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THE ADMINISTRATIVE LAW OF SECTION 33 OF THE *CHARTER*

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ABSTRACT

Section 33 of the *Canadian Charter of Rights and Freedoms* (*Charter*) can be used to ensure that legislation operates notwithstanding sections 2 or 7 to 15 of the *Charter*, but can it be used to ensure that administrative decisions made under legislation survive notwithstanding those provisions, and if so, how? This administrative law—as opposed to purely constitutional law—question has become a live one, given increasing use of section 33 and the evolving framework for assessing whether administrative decisions comply with the *Charter*. Yet this question is underexplored. In this article, I suggest that section 33 can, in principle, be used to ensure that administrative decisions survive notwithstanding the relevant provisions. I then examine whether section 33 can, in fact, be used in this way—and if so, how. Given the evolving framework for assessing whether administrative decisions comply with the *Charter*, I distinguish

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between two general approaches to the framework—one based on *Charter* rights and the other based on *Charter* values—and explain the effect of using section 33 in the context of administrative decisions on each approach. On the *Charter* rights approach, using section 33 has effects that are analogous to the effects of using section 33 in the context of legislation; at the least, it prevents a court from quashing the decision. On the *Charter* values approach, however, using section 33 has no effect, since using section 33 has no effect on *Charter* values or their enforcement.

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RÉSUMÉ

L'article 33 de la *Charte canadienne des droits et libertés* (*Charte*) permet de s'assurer que la législation s'applique malgré les articles 2 ou 7 à 15 de la *Charte*. Toutefois, peut-il être utilisé pour garantir que les décisions administratives prises en vertu de la législation y survivent, et si oui, comment ? Cette question de droit administratif — par opposition au droit purement constitutionnel — est devenue d'actualité, compte tenu de l'utilisation croissante de l'article 33 et de l'évolution du cadre d'évaluation de la conformité des décisions administratives à la *Charte*. Pourtant, cette question n'a pas été suffisamment explorée. Dans cet article, je suggère que l'article 33 peut, en principe, être utilisé pour s'assurer que les décisions administratives ne sont pas jugées contraires aux dispositions concernées. Ensuite, je vérifie si l'article 33 peut effectivement être appliqué de cette façon, et, dans l'affirmative, je précise comment. Compte tenu de l'évolution du cadre d'évaluation de la conformité des décisions administratives à la *Charte*, je distingue deux approches générales de ce cadre : l'une fondée sur les droits garantis par la *Charte* et l'autre sur les valeurs garanties par la *Charte*. J'explique ensuite l'effet de l'utilisation de l'article 33 dans le contexte des décisions administratives pour chacune de ces approches. Selon l'approche fondée sur les droits garantis par la *Charte*, l'utilisation de l'article 33 a des effets analogues à ceux de l'utilisation de l'article 33 dans le contexte de la législation ; à tout le moins, elle empêche un tribunal d'annuler la décision. En revanche, dans le cadre de l'approche fondée sur les valeurs de la *Charte*, l'utilisation de l'article 33 n'a aucun effet, puisque celle-ci n'a aucun effet sur les valeurs de la *Charte* ou sur leur mise en œuvre.

INTRODUCTION

A. *The Question: Can the Legislature Use Section 33 to Ensure that Administrative Decisions, as Distinct from Legislation, Survive Notwithstanding Sections 2 or 7 to 15 of the Charter?*

THE very existence of section 33 in the *Canadian Charter of Rights and Freedoms* has been controversial since the *Charter* was enacted in 1982.[1] The provision permits the legislature to enact legislation that operates notwithstanding sections 2 or 7 to 15 of the *Charter*, provisions which guarantee fundamental rights. For critics, section 33 inappropriately permits the legislature to "override" fundamental rights or to preclude the judicial review of legislation on the grounds that the legislation is inconsistent with the relevant *Charter* provisions.[2] For defenders, section 33 appropriately permits the legislature to assert the primacy of its view of whether legislation is consistent with the relevant *Charter* provisions over the judiciary's view.[3]

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1 *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 33 is often known as the "notwithstanding clause" or the "override clause." However, because such terminology leaves unclear the question of notwithstanding or overriding what, I prefer to use more neutral terminology. For a recent summary of the scholarship on section 33, see Kristopher EG Kinsinger, "The Evolving Debate Over Section 33 of the Charter" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 49.

2 See e.g. Patrick J Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 119; John D Whyte, "On Not Standing for Notwithstanding" (1990) 28:2 Alta L Rev 347 [Whyte, "Not Standing for Notwithstanding"]; Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004) 135 [Cameron, "Legislative Override"].

3 See e.g. Lorraine Eisenstat Weinrib, "Learning to Live With the Override" (1990) 35:3 McGill LJ 541 [Weinrib, "Learning to Live"]; Peter H Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293 [Russell, "Standing Up"]; Peter H Russell, "The *Charter* and Canadian Democracy" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Columbia Press, 2009) 287 [Russell, "The *Charter*"].

More recently, increasing use of section 33 has prompted discussion in the courts and the scholarship on the extent to which the legislature's use of section 33 immunizes (or insulates) legislation from judicial review on the grounds of inconsistency with the relevant *Charter* provisions.[4] But as a legal matter, it is clear that, for better or for worse, the legislature can use section 33 to ensure that legislation operates notwithstanding the relevant *Charter* provisions.[5]

In this article, I am interested in a different but closely related question: Can the legislature use section 33 to ensure that *administrative*

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4 For cases, see generally *Hak c Québec (PG)*, 2021 QCCS 1466, varied by *Mouvement laïque québécois c English Montreal School Board*, 2021 QCCA 1675 and *Organisation mondiale sikhe du Canada c Québec (PG)*, 2024 QCCA 254 [*Hak*]; *Working Families Coalition (Canada) Inc v Ontario (AG)*, 2023 ONCA 139 [*Working Families*], leave to appeal to SCC granted, 40725 (9 November 2023); *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2024 SKKB 23. For the scholarship, see generally Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum Const 38; Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510 [Webber, "Notwithstanding Rights"]; Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189; Geoffrey Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review" (2024) 61:1 Osgoode Hall LJ 63 [Sigalet, "Legislated Rights as Trumps"]; Grégoire Webber, "The Notwithstanding Clause, the Operation of Legislation, and Judicial Review" in Peter L Biro, ed, *The Notwithstanding and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 93; Robert Leckey, "Legislative Choices in Using Section 33 and Judicial Scrutiny" in Peter L Biro, ed, *The Notwithstanding and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 111; 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 and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 132; Geoffrey Sigalet, "Notwithstanding Judicial Review: Legal and Political Reasons Why Courts Cannot Review Laws Invoking Section 33" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (Montreal: McGill-Queen's University Press, 2024) 168. See also Carissima Mathen, "Federalism and the Notwithstanding Clause" (2024) 32:3 Const Forum Const 1 at 2, 6.

5 See e.g. *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC) [*Ford*].

decisions made under legislation survive notwithstanding those same provisions?

To avoid begging important questions, I will say that a decision "survives" in just the way that legislation "operates."[6] It is clear that ensuring that legislation operates means, at minimum, that a court cannot strike down the legislation, so it is clear that doing so precludes judicial review to at least some extent. However, there is debate over the exact extent to which this may be the case, specifically whether it may preclude judicial review *entirely*.[7] That is, there is a debate over the scope of the section 33 immunity. Some suggest that a reviewing court can still issue remedies other than striking down the legislation, such as declarations, while others suggest that the court cannot issue any remedies at all.

B. The Significance of the Question

The question of whether the legislature can use section 33 to ensure that administrative decisions made under legislation survive notwithstanding the relevant *Charter* provisions has received little attention, in part because section 33 has historically only been used rarely. The federal Parliament has never used it, and although the Quebec legislature initially used it extensively, provinces outside Quebec have used it sparingly.[8]

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6 The issue is whether legislation "operates" rather than whether it is "valid" because I am focusing on the legal effect of legislation, and valid legislation is not necessarily enforceable or capable of being given legal effect. In the federalism or division of powers jurisprudence, the doctrine of paramountcy can render provincial legislation that is valid nonetheless inoperable to the extent that the provincial legislation conflicts with federal legislation (see e.g. *Multiple Access Ltd v McCutcheon*, 1982 CanLII 55 (SCC)). Moreover, in the context of section 33, Grégoire Webber proposes that a reviewing court can still conclude that legislation immunized by the legislature's use of section 33 is invalid, although the court cannot further conclude that the legislation is inoperable. I elaborate on Webber's view *below*, in the main text.

7 I explain this debate, and the scholars involved in it, in Part II, Section C.

8 See 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, UK: Oxford University Press, 2017) 695; Caitlin Salvino, "A Tool of the 'Last Resort': A Comprehensive Account of the Notwithstanding Clause Political Use from 1982-2021" (2022) 16:1 JPPL 11 at 19; Tsvi Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60:1 Osgoode Hall LJ 1 at 8.

More recently, however, the Quebec legislature has started using section 33 again, and the Ontario legislature has used or threatened to use the provision three times over the last few years (with two actual uses). The Saskatchewan legislature used it in 2023.[9]

In 2022, both the Quebec and Ontario legislatures used it, once each. Quebec's *An Act respecting French, the official and common language of Québec* used section 33 to ensure the exclusive use of French in a wide variety of situations, with section 114 of that *Act* providing for warrantless search and seizure to enforce the legislation.[10]

The second-most recent use, in Ontario's *Keeping Students in Class Act, 2022* (Bill 28, now repealed), is notable because it directly raises the question I am interested in here.[11] Not only did that *Act* use section 33 so that it would operate notwithstanding sections 2, 7, and 15 of the *Charter*, but it also purported to preclude any "cause of action or other legal basis for a proceeding" against the Crown for "anything done or not done in order to comply with this Act or the regulations made under this Act."[12] Thus, the *Act* purported to ensure that non-legislative, administrative decisions would survive notwithstanding sections 2, 7, and 15 of the *Charter*.

In 2023, the Saskatchewan legislature used section 33 in *The Education (Parents' Bill of Rights) Amendment Act* to prevent teachers from using the gender-related preferred name or gender identity of a student

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9 Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019, cl 34 (assented to 16 June 2019), SQ 2019, c 12; Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 49th Leg, Quebec, 2022, cl 214 (assented to 1 June 2022), SQ 2022, c 14 [Bill 96]; Bill 307, *Protecting Elections and Defending Democracy Act*, 1st Sess, 42nd Leg, Ontario, 2021, cl 4 (assented to 14 June 2021), SO 2021, c 31; Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 1st Sess, 42nd Leg, Ontario, 2018 (first reading 12 September 2018); Bill 28, *An Act to resolve labour disputes involving school board employees represented by the Canadian Union of Public Employees*, 1st Sess, 43rd Leg, Ontario, 2022, cl 13 (assented to 3 November 2022), SO 2022, c 19 as repealed by Bill 35, *An Act to repeal the Keeping Students in Class Act, 2022*, 1st Sess, 43rd Leg, Ontario, 2022 (assented to on 14 November 2022), SO 2022, c 20 [Bill 28].

