, is done through an enactment in either case. Which means normally, enactments go through three readings, they have committee work, they have legislative debate. There's usually a prolonged process, so there's enough time for a public discussion, expert input, impact analysis.

The notwithstanding clause is not applicable to all guarantees in the Charter, only to those that were considered novel or traditionally not subject matter under the auspices of judges. So these are section two, which includes the fundamental freedoms of, for example, freedom of expression, freedom of religion, freedom of association. Next the legal rights, the right to life, liberty, security to the person, and the rights that people enjoy under the criminal justice system.

And lastly, the equality clause, which has two sections. One is a section of non-discrimination, and the other is the section on affirmative action. So these are sections that were very strongly pressed for enactment by the joint committee, because they encompass a large percentage of the problems in Canada that had popped up from time to time, or that were chronic in terms of protecting fundamental rights.

When an override declaration is enacted, but it can be invoked to apply to a whole statute or a part of the statute, and in terms of the rights, it can apply to any of the rights or could apply to all of the rights that are subject to the override. But I think it's important that the override instrument has the effect of suppressing the particular rights that it names, for the maximum of a five-year period.

The legislature or parliament invoking the override can dictate a period of time shorter than five years, but it is a maximum of five years. There's also the possibility of renewal. But the text section 33 makes very clear, that while renewal is possible after the maximum five-year period, the override instrument sunsets, it ceases to have operation for some period of time before the enactment. It may only be a notional minute, but at that moment, the Charter right comes alive. And at least at that time, that there is the basis for litigation.

Caitlin S.: There's currently a debate within the literature on whether courts should be permitted to conduct the Charter analysis, and declare a Charter infringement when the notwithstanding causes invoked.

Specifically, Robert Leckie and Eric Mendelson, in a recent university of Toronto law journal article argued that when a notwithstanding clause is invoked, courts may declare unjustifiable rights infringements, but may not strike down the operation law which is protected by section 33. Could you comment on your view of the court's role when the notwithstanding clause was invoked?

Lorraine W.: Now I would argue that there is a basis for litigation when an override declaration is in effect. What would be unavailable is any kind of remedy giving relief from the override.

Unless there's been some failure to comply with the strictures that I've mentioned, the override will have legal effect, but I don't believe there's anything in the section, and I believe there's everything in terms of the purposes of the Charter, the normativity of the Charter, the public support for the Charter, and the lack of support for the override publicly.

That there can be, and should be litigation, when an override instrument is in place, but no remedy. The remedy would fall into place when there is a sunset, and that for some notional period of time, if there is a renewal, that there is a right that has been breached, that is alive and functioning.

I think that is a necessary implication from the five-year period, because if you had an override, and didn't know if the rights had actually been breached for five years. And then there is the sunset or the expert of the override clause, you would then have to start litigation just to know if your rights had been breached. And that doesn't make any sense, that would extend the five-year period to at least ten years, until you could get a supreme court of Canada judgment.

So this is an issue that is being discussed in the academic literature, and I think that what I've just described as a textual basis for, which is the strongest kind of legal argument you can make in this context, in terms of this exceptional capacity of override that the section provides.

So I think that it's important to use temporary, a period, that's stipulated in order to shine light on the question as to whether you can litigate during the time when a declaration is operative.

Caitlin S.: To the sunset clause that you discuss, is the idea of the democratic accountability of the notwithstanding clause. So a notwithstanding class purposely cannot be applied to sections three to five of the Charter, which are democratic rights. And then the sunset clause expiring every five years, lines with when democratic elections are held, at least provincially and federally.

And so the idea with an outstanding cause was also that if it's used inappropriately or too much, the public would intervene through elections, to hold the political government accountable for how they use the notwithstanding clause. And that's something that was really important to its design.

Now that you've discussed how the notwithstanding clause can be invoked, we can discuss how it's actually been invoked, and has been used politically in the past 40 years. When the notwithstanding clause was first added to the Charter, the Charter drafters defended its inclusion by presenting that it was a tool of the last resort, only to be used as Jean Chretien said, to correct absurd situations.

In some of my recent doctoral research, I produced an updated catalog on the notwithstanding clause uses, and have identified that between 1982 and 2022, there were a total of 24 pieces of legislation table with the notwithstanding clause. 16 of these, 24 notwithstanding clause bills were subsequently fully promulgated and became effective.

Would you please discuss some of the uses of the notwithstanding clause, including the uses by Quebec, a province that scholars Guillaume Rousseau and Francois Cote say has a distinct notwithstanding clause practice.

