International Law and the Notwithstanding Clause: Resorting to the Forest, not the Trees, to Help Interpret Section 33 of the *Canadian Charter*

Stéphane Beaulac*

This article's hypothesis is that the rejection of the international law argument vis-à-vis the interpretation of section 33 of the Charter *relates to the type of international normativity and the source of international law used by counsels and considered by judges. To frame my argument, it is necessary to look in detail at the February 2024 Quebec Court of Appeal decision in the Bill 21 case, most notably the part dealing with the international law perspective and specific elements thereof (i.e. the trees). Then, the lionheart of the article deals with the proper analytical framework that courts should use when resorting to international law (conventional or customary), as clarified by the Supreme Court of Canada in two seminal judgments in 2020:* Québec inc *and* Nevsun. *The original contribution of the article is that a much better way to invoke international law as a relevant and persuasive source to assist in interpreting the notwithstanding clause is to use general human rights normativity (i.e. the forest), with a view to placing section 33 within the broader context of the* Charter*, considered as a whole. The idea is to understand the override as an "exception" (which calls for a strict and restrictive interpretation) to the*

L'hypothèse veut que la raison pour laquelle l'argument du droit international est rejeté s'agissant de l'interprétation de l'article 33 de la Charte *est liée au type de normativité internationale, ainsi qu'à la source de droit international mis de l'avant par les procureurs et, du coup, pris en considération par les juges. Pour ancrer le débat, il est nécessaire d'examiner la décision de la Cour d'appel du Québec de février 2024 dans l'affaire de la Loi 21, surtout la partie traitant de la perspective de droit international, dont les éléments précis considérés (c.-à-d. les arbres). Suit l'essentiel de l'article, qui porte sur la grille d'analyse appropriée pour avoir recours au droit international (conventionnel ou coutumier), telle que précisée par la Cour suprême dans deux jugements de principe en 2020 :* Québec inc. *et* Nevsun. *La contribution originale de l'auteur est qu'une bien meilleure façon de se référer au droit international comme source pertinente et persuasive pour aider à interpréter la clause de dérogation est d'avoir recours à la normativité générale des droits humains (c.-à-d. la forêt), pour ainsi placer l'article 33 dans le contexte plus large de la* Charte canadienne*, considérée dans son ensemble. L'idée est d'amener à voir*

* Ph.D. (*Cantab*.), LL.M. (first class honour), J.D. in common law (first in national program) and LL.L. in civil law (*summa cum laude*). Full professor (*professeur titulaire*) at the Faculty of Law, University of Montreal, where I teach constitutional law and international law. Member of both the Ontario Bar and the Quebec Bar, of counsel (avocat-conseil) with the Montreal office of Dentons Canada S.E.N.C.R.L. (litigation group). Thanks to Me Narek Chakhalyan, a former student of mine, for the initial research to gather the basic material on these issues; appreciation as well to Ms. Stéphanie Macdonald (a student then) at Dentons for helping to finalize the footnotes and for editing work.

overall Charter *regime, which normally is meant to provide for access to justice and to allow for a remedy where a right or freedom is violated. These norms exist in international law, forming part of the "forest" that can be used to validate the interpretation of section 33. The conclusion suggests two considerations flowing from this new interpretation of the notwithstanding clause, which could be judicially reviewed.*

que cette clause est en fait une « exception » (qui commande une interprétation stricte et restrictive) à l'application du régime, qui normalement existe, en cas de violation à une liberté fondamentale, pour permettre un accès à la justice et pour garantir le droit à un redressement. Ces normes internationales forment la « forêt » et valident l'interprétation de l'article 33. En conclusion, deux considérations découlant de la nouvelle interprétation de la clause de dérogation sont proposées, pouvant faire l'objet d'un contrôle judiciaire.

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I. Introduction

Since the adoption of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in 1982,[1] there has been a paradox in regard to its relationship with international law. On the one hand, following the logic of dualism,[2] it is blatantly clear to (almost)[3] all that this supra-legislative instrument did not formally implement the human rights treaties or incorporate other international legal obligations of the Canadian state.[4] On the other hand, as empirical studies show without a doubt, there has been a constant and substantial increase in the domestic use of international human rights law in Canada,[5] as well as comparative law,[6] over the last 40 or more years of the *Charter*.[7]

In one of the early pieces on the role of international law in regard to the *Charter*, in 1982, Professor Errol Mendes relied on a United Nations study pointing out that a number of the world's contemporary documents of a constitutional nature were, either in all or in part, inspired by the *Universal Declaration of Human Rights*. As he wrote: "[T]oday, one more could add Canada to that list of countries, as there are rights laid down in the Canadian *Charter* which clearly correspond to the rights in the Universal Declaration and

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

2 See generally Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois" in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, *JurisClasseur Québec — Droit constitutionnel* (Montreal: LexisNexis, 2011), loose leaf, fasc 23, ss 5–8. For a forceful reiteration of dualism with regard to international treaty law, by the Supreme Court of Canada, see Justice L'Heureux-Dubé (for the majority) in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 69; See also, more recently, *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 150 [*Kazemi*].

3 The main challenger of the received wisdom is Gibran van Ert, a lawyer in Ottawa and former executive director at the office of the Chief Justice of Canada. See generally Gibran van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008); See also Anne F Bayefsky, *International Human Rghts Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworth, 1992) at 63.

4 William A Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed (Toronto: Thomson Carswell, 2007) at 50 ff. See also Hugh M Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts" in Steve G Coughlan & Dawn Russell, eds, *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Éditions Thémis, 2002) 263.

5 See for instance Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought" in Richard Albert & David R Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2017) 305.

6 See for instance Eszter Bodnar, "A 'Comparative Constitutional Powerhouse' in Action: An Empirical Study of the Supreme Court of Canada's Use of Comparative Law Based on Interviews and Case Citations" (2021) 54:2 UBC L Rev 353.

7 See also Michel Lebel, "L'interprétation de la *Charte canadienne des droits et libertés* au regard du droit international des droits de la personne — Critique de la démarche suivie par la Cour suprême du Canada" (1988) RB 743.

the European Convention of Human Rights."[8] The Supreme Court of Canada ("SCC") promptly embraced the invitation to resort to international normativity in the interpretation and application of the *Charter*, doing so around the idea that these norms, although not binding per se,[9] are "relevant and persuasive,"[10] as Chief Justice Dickson explained in the *1987 Reference*[11] (although we will see below how the majority in *Québec inc*[12] reframed and refined this approach to international law in the *Charter* context).

Here, it is worth emphasizing that, from the earliest point in its case law, the SCC did not just reference international normativity to help ascertain the meaning and the scope of substantive rights and freedoms found in the *Charter*: e.g. section 7 (*Re BC Motor Vehicle Act*[13] in 1985 and again in *Suresh*[14] in 2002), or section 2(d) (*1987 Reference*[15] and again in *Saskatchewan Federation of Labour*[16] in 2015). Indeed, true to the teaching of Chief Justice Dickson in 1987, who spoke about international law as "relevant and persuasive source for *interpretation of the provisions of the Charter*,"[17] the so-called meta-provisions of Canada's human rights document — such as the limitation clause in section 1

8 Errol P Mendes, "Interpreting the *Canadian Charter of Rights and Freedoms*: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20:3 Alta L Rev 383 at 385.

9 See for instance the statement made by the Supreme Court of Canada in *Ordon Estate v Grail*, 1998 CanLII 771 (SCC) at para 137: "Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community." See also Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002) 16 SCLR 2d at 62.

10 On the importance of this standard, as opposed to suggesting that domestic courts are bound by international law, see Stéphane Beaulac, "Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004) 38:2 RJT 359. See also Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32:2 NYUJ Intl L & Pol 501.

11 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349, 1987 CanLII 88 (SCC) [*1987 Reference*]. As former justice Michel Bastarache once wrote, extra-judicially, although Dickson CJ's view in that case was expressed in a dissent, "his opinion reflects the present state of the law." See Michel Bastarache, "The Honourable GV La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts" in Rebecca Johnson & John P McEvoy, eds, *Gérard V La Forest at the Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project, 2000) 433 at 434.

12 *Quebec (AG) v 9147-0732 Québec inc*, [2020] 3 SCR 426 at 22 [*Québec inc*], which speaks of international law as playing "a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation" of the *Canadian Charter* (emphasis in original).

13 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503, 512 [*Re BC Motor Vehicle Act*].

14 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 59 [*Suresh*].

15 *Québec inc*, *supra* note 12 at 350.

16 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 62 [*Saskatchewan Federation of Labour*].

17 *1987 Reference*, *supra* note 11 at 349 (emphasis added).

and the application clause in section 32 — have also benefited from an international perspective in their interpretation.[18]

In *Slaight Communications*,[19] Dickson CJ himself, after referring to his reasons in the *1987 Reference*, made the point thus: "Given the dual function identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter*," but can also be resorted to for "the interpretation of what can constitute pressing and substantial section 1 objectives which may justify restrictions upon those rights." [20] Furthermore, with respect to the last leg of the *Oakes*[21] analysis, the proportionality test, Dickson explained that, "the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective."[22] Later case law confirmed that international law may often prove "relevant and persuasive" in a section 1 analysis, as it was for the majority in *Keegstra*[23] (1990) and, later, in *Suresh*, where the Court stated that the international perspective is useful both for the principles of fundamental justice analysis under section 7 and for the *Oakes* analysis under section 1.[24]

The same is true for section 32, with international law considered highly useful in determining the scope of application of the *Charter*. The case in point is the SCC's 2007 decision in *Hape*,[25] which raised the question of whether guaranteed legal rights — in that instance, the section 8 protection against unreasonable search and seizure — may have an extraterritorial reach. One quite interesting feature of that case, given that most of these issues of domestic use of international law concern treaties, is that the argument was in fact based on customary international law, namely the rules of state jurisdiction as per the landmark 1927 decision of the International Court of Permanent Justice in the *Lotus* case.[26] The route by which the SCC resorted to these customs — specifically the ones dealing with executive/investigative/enforcement jurisdiction — is known as the presumption of conformity with international law, which is well

18 See Stéphane Beaulac, "L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international" (2005) 27 SCLR 1 at 30–32.
19 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*].
20 *Ibid* at 1056–1057.
21 *R v Oakes*, [1986] 1 SCR 103 at 136.
22 *Slaight Communications*, *supra* note 19 at 1057.
23 *R v Keegstra*, [1990] 3 SCR 697 at 749–755.
24 *Suresh*, *supra* note 14 at para 59.
25 *R v Hape*, [2007] 2 SCR 292 [*Hape*].
26 *The Case of the SS "Lotus"* (1927), PCIJ Ser A, no 10 [*Lotus*].

settled in Canada.[27] It is in that context that LeBel J, for the majority of five judges (four were concurring), wrote that, "as with the substantive provisions of the *Charter*, it falls upon the courts to interpret the jurisdictional reach and limits of the *Charter*."[28] Given that this case involved issues of extraterritoriality and implicated interstate relations, "the tools that assist in the interpretation exercise [under section 32(1)] include Canada's obligations under international law,"[29] the Court said.

