

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

**ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI**

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant)

and

**ATTORNEY GENERAL OF QUEBEC
JEAN-FRANÇOIS ROBERGE, in his official capacity
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Respondents)

and

**MOUVEMENT LAIQUE QUÉBÉCOIS
FRANÇOIS PARADIS, in his official capacity**

RESPONDENTS

(Style of cause continued on next page)

**FACTUM OF THE INTERVENER
PUBLIC INTEREST LITIGATION INSTITUTE**
(Rules 37 and 56 of the *Rules of the Supreme Court of Canada*)

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AND BETWEEN:

**WORLD SIKH ORGANIZATION OF CANADA
and AMRIT KAUR**

APPELLANTS/
RESPONDENTS ON CROSS-APPEAL
(Appellants)

and

ATTORNEY GENERAL OF QUEBEC

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent)

AND BETWEEN:

**ICHRAK NOUREL HAK,
NATIONAL COUNCIL OF CANADIAN MUSLIMS
and CORPORATION OF THE CANADIAN
CIVIL LIBERTIES ASSOCIATION**

APPELLANTS/
RESPONDENTS ON CROSS-APPEAL
(Appellants)

and

**ATTORNEY GENERAL OF QUEBEC
JEAN-FRANÇOIS ROBERGE, in his official capacity
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Respondents)

and

**FRANÇOIS PARADIS, in his official capacity
MOUVEMENT LAIQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC**

RESPONDENTS

(Style of cause continued on next page)

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant)

and

**ATTORNEY GENERAL OF QUEBEC
JEAN-FRANÇOIS ROBERGE, in his official capacity
SIMON JOLIN-BARRETTE, in his official capacity**

RESPONDENTS/
APPELLANTS ON CROSS-APPEAL
(Respondents)

AND BETWEEN:

**ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI,
LEGAL COMMITTEE OF COALITION INCLUSION QUÉBEC**

APPELLANTS/
RESPONDENTS ON CROSS-APPEAL
(Appellants)

and

ATTORNEY GENERAL OF QUEBEC

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent)

AND BETWEEN:

THE LORD READING LAW SOCIETY

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant)

and

ATTORNEY GENERAL OF QUEBEC

RESPONDENT/
APPELLANT ON CROSS-APPEAL

(Style of cause continued)

and

QUEBEC COMMUNITY GROUPS NETWORK, ICHRAK NOUREL HAK, NATIONAL COUNCIL OF CANADIAN MUSLIMS, CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION, FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT, ANDRÉA LAUZON, HAKIMA DADOUCHE, BOUCHERA CHELBI, LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC, CANADIAN HUMAN RIGHTS COMMISSION, LORD READING LAW SOCIETY, WORLD SIKH ORGANIZATION OF CANADA, AMRIT KAUR, AMNISTIE INTERNATIONALE SECTION CANADA FRANCOPHONE, PUBLIC SERVICE ALLIANCE OF CANADA (PSAC), CHRISTIAN LEGAL FELLOWSHIP, QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION, FÉDÉRATION DES FEMMES DU QUÉBEC, WOMEN'S LEGAL EDUCATION AND ACTION FUND, POUR LES DROITS DES FEMMES DU QUÉBEC, MOUVEMENT LAIQUE QUÉBÉCOIS, ENGLISH MONTREAL SCHOOL BOARD, MUBEENAH MUGHAL, PIETRO MERCURI, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, PUBLIC INTEREST LITIGATION INSTITUTE, RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, MUSLIM ADVISORY COUNCIL OF CANADA, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, DROITS COLLECTIFS QUÉBEC, ADVOCATES' SOCIETY, INTERNATIONAL COMMISSION OF JURISTS (CANADA), TASK FORCE ON LINGUISTIC POLICY AND ANDREW CADDELL, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL-LAVAL-LONGUEUIL, SERGE JOYAL, P.C., SOUTH ASIAN BAR ASSOCIATIONS (TORONTO, CALGARY, BRITISH COLUMBIA, AND EDMONTON), CANADIAN MUSLIM LAWYERS ASSOCIATION, CANADIAN ASSOCIATION OF BLACK LAWYERS AND FEDERATION OF ASIAN CANADIAN LAWYERS (ONTARIO), CANADIAN LABOUR CONGRESS, CANADIAN CONSTITUTION FOUNDATION, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, MIGRANT JUSTICE CLINIC, CONSTITUTIONAL RIGHTS CENTRE, HAMSUCHAS HADOIROIS INTERNATIONAL ASSOCIATION, COMMISSION NATIONALE DES PARENTS FRANCOPHONES, WEST COAST LEGAL EDUCATION AND ACTION FUND, CANADIAN COUNCIL OF MUSLIM WOMEN, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, WOMEN IN CANADIAN CRIMINAL DEFENCE, LIGUE DES DROITS ET LIBERTÉS, BRITISH COLUMBIA HUMANIST ASSOCIATION, CANADIAN SECULAR ALLIANCE, ONTARIO HUMAN RIGHTS COMMISSION, BRITISH COLUMBIA TEACHERS FEDERATION, EGALE CANADA, SAMARA CENTRE FOR DEMOCRACY, CLINIQUE JURIDIQUE JURITRANS, FEDERATION OF ONTARIO LAW ASSOCIATIONS, NATIONAL ASSOCIATION OF WOMEN AND THE LAW, ASSOCIATION DES CONSEILS SCOLAIRES DES ÉCOLES PUBLIQUES DE L'ONTARIO, COMMISSIONER OF

