Advocacy Notwithstanding the Notwithstanding Clause

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My topic is a fundamental social and political change and how it prompts advocates to think differently. We see the change on the part of legislatures. It's a change from a paradigm of respect for rights to one of majoritarian willingness to override them without justification. I think this change imposes on advocates two responsibilities. One is to help judges to recognize the paradigm shift and its implications for them. The other is to conceive and frame arguments appropriate to the new paradigm — what I call advocacy notwithstanding the notwithstanding clause.

Let's start with what I'll call the old framework or paradigm. Over recent decades, legislatures appeared to assume the importance of individual rights and freedoms — that taking them into account was part of their job. Citizens going to court to enforce their rights might annoy governments, but they were acting legitimately, not as the enemy of the people. There was a sort of consensus against hasty recourse to the mechanism which allows legislation to take effect despite, or notwithstanding, protected rights and freedoms. In the Canadian *Charter*,[1] this mechanism is section 33, the notwithstanding clause (also called the override).

To be clear, under the old paradigm, entrenched rights and freedoms weren't absolute. We accepted limits on rights — under the limitation clauses in section 1 of the Canadian *Charter* and section 9.1 of the Quebec *Charter*. We acknowledged that making an omelet requires breaking some eggs. Specifically, we accepted reasonably justifiable limits on rights, where the overall benefit exceeds the law's harms. Disagreements bore on the scope of rights and on their limits — about where to draw the line, taking for granted that rights are important. Think of freedom of speech. Whether it's speech during elections[2] or tobacco advertising,[3] people who cherish such a right and accept that some limits on it are valid can debate where to set those limits.

Relatedly, under the old paradigm, one way of understanding the notwithstanding clause was that it gave the legislature a means by which to disagree with the Supreme Court on such line drawing. By this approach, the legislature would wait to lose in court before using the section 33 override. In other words, the notwithstanding clause allowed the legislature to give effect to a law that it — but not the Court, or a majority of its judges — viewed as setting a reasonable limit on one or more rights.

It's early days, but I think we are moving into a new paradigm. I think so based on examples from our two most populous provinces. Under this new paradigm, governments will much more readily shield their rights-infringing laws from constitutional challenge. They may denigrate constitutional review by judges, characterizing it as illegitimate interference with the majority's will. Under the new paradigm, the government doesn't bother to claim that evidence justifies its policy choice, or that its chosen path is proportionate in its harms and benefits.

The first instance arose in Ontario, roughly a year ago. The *Better Local Government Act, 2018*[4] purported to cut in half the number of seats on

Toronto City Council — and it made this drastic change while the municipal election was underway. The Superior Court declared provisions of the law invalid for unjustifiably limiting freedom of expression, contrary to the *Charter*. It suspended the law.[5] Before the Court of Appeal set aside the stay,[6] the government of Premier Doug Ford threatened to use section 33 to give effect to its law.

The second instance of a government attacking *Charter* rights comes from Quebec. I refer, of course, to Bill 21, *An Act respecting the laicity of the State*.[7] This law shunts aside as much of the Quebec *Charter* and Canadian *Charter* as possible. It does so to shield, from constitutional strike-down, measures including a ban on religious symbols worn by many categories of public employees. The law prevents visibly religious people from being hired as teachers, principals, and government lawyers. Although there is a grandfather clause for employees who were in place by March 2019, it won't cover them if they accept promotion or reassignment.

Bill 21 also affirms that all persons have the right to lay government institutions and lay public services. This right underpinned parents' demands in August for their children to switch classrooms to avoid exposure to the visibly religious teachers who are … protected by the grandfather clause. In fact, Bill 21 does much more, including amend the Quebec *Charter* and the province's constitutional foundations.