Lorraine W.: Yes. What the first and only case so far litigated in the supreme court of Canada came out of Quebec's first, very extensive indeed maximal use of the override. And I'll think about that legislation and have the supreme court of Canada dealt with it in a moment. I was privileged to represent Ontario in that litigation, and so I have quite a detailed memory of the oral argument, and the disposition.

After that, there was a period of time where the idea of using the override was anathema began. I wrote an article published in the Israel law review, when Israel was considering copying Canada's override. And what I wrote about was the non-use of the override, all the times when it was proposed or considered and there were decisions not to use it. And one of the things that was interesting is that the imagery used was that the override was like an atomic weapon.

It's fine to have it, but you should never use it. Because it would be more trouble than it was worth. And actually, one of the most interesting examples of that was in Alberta, Alberta had been the premier of Alberta, premier law he had been the champion of the override, and Alberta there was this very interesting deliberation on using the override in the same sex equality subject matter. And the premier rejected using the override, even though there was quite overwhelming popularity for doing it. And he said that he read the emails and the phone messages, and the media coverage urging him to use the override, and as he said, it turned his stomach. It was just so homophobic.

And he said if those are the reasons that the public wants this, then you basically can't have it. At the occasion for him to say he wasn't going to use it was just before easter. And he said I urge Albertans to go home and basically love your neighbor, respect the human dignity of your neighbor, and consider a fundamental race and freedom are. So there was a long period where the override was an option, but it wasn't used.

Quebec has used it most in there, and two of the most current controversial uses of it are in Bill 21, which restricts the wearing or display of religious symbols, and the main burden of that prohibition in the name of the secular nature of the state and therefore the required secular appearance of people who carry out public functions, is that the state should be secular.

But just returning to Caitlin's point about the democratic process, the override in that situation was passed in a fast-track method with very little public deliberation, with almost virtually no consideration of the perspective of the people whose lives would be affected by having jobs unavailable to them, or having their jobs frozen. Another current, more excessive override in Quebec relates to the use of the French language.

Quebec is also always, rightly, preoccupied with the minority status of the use of French in Quebec, but it seems that the claims that the fragility of the use of the language are overstated in these contexts, and we will sort of wait to see there's litigation in play for both of those elements. Another I think egregious example is the province of Ontario, my province. Without Ontario support, the Charter project would not have been kept alive long enough for the joint committee to ignite its popularity.

And so it is just a wrenching experience for me to see how Ontario has used the override into election contexts. One was a decision which was not announced beforehand in a provincial election, that ended the municipal election in Ontario, which was more than almost two-thirds expired, the premiered in a very superficial legislative process. Also fast tracked and with almost no deliberation and no public hearings in weekend and evening sessions, and emptying the public gallery, introduced legislation that changed the boundaries in the municipal election, which meant that all of the candidates were cancelled, that the election spending was gutted.

The whole notoriety of the override process got in and distracted the electorate from any kind of issues, people didn't know who they were voting for, it was terrible. It turned out, for reasons that I don't have to get into, that the override didn't have to be used. But the override legislation was quite horrific.

It had retroactive features that had delegated features, so that the actual invocation of the override would take place by the action of a minister, rather than the action of the legislature. I think that those are the most prominent examples.

And so we have a lot of opportunity to reflect on ways in which provinces have used the override, so as to avoid the political criticism and opposition that would follow if there had been a full regular political evaluation, and legislative process undertaken.

Caitlin S.: Turning to their notwithstanding clause jurisprudence, based on the nature of the clause, and thus far, relatively low uptake. There's limited case law in section 33 of the Charter. The leading case is Ford and Quebec. In Ford, the supreme court of Canada heard a challenge the notwithstanding clause invoked twice to apply it to the existing Charter of the French language.

Both of the notwithstanding clause invocations aimed at protecting French language protections, specifically requirements that all commercial signs be only in French, and protecting it from sections 2 and 7 to 15 of the Charter. Ford was the first time the supreme court of Canada heard a case challenging the constitutionality of a notwithstanding classification, and the decision by the supreme court of Canada was very interesting.

First, the supreme court of Canada analyzed section 2b of the Charter, and determined that the requirement of unilingual commercial signs unjustifiably violated the constitutional freedom of expression rights. Then the court addressed the two notwithstanding clause implications. The court declared the first notwithstanding classification to have expired, and the second notwithstanding classification to be invalid, because it was applied retroactively to the statutes. In making this decision, the Supreme Court of Canada stressed that it was not the role of the courts to substantively review notwithstanding clause implications.