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OF BRITISH COLUMBIA, SOUTH ASIAN WOMEN'S COMMUNITY
CENTRE, CHINESE CANADIAN NATIONAL COUNCIL FOR SOCIAL
JUSTICE AND CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC**

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TABLE OF CONTENTS

	Page
PART I – OVERVIEW OF FACTS AND OF INTERVENER’S POSITION.....	28-29
PART II – LEGAL ISSUES FOCUSED ON BY INTERVENER.....	29
PART III – INTERVENER’S ARGUMENTS.....	29-37
1. Horizontal <i>stare decisis</i> in this Honourable Court is not synonymous with the exceptions to vertical <i>stare decisis</i> identified in <i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72.....	29
2. <i>Ford</i> was wrongly decided in authorizing s. 33’s prospective invocation.....	30
3. <i>Ford</i> ’s legal foundations have been eroded by subsequent jurisprudence.....	33
4. <i>Ford</i> ’s application leads to harsh and unconscionable results.....	35
5. Reliance interests generated by <i>Ford</i> do not prevent its partial overruling.....	35
6. The definition of responsive invocation.....	36
PARTS IV AND V – COSTS AND ORDERS SOUGHT.....	38
PART VI – SUBMISSIONS ON SEALING OR CONFIDENTIALITY ORDERS.....	38
PART VII – ALPHABETICAL TABLE OF SOURCES.....	39

PART I – OVERVIEW OF FACTS AND OF INTERVENER’S POSITION

A – Intervener’s Position

1. Public Interest Litigation Institute’s (“PILI”) intervention concerns the precedent in *Ford v. Quebec (Attorney General)*, [\[1988\] 2 S.C.R. 712](#) and horizontal *stare decisis*.
2. In its discussion of the application of the vertical axis of *stare decisis* in respect of *Ford* in the judgment on appeal, the Quebec Court of Appeal quoted a monograph written by PILI’s Founder and Co-President Lawrence David. This monograph is entitled *Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada*. The Court of Appeal concluded that it was bound by – and could not overrule or otherwise depart from – *Ford* as none of the criteria authorizing precedential departure were present.¹
3. But the discussion of *Ford* and *stare decisis* is not confined to the vertical axis of that doctrine. Now that the present appeals are before this Honourable Court, considerations pertaining to the horizontal axis of *stare decisis* become particularly salient and significant.
4. This specific question of horizontal *stare decisis* and the precedent in *Ford* is the specific and narrow issue on which PILI wishes to intervene in the present appeal. In particular, should the precedent in *Ford* be overruled in part to prohibit the prospective legislative invocation of s. 33 of the *Canadian Charter of Rights and Freedoms*? In other words, can s. 33 be invoked prospectively or is it a purely responsive provision that can only be invoked by a legislature *in response* to judgments with which it disagrees?
5. Drawing from constitutional debates and this Honourable Court’s jurisprudence, PILI will propose that *Ford* was wrongly decided, rests on outdated legal foundations that have since been eroded, and leads to unconscionable results. As a result, the answer to the questions posed in the immediately preceding paragraph is affirmative. Section 33 is purely responsive.
6. An invocation of s. 33 will only be truly responsive if the judgment responded to is expressly identified in the invoking legislation, if the judgment actually applies to the subject-matter of the legislation and if only rights addressed in the judgment are temporarily displaced by s. 33.

