S.C.C. File No. 39270

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

DAVID SULLIVAN

Respondent
(Appellant)

A N D B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

THOMAS CHAN

Respondent
(Appellant)

- and -

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Interveners

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I — OVERVIEW

1. Courts have struggled with the effect of a superior court's declaration that a law is "of no force or effect" pursuant to s. 52(1) of the *Constitution Act, 1982*. Some have held that the declaration binds courts of coordinate or subordinate jurisdiction in the province.[1] Others have held that the declaration is subject to the ordinary common law principles of *stare decisis*.[2] These conflicting decisions have sowed confusion and uncertainty. Guidance is needed. Advocates for the Rule of Law ("**ARL**") intervenes to assist the Court in providing it.

2. ARL submits that a s. 52(1) declaration of a superior court binds courts of coordinate and subordinate jurisdiction in the province unless and until it is set aside on appeal. This conclusion has three constitutional bases: (i) the principle of constitutional supremacy enshrined in the text of s. 52(1); (ii) the Constitution's remedial scheme; and (iii) the rule of law.

3. First, a s. 52(1) declaration is no ordinary declaration. Its effect flows from the Constitution,[3] which s. 52(1) confirms is "the supreme law of Canada". Therefore, unlike an ordinary declaration, a s. 52(1) declaration's effect is not limited by the ordinary common law principles of *stare decisis*. Deriving its force from the Constitution itself, a s. 52(1) declaration "remove[s] [the law] from the statute books"[4] and "establish[es] the general invalidity of [the law] *for all future cases*".[5]

4. Second, permitting the government to re-litigate a law's constitutionality on a case-by-case basis after it has been declared "of no force or effect" would be inconsistent with the Constitution's remedial scheme. The Constitution contains two remedial provisions: s. 24(1) of the *Canadian*

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1 **See, e.g.:** *R. v. Scarlett*, 2013 ONSC 562, ¶36, 41-42; *R. v. Sarmales*, 2017 ONSC 1869, ¶20; *R. v. Ali*, 2017 ONSC 4531, ¶14; *R. v. Haniffa*, 2017 ONCJ 844, ¶2, 20-21; *R. v. McCaw*, 2018 ONSC 3464 [***McCaw***], ¶77; *R. v. Alamary*, 2018 ONCJ 649, ¶9-15; *R. v. W.G.*, 2019 ONSC 1146, ¶21; *R. v. Bruce*, 2019 ONSC 5865, ¶14.

2 **See, e.g.:** *R. v. J.H.*, 2019 ONSC 7242, ¶12; *R. v. Chan*, 2018 ONSC 3849 [***Chan ONSC***], ¶58, motion to reopen application dismissed 2019 ONSC 783.

3 *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 [***Martin***], ¶28; *R. v. Ferguson*, 2008 SCC 6 [***Ferguson***], ¶35; *Ontario (Attorney General) v. G*, 2020 SCC 38 [***Ontario v. G***], ¶88 (*per* Karakatsanis J.), ¶255 (*per* Côté and Brown JJ., dissenting).

4 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶65.

5 *Martin* (S.C.C., 2003), *supra* note 3, ¶31 [emphasis added].

Charter of Rights and Freedoms and s. 52(1) of the *Constitution Act, 1982*.[6] A s. 24(1) remedy is personal, whereas a s. 52(1) declaration is global, having effect *erga omnes* (towards everyone).[7] Permitting case-by-case re-litigation of a law's constitutionality after it has been declared "of no force or effect" would, in effect, transform a global s. 52(1) remedy into a personal s. 24(1) remedy.

5. Third, permitting the possibility of conflicting rulings on a law's constitutionality after it has been declared "of no force or effect" would undermine the rule of law in at least two ways. First, it would interfere with a person's ability "to know what the law is in advance and govern their conduct accordingly".[8] It would leave individuals in a state of uncertainty about whether a dead law might spring back to life. Second, it would deny the rule-of-law guarantee of "equality before the law".[9] It would mean that, within a single jurisdiction, a law could be "of no force or effect" for some, but of full force and effect for others.