10 Bill 96, *supra* note 9, cl 114. See also *Charter of the French Language*, CQLR c C-11, s 174.

11 Bill 28, *supra* note 9.

12 *Ibid*, cl 15.

under sixteen years old without parental consent.[13] Like the Ontario legislation, this Saskatchewan legislation not only used section 33 so that the legislation would operate notwithstanding sections 2, 7, and 15 of the *Charter*, but also purported to preclude any "action or proceeding based on any claim for loss or damage resulting from the enactment or implementation of this section or of a regulation or policy related to this section" against the Crown.[14] Saskatchewan's 2023 legislation suggests that Ontario's 2022 legislation was not anomalous, but an illustration of how legislatures can and increasingly do use section 33.

The increasingly frequent use of section 33 shows that the distinctively administrative law—as opposed to purely constitutional law—question of whether the legislature can use section 33 in the context of administrative decisions, and if so, how, has become a live one. As I will explain, the question is also tied to the evolving framework for assessing whether administrative decisions comply with the *Charter*. Yet, there has been no direct and sustained attempt to answer this question.[15]

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13 *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46.

14 *The Education Act, 1995*, SS 1995, c E-0.2, s 197.4(5); see also s 197.4(6).

15 The most in-depth discussion of the issue appears to be in Richard C Fraser & Jennifer AI Addison, "What's Truth Got to Do With It? The Supreme Court of Canada and Section 24(2)" (2004) 29:2 Queen's LJ 823. This article concerns subsection 24(2) of the *Charter*, which permits a court to exclude criminal evidence that was obtained in a manner that infringed or denied a *Charter* right. A subsection 24(2) remedy usually addresses *Charter* limitations due to police decisions, which are usually not thought of as administrative decisions, although it is conceptually coherent to think of them as such (see Michael Plaxton, "Police Powers After Dicey" (2012) 38:1 Queen's LJ 99 at 129–31), since police decisions purport to implement legislative decisions, just like all administrative decisions. Fraser and Addison make the intriguing proposal of using section 33 to address what they view as problematic court decisions on subsection 24(2) (Fraser & Addison, *supra* note 15 at 845). They write that the section 33

> override would have to apply to the legislation under which the rights breach was found, or used to create new legislation that allows the rights violation and is insulated by section 33 in cases where the breach was a result of police conduct that took place without a governing statute (Fraser & Addison, *supra* note 15 at 846).

In doing so, they implicitly assume the conclusion that I seek to argue for in this article—namely, that the legislature can use section 33 to immunize or insulate administrative decisions from *Charter* scrutiny. I agree with their implicit assumption, but I do not take its truth to be as obvious as it might have been when they were writing in 2004, especially since the Supreme Court introduced the *Doré* framework for assessing

The question is not only practically significant but also raises broader and deeper questions about the roles of the legislature and of the judiciary in determining the role of the *Charter* in constitutional and administrative law. While the discussion on section 33 has understandably focused on the extent to which courts can review uses of section 33 in the context of legislation, the extent to which courts can review uses of section 33 in the context of non-legislative, administrative decisions is just as significant.

Legislation has limited practical effect without implementation via decisions which are themselves non-legislative, but made under, or *purportedly* made under, legislation. It is through this delegated decision-making by administrative actors that the legislature gives effect to legislation. Thus, the impact of legislation on Canadians, including any infringement of their rights, derives from not only the legislation itself but also—and even especially—administrative decisions made under, or purportedly made under, such legislation.

Even if legislation itself is constitutional, decisions purportedly made under it might not be, in which case Canadians might experience an infringement of their *Charter* rights all the same. The potential for administrative decisions themselves to impact *Charter* rights means that we must think carefully about what, if anything, a reviewing court can do when the legislature tries to use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions.

The Supreme Court of Canada's decisions in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* and *Canada (Attorney General) v. PHS Community Services Society* illustrate how *Charter*-infringing decisions can be made under, or purportedly made under, *Charter*-compliant legislation.[16]

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administrative decisions for *Charter* compliance in 2012. In addition to the discussion in Fraser and Addison, Paul Daly has recently discussed this issue on his blog, where he describes the issue as a "difficult" one "which has not been much discussed" (Paul Daly, "Notwithstanding Administrative Law?" (18 September 2023), online (blog): <administrativelawmatters.com> [perma.cc/W46T-PLWW]; Paul Daly, "More on the Notwithstanding Clause and Administrative Law" (25 September 2023), online (blog): <administrativelawmatters.com> [perma.cc/HWN7-5VPM]).

16 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 125 [*Little Sisters*]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 114 [*Insite*].

In *Little Sisters*, the Court held that even though customs legislation was itself constitutional, the administrative implementation of the legislation unjustifiably limited the claimants' section 15 rights to equality.[17] Customs officials targeted importers of obscene materials despite the absence of any evidence suggesting that gay and lesbian erotica was more likely to be obscene than heterosexual erotica or that the importers were more likely offenders in this regard, the consequence of which was excessive and unnecessary prejudice to the importers.[18] In *Little Sisters*, the non-legislative decision—that is, the administrative implementation of the legislation—may have purported to be, but was not in fact, authorized by the customs legislation, which did not authorize or purport to authorize such decisions.[19]

Similarly, in *Insite*, the Court held that even though certain criminal legislative prohibitions on possession and trafficking controlled substances were constitutional, the minister of health's failure to grant an exemption (which the legislation provided for at the minister's discretion) to a supervised injection site unjustifiably limited the claimants' section 7 rights.[20] The minister's decision prevented injection drug users from accessing health services, threatening their health and lives in a way that contravened the principles of fundamental justice against arbitrariness and gross disproportionality.[21] Although the Court did not explicitly say so, we can infer from the Court's reasoning that the minister's failure to grant an exemption under the legislation was not authorized by legislation.[22]

What about a case just like *Little Sisters* or *Insite*, except that by using section 33, the legislature authorizes—or purports to authorize—administrative decisions made under legislation that might be inconsistent with sections 2 or 7 to 15 of the *Charter*? Can the legislature really authorize

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17 *Little Sisters*, *supra* note 16 at para 125.

18 *Ibid* at para 154.

19 *Ibid* at para 125.

20 *Insite*, *supra* note 16 at paras 95, 137.

21 *Ibid* at para 136.

22 Canada argued that the minister had not yet made a decision on whether to grant an exemption under section 56 of the legislation, the *Controlled Drugs and Substances Act*, but the Court concluded that the minister had made a decision on the request for an exemption—to refuse (see *ibid* at paras 119–20).

such decisions by using section 33 to extend immunity from *Charter* challenges based on those provisions to administrative decisions made under such legislation?[23] If so, to what extent are the administrative decisions immune from judicial review on the grounds of inconsistency with the relevant sections of the *Charter*?

C. *My Answer to the Question*

I will argue that the legislature can, in principle, use section 33 in legislation to authorize administrative decisions that might be inconsistent with sections 2 or 7 to 15 of the *Charter*. Specifically, it can do so by extending the immunity that legislation it enacts may have from *Charter* challenges based on those provisions to administrative decisions made under such legislation.

But this does not itself resolve to what extent such administrative decisions are immune from judicial review on the grounds of inconsistency with the *Charter*'s relevant sections. Resolving this requires addressing a complication introduced by the Supreme Court's framework in *Doré v. Barreau du Québec*,[24] after its decisions in *Little Sisters* and *Insite*, for assessing the compliance of administrative decisions with the *Charter*. According to that framework, an administrative decision implicating the *Charter* must reasonably balance statutory objectives with the relevant *Charter* protections—that is, *Charter* rights and values. For some time, it was unclear what that framework involves, and to what extent it survives the current framework from the Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* for selecting

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23 Although there might be a general difference between authorization and delegation, in the context of how the legislature can use section 33, the issues are substantially the same, since only the legislature can use section 33 and the legislature can only use it to immunize legislation that it enacts from judicial review. In this context, whether the legislature can authorize administrative decisions notwithstanding the relevant *Charter* provisions depends on whether the legislature can delegate its authority to make decisions notwithstanding the relevant *Charter* provisions. To put it another way, the issue is whether the legislature can extend the section 33 immunity that legislation it enacts may have from *Charter* challenges based on the relevant provisions to administrative decisions made under such legislation.

24 *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55–56 [*Doré*].

and applying the standard of review for the substantive review of administrative decisions.[25]

The Court has recently clarified the *Doré* framework.[26] Consistent with that clarification, I suggest distinguishing between two general and mutually compatible approaches to assessing the compliance of administrative decisions with the *Charter*, one based on *Charter* rights and the other based on *Charter* values. On the *Charter* rights approach, I suggest that various views on the operation of section 33 in the context of legislation correspond to analogous views on the operation of section 33 in the context of non-legislative, administrative decisions. Just as one might hold that using section 33 entirely precludes the judicial review of legislation, one might similarly hold that section 33 entirely precludes the judicial review of administrative decisions. Alternatively, just as one might hold that using section 33 permits the judicial review of legislation but permits only remedies other than striking down the legislation, one might similarly hold that section 33 permits the judicial review of administrative decisions but permits only remedies other than quashing the administrative decision. However, on the *Charter* values approach, section 33 cannot immunize administrative decisions from judicial review on the grounds of inconsistency with the relevant sections of the *Charter*.

I will proceed as follows. In Part II, I explain how section 33 works and how it has been understood to work in the context of legislation. I set out the consensus that using section 33 in the context of legislation at least prevents a court from striking down the legislation, although there is currently a lively debate over the extent to which using section 33 precludes judicial review. The maximalist view is that section 33 precludes judicial review based on the relevant *Charter* provisions altogether, while the minimalist view is that section 33 still permits judicial review based on those provisions with a more limited range of remedies. In Part III, I illustrate how Bill 28 raises the question of whether the legislature can use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. In Part IV, I argue that the principle that the legislature can authorize

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25 2019 SCC 65 [*Vavilov*].

26 See *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at paras 59–74, 84, 92 [*CSFTNO*].

another entity to do whatever the legislature can itself do suggests that the legislature can use section 33 to authorize an administrative decision-maker to make decisions that would otherwise unconstitutionally limit the relevant *Charter* protections. Thus, the legislature can in principle use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. In Part V, I examine whether the legislature can in fact use section 33 in this way, and if so, how. Given the evolving framework for assessing whether administrative decisions comply with the *Charter*, I distinguish between two general approaches—one based on *Charter* rights and the other based on *Charter* values—and explain the effect of using section 33 in the context of administrative decisions under each approach. On the *Charter* rights approach, using section 33 has effects that are analogous to the effects of using section 33 in the context of legislation; at the least, it prevents a court from quashing the decision. On the *Charter* values approach, however, using section 33 has no effect, since using section 33 has no effect on *Charter* values or their enforcement.