Let's try to grasp the magnitude of the paradigm shift. Given how events played out in Ontario, we see it most clearly in Quebec. The shift relates to timing and starting points. On timing, Bill 21 derogates from *Charter* rights preemptively, upstream of any conclusion by a trial court, let alone the Supreme Court, that it infringes a right. As for starting points, the Legault government's premise is not the importance of religious freedom and protection from discrimination. The governmental messaging isn't that the law complies with the *Charter* as best interpreted, that the law's measures are minimally impairing, and that its foreseeable harms are proportionate. Instead, contrary to decades of case law on discrimination, the Bill's sponsoring minister insisted that across-the-board rules cannot target or discriminate against Muslim women. Moreover, supporters of the law have called into question religious freedom as long understood. After all, they say, religious folk remain free to be observant after working hours and in private spaces.

Fundamentally, the government's message is that a majority shouldn't let *Charter* rights or courts — staffed, if you can believe it, with unelected judges! — get in their way. Now the litmus test is not the reasonableness of a limit on rights, but the comfort level of the majority. Tragically, Quebec's government no longer takes pride in the province's *Charter of Human Rights and Freedoms*,[8] which was adopted years before the Canadian *Charter*. Government discourse in this province now regards protection of minorities as a federalist or multiculturalist intrusion that threatens the legitimate aspirations of the Quebec majority. In short, our assumption that political actors operate within a framework based on the importance of human rights no longer applies.

Deciding that fundamental rights and freedoms don't need to be taken into account at all is a radical shift, so radical it's disorienting. But we need to acknowledge and adapt to our new reality. Those of us concerned about minority rights — those whose interests don't always align with those of the majority — cannot afford to keep going as if the old rules still applied. Governments' willingness to derogate from rights, without even cursory justifications for doing so, calls us as advocates to depart from business as usual. Advocates committed to defending fundamental rights and freedoms have a responsibility in the face of these developments, and this whether your point of personal connection be a minority religion, language, sexual orientation, or something else.

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Turning to advocates' first responsibility under the new paradigm, they have a role in helping judges to recognize and adapt to the paradigm shift. It's up to them to help the court to define

its constitutional duty in these new conditions. They shouldn't be shy: advocates working on challenges to governments' actions under the new paradigm have likely wrestled with these issues for longer than have the judges before whom you plead.

The starting point is that, whatever a government may do, courts make no corresponding choice to opt out of the business of protecting rights. Nor, given judicial independence, and the courts' duty to uphold the *Constitution*, can a government conscript courts into collaborating in the enterprise of violating rights. I do not forget that section 33 is part of that *Constitution*.

Advocates might helpfully remind judges that the judiciary should give section 33 its due, but not an inch more. This proposition is consistent with construing exceptions narrowly. After all, section 33 is plainly an exception to the *Charter*'s protection of rights and freedoms.

Recognizing that courts have no responsibility to help a government that is violating rights might require judges to change their role in statutory interpretation. We often see judges collaborating with legislative drafters — and we don't normally sense tension between that collaboration and fundamental rights. Judges correct drafting mistakes and resolve minor contradictions. They fill in gaps and decide whether a statute applies broadly or narrowly. They attribute a good-faith public purpose even to poorly drafted provisions.

It is worth putting to the courts that where the legislature preemptively shields a law from *Charter* scrutiny, they should make no special efforts to breathe life into the legislative text. One analogy is to working to rule: doing the basic job, but no extra efforts.

As for our chief example, Bill 21 was badly drafted. Amendments at the eleventh hour made it worse. It has gaps and outright contradictions. Making this Bill workable may not be judges' job — especially after the government's insistence that judges should not interfere. For example, if the law is missing a workable definition of religious symbol, judges should not step up to fashion one. I turn now to particular doctrines and arguments.

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The new paradigm invites advocates to be bold, ambitious, and imaginative in drawing on our constitutional resources. Our *Charter* dates back nearly 40 years, not 400. It has more unexplored text and possibilities than many acknowledge. In any event, the Supreme Court of Canada occasionally overrules itself on key matters — think of the rights to medical aid in dying and to collective bargaining. It's crucial, then, to return to first principles. We need to reread the constitutional text and our foundational judgments rigorously and with fresh eyes, taking a healthy distance from orthodoxy and prevailing wisdom.