6. Since s. 52(1) declarations have a dramatic effect, superior courts should not grant them lightly. The principle of judicial restraint (or "judicial minimalism") directs that a superior court should not grant a formal s. 52(1) declaration unless: (i) the applicant has expressly sought a s. 52(1) declaration and satisfied all applicable notice requirements; (ii) the court is satisfied that the dispute cannot be resolved on other grounds; and (iii) the applicant has shown that the impugned law is inconsistent with the Constitution. In the rare case in which one of these conditions is not met but the court nonetheless finds it necessary to rule on the impugned law's constitutionality, the court can and should address the issue in its reasons without making a formal s. 52(1) declaration, much as a provincial court may do.

PART II — QUESTION IN ISSUE

7. ARL takes no position on the constitutionality of s. 33.1 of the *Criminal Code*. It intervenes only on: (i) why the Court should provide guidance on a s. 52(1) declaration's effect; (ii) a s. 52(1) declaration's effect on courts of coordinate and subordinate jurisdiction in the province; and (iii)

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6 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶58.

7 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶59; L. Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016), at 162 (Book of Authorities of ARL [**BOA**], Tab 7); K. Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Thomson Reuters) (electronic loose-leaf, updated October 2020), §§ 14.190-14.200 (BOA, Tab 6).

8 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶72.

9 *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349 [***Lavell***], at 1366, *per* Ritchie J.

the need to exercise restraint in making a s. 52(1) declaration.

PART III — ARGUMENT

A. THE COURT SHOULD PROVIDE GUIDANCE ON THE EFFECT OF A S. 52(1) DECLARATION

8. The courts below squarely addressed the effect of a s. 52(1) declaration.[10] As noted above, courts have struggled with this issue and reached inconsistent conclusions.[11] Excluding the decision on appeal, appellate guidance is almost non-existent.[12]

9. The Court of Appeal's decision has already generated confusion. For example, both provincial and superior courts have since expressed confusion about how to proceed in the face of conflicting rulings from a superior court on a law's constitutionality.[13] Further, *provincial* courts in Ontario have relied on the Court of Appeal's decision as a basis for disregarding a *superior* court's declaration of invalidity[14] — a result that neither the Constitution nor the ordinary principles of *stare decisis* can support. Outside Ontario, the Court of Appeal's approach has been rejected as "problematic".[15]

10. Clarity on this issue is essential to maintaining Canada's legal and constitutional order. Section 52(1) embodies "[t]he essence of constitutionalism in Canada".[16] It provides that "[t]he Constitution of Canada is the supreme law of Canada" and guarantees the right of all Canadians to be free from unconstitutional laws.[17] A failure to give full effect to a s. 52(1) declaration denies Canadians this basic right and undermines principles that underpin our Constitution — namely, constitutional supremacy and the rule of law.[18] Accordingly, ARL urges the Court to provide

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10 *Chan ONSC* (O.N.S.C., 2018), *supra* note 2, ¶50-62, aff'd 2020 ONCA 333, ¶31-41.

11 **See:** *Supra* notes 1-2 and accompanying text.

12 **See:** *R. v. Boutilier*, 2016 BCCA 24, ¶45 (*obiter*), aff'd (without comment) 2017 SCC 64.

13 **See:** *R. v. A.T.*, 2020 ONCJ 576 [***A.T.***], ¶14; *R. v. Barakat*, 2021 ONCJ 44 [***Bakarat***], ¶27; *R. v. Green*, 2021 ONSC 2826, ¶17, 20. **See also:** *R. v. Vitale*, 2021 NSSC 109, fn. 18.

14 **See, e.g.:** *A.T.* (O.N.C.J., 2020), *supra* note 13, ¶12; *Bakarat* (O.N.C.J., 2021), *supra* note 13, ¶25-28.

15 *R. v. Zabihullah*, 2021 SKQB 127, ¶26.

16 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [***Secession Reference***], ¶72.

17 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [***Big M***], at 313-14.

