File No. 41231

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ENGLISH MONTREAL SCHOOL BOARD

MUBEENAH MUGHAL

PIETRO MERCURI

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL
(Respondents /
Appellants on Cross-Appeal)

- and -

ATTORNEY GENERAL OF QUÉBEC

JEAN-FRANÇOIS ROBERGE, in his official capacity

SIMON JOLIN-BARRETTE, in his official capacity

RESPONDENTS /
APPELLANTS ON CROSS-APPEAL
(Appellants /
Respondents on Cross-Appeal)

- and -

MOUVEMENT LAÏQUE QUÉBÉCOIS

RESPONDENT
(Mis en cause)

- and -

FRANÇOIS PARADIS, in his official capacity

RESPONDENT
(Intervener)

(Style of cause continues next pages)

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF CANADA

(Rule 42 of the *Rules of the Supreme Court of Canada*))

AND BETWEEN:

WORLD SIKH ORGANIZATION OF CANADA

AMRIT KAUR

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL
(Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT /
APPELLANT ON CROSS-APPEAL
(Respondent)

AND BETWEEN:

ICHRAK NOUREL HAK

NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)

CANADIAN CIVIL LIBERTIES ASSOCIATION

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL
(Respondents /
Mis en cause on Cross-Appeal)

- and -

ATTORNEY GENERAL OF QUÉBEC

JEAN-FRANÇOIS ROBERGE, in his official capacity

SIMON JOLIN-BARRETTE, in his official capacity

RESPONDENTS /
APPELLANTS ON CROSS-APPEAL
(Appellants /
Respondents on Cross-Appeal)

- and -

MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC

RESPONDENTS
(Mis en cause)

- and -

FRANÇOIS PARADIS, in his official capacity

RESPONDENT
(Intervener)

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT /
RESPONDENT ON CROSS-APPEAL
(Appellant)

- and -

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

RESPONDENTS /
APPELLANTS ON CROSS-APPEAL
(Respondents)

AND BETWEEN:

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

APPELLANTS /
RESPONDENTS ON CROSS-APPEAL
(Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT /
APPELLANT ON CROSS-APPEAL
(Respondent)

- and -

MOUVEMENT LAÏQUE QUÉBÉCOIS

RESPONDENT
(Mis en cause)

AND BETWEEN:

LORD READING LAW SOCIETY

APPELLANT /
RESPONDENT ON CROSS-APPEAL
(Appellant)

- and -

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT /
APPELLANT ON CROSS-APPEAL
(Respondent)

- and -

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QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION

WOMEN'S LEGAL EDUCATION AND ACTION FUND

POUR LES DROITS DES FEMMES DU QUÉBEC

MOUVEMENT LAÏQUE QUÉBÉCOIS

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FACTUM OF THE INTERVENER
ATTORNEY GENERAL OF CANADA

PART I – OVERVIEW OF THE ATTORNEY GENERAL OF CANADA'S POSITION

A. Overview

1. In accordance with his role as intervener, the Attorney General of Canada takes no position, on any basis whatsoever, on the constitutional validity of the provisions of the *Act respecting the laicity of the State.*[1] However, as s. 33 of the *Canadian Charter of Rights and Freedoms*[2] is invoked with increasing frequency, it is important to consider whether there are constitutional limits on the use of this provision in addition to those outlined in *Ford v. Quebec*.[3]

2. To respond to this fundamental question, one must recall that, since 1982, the rights and freedoms guaranteed by the *Charter* limit legislative action, unless such action is exercised in accordance with the conditions set out in ss. 1 or 33. The only alternative to meeting those conditions is to initiate the constitutional amendment procedures set out in Part V of the *Constitution Act, 1982*,[4] which, in relation to *Charter* rights and freedoms, exclude the unilateral amendment procedures.