It's worth considering openings that exemplify advocacy in the new paradigm, and here I sketch four. One is the notion that the approach to granting a stay, pending trial, should change when the legislature has preemptively used section 33, the notwithstanding clause, to protect the law in question. Another is the possibility that a judge will pronounce on how legislation shielded by section 33 affects rights. Yet another is the claim for *Charter* damages for harms caused by a law that section 33 keeps in force. The final one bears on our relationship with those parts of the *Charter* immune from section 33.

First, then, is the question of a stay or suspension before a court concludes on a challenged law's constitutionality. In July, the Superior Court of Quebec denied a request[9] to stay the operation of provisions of Bill 21 pending trial. The province's Court of Appeal will hear arguments on the matter in late November. According to the case law of the Supreme Court of Canada, the balance of convenience is a factor in the analysis here. The Superior Court's reasons included the idea that the balance of convenience favoured the government: "once adopted by a democratically elected legislature, the law is presumed to have been enacted in the public interest and to the advantage of the common good."[10] (The judge regarded himself as bound by the Supreme Court of Canada's judgment in *Manitoba (AG) v Metropolitan Stores Ltd.*[11]). It's fair to ask, though,

whether such a presumption applies unaltered when the legislature reaches preemptively for section 33. It's worth reading the precedents carefully. In *Metropolitan Stores*, the Supreme Court referred to laws that litigants had sought to suspend as having been "generally passed for the common good." It gave obvious examples of regimes purporting to benefit the public — albeit like most laws presumably imposing some unwelcome costs. Examples included provision and financing of public services such as education and public utilities; protection of public health, natural resources, and the environment; the control of economic activity and the repression of crime. Justice Beetz took it as axiomatic that granting interlocutory injunctive relief in such cases would likely frustrate pursuit of the common good. He noted the potential tension between respect for the *Constitution* and attention to the costs of depriving the public, or important sectors of it, of "the protection and advantages of impugned legislation."[12]

I contend that Bill 21 prompts reflection as to how much a court can scrutinize a law shielded by section 33 to see the extent to which it delivers "protection and advantages." The Quebec government gave no evidence during the legislative process that it had weighed the anticipated protection and advantages of the law against the foreseeable costs, concluding that the benefits exceeded the costs. Returning to the examples given in *Metropolitan Stores*, did the Supreme Court of Canada take the public provision of education and public utilities as public benefits on the government's word alone, deferring entirely? Or, whether spelling it out or not, did the Court agree by its independent judgment that the claims were plausible? Advocates need to reread the jurisprudence and consider carefully the extent to which decisions from cases not involving section 33 apply where it shields legislation. A judge might fairly conclude that preemptive use of section 33 by a legislature alters the calculus of the balance of convenience, militating in favour of a stay.

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Next is the possibility that a judge will review a law shielded by section 33, issuing a declaration detailing the ways in which that law violates fundamental rights and freedoms. The prevailing wisdom here is that a legislature's use of section 33 precludes *Charter* review, essentially evicting litigants from the courtroom. Here's an instance where we need to read carefully: the text of section 33 says no such thing.

Section 33 states: "Parliament or the legislature … may expressly declare … that [an] Act or a provision thereof shall operate notwithstanding … section 2 or sections 7 to 15 of this *Charter*." It goes on: "An Act or a provision … in respect of which a declaration made under this section is in effect, shall have such operation as it would have but for the provision of this *Charter* referred to." By the constitutional language, the law shall operate. The focus is the protected law's having its effects, but there is no mention of judicial review, or indeed of the judiciary at all.

Here our thoughts turn to the Supreme Court's judgment on Bill 101 in *Ford v Québec*.[13] Among other things, that judgment offers the Court's fullest discussion of section 33. Yet all it addresses is what a legislature must do to deploy the notwithstanding clause. It offers no discussion of the effects of doing so, of what happens next. That is uncharted territory.