Instead, the court should apply a form-only approach to the notwithstanding clause. Lorraine, you are involved in this case representing the Ontario government as an intervenor. Could you discuss this case in more detail? And your experiences while litigating the validity of the override?

Lorraine W.: In Ford, there was a very strong pro Charter analysis on the Quebec court of appeal, and it invalidated the override. The Supreme Court of Canada overturned them, except on one ground. I was successful in arguing that you can't use the override retroactively. The court agreed on that, but it agreed on it in very simple terms.

They just applied statutory interpretation which is that the presumption is legislations aren't attracted unless the intention is made very clear. But I made arguments in addition about the fact that Quebec had inserted override instruments in every statute, and had overridden every section that was available for override. And I argued that there could be no political accountability for that, because it was completely unintelligible to think of what the impact would be.

And therefore, what the political responsibility would be for such maximal use of the override. Now I just want to share some of my insight into the thinking of the supreme court of Canada, because I think that the judgment is very unsatisfactory, because it was simply reading the override as if it was sort of a garden variety statute, rather than an exceptional power encroaching on such fundamental interests as the Charter guarantees.

So the first thing that Justice Lamer asked me was how I thought it would be possible for the Supreme Court of Canada to deal with challenges, to use of the override, and

remember that this is just at the beginning when we didn't think there would be any overrides. When they already had all this extra work, the Charter infringement challenges.

He said that the provincial legislatures would have to have an army of lawyers to satisfy the stringency of the particular use of the override, naming the particular, right? Anyway, I didn't even know how to answer such questions, because they weren't legal questions, and they presupposed a position that perhaps, I want you to have to argue for in term because it was so far away from the genesis of the override or its text. This was all the more surprising, because this was a period in which the court still had a very principled purposive interpretation of the Charter chapter text.

But the attitudes seem to be that the override should be a kind of get out of jail free card, and that shouldn't have any burdens, and it shouldn't be interpreted narrowly, because it was exceptional, and it shouldn't be interpreted. So it has to impose democratic accountability on the enacting legislature.

Caitlin S.: Absolutely. Ford is a really interesting case in itself. I know when I was first reviewing it, in a way it is unlike most other Charter cases. It's unique because the Supreme Court of Canada did not engage in the standard forms of Charter interpretation such as purposive or progressive interpretation. The Supreme Court of Canada did not examine the history of an existing notwithstanding clause, or evaluate its role within the Charter and Canada's constitutional democracy as a whole.

Instead, the Supreme Court of Canada stated very bluntly that they were adopting a form only approach with very little reasoning or justification. What I also found interesting about the Ford decision, is that it occurred in a very politically sensitive moment in Canada's history. Where the Quebec succession movement was very popular, and there was ongoing constitutional amendment discussions.

So although the Supreme Court of Canada never acknowledged this political environment, it's likely that it impacted the approach to the reasoning on the notwithstanding clause.

In terms of upcoming constitutional litigation, Lorraine as you've discussed, Ford is the only Supreme Court of Canada decision that directly engages with section 33. But there's

likely upcoming constitutional litigation from Quebec and Ontario where the Supreme Court of Canada will rule once again on the notwithstanding clause.

Do you have any comments on how the Supreme Court of Canada may interpret section 33 in upcoming litigation? And how much the Ford precedent will be maintained, or if the court will expand beyond it?

Lorraine W.: Well, I have of course strong views as to what the court should do. I think it should revisit Ford and provide as you say propose an institutionally sound historically sensitive account of the notwithstanding clause. I'm not confident that will happen. But there were statements in the oral argument of the recent City of Toronto election case in the Supreme Court that are, I think, indications of where some members of the court will go.

For reasons that I actually can't remember at the moment, because there was an override proposed, but the override wasn't actually necessary in the litigation of the challenge to the change in the election awards in the city of Toronto election. Justice Brown kept on bringing up section 33, and he was acting a little bit like Justice Scalia in the American supreme court, a former justice there. Who had the habit of forgetting that he was one of the judges, and becoming one of the advocates, if he thought the advocate was actually arguing in case wasn't making a strong argument for that particular position as he wanted to hear. And Justice Brown seemed to be emulating that very odd behavior. And he kept on raising concerns about how section 33 would be interpreted.