3. Although the Constitution allows a legislature that invokes s. 33 to avoid *temporarily* the binding nature of rights and freedoms, it necessarily prohibits any use of s. 33 that would lead to an irreparable impairment of the rights and freedoms guaranteed by the Constitution. Accordingly, any right or freedom referred to in an express declaration made under s. 33 must retain its integrity so that it can be fully exercised when the declaration expires—just as a lightbulb should shine as brightly as it did before being temporarily turned off.

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1 *Act respecting the laicity of the State*, CQLR, c. L-0.3.
2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [***Charter***].
3 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [***Ford***].
4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [***C.A. 1982***].

4. Accordingly, the Attorney General of Canada will make the following submissions to assist the Court in delineating the constitutional limits of s. 33 of the *Charter*:

(1) The wording of s. 33 confirms its limited scope by precluding recourse to it in respect of any rights and freedoms other than those provided for in ss. 2 or 7 to 15 of the *Charter* and where the protection afforded by these rights and freedoms overlaps with other constitutional guarantees;

(2) The wording of s. 33 confirms that it confers a power of temporary application. Section 33 limits a declaration to a term of five years and the possibility of renewing such a declaration[5] necessarily presupposes that s. 33 cannot be used in a way that produces permanent effects, for any renewed declaration necessarily presupposes the rights and freedoms will otherwise operate fully, otherwise the declaration would be otiose. The temporary character of the use of s. 33 confirms that it cannot be used to cause an irreparable impairment of the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter*. Such use would amount to indirectly amending the Constitution. It follows that the courts must retain jurisdiction to review, on a case-by-case basis, whether the use of s. 33 violates this limit; and

(3) Section 33 does not oust the jurisdiction of a court to declare that a law invoking s. 33 violates a right or freedom guaranteed by ss. 2 or 7 to 15 of the *Charter*.

5. The constitutional limits of the s. 33 power preclude it from being used to distort or annihilate the rights and freedoms guaranteed by the *Charter*, or to reduce them to *des peaux de chagrin*, that is, to shrivel them beyond recognition, if not transform them into mere legal fictions. Courts have the responsibility to ensure that these limits – which were neither considered nor rejected by this Court in *Ford* – are respected.

6. The Attorney General of Canada's analytical approach to interpreting s. 33 is anchored in the text and scheme of the Constitution of Canada and reflects the essential balance that lies at the heart of our constitutional democracy. The Constitution gives Parliament and the

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5 *Charter*, s. 33(4).

legislatures a wide margin to enact laws in the public interest within their respective jurisdictions. However, this latitude has never been absolute: the principle of parliamentary sovereignty has always been constrained by the Constitution.[6]

B. Concise statement of the facts relevant to the intervention

7. The Attorney General of Canada takes no position on the facts in dispute.

PART II – THE ATTORNEY GENERAL OF CANADA'S POSITION ON THE QUESTIONS IN ISSUE

8. The Attorney General of Canada will address the following constitutional questions:

- Is the use of s. 33 of the *Canadian Charter of Rights and Freedoms* subject to constitutional limits other than requirements of form? Answer: yes.

- Can the courts, in the exercise of their inherent jurisdiction, declare that the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter* have been violated[7] despite a valid use of s. 33 of the *Charter*? Answer: yes.

9. More specifically, the Attorney General of Canada submits that s. 33, interpreted in light of its context and the scheme of the Constitution:

A. cannot have legal effects beyond ss. 2 or 7 to 15 of the *Charter*;

B. grants only a temporary legislative power that cannot result in the irreparable impairment of the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter*; and

C. does not oust the jurisdiction of a court to declare that the rights and freedoms subject to s. 33 have been unjustifiably limited within the meaning of s. 1 of the *Charter*.

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6 See, for example, *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91-93 and 133 [***C.A. 1867***].

7 A law violates a right or freedom guaranteed by ss. 2 or 7 to 15 where the limit it imposes is not justified under s. 1 of the *Charter*.

PART III – ARGUMENTS

10. In 1982, the Constitution of Canada was amended, notably to entrench the *Charter*, the main purpose of which is set out in s. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it […]" [our emphasis].