I. SECTION 33 OF THE *CHARTER*

A. Section 33 Prevents a Court from Striking Down the Legislation

In full, section 33 of the *Charter* reads as follows:[27]

> **Exception where express declaration**
>
> **33 (1)** Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> **Operation of exception**
>
> **(2)** An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

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27 *Charter*, *supra* note 1, s 33.

> **Five year limitation**
>
> **(3)** A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> **Re-enactment**
>
> **(4)** Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> **Five year limitation**
>
> **(5)** Subsection (3) applies in respect of a re-enactment made under subsection (4).

Although section 33 does not specifically refer to striking down or any other remedy, it is clear that a section 33 declaration in legislation prevents a court from striking it down.[28] Insofar as related remedies such as reading down, severance, and reading in are simply variations of striking down, it is similarly clear that a section 33 declaration in legislation also prevents a court from issuing these related remedies. For simplicity, I will refer just to striking down on the understanding that such reference includes reference to these related remedies.

B. Debates Involving Section 33

Beyond this modicum of agreement, there is much debate involving section 33, only part of which is relevant to this article. One major debate is over the political or moral merits of using section 33.[29] I have nothing to say about this debate, since my focus is on the distinctively legal

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28 See e.g. Webber, "Notwithstanding Rights", *supra* note 4 at 511, 515, 521; Leckey & Mendelsohn, *supra* note 4 at 190–91; Sigalet, "Legislated Rights as Trumps", *supra* note 4 at 64–65; St-Hilaire, Ménard & Dutrisac, *supra* note 4 at 133. See also *Ford*, *supra* note 5 at para 35.

29 See e.g. Whyte, "Not Standing for Notwithstanding", *supra* note 2; Weinrib, "Learning to Live", *supra* note 3; Russell, "Standing Up", *supra* note 3 at 299–309; Russell, "The *Charter*", *supra* note 3 at 289–293; John D Whyte, "Sometimes Constitutions Are Made in the Streets: The Future of the Charter's Notwithstanding Clause" (2007) 16:2 Const Forum Const 79; Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Const Forum Const 9. See also Léonid Sirota, "The Rule of Law All the Way Up" (2019) 92 SCLR (2nd) 79 at 93–97.

debate.[30] A related but distinct debate, which is more relevant here, is over the extent to which a court can review the legislature's use of section 33. That debate was in part addressed by the only case in which the Supreme Court has specifically considered the use of section 33—namely, *Ford v. Quebec (Attorney General)*.

In *Ford*, the Quebec legislature used section 33 in legislation requiring that public signs and posters and commercial advertising be solely in French, and that only the French version of a firm name be used. The Court held that 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."[31] Section 33 can be used "to override more than one provision of the *Charter* and indeed all of the provisions which it is permitted to override by the terms of s. 33."[32] Thus, the "standard override provision" in the case—which said that "[t]his Act shall operate notwithstanding the provisions of sections 2 and 7 to 15" of the *Charter*—was "a valid exercise of the authority conferred by s. 33 in so far as it purport[ed] to override all of the provisions in s. 2 and ss. 7 to 15 of the *Charter*."[33] However, the Court added that the override provision can only have prospective and not "retroactive" or "retrospective" effect.[34] In short, the Court in *Ford* established that a court can engage in extremely limited review of the legislature's use of section 33 in legislation. If the legislature uses the appropriate language, it can ensure that its legislation will operate notwithstanding one or more of sections 2 and 7 to 15 of the *Charter*.[35]

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30 I readily concede that, in the context of section 33, it might not be as straightforward as it might be in other contexts to separate views about the political or moral merits of a particular use of the provision from views about the lawfulness or legality of that use. Nonetheless, insofar as courts are appropriately institutionally restricted to considering only lawfulness or legality, the line must be drawn somewhere, so it is reasonable to assume that there is such a line to be drawn here.

31 *Ford*, *supra* note 5 at para 33.

32 *Ibid*.

33 *Ibid* at paras 23, 33.

34 *Ibid* at para 36.

35 The only apparent ground of review is retroactive or retrospective operation notwithstanding such a *Charter* provision. But, arguably, this apparent ground of review does not really involve reviewing a use of section 33 for lawfulness. Rather, it involves clarifying the legal effect of such use.

C. *The Maximalist and Minimalist Views*

The relatively more frequent use by the provinces of section 33 in recent years has led courts and scholars to pay its use increasing attention. Litigants in cases like *Hak c. Procureure générale du Québec* (on Quebec's 2019 religious symbols law, which used section 33) and *Working Families Coalition (Canada) Inc v. Ontario (Attorney General)* (on Ontario's elections law, which also used section 33) have urged courts to subject uses of section 33 to more substantive review, as opposed to the largely formal review contemplated in *Ford*.[36] In addition to these developments in litigation, scholars have recently debated the precise effects of a section 33 declaration; specifically, what is the extent to which such use precludes judicial review of the legislation? The debate focuses on whether using section 33 in legislation entirely precludes a court from reviewing the legislation for consistency with the relevant *Charter* provisions and, if not, what remedies other than striking down the legislation are available to the court.

In this debate, we can distinguish between two views: the maximalist view, which holds that using section 33 in legislation completely immunizes the legislation from judicial review, and the minimalist view, which holds that using section 33 in legislation only partly immunizes the legislation from judicial review and continues to make available remedies other than striking down to the court. Although the debate might seem arcane or technical, it is practically significant because each view has different implications for whether a reviewing court can act in response to section 33-immunized legislation. If the minimalist view is correct, then a reviewing court can still issue remedies other than striking down and may even issue a striking down that is deferred but takes effect once the section 33 declaration expires. By contrast, if the maximalist view is correct, then a reviewing court cannot do so—at least while the section 33 declaration remains in effect. With the practical significance of the debate in mind, let me elaborate on both views.

From the maximalist view, there can be no judicial review; at least, not based on inconsistency with the relevant *Charter* provisions. The maximalist view might seem to be what *Ford* held, and the purpose and

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36 For instances where litigants' arguments to this effect were responded to by the Court, see generally *Hak*, *supra* note 4; *Working Families*, *supra* note 4.

text of section 33 may seem to support it. Recently, Geoffrey Sigalet has endorsed this maximalist view in response to others' claims (which I examine below) that there can still be a more limited form of judicial review.[37] In his view, "section 33 prohibits substantive judicial review. ... Practically speaking, this means that courts may not hold laws properly invoking the notwithstanding clause to be inconsistent with selected *Charter* provisions, nor can they declare laws to violate *Charter* rights."[38] Similarly, Maxime St-Hilaire, Xavier Foccroulle Menard, and Antoine Dutrisac write that section 33 "suspends targeted rights-guaranteeing provisions of the *Charter*, rendering them inapplicable to protected legislation. Under these circumstances, for the times s. 33 is temporarily invoked, there cannot be any judicial review of the protected legislation in relation to these inapplicable provisions, and as a consequence, there cannot be any remedy for a non-existent *Charter* rights violation, be it a 'mere' declaration of 'inconsistency.'"[39]

By contrast, from the minimalist view, there can still be judicial review based on inconsistency with the relevant *Charter* provisions, but the court can only issue remedies other than striking down the legislation. Grégoire Webber develops one version of this view, according to which a court can conclude that the legislation is inconsistent with the relevant *Charter* provisions and further conclude that the legislation is invalid, but cannot finally conclude that the legislation is inoperable.[40] Although the court cannot remedy the invalidity by making the legislation inoperable, according to Webber, the court can still declare the legislation to be invalid.[41] Robert Leckey and Eric Mendelsohn develop another version of the minimalist view, according to which a court can conclude that legislation unjustifiably infringes a fundamental right or freedom but cannot further conclude that the legislation is inconsistent with the Constitution.[42] Although the court cannot remedy the rights violation by striking down the legislation, the court can still declare the legislation to have

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37 Sigalet, "Legislated Rights as Trumps", *supra* note 4 at 83.

38 *Ibid.*

39 St-Hilaire, Ménard & Dutrisac, *supra* note 4 at 160. See also St-Hilaire & Ménard, *supra* note 4.

40 Webber, "Notwithstanding Rights", *supra* note 4 at 521.

41 *Ibid* at 524–25.

42 Leckey & Mendelsohn, *supra* note 4 at 190.

violated rights and potentially issue a subsection 24(1) remedy, including damages.[43]

My interest here is not to adjudicate between the minimalist and maximalist views, or versions of those views, on the use of section 33 in the context of legislation. Nonetheless, as I will explain, each of those views suggest corresponding views on the use of section 33 in the context of administrative decisions made under legislation. Accordingly, they shed light on the question that I am interested in answering, which I turn to now: Can the legislature use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions?

D. The Question That Ontario's Bill 28 Raises

The question that I seek to address in this article is raised in Ontario's *Keeping Students in Class Act, 2022* (Bill 28, now repealed). During a labour dispute in November 2022 between Ontario and school board employees represented by the Canadian Union of Public Employees, Ontario passed the bill to impose new collective agreements, require the termination of any strike or lockout, and prohibit strikes or lockouts during the term of the collective agreement.[44] Notably, Bill 28 was declared to operate notwithstanding sections 2, 7 and 15 of the *Charter*, and provided that there were to be no causes of action or proceedings—including judicial review—against the Crown for certain acts.[45]

Subsection 13(1) of Bill 28 made a declaration under subsection 33(1) of the *Charter* that it was to operate notwithstanding the relevant sections of the *Charter*.[46] That was a standard use of section 33. More interestingly, for the purposes of this article, subsection 13(3) of Bill 28 suggested that the use of section 33 in the context of legislation may have some application in the context of non-legislative decisions as well: "For greater certainty," subsection (1) applies to "regulations made under

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43 *Ibid* at 209.

44 Bill 28, *supra* note 9, explanatory note, preamble. See also Adam Strömbergsson-De-Nora & Rebecca Jaremko Bromwich, "Charter, Constitutionality and the Honour of the Crown: Considering an Additional Constraint" (2024) 46:4 Man LJ 157 at 159–60.

45 Bill 28, *supra* note 9, preamble.

46 *Ibid*, s 13(1).