And he kept on making a distinction between written and unwritten principles, and he was adamant that, I think his first position was you can't use constitutional principles at all to interpret section 33, and then it was you can't use unwritten constitutional principles. Now of course in the secession reference, the supreme court of Canada mentioned democracy, federalism of the rule of law, the protection of minorities as unwritten constitutional principles, but they're actually as written as any other principles.

And since some of them are inherited from the British unwritten constitutional order, the distinction between written and unwritten isn't really all that informative. But I think the last comment that Justice Brown made in the oral argument was that unwritten constitutional principles can't be used to give meaning to the terms of section 33.

Now this was very odd, and because he said it wasn't the deal. Now my guess is I've done more work on section 33 than Justice Brown has, since I literally spent years or more than a decade thinking about this and reworking my ideas, and studying the historical documents and the secondary sources, and the primary source. So I think I know as much about the deal as he does.

And I think that it's very clear that section 33 is not the strongest clause in the Charter. So his reading, I think would deliver. So I'm concerned about what the court will do. But I just want to make some comments about some of the things that I think could be argued as, we probably are coming up to a number of Supreme Court of Canada cases, hearing the voices of segments of the multicultural community that are deleteriously affected by a proposed use of the override.

That's what democratic accountability is, it's not only to the majority, or the majority of a particular ruling party, but the interests of the whole population and their rights protection and particularly the weakest sectors.

And so there is a lot to be worked through in terms of the text, and in terms of the constitutional principles, that I think, of course the way I would argue to the supreme court if I had the position to do so, but I also the way I think the court should go in order to have a coherent approach to interpreting the Charter, and establishing the appropriate institutional roles for courts of legislatures and the executive under the Charter.

Caitlin S.: And I greatly appreciate you sharing with the listeners where the litigation might be going, because the notwithstanding clause for a long time, it wasn't a constitutional issue, at least from 2000 to 2018. There wasn't a lot of uses, people weren't talking about it very much.

But definitely since 2018, there's been a series of notwithstanding clause uses by provinces like Ontario that had never used it before, and very much was a live constitutional issue. And I think we can pretty confidently say that there will likely be major supreme court rulings on it in the next five to ten years.

So as we come to the end of the podcast episode, we wanted for you to share with our listeners any current academic projects you're working on, or other community involvement that you're involved in constitutional litigation.

Lorraine W.: Okay. Well, first of all, I'm working on a project of which, and the work I've been sharing with you is part on the institutional roles under the Charter. I think that we've spent a lot of time on the politics of the Charter and academically, and we spend a lot of time on the delineation of the content of the rights, and now we have a lot of focus on the override.

But I think the question of the institutional roles and responsibilities of legislatures and powers have been dramatically altered by the constitutional amendments is a rich field for deliberations. So I'm working on that.

I'm also very concerned about some of the things that have happened recently in constitutional litigation, that make it very hard to litigate Charter cases. It seems to me the whole ethos is the debates on the Charter and the deliberations created a framework for understanding how cases should get to the courts, and how they should be funded, and the responsibilities of government, lawyers and their government apparatus and taking positions and Charter cases.

So I'm interested in thinking through what it would be to create better rules for the litigation of Charter cases. I'm very concerned with the process of litigating Charter cases, that you could have the best Charter in the world, but if you don't have a good process for litigating it, then the judges don't get the proper support for their work. And of course, I'm also very interested in improving the quality of particularly constitutional advocacy in Canada. So I'm working on that as well.

Caitlin S.: Thank you very much, Lorraine, for sharing this with our listeners. And also sharing your insights on this live constitutional issue that students will probably be hearing quite a bit about over the next few years.

Lorraine W.: Yes, pleasure.

Caitlin S.: We've been speaking with Professor Lorraine Weinrib, of the University of Toronto faculty of law about Canada's notwithstanding clause under section 33 of the Charter.

Cheryl M.: Hello, and welcome to the Asper Centre's practice corner. I'm Cheryl Milne, the executive director of the Asper Centre. And on today's practice corner, I am speaking with lawyers Gregory Bordan and Marion Sandilands, on Quebec's act respecting the Laicity of the state, also known as bill 21.

Gregory Bordan is counsel at Norton Rose Fulbright in Montreal, where his practice focuses on complex, regulatory and administrative law matters. He also has significant experience practicing constitutional law, with expertise on the Quebec Charter of the French language. He is also secretary of the legal committee of the coalition inclusion Quebec, one of the plaintiffs challenging the legislation.