11. Given their superior normative value, the rights and freedoms set out in the *Charter* can only be restricted or modified under strictly circumscribed conditions: first, s. 1 of the *Charter* allows reasonable limits to rights and freedoms; second, s. 33 authorizes the enactment of a law that expressly declares that a law or any of its provisions operates despite ss. 2 or 7 to 15 of the *Charter*; and third, Part V of the *C.A. 1982* allows the amendment of constitutional provisions, including those contained in the *Charter.*

12. The interpretation of s. 33 must, according to the method of interpretation favoured by this Court, begin with the text:[8]

(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.	(1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.
(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.	(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur à l'effet qu'elle aurait sauf la disposition en cause de la charte.
(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.	(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

[8] *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32 at paras. 8 and 9; *Caron v. Alberta*, 2015 SCC 56 at para. 36; *Dickson v. Vuntut Gwitchin first Nation*, 2024 SCC 10 at para. 113.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).	(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).	(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

13. The text of s. 33 must then be interpreted in light of its context and the scheme of the *Charter* and the Constitution as a whole. This interpretation, it is submitted, brings to light the constitutional limits on the use of s. 33.[9]

A. Section 33 cannot have effects beyond ss. 2 or 7 to 15 of the *Charter*

14. The circumscribed scope of the effects that s. 33 may have on the constitutional order reflects its exceptional character. Its very words attest to a clear and unmistakable limit on the principle of parliamentary sovereignty expressly enshrined by the framers of the Constitution.

15. Indeed, s. 33 is explicitly limited by its very wording: it can be invoked only in respect of some of the rights and freedoms guaranteed in the *Charter*, namely ss. 2 or 7 to 15. Pursuant to s. 33(2), an Act or a provision in respect of which a declaration made under s. 33(1) has such operation as it would have but for ss. 2 or 7 to 15 of the *Charter*. Democratic rights, mobility rights, rights related to the official languages of Canada and minority language education, as well as all other constitutional guarantees outside the *Charter*, are therefore outside the scope of s. 33.

16. Moreover, this Court has recognized that "the scope of one *Charter* right does not circumscribe the scope of another".[10] It follows that if an activity is protected both by one of the provisions of ss. 2 or 7 to 15 of the *Charter* and by another constitutional provision, s. 33 could not allow a law to have adverse effects on that activity. Relying on s. 33, a legislature

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9 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 117; *Canada (Attorney General) v. Power*, 2024 SCC 26 at paras. 26-27 [***Power***].

10 *Baier v. Alberta*, 2007 SCC 31 at para. 58. See also *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at p. 320.

cannot do indirectly what it cannot do directly, namely shield its law against any incompatibility with a constitutional provision other than ss. 2 or 7 to 15.

17. For example, in *Ontario v. Working Families Coalition* this Court recognized that "there will necessarily be overlap between the electoral activity protected by both ss. 2(b) and 3 of the *Charter*".[11] Although s. 33 may be relied upon in respect of s. 2(b), it cannot interfere with the constitutional guarantee provided in s. 3. The informational aspect of the right to meaningfully participate in the electoral process is protected under both s. 3 and s. 2(b).[12]

18. The same principle applies to judicial independence, among other constitutional guarantees. Although the scope of s. 33 does extend to s. 11(d) of the *Charter*, which guarantees every accused person the right to an "independent and impartial tribunal", it does not extend to s. 92(14) and ss. 96 to 100 of the *C.A. 1867*, which provide an independent basis for the same guarantee.[13]

19. The express textual limits of s. 33 ensure that recourse to s. 33 by a legislature shall not adversely affect any constitutional protections or rights and freedoms other than those guaranteed in ss. 2 or 7 to 15 of the *Charter*. Accordingly, it is for a court to consider any alleged adverse effects beyond what is permitted by s. 33.

B. The use of section 33 cannot result in an irreparable impairment of the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter*

20. Section 33 is subject to a second constitutional limitation: it cannot be used to cause an irreparable impairment of the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter*, that is, an impairment that prevents these rights and freedoms from regaining their full normative force once the declaration expires. This limit refers to the impact on a right or freedom itself in its general and normative scope, rather than the impact on any one individual. For example, if a declaration made under s. 33 eliminated the means

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11 *Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.*, 2025 SCC 5 at para. 118 [***Working Families***].

