

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Québec)**

BETWEEN:

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

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL,

-and-

**ATTORNEY GENERAL OF QUÉBEC, JEAN-FRANÇOIS ROBERGE,
IN HIS OFFICIAL CAPACITY and SIMON JOLIN-BARRETTE,
IN HIS OFFICIAL CAPACITY,**

RESPONDENTS /
APPELLANTS ON CROSS-APPEAL,

-and-

**MOUVEMENT LAÏQUE QUÉBÉCOIS and FRANÇOIS PARADIS,
IN HIS OFFICIAL CAPACITY,**

RESPONDENTS.

(Style of Cause continued next page)

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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(Style of Cause continued)

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APPELLANTS /
RESPONDENTS ON CROSS-APPEAL,

-and-

ATTORNEY GENERAL OF QUÉBEC,

RESPONDENT /
APPELLANT ON CROSS-APPEAL,

AND BETWEEN:

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

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL,

-and-

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RESPONDENTS /
APPELLANTS ON CROSS-APPEAL,

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**FRANÇOIS PARADIS, IN HIS OFFICIAL CAPACITY, MOUVEMENT LAÏQUE
QUÉBÉCOIS and POUR LES DROITS DES FEMMES DU QUÉBEC,**

RESPONDENTS.

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT,

APPELLANT /
RESPONDENT ON CROSS-APPEAL,

-and-

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AND BETWEEN:

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APPELLANTS /
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AND BETWEEN:

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-and-

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FACTUM OF THE INTERVENER

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. *Overview*

1. Over forty years ago, Canada’s democratic leaders came together in the process that has been described as a “revolutionary transformation of the Canadian polity,”¹ resulting in the patriation of Canada’s Constitution and, of course, the *Charter*. Section 33 of the *Charter* – the notwithstanding clause or the override provision – played a crucial role in the federal-provincial negotiations that led to the adoption of the *Charter*, as it provided a counterweight or a balance to alleviate concerns over the expanded role of the judiciary in this redefinition of our constitutional design.²

2. The introduction of the *Charter* and the consequential remedial role of the courts has required a relationship of dialogue and mutual respect between the courts and the legislatures. We trust the courts to make principled and reasoned decisions according to the dictates of the Constitution. However, the architecture of Canada’s Constitution, including the roles of the different branches of government within it, has always been based on the democratic choices of Canadians through their elected representatives, from Confederation³ to the adoption of the *Charter*.⁴ The possibility that democratic institutions may be under threat, as due to a rise in populism as appears to have been suggested,⁵ makes it doubly important that the role of legislative bodies in balancing rights and freedoms within our constitutional framework be acknowledged and respected. Ultimately, the rights and freedoms of everyone in Canada will be best secured if s. 33 is interpreted in a manner that respects the institutional role of all branches of government in that endeavour.

¹ *Canada (Attorney General) v. Power*, 2024 SCC 26 at para. 94.

² *Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 at paras. 107-108; citing *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254 at para. 228.

³ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 35.

⁴ *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 134; *British Columbia v. Imperial Tobacco*, 2005 SCC 49 at paras. 51-53, 65-66.

⁵ Factum of Fédération autonome de l’enseignement at paras. 44-45

3. The controversy surrounding s. 33 of the *Charter*, which is at the core of the constitutional issues in this appeal, highlights the interface between the branches of government and their respective roles and responsibilities to advance and protect rights in Canada.

4. Imposing preconditions on the use of s. 33 is inconsistent with the language, historical context and fundamental purpose of the notwithstanding clause, which is to provide Parliament and the legislatures with the “last word.”⁶ On the other hand, there is nothing in s. 33 that precludes post-enactment judicial scrutiny of legislation, subject to the usual rules pertaining to mootness. Indeed, in appropriate cases the exercise of judicial discretion to review and make findings respecting whether legislation would otherwise be compliant with *Charter* provisions can inform and assist the democratic process. In addition to furthering the “dialogue” between branches of governance, judicial commentary can serve the valuable function of providing voters with reliable and impartial information about the effect of the legislation in question on *Charter* rights.⁷

5. The Attorney General of Manitoba (“Manitoba”) intervenes in this appeal to respond to issues raised in the Notices of Constitutional Question relating to the interpretation and application of s. 33 of the *Charter*. Bearing in mind the many parties and other interveners in this appeal, Manitoba’s submissions will endeavor to succinctly supplement the arguments that have already been raised.

B. *Statement of Facts*

6. Manitoba relies on the facts in the record provided by the parties and the judgments below.

PART II – QUESTIONS IN ISSUE

7. Manitoba’s submissions will be focused on the following issues related to s. 33 of

⁶ *UR Pride, supra* at para. 2.