[the] Act."[47] Since regulations made under Bill 28 are by the lieutenant governor in council (section 16), they are not legislation in the strict sense but are rather administrative decisions, even if they have a quasi-legislative dimension to them.[48]

Further, subsection 15(1) of Bill 28 suggested that there could be "no legal basis for a proceeding" against the Crown or any administrative decision-maker implementing Bill 28. Subsection 15(3) suggested broad application to "any court, arbitral or administrative proceeding, including any application, claim or complaint, claiming any remedy or relief." Subsection 15(4) suggested that "[f]or greater certainty, subsection (3) applies to any proceedings, including any application, claim or complaint, claiming damages or any other remedy" under subsection 24(1) of the *Charter* or subsection 52(1) of the *Constitution Act, 1982* "for any purported infringement of section 2, 7 or 15" of the *Charter*. Subsection 15(5) suggested that "[f]or greater certainty, subsections (1) to (3) do not preclude an application for judicial review, but no remedy shall be granted in an application for judicial review with respect to any purported infringement referred to in subsection (4)."[49]

Thus, sections 13 and 15 of Bill 28 together expressed an intention by the legislature to use section 33 of the *Charter* to ensure not only that Bill 28 itself would operate notwithstanding the relevant *Charter* sections, but also that any administrative implementation of Bill 28 would survive notwithstanding those provisions.[50] In other words, the legislature was at least purporting to use Bill 28 to authorize administrative decisions made under it that might be inconsistent with sections the *Charter*. But can the legislature really authorize such decisions by using section 33 to extend immunity from *Charter* challenges based on those provisions to administrative decisions made under such legislation? If the legislature can really authorize such decisions, and not merely purport to

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47 *Ibid.*

48 On treating regulations made by a provincial board as administrative decisions, see *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paras 8–10. On treating regulations made by the Governor in Council as administrative decisions, see also *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 51.

49 See generally Bill 28, *supra* note 9, s 15.

50 In Part IV, I explore the possibility that sections 13 and 15 amount to a privative clause, which seeks to limit judicial review.

do so, to what extent are the administrative decisions immune from judicial review on the grounds of inconsistency with sections 2 and 7 to 15 of the *Charter*?

II. SECTION 33 CAN IN PRINCIPLE BE USED TO ENSURE ADMINISTRATIVE DECISIONS SURVIVE NOTWITHSTANDING SECTIONS 2 AND 7 TO 15 OF THE *CHARTER*

A. The Delegation Argument

I suggest that the legislature can in principle use section 33 of the *Charter* to ensure that administrative decisions survive notwithstanding sections 2 and 7 to 15 of the *Charter*. The main rationale is based on the legislature's unquestionable ability to delegate its authority.[51]

In administrative law, it is well established that a legislature which cannot itself do something constitutionally cannot authorize another entity to do the same thing.[52] Thus, where the legislature cannot itself make a decision that would be unconstitutional, an administrative decision-maker acting under legislative authority cannot make the same decision. The converse principle is that a legislature which can itself do something constitutionally can authorize another entity to do the same thing.[53]

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51 See e.g. *Vavilov*, *supra* note 25 at paras 4, 12. See also Alyn James Johnson, "The Case for a Canadian Nondelegation Doctrine" (2019) 52:3 UBC L Rev 817 at 888–90; Paul Daly, "The Administrative State after the Carbon Tax References" (2021) 26:1 Rev Const Stud 33 at 40–41; John Mark Keyes, "Parliamentary Scrutiny and Judicial Review of Executive Legislation — Is It Working in Canada?" (2023) 17 JPPL 191 at 192.

52 See e.g., Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2022) (loose-leaf 2022 supplement) at § 14:5; *Vavilov*, *supra* note 25 at para 56; *Doré*, *supra* note 24 at para 35; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 17 (citing *Ross v New Brunswick School District No. 15*, 1996 CanLII 237 at para 31 (SCC)); *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 at 1077–78, 1989 CanLII 92 (SCC) (citing *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 at para 20 (SCC)).

53 See e.g. *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 84–85; Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond, 2022) 103 at 110. See also Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55:3 UTLJ 575 at 575 (see

Thus, where the legislature can itself make a decision that would be constitutional, an administrative decision-maker acting under legislative authority can make the same decision.[54] In both cases, the general principle is that whatever the legislature can or cannot do, constitutionally speaking, it accordingly can or cannot delegate.[55]

Applying this general principle and, in particular, the converse principle to the situation at hand, suggests that since the legislature can itself make (legislative) decisions that operate notwithstanding the relevant sections of the *Charter*, it can authorize an administrative decision-maker to make (non-legislative) decisions that survive notwithstanding those *Charter* provisions. That is, the legislature can delegate its authority to make decisions notwithstanding those *Charter* provisions to administrative decision-makers.

In my view, this delegation argument provides the basis for the legislature to use section 33 to immunize administrative decisions, even though the extent to which the legislature can delegate its authority is a complex issue. I wish to acknowledge this complexity. One might think of section 33 as a provision that limits the legislature's ability to act rather than a provision that empowers the legislature to do something—so perhaps we should emphasize that section 33 is about constraining rather than empowering the legislature. Still, a plausible reading of section 33 is that it authorizes the legislature to act notwithstanding the relevant *Charter* provisions.[56] In this context, there is nothing problematic about

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especially the second opening quotation, from Ernest Gellhorn & Glen O Robinson, "Perspectives on Administrative Law" (1975) 75:4 Colum L Rev 771, which describes "the delegation of powers by the legislature" as "the foundation of administrative law" at 774).

54 The only apparent exception is attempted delegation to the electorate (see *The Initiative (Re)*, 1919 CanLII 426 (UK JCPC)). But that might not be a real exception since such attempted delegation seems to amount to an abdication of responsibility. That is importantly not the case with delegation to an administrative decision-maker. For discussion, see Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask L Rev 45.

55 See Hogg & Wright, *supra* note 52 at § 14:1 ("there is no strict requirement that 'legislative' and 'executive' powers be exercised by separate and independent bodies" at § 14:5).

56 See e.g. Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University

conceiving of section 33 as I am suggesting, where the provision empowers the legislature to act in certain ways subject to constitutional limits, including those specified in section 33 itself, such as that a section 33 declaration expires after five years. The five-year expiration period corresponds to the maximum duration of legislative bodies, which is also five years (under section 4 of the *Charter*), so it is reasonable to infer that a use of section 33 is meant to be supported by democratic legitimacy.[57] But even if democratic legitimacy properly constrains the use of section 33, it does not follow that administrative decisions cannot receive immunity under section 33. The whole point of the delegation argument is that it is the legislature—which has democratic legitimacy, if anything or anyone does—that delegates its authority to make decisions notwithstanding the relevant *Charter* provisions to administrative decision-makers. It is always the legislature and not an administrative decision-maker that uses section 33.

B. Supporting Considerations

A supporting consideration for the conclusion that the legislature can in principle use section 33 to immunize administrative decisions is the purpose of section 33. While the Supreme Court has not ascertained the purpose of section 33 in the way that it has done so when interpreting other *Charter* provisions, we should plausibly understand section 33

Press, 2019) 209 ("the [notwithstanding] clause does not just empower government abstractly, as in debates about rights in general, but empowers both the federal parliament and provincial legislatures" at 225); Eric M Adams & Erin RJ Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the Charter" (2022) 26:2 Rev Const Stud 121 & (2022) 27:1 Rev Const Stud 121 ("[w]hat the notwithstanding clause promises is ... [in part] an enabling of parliamentary power" at 139) [Adams & Bower, "Notwithstanding History"].

57 See e.g. Lorraine E Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80:1/2 Can Bar Rev 699 at 727–33. See also Leckey & Mendelsohn, *supra* note 4 ("[t]hrough the democratic process, the public has occasion to express judgments about past legislative decisions to use the notwithstanding clause and about future-oriented commitments by political actors as to whether to renew or repeat its use" at 199). On the differing levels of accountability had by legislative and executive or administrative decision-makers, see Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal LJ 519 at 551–53.

given its purpose—and the history behind section 33 sheds light on this purpose.

Section 33 was included in the *Charter* in part as a compromise so that provinces seeking to maintain legislative supremacy and to avoid transferring power from elected officials to the judiciary could have the last word on the scope of certain rights and freedoms.[58] There is suggestion that the *Charter* would not have been possible in the first place without the inclusion of section 33.[59] This history suggests that the purpose of section 33 is to ensure that the legislature has the last word on the scope of the rights in the relevant sections of the *Charter*. Assuming, as is plausible, this (or something like it) is the purpose of section 33, there is no principled reason why the legislature's ability to use section 33 to permit legislation to operate notwithstanding the relevant *Charter* provisions does not extend to its ability to use section 33 to permit non-legislative, administrative decisions to survive notwithstanding those

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58 See e.g. Newman, *supra* note 56 at 214, 219, 221, 231–32 ("[t]he dominant purpose of s. 33, as expressed in the lead features of its text, is to permit a Canadian federal parliament or provincial legislative assembly to have the last word on rights questions by making declarations that ensure the operation of particular statutory enactments" at 221). See also Brian Slattery, "Canadian Charter of Rights and Freedoms — Override Clauses Under Section 33 — Whether Subject to Judicial Review Under Section 1" (1983) 61:1 Can Bar Rev 391 at 396; Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221 at 223; Barbara Billingsley, "Section 33: The Charter's Sleeping Giant" (2002) 21 Windsor YB Access Just 331 at 332; Cameron, "Legislative Override", *supra* note 2 at 137, 141–148; Janet L Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 107 at 108 [Hiebert, "Compromise"]; Allan E Blakeney, "The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 Const Forum Const 1 at 5; Mark Carter, "Diefenbaker's *Bill of Rights* and the 'Counter-Majoritarian Difficulty': The Notwithstanding Clause and Fundamental Justice as Touchstones for the *Charter* Debate" (2019) 82:2 Sask L Rev 121 at 136–37; Geoffrey T Sigalet, "The Truck and the Brakes: Understanding the Charter's Limitations And Notwithstanding Clauses Symmetrically" (2022) 105 SCLR (2nd) 194 at 199, 222; Adams & Bower, "Notwithstanding History", *supra* note 56 at 143–44; Thomas S Axworthy, "An Historic Canadian Compromise: Forty Years After the Patriation of the Constitution, Should We Cheer a Little?" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024), 25 at 28.

59 See e.g. Hiebert, "Compromise", *supra* note 58 at 109.

provisions. On the contrary, it appears that the purpose of section 33 requires that the legislature be able to use section 33 in this way.

Another supporting consideration is the text of section 33. This might seem surprising, since the text of section 33 seems focused on legislation. Subsection 33(1) refers to a declaration in an "Act of Parliament or of the legislature" and "the Act or a provision thereof." Subsection 33(2) similarly refers to "[a]n Act or a provision of an Act in respect of which a declaration made under this section is in effect."[60] So, a narrow reading of section 33 might suggest that the provision concerns legislation and nothing more. But, in my view, such a narrow meaning seems implausible and fails to give effect to the clear direction that legislation "operate notwithstanding" and "have such operation as it would have but for" the relevant *Charter* provisions.[61] The mere existence of legislation means little without operation or enforcement, which in practice occurs through administrative implementation. So, to give proper effect to the words "operate notwithstanding" and "have such operation but for" the relevant *Charter* provisions, any plausible interpretation of section 33 would seem to require extending at least part of the legislature's immunity in its legislative decision-making to administrative decision-makers, so that they too have some level of immunity in decision-making.

C. Countervailing Considerations

To be sure, the above supporting considerations involving the purpose and text of section 33 are just that—considerations—and are not decisive. The contrary conclusion, namely that the legislature cannot use section 33 to ensure that administrative decisions survive notwithstanding those *Charter* provisions, finds support in several, related countervailing considerations. However, these considerations do not detract from my conclusion that the legislature can in principle use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* sections.