The notwithstanding clause in section 33 of the *Charter*, in a somewhat obvious way, can be considered as similar to the limitation clause in section 1, and even more so to the application clause in section 32. Indeed, all three are meta-provisions, not substantive provisions of the human rights regime, like the provisions that guarantee fundamental freedoms (section 2) or equality (section 15). More significantly, let us recall that, *a priori* at least, the general methodology of constitutional interpretation — proposed in *Big M Drug Mart*[30] in 1985, recalibrated in cases at the turn of 2020,[31] and now dubbed "purposive textual interpretation"[32] — is equally applicable to meta-provisions, as was clarified recently in a March 2024 SCC decision.[33] Regarding issues of interlegality, just like the general approach, the specific interpretative rules for resorting to international law domestically should apply to *all Charter provisions*, that is to say, indiscriminately whether one is concerned with a meta-provision or a regular provision.

Accordingly, as noted above, international norms are deemed "relevant and persuasive" sources of interpretation for the limitation clause in section 1, as well as for the application clause in section 32 of the *Charter*. Logically, this should also mean that international law ought to be used to help in the interpretation of the notwithstanding clause of the *Charter*, another meta-provision

27 See generally, Stéphane Beaulac, "International Law and Statutory Interpretation: Up with Context, Down with Presumption" in Oonagh E Fitzgerald et al, eds, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) at 331.

28 *Hape*, *supra* note 25 at para 33.

29 *Ibid.*

30 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344 [*Big M Drug Mart*].

31 Beside *Québec inc*, *supra* note 12 at paras 3–12, which is the main case, see also *R v Poulin*, [2019] 3 SCR 566 at paras 53–70 [*Poulin*]; *Toronto (City) v Ontario (AG)*, 2021 SCC 34 at paras 50–60 [*City of Toronto*].

32 *City of Toronto*, *supra* note 31 at para 53.

33 In *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Vuntut Gwitchin First Nation*], which in part concerned the possible application of the *Canadian Charter* to a newly recognized self-governing Indigenous community in the Yukon territory, the majority wrote the following, at para 45: "Section 32(1) of the *Charter*, as the entry point for the *Charter*'s application, *must be interpreted in a manner that is flexible, purposive, and generous*, rather than technical, narrow, or legalistic" (italics added).

of Canada's human rights regime. As will be further explained below, the issue requires to take into account that section 32 is adjacent to section 33 under the heading "application of the Charter," thus forming part of its immediate context (as per canons of interpretation[34]). This feature, along with the marginal note speaking of "exception where express declaration," makes the link between sections 33 and 32 very clear indeed. Of course, headings and marginal notes are not determinative in understanding the notwithstanding clause,[35] but for our purposes, they support the following point: section 33 is a meta-provision of the *Charter*, no doubt, for which international law may act as a "relevant and persuasive" source in its interpretation.

Having said that, such recourse did not happen in the landmark ruling on the issue of derogation, the *Ford*[36] decision of 1988, which is not at all surprising as the domestic use of international law in *Charter* interpretation was not developed back then. Moreover, while the international perspective has been put forward in the constitutional litigation over Bill 21 — the law regarding laicity in the province of Quebec — it has so far proven unsuccessful. However, there is a fundamental flaw in the use of international normativity in this litigation, which may be summarized simply thus: The focus has been wrongly placed on the international law "trees," whereas the most powerful points are to be drawn from the "forest," so to speak, of international human rights law.

This article's hypothesis is that the rejection of the international law argument vis-à-vis the interpretation of section 33 of the *Charter* relates to the type of international normativity and the source of international law used by counsels and considered by judges. To frame my argument, it is necessary to look in detail at the February 2024 Quebec Court of Appeal decision in the Bill 21 case (Part II), most notably the part dealing with the international law perspective and specific elements thereof (i.e. the trees). Then, the lionheart of the article deals with the proper analytical framework that courts should use when resorting to international law (conventional or customary), as clarified by the Supreme Court of Canada in two seminal judgments in 2020: *Québec inc*[37] and *Nevsun*[38] (Part III). The original contribution put forward is that the better way to invoke international law as a "relevant and persuasive" source to assist in interpreting the notwithstanding clause is to resort to general human

34 See generally, Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Toronto: LexisNexis Canada, 2008) at 124.

35 See *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 375–77 [*Skapinker*].

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

37 *Quebec inc*, *supra* note 12.

38 *Nevsun Resources Ltd v Araya*, [2020] 1 SCR 166 [*Nevsun*].

rights normativity — the "forest," as I call it — with a view to placing section 33 within the broader context of the *Charter*, considered as a whole (Part IV). The idea is to understand the override as an "exception" (with a narrow scope) to the overall human rights regime, which is normally meant to provide for access to justice and to allow for a right to a remedy where a right or freedom is violated (Part IV(A)). These latter norms are found in international law (treaties, customs) and form part of the "forest" that can be used to validate the interpretation of section 33 (Part IV(B)).

II. Bill 21 on Laicity in Quebec and the Current Court Challenge

After considerable tergiversations, the provincial government of the Coalition Avenir Quebec ("CAQ"), led by Premier François Legault, along with the keen and ideological advocacy of Justice Minister Simon-Jolin Barrette, presented and had the Quebec legislature (the National Assembly) adopt Bill 21, formally named the *Act Respecting the Laicity of the State*.[39] In the preamble, it is put clearly by means of a declaration of legislative intent that the so-called laicity of the state — not just the neutrality of the state[40] — is imposed upon society as a paramount principle within the province. This unprecedented affirmation of state laicity, which is made applicable to public institutions (such as the legislature, government, and even the judiciary) in section 3 of the *Act*, is followed by somewhat invasive individual requirements, found in section 6, prohibiting the wearing of religious symbols by certain persons, and in sections 7 to 10, requiring personnel of the public or parapublic sectors to fulfil their functions with their faces uncovered — an obligation that bares some exceptions, but that extends to contractual partners of the state, and to certain persons seeking public services (for identification or security reasons).

To get a full picture of the immense impact of Bill 21, it's worth referencing Schedule I of the *Act*, which shows the scope of application of the liberty-depriving requirements, under the pretext of laicity, for state employees and agents of numerous bodies. Most public and parapublic institutions and organizations are included, such as government departments, municipalities, childcare centres, transit corporations (e.g. STM), elementary and secondary schools and school service centres, the province's cegeps, and universities. In

39 CQLR, chap L-03, presented as Bill 21 and adopted under that name, SQ 2019, chap 12 [*Bill 21*].

40 This is the concept (which is much less invasive of individual fundamental freedoms), rooted in section 2(a) of the *Charter*, that was endorsed by the SCC in the case of *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 SCR 3.

addition, Schedule III extends the relevant restrictions to specific persons exercising public or parapublic functions or services, such as Members of the National Assembly or the Office of the Lieutenant-Governor, elected municipal officers (with some exceptions), peace officers, and physicians, dentists, and midwives in the public health care sector, though this list is not exhaustive. For the sake of completeness, one must also mention Schedule II of the *Act*, which, along with section 31, provides for a sort of grandfather clause for certain persons, including teaching personnel, if they wore religious symbols at the time Bill 21 came into force and want to continue doing it, providing they stay within the same organization.

For present purposes,[41] the most materially significant feature of the *Act* is found in Chapter VI, which is dedicated to transitional and final provisions. That is where Bill 21, intending to permit any and all liberticide measures, provides for the override of both the *Canadian Charter* and the Quebec *Charter of Human Rights and Freedoms*,[42] specifically in sections 33 (the coincidence on numbering is quite ironic) and 34. Since their content is pretty much exactly the same, only the latter needs to be quoted here. It reads thus: "This Act and the Amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 [i.e. of the *Charter*]".

To be clear, this recourse to the notwithstanding clause, in regard to both Canada's supra-legislative and Quebec's quasi-constitutional human rights instruments, is the opposite of a well tailored minimalist use, i.e. one that would limit the derogation to a specific part of the *Act* and restrict the override to the relevant *Charter* provisions. Instead, Bill 21's resort to section 33 is the most maximalist use possible,[43] covering the whole of the *Act* and its amendments, and, even more excessively, setting aside the whole list of applicable rights and freedoms (sections 2 and 7 to 15 of the *Charter*), regardless of whether they are engaged by the law. It is worth noting that the same liberticide maximalist strategy is adopted for the *Quebec Charter*, with the law setting aside the whole

41 On the notwithstanding clause generally, see these contributions: Donna Greschner & Ken Norman, "The Courts and Section 33" (1987) 12:2 Queen's LJ 155; Lorraine E Weinrib, "Learning to Live with the Override" (1990) 35:3 McGill LJ 541; Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221; André Binette, "Le pouvoir dérogatoire de l'article 33 de la *Charte canadienne des droits et liberté* et la structure de la Constitution du Canada" (2003) RB (special ed) 107; and Janet L Hiebert, "The Notwithstanding Clause: Why Non-use Does not Necessarily Equate with Abiding by Judicial Norms" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 695.

42 *Charter of Human Rights and Freedoms*, CQLR, c C-12 [*Quebec Charter*].

43 See Marion Sandilands, "Quebec's Bills 21 and 96: An Underwater Eruption" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 253.

list of human rights found in section 1 to 38. In a sense, this is even worse than the section 33 invocation, as the derogation under section 52 of the *Quebec Charter* need not be re-enacted every five years.

From a human rights perspective, this is an excessive and arguably even abusive use of the notwithstanding clauses by the Legault Government, sponsored by Justice Minister Jolin-Barette, and repeated some years later with another enactment (Bill 96, on the status of French as the common language of Quebec).[44] While some commentators have agreed that such a course of action is quite unworthy of a liberal democracy,[45] however, others have argued that Quebec's status as a distinct society and its failure to formally endorse the patriation of the Constitution in 1982 mean that it is more legitimately justified in resorting to the *Charter*'s override clause.[46] Even if this position has some merit though, framing Quebec as a constitutional victim does not justify the provision of less protection for Quebec people's human rights,[47] which will no doubt lead this episode in the province's governance to be judged harshly by history.[48]

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44 *Act Respecting French, the Official and Common Language of Québec*, SQ 2022, c 14. See also Tsvi Kahana, "The Notwithstanding Clause, Bill 96, and Tyranny" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 290.

45 See Jonathan Montpetit, "The Rise and Fall of Liberal Constitutionalism in Quebec" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 271.