¹ See paras. 260-264, citing [Lawrence David, *Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada*, Vol. 97 of the *Supreme Court Law Review*, Second Series \(2020\)](#) at 135-137; *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#), at paras. 42, 44.

B – Overview of the Facts

7. PILI takes no position on the facts at issue in the present appeal.

PART II – LEGAL ISSUES FOCUSED ON BY INTERVENER

8. PILI’s intervention focuses on a single issue: should the precedent in *Ford* be partly overruled to prohibit s. 33’s prospective invocation? The answer is affirmative. Section 33 can only be invoked in response to court judgments with which a legislature disagrees.

PART III – INTERVENER’S ARGUMENTS

1. Horizontal *stare decisis* in this Honourable Court is not synonymous with the exceptions to vertical *stare decisis* in *Canada (Attorney General) v. Bedford*

9. This Honourable Court’s constitutional authority to overrule its own precedents as a matter of horizontal *stare decisis* is broader than the authority conferred to courts lower in the judicial hierarchy to depart from its precedents as a matter of vertical *stare decisis*. Under *Bedford*, lower courts may depart from Supreme Court precedent based on subsequent legal developments and/or based on a shift in the factual or evidentiary matrix that “fundamentally shifts the parameters of the debate.”²
10. By contrast, this Honourable Court may overrule its own precedents in the face of “compelling reasons.”³ Said “reasons” include the two *Bedford* exceptions,⁴ but also extend to precedents that are “unsound in principle,” unworkable, validly criticized, or that “result in unfairness.”⁵ Significantly, this Court may overrule its own precedent even if the precedent was not wrongly decided – legal error is neither sufficient nor necessary.⁶
11. There are *at least* three key “compelling reasons” for overruling *Ford* to prohibit s. 33’s prospective invocation: *Ford* (1) was wrongly decided; (2) is based on legal foundations that have since been eroded; and (3) leads to harsh and unconscionable outcomes.

² *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#), at para. 42, [David at 135-137](#).

³ E.g., *Binus v. The Queen*, [\[1967\] S.C.R. 594](#), at 601; *R. v. Bernard*, [\[1988\] 2 S.C.R. 833](#), at 849; *R. v. Henry*, [2005 SCC 76](#), at para. 44; *Canada v. Craig*, [2012 SCC 43](#), at para. 25; *R. v. Jordan*, [2016 SCC 27](#), at para. 45; *R. v. Edwards*, [2024 SCC 15](#), at para. 66, [David, at 47-69](#).

⁴ *Edwards*, at para. 66; *John Howard Society v. Saskatchewan (AG)*, [2025 SCC 6](#), para. 6, 34.

⁵ *Michel v. Graydon*, [2020 SCC 24](#), at para. 107, citing *Vavilov*, at para. 20.

⁶ *John Howard Society*, at paras. 6, 34; *Henry*, at para. 45; [David, at 55-69](#).

2. Ford Was Wrongly Decided in Authorizing Section 33's Prospective Invocation

12. PILI respectfully submits that *Ford* is “unsound in principle”⁷ and was wrongly decided. *Ford* held that s. 33 could not retrospectively be invoked to laws enacted before the *Charter*’s entry into force. This is constitutionally *correct*. However, *Ford* also upheld the validity of Quebec’s invocation of s. 33 to laws enacted after the *Charter*’s entry into force that had not been constitutionally invalidated in a court judgment.⁸ In essence, then, *Ford* authorizes *prospective* invocations of s. 33 – rather than purely *responsive* invocations under which legislatures can invoke s. 33 to re-enact laws declared unconstitutional.⁹ This is constitutionally *incorrect*. A purely prospective invocation of s. 33 is manifestly contrary to the express intent of the *Charter*’s Framers.

13. Following the First Ministers’ Conference preceding the *Charter*’s adoption, then-Prime Minister Pierre Elliott Trudeau stated:

[Section 33] is a way that the legislatures, federal and provincial, have of ensuring that the last word is held by the elected representatives of the people rather than by the courts.¹⁰

14. Then-Premier of Saskatchewan, Allan Blakeney, stated as follows:

[The *Constitution Act, 1982*] contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so w[e]ll for so many centuries.¹¹

15. Then-Attorney General of Ontario, Roy McMurtry, stated:

The fact is that the clause does provide a form of balancing mechanism between the legislators and the courts in the unlikely event of a decision of the courts that is clearly contrary to the public interest. On the other hand, political accountability is the best safeguard against any improper use of the “override clause” by any parliament in the future.¹²

⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), at para. 20.