In May, I co-authored a short essay with Grégoire Webber and Eric Mendelsohn.[14] In our essay, we argue that invoking the notwithstanding clause, section 33, doesn't stop a court from reviewing a law. Having scrutinized the law in the light of arguments and the evidence, a court might specify the extent to which the law violates rights.

To be clear, such a declaration would not stop the challenged law's application, but it might still be valuable. Citizens would gain a clearer understanding of the law's impact on rights. Such understanding matters because, although section 33 allows the democratic branches of government to have their say, it invites the electorate to evaluate that say. We see that invitation in the five-year sunset clause, which corresponds with the maximum time between general elections. Moreover, the judicial process may hear minority voices that the democratic branches of gov-

ernment will not. Recall that last spring, when the government held rushed hearings on Bill 21, it invited almost no religious groups representing those most threatened.

Furthermore, our proposal is consistent with the Supreme Court of Canada's recognition that a declaration the government has violated *Charter* rights can itself be a meaningful remedy. Think here of the case of Omar Khadr,[15] in Guantanamo Bay. The Court held that Khadr's rights had been violated, but that no further remedy would follow. A key opening, then, is for a judicial declaration, even while a law shielded by section 33 produces its effect.

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Advocates might push for an award of damages under the *Charter*'s remedies clause. Section 24(1) states simply that anyone whose *Charter* rights "have been infringed or denied may apply … to obtain such remedy as the court considers appropriate and just in the circumstances."

It's nearly a decade since *Vancouver (City) v Ward*,[16] the Supreme Court's leading case on the subject. In that affair, an individual was mistakenly arrested on the thought that he intended to throw a pie at the prime minister. Ward was strip-searched in violation of his *Charter* right to freedom from unreasonable search and seizure. He was ultimately granted $5,000 in damages. The Court emphasized the potential for *Charter* remedies to include constitutional damages. In short, *Ward* tells us that there can be damages for violation of *Charter* rights. Bill 21 violates *Charter* rights. Might the harms from Bill 21 be compensable too? Let me elaborate.

Here again, we need to read the *Charter* with fresh eyes. Recall the text of section 33: a protected law "shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*." As observed by Léonid Sirota,[17] it flows from the text that a government cannot use section 33 to shield a law from the remedies clause. Most simply, a clause stating that a law shall operate — i.e., inflict its harms — notwithstanding s. 24 of the *Charter* would be ineffective. I see no reason for judges to give governments greater immunity from the *Charter* than its drafters did by fashioning judge-made law to that effect.

It's useful to recall from administrative law that an act's legal effect is separable from compensation for its harms. That is, a governmental action may be legally effective, but still generate a claim to compensation. Think of expropriating legislation that is silent on this matter. The expropriation will be valid, but the court will assume that the government intended to respect the former owner's entitlement to compensation. Similarly, then, Bill 21 might be in effect, in virtue of section 33, all the while racking up liability for its directly caused harm.

I anticipate an objection that government has a public policy immunity, that it would be wrong for courts to award damages for the foreseeable harms of operative legislation. One might also object that in *Ward*, the strip search was illegal. Given all that, what should be the approach where a law shielded by section 33 legalizes discrimination, and other harms?

We need to consider new ideas, ones appropriate to the new paradigm. I mentioned earlier that we accept reasonable limits on rights. Appropriately enough, we don't regard a law that reasonably and proportionately limits *Charter* rights as incurring governmental liability for any harm it causes. But where the limits are unreasonable and disproportionate, or where the government has not taken the trouble to establish otherwise, maybe the approach should change.

Here is the gist of my argument: Section 1 of the *Charter* requires rights-bearers to absorb the impact of reasonable, proportionate limits on their rights, in pursuit of the general good. But where there is no basis to believe that the social benefit justifies the harm to rights — no basis to think that the public good attained thereby is worth the candle — it might be appropriate and just to conclude that the regime's costs should not fall only on an identifiable, vulnerable class of individuals.