46 *Contra* see Benoît Pelletier, "The Notwithstanding Powers and Provisions: An Asset for Quebec and for Canada" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 205. For the bold claim, unsubstantiated by true empirical work though, that there is a specific theory and practice in Quebec regarding the notwithstanding clause, see Guillaume Rousseau, "La Disposition dérogatoire des chartes des droits: de la théorie à la pratique, de l'identité au progrès social" (Mars 2016) *Institut de recherche sur le Québec* (available online only); and Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 RGD 342. The accurate tally of the number of times the derogation clause has actually been used, in promulgated pieces of legislation, is 18; see Caitlin Salvino, "A Tool of Last Resort: A Comprehensive Account of the Notwithstanding Clause Political Uses 1982-2021" (2022) 16:1 JPPL 16; and Caitlin Salvino, "Notwithstanding Minority Rights: Rethinking Canada's Notwithstanding Clause" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston : McGill-Queen's University Press, 2024) 401.

47 See Gregory B Bordan, "Are There Constitutional Limits on the Use of the Notwithstanding Clause?" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 401.

48 See Noura Karazivan & Jean-François Gaudreault-DesBiens, "Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: The Example of Quebec's Laicity Act" (2020) 99 SCLR 2d 487.

Initially coming in four separate court procedures — by plaintiffs Hak *et al*, Lauzon *et al*, English Montreal School Board *et al*, and Fédération autonome de l'enseignement — the challenge to Bill 21 was first considered by the Quebec Superior Court's Justice Marc-André Blanchard, with the decision rendered on 20 April 2021 in the case known as *Hak*.[49] Except for claims relating to minority language rights for the benefit of Quebec English schools and those relating to members of the legislature — which remained viable insofar as sections 23 and 3 of the *Charter* are outside the reach of the notwithstanding clause — the Court confirmed the constitutional validity of the bulk of Bill 21.

On appeal, the case became known as *World Sikh Organization of Canada*,[50] the decision in which was handed down on 29 February 2024 — a unanimous decision signed by all three justices (Savard, CJQ, Morissette JA, and Bich JA). The only argument challenging Bill 21 accepted on appeal was the one based on section 3 of the *Charter*, rendering inoperative the uncovered face requirement for members of the legislature. By contrast, the section 23 argument was dismissed, the Court expressing the view that the *Act* actually fell outside the scope of protection provided by this provision.

Because this article does not intend to conduct an exhaustive study of these judgments, and since the latest judicial ruling is what matters for our purposes, only the part of the Court of Appeal decision concerning the notwithstanding clause is examined in what follows, specifically with reference to the use of international law.[51] Only two parties raised the international law argument in regard to section 33 of the *Charter* at the Court of Appeal, namely the Fédération autonome de l'enseignement and Amnistie Internationale (section Canada francophone). A review of their factums shows that their submissions were superficial, yet too focused on drawing a parallel with the derogation clauses found in international law instruments. Amnistie Internationale, for instance, made a mere general reference to the presumption of conformity with international law and relied on quite old case law (e.g. the *1987 Reference*[52]) to justify interpreting the *Charter* in conformity with Canada's international obligations. Then they presented it as a new question of law — to justify departing from the precedent of the *Ford*[53] decision — that the notwithstanding clause

49 *Hak c Procureur général du Québec*, 2021 QCCS 1466 [*Hak*].

50 *World Sikh Organization of Canada v Attorney General of Canada*, 2024 QCCA 254 [*World Sikh Organization*].

51 For a summary of the whole Court of Appeal judgment, see my analysis in the article by Luis Millán, "Notwithstanding clause centre stage in Quebec Appeal Court ruling over controversial secularism law" (11 March 2024), online: <https://www.law360.ca/ca/articles> [perma.cc/59HQ-D8P9].

52 *1987 Reference*, *supra* note 11.

53 *Ford*, *supra* note 36.

ought to be interpreted in light of the *International Covenant on Civil and Political Rights*[54] override clause, namely section 4, with its stringent criteria relating to the existence of a "public emergency which threatens the life of the nation."

The Fédération autonome de l'enseignement, for its part, cut even more corners by referring to a law journal article by Professor Marie Paré,[55] who attempted the difficult endeavour of comparing section 33 of the *Charter* with section 4 of the *International Covenant on Civil and Political Rights* (and section 5 of the *International Covenant on Economic, Social and Cultural Rights*[56]), as well as with similar derogation clauses in the *European Convention of Human Rights* (section 15)[57] and the *American Convention of Human Rights* (section 27).[58] The problem, though, is that the nature of these clauses, their scope of application, and the conditions for their use are all very different from what is found in the *Charter*'s override clause. This is what brought the Quebec Court of Appeal to hold that, really, there is no equivalent to section 33 in international law. Quoting from legal writings,[59] the Court accepted the idea that the Canadian form of derogation "seems to be unique to Canada and does not have a real equivalent in other Western democracies." For this reason, the Court continued, there is "no real relation between the override power in the international instruments and that in the *Charter*."[60]

Furthermore, the Court of Appeal was correct in resorting to contemporary cases to support its treatment of the international argument, chiefly among them the decision of the Supreme Court of Canada in *Québec inc*[61] and the decisions in *Hape*[62] and *Kazemi*.[63] These decisions were all relied upon by the Court to support the position that the presumption of conformity with inter-

54 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*].

55 See Marie Paré, "La légitimité de la clause dérogatoire de la Charte canadienne des droits et libertés en regard du droit international" (1995) 29:3 RJT 627, which is one of the very few texts in the legal literature on the subject.

56 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) [*ICESCR*].

57 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*European Convention*].

58 *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) [*American Convention*].

59 François Chevrette & Herbert Marx, *Droit constitutionnel: Principes fondamentaux — Notes et jurisprudence*, 2nd ed by Han-Ru Zhou (Montreal: Éditions Thémis, 2021) at 1173.

60 *World Sikh Organization*, *supra* note 50 at para 294.

61 *Québec inc*, *supra* note 12.

62 *Hape*, *supra* note 25.

63 *Kazemi*, *supra* note 2.

national law "cannot be used to overthrow clear legislative intent not to arrive at an interpretation that is precluded by the very working of the statute."[64] In regard to the notwithstanding clause, the Court's reasoning essentially proceeded in three stages: 1) the *Charter* was enacted in 1982, after Canada's ratification of the *International Covenants*, yet no language used internationally was borrowed in the wording of section 33, 2) "relying on the presumption of conformity applicable to the *International Covenants*" would be "contrary to the very wording of this provision and the clear intention of the *Charter*'s framers,"[65] and 3) in the end, the specific international instruments and their very different override provisions cannot be a "source of authority to rewrite s. 33 of the *Canadian Charter*."[66]

For the sake of completeness, note that the Court of Appeal was of the view that the same conclusion regarding the role of international law applied to the *Quebec Charter*'s section 52 override clause. Incidentally, no use was made either of the few non-binding international instruments, specifically their derogation clauses, as they can only be persuasive (never determinative) as mere interpretative tools, not through the presumption of conformity.[67] Finally, it is worth highlighting that such references to international law by the Court of Appeal were not made in an attempt to revisit, as it were, the actual interpretation of the *Charter*'s notwithstanding clause. Instead, because of the doctrine of vertical *stare decisis* and the restrictive test for setting aside a binding precedent, the international law argument was considered as part of the analysis to see if there was a new legal issue, under the first criterion laid out in the SCC's *Bedford*[68] decision.

In the end, the Court of Appeal rejected all arguments, including those based on specific international instruments and their override clauses,[69] and held that there was no basis (other arguments were considered) to justify discarding *Ford* as a binding precedent for the interpretation of section 33 of the *Charter*.

64 *World Sikh Organization*, *supra* note 50 at para 292.
65 *Ibid* at para 295.
66 *Ibid.*
67 *Ibid* at para 297.
68 *Canada (AG) v Bedford*, [2013] 3 SCR 1101 at para 42 [*Bedford*]. See also *Carter v Canada (AG)*, [2015] 1 SCR 331 at para 44.
69 *World Sikh Organization*, *supra* note 50 at para 298.

III. Revising the *Ford* Case with International Law: New Scheme from Case Law

Understandably, because the *World Sikh Organization* decision of 2024 was at the level of a court of appeal, and the 1988 judgment in *Ford* is a precedent from the SCC, the stringent test of *Bedford* in regard to vertical *stare decisis* needed to be met,[70] which was perhaps an impediment to the use of international law, as a "relevant and persuasive" source, to assist in interpreting the notwithstanding clause. In the context of the Bill 21 case going to the SCC, however, the story is different, as horizontal *stare decisis*[71] (with its much more lenient hurdle) will certainly not stand in the way of a full and complete reconsideration of the *Ford* case.

Accordingly, the idea here is not to see how international law could be used to justify setting aside the *Ford* case, like the Quebec Court of Appeal did (or refused to do) in *World Sikh Organization*. Rather, for the sake of the discussion, we shall assume that the question of the interpretation of section 33 of the *Charter* has reached the apex court (as it now has), that there is no issue with *stare decisis*, and that the SCC is indeed conducting a full-fledged exercise of constitutional interpretation of the clause. In such a scenario, how can international norms be invoked as "relevant and persuasive" sources of interpretation, and as aids to our understanding of the notwithstanding provision in the *Charter*?

To begin answering this question, let us first recall that that, under section 38(1) of the *Statute of the International Court of Justice*,[72] which is generally viewed as codifying the sources of international normativity,[73] the two main categories of formal norms are conventional (i.e. treaties) and customary (i.e. state practice, accompanied by *opinio juris*).[74] Dualism, we saw already, is the heuristic tool deployed in Canada to rationalize the domestic use of international treaties, while monism is the logic followed for customary international law. The latter was reiterated and clarified in the SCC decision in *Nevsun*,[75] a

70 On vertical *stare decisis*, see the decision by the SCC in *R v Sullivan*, 2022 SCC 19.

71 On horizontal *stare decisis*, see the decision by the SCC in *R v Kirkpatrick*, 2022 SCC 33.

72 *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Can TS 1945 No 7 (entered into force on 18 April 1946) Annex [*ICJ Statute*].

73 See Stéphane Beaulac & Miriam Cohen, *Précis de droit international public — Théorie, sources, interlégalité, sujets*, 3rd ed (Montréal: LexisNexis Canada, 2021) at 83–84.

74 Of course, there is a third source of formal norms, the so-called general principle of international law, as well as auxiliary sources such as judicial decisions and legal writings. However, these sources are of limited use, and are in fact of no interest as far as interlegality is concerned.

75 *Nevsun*, *supra* note 38.

case ruling on a preliminary objection regarding whether there was a cause of action in common law torts, which in the end was deemed possible by relying on international customs. We will come back to this judgment shortly to dwell upon the domestic use of this source of international norms.