18 *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 750; *Secession Reference* (S.C.C., 1998), *supra* note 16, ¶49, 70-72.

guidance on this pivotal issue.

B. A S. 52(1) DECLARATION BINDS COURTS OF COORDINATE AND SUBORDINATE JURISDICTION IN THE PROVINCE, UNLESS AND UNTIL IT IS SET ASIDE ON APPEAL

(1) The text of s. 52(1)

11. In interpreting a constitutional provision, the interpreter "must … begin with the language of the constitutional law or provision in question".[19] Section 52(1) provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This language consists of two components: (i) a confirmation of the principle of constitutional supremacy; and (ii) a direction that, as a corollary of that principle, any law that is inconsistent with the Constitution is, to the extent of that inconsistency, "of no force or effect". Section 52(1) thus guarantees Canadians a system of law that is founded on, and fully consistent with, the Constitution.

(2) A s. 52(1) declaration's effect is to remove the unconstitutional law from the books

12. Section 52(1) does not expressly provide courts with any remedial jurisdiction.[20] Instead, superior courts and courts with statutory authority trigger its application through a formal declaration made pursuant to their inherent or statutory jurisdiction.[21] Once triggered, s. 52(1) renders the impugned law "of no force or effect" to the extent of the inconsistency. This means that, "[t]o the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, *and is effectively removed from the statute books*".[22] This "establish[es] the general invalidity of [the] legislative provision *for all future cases*"[23] — i.e., "once and for all".[24] The benefit of a s. 52(1) declaration thus "enures to society at large".[25]

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19 *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at 88. **See also:** *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶8.

20 *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶85.

21 *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶85.

22 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶65 [emphasis added]. **See also:** *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶148; P. W. Hogg, *Constitutional Law of Canada*, 5th ed. (sup.) (Toronto: Thomson Reuters) (electronic loose-leaf), § 58.1 (BOA, Tab 5).

23 *Martin* (S.C.C., 2003), *supra* note 3, ¶31.

24 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶72.

25 *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶142, quoting *R. v. Demers*, 2004 SCC 46, ¶99.

13. Only superior courts and courts with statutory authority have jurisdiction to grant a formal s. 52(1) declaration.[26] Although provincial court judges lack this jurisdiction, they may determine a law's constitutionality where the issue is properly before them.[27] Where a provincial court judge determines that a law is unconstitutional, the judge may refuse to apply it, but it remains on the books.[28] In subsequent cases, provincial court judges may either: (i) decline to apply the law (for reasons already given or for their own); or (ii) if satisfied that it is constitutional, apply the law.[29]

14. Once a law has been formally declared "of no force or effect", "[t]he ball is thrown back into [the legislature's] court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects".[30] If the legislature takes no action, it can be presumed to have accepted the declaration's effect and decided not to enact a constitutionally compliant alternative.

(3) A s. 52(1) declaration's effect flows from the Constitution

15. Unlike ordinary declarations, a s. 52(1) declaration's effect flows from the Constitution. As Gonthier J. explained in *Nova Scotia (Workers' Compensation Board) v. Martin*, "[t]he invalidity of a legislative provision inconsistent with the *Charter* does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1)".[31] Similarly, as McLachlin C.J. stated in *R. v. Ferguson*, "when a court 'strikes down' a law, the law has failed by operation of s. 52".[32] Most recently, as Karakatsanis J. confirmed in *Ontario (Attorney General) v. G*, "s. 52(1) is the substantive basis of constitutional invalidity".[33] Thus, "even though the declaration is channeled through the court, it is in truth issued by [s. 52(1)]".[34]

16. Since a s. 52(1) declaration's effect flows from the Constitution, it is not limited by the

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26 *R. v. Lloyd*, 2016 SCC 13 [***Lloyd***], ¶15.

27 *Lloyd* (S.C.C., 2016), *supra* note 26, ¶15, 18.

28 *Lloyd* (S.C.C., 2016), *supra* note 26, ¶19

29 *Lloyd* (S.C.C., 2016), *supra* note 26, ¶19

30 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶65.