⁸ *Ford*, at 741-744.

⁹ e.g. *Ontario (AG) v. Working Families Coalition (Canada) Inc.*, [2025 SCC 5](#), paras. 21, 83.

¹⁰ [Library of Parliament, “The Notwithstanding Clause of the Charter” \(Pub. No. 2018-17-E\).](#)

¹¹ [Library of Parliament, “The Notwithstanding Clause of the Charter” \(Pub. No. 2018-17-E\).](#)

¹² [Library of Parliament, “The Notwithstanding Clause of the Charter” \(Pub. No. 2018-17-E\).](#)

16. Then-Premier of Alberta, Peter Lougheed stated as follows:

We have never been anything other than a proponent of a Charter of Rights, but it had to be done, in our judgment, in a way that did not affect the supremacy of the elected people and they had to be in a position in a parliamentary system that they could respond through their elected legislature to the interpretation of what might come over the years ahead to decisions of the courts in interpreting a Charter of Rights.¹³

17. Then-Minister of Justice, Jean Chrétien also explained that s. 33 is purely *responsive*:

What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.¹⁴

18. Section 33 can also be seen as crystallizing a constitutional convention flowing from the Framers' intent as to its lawful and therefore legitimate invocation. As this convention is embedded within s. 33, it is judicially enforceable.¹⁵ *Ford* erred in not enforcing it.

19. Notwithstanding *Ford*, this Honourable Court also has recognized that s. 33 is intended to operate on a purely *responsive* basis. In *Toronto (City)*,¹⁶ a five-judge majority held:

[60] ...s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using... the Charter, the legislature may give continued effect to its understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions... (emphasis added)

20. This understanding of s. 33's operation appears in other precedents of this Honourable Court.

For example, Justice Rothstein's concurring reasons in *Fraser* provide as follows:

While s. 33 of the *Charter* may allow Parliament or the legislatures to suspend, temporarily, the force of this Court's ruling, history over the last two decades demonstrates that resort to s. 33 by legislatures has been exceedingly rare.¹⁷

¹³ [Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, p. 128.](#)

¹⁴ [House of Commons Debates, 32nd Parliament, 1st Session: Vol. 12, 20 November 1981, pp. 13042-13043.](#)

¹⁵ *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at 882, 888; *Osborne v. Canada Treasury Board*, [1991] 2 S.C.R. 69, at 86-87.

¹⁶ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 60.

¹⁷ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, para. 141.

21. In *Ontario (Attorney General) v. G.*, majority and dissent debated the interplay between court-ordered suspended declarations of invalidity and the legislative invocation of s. 33 in response to court judgments with which the legislature disagrees. Majority and dissent agreed that court-ordered suspension leaves Parliament and the legislatures free “to respond” to such declarations, including by using s. 33, despite disagreeing as to whether this should impact on courts’ authority and ability to issue suspended declarations.¹⁸
22. In essence, *Toronto (City)*, *Fraser*, and *G* precisely capture the intent of the *Charter*’s framers concerning s. 33. Specifically, this provision is only to be used *responsively* by legislatures in reaction to court judgments invalidating legislation under the *Charter*.
23. This Honourable Court has emphasized the significance of the *Charter* Framers’ intent as a constraint on the *Charter*’s interpretation.¹⁹ Constitutional debates preceding the *Charter*’s adoption and “the background against which the *Charter* was drafted and enacted” are essential to correctly interpreting its provisions²⁰ – including s. 33. While the purposive approach to *Charter* interpretation allows for a *Charter* provision’s text, purpose, and historical and philosophical context to inform the interpretive exercise, *Charter* interpretation cannot reintroduce what was expressly rejected by the Framers in discussing how a *Charter* provision should be interpreted and applied. As held by this Honourable Court, “[i]t is not for the Court to do by ‘interpretation’ what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.”²¹
24. As *Ford* clearly departed from the *Charter* Framers’ express intent as to the interpretation and application of s. 33, *Ford* is “unsound in principle”²² and was wrongly decided. This is, on its own, insufficient to warrant overturning *Ford*,²³ but contributes to PILI’s conclusion that *Ford* should be overruled in part. Additional “compelling reasons” are set out below.