Marion Sandilands is a partner at Conway litigation in Ottawa, and is particularly passionate about constitutional and administrative law. She previously served as a law clerk to the honorable Justice Andromache Karakatsanis at the Supreme Court of Canada, and currently teaches Canadian federalism law at the University of Ottawa. Welcome to both of you.

Gregory B.: Good morning.

Marion S.: Thanks for having us.

Cheryl M.: Today we're talking about an Act respecting the Laicity of the state, passed in 2019. It prohibits individuals working in public service from wearing religious symbols such as a hijab, kippa or turban. The ban applies to Quebec crown prosecutors, judges, public

service employees, police officers, prison guards, public sector, teachers and principals. It also applies to all lawyers and notaries working in the public sector, as well as private sector lawyers and notaries working on government mandates, if they need to interact with others.

Bill 21 also prohibits any person employed by a government department, agency or government subsidized body from having their face covered while exercising their functions. The stated purpose for the religious symbols ban is to achieve state religious neutrality, to preempt what they perceive to be inevitable Charter challenges, the Quebec government quite controversially invoked the notwithstanding clause immunizing the act under sections 2 and 7 to 15 of the Charter.

Almost immediately following the passage of the legislation four, separate constitutional challenges were commenced and were all heard jointly in the case called Hak versus Precur General de Quebec. So I want to start with Greg first, in Hak, you provided an affidavit where you discussed how you were personally affected by the legislation. Do you mind discussing this and how you've been involved in the constitutional litigation?

Gregory B.: You're right, I am an affiant in the Hak case. In fact, the Hak case was the first case off the mark after the bill was enacted. It had been in preparation for several months, and they were getting affidavits from people who would be affected.

I should say right off the bat that most of them are from Muslim women, because they are clearly the primary target of this. I was asked to contribute one, I'm an orthodox Jew, and they wanted to show the breadth of the impact.

My affidavit discussed some of the, my personal impacts, first thing was that as a lawyer, I am barred from taking any job in any Quebec provincial government department, any commission, any agency or board, even as outside counsel, I'm barred from working on any Quebec government mandate if that involves going to court or even if it involves simply interacting with a colleague in a different office.

I'm personally not permitted to work on that mandate. And I should mention that as an orthodox Jew, I wear a kippa. I wear it all the time, I wear it in court, I wear it with clients, I

wear it at work, that has never been an issue before. So, it's because I wear that, that I am now excluded from working on a mandate given to our firm even if I happen to be perhaps the most competent person to do it. I'm excluded from that.

The affidavit also tried to put this in a certain historical perspective, personally through, my great-grandparents as I described in the affidavit immigrated to Quebec 120 years ago from Europe. Where they came from, they never would even have dreamed of wanting to fit into their society, that was something that was simply not imaginable to them. In fact, if they lived at a time and a place where their physical security was not threatened by virtue of being Jewish, they felt very privileged.

My parents were born and brought up in Quebec, related to the world very differently. They assumed especially after the Quiet revolution in Quebec, that they had a place in society, that they had therefore also a responsibility to contribute to society and to its development. They sent their children to French schools for a number of years, myself included. I went to an elementary school, and part of an elementary school in French.

And that was specifically because they thought number one it was the right thing to do, and number two it would allow us to take full part in this society. And I was brought up believing that was true. Bill 21 demonstrated to me that this was largely an illusion. That, in fact, it is not a society in which I can take part in as a full member, at least it's one that tells me I must either choose between being faithful to a religion or being part of the society.

And that really does feel like an attack on personal dignity, and it's very difficult in these circumstances to even want your children to be brought up in this society. So that in essence are the highlights of the affidavit.

I had been working with a number of other lawyers, and we finally decided that the best way of putting this forward was, as a separate action, I had been involved with the group of grassroots movement called the Coalition [Inaudible 00:47:09.06] Quebec. It was decided amongst our group that I would be a client in this case.

I work with the lawyers on it, and let's say they're a group of not only talented lawyers, but everybody is working, volunteering their time pro bono. And although, I'm active with the case, I'm really the client.

Cheryl M.: Well, I want to turn to one of those lawyers now, Marion Sandilands. You represent an intervener in Hak, can you talk to us about the intervention and how you became involved in the case?

Marion S.: So I was not involved at the trial level like Gregory. There were a number of interveners at the trial level, but I wasn't part of that. I became involved at the appeal level, which is where the case is now. I represent the Quebec English school boards association, which is intervening before the Quebec court of appeal. There are a few new interveners as well on the appeal.