31 *Martin* (S.C.C., 2003), *supra* note 3, ¶28.

32 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶35.

33 *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶88.

34 *Ontario v. G* (S.C.C., 2020), *supra* note 3, ¶255, *per* Côté and Brown JJ. (dissenting), quoting G. C. N. Webber, "Originalism's Constitution", in G. Huscroft and B. W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (2011), 147, at 166-67 (BOA, Tab 8).

ordinary common law principles of *stare decisis*. This conclusion flows from the principle that "animate[s]" s. 52(1): constitutional supremacy.[35] The Court of Appeal erred in concluding otherwise.

(4) A s. 52(1) declaration must be viewed within the Constitution's remedial scheme

17. The Constitution contains two remedial provisions: s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.[36] Each serves a different remedial purpose. Section 24(1) provides a remedy for unconstitutional *acts*, whereas s. 52(1) provides a remedy for unconstitutional *laws*.[37] Further, each has different remedial implications. A s. 24(1) remedy is personal, whereas a s. 52(1) declaration is global, having effect *erga omnes* (towards everyone).[38] This means that a s. 52(1) declaration creates "a legal vacuum" for *all* persons, not just the parties to the proceeding.[39]

18. Consistent with their different remedial purposes and effects, ss. 24(1) and 52(1) have different standing requirements. An applicant may seek a s. 24(1) remedy only if *their* rights have been violated,[40] whereas an applicant may seek a s. 52(1) declaration even if *another person's* rights have been violated.[41] Thus, s. 52(1) guarantees the right of *all* Canadians to be free from unconstitutional laws, whether or not the applicant suffers its unconstitutional effects.[42]

19. Permitting the government to re-litigate a law's constitutionality on a case-by-case basis after it has been declared "of no force or effect" would, in effect, transform a global s. 52(1) remedy into a personal s. 24(1) remedy, to be re-established in each case. This transformation would be inconsistent with the Constitution's remedial scheme, which affords two different remedies, each with different purposes, effects, and standing requirements.

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35 *Mckinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 386, *per* Wilson J.

36 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶58.

37 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶61.

38 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶59; Sarna, *supra* note 7, at 162 (BOA, Tab 7); Roach, *supra* note 7, §§ 14.190-14.200 (BOA, Tab 6).

39 *Reference re Manitoba Language Rights* (S.C.C., 1985), *supra* note 18, at 747.

40 *Big M* (S.C.C., 1985), *supra* note 17, at 313.

41 *Big M* (S.C.C., 1985), *supra* note 17, at 313-14; *Ferguson* (S.C.C., 2008), *supra* note 3, ¶59.

42 *Big M* (S.C.C., 1985), *supra* note 17, at 313-14.

(5) A s. 52(1) declaration's effect is shaped by the rule of law

20. The rule of law is "a fundamental postulate of our constitutional structure"[43] that "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society".[44] The rule of law guarantees the right of persons "to know what the law is in advance and govern their conduct accordingly" and dictates that "the law must be accessible and so far as possible intelligible, clear and predictable".[45] The rule of law also guarantees "equality before the law".[46]

21. Permitting conflicting rulings on a law's constitutionality after it has been declared "of no force or effect" would undermine the rule of law in at least two ways.

22. First, it would interfere with a person's ability to know the law in advance and govern their conduct accordingly. It would leave individuals in a state of uncertainty about whether a dead law might spring back to life. The consequences could be particularly severe in the criminal context, in which relative certainty and predictability in the law are essential to a person's ability to plan their life so as to avoid a criminal conviction.[47] For example, if a judge disagrees with an earlier s. 52(1) declaration, an accused may be convicted of an offence, or may receive a mandatory minimum sentence, on the basis of a law that at the time was "of no force or effect". Further, a lack of certainty and predictability in the law inhibits an accused person's ability to navigate the criminal justice system. For example, an accused person cannot meaningfully engage in plea bargaining if they do not know which laws are constitutional and which are not.