¹⁸ *Ontario (Attorney General) v. G.*, [2020 SCC 38](#), at paras 137 (majority) and 239-241, 249, 255.

¹⁹ e.g., *R. v. Oland*, [2017 SCC 17](#), at para. 34; *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), at para. 83; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, [2023 SCC 31](#), at para. 75.

²⁰ *R. v. Stillman*, [2019 SCC 40](#), at para. 22.

²¹ *Toronto (City)*, at para. 83.

²² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), at para. 20.

²³ *R. v. Bernard*, [\[1988\] 2 S.C.R. 833](#), at 849 (Dickson C.J.); *R. v. Chaulk*, [\[1990\] 3 S.C.R. 1303](#) (Lamer C.J.); [David at 55-69](#).

3. Ford's Legal Foundations Have Been Eroded by Subsequent Jurisprudence

25. PILI respectfully submits that *Ford's* legal foundations have been eroded by this Honourable Court's subsequent jurisprudence – namely, the emergence and refinement of the purposive approach to constitutional interpretation under which the *Charter* is interpreted and applied.
26. A close reading of *Ford* reveals two elements central to PILI's position. **First**, this Honourable Court did not expressly address the question of whether s. 33 may be invoked *prospectively* – rather than only *in response* to judgments invalidating legislation under the *Charter*. This conclusion simply emerges from the Court upholding Quebec's invocation of s. 33 in s. 52 of *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56. *Ford* does not actually discuss the bases upon which s. 33's prospective invocation is constitutionally permissible.
27. **Second**, the legal foundation of *Ford's* analysis of s. 33 – and of the permissibility of its prospective invocation – consists of a purely textual analysis of that provision. No reference is made to s. 33's purpose, to its historical and philosophical context, or to the circumstances under which it was added to the *Charter* as a compromise among political actors to secure the consent sufficient to include it as part of the *Constitution Act, 1982*.²⁴ There is no reference to the *Charter* Framers' intent, including those reproduced above. This is striking.
28. *Ford's* purely textual analysis is not only inconsistent with the intent of the *Charter's* Framers, it is also inconsistent with the purposive approach this Honourable Court has repeatedly identified as the only legitimate method of interpreting the *Charter*.²⁵
29. Critically, “the same core principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*”²⁶ – which necessarily includes s. 33. Section 33 is “to be read purposively, rather than in a technical or legalistic fashion” – as was done in *Ford*. The purpose of s. 33 is to enable legislatures to respond to court judgments with which they disagree. By authorizing its prospective invocation, *Ford* “overshoot[s] the purpose” of s. 33 by “giving it an unduly generous interpretation” contrary to its Framers' intent.²⁷

²⁴ *Ford*, at 741-744.

²⁵ e.g., *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32](#), paras. 4-13.

²⁶ *R. v. Stillman*, [2019 SCC 40](#), at para. 22.

²⁷ *Stillman*, at para. 22.

30. The legal foundation of *Ford*'s interpretive conclusions – a purely textual and acontextual analysis of s. 33 – has therefore been eroded by subsequent developments in this Honourable Court's jurisprudence. Significantly, the Court has repeatedly emphasized that *Charter* precedent may be overruled or otherwise departed from when its legal foundations have been eroded by subsequent evolution in its jurisprudence.²⁸ This Honourable Court has also "overturned precedents that adopted an overly formalistic method of *Charter* interpretation"²⁹
31. As the legal foundation of *Ford*'s interpretation of s. 33 is a purely textual analysis, and as this "overly formalistic method of *Charter* interpretation" has been eroded by the purposive approach,³⁰ *Ford* should be partly overruled to prohibit s. 33's prospective invocation. This is the only constitutional correct interpretation emerging from "the contemporary legal landscape of *Charter* interpretation"³¹ and the *Charter* Framers' intent.
32. Significantly, *Ford* has also been undermined by *Toronto (City)*, as well as *Ontario (Attorney General) v. G*, which respect and enforce the *Charter* Framers' intent by identifying s. 33 as a limited right of override that can only be invoked *responsively*.³² Importantly, this conclusion shows that the Court of Appeal erred in law in refusing to depart from *Ford* – something it was authorized to do using the first *Bedford* exception pertaining to subsequent developments in this Honourable Court's jurisprudence.³³ All of these legal developments occurred prior to the Court of Appeal's judgment at issue in the present appeal. However, as emphasized, this Honourable Court should exercise its constitutional authority to review *Ford* under the principles of horizontal *stare decisis* – not the vertical axis of that doctrine.³⁴
33. As *Ford* is "unsound in principle," was wrongly decided, and has been undermined by subsequent developments in this Honourable Court's jurisprudence, it is ripe for this Honourable Court to overrule it in part and hold that s. 33 is a purely *responsive* provision.