The Quebec English school boards association was granted leave to intervene specifically on one issue with section 23 of the Charter, which is the minority language education rights issue. I'll talk about this issue probably later as we get through all the issues that were raised.

But suffice it to say section 23 was one of the grounds upon which bill 21 was successfully challenged at trial. It's not subject to the notwithstanding clause, and it affects all of the English-speaking public-school boards in Quebec. And so the association is my client, they've intervened on the appeal.

Cheryl M.: So at first glance, Hak is a complex case, with multiple challenging parties. And as you've alluded to Marion, different sections of the constitution or the Charter are being invoked in terms of the challenge. Greg, could you discuss the arguments put forward by the challenging parties in respect of section 33 in the case?

Gregory B.: There are really three ways in which parties dealt with section 33. One, we're using arguments which essentially sidestep, avoid the section 33. I think Marion will be discussing these much later. Things like division of power and so on where section 33 is not engaged.

There's also some of the parties have directly taken on section 33, and I'll come back to discuss that. And then there's a third way which we have also asked for just declaratory relief, saying if everything else fails, we ask the court to declare that there's a violation of Charter rights and they're not justified.

So let me go back let's deal with the arguments on section 33 itself. There are two parties who directly address this, one is the Federation Autonome de L'enseignement, the teacher's union. And they are inviting the court to overturn Ford.

In Ford, the court said that there were only formal requirements to be able to effectively invoke section 33, but they're asking the court to take a new approach, and to also add substantive requirements and say that the legislature which invokes section 33 must come to court and demonstrate first that there's a pressing of substantial objective that is being pursued by the legislation.

The coalition approaches this somewhat differently. We've said that it's not necessary to overturn Ford, but we're inviting the court to do is add a new layer to the analysis. A layer that was not pleaded in Ford, the court didn't address it, and it wasn't actually necessary for it to do so. And we're suggesting that in our case, they should take a further step and add this layer. In effect, or in brief what we're saying is that section 33 is like every other provision in the Charter, and remember that section 33 is actually part of the Charter itself.

That section 33 like the other provisions are subject to justification under section one. Obviously, that justification cannot be just the application of Oakes test. Oakes test was designed for provisions other than section 33, but a justification is required under section one nonetheless. This was an argument first advanced by somebody named Professor Slattery back in 1983.

But much more recently, Justice Bastarache in 2005 wrote an article in which he did note that the issue of the relationship between section 33 and section 1 has never been the subject of judicial scrutiny, and this is the case in which we're inviting the court to do it. I can go into a little bit more detail about how that would work if you wish.

Cheryl M.: Well, why don't we turn to Marion, because I think what you're talking about, and I do want to get back into it is this sort of proportionality aspect of section 33. But I want to talk with Marion a little bit about the arguments where parties are circumventing the notwithstanding clause. So you mentioned section 23 in particular, were these arguments successful at the court at first instance, and what are the nature of those arguments to sort of get around the use of the notwithstanding clause?

Marion S.: I wasn't involved at the trial level, but I watched it unfold and I read the trial judgment. It was what I would call the kitchen sink of legal arguments that were thrown at bill 21. The parties and interveners brought a host of constitutional arguments, aside from the obvious Charter grounds, because those are shielded by the notwithstanding clause, but they're trying to sidestep all of that by looking at other parts of the constitution and other parts of the Charter.

So the result is that the challenge itself now touches on so many parts of the Canadian constitution. In many ways, I think even the foundations of our constitution. So I'll run through, just to give a flavor of what was brought forward, and there's kind of two groups, there's non-Charter arguments, and then there's Charter arguments that don't involve the notwithstanding clause.

So first in the non-Charter world, this is not a comprehensive list of everything that was brought, but I'll hit the main ones. It was argued that bill 21 is ultra-vires of the province, so it's outside of Quebec's jurisdiction because it's essentially criminal law. It was argued that bill 21 violates pre-confederation statutes, including, for example, the Quebec act of 1774, which guarantees a measure of religious freedom.

It was argued that bill 21 violates the constitution's architecture, because it limits the participation of citizens in public institutions. It was argued that bill 21 violates the principle of the rule of law, because it's too vague or it has a retroactive effect.

And it was also argued that it violates the principle of judicial independence, because it imposes behaviours on judges or it constrains hiring of court staff. All of these arguments failed at trial, but most of them have been brought forward on appeal, so we'll see what the court of appeal makes of these.