To try to keep the discussion succinct, and because it seems to have become the reference case establishing the scheme of analysis for resorting to any type of international normativity (conventional or customary, binding or non-binding) or even comparative law in the interpretation of the *Charter*, the focus here is put solely on the seminal judgment in *Québec inc*, also from 2020. This case concerned the interpretation of the *Charter*'s section 12 protection against cruel and unusual treatment or punishment, and raised the question of whether a legal but not natural person (i.e. a corporation) could be the beneficiary of such a right. Although the judgment was not unanimous, there is no dissent as all judges agreed to answer the legal question in the negative, with the Court's 5-3-1 split (the latter two are concurring opinions) occurring on the issue of constitutional interpretation and, indeed, the role of international law in *Charter* interpretation. Only the last feature will be examined here in detail.

As an initial point, to fully appreciate the impact of the reasons of Justices Brown and Rowe in *Québec inc* (Justice Abella J penned the main concurring opinion), one must bear in mind the impact that it has had on subsequent opinions. In this regard, suffice it to say that although the Brown and Rowe JJ opinion was only endorsed by an (apparently) weak five-judge majority, their position has since been accepted by the whole Supreme Court of Canada, as the unanimous decision in *Bissonnette*[76] shows. Another general point, before diving into how the scheme for using international law was reframed and refined in *Québec inc*, is to highlight how Brown and Rowe JJ viewed this issue as part of the broader need to recalibrate the general methodology of constitutional interpretation of the *Charter*.[77] In that regard, they explained the importance of "a consistently defined methodology of interpretation [as] a means of promoting the rule of law, notably through legal predictability."[78]

76 *R v Bissonnette*, 2022 SCC 23 at para 98, where Wagner CJ, on behalf of the whole Court, endorsed Brown and Rowe's position in *Québec inc*, writing at para 28 that "there is a role for international and comparative law in the interpretation of *Charter* rights," but that this role is a limited one, that is, "to *support* or *confirm* an interpretation" (emphasis in *Québec inc*) based on the purposive interpretation of the *Charter*.

77 *Québec inc*, *supra* note 12 at paras 19–21.

78 *Ibid* at para 3. On this point, the majority refers to my law journal article, Stéphane Beaulac, "'Texture ouverte', droit international et interpretation de la *Charte canadienne*" (2013) 61 SCLR 2d 191 at 192–193.

Recall, on this point, Dickson CJ's statement (quoted above) that international law may be used as a "relevant and persuasive" source to interpret provisions of the *Charter*. The crucial adjustment made to this position by Brown and Rowe JJ in *Québec inc* is to clarify what this means in terms of the role of such non-domestic interpretative elements. Their reframing is clear as crystal:

> While this court has generally accepted that international norms can be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms.[79]

In support of this statement, Brown and Rowe JJ cite a passage from my book, *Précis d'interprétation legislative*, which is directly taken from my chapter in *JurisClasseur Québec — Droit constitutionnel*.[80] To quote this passage:

> [Translation] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.
>
> … even though international normativity is not binding in domestic law, what is can and, indeed, should do in appropriate circumstances is to influence the interpretation and application of domestic law by our courts. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of "persuasive authority" [Emphasis added by Brown and Rowe JJ].[81]

This is, by far, the most important adjustment — surely more than a tweaking — in the scheme of analysis concerning the national role of international norms, not just for conventional or treaty law, but also for other sources like customary international law, as well as all non-domestic elements of non-binding normativity and comparative law. As a matter of fact, Brown and Rowe JJ went even further in their mission of clarifying the use of these "relevant and persuasive" sources of interpretation by refining the scheme. One

79 *Québec inc*, *supra* note 12 at para 22 (italics in original).

80 Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois" in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, *JurisClasseur Québec — Droit constitutionnel* (Montreal: LexisNexis, 2011), loose leaf, fasc 23, ss 5 and 36.

81 Excerpts translated by the Supreme Court of Canada. These passages have since been updated in the previously referenced chapter of *JurisClasseur Québec — Droit constitutionnel*, at ss 5, 36, as available on the LexisNexis Canada web resource.

paragraph further on, they write that "even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution."[82] The reason why such a differentiation is required, they explained, relates to the integrity of the Canadian constitutional structure, as well as Canadian sovereignty. Quoting from LeBel J's reasons in the *Kazemi* case, which tossed out the argument, the fundamental constitutional precepts remain the same: "The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy."[83]

Acknowledging that the High Court has not always been clear as to how or why different sources are resorted to, or as to the proper weight to attach to international and comparative law, Brown and Rowe JJ resolve to take on this sloppy methodology. In fact, they are prompted to remedy these shortcomings because of Justice Abella's minority reasons in *Québec inc*, which exacerbate the problem "by indiscriminately drawing from binding instruments *and* non-binding instruments, instruments that pre-date the *Charter and* instruments that post-date it, and decisions of international tribunals *and* foreign domestic courts."[84] The majority intends to remedy this confusing and problematic use of non-domestic norms along these three parameters: binding versus non-binding international law; whether norms are pre- or post-dating the law to be interpreted; and the type of case law at issue, international or comparative.

The clarifications that follow, which are rooted in concerns expressed by many of us in international legal circles, are meant to fill in "the need for structure when citing international and foreign sources."[85] Justices Brown and Rowe propose to do that job:

> A principled framework is therefore necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants. Setting out a methodology for considering international and comparative sources recognizes how this Court has treated such sources in practice and provides guidance and clarity. Given the issue raised in this case, our focus is on the use of international and comparative law in constitutional interpretation.[86]

82 *Québec inc*, *supra* note 12 at para 23.
83 *Kazemi*, *supra* note 2 at para 150.
84 *Québec inc*, *supra* note 12 at para 24 (emphasis in original).
85 *Ibid* at para 26.
86 *Ibid* at para 27.

Note, in the last sentence, that the clarifications are said to be for all of international and comparative law (not just treaty law) and, the suggestion seems to be, for constitutional interpretation, but also presumably for the interpretation of any type of legislation. Incidentally, the last point did end up panning out, as a scheme very similar to *Quebec inc*'s was articulated for using international treaty law in statutory interpretation in the 2022 case, *Entertainment Software*[87] (this would bring us away from the focus in this article, and will not be examined further here).

Along the three parameters identified previously, what are the new directives to refine the scheme of analysis when resorting to international law (and comparative law) as a "relevant and persuasive" source in the interpretation of *Charter* provisions, such as the notwithstanding clause in section 33? There are essentially six scenarios, which can be outlined as follows:

- International instruments that are binding and that pre-date the *Charter*;
- International instruments that are binding, but posterior to the *Charter*;
- International instruments that are non-binding and that pre-date the *Charter*;
- International instruments that are non-binding, but posterior to the *Charter*;
- Jurisprudence from international tribunals, from binding or non-binding regimes;
- Jurisprudence (case law) from domestic courts, as comparative law.

There are several other clarifications made by Justices Brown and Rowe that can be mentioned.[88] The different scenarios synthetized in the six categories above, in terms of the weight the argument carries, would be in decreasing order, with binding pre-dating treaties at the top and comparative law at the bottom. As regards the interpretative tools available, the presumption of conformity with

87 *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*Entertainment Software*]. Writing for a seven-judge majority, Justice Rowe stated that the case "calls for a reiteration of the role international treaties play in statutory interpretation" (*ibid* at para 43). The clarifications he makes, along the same lines as in *Québec inc*, are found at paras 43–47, and at para 48, he concludes thus: "Accordingly, while a treaty can be highly relevant to statutory interpretation, it cannot overwhelm clear legislative intent. The court's task is to interpret what the legislature (federally and provincially) has enacted and not subordinate this to what the federal executive has agreed to internationally. It is always the domestic statute that governs because '[i]nternational law cannot be used to support an interpretation that is not permitted by he words of the statute.'"

88 This summary is taken from the information found in paras 30–45 of the majority reasons in *Québec inc*, *supra* note 12.

international law, carrying more persuasive force, would be possible only for the first two categories, involving binding instruments, the other ones being used by means of the contextual argument of interpretation, varying in weight depending on what they are, but of course never determinative. There are hints too that pre-dating international instruments, whether binding or not, would be part of the context of adoption of the *Charter* (or other legislation) and would carry more weight, while post-dating ones would be part of the context of application of the *Charter*, since they did not exist at the time of adoption, and thus have less persuasive force.

This is by no means an exhaustive summary of the teachings Brown and Rowe JJ in *Québec inc.* However, it surely helps us to more clearly visualize the different categories of international and comparative law, when arguing or considering such lines of argument, keeping in mind that these are merely "relevant and persuasive" sources of interpretation, which may be deemed useful but in the limited role of providing "support or confirmation" of the conclusion reached.

Two last comments from the *Québec inc* judgment are worth including. First, in contrast with Abella J's reasons, Brown and Rowe JJ are adamant that there is nothing "novel" in the guidance given: "As this Court's jurisprudence amply shows, the normative value and weight of international and comparative sources have been tailored to reflect the nature of the source and its relationship to our Constitution."[89] Second, and bringing us full circle to how the international argument is part of the general methodology at play, a warning is expressed: "[C]ourts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law."[90] What is at stake is the constitutional interpretation of *Charter* provisions — following the so-called purposive approach, which generally favours a broad and liberal interpretation — including meta-provisions like section 33, and international law is merely one "relevant and persuasive" source that should be used to assist in ascertaining constitutional meaning.

* * *

To move on with customary international law, one must consider the important decision in the 2020 *Nevsun*[91] case. Even though it was rendered in the odd context of a preliminary objection, which surely limits its impact in Canadian

89 *Ibid* at para 46.
90 *Ibid* at para 47.
91 *Nevsun*, *supra* note 38.

law as a pure matter of jurisprudence, this other major 2020 decision on interlegality by the SCC does provide some useful information as to the use of the other formal source of international normativity. Here, the logic is monist, not dualist, which essentially means that "customary international law [is] part of domestic law by way of automatic judicial incorporation,"[92] without the need for legislative action (as for treaties). This is known in Canada as the doctrine of adoption, and as the doctrine of incorporation in England.[93] The logic of this doctrine has always been followed in this country for the use of customary law, although it was said that there was some uncertainty until the SCC sorted it out in the 2007 *Hape*[94] judgment, in the context of the interpretation of section 32 of the *Charter*.