²⁸ *John Howard Society of Saskatchewan v Saskatchewan (Attorney General)*, 2025 SCC 6, at paras. 4-8, 33-34.

²⁹ *John Howard Society*, para. 35, citing several precedents. See also [David, at 50](#).

³⁰ *John Howard Society*, para. 35, citing several precedents. See also [David, at 50](#).

³¹ *John Howard Society*, at para. 38.

³² *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 60.

³³ *Organisation mondiale sikhe du Canada c. Québec*, 2024 QCCA 254, at paras. 286-299.

³⁴ *R. v. Wetmore*, [1983] 2 S.C.R. 284, at 299 (Laskin CJC, majority), [David, at 66, 69](#).

4. *Ford's Application Leads to Harsh and Unconscionable Results*

34. *Ford's* application by Canadian legislatures leads to harsh and unconscionable results, further warranting its partial overruling.
35. The prospective invocation of s. 33 authorized by *Ford* leads to harsh and unconscionable results because it enables legislatures to deprive Canadians of their constitutional rights and freedoms despite prospective invocation being expressly directly contrary to the intent of the framers of the *Constitution Act, 1982*. Importantly, this Honourable Court has held that “[i]t is better to revisit precedent than to allow it to perpetuate an injustice.”³⁵ In fact, one of the central reasons this Honourable Court departed from its previous “inelastic conceptualization of *stare decisis*” was the realization that “too rigid adherence to precedent may lead to injustice.”³⁶ This Honourable Court has also overruled precedent whose application “results in unfairness.”³⁷ *Ford's* revisitation is sorely required to prevent perpetuating the injustices and unfairness caused by prospective invocation of s. 33.
36. *Ford's* authorization of s. 33's prospective invocation restricts the full enjoyment of rights and freedoms enshrined in the *Charter*. The partial overruling of *Ford* to prohibit prospective invocations will expand *Charter* protection consistent with its Framers' intent. This Honourable Court has been,³⁸ is³⁹ – and should continue to be – less hesitant to overrule precedents where the effect would be to expand – rather than restrict – *Charter* protections.

5. *Reliance Interests Generated by Ford Do Not Prevent its Partial Overruling*

37. Any reliance interests governments may have⁴⁰ on *Ford* to justify and legitimize s. 33's prospective invocation do not prevent its partial overruling. It is true that legislatures have prospectively invoked s. 33 several times since *Ford*. No legitimate reliance interests can, however, flow from this practice. The reason: prospective invocation of s. 33 is a

³⁵ *R. v. Sullivan*, [2022 SCC 19](#), at para. 66.

³⁶ *R. v. Kirkpatrick*, [2022 SCC 33](#), at paras. 175-176, 193; [David](#) at 36-37.

³⁷ *Michel v. Graydon*, [2020 SCC 24](#), at para. 107, citing *R. v. Henry*, [2005 SCC 76](#), paras. 45-46.

³⁸ e.g., *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia*, [2007 SCC 27](#), *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015 SCC 1](#); *Carter v. Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#).

³⁹ *John Howard*, paras. 4-8, 32-51.

⁴⁰ *Vavilov*, para. 272 (Abella & Karakatsanis JJ., dissenting on another point); [David](#), at 83-87.

constitutional anomaly – it instantiates a manifest disconnect between the *pouvoir constituant* (the *Charter*’s Framers) and the *pouvoir constitué* in deploying constitutional powers in ways contrary to their original purpose and envisaged operation.