⁷ *Ibid.* at para. 115; *Vriend, supra* at para. 139.

the *Charter*:

- (a) the interpretation of s. 33;
- (b) the lack of preconditions on Parliament or a legislature when passing legislation that invokes s. 33 of the *Charter*; and,
- (c) the jurisdiction of courts to consider and make findings regarding the constitutionality of legislation that invokes s. 33 of the *Charter*.

PART III – STATEMENT OF ARGUMENT

A. *Interpretation of s. 33*

8. The parties have made extensive submissions with respect to the appropriate interpretive approach to s. 33.⁸ Manitoba adds the following submissions that, in our respectful view, deserve particular emphasis.

9. As a starting point, it bears emphasizing what should be obvious but is sometimes lost in the social policy debate that surrounds s. 33. Section 33 is an integral part of the *Charter*⁹ and must be interpreted in a manner that is consistent with the principles of constitutional interpretation. Its text must be interpreted in a purposive and contextual manner, as is the case with all *Charter* provisions. Further, it is well established that there is no hierarchy of constitutional provisions; no part of the Constitution can abrogate or diminish another part of the Constitution.¹⁰ This means that s. 33 is no less important than other provisions of the *Charter*, and it must also be interpreted as part of the Constitution as a coherent whole.¹¹

⁸ The jurisprudence regarding the interpretation of s. 33 is set out in the Factum of the Respondent at paras. 185-206.

⁹ *Organisation mondiale sikhe du Canada, supra* at para. 186.

¹⁰ *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 at para. 42 citing *New Brunswick Broadcasting v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at paras. 98, 108.

¹¹ *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 80 citing *R. v. Dubois*, [1985] 2 SCR 350 at p. 365. See also *R. v. Big M Drug Mart Ltd.*, 1 SCR 295 at p. 344; *Walsh v. Bona*, [2002] 4 SCR 325 at para. 63.

10. While extrinsic evidence of purpose can play a role in the interpretation of a provision, it must be approached with caution. In the case of s. 33, certain framers of the *Charter* referred to the possibility of prior judicial scrutiny. Other framers referred to the need for a notwithstanding clause as a “safety valve” against the uncertainties of the future. They were aware of the experience with the United States Constitution where judicial decisions had been, at times, profoundly out of step with important socio-economic policies such as the abolition of slavery and the “New Deal” legislation designed to ameliorate the hardships of the Great Depression of the 1930s. What became s. 33 was viewed as a mechanism that would enable legislative bodies to protect what they determined to be important matters of public policy, should the need arise.¹²

11. Section 33 played a pivotal role in the adoption of the *Charter*. It was the product of the contributions of many individuals involved in the negotiating, drafting and adoption of the *Charter*.¹³ The statements of political actors at the time, including those referred to above, are part of the backdrop to the negotiations that culminated in s. 33, and the enactment of the *Charter* as a whole. However, they cannot be assumed to represent the collective intention of its framers.¹⁴

12. Unwritten constitutional principles can also play a role in the interpretation of the *Charter*, informing the character and the larger objects of a given provision.¹⁵ In this regard, Manitoba submits that the principle of democracy is particularly germane to guide the interpretation of s. 33. This is because providing democratically elected representatives with the final say on certain rights and freedoms via the notwithstanding clause was viewed as essential to the legitimacy of entrenching *Charter* rights and the judicial review of legislation.

13. Importantly, the democratic principle is tied to the promotion of self-government and federalism. This principle reflects and recognizes that there may exist diverse opinions on

¹² “Why a Notwithstanding Clause?” The Honourable Peter Lougheed. *Points of View* No. 6 (The Merv Leitch Q.C. Memorial Lecture Series). Published by the Centre for Constitutional Studies, 1998.

¹³ *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at para. 58.

¹⁴ *R. v. Sharma*, 2022 SCC 39 at paras. 88-89.

important matters of public policy in communities across Canada. Therefore, s. 33 should be interpreted in a manner that acknowledges the role of provincial legislatures to respond to the particular concerns and interests of the people in the province.¹⁶

14. At the same time, a functioning democracy requires a continuous process of discussion. As this Court emphasized in the *Secession Reference*:

The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (*Saumur v. Quebec (City)*, *supra* at p. 330). At both the federal and provincial level, by its nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices and seeking to acknowledge and address those voices in the laws by which all in the community must live.¹⁷

15. Subsequent decisions of this Court have continued to emphasize the importance of balanced political discourse to meaningful and informed participation in the electoral process.¹⁸ For example, in decisions respecting s. 3 of the *Charter* and the right to vote — which, importantly, is excluded from the application of s. 33 — an informed vote has been described as foundational to the health of the electoral system and a properly functioning democracy.¹⁹

16. Thus, the democratic principle supports an interpretation of s. 33 that recognizes the legislative branch’s fundamental role in determining the appropriate balance of *Charter* rights. At the same time, s. 33 does not preclude post-enactment judicial scrutiny in appropriate cases, which can support meaningful and informed participation in the electoral

¹⁵ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 55.