First, perhaps insofar as section 33 itself is a regrettable part of Canada's constitution, courts may or even must refuse to give effect to the legislature's attempt to use section 33 to immunize administrative

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60 See generally *Charter*, *supra* note 1, s 33.

61 *Ibid*, ss 33(1)–(2).

decisions; even if courts must give effect to the legislature's use of section 33 to immunize *legislative* decisions from *Charter* scrutiny because the text leaves no room to do otherwise, courts may or must refuse to give effect to the legislature's attempt to use section 33 to protect administrative decisions because the text is ambiguous enough. However, this countervailing consideration assumes that section 33 itself is indeed a regrettable part of Canada's constitution, even though it is unclear whether courts can properly proceed on that basis while staying within their judicial role. The courts are typically confined to assessing the lawfulness but not the wisdom of the law that they are tasked with interpreting and applying.[62]

Second, the text of Canada's constitution could be—but has not been—drafted to explicitly permit the legislature to immunize administrative decisions implementing immunized legislation from *Charter* scrutiny.[63] This countervailing consideration correctly notes that the text of section 33 could be drafted to explicitly permit the legislature to immunize administrative, as well as legislative, decisions from *Charter* scrutiny. But the absence of explicit permission is not determinative. As I have suggested, a plausible interpretation of the text would seem to require extending at least part of the legislature's immunity in its legislative decision-making to administrative decision-makers.

Third, just as Canadian tort law recognizes a distinction between "core policy" decisions that are shielded from negligence liability and "operational" decisions implementing policies that are not so shielded, so it might be that even if legislative decisions are immune from *Charter* scrutiny, administrative decisions implementing immunized legislative

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62 See e.g. Newman, *supra* note 56 at 226.

63 By contrast, consider that the UK's *Human Rights Act 1998* (UK), s 6 explicitly immunizes administrative decisions implementing legislation that is incompatible with Convention rights. Subsection 6(1) says: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right," where a Convention right is a right under the European Convention on Human Rights. However, subsection 6(2) says:

> Section (1) does not apply to an act if ... (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

decisions are not so immune.[64] However, this countervailing consideration tries to import a distinction from tort law into administrative law, even though that distinction has been problematically unclear and it is questionable whether administrative law could or should adopt an analogous one.[65] Modern administrative law focuses on the substance of decisions and would seem to resist making judicial review depend on whether a decision is classified as "policy" or "operational"—a classification that has been notoriously difficult to make in tort law. Many administrative decisions can plausibly be characterized as both policy decisions and operational decisions. For example, in *Insite*, the minister's refusal to grant an exemption to the supervised injection site was a policy decision insofar as the refusal reflected the government's stance on drug use; and the refusal was also an operational decision insofar as it implemented the government's policy on drug use.[66]

D. The Objection Based on the Constitutionally Protected Power of Judicial Review Fails

Perhaps the main objection to my suggestion that the legislature can in principle use section 33 to immunize administrative decisions is that the legislature's doing so invades the judiciary's constitutionally protected power to review administrative decisions under section 96 of the *Constitution Act, 1867*.[67] The principle from the foundational case of *Crevier v. A.G. (Québec) et al.* is that "where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions ... [such] provincial legislation must be struck down as unconstitutional."[68] Chief Justice Laskin held in *Crevier* that "a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction"—a limitation

64 See e.g. *Nelson (City) v Marchi*, 2021 SCC 41 at paras 38–49.

65 See Paul Daly, "The Policy/Operational Distinction – A View from Administrative Law" in Matthew Harrington, ed, *Compensation and the Common Law* (Toronto: LexisNexis, 2015) 1.

66 *Insite*, *supra* note 16 at paras 81, 103–105.

67 See *Vavilov*, *supra* note 25 at para 24, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31 [*Dunsmuir*]; *Crevier v AG (Québec)*, [1981] 2 SCR 220 at 236–37, 1981 CanLII 30 (SCC) [*Crevier*]; *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1090, 1988 CanLII 30 (SCC) [*UES*].

68 *Crevier*, *supra* note 67 at 234.

which he held "stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality."[69] *Crevier* continues to stand for the proposition that there is a constitutionally protected right to judicial review, at least on certain questions such as jurisdiction.[70] More recently, *Vavilov* affirmed that "because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely."[71] So, one might reason that an attempt by the legislature to use section 33 to immunize administrative decisions invades the court's constitutionally protected power to review those decisions.

However, this objection fails: it relies on too broad an understanding of the constitutionally protected power of judicial review, too broad an understanding of the section 33 immunity at stake, or both. No one can reasonably understand section 33 to mean that the legislature can use it to completely immunize legislation from judicial review. Even on the

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69 *Ibid* at 236.

70 Although the section 96 jurisprudence has evolved since *Crevier*, the core point still stands (see *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at para 42, 1995 CanLII 57 (SCC), affirming Laskin CJ's statement in *Crevier*, *supra* note 67 at 236).

71 *Vavilov*, *supra* note 25 at para 24, citing *Dunsmuir*, *supra* note 67 at para 31; *Crevier*, *supra* note 67 at 236–37; *UES*, *supra* note 67 at 1090. *Vavilov* did suggest subjecting jurisdictional questions (including, presumably, the ones contemplated in *Crevier*) to reasonableness review rather than correctness review, but this change does not detract from the core point that judicial review is constitutionally protected (see *Vavilov*, *supra* note 25 at paras 65–68). The post-*Vavilov* case of *Reference Re Code of Civil Procedure (Que), art 35* affirmed *Crevier* on this point, and the recent case of *Yatar v. TD Insurance Meloche Monnex* affirmed *Vavilov* (see *Reference Re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at para 51; *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 61 [*Yatar*]). Although there is debate over the extent to which judicial review is constitutionally protected after *Vavilov*, it is not in doubt that judicial review remains constitutionally protected. For discussion of the availability of judicial review given *Vavilov*, see Hogg & Wright, *supra* note 52 at § 7:20. See also Paul Daly, "Unresolved Issues After *Vavilov*" (2022) 85:1 Sask L Rev 89 at 110–17 [Daly, "Unresolved Issues"]; Mark Mancini, "Foxes, Henhouses, and the Constitutional Guarantee of Judicial Review: Re-Evaluating *Crevier*" (2024) 102:2 Can Bar Rev 315; *Canada (AG) v Best Buy Canada Ltd*, 2021 FCA 161; *Democracy Watch v Canada (AG)*, 2022 FCA 208; *Democracy Watch v Canada (AG)*, 2023 FCA 39; *Canada (AG) v Pier 1 Imports (United States), Inc*, 2023 FCA 209. There is currently debate involving the availability of judicial review where there is a privative clause, i.e., a clause that seeks to limit judicial review. However, *Yatar* left the question for another day (*supra* note 71 at para 50).

maximalist view of the section 33 immunity in the context of legislation, the claim is only that the immunity precludes judicial review on the grounds of inconsistency with the relevant sections of the *Charter*.[72] The qualification involving the grounds of review is crucial. There is no suggestion that the immunity precludes judicial review on other grounds, such as other *Charter* provisions, other constitutional grounds (such as the division of powers) or non-constitutional, purely administrative law grounds (such as common law procedural fairness). Further, although *Crevier* means that there is a constitutionally protected power of judicial review based on at least some grounds, there is no suggestion that the power is so broad as to permit judicial review based on any ground. There are well established privileges and immunities, such as cabinet immunity, that restrict the scope of judicial review. The situation is similar with administrative decisions. My suggestion is not that the legislature can use section 33 to completely immunize administrative decisions from judicial review, in part since that is not something the legislature can do even with its own legislation, which is subject to judicial review on grounds other than the relevant *Charter* sections. Rather, my suggestion is only that the legislature can use section 33 to at least partly immunize administrative decisions. In the next Part, I will say more about what I mean by immunity in the context of administrative decisions, but for now I only want to emphasize that the immunity is analogous to the immunity in the context of legislative decisions. The legislature can in principle use section 33 to ensure that administrative decisions made under legislation survive notwithstanding the relevant *Charter* provisions, just as it can use section 33 to ensure that legislation it enacts operates notwithstanding those provisions.

However, to avoid misunderstanding, I want to clarify what this conclusion does not entail. Nothing I have said detracts from the continued availability of judicial review based on provisions other than sections 2 and 7 to 15 of the *Charter*. Nor does it detract from the availability of private law claims against public authorities. Thus, even if the legislature uses section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* sections, courts can in principle still

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72 For example, in *Working Families*, the claimants challenged legislation that was protected by section 33 based on section 3 of the *Charter*. The Court of Appeal for Ontario held that the legislation unconstitutionally infringed section 3 (see *Working Families*, *supra* note 4 at paras 9–14).

consider challenges to those decisions based on other grounds, whether the basis for those claims is from elsewhere in public law or from private law.[73]

III. HOW SECTION 33 CAN BE USED TO ENSURE ADMINISTRATIVE DECISIONS SURVIVE NOTWITHSTANDING SECTIONS 2 AND 7 TO 15 OF THE *CHARTER*

So far, I have argued that the legislature can, in principle, use section 33 of the *Charter* to ensure that administrative decisions made under legislation survive notwithstanding sections 2 and 7 to 15 of the *Charter*—but can the legislature, *in fact*, do so? In this Part, I focus on a complication arising from the evolving framework for assessing whether administrative decisions comply with the *Charter*.

Before 2012, courts generally assessed all administrative decisions for *Charter* compliance using the same framework that they used to assess legislation for *Charter* compliance: the *Oakes* framework, which is based on a limitation of a *Charter* right.[74] Courts applying the *Oakes* framework uphold limits on the *Charter* as *Charter*-compliant where (1) there is a pressing and substantial objective and (2) proportionality between societal and individual interests in that (a) the measures are rationally connected to the objective, (b) the means minimally impair the right, and (c) there is proportionality between the effects of the measures and the objective.[75]

But, as I will explain, in 2012, the Supreme Court announced that courts should assess at least some administrative decisions for *Charter* compliance using a different framework, one based on a limitation of a *Charter* "protection"—a *Charter* right or a *Charter* value. Courts applying the *Doré* framework uphold limits on the *Charter* as *Charter*-

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73 For a discussion that suggests section 33 of the *Charter* cannot prevent a claimant from relying on pre-*Charter* law and principles, see André Schutten & Tabitha Ewert, "Section 31 and the Charter's Unexplored Constraints on State Power" (2022) 105 SCLR (2nd) 322.

74 *R v Oakes*, 1986 CanLII 46 at 135, 138–39 (SCC) [*Oakes*].

75 See generally *ibid.*

compliant where the limit proportionately and reasonably balances *Charter* protections and statutory objectives.[76]

This new framework gives rise to many issues, but here, I focus on just one: Are *Charter* rights the same as *Charter* values, and if not, does the framework involve *Charter* rights, *Charter* values, or both?