38. Allowing governments and legislatures to deploy constitutional powers expressly contrary to Framers’ intent would enable them to amend the constitution without using the formal constitutional amendment rules in Part V of the *Constitution Act, 1982*. As well, no amount of unconstitutional practices renders them constitutionally palatable; repetition only exacerbates and does not sanitize unconstitutionality. If the contrary were true, governments would be incentivized to repeatedly violate the constitution in order to subsequently contend that these violations are lawful and therefore legitimate. This would turn the entire Canadian constitutional order on its head. This can evidently not be countenanced.
39. Short of a constitutional amendment under the general procedure in s. 38 of the *Constitution Act, 1982* expressly prohibiting prospective invocation, only this Honourable Court can restore s. 33 to its intended usage. A judgment to this effect will be just as legitimate, as this Court is the final and authoritative interpreter of the Constitution and because its Framers expressly envisaged that s. 33 would only operate in a purely responsive manner. In prohibiting its prospective invocation, this Honourable Court will simply be enforcing “an undeniable aspect of the constitutional bargain” leading to the *Charter*’s adoption.⁴¹
40. In addition, and as s. 33 forms part of the *Charter*’s “basic structure,”⁴² its constitutionally correct interpretation is critical to securing the protections conferred under the *Charter* and to identifying the circumstances under which sections 2 and 7 to 15 can be displaced.⁴³ Correlatively, it is critical that legislatures have absolute certainty as to the circumstances under which s. 33 can and cannot be invoked. Section 33 can only be invoked responsively.

6. The Definition of Responsive Invocation

41. A definition of “responsive invocation” is critical to ensure clarity and predictability once *Ford* is partly overruled to prohibit s. 33’s prospective invocation. The following proposals are not exhaustive but should be included or contemplated as part of any framework

⁴¹ *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), para. 60.

⁴² *Working Families*, at paras. 181, 255 (Côté & Rowe JJ. diss.)

⁴³ *Ontario (Attorney General) v. Fraser*, [2011 SCC 20](#), at para. 141 (Rothstein J., concurring).

42. First, s. 33 can be invoked by a legislature to re-enact its own legislation that has been invalidated in a judgment or to enact legislation identical or equivalent to invalidated legislation of a different order of government. For example, let us assume that a provision in a federal taxation statute is invalidated under s. 8 of the Charter for compelling the production of materials protected by solicitor-client privilege. A provincial legislature could then repeal and re-enact an identical or equivalent provision and invoke s 33 in respect of it.
43. Second, to be truly responsive, legislation invoking s. 33 must expressly identify the judgment to which it responds. This is required as a matter of democratic accountability and transparency and to enable courts to ensure s. 33 has truly been responsively invoked. It is not uncommon for legislatures to enact responsive legislation even when s. 33 is not invoked.⁴⁴ This second aspect of truly responsive justification will fit with existing practices.
44. Third, s. 33 can only be invoked in respect of *Charter* provisions used to invalidate legislation in a given judgment. Section 33 cannot be invoked in respect of perceived jurisprudential tendencies – rather than individual judgments – as this is a contestable standard amenable to arbitrary or opportunistic manipulation.
45. In essence, prospective invocation is anything that is not responsive as defined above. This “clear red line” approach promotes democratic accountability, transparency, as well as certainty and predictability in s. 33’s application. This, in turn, enhances the rule of law.
46. Crafting a definition and framework for assessing whether s. 33 has been invoked responsively is essential to enforcing the intent of the Charter’s Framers. The elaboration of this framework will further serve to delimit the appropriate scope and boundaries of judicial review of legislation invoking s. 33. As s. 33 is an exceptional constitutional power with extreme constitutional implications – the displacement of *Charter* rights and freedoms protected under ss. 2 and 7 to 15 – it is paramount that such a definition framework reconcile the legitimate invocation of s. 33 as constitutionally authorized and the judicial role in ensuring the supremacy of the constitution. This necessarily ensures policing the use of s 33.

⁴⁴ Legislatures often do this when legislation responsive to a judgment invalidating statutory provisions is enacted without invoking s. 33: e.g., *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, S.C. 2014, c. 25; and *Response to the Supreme Court of Canada Decision in R. v. Shoker Act*, S.C. 2011, c 7.

47. Judicial review can involve examining whether legislative invocation is truly responsive, as non-exhaustively defined above. For example, judicial review may involve ensuring that the legislation invoking s. 33 actually responds to a given judgment. If the answer is negative, any invocation of s. 33 is to be treated as “impertinent to be observed.”⁴⁵ It is as if s. 33 was never invoked at all.
48. Constitutional review of the provisions in respect of which s. 33 was invoked can then proceed, including to determine whether any infringement is justified under s. 1 of the *Charter*. If the invocation of s. 33 is not truly responsive, and if the infringement is not justified, a court can – pursuant to s. 52(1) of the *Constitution Act, 1982* – strike down the provisions in respect which s. 33 are invoked.
49. As well, a court may apply the remedy of severance if *Charter* provisions other than those used to invalidate legislation in the relevant judgment are attempted to be displaced by s. 33. For example, if the judgment at issue invalidated legislation under s. 7 of the *Charter* but the legislation invokes s. 33 in respect of ss. 7, 8 and 9, s. 33 will only be treated as having been truly responsive with respect to s. 7. Any parts of the legislation purporting to invoke s. 33 to ss. 8 and 9 is severed. No *Charter* challenge with respect to s. 7 can be entertained as long as the invocation of s. 33 applies. *Charter* challenges under ss. 8 and 9 can proceed.
50. This approach to responsive invocation reconciles the separation of powers, democratic legitimacy, parliamentary sovereignty, constitutional supremacy, and the rule of law.