What Justice Abella did for the majority of five judges in *Nevsun* is to reaffirm as a matter of principle that customary international law constitutes a highly important formal source of normativity that may be resorted to as "pertinent and persuasive" in interpreting and applying domestic law, be it judge-made law (as in that case), a statute, or even the Constitution, including the *Charter* (as in the *Hape* case). Some of her statements in that regard are worth reproducing. For example: "The fact that customary international law is part of our common law," she writes, "means that it must be treated with the same respect as any other law."[95] Another point concerns judicial notice: "Unlike foreign law in conflict of laws jurisprudence, … established norms of customary international law are law, to be judicially noticed," which means that customs do not need "formal proof by evidence."[96]

Furthermore, the traditional warning regarding the use of international customs is reaffirmed in the *Nevsun* case. As Abella J puts it: "The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law *absent legislation to the contrary*."[97] Furthermore, comparing the situation at hand with that in the *Kazemi*[98] case, Abella J makes a highly interesting comment about the right to a remedy: "The majority [in *Kazemi*] did not depart from the position in *Hape* that customary international law, including peremptory norms, are

92 *Ibid* at para 87

93 See, generally, Stéphane Beaulac, "Customary International Law in Domestic Courts: Imbroglio, Lord Denning, *Stare Decisis*" in Christopher PM Waters, ed, *British and Canadian Perspectives on International Law* (Leiden/Boston: Martinus Nijhof, 2006) 379.

94 *Hape*, *supra* note 25 at paras 37–39.

95 *Ibid* at para 95.

96 *Ibid* at paras 97–98.

97 *Ibid* at para 128 (emphasis added); see also para 116.

98 *Kazemi*, *supra* note 2.

part of Canadian common law, absent express legislation to the contrary."[99] In *Kazemi*, however, Canada's *State Immunity Act*[100] had actually done just that with respect to the customs prohibiting torture, by providing for a complete code of exception to state immunity, a list that could not be deemed to include grave human rights violations. As such, Justice Abella writes in *Nevsun*, "the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament's enactment of the *State Immunity Act.*"[101] In the case at hand, however, this was not the situation, as nothing barred the direct application of the custom.

IV. Resorting to the "Forest" of International Human Rights Law to Revisit Section 33

The hypothesis at the heart of this article is that the reason why the international argument has been unsuccessful as a potential "relevant and persuasive" factor to aid the interpretation of section 33 of the *Charter*, as it was in the *World Sikh Organisation* decision, boils down to the type of normativity and the source of international law relied upon. Simply put, the derogation clauses in sections 4 and 5 of the *International Covenants*[102] (and non-binding international treaties like the *European Convention on Human Rights*[103] or the *American Convention on Human Rights*[104]), which rely on stringent application criteria requiring the demonstrable existence of a "public emergency which threatens the life of the nation," have nothing to do with Canada's unique notwithstanding clause in section 33 of the *Charter*. This was indeed the conclusion reached by the Court of Appeal in its unanimous February 2024 judgment, essentially suggesting that such comparisons are like comparing apples and oranges.

This is what I am referring to as the "trees" of international human rights law: namely the analogical use of specific derogation clauses — e.g. sections 4 or 5 of the *International Covenants*[105] — to make an argument relating to section 33 of the *Charter*. Such arguments have been roundly and repeatedly rejected also by the defenders of the maximalist recourse to the notwithstanding clauses to shield Bill 21 — as well as Bill 96 — from the protection normally given by Canada's and Quebec's supra-legislative and quasi-constitutional domestic hu-

99 *Nevsun*, *supra* note 38 at para 121.
100 RSC 1985, c S-18.
101 *Nevsun*, *supra* note 38 at para 121.
102 *Supra* note 54, 56.
103 *European Convention*, *supra* note 57.
104 *American Convention*, *supra* note 58.
105 See *ICCPR*, supra note 54; *ICESCR*, *supra* note 56.

man rights regimes. They rely on the *Ford* precedent, the core statement being presented as a *ratio decidendi* of the case on that point, and even elevated as a sort of sacrosanct formulation by some:[106] "Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case."[107] In the Bill 21 challenge, both the trial judge in *Hak*[108] and the three justices of the Quebec Court of Appeal in *World Sikh Organisation*[109] felt hand-tightened by this statement, adding that the international law argument fails to justify departing from the rule of vertical *stare decisis*.

However, in the scenario where the Bill 21 challenge reaches the country's apex court, as it now has, and assuming that horizontal *stare decisis* does not stand in the way, a full-fledged reinterpretation of the notwithstanding clause is very plausible, and surely desirable. Such a revisitation of the *Ford* precedent, and its holding limiting the requirements for invoking section 33 of the *Charter* to formal ones (not substantive ones), should include the international law argument as a "relevant and persuasive" element (Dickson CJ in the *1987 Reference*) to "support and confirm" the interpretative conclusion (Brown and Rowe JJ in *Québec inc*). The original contribution of this article is that such a line of argument ought to be articulated in terms of general human rights normativity — the international law "forest" rather than the "trees" of the (irrelevant) treaty derogation clauses — with a view to rightly placing section 33 within the broader context of the *Charter*, considered as a whole.

The new idea put forward here is that, unlike what was done in the past, the much better way to understand the *Charter* override clause is as an "exception," really, to the normal operation of our human rights regime. Reading section 33 alongside and in light of the application clause of section 32 will then allow for a proper use of international human rights normativity, one that sheds light on the *Canadian Charter* in terms of its capacity to facilitate access to justice and the right to a remedy when rights and freedoms are violated. Indeed, the international law argument, as a relevant and persuasive source of interpretation, shall back up (support and confirm) the return of a sound

106 See for instance, Maxime St-Hilaire, Xavier Foccroulle Ménard & Antoine Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-) Rejoinder" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 132.

107 *Ford*, *supra* note 36 at 740.

108 *Hak*, *supra* note 49 at paras 724, 750.

109 *World Sikh Organization*, *supra* note 50 at paras 245, 248. At para 254, the Court endorsed the Attorney General of Quebec's position that the *Ford* case, "leaves no door open to the possibility of incorporating substantive requirements for the application [of section 33]."

understanding of Canada's human rights regime, which at its core, one must recall, is actually meant to provide protection to fundamental freedoms, not to give governments the unchecked means to legitimize disregarding and dismissing them cavalierly.

A. Understanding Section 33 Override in Context: The Section 32 Application Clause

As already mentioned,[110] it is important to consider the notwithstanding clause within the large scheme of the *Charter*, including in light of the heading under which the provision is found, namely "Application of *Charter*" (in French, "Application de la Charte"), a part containing only two provisions: the section 32 application clause and section 33. Another crucial element of text to consider here is the marginal note, which is an accepted (albeit cautiously) interpretative tool in constitutional interpretation, as Estey J explained in the *Skapinker*[111] case, although headings are normally considered a much more persuasive method. In any event, for our purposes, it must be highlighted that the marginal note of section 33(1) speaks, in the clearest terms, of making "*exception* where express declaration" (in French, "dérogation par déclaration"). Similarly, the marginal note of section 33(2) uses the terminology "operation of *exception*" (in French, "effet de la dérogation"). Note that the emphases are mine in these excerpts.

The idea that section 33 is an "exception" to the application of the *Charter* under section 32, in addition to being in line with the scheme of the *Charter* as revealed by the heading, is intrinsically linked to the very name of the clause in French. It is known as the "disposition de dérogation," a phrasing that is obviously drawn from the French marginal note in section 33 (dictionaries provide that "dérogation" actually means "passer outre ou faire exception à une loi"[112]). In English, the equivalent term — and indeed, the linguistic synonym for the French term "dérogation" — is "exception." This is most interesting as, with little effort or speculation, it becomes pretty obvious that the section 33 provision is meant to be, in relation to the application clause in section 32, an "exception" to what the *Charter* is generally meant to do, namely to provide for supra-legislative protections in situations involving human rights.

110 See *supra* note 34, and accompanying text.

111 *Skapinker*, *supra* note 35 at 375–377; see also *R v Wigglesworth*, [1987] 2 SCR 541 at para 19; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths, 2002) at 305–306, 309–311.

112 See the different Internet-based dictionary resources.

It is surprising that this understanding of section 33 — viewing it in light of section 32, the other principal and major provision dealing with *Charter* application — is not often entertained, if ever at all. This makes it seem as if the notwithstanding clause, for some odd reasons, is to be considered in isolation, disembodied from the rest of the *Charter*, in effect ignoring its existential link with the section 32 application clause, arguably the most important meta-provision of this country's constitutional human rights regime. This conceptual shortcoming, especially in view of the basic rules of legislative and constitutional interpretation,[113] should not go unnoticed when the *Ford* case is revisited by our apex court, hopefully leading to a reconsideration of section 33 of the *Charter*.

Furthermore, as a canon of pragmatic interpretation, there exists a presumption of intent to the effect that, as much as legislation providing for benefits or for protections to individual interests or rights calls for an expansive interpretation and broad scope of application, when on the other hand exceptions, exemptions, or derogations are expressly granted or allowed, they should as a general rule be construed in a strict and restrictive manner.[114] A case on point is the SCC decision in *Zurich Insurance*,[115] a case concerning human rights legislation in Ontario. After recalling the landmark *Simpsons-Sears*[116] case and the special nature of these quasi-constitutional instruments, Justice Sopinka for the majority of five (L'Heureux-Dubé and McLachlin JJ. dissented, separately) explained that exceptions found in human rights statutes "should be narrowly construed."[117] In a similar case decided a few years before, the same interpretative rule was followed in the context of the *Quebec Charter*.[118]

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113 See, generally, Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Toronto: LexisNexis Canada, 2008) at 383.

114 See *Air Canada v British Columbia*, [1989] 1 SCR 1161 at 1207. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at 506: "In keeping with the current emphasis on purposive analysis, modern courts are particularly concerned that exceptions and exemptions be interpreted in light of their underlying rationale and not be used to undermine the broad purpose of the legislation."

115 *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 [*Zurich Insurance*].

116 *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at 547 [*Simpson-Sears*], see also, at the federal level, *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 at 89; and for the application of this approach in the context of the *Quebec Charter*, see *Béliveau St-Jacques v Fédération des employées et employés de services publics inc*, [1996] 2 SCR 345 at paras 43–44; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665 at paras 28–30; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789 at paras 30–31.

117 *Zurich Insurance*, *supra* note 115, at 339.

118 See *Brossard (Town) v Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 at 307.

This pragmatic canon of legal interpretation, which applies *mutatis mutandis* for constitutional interpretation,[119] justifies a strict and restrictive reading (the opposite of a large and liberal one) of section 33, which is indeed an exception to the application clause in section 32 of the *Charter*. One may intuitively object because, at least at first blush, this reasoning may appear to run contrary to the general approach to the interpretation of Canada's human rights instrument, as per the celebrated *Big M Drug Mart* case, recalibrated recently in 2020 case law.[120] This would be an error, however. In rigorous interpretative terms, the reasoning is as follows: Even if, in most circumstances, purposive interpretation is associated with a generous reading of legislation (as opposed to a narrow one), these two methodological pillars — teleological and normative scope — are different, ontologically, and must be kept separate, including in *Charter* interpretation. The basic reason is straightforward: There are instances, although admittedly less common, where providing for a purposive interpretation shall lead not to an expansive reading, but to a narrow reading of the provision under consideration.