Given the complication arising from the evolving framework for assessing whether administrative decisions comply with the *Charter*, in this Part, I distinguish between two general approaches to such an assessment; one based on *Charter* rights and the other based on *Charter* values. Although there was initially confusion over the framework, the Court has recently clarified it,[77] consistent with my suggestion to distinguish between these two general approaches.

Distinguishing between these two general approaches is crucial because, as I will explain, the effect of using section 33 of the *Charter* in the context of administrative decisions depends on the approach to assessing administrative decisions for *Charter* compliance.[78] On the *Charter* rights approach, I suggest that using section 33 has effects that are analogous to the effects of using section 33 in the context of legislation; at the least, it prevents a court from quashing the decision. On the *Charter* values approach, however, I suggest that using section 33 has no effect on *Charter* values or their enforcement.

A. The Doré *Framework*

The framework introduced in *Doré* requires the administrative decision-maker to balance statutory objectives and *Charter* protections, which are said to be *Charter* rights and *Charter* values.

In the 2012 case of *Doré*, Justice Abella, for the Court, articulated the framework in several—apparently non-equivalent—ways. She started by suggesting that in assessing whether an administrative decision violates

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76 For an elaboration on *Doré*, see *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 37–42 [*Loyola*].

77 *CSFTNO*, *supra* note 26 at paras 59–74, 84, 92.

78 I focus on substantive review and not procedural review. It is unclear whether the *Doré* framework applies to the procedural review of administrative decisions, so I confine my discussion to the substantive review of administrative decisions, to which the framework clearly applies.

the *Charter*, the court balances whether the "decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right."[79] In doing so, she suggested that just as in assessing whether a law violates the *Charter*, the court is determining "whether there is an appropriate balance between rights and objectives" and the purpose of the exercise is "to ensure that the rights at issue are not unreasonably limited."[80] Elsewhere in her reasons, she held that on the new framework, as on the *Oakes* framework, the framework contemplates deferring to decision-makers in "balancing *Charter* values against broader objectives."[81] These differently-worded articulations of the framework do not necessarily indicate different frameworks altogether, as perhaps Justice Abella understood *Charter* "values" to be the same as *Charter* "rights."[82] Yet, elsewhere in *Doré*, Justice Abella discussed "[i]ntegrating *Charter* values into the administrative approach," hinting that *Charter* values might be different from *Charter* rights.[83] In applying the new framework to the facts, Justice Abella did not apply or even consider the doctrinal test for infringement of freedom of expression, which was the "*Charter* value at issue" in the case.[84]

Doré attracted significant criticism for many reasons, including its introduction of *Charter* values into the framework for assessing *Charter* compliance. In 2014, two years after *Doré*, many commentators found that it was unclear what *Charter* values are. Christopher D. Bredt and Ewa Krajewska wrote that "the scope and essence of Charter values are ill defined" and discussed the "nebulous nature of Charter values."[85] Similarly, Matthew Horner criticized the language in *Doré* for "caus[ing] considerable confusion among litigants, tribunals and other courts"[86] and suggested rejecting the concept of *Charter* values, which "create

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79 *Doré*, *supra* note 24 at para 6.

80 *Ibid*.

81 *Ibid* at para 57.

82 See also *ibid* at paras 23, 34.

83 See generally *ibid* at paras 35–42.

84 *Ibid* at para 59.

85 Christopher D Bredt & Ewa Krajewska, "*Doré*: All That Glitters is Not Gold" (2014) 67 SCLR (2nd) 339 at 339.

86 Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR (2nd) 361 at 362.

ambiguity when previously there was none"[87] and whose "substantive scope ... is ill defined."[88] Audrey Macklin argued that the Court's approach "lack[ed] necessary rigour, clarity and suppleness" and "respect[ed] neither the primacy nor priority of Charter rights and produce[d] instead a Charter-lite approach to discretion."[89] Even Lorne Sossin and Mark Friedman, who were more sympathetic to *Doré*, agreed that there was a "lack of precise definition or explanation as to what is or is not a Charter value and why."[90]

Two later cases from the Court re-articulated the *Doré* framework. In the 2015 case of *Loyola High School v. Quebec (Attorney General)*, Justice Abella, for the majority, held that "*Doré* requires administrative decision-makers to proportionately balance the *Charter* protections—values and rights—at stake in their decisions with the relevant statutory mandate."[91] The reference to "values and rights" suggested that *Charter* rights are distinct from *Charter* values, a suggestion Justice Abella confirmed in explaining that *Charter* values are "those values that underpin each right and give it meaning."[92] Presumably, something cannot underpin itself and give itself meaning, so this explanation suggests that *Charter* rights are distinct from *Charter* values. In applying the framework to the facts, Justice Abella concluded that the administrative decision in the case engaged religious freedom under the *Charter* without applying or considering the doctrinal test for infringement of religious freedom.[93]

Then, in the 2018 case of *Law Society of British Columbia v. Trinity Western University*, a majority (including Justice Abella) held that the *Doré* framework is concerned with "ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives,"

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87 *Ibid.*

88 *Ibid.*

89 Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2nd) 561 at 563 [Macklin, "Charter Right"].

90 Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2nd) 391 at 409.

91 *Loyola*, *supra* note 76 at para 35 [reference omitted].

92 *Ibid* at para 36.

93 *Ibid* at paras 58–61.

so that "*Charter* rights are no less robustly protected."[94] But if "*Charter* rights are no less robustly protected," that would seem to suggest that *Charter* values are virtually identical to *Charter* rights. Yet the majority did not explain whether that was indeed the case or whether they might still be distinct. It simply reiterated that if "*Charter* protections — both rights and values" are limited, "the question becomes 'whether ... the decision reflects a proportionate balancing of the *Charter* protections at play.'"[95] In applying the framework to the facts, the majority considered and applied the doctrinal test for infringement of religious freedom.[96] Chief Justice McLachlin agreed with the majority that the *Doré* framework applied but, given commentary on the framework, sought to "address some of the gaps and omissions in the framework" by clarifying that it concerns *Charter* "rights," not *Charter* "values."[97] Justice Rowe similarly interpreted the framework;[98] Justices Côté and Brown (dissenting) used stronger language. They found that "[t]he majority's continued reliance on 'values' protected by the *Charter* as equivalent to 'rights' is ... troubling."[99] In their view, *Charter* values are "unsourced," "amorphous and ... undefined."[100]

Despite the Court's attempts to clarify the *Doré* framework, what exactly it involves remained unclear for some time.[101] Are *Charter* rights and *Charter* values the same, or not? If not, which must be balanced?

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94 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 57 [*TWU*].

95 *Ibid* at para 58, citing *Doré*, *supra* note 24 at para 57 and *Loyola*, *supra* note 76 at para 39.

96 *TWU*, *supra* note 94 at paras 60–75.

97 *Ibid* at paras 111–12, 115.

98 *Ibid* at para 166 [reference omitted].

99 *Ibid* at para 306 [reference omitted].

100 *Ibid* at paras 308–09.

101 For the scholarship, see e.g. Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law: Substantive Review" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond, 2022) 399 at 408. See also Hoi L Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 SCLR (2nd) 501; Macklin, "Charter Right", *supra* note 89; Sossin & Friedman, *supra* note 90; Horner, *supra* note 86 at 385; Bredt & Krajewska, *supra* note 85 at 358; Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66:1 UTLJ 121 at 137–40; Mary Liston, "Administering the Charter, Proportioning Justice:

Further, a new framework subsequently introduced in the 2019 case of *Vavilov* for selecting and applying the standard of review left the status of *Doré* unclear, and the Court in *Vavilov* expressly declined to address *Doré*.[102] Still, *Vavilov* did seem to have implications for *Doré*.[103] With respect to selecting the standard of review, *Vavilov* set out a presumption that reasonableness, rather than correctness, is the applicable standard whenever a court reviews administrative decisions.[104] But, according to *Vavilov*, this presumption can be rebutted either where the legislature has indicated that it intends a different standard or set of standards to apply, or where the rule of law requires that the standard of correctness be applied.[105] With respect to applying the standard of review of reasonableness, *Vavilov* also clarified its application, emphasizing the need for a

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Thirty-five Years of Development in a Nutshell" (2017) 30:2 Can J Admin L & Prac 211; Justin Safayeni, "The Doré Framework: Five Years Later, Four Key Questions (And Some Suggested Answers)" (2018) 31:1 Can J Admin L & Prac 31; Audrey Macklin, "On Being Reasonably Proportionate" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford, UK: Hart Publishing, 2018) 79 at 99; Peter D Lauwers, "What Could Go Wrong with Charter Values?" (2019) 91 SCLR (2nd) 1 at 1–4; Matthew P Harrington, "Canada's New Hierarchy of Rights" (2019) 91 SCLR (2nd) 297; Charlotte Baigent, "Undoing Doré: Judicial Resistance in Canadian Appellate Courts" (2020) 33:1 Can J Admin L & Prac 63; Carmelle Dieleman, "Accommodating Rights in Administrative Law: A Critique of the *Doré/Loyola* Framework" (2021) 34:2 Can J Admin L & Prac 197; Mark Mancini, "The Future of Section 1 in the Law of Judicial Review" (2023) 112 SCLR (2nd) 237; Meera Bennett & Steven Davis, "A Reasonable (or Correct?) Look at Charter Values in Canadian Administrative Law" (2023) 36:2 Can J Admin L & Prac 91 at 92; Richard Stacey, "Public Law's Cerberus: A Three-Headed Approach to *Charter* Rights-Limiting Administrative Decisions" (2023) 37:1 Can JL & Jur 287. For appellate cases, see e.g. *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at paras 76–83, Lauwers & Miller JJA; *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893, Lauwers JA, concurring; *Ontario Nurses' Association v Participating Nursing Homes*, 2021 ONCA 148 at paras 139–156; *Elementary Teachers Federation of Ontario v York Region District School Board*, 2022 ONCA 476 at paras 43–44; *Law Society of British Columbia v Harding*, 2022 BCCA 229 at paras 55; *Gordon v British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260 at paras 55–56; *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at para 140; *CSFTNO*, *supra* note 26 at paras 59–74, 84, 92.

102 *Supra* note 25 at para 57.

103 See generally Vincent Roy, "The Implications of the Vavilov Framework for Doré Judicial Review" (2022) 48:1 Queen's LJ 1.

104 *Supra* note 25 at para 16.

105 *Ibid* at para 17.

culture of justification and robust reasonableness review, which demands responsiveness to the entire context, including legal and factual constraints.[106]

We can distinguish between two views on the status of *Doré* given *Vavilov*. One view is that *Vavilov* casts doubt on and may have even displaced *Doré*.[107] After all, *Vavilov* says correctness is the standard of review for constitutional questions involving the division of powers and rights under section 35 of the *Constitution Act, 1982* because the rule of law requires a final and determinate answer to such questions.[108] Since *Charter* questions might seem to be analogous constitutional questions, *Vavilov* might similarly require a final and determinate answer to *Charter* questions. If so, an apparently more exacting framework, like the *Oakes* framework, would seem to be more appropriate than the apparently more deferential *Doré* framework. An opposing view on the status of *Doré*—given *Vavilov* is that far from casting doubt on or displacing *Doré*—*Vavilov* actually enhances *Doré*.[109] After all, *Doré* calls for robust review based on reasonableness.[110] *Vavilov* also calls for the same. So, *Doré* might align well with *Vavilov*.