PART IV AND V – COSTS AND ORDERS SOUGHT

51. PILI does not seek costs and respectfully requests that no costs be ordered against it. PILI is not requesting any orders.

PART VI – SUBMISSIONS ON SEALING OR CONFIDENTIALITY ORDERS

52. PILI makes no submissions on these issues.

THE WHOLE RESPECTFULLY SUBMITTED THIS 24th DAY OF JULY 2025



Lawrence David, LLM

⁴⁵ *Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a C.P. 1610, Sir Edward Coke.

PART VII – ALPHABETICAL TABLE OF SOURCES

JURISPRUDENCE	PARAGRAPHS
<i>Binus v. The Queen</i> , [1967] S.C.R. 594	10
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72	2, 9, 10
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65	10, 12, 24, 37
<i>Canada v. Craig</i> , 2012 SCC 43	10
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5	36
<i>Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)</i> , 2023 SCC 31	22
<i>Ford v. Quebec (Attorney General)</i> , [1988] 2 S.C.R. 712	1-6, 12, 19, 24-37
<i>Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia</i> , 2007 SCC 27	36
<i>John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)</i> , 2025 SCC 6	10, 30, 31, 36
<i>Michel v. Graydon</i> , 2020 SCC 24	10, 35
<i>Mounted Police Association of Ontario v. Canada (Attorney General)</i> , 2015 SCC 1	36
<i>Ontario (Attorney General) v. Fraser</i> , 2011 SCC 20	20, 22, 40
<i>Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.</i> , 2025 SCC 5	12-40
<i>Organisation mondiale sikhe du Canada c. Québec</i> , 2024 QCCA 254	2, 32
<i>Osborne v. Canada Treasury Board</i> , [1991] 2 S.C.R. 69	18

<i>Quebec (Attorney General) v. 9147-0732 Québec inc.</i> , 2020 SCC 32	28
<i>R. v. Bernard</i> , [1988] 2 S.C.R. 833	10, 24
<i>R. v. Chaulk</i> , [1990] 3 S.C.R. 1303	24
<i>R. v. Edwards</i> , 2024 SCC 15	10
<i>R. v. Henry</i> , 2005 SCC 76	10, 35
<i>R. v. Jordan</i> , 2016 SCC 27	10
<i>R. v. Kirkpatrick</i> , 2022 SCC 33	35
<i>R. v. Oland</i> , 2017 SCC 17	23
<i>R. v. Stillman</i> , 2019 SCC 40	23, 29
<i>R. v. Sullivan</i> , 2022 SCC 19	35
<i>R. v. Wetmore</i> , [1983] 2 S.C.R. 284	32
<i>Reference re Resolution to Amend the Constitution</i> , [1981] 1 S.C.R. 753	18
<i>Saskatchewan Federation of Labour v. Saskatchewan</i> , 2015 SCC 4	36
<i>Toronto (City) v. Ontario (Attorney General)</i> , 2021 SCC 34	19, 22, 32, 39

DOCTRINE	PARAGRAPHS
Lawrence David, <i>Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada</i>, Vol. 97 of the <i>Supreme Court Law Review</i>, Second Series (2020) **Note: available in Supreme Court library and Judges' Reading Room – click link for for more information** see also <i>R. v. Bouvette</i> , 2025 SCC 18, at para. 270	1, 10, 11, 24, 30-32, 35-37

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LEGISLATION	PARAGRAPHS
<u>An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts</u> , S.C. 2014, c. 25	41
<u>Response to the Supreme Court of Canada Decision in R. v. Shoker Act</u> , S.C. 2011, c. 7	41

JUDICIAL NOTICE	PARAGRAPHS
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<u>House of Commons Debates, 32nd Parliament, 1st Session: Vol. 12, 20 November 1981</u>	17
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