This clarification was made, very pointedly, by the SCC in the 2019 *Poulin*[121] decision, a case pertaining to section 11(i) of the *Charter* (benefit of the lesser punishment). In a dialectic reply to her colleague Karakatsanis J — who opined that "a generous *and* purposive approach must be taken to the interpretation of *Charter* rights"[122] — Martin J for the majority gave the following warning: "'purposive' can be mistakenly conflated with 'generous,'"[123] something one must be careful to avoid, as already mentioned in the 2009 *Grant*[124] case. Keen to set the record straight, Justice Martin writes: "Thus, while it has often been said that *Charter* rights must be interpreted in a 'large

119 See the decision of the Supreme Court of Canada in *R v Stillman*, [2019] 3 SCR 144, where both the majority of five judges (para 22) and the dissent of two (para 127) worked on the assumption that the military exception of the right to trial by jury, pursuant to section 11 of the *Charter*, calls generally for a strict and restrictive interpretation. This being so, one must be careful not to read the following (at para 22) from the majority's reasons as suggesting otherwise: "And, just as courts must take care not to 'overshoot' the purpose of a *Charter right* by giving it an unduly generous interpretation, so too must they be careful not to 'undershoot' the purpose of a *Charter exception* by giving it an unduly narrow interpretation" (emphasis in original). Read properly, this passage makes it clear that, depending on the situation, there is indeed a sort of interpretative "*a priori*" which is to favour a generous interpretation when it comes to right and freedom protections, on the one hand, and to favour a narrow interpretation of exceptions to or derogations from such protection, on the other hand.

120 See *supra* note 31, and the cases referred to therein.

121 *Poulin, supra* note 31.

122 *Ibid* at para 151 (emphasis in original).

123 *Ibid* at para 53.

124 *R v Grant*, [2009] 2 SCR 353 at para 17.

and liberal' manner, they are ultimately bounded by their purposes."[125] This brings us back to one of the main teachings by Justice Dickson (later CJ) in *Big M*,[126] which was refined by Justices Brown and Rowe in *Québec inc.* The gist of this teaching is that "while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right."[127] To put it another way, the name of the game is purposive interpretation, not generous interpretation in all circumstances; though statistically, it is true that the former generally leads to the latter, even if that is not always the case.

As regards the notwithstanding clause, a narrow interpretation of the "exception" provided for in section 33 that remains geared toward its underlying purpose would also ensure that the general objective of the *Charter*, understood holistically, is a cardinal consideration. This feature is at the centre of the interpretative instructions given in *Big M Drug Mart*, where Justice Dickson wrote that, among other things, the purpose of a *Charter* provision "is to be sought by reference to the *character and the larger objects* of the *Charter* itself."[128] This further supports the proposition that, in order to appreciate the notwithstanding clause as per the object of section 33 — i.e. an exception to the section 32 application clause — the very core purpose of Canada's regime of supra-legislative human rights protection must be front and center.

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More recent case law from the SCC, which was alluded to in the introduction above, can help us flesh out such a holistic understanding of the *Charter*. In the *Vuntut Gwitchin First Nation* decision, considerations around section 15 and section 25 required addressing, but as an initial issue, the Court had to determine the application (or non-application) of the *Charter* to a self-governing First Nation in the Yukon territory. The majority of four judges (two judges dissented in part, the last one fully), per Kasirer and Jamal JJ, referred to section 32 as the "entry point for the application of the *Charter*,"[129] which calls for the *Big M Drug Mart* purposive approach in constitutional interpretation to apply just the same, as was highlighted already.

125 *Poulin*, *supra* note 31 at para 54.
126 *Big M Drug Mart*, *supra* note 30 at 344.
127 *Québec inc*, *supra* note 12 at para 10.
128 *Big M Drug Mart*, *supra* note 30 at 344 (emphasis added).
129 *Vuntut Gwitchin First Nation*, *supra* note 33 at para 45.

The next sentence in the majority judgment is right on target for our purposes, that is to say, to understand section 33 in light of the broader purpose of the *Charter*, as manifested by section 32 as its "entry point." The majority writes this: "Such [a purposive and generous interpretative] approach serves to secure for individuals and relevant collective minorities the full benefit of the *Charter*'s protections and to constrain government action inconsistent with those protections."[130] This solemn statement places *Vuntut Gwitchin* on the list of classic cases in Canadian jurisprudence — starting with the famous *Oakes*[131] decision on section 1 of the *Charter* — where the SCC lays the grounds for the country's human rights regime with a proper interpretation of its meta-provisions. This is true for the section 1 limitation clause, for the section 32 application clause (and its exception, found in section 33), and, as we will see below, for the remedy provisions of the *Charter*.

Just last July, in the *Power*[132] decision (2024), which mainly revolved around the remedy provisions in the *Charter* (the issue was whether damages can be ordered against government for legislation declared invalid), one finds other beautiful passages to further support my argument. Writing for the majority of five judges, Chief Justice Wagner and Justice Karakatsanis drew a direct connection — after the usual incantations and references to the purposive approach to *Charter* interpretation[133] — between the right to a remedy, downstream, and the application of Canada's human rights regime, upstream. In their words: "As explained further below, ss. 32(1) and 24 of the *Charter*, along with s 52(1) of the *Constitution Act, 1982*, entrench the court's role in holding the government to account for *Charter* violations."[134] This is what a holistic understanding of the *Charter* is all about, one is tempted to sum up.

But this is not all, as this forceful statement by Wagner CJ and Karakatsanis J on the general objective of the *Charter* was in fact preceded by references to landmark cases that articulated the deeper tenets of the country's constitutional order. For example, they cite the *Quebec Secession Reference*[135] and its references to unwritten constitutional principles, including the immensely important "rule of law" principle, which aims to protect "individuals from arbitrary state action" by providing that "the law is supreme over the acts of both government

130 *Ibid* (emphasis added).
131 *R v Oakes*, *supra* note 21 at 135–136.
132 *Canada (AG) v Power*, 2024 SCC 26 [*Power*].
133 *Ibid* at paras 26–27.
134 *Ibid* at para 30.
135 *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*].

and private persons."[136] Also on point is the rule of law's companion principle of "constitutionalism," which is explained as follows in the *Quebec Secession Reference*: "[W]ith the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy."[137]

These constitutional principles, as the SCC explained in yet another classic judgment, *Doucet-Boudreau*,[138] are behind the duty that domestic courts have "to act as *vigilant guardians of constitutional rights and the rule of law*."[139] Building on this jurisprudence, the majority judges in *Power* opined that constitutional principles must inform our understanding of the section 32 application clause and the remedy provisions of the *Charter*. As they put it, "courts play a fundamental role in holding the executive and legislative branches of government to account in Canada's constitutional order."[140]

These last two cases in 2024 provide an invaluable reiteration of constitutional fundamentals and, actually, are such a boost to my argument that, in order to properly reinterpret the section 33 notwithstanding clause, both the section 32 application clause and the constitutional remedy provisions allow for a consideration of the issue in light of the general purpose of the *Charter*. A holistic understanding of Canada's human rights regime — with or without consideration of the unwritten principles of the rule of law and constitutionalism[141] — allows one to consider the specific purpose of the override clause in section 33 in view of the core values of our constitutional order. Chiefly among them is the idea that courts are "vigilant guardians of constitutional rights and the rule of law,"[142] which, again, means "holding the executive and legislative branches of government to account in Canada's constitutional order."[143]

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136 *Ibid* at paras 70–71, quoted by the majority in *Power*, *supra* note 132 at para 54.

137 *Ibid* at para 72. Incidentally, this statement by the Court in the *Quebec Secession Reference*, *supra* note 135, should resonate with the die-hard advocates of the (abusive) use of the notwithstanding clause — including the leader of the pack, Justice Minister Simon Jolin-Barrette — who have dubbed section 33 of the *Canadian Charter*, as well as section 52 of the *Quebec Charter*, the "parliamentary sovereignty clauses." Needless to say, a review of the classic cases in constitutional law seems to be in order for a number of these self-proclaimed experts on these matters.

138 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 [*Doucet-Boudreau*].

139 *Ibid* at para 110 (emphasis added), quoted by the majority in *Power*, *supra* note 132 at para 56.

140 *Power*, *ibid* at para 56.

141 In the 2021 case *City of Toronto*, *supra* note 31, some uncertainties were introduced as to the proper use that can be made of unwritten constitutional principles in the interpretation of *Charter* rights and freedoms, hence this caveat here.

142 *Doucet-Boudreau*, *supra* note 138 at para 110, quoted by the majority in *Power*, *supra* note 132 at para 56.

143 *Power*, *supra* note 132 at para 56.

Such juridical values, when examined in the context of international human rights law, relate to the issue of access to justice and the right to a remedy, which are indeed linked to the fundamentals of the section 32 application clause, as well as to the *Charter*'s remedy provisions. Section 33, which by nature is an "exception" to Canada's system of human rights protection, in effect runs contrary to these values, and should therefore be interpreted carefully if it is to make sense as part of the *Charter*.

With that said, and with the issue now being properly articulated in domestic constitutional terms, let us move on to examining the international perspective, which can provide support of the interpretation of section 33 offered above.

B. International Norms of Access to Justice and the Right to a Remedy

This last section is where I consider the "forest" of general international human rights law, rather than the "trees" mentioned earlier. As a prelude to this consideration, remember that the goal is to draw on international law as a "relevant and persuasive" source to support my interpretation of the "exception" provided for in section 33 of the *Charter*. In this regard, it should also be recalled that an initial conclusion was already reached in the previous section: that the 1988 *Ford* decision should be revisited and that, ultimately, there could be conditions and criteria other than mere formal requirements for invoking the notwithstanding clause. This initial conclusion is based on domestic considerations, relying on the purposive approach to constitutional interpretation of the *Charter*, as it was reframed and refined in *Québec inc.* What remains to be done now is to see how international norms, both conventional and customary, may play the limited role of providing "support or confirmation" for this conclusion, as the case may be.

Accordingly, two themes are explored in the following paragraphs — namely access to justice and the right to a remedy in situations of human rights violations — based on both conventional international law and customary international law, although other elements of "soft-law" and relevant case law are considered as well. To that end, both the reframed approach to such normativity in constitutional interpretation from *Québec inc*, and the scheme of analysis it articulated to determine the appropriate weight for the different sources, must be kept in mind. Let us start, then, with access to justice, although we will see that there is a measure of overlap between the right to bring a claim before a court, upstream, and the right to have a remedy, downstream, in the context of human right violations.