23. Second, it would deny the rule-of-law guarantee of equality before the law. It would mean that, within a single jurisdiction, a law could be "of no force or effect" for some, but of full force and effect for others. The rule of law does not tolerate such differential treatment. While a law may be *inapplicable* to some but not others, it cannot be *invalid* for some but not others.

24. These rule of law concerns are not merely theoretical. As this case illustrates, they have

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43 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [***Roncarelli***], at 142, *per* Rand J.

44 *Secession Reference* (S.C.C., 1998), *supra* note 16, ¶70.

45 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶69, 72.

46 *Lavell* (S.C.C., 1974), *supra* note 9, at 1366, *per* Ritchie J. **See also:** *Roncarelli* (S.C.C., 1959), *supra* note 43.

47 *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, ¶41. **See also:** *R. v. K.R.J.*, 2016 SCC 31, ¶99.

practical effects in the real world. In 1999, the Superior Court of Ontario in *R. v. Dunn* declared s. 33.1 of the *Criminal Code* to be "of no force or effect".[48] This should have settled the matter "once and for all" (subject to appeal).[49] Yet, in the years that followed, s. 33.1's constitutionality was re-litigated in that court no fewer than five times.[50] Setting aside the undesirable duplication of effort that such perpetual re-litigation entails,[51] it leaves Canadians in a state of uncertainty about what the law actually is. Moreover, as the case law illustrates, it can leave provincial court judges with the impossible task of determining which of two (or more) equally binding but inconsistent rulings ought to be followed. The rule of law does not tolerate such instability in the law and disorder in the courts.

25. Conversely, recognizing that a s. 52(1) declaration made by a superior court binds courts of coordinate and subordinate jurisdiction in the province, unless and until it is set aside on appeal, advances the rule of law by guaranteeing that once a law has been declared "of no force and effect" and all appeal rights have been exhausted, it need not be followed. This guarantee affords everyone within the jurisdiction the certainty they need to order their lives accordingly.

(6) A s. 52(1) declaration's effect is subject to appeal

26. "[A] formal declaration of invalidity" triggers s. 52(1)'s effect.[52] An order containing such a formal declaration may be appealed, subject to statutory limitations. If the order is set aside on appeal, the trigger for s. 52(1)'s effect is removed, and the impugned law remains in effect.[53]

27. The government is not at risk of being without recourse to appeal a s. 52(1) declaration. Statutes across Canada require anyone seeking to challenge a law's constitutionality to serve a notice of constitutional question on the relevant Attorney General.[54] These laws prohibit the court

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48 *R. v. Dunn*, [1999] O.J. No. 5452 (S.C.) (BOA, Tab 2).

49 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶72.

50 *R. v. Decaire*, [1998] O.J. No. 6339 (S.C. (Gen. Div.)) (BOA, Tab 1); *R. v. Jensen*, [2000] O.J. No. 4870 (S.C.) (BOA, Tab 4); *R. v. Fleming*, [2010] O.J. No. 5988 (S.C.) (BOA, Tab 3); *McCaw* (O.N.S.C., 2018), *supra* note 1; *Chan ONSC* (O.N.S.C., 2018), *supra* note 2.

51 *Ferguson* (S.C.C., 2008), *supra* note 3, ¶72.

52 *Lloyd* (S.C.C., 2016), *supra* note 26, ¶19.

53 Hogg, *supra* note 22, § 58.1 (BOA, Tab 5).

54 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57; *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8; *Judicature Act*, R.S.A. 2000, c. J-2, s. 24; *The Constitutional Questions Act, 2012*, S.S. 2012, c. C-29.01, s. 13; *Constitutional Questions Act*, C.C.S.M., c. C-180, s. 7; *Courts of*

from determining the question unless and until the notice has been served, and give the Attorney General a right to be heard and a right to appeal.[55] If the Attorney General declines to avail itself of these rights, it cannot launch a collateral attack by re-litigating the matter in another forum.[56] Its only remedy, therefore, is to appeal the formal order triggering s. 52(1)'s effect.