Now for the Charter arguments, so recall is that the notwithstanding clause only applies to sections 2 and 7 through 15 of the Charter. That's in the words of section 33 itself. But that means there are many sections of the Charter that the notwithstanding clause doesn't touch. And so these grounds, many of them were put forward as well. There were four that were brought forward, and two failed, and two actually succeeded at trial, and these were the only grounds that actually succeeded at trial.

So there's four, I'll list them, section 28 of the Charter is the guarantee that the Charter rights apply equally to men and women. It was argued that bill 21 violates this provision, because it disproportionately harms women. This one failed at trial, the trial judge found that section 28 isn't a freestanding right, it only applies to the scope of other Charter rights. The second one was section 6 of the Charter, which is the mobility rights.

So the right to move between provinces freely, and they argued that bill 21 hinders inter-provincial mobility, particularly of people who wear religious symbols, because it limits their employment in Quebec. This one also was not successful at trial. The next one at section 3 of the Charter which is the right to stand for election in provincial legislature, and bill 21 specifically prohibited people who wear religious symbols from sitting in the national assembly.

So the trial judge found that yes, this did in fact violate section three, and this violation was not justified under section one. And finally, section 23 which is the ground that my client, the Quebec English school boards association has intervened on, this is minority language education rights. This right has been found to include the right of the minority community to manage and control aspects of education that are linked to its language and culture. This is in the jurisprudence already on section 23.

And in Quebec, specifically we'd be talking, the minority language group is the English language school boards and schools. So it was argued here that bill 21's prohibition on religious symbols interferes with the English minority communities cultural autonomy within its schools, and the trial judge found that in fact yes, bill 21 did violate section 23, and this violation was not justified under section one. So the trial judge declared that bill 21 doesn't apply inside the English school system.

So these were the only two successful grounds at trial. And I just want to note that Quebec as the province defending its legislation, didn't plead any section one justifications, and didn't bring any arguments or evidence on section one to justify these potential breaches, and has again not done so on appeal. And that's very noteworthy, because typically an attorney general in defending its legislation will argue, first of all, that there's no Charter breach.

But then if that fails, they'll also argue that any breach is justified. But Quebec has not done that here. And I think there's an interesting interplay with the fact of the use of the notwithstanding clause, but I'll leave it there.

Cheryl M.: That's very interesting. Well, and I think from what you were saying earlier, Gregory, about just the scope of the impact of this legislation on people like yourself, in terms of your ability to be a fully participating member of Quebec society. It's not a big surprise that there's been a bit of a kitchen sink kind of approach to trying to challenge this.

But going back to what you were talking about in terms of the use of the notwithstanding clause. Can you expand a little bit on what you were going to talk about there. But also, Quebec court of appeal is going to hear the Hak case in the fall of 2022.

In regards to the arguments, but also your practice of litigating constitutional cases. How is this different than other Charter cases that you maybe have been involved with in the past?

Gregory B.: Look, can I just very briefly make a comment or addition to what Marion mentioned. It's quite true that other than the section 23 and one other argument, they were not accepted at first instance. However, there were many findings of fact which are likely to be very helpful. And perhaps as litigators, ultimately the most important thing at first instance is to get the facts into the record. And the judge was pretty good at setting out the essential elements.

So if this will play a role as the case moves up. Let me just go back, and if you don't mind, slightly revise what you had said, Cheryl, about the argument on section one. I don't think

it's particularly correct to say that we were just trying to apply the proportionality test, that wasn't designed with section 33 in mind.

Section 33 was clearly intended to give the legislatures the final word on issues that normally the court would decide. That's not for debate. What we're suggesting though is that section one in some ways circumscribes how far a legislature can go in deviating from constitutional rights.

Because section 33 is part of the Charter, the original drafters, the framers of the constitution could not have had in mind just complete and wholesale putting aside of rights which would completely undermine of section one, the basis for a free and democratic society.

What we're saying is that section one imposes limits, if something is really beyond the pale in terms of how far it trenches on those fundamental rights, that is something where section one says no. If there's no reasonable basis on which that could be justified, it isn't allowed. There's a lot of room to develop that, and I think it should be a very interesting argument.

Coming to your final question about what particular challenges are posed by this case, you're right, it certainly does pose, it is in many ways unique. Marion actually has alluded to the two areas that I would identify as being the most challenging and different in this case. The first is in a sense the most obvious. This at its core should be a Charter case, it's about a violation of Charter rights.