The international human rights forest: access to justice

Although the goal is certainly not to suggest an exhaustive comprehension of the concept of access to justice,[144] a brief consideration of what it signifies in international human rights law is in order.[145] It is sometimes referred to as a term of art, with broader or more limited meanings, from thicker substantive versions to thinner procedural ones. Having said that, the common understanding of access to justice, at its core, pertains to the possibility for a right-holder to bring a claim before a competent court and have the case adjudicated in an adequate manner. For the present discussion around a possible interpretative argument vis-à-vis section 33 based on international law, the obvious domestic anchor for the concept is clearly the application clause in section 32 of the *Charter* — its "entry point," as it was put in *Vuntut Gwitchin First Nation*.[146] This adjacent provision to section 33 "exception", we saw above, is key to understanding the purpose of the notwithstanding clause which, we shall now see, is validated by this "relevant and persuasive" element.

The expression "access to justice," often deemed a synonym of the right to seek and ultimately obtain a remedy or redress before a court of law or an administrative tribunal with minimum guarantees of independence and impartiality, is surely premised, in a way, on the existence of a system of governance based on the rule of law. As such, in addition to being a fundamental constitutional principle in Canada, as we just recalled, the rule of law is also at the heart of international human rights. To be clear though, it is not so much the international version of the rule of law that is useful for our purposes,[147] given its limited concern with access to justice before international adjudicatory tribunals. Rather, my concern is with the classic version of the principle as it applies domestically, e.g. in cases of human rights violations.[148]

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144 For a general introduction to the concept, see the outstanding work by my colleague and new doctor in law, Shana Chaffai-Parent, "Déconstruire la symbolique du principe de contradiction dans l'instance civile" (Ph.D. dissertation submitted and successfully defended at the Faculty of Law, University of Montreal, May 2024) at 29ff.

145 See, generally, Francesco Francioni, ed, *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007).

146 *Vuntut Gwitchin First Nation*, *supra* note 33 at para 45.

147 On the international rule of law, see Stéphane Beaulac, "The Rule of Law in International Law Today" in Gianluigi Palombella & Neil Walker, eds, *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 197.

148 In the Anglo-Saxon common law world, the concept of the rule of law is very much associated with the English theorist Albert Venn Dicey, especially the views articulated in his classic book, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885). For a comprehensive summary of what the rule of law entails in public law, with a broader domestic perspective, see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

Although the expression "access to justice" is not employed in the language found in most international human rights instruments, there is no doubt that the concept is included and plays a central role. For instance, the *Universal Declaration of Human Rights*,[149] at Article 8, links access to justice to the right to a remedy: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." This is also the terminology that is used in the *European Convention on Human Rights*[150] (at Articles 6(1) and 13), whereas the *American Convention on Human Rights*,[151] at Article 25, refers to "prompt recourse" and "effective recourse."

As for international instruments binding on Canada, the *International Covenant on Civil and Political Rights*[152] employs the expressions "effective remedy" (Article 2), the right to "take proceedings before a court" (Article 9(4)), and the right to have "a fair and public hearing" (Article 14(1)). When it comes to "international" access to justice, which is different than our issue (although still pertinent to highlight), the *Optional Protocol to the International Covenant on Civil and Political Rights*,[153] at Article 2, provides for a right for individuals to "submit a written communication to the Committee." To complete the list with other non-binding instruments, the concept is also found in Article 7.1 of the *African Charter on Human and Peoples' Rights*,[154] and Article 47 of the *Charter of Fundamental Rights of the European Union*.[155]

Without going in the details of the different ramifications of access to justice as a human right — which range from the imposition of mere negative obligations to more onerous positive obligations — the consensus in international law seems to be that it is not a stand alone right. Rather, most commentators regard access to justice as a "derivative" right, triggered when there are violations of substantive rights and freedoms (this is also true of the right to a remedy, as will be seen below). Having said that though, at the international normative level, it is indisputable that access to justice is indeed a fundamental right. At a minimum, such an international norm may be invoked when there

149 *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).
150 *European Convention*, *supra* note 57.
151 *American Convention*, *supra* note 58.
152 *ICCPR*, *supra* note 54.
153 *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).
154 *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 (entered into force 21 October 1986).
155 *Charter of Fundamental Rights of the European Union*, 7 December 2000, C 364/8, (entered into force 1 December 2009).

is an interference with the ability of right-holders to benefit from a judicial proceeding, no matter what right or freedom is at stake. Of course, this scenario is reminiscent of the notwithstanding clause in section 33 of the *Charter*, which would act to bar access to courts if effectively invoked.

An example of a situation where there was a real impediment to access to justice domestically comes from the *Golder*[156] case, decided by the European Court of Human Rights in 1975. Instead of accepting a textual and literalist reading of Articles 6 and 13 of the *European Convention*[157] and the "fair hearing" and "right to an effective remedy" standards, a reference was made to the rule of law in the preamble of the *Convention*, which, in the end, was deemed to support a generous interpretation of the provision. On the basis of this generous interpretation, it was held that the state party had the obligation to guarantee access to a court, with a view to realizing the right to a judicial remedy (in that case, civil in nature). Here, too, the intrinsic link between access to justice and the right to a remedy was obvious, though the Court was keen to keep them distinct in its analysis.[158]

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More briefly, in terms of customary international law,[159] a cursory review of state practice and *opinio juris* seems to further support the existence of a norm of access to justice, at least in terms of limits to procedural obstacles. An illustration comes from the Human Rights Committee in the *Adam*[160] case, which concerned a six-month limitation period for proceedings against property confiscations that was held to be in breach of the claimant's right under Article 26 (equal protection of the law) of the *International Covenant of Civil and Political Rights*.[161] Pursuant to Article 2 of the *Covenant*, paragraph 3(a), the recommendation was to allow for an effective and enforceable remedy, domestically, based on the violation of the substantive human right, which otherwise was not accessible by reason of the period of limitation. Although this is not even a judicial decision pursuant to section 38(1)(d) of the *Statute of the International Court of Justice*[162] (i.e. subsidiary sources of international law), the case nonethe-

156 *Golder v United Kingdom*, [1975] ECHR 1, (1979) EHRR 524 [*Golder*].
157 European Convention, *supra* note 57.
158 *Golder*, *supra* note 156 at paras 28–36.
159 See, generally, Francesco Francioni, "The Rights of Access to Justice under Customary International Law" in Francesco Francioni, ed, *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007) 1.
160 *Adam v Czech Republic*, Com No 586/1994, UN Doc CCRP/C57/D/586/1994 (23 July 1996).
161 *ICCPR*, *supra* note 54.
162 *ICJ Statute*, *supra* note 72.

less provides evidence of state practice and *opinio juris* supporting the existence of an access to justice customary norm.[163]

In the criminal law context, another famous case, this time from the International Court of Justice ("ICJ"), provides further evidence for the proposition that there is an individual right to be given access to justice. The *Avena*[164] case concerned a number of nationals from Mexico who had been found guilty of capital crimes in the United States, with criminal proceedings conducted in breach of their consular assistance rights under the 1963 *Vienna Convention on Consular Relations*[165] (Article 36). Rejecting the argument that the violation of their rights only triggered a state obligation to provide an apology and an assurance of non-repetition, the ICJ recognized actual human rights benefiting foreign accused individuals. In the end, the judicial order was based on the idea of access to justice and the right to a remedy, and the United States was summoned to grant a "review and reconsideration [of their cases] according to the criteria indicated in … the present judgment."[166]

This major judicial decision of the ICJ constitutes a subsidiary means to determine international law under section 38(1), paragraph (d) of the *ICJ Statute*, including the customary norm of access to justice as a general international rule. To be sure, the judicial order to review and reconsider the criminal proceedings in the *Avana* case is not based on a conventional norm provided by the *Vienna Convention on Consular Relations*, though it was indeed the principal source of normativity in the circumstances. Instead, the idea of access to justice as a derivative human right and corollary of the substantive right explicitly found in the treaty, was, by nature, customary law. Although the ICJ in *Avana* unfortunately failed to dwell at all upon the constituting elements of the custom (i.e. state practice and *opinio juris*),[167] it is a brilliant illustration of access to justice as a human right under general international law.

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163 On the demonstration of the constituting elements of customary international law, in the context of its use domestically, see Cedric MJ Ryngaert & Duco W Hora Siccama, "Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts" (2018) 65:1 Nethl Intl L Rev 1.

164 *Avena and other Mexican Nationals (Mexico v USA)*, Judgment, ICJ Reports 2004, p 12 (31 March 2004) [*Avena*].

165 *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261, Can TS 1974 No 25 (entered into force on 19 March 1967).

166 *Avena*, *supra* note 164 at para 152.

167 In international legal circles, these references to customary international law based on confident affirmations, but without substantiation of the constituting elements, are known as "apocryphal customs." See William A Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021) at 67–71.

There is even case law at the international regional level suggesting that access to justice is a peremptory norm, that is to say, a norm of *jus cogens* as per article 53 of the *Vienna Convention on the Law of Treaties*.[168] The Grand Chamber of the European Court of Human Rights, however, discarded the argument in a 2016 case[169] while still maintaining that access to justice is a fundamental human right under the *European Convention on Human Rights*. Some judges disagreed in separate opinions, though, and supported the view that access to justice is indeed a norm of (at least) "regional" *jus cogens*.[170]

Following the monist logic (also known as the doctrine of adoption), as the majority of the SCC explained in the *Nevsun*[171] case, this norm of customary international law is directly and automatically applicable domestically. Indeed, the norm of access to justice based on custom, to paraphrase Justice Abella,[172] forms an integral part of the country's national law, including with respect to the *Charter*. This "relevant and persuasive" element of interpretation could, accordingly, prove useful in supporting a revisited understanding of section 33 as a narrow "exception" to the section 32 application clause — that is, the conclusion reached based on the purposive approach to *Charter* interpretation.

* * *

Before moving on to consider the right to a remedy, it is worth noting that "access to justice" is a concept that is also explicitly provided for in some foreign national constitutions. Often referred to simply as the right to have a case considered by one's natural judge or court, such a formulation is found in the constitutional texts of Germany, Austria, Belgium, Luxembourg, the Czech Republic and Spain. Other domestic constitutional documents are more explicit about the content of access to justice, like the Italian Constitution of 1947, which refers to access to justice of persons before a court of law in order to obtain legal protection of their rights under civil and/or administrative proceedings, including specific elements like legal aid.

One last example from comparative constitutional law is particularly interesting, as it seems to run contrary to the possibility of an override clause

168 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980); see, for example, the decision by the Inter-American Court of Human Rights in *Goiburú et al v Paraguay*, Judgment (merits, reparations, and costs), series C, no 153 (22 September 2006) at para 131; see also, the separate opinion by Judge Cançado Trindade, *ibid* at para 68.

169 *Al-Dulimi and Montana Management Inc v Switzerland*, No 5809/08 (21 June 2016), s 136.

170 Judge Pinto de Albuquerque, supported by three other judges.

171 *Nevsun*, *supra* note 38.