The Court's recent unanimous decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)* has helpfully clarified the proper understanding of the *Doré* framework, given both lack of clarity over what the framework involves and *Vavilov*.[111] The case concerned section 23 of the

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106 *Ibid* at paras 2, 12–14, 67, 72, 90, 99, 105.

107 See Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie LJ 793; Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2:1 J of Commonwealth L 1 at 38–45; Anthony Sangiuliano, "The Dawn of *Vavilov*, the Twilight of *Doré*: Remedial Paths in Judicial Review of Rights-Affecting Administrative Decisions and the Unification of Canadian Public Law" (2022) Alta L Rev 725 at 741.

108 *Vavilov*, *supra* note 25 at paras 53, 55.

109 See Paul Daly, "Big Bang Theory: Vavilov's New Framework for Substantive Review" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Publishing, 2022) 327 at 346–47; Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338 at 352; Daly, "Unresolved Issues", *supra* note 71 at 104–10.

110 See *Loyola*, *supra* note 76 at para 40; *TWU*, *supra* note 94 at paras 79–80.

111 See *CSFTNO*, *supra* note 26 at paras 59–74, 84, 92.

Charter, which grants a defined category of Canadian citizens the right to have their children receive instruction in one of the two official languages where it is the minority language.[112] The issue was whether the refusal to admit children of non-rights holder parents to minority language schools in the Northwest Territories gave due consideration to the protections conferred by section 23.[113] Several non-rights holder parents asked the relevant minister to exercise her discretion to admit their children to a French first language education program, but the minister denied the requests.[114] On judicial review, Justice Côté, for the Court, stated: "It is through the lens of *Doré*, which governs the judicial review of administrative decisions that engage the *Charter*, that the Minister's decisions must be considered. This case is a straightforward application of that precedent."[115] Importantly, the Court both affirmed *Doré* and clarified that, under that framework, *Charter* values are distinct from *Charter* rights.

First, Justice Côté clarified the distinction between *Charter* values and *Charter* rights. She noted that under the *Doré* framework, "a reviewing court must begin by determining whether the administrative decision at issue 'engages the *Charter* by limiting *Charter* protections — both rights and values.'"[116] But the parties in the case disagreed over whether "the *Doré* framework applies only in cases where an administrative decision *directly* infringes a *right*."[117] Justice Côté clarified that "the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights."[118] This is "because administrative decision makers have an obligation to consider the values relevant to the exercise of their discretion, in addition to respecting *Charter* rights,"[119] and there "can be no doubt about this,

112 *Ibid* at para 1.

113 *Ibid* at para 5.

114 *Ibid* at para 6.

115 *Ibid* at para 59.

116 *Ibid* at para 61 (citing *Loyola*, *supra* note 76 at para 39 and *TWU*, *supra* note 94 at para 58) [references omitted].

117 *Ibid* at para 62 [emphasis in original, references omitted].

118 *Ibid* at para 64 [emphasis in original, references omitted].

119 *Ibid* at para 65.

because '[t]he Constitution — both written and unwritten — dictates the limits of all state action."[120] Relatedly, "a discretionary decision, to be reasonable, must be made in accordance with the 'fundamental values of Canadian society' as reflected in the *Charter*," so that "discretionary decisions must '*always*' take *Charter* values into consideration."[121]

Second, Justice Côté affirmed *Doré*, whose status was unclear given *Vavilov*. The standard of review applicable in reviewing discretionary administrative decisions that limit *Charter* protections remains reasonableness.[122] Reasonableness under *Vavilov* requires justification in relation to relevant law and facts, and so it requires an administrative decision-maker to consider the relevant *Charter* values.[123] Further, in the context of discretionary decisions that engage *Charter* protections, *Doré* is the governing framework.[124]

On the facts, Justice Côté concluded that although there was no dispute that the parents' *Charter* rights (under section 23) had not been infringed, the minister's decisions limited the relevant *Charter* values underlying the right, and so the *Doré* framework applied.[125] The minister was required to consider the values of preservation and development of minority language communities in exercising her discretion to decide whether to admit children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories.[126] Refusing to admit those children by prioritizing the government's interests had the effect of limiting the values of preservation and development of minority language communities, so the minister had to proportionately balance

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120 *Ibid* at para 65 (citing *Vavilov*, *supra* note 25 at para 56) [references omitted].

121 *Ibid* at para 65 (citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 56 and *Doré*, *supra* note 24 at para 35) [emphasis in original, references omitted].

122 *Ibid* at para 60 (citing *Vavilov*, *supra* note 25 at paras 16–17).

123 *Ibid* at para 77 (citing *Loyola*, *supra* note 76 at para 36) [reference omitted]. See also *ibid* at para 68.

124 *Ibid* at paras 67–74.

125 *Ibid* at paras 63, 74, 83–84.

126 *Ibid* at para 83.

these values with the government's interests.[127] But the minister failed to truly consider these values, and so her decisions were unreasonable.[128]

B. *Two Approaches to the* Doré *Framework: The* Charter *Rights Approach and the* Charter *Values Approach*

Consistent with the Supreme Court's recent decision in *CSFTNO*, I suggest that we can distinguish between two general approaches to the *Doré* framework and, more generally, to assessing administrative decisions for compliance with the *Charter*. One approach is based on *Charter* rights, and the other approach is based on *Charter* values.

I assume, as the weight of both authority and reason suggests, that *Charter* rights are distinct from *Charter* values.[129] I also assume, as Justice Abella held in *Loyola*, and as the unanimous Court affirmed in *CSFTNO*,[130] that *Charter* values are those values that "underpin each right and give it meaning."[131] Unlike *Charter* rights, the limitation of which depends on the application of the doctrinal tests, *Charter* values underpin and have broader scope than *Charter* rights. Thus, *Charter* values can engage the *Doré* framework even in the absence of any infringement of a right.[132]

On the *Charter* rights approach, assessing an administrative decision for compliance with the *Charter* involves balancing statutory objectives and *Charter* rights. That is the approach in both a section 1 analysis based on the *Oakes* framework and one of the dominant understandings of the *Doré* framework. On the *Charter* values approach, assessing an administrative decision for compliance with the *Charter* involves balancing

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127 *Ibid* at para 91.

128 *Ibid* at para 92. See also *ibid* at para 102.

129 See e.g. *Oakes*, *supra* note 74 at 136. For recent discussion, see Fox-Decent & Pless, *supra* note 101 at 409. For discussion in the immediate aftermath of *Doré*, see Sossin & Friedman, *supra* note 90 at 408. See also Bredt & Krajewska, *supra* note 85 at 349–50; Horner, *supra* note 86 at 365–66; Macklin, "Charter Right", *supra* note 89 at 561–62; Paul Daly, "The *Doré* Duty: Fundamental Rights in Public Administration" (2023) 101:2 Can Bar Rev 297 at 302–04.

130 *CSFTNO*, *supra* note 26 at para 75.

131 *Ibid*.

132 *Ibid* at para 77.

statutory objects and *Charter* values, where *Charter* values are distinct from *Charter* rights.

Although I suggest distinguishing between these two approaches to assessing administrative decisions for compliance with the *Charter*, these two approaches are mutually compatible and can be employed together. Specifically, it could be that the *Charter* values approach more often applies, while the *Charter* rights approach applies only where *Charter* rights are engaged.[133] The idea would be that administrative decision-makers must always balance statutory objectives with (relevant) *Charter* values, but that they must also add *Charter* rights into the balance when such rights are limited. Since *Charter* rights are directly protected by the *Charter*, whereas *Charter* values are only indirectly protected by the *Charter*, *Charter* rights might attract greater weight in the balancing, with stronger magnetic pull than *Charter* values. The Court's recent decision in *CSFTNO* clarifies that the *Doré* framework applies when *either Charter* values *or Charter* rights are engaged.[134]

C. *Significance of Each of the* Charter *Rights and* Charter *Values Approaches to the* Doré *Framework*

The *Charter* rights and the *Charter* values approaches, I suggest, lead to different conclusions on whether the legislature can in fact—as opposed to merely in principle—use section 33 to ensure that administrative decisions survive notwithstanding sections 2 and 7 to 15 of the *Charter*.

The difference arises because of the difference between *Charter* rights and *Charter* values. The legislature can restrict the enforcement of

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133 The language in *Doré* suggests that administrative decision-making is always constrained by compliance with *Charter* values: "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values" (*supra* note 24 at para 24); and "administrative decisions are *always* required to consider fundamental values" (*ibid* at para 35 [emphasis in original]). *Loyola* and *TWU* suggest that the *Doré* framework is only triggered where administrative decision-making engages or limits *Charter* "protections" (see *Loyola*, *supra* note 76 at para 39; *TWU*, *supra* note 94 at para 58). But *CSFTNO* confirms that "administrative decision makers must always consider the values relevant to the exercise of their discretion," including "*Charter* values," which can "engage the *Doré* framework, even in the absence of any infringement of a right" (*supra* note 26 at para 77).

134 See e.g. *supra* note 26 at paras 64, 67, 73, 84.

Charter rights by using section 33 to ensure that legislation operates notwithstanding the relevant *Charter* provisions. By contrast, the legislature cannot restrict the enforcement of *Charter* values, not even if it tried to do so by using section 33. That is because section 33 only concerns the relevant *Charter* provisions, which only directly protect *Charter* rights and only indirectly protect *Charter* values. While *Charter* values are indirectly protected by the relevant *Charter* provisions, *Charter* values are more broadly grounded throughout the *Charter*, including in provisions that are not subject to section 33. For example, section 3 protects the right to vote, section 6 protects mobility rights, and sections 16 to 23 protect language rights. The *Charter* values of human dignity, equality, liberty, autonomy, and democracy[135] all seem at least partly grounded in these provisions, which are not subject to section 33.

So, even in the hypothetical case where Parliament and all the provincial legislatures were to use section 33 in all legislation so that the legislation operates notwithstanding sections 2 and 7 to 15 of the *Charter*, *Charter* values (such as human dignity) grounded in its remaining provisions would still exist even if only in a diminished form.

To elaborate on this hypothetical case, consider two views on the status of *Charter* values. Within the first view, *Charter* values might have diminished effect during the period when the legislation operates notwithstanding *Charter* provisions in which the *Charter* values are partly grounded. The idea would be that during that time, the use of section 33 in all legislation weakens *Charter* values that are partly grounded in the relevant sections of the *Charter* or the enforcement of such values. But insofar as those *Charter* values are also partly grounded in *Charter* provisions other than these sections (which are not subject to section 33), those *Charter* values still retain some force.