¹⁶ *Secession reference*, *supra* at paras. 64, 66.

¹⁷ *Ibid.* at para. 68.

¹⁸ *Ontario (Attorney General) v. Working Families Coalition*, 2025 SCC 5 at paras. 8-9 citing *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paras. 71-73.

¹⁹ *Working Families*, *supra* at para. 9

process. This may occur when voters consider a government's use of s. 33 in subsequent elections, or when elected representatives must consider whether to reinvoke s. 33 after it expires.

B. Section 33 Does Not impose Substantive Preconditions or Require Prior Judicial Scrutiny

17. This Court's early decision in *Ford* concluded that "there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority."²⁰ The Saskatchewan Court of Appeal recently described the import of this passage in the following manner:

[T]he *ratio* of *Ford* is that Parliament or a provincial legislature does not need to offer a substantive justification for the decision to invoke s. 33 Put differently, "judicial review has no role to play in adding extraneous substantive preconditions to the legislative *decision* to invoke the clause beyond the requirements set out in the decision itself" (Eric M. Adams, "*Ford* Focus" at 34, emphasis in original).²¹

18. However, several of the parties urge this Court to import substantive preconditions to the use of s. 33, in the form of requirements on the government or the legislature to satisfy criteria or to require prior judicial review of a proposed use of the notwithstanding clause. Manitoba submits that, applying the appropriate purposive approach to s. 33, no such preconditions can be imposed to fetter the decision of the legislative branch. The Court's conclusion in the *Ford* decision remains sound. Imposing substantive preconditions on the use of s. 33 undermines its purpose. Manitoba agrees with the Respondent that s. 33 cannot be so interpreted and makes the following additional submissions with respect to the issue of prior judicial scrutiny.

19. It is not clear what purpose is to be served by importing a requirement of prior judicial scrutiny to the use of s. 33. There may be occasions where a government determines that it would be appropriate to seek a court's opinion regarding the impact of proposed

²⁰*Ford c. Québec (Procureur général)*, [1988] 2 SCR 712 at para. 13.

²¹ *UR Pride, supra* at para 47.

legislation on *Charter* rights. In those circumstances it is open to all governments to direct a reference to the courts in accordance with the appropriate legislation.²² However, a government may already be well aware of the impact of proposed legislation on *Charter* rights, with the benefit of over 40 years of jurisprudence interpreting the *Charter*. For that or other reasons, the government and the legislature may determine that a reference is unnecessary before invoking s. 33.

20. Introducing a new requirement of a prior judicial opinion outside the reference process would simply delay the implementation of legislation that the legislature has deemed essential in the public interest, notwithstanding the impact on *Charter* rights. Such delay, which could potentially span years as a matter progresses through the courts, thwarts the legislative objective and is inconsistent with the purposes of s. 33. As an example, this Court's decision in *Ford* was released in 1988 in respect of legislation that was enacted six years earlier in 1982. Moreover, the possibility of such delays is incongruent with one of the premises of s. 33, which is that the legislation it protects will immediately be in force but only for five years unless the clause is reinvoked. It is submitted that it is beyond the institutional capacity of courts to require the judicial review of constitutionality of a statute before s. 33 may be invoked by the legislature, as the role of the courts is to adjudicate on the constitutionality of legislation as it is enacted.

21. Furthermore, mandatory pre-emptive review goes beyond the institutional capacity of the judiciary. It undermines the relationship and proper dialogue between the legislative and judicial branches by forcing the Court to make a determination on a purely hypothetical question (would the Act violate the Charter absent s. 33), without a request for a reference.

22. In *Power*, this Court stated that “parliamentary sovereignty, the separation of powers and parliamentary privilege are constitutional principles that ensure that democratically elected officials are free to make laws [...] without undue interference from an unelected judiciary.” As such, this Court noted that generally, “courts should not meddle with the law-

²² In Manitoba, see *The Constitutional Questions Act*, C.C.S.M. c. C180, s. 1.

making process, including the enactment of legislation.”²³ Crucially, this Court went on to find that there is an important difference between, on the one hand, the courts requiring the legislature to implement a substantive step in the legislative process, and on the other, after-the-fact review of an enacted law²⁴.