172 *Ibid* at para 132: "Customary international law is part of Canadian law," plain and simple.

like section 33 of the *Charter*, namely Article 17 of the Constitution of the Netherlands of 1983, which reads as follows: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law."[173] Taking this text at face value, one could say that the Dutch not only provide for a constitutional right to access to justice, but actually have a constitutional prohibition for clauses that would prevent access to justice.

The international human rights forest: the right to a remedy

Although it is somewhat artificial to separate access to justice and the right to a remedy — we just saw how much they overlap — it is certainly worth considering the latter on its own. Much like access to justice, then, the right to remedy is a human right derived from (or flowing as a corollary consequence of) the violation of a substantive right or freedom. For the purpose of resorting to this international norm to assist in interpreting the notwithstanding clause in light of the general purpose of Canada's human rights regime viewed holistically, the domestic hook are the remedy provisions found in section 24(1) of the *Charter* and in section 52(1) of the *Constitution Act, 1982*. The dynamic between these provisions and the section 32 application clause — all of which provide an appropriate context to better understand section 33 — was already highlighted when considering the 2024 case of *Power*,[174] above.

As we have seen in the previous section, the right to a remedy is provided for in most universal and regional human rights treaties — usually in tandem (explicitly or implicitly) with the right of access to justice. There is one notable exception, however: namely, the *International Covenant on Economic, Social and Cultural Rights*.[175] The reason for this is quite simple: the legal protection in this international treaty is not meant to be enforceable, per se, by an international adjudicative body. This explains why the language used in what is referred to as the "second generation" *Covenant* is soft (merely calling for the progressive implementation of the rights therein), and why there is no corresponding optional protocol for individual petitions, like for the *International Covenant on Civil and Political Rights*.[176] It is also noteworthy that, with respect

173 This quote from the Dutch Constitution, in English, as well as the information in these two paragraphs on comparative constitutional law, are taken from the following excellent paper co-authored by Professor Jacques Ziller, who was my mentor when I spent a year as a Max Weber fellow at the European University Institute, in Florence, Italy: Eva Storskrubb & Jacques Ziller, "Access to Justice in European Comparative Law" in Francesco Francioni, ed, *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007) at 180–181.

174 *Power*, *supra* note 132.

175 *Supra* note 56.

176 *ICCPR*, *supra* note 54.

to the latter, the right to a remedy at the international level does require claimants to show, as an actual admissibility requirement, that domestic remedies have been exhausted[177] (although this issue is peripheral to our topic).

In *Nevsun*, the reference case on the domestic use of customary international law, Justice Abella, for the majority, relied heavily on the general principle that "where there is a right, there must be a remedy for its violation."[178] She noticed that this idea was explicitly recognized by the SCC in a number of cases, including *Kazemi*[179] and *Doucet-Boudreau*,[180] as well as in other recent and old judgments.[181] Quoting from the majority decision in *Kazemi*,[182] Abella J made it clear in *Nevsun*[183] that when LeBel J opined that the presumption of conformity was rebutted because of the express provisions of the *State Immunity Act*,[184] it was on the assumption that the right to a remedy indeed existed as a norm of general international law, that is to say, as a custom.[185]

It is also interesting that, earlier in her majority opinion in *Nevsun*, Abella J made extensive references to the main binding international human rights instrument for Canada — the *International Covenant on Civil and Political Rights*[186] — specifically with regard to the right to an effective remedy in Article 2. Given that customary international law is the interlegality source at play in the *Nevsun* case, these references are obviously made with a view to supporting the argument that the right to a remedy in Article 2 of the *International Covenant on Civil and Political Rights* is indeed a norm of customary international human rights law.[187] Further evidence of this is drawn from a soft-law source: namely, Human Rights Committee *General Comment No 31 — The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*.[188] In and of itself, such a document has very little persuasive force —

177 *Optional Protocol to the International Covenant on Civil and Political Rights*, *supra* note 153, art 2.

178 *Nevsun*, *supra* note 38 at para 120.

179 *Kazemi, supra* note 2 at para 159.

180 *Doucet-Boudreau*, *supra* note 138 at para 25.

181 *Henry v British Columbia (AG)*, [2015] 2 SCR 214 at para 65; *R v 974649 Ontario Inc*, [2001] 3 SCR 575 at para 20; and *Great Western Railway v Brown*, (1879) 3 SCR 159 at 179.

182 *Kazemi*, *supra* note 2 at para 159.

183 *Nevsun*, *supra* note 38 at para 120.

184 *Kazemi*, *supra* note 2.

185 In fact, LeBel J in *Kazemi* at para 60, relied on his set of reasons on the domestic use of customary international law, as well as the presumption of conformity with international law, considered in detail in the *Hape* decision (*supra* note 25 at paras 53–54).

186 See Paré, *supra* note 55.

187 As explained by William A Schabas, *The Customary International Law of Human Rights* (Oxford: Oxford University Press, 2021) at 85: "Today, the near universal treaties [like the two *International Covenants*] provide very compelling evidence of custom."

188 UNHRC, 80th sess, UN Doc CCPR/C/21/Rev1/Add13 (2004) 2187th Mtg.

it would be deemed non-binding, of course, under the *Québec inc*[189] categories, as mentioned above[190] — but it is obviously deemed useful to validate the constituting elements of a custom (state practice and *opinio juris*).

V. Conclusion

This article has claimed that there is a much better way to resort to international law in the section 33 context than to focus on the "trees" of the specific derogation clauses in some international human rights instruments. Because these clauses address the situation of a "public emergency which threatens the life of the nation," there is no equivalence with Canada's notwithstanding clause in section 33 of the *Charter*. This does not mean, however, that international normativity has no role to play in the interpretation of section 33, and now that the Bill 21 case has reached the SCC, there shall be an opportunity to revisit and supplement the *Ford* precedent,[191] allowing for a *de novo* interpretation of the override provision that is aided by international law. To that end, the two major cases in 2020 that reframed and refined the scheme of analysis for the use of conventional and customary international law — respectively, *Québec inc* and *Nevsun* — were examined in some detail, yielding the conclusion that non-domestic normativity constitutes a "relevant and persuasive" source in domestic interpretation, even if its role is limited to giving "support and confirmation" to the interpretative conclusion reached.

Accordingly, in the context of *Charter* interpretation, it remains essential that each provision is understood, first and foremost, on the basis of the purposive approach set out by Dickson J in *Big M Drug Mart*. In this regard, any reconsideration of section 33 must start off with the text of the override clause, including the marginal notes, the heading, and the adjacent provision of section 32. The purpose of the notwithstanding clause then becomes clear: the override is meant to be an "exception" to the country's supra-legislative human rights regime. This characteristic of section 33 calls for a narrow scope, based on a strict and restrictive interpretation (as opposed to a large and liberal one), which goes along with the general purpose of the *Charter*. Indeed, as 2024 case law confirmed, a holistic understanding that includes the section 32 application clause and the remedial provisions (sections 24(1) and 52(1)) — and, if need be, the unwritten constitutional principle of the rule of law and consti-

189 *Québec inc*, *supra* note 12.

190 See *Zurich Insurance*, *supra* note 115, and accompanying text.

191 On the view that, in any event, there are many propositions of law that were not settled by the *Ford* decision, see Grégoire Webber, "The Notwithstanding Clause and the Precedent in *Ford*: Le dit et le non-dit" (2024) 32:3 Const Forum Const 13.

tutionalism — provides the necessary perspective to reinterpret the section 33 notwithstanding clause.

At its core, an override of *Charter* sections 2 and 7 to 15 fundamental rights has stark consequences for the people of Canada and Quebec. In essence, it circumvents the entire human rights regime, which is meant, in cases of violations, to provide for access to justice and to allow for a right to a remedy. This is tantamount to returning to the dark ages, or at least to a time when no real mechanism existed to check and counter abuses of public powers (the era of the *Roncarelli*[192] case, you could say). In short, this cannot be the purpose section 33 is meant to achieve.

Further, the international perspective, which no doubt has a meaningful (albeit limited) role to play, validates the idea that an exception to the application of the *Charter* must be given a strict and restrictive interpretation. Two norms rooted in both conventional and customary international law are most apposite here: access to justice and the right to a remedy. This normativity, I argue, represents the international "forest" in the interpretation of the *Charter*'s notwithstanding clause, supporting and confirming the conclusion reached, initially, pursuant to its purposive interpretation.

These non-domestic norms, we saw, are based on both treaty and customary law. In terms of operationalization, they could be resorted to by domestic courts either though the presumption of conformity with international law or with the use of the argument of international context.[193] The latter is generally deemed to carry less persuasive force, but at least it does not run the risk of being set aside on the pretext that the provision is clear (i.e. that there is no ambiguity), which is often the problem with presumptions.[194] As for the international norms of access to justice and the right to a remedy serving as "relevant and persuasive" sources that provide "support and confirmation" of an interpretative conclusion based on section 33 of the *Charter*, some further operationalization points are needed. For example, if somebody wants to plead these norms as customary law, the presumption of conformity could be used, as they are directly and automatically part of Canada's domestic law.[195]

192 *Roncarelli v Duplessis*, [1959] SCR 121.

193 See *Hape*, *supra* note 25 at para 53, for a good summary of the two options.

194 See, for instance, what LeBel J wrote in *Kazemi*, *supra* note 2 at para 60: "Indeed, the presumption that legislation will conform to international law remains just that — merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute under consideration." This was indeed held to be the case in *Hape*, specifically regarding the exception to state immunity found in the *State Immunity Act*, *supra* note 101.

195 See *Nevsun*, *supra* note 38 at 132.

Along with that, or instead, somebody may want to ground their legal arguments in the international human rights instruments providing for access to justice and the right to a remedy, which were examined in the previous section. Some of these instruments are binding treaties, which then allow for the use of the presumption of conformity; others are non-binding, or are mere soft-law, which means that only the contextual argument would be available, with the persuasive force being adjusted down. As far as international and foreign case law goes, judicial decisions would carry more weight if they are from the International Court of Justice (a subsidiary source under section 38(1)(d) of the *ICJ Statute*) than if they come from the European Court of Human Rights (tantamount to comparative law, really).

In the end, keeping the instructions of the *Big M Drug Mart* purposive approach in mind, validated by norms from the international "forest," a proper and comprehensive interpretation of the notwithstanding clause in section 33 should be conducted in the Bill 21 case. Certainly, more than merely formal requirements, as set out in the *Ford* decision,[196] ought to be included in the analysis. This is not to say that this 1988 decision must be reversed, but just that it needs to be supplemented under the new circumstances that exist today. The excessive, some say abusive use of the notwithstanding clause must be curtailed, and international law can no doubt contribute to justifying a new and modern test for the legality of section 33's invocation. This is hopefully what the year 2025 shall bring to Canada's public law jurisprudence.

196 *Ford*, *supra* note 36 at 740.