On the second view, *Charter* values, even those partly grounded in the relevant sections of the *Charter*, might remain in full force during that time. The idea would be that all *Charter* provisions, including sections 2 and 7 to 15, continue to have some legal force as part of the constitution. On this second view, the legislature cannot use section 33

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135 See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 88, citing *Thomson Newspapers Co v Canada (Attorney General)*, 1998 CanLII 829 at para 125 (SCC).

to weaken *Charter* values or their enforcement, even if it could use section 33 to weaken *Charter* rights or their enforcement.

I prefer this second view, because I find it plausible that *Charter* values derive from the mere existence of the *Charter*, irrespective of its enforcement. As Justice McIntyre wrote for the Court in a foundational case on *Charter* values, *RWDSU v. Dolphin Delivery Ltd.*, *Charter* values are "the fundamental values enshrined in the Constitution."[136] This characterization of *Charter* values suggests that *Charter* values derive from the mere existence of the *Charter*, irrespective of its enforcement. This suggestion, in my view, aligns with Justice Cory's statement in another foundational case on *Charter* values, *Hill v. Church of Scientology of Toronto*, that: "The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system."[137]

The unanimous Court's more recent comments in *CSFTNO* also support this second view. There, Justice Côté reiterated that "discretionary decisions must '*always*' take *Charter* values into consideration."[138] She clarified that *Charter* values can "engage the *Doré* framework, even in the absence of any infringement of a right."[139] We can infer that even where *Charter* rights have no application, *Charter* values continue to have application—even full application.

I conclude that the legislature cannot use section 33 to prevent a reviewing court from engaging in review based on *Charter* values. However, can the legislature nonetheless—that is, without using section 33—prevent a reviewing court from engaging in review based on *Charter* values?

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136 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 603, 1986 CanLII 5 (SCC). Although in this case Justice McIntyre was writing about *Charter* values in the context of common law principles, Justice Abella in *Doré* explicitly drew from the case law in that context to inform the use of *Charter* values in administrative law (see *Doré*, *supra* note 24 at paras 39–42).

137 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, 1995 CanLII 59 (SCC).

138 *CSFTNO*, *supra* note 26 at para 65 (citing *Doré*, *supra* note 24 at para 35 [emphasis in original]).

139 *Ibid* at para 77.

An intriguing possibility is that the legislature can use an unwritten analogue of section 33 to restrict the enforcement of *Charter* values. However, it is questionable whether such an unwritten analogue could be available. In *City of Toronto*, the majority at the Supreme Court implicitly assumed that there is no unwritten analogue of section 33, because the constitutional bargain is specified in the text.[140] That implicit assumption seems plausible. The dissent in that case avoided responding to the majority's concerns.[141]

Another intriguing possibility is that the legislature can use a written provision to specifically instruct courts not to review administrative decisions based on *Charter* values. However, I doubt that a court would give full effect to the legislature's attempt to limit judicial review in this way. As *Dunsmuir v. New Brunswick* put it:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect.[142]

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140 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 60 [emphasis in original, references omitted]:

> Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of 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. Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not "set out" in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

141 *Ibid* at para 182.

142 *Dunsmuir*, *supra* note 67 at para 31 [references omitted].

In my view, the legislature's use of a written provision to specifically instruct courts not to review administrative decisions based on *Charter* values would be a privative clause which a reviewing court would, or at least ought, not give full effect to. Such a clause would amount to a constitutionally impermissible attempt to limit judicial review. After all, *Charter* values are—as Justice McIntyre wrote in *Dolphin Delivery*—"enshrined in the Constitution." This enshrinement, it seems to me (and to repeat myself), means that *Charter* values derive from the very existence of the *Charter* as part of the Constitution. A clause that seeks to limit judicial review based on *Charter* values would attempt to limit the judicial review of administrative decisions for compliance with the "constitutional capacities of the government," contrary to *Dunsmuir*.[143]

To put my point another way, the legislature cannot prevent the judicial review of administrative decisions based on *Charter* values because the legislature cannot (itself) amend the *Charter*. So long as the *Charter* exists, the *Charter* values that it supports constrain administrative decisions made under legislation.

One might think that since, as *CSFTNO* suggested,[144] administrative decisions are only constrained by *relevant* values, perhaps the legislature can attempt to use a privative clause to render irrelevant *Charter* values that would otherwise be relevant. In my view, the legislature cannot succeed in such an attempt. *CSFTNO* explained that *Charter* values can be relevant "because of the nature of the governing statutory scheme, because the parties raised the value before the administrative decision maker, or because of the link between the value and the matter under consideration."[145] Thus, for example, a *Charter* value can be relevant simply because the parties raised it, irrespective of what the legislature says.

D. The Charter *Rights and* Charter *Values Approaches*

The upshot of the difference between *Charter* rights and *Charter* values, I suggest, is that the legislature's actual ability to use section 33 to ensure that administrative decisions survive notwithstanding the

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143 *Ibid* at para 31.

144 See *CSFTNO*, *supra* note 26 at paras 65–66, 68, 71–73 [references omitted].

145 *Ibid* at para 66.

relevant *Charter* provisions depends on the approach to assessing administrative decisions for *Charter* compliance. Let me explain.

On the *Charter* rights approach, the legislature can use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. But what does it mean to ensure that an administrative decision survives? It is analogous to ensuring that legislation operates. Since ensuring that legislation operates means at least that a court cannot strike it down, ensuring that administrative decisions survive means at least that a court cannot quash it. Quashing administrative decisions is the analogue of striking down legislation. This much seems clear, and that is the only certain effect of the legislature's ability to use section 33 to ensure that administrative decisions survive on the *Charter* rights approach. But this effect leaves room for debate about whether ensuring that administrative decisions survive has further effects.

Specifically, I suggest that the maximalist and minimalist views within the existing debate over the effect of using section 33 in the context of legislation correspond to analogous views on the effect of using section 33 in the context of administrative decisions. Recall from Part II that, in the context of legislation, using section 33 prevents a court from striking down legislation, although there is disagreement over the extent to which such use precludes judicial review on the grounds of unconstitutionality based on the relevant *Charter* provisions. On the maximalist view, there can be no such judicial review. However, on the minimalist view, there can be a limited version of such judicial review; a reviewing court cannot strike down the legislation but can still make declarations about whether the legislation infringes or violates the relevant *Charter* rights, whether the legislation is consistent with the relevant *Charter* provisions, or whether the legislation is valid.

In the context of administrative decisions, I suggest there is a range of views on the effect of using section 33 corresponding to the maximalist and minimalist views in the context of legislation. On any view, using section 33 prevents a court from quashing administrative decisions, but the corresponding views differ over the extent to which such use precludes judicial review on the grounds of unconstitutionality based on the relevant *Charter* provisions. Within the view corresponding to the maximalist view, there can be no such judicial review. Within the view corresponding to the minimalist view, however, there can be a limited version of such judicial review; a reviewing court cannot quash the decision, but

can still make declarations about whether the administrative decision limits or interferes with the relevant *Charter* rights, whether the decision involves a reasonable and proportional balance with respect to the relevant *Charter* rights, or whether the decision is valid, *intra vires* or reasonable.

That said, my point here is only that, on the *Charter* rights approach, there is a range of views on the effect of using section 33 in the context of administrative decisions that corresponds to the range of views on the effect of using section 33 in the context of legislation. I am not suggesting that the proponent of one view (say, the maximalist view) in the context of legislation should or must be a proponent of the corresponding view in the context of legislation. Nothing as a matter of principle would seem to require that. It could be that a maximalist in the context of legislation might be a minimalist in the context of administrative decisions. Nonetheless, it might be natural for a maximalist in the context of legislation to also be a maximalist in the context of administrative decisions.

So much for the *Charter* rights approach. What about on the *Charter* values approach? On the *Charter* values approach, it seems to me that the legislature cannot, in fact, use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. That is because, as I have suggested, *Charter* values are grounded in the very existence of the *Charter*, including in *Charter* provisions that are not subject to section 33. Again, to quote Justice McIntyre in *Dolphin Delivery*, *Charter* values are "enshrined" in the Constitution. Thus, the legislature cannot use section 33 to restrict the enforcement of *Charter* values, at least not in the total way that it can restrict the enforcement of *Charter* rights. Even in the hypothetical case where Parliament and all the provincial legislatures were to use section 33 in all legislation so that the legislation operates notwithstanding sections 2 and 7 to 15 of the *Charter*, *Charter* values (such as human dignity) grounded in the remaining provisions of the *Charter* would still exist.

Finally, as I have explained, the *Charter* rights approach and the *Charter* values approach are mutually compatible and can be employed together, in which case the legislature can use section 33 to restrict the enforcement of *Charter* rights but not, or at least not as completely, restrict the enforcement of *Charter* values.

CONCLUSION

I conclude that since the legislature can delegate its authority by authorizing an administrative decision-maker to make decisions that the legislature can itself engage in, the legislature can in principle use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. But whether the legislature can in fact use section 33 in this way depends on the approach to assessing administrative decisions for *Charter* compliance.

On the *Charter* rights approach, which requires the administrative decision to reasonably and proportionately balance statutory objectives and *Charter* rights, the legislature can in fact use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. At least, a court cannot quash an immunized administrative decision on the ground of unconstitutional interference with the relevant *Charter* provisions. In addition, it might also be that a court cannot review the decision based on such a ground at all.

By contrast, on the *Charter* values approach, which requires the administrative decision to reasonably and proportionately balance statutory objectives and *Charter* values, the legislature cannot in fact use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions. *Charter* values transcend the relevant *Charter* provisions, while any use of section 33 can only affect the relevant *Charter* provisions.

To return to Bill 28, the Ontario legislature's purported use of section 33 to ensure that administrative decisions made under the legislation would survive may have been lawful, at least in part. The legislature could in fact have used section 33 to extend the legislation's immunity from being struck down to administrative decisions made under the legislation, so that the decisions were immune from being quashed. At least, this is so if the framework for determining whether administrative decisions comply with the *Charter* is based on *Charter* rights. Yet the extent to which the legislature could have immunized the administrative decisions from judicial review on the grounds of unconstitutional interference with the relevant *Charter* provisions depends on the scope of the immunity for administrative decisions, which I have outlined the options for but not settled. However, if the framework for determining whether administrative decisions comply with the *Charter* is based on *Charter* values,

then the legislature could not in fact have used section 33 to extend the legislation's immunity to administrative decisions made under the legislation.

In closing, I wish to add a broader remark to emphasize the context for my project here. In the interest of advancing our understanding of whether the legislature can use section 33 to ensure that administrative decisions survive notwithstanding the relevant *Charter* provisions, I have argued for a particular view on the issue. But my underlying aim is to draw attention to and encourage discussion of this important but neglected subject. Even if one disagrees with my particular view, or with the associated conceptions of *Charter* rights and *Charter* values, I hope to spark further exploration of the administrative law of section 33.