Granted, some harms flowing from Bill 21 might be too remote for compensation. But

some are unmistakably tied closely to it and are, on top of that, easily quantified. Think of hijab-wearing education students or immigrant teachers in the process of acquiring credentials to teach in Quebec. If not in a job by last March, under the wire of the grandfather clause, they will have losses directly linked to their efforts to become public-school teachers in the province. Why should the public decision to stop hiring visibly religious people in our schools lay its costs on them alone?

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The final opening to sketch here bears on how we reason with those *Charter* elements that section 33 cannot touch. When the legislature of Quebec invoked section 33 to shield Bill 21, some people seemed to assume that the entire *Charter* was off the table. They turned their attention to constitutional resources outside the *Charter*, against which section 33 is powerless. But given the *Charter*'s centrality in the lawyerly imagination of our time, we should look closely at it before concluding it has no resources to offer, even when the notwithstanding clause operates.

Remember that certain *Charter* provisions are immune to derogation via section 33. These include the democratic rights in sections 3, 4, and 5; the mobility rights in section 6; and the minority-language educational guarantees in section 23. As I mentioned, they include the remedies clause, section 24. They also encompass the equal guarantee of *Charter* rights to male and female persons, section 28.

The new paradigm — with readier reach by legislatures for the notwithstanding clause — impels us to think much harder about those non-derogable parts of the *Charter*. We need to think about these provisions' premises and implications. Are they a random laundry list? On the contrary, I think a more promising avenue is to work through how they fit together as the *Charter*'s irreducible guarantees, safeguarding mobility in the federation, minority language schooling, and participation in public life through elections and the political process. As such, they might lead to implied rights anchored to constitutional text that we haven't yet considered. Advocates should make sense of the untouchable framework in plain sight in the *Charter*.

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To conclude, I have sketched examples of the advocacy that I think is imperative under the new paradigm, in which legislatures no longer take respecting rights for granted. Each reflects the idea that judges should give section 33 its due, but no more. In other words, section 33 isn't a nuclear privative clause that suspends all other legal norms or safeguards in our constitutional order. Nor does it require judges to defer submissively to the legislature. Section 33 secures a law's operation despite its violation of certain rights and freedoms. It doesn't open a constitutional black hole.

I hope that one day — soon — professors and students, in my faculty and others, will read about Bill 21 in Constitutional Law as we read about *Roncarelli v Duplessis*.[18] For that to happen, advocates and defenders of fundamental rights will need to step confidently into the altered role that altered circumstances require.

Endnotes

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1 *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

2 See e.g. *Harper v Canada (AG)*, 2004 SCC 33.

3 See e.g. *Canada (AG) v JTI-Macdonald Corp,* 2007 SCC 30.

4 SO 2018, c 11.

5 *City of Toronto et al v Ontario (AG),* 2018 ONSC 5151.

6 *Toronto (City) v Ontario (AG),* 2018 ONCA 761.

7 SQ 2019, c 12.

8 CQLR c C-12.
9 *Hak c Quebec (AG),* 2019 QCCS 2989
10 *Ibid* at para 128 [author's translation].
11 [1987] 1 SCR 110 at 128 [*Metropolitan Stores*].
12 *Ibid* at 135.
13 [1988] 2 SCR 712.
14 Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The Faulty Received Wisdom Around the Notwithstanding Clause" (10 May 2019), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause/>.
15 *Canada (Prime Minister) v Khadr,* 2010 SCC 3.
16 2010 SCC 27.
17 Leonid Sirota, "Does the Charter's 'notwithstanding clause' exclude judicial review of legislation? Not quite!" (23 May 2019), online (blog): *Double Aspect* <doubleaspect.blog/tag/notwithstanding-clause/>.
18 [1959] SCR 121.