And the arguments would be do does it violate the right, and if so, is it justified? We're now back in a situation much more akin to what the litigators were in back in the 1950s, when they were facing violations of rights and looking for non-Charter arguments. And that poses a whole generation on the set of challenges in particular. The other area, and again, Marion has alluded to this, is simply the number of arguments out there.

It will clearly be necessary to whittle this down to focus when we get to the supreme court. How do you decide which arguments to set aside, and which to focus on. These are not easy decisions, because every one of the arguments in this case has its difficulties and every one of it has its appeal, no pun intended. So that will be a litigation challenge as we move towards the supreme court.

Cheryl M.: I mean, it is very concerning about how this bill and the use of the notwithstanding clause here is really targeted at minorities, who we would normally think of as being protected by the Charter. And it seems to go beyond what people had conceived the section 33 being used for.

However, all provinces and the federal government can invoke section 33, the notwithstanding clause, but Quebec is the province that has made most use of it. Since the Quebec superior court decision and Hak, the Quebec national assembly has invoked the notwithstanding clause again in bill 96. Marion, could you briefly just describe what that is all about?

Marion S.: Bill 96 was passed at the national assembly in May, 2022. The title of the law is "an act respecting French, the official and common language of Quebec.". Unlike bill 21, which brought in a brand-new act, the Laicity act, bill 96 is actually more of an omnibus bill. It's a massive overhaul to an existing law, namely the chart of the French language, but it also amends 25 other provincial statutes including Quebec's own human rights Charter.

And it also purports to amend the constitution act 1867, just to give you an overview of what this is. In terms of the notwithstanding clause, bill 96 uses the notwithstanding clause the same way as bill 21, so totally and preemptively. It overrides both the Canadian Charter and the Quebec Charter.

And I'll note that the trial judge in the bill 21 challenge found that this particular mechanism of using the notwithstanding clause preemptively and totally over both the Quebec and Canadian Charter, it was the first time this had ever been done in Quebec and Canadian history.

So bill 96 is the second. And bill 96 I'll note was introduced in the national assembly about a month after the trial judgment in the bill 21 challenge, which upheld the use of the clause in that manner.

Bill 96 uses the notwithstanding clause twice actually, to oust both Charters. First, it provides that the entire Charter of the French language will operate notwithstanding the

Charter. So not just bill 96 itself, but the entire statute, the chart of the French language will operate notwithstanding the Charters. And then second, it puts the remainder of bill 96, so the amendments to the 25 other provincial statutes, regulations and the constitution act itself all under the shield of the notwithstanding clause.

So this is the same device as bill 21, but it's more extensive in terms of the scope of the legislation that it's shielding from Charter scrutiny. For example, bill 96 creates a huge number of new executive powers and administrative powers of the state, for example, some new search powers, and these are all shielded from Charter scrutiny. In terms of how this interacts with bill 21 challenge, I'll say so far, bill 96 has not been put before the court of appeal in the context of the bill 21 challenge. So right now, the bill 21 challenge is continuing on its own path as before.

But I'll note that in May of 2022, the minister of justice, David Lametti, announced that Canada would intervene in the bill 21 appeal when it gets to the supreme court of Canada. And he made this announcement the day after bill 96 was adopted. It's not officially part of the bill 21 appeal. But the announcement was made the day after it was passed, so I think ultimately, bill 96 raises the stakes for the bill 21 challenge.

Because now we've got a second and even broader use of the notwithstanding clause. So the court's decision, one way or the other, in bill 21, is going to have a ripple effect on the use of the clause in bill 96, and any future uses that come between now and when the bill 21 appeal is decided and even after.

Gregory B.: We might just want to also point out that this should not be considered just a Quebec interest. Besides the fact that basic rights are an issue, Ontario has recently adopted legislation, important legislation regarding election expenses, which it has chosen to shield with the notwithstanding clause. So the repercussions of this across the country are likely to be significant.

Cheryl M.: There's lots to watch for in the Hak case as it makes its way up. I think many people will be paying close attention to what the Quebec court of appeal does. But it certainly is on its

way to the supreme court of Canada. I want to thank both of you for speaking with us today. As you've mentioned, Gregory, the notwithstanding clause has seen a spike in invocations across Canada since 2018, and we will likely see more constitutional litigation on the scope of its application in the coming years.

And it really is sort of at the essence of the architecture of our constitution. So thank you very much for talking to us today about this really important case.

Gregory B.: Thank you.

Marion S.: My pleasure.

[End of Recorded Material]