C. Section 33 Does Not Preclude Post Enactment Judicial Scrutiny

23. The same considerations do not apply to judicial review of legislation already in force. It has been clear since this Court’s very early decision in *Mills* that the *Charter* does not, in and of itself, attempt to fix or limit the jurisdiction of tribunals in Canada. The *Charter* was not intended to turn the Canadian legal system upside down, but rather *Charter* issues should be fitted into the existing scheme of Canadian legal procedure.²⁵ In the case of superior courts, jurisdiction is generally assumed,²⁶ the issue being not whether the court has jurisdiction but whether it is appropriate to exercise that jurisdiction.

24. Manitoba does not agree with the Quebec Court of Appeal’s view that s. 33 is a “constitutional privative clause.”²⁷ There is nothing in the language of s. 33 that purports to oust the ordinary jurisdiction of the courts.

25. Rather, the argument against a court exercising jurisdiction where s. 33 is invoked relates to mootness. The court’s opinion on whether legislation violates s. 2 or ss. 7-15 of the *Charter* has no practical effect and cannot result in a remedy for the parties, because the statute will continue to operate notwithstanding any finding of the court. However, even if the effect of s. 33 is to make the legal issues moot because there will be no live controversy, at least for a period of time, the question is whether the court should exercise its discretion to hear the moot case nonetheless.

26. The *Borowski* decision, which continues to be the leading case on mootness,

²³ *Power, supra* at para. 48.

²⁴ *Ibid.* at para. 73.

²⁵ *R. v. Mills*, [1986] 1 SCR 863 at paras. 6-7, 15, 63, 325.

²⁶ *Doucet Boudreau, supra* at para. 49.

²⁷ *Organisation mondiale sikhe du Canada, supra* at para. 358.

established the framework for determining whether to hear a moot case. These now-familiar criteria include (1) whether an adversarial context exists, (2) the concern for judicial economy and (3) awareness of the proper limits of the judicial function, as pronouncing judgments in the absence of a live dispute may be viewed as intruding into the role of the legislative branch.”²⁸ The *Borowski* decision also emphasizes that these criteria are not exhaustive.²⁹

27. In *Smith*, in the context of an appeal from conviction for second degree murder where the appellant had subsequently died, this Court referred to a number of additional relevant considerations to determine whether there were special circumstances that made it “in the interests of justice” to proceed. These non-exhaustive factors included (1) whether there is a legal issue of general public importance, (2) whether there is a systemic issue related to the administration of justice, (3) collateral consequences to the family or other interested persons, and (4) whether continuing the appeal would go beyond the judicial function by involving the Court in free-standing pronouncements more properly left to the legislature.³⁰

28. Similar considerations will be relevant to the determination of whether it is appropriate for a court to exercise its discretion to hear a case involving s. 33 of the *Charter*. The impact on scarce judicial resources is an important consideration. The question is whether the case raises an issue of public importance, the resolution of which is in the public interest such that it may justify the use of those resources, “bearing in mind the social cost in leaving the matter undecided.”³¹

29. The weighing of the social cost of continued uncertainty in the law against the cost of using scarce judicial resources on a moot case will depend on the circumstances of the individual case.³² However, it seems likely that cases where s. 33 has been invoked will

²⁸ *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at paras. 31-40.

²⁹ *Ibid.* at para. 29.

³⁰ *R. v. Smith*, 2004 SCC 14 at para. 50.

³¹ *Borowski, supra* at para. 39.

³² *Ibid.* at para. 37.

often raise issues of public importance that could justify a court exercising its discretion to review the legislation, and to make findings respecting whether the legislation would otherwise be compliant with *Charter* provisions. By way of analogy, this Court has exercised its discretion to make a determination on the constitutionality of the patriation of the Constitution, despite the event having already occurred by the time of the hearing.³³ Moreover, in weighing the social cost of uncertainty in the law, this Court has also noted that “the *Charter* is designed to protect those who are most vulnerable to the dangers of majority rule.”³⁴

30. The vital role that judicial scrutiny can play in assisting the democratic process will also be relevant to the determination. The impartial, dispassionate, and expert role of judicial scrutiny and reasoning can provide valuable information with which to evaluate a legislature’s decision to invoke s. 33. The potential benefits are twofold: not only can judicial reasoning provide helpful information to voters, contributing to meaningful participation in the electoral process, it can also inform future decisions of legislators.³⁵ The potential benefits of a judicial determination have been described as follows:

A judicial finding that a law infringes a *Charter* right without justification and would have been invalid but for the invocation of the notwithstanding clause provides crucial information for both voters and governments alike as they contemplate their democratic choices during the five-year span that the notwithstanding clause operates. By the same token, a judicial finding that the legislation did *not*, in fact, need the protective shield of the clause since the law would not have infringed the *Charter*, will allow a government to let the sun set without having to pay the ongoing political cost for a deliberate infringement of *Charter* rights. Additionally, a judicial determination and the constitutional litigation surrounding it might inspire productive legislative alternatives for the legislature to consider that would fulfill its policy objectives without unjustifiably infringing rights. Similarly, a judicial interpretation of a rights infringement that would otherwise have invalidated the legislation but for the protective shield of the notwithstanding clause will bring the constitutional stakes at play into sharper relief and to broader public attention than the legislative process alone might afford. It will, through evidence, testimony and legal argument, inject the perspectives of the

³³ *Ibid.* at para. 38 citing *re Objection by Que to Resolution to Amend Constitution* [1982] 2 SCR 793.

³⁴ *Doucet-Boudreau, supra* at para. 21.

³⁵ *Working Families, supra* at para 115.

individuals and groups most directly impacted by the law into the constitutional debate. This may especially be the case, and will be particularly important, where the rights infringements are experienced and endured by a vulnerable minority.³⁶

31. Therefore, as the court in *UR Pride* has commented, judicial scrutiny is not a penalty for the use of s. 33 but rather can form part of the dialogue between the judicial and legislative branches of government.³⁷ This Court similarly stated in *Vriend*,

[A] great value of judicial review and the dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.³⁸

32. It is significant that in *Shot Both Sides v Canada*, this Court pointed to the potential importance of declaratory relief to such matters as assisting in reconciliation, restoring the honour of the Crown, and assisting with extra judicial negotiations with the Crown, even where personal relief is not available.³⁹ By analogy, it is submitted that Courts may assess the practical utility of a declaration in cases involving s. 33 for vulnerable groups whose *Charter* rights are negatively impacted by the invocation of the notwithstanding clause. In such cases, while the operation of s. 33 will insulate the legislation from being struck down, at least for a period of time, a declaration may nevertheless serve the purpose of assisting their claims in other arenas.

33. Therefore, as the court in *UR Pride* concluded, the decision to invoke s. 33 is a political one, the legality of which can only be reviewed for issues of form. However, there

³⁶ “Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the Charter,” Eric Adams and Erin Bower. *Review of Constitutional Studies*, Vol. 26, Issue 2; Vol. 27, Issue 1, 2022 121 at pp. 142-143.

³⁷ *UR Pride*, *supra* at para. 119.

³⁸ *Vriend*, *supra* at para. 139.

³⁹ *Shot Both Sides v. Canada*, 2024 SCC 12 at paras. 63, 82.

is nothing in s. 33 that precludes the possibility of a court exercising its discretion to consider whether the legislation would otherwise unjustifiably infringe *Charter* rights.⁴⁰

D. Conclusion

34. Manitoba submits that s. 33 of the *Charter* should be interpreted in a manner that best promotes the role and responsibility of all branches of government to secure the rights and freedoms of persons in Canada. While s. 33 imposes no substantive preconditions to the use of the notwithstanding clause, it also does not foreclose the subsequent exercise of judicial discretion to scrutinize the impact of legislation on the *Charter* rights of those affected. This preserves a healthy dialogue and respect among the institutions of government, which can only enhance respect for *Charter* rights and the democratic process.

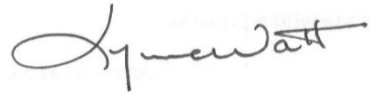
PART IV – COSTS

35. Manitoba does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

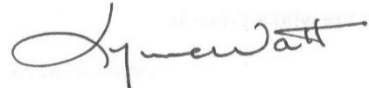
36. Manitoba takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th day of September, 2025.



for:

DEBORAH CARLSON



for:

PATRICIA BENHAM

CROWN COUNSEL FOR THE ATTORNEY
GENERAL OF MANITOBA

⁴⁰ *UR Pride, supra* at para. 119.

PART VII - TABLE OF AUTHORITIES

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<i>Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity</i>, 2025 SKCA 74	1
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<i>Shot Both Sides v. Canada</i>, 2024 SCC 12	32
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<i>Toronto (City) v. Ontario (Attorney General)</i>, 2021 SCC 34	12
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<u>“Why a Notwithstanding Clause?” The Honourable Peter Loughheed. <i>Points of View</i> No. 6 (The Merv Leitch Q.C. Memorial Lecture Series). Published by the Centre for Constitutional Studies, 1998.</u>	10