28. In the criminal context, the Crown can appeal a s. 52(1) declaration irrespective of the verdict. Section 676(1)(a) of the *Criminal Code* permits the Crown to appeal a verdict of acquittal in proceedings by indictment on a question of law;[57] s. 40(1) of the *Supreme Court Act* permits the Crown to seek leave to appeal on a question of law despite having secured a conviction.[58]

C. COURTS SHOULD EXERCISE RESTRAINT IN GRANTING A S. 52(1) DECLARATION

29. Since s. 52(1) declarations have a dramatic effect, superior courts should not grant them lightly. The principle of judicial restraint (or "judicial minimalism"[59]) directs that a superior court should not grant a formal s. 52(1) declaration unless: (i) the applicant has expressly sought a s. 52(1) declaration and satisfied all applicable notice requirements; (ii) the court is satisfied that the dispute cannot be resolved on other grounds; and (iii) the applicant has shown that the impugned law is inconsistent with the Constitution.

30. First, the applicant must expressly seek a s. 52(1) declaration and satisfy all applicable notice requirements. These requirements "serve a vital purpose in ensuring that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation".[60] They are essential, since a s. 52(1) declaration

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Justice Act, R.S.O. 1990, c. C.43, s. 109; *Code of Civil Procedure*, CQLR, c. C-25.01, s. 76; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 22; *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, s. 10; *Judicature Act*, R.S.P.E.I. 1988, c. J-2.1, s. 49; *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 57; *Constitutional Questions Act*, R.S.Y. 2002, c. 39, s. 2; *Judicature Act*, S.N.W.T. 1988, c. 34, s. 1, s. 58; *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 59. **See:** Hogg, *supra* note 22, § 59.6(a) (BOA, Tab 5).

55 Hogg, *supra* note 22, § 59.6(a) (BOA, Tab 5).

56 *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at 599.

57 *R. v. Biniaris*, 2000 SCC 15, ¶30.

58 *R. v. Laba*, [1994] 3 S.C.R. 965, at 982.

59 **See:** C. Feasby, "Failing Students by Taking a Pass on the *Charter* in *Pridgen v University of Calgary*" (2013), 22 *Const. Forum* 19, at 19-20, 24-26, 28.

60 *Guindon v. Canada*, 2015 SCC 41, ¶19. **See also:** *R. v. McCann*, 2015 ONCA 451, ¶6, leave to appeal ref'd 2016 CanLII 13756 (S.C.C.).

is "not to be exercised except after the fullest opportunity has been accorded to the government to support [the law's] validity".[61]

31. Second, the principle of judicial restraint instructs courts not to decide constitutional issues or grant constitutional remedies unless necessary to resolve a dispute before them.[62] Accordingly, if a court can resolve the dispute before it on other grounds (e.g., statutory construction), it should.[63] This posture of judicial restraint and humility recognizes that unnecessary constitutional pronouncements can have far-reaching — and sometimes unforeseen — effects.[64]

32. Third, as the text of s. 52(1) indicates, a court may grant a s. 52(1) declaration only if the impugned law is "inconsistent with … the Constitution".

33. In the rare case in which one of these conditions is not met but a superior court nonetheless finds it necessary to rule on the impugned law's constitutionality, the court should address the issue in its reasons without making a formal s. 52(1) declaration — in effect, applying the approach that provincial courts take by necessity. This allows the court to decline to apply the impugned law without triggering s. 52(1)'s effect, consistent with the principle of judicial restraint.

PART IV — SUBMISSIONS CONCERNING COSTS

34. ARL requests that no costs be awarded for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July, 2021.

Connor Bildfell / Asher Honickman

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61 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, ¶48.

62 *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 419; *Attorney General of Quebec v. Cumming*, [1978] 2 S.C.R. 605, at 611; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 [***Phillips***], ¶6-13.

63 **See, e.g.:** *Toronto (City) v. Outdoor Neon Displays Ltd.*, [1960] S.C.R. 307, at 314; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at 188-89, *per* Wilson J.

64 *Phillips* (S.C.C., 1995), *supra* note 62, ¶9; *Steel v. Canada (Attorney General)*, 2011 FCA 153, ¶65-66.

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