12 *Ibid.* at paras. 31 and 115.

13 See *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3.

indispensable to the exercise of the right or freedom, the legislature would impede the exercise of that right or freedom beyond the temporal limit imposed by s. 33. Section 33 does not confer on a legislature the power to distort or destroy a right or freedom. This interpretation is based on the text of s. 33, read in the light of the broader context of the *Charter* and the Constitution.

21. Specifically, this interpretation is grounded on the following propositions: (1) by its very terms, s. 33 provides for a power that is necessarily temporary in application; (2) the expiry of a declaration and the possibility of its re-enactment, provided for in s. 33, confirm the essentially temporary nature of the permissible effects on rights and freedoms; (3) any irreparable impairment of a right or freedom would exceed the scope of s. 33 since it would constitute an unauthorized amendment to the Constitution; and (4) a court may conduct an analysis to determine whether the rights and freedoms guaranteed by ss. 2 or 7 to 15 of the *Charter* have been irreparably impaired.

1. Section 33 provides for a power that is necessarily temporary in application

22. Subsections 33(3), (4) and (5) prescribe the temporal limit applicable to any declaration made under s. 33, as well as the possibility of renewing the use of s. 33 after the expiry of such a declaration. By limiting any recourse to s. 33 to a renewable period of five years, s. 33 departs from the general principle that a legislative provision enacted by a legislature remains indefinitely in force.

23. Section 33 differs in this respect from other similar provisions found in other rights-protecting instruments. The *Canadian Bill of Rights*, for example, provides that "[e]very law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared ...".[14] In that case, there is no sunset clause limiting Parliament's use of this override provision.

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14 *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2 (emphasis added).

24. Similarly, s. 52 of the Quebec *Charter of Human Rights and Freedoms* places no constraints on the duration of the legislature's use of its override authority.[15] The same is true of human rights legislation in Alberta,[16] Ontario[17] and Saskatchewan:[18] none impose a temporal limit upon the legislature's authority.

25. The temporal limit placed on s. 33 deprives legislatures of a power otherwise inherent to their function: the power to modify the law without delimiting in time any such change. Section 33 prevents legislatures from permanently exempting themselves from the constitutional guarantee of rights and freedoms. Thus, it reaffirms the primacy of the supreme law of Canada over ordinary law, which cannot be set aside by a simple legislative act.

2. The conditions of application of s. 33 confirm the inherently temporary nature of its permissible effects on rights and freedoms

26. The possibility of renewing an express declaration necessarily implies that s. 33 can only have temporary effects on rights and freedoms.

27. The choice of a maximum period of five years for any declaration made under ss. 33(1) or (4) is no accident: it corresponds generally to the maximum term of a legislative assembly as contemplated by s. 4 of the *Charter*. Since the use of s. 33 cannot exceed the maximum mandate of a legislative assembly, the assembly or its successor is thus required to reconsider the merits of the use of s. 33 at regular intervals.

28. The temporary nature of a declaration under s. 33 aims, first, to align the exercise of the power provided for in this provision with the democratic electoral cycle, so as to ensure that elected officials are accountable to voters.[19] In addition, this requirement expresses the will

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15 *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 52.
16 *The Individual's Rights Protection Act*, S.A. 1972, c. 2, s. 1(1).
17 *Human Rights Code*, R.S.O. 1990, c. H.19, s. 47(2).
18 *Saskatchewan Human Rights Code*, 2018, S.S. 2018, c. S-24.2, s. 52(b).
19 *Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 at paras. 110, 121 and 184 [***UR Pride***]. See also Robert Leckey and Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72 University of Toronto Law Journal 189 [**Leckey and Mendelsohn, *The Notwithstanding Clause***] and Michael Pal, "Democracy and the Notwithstanding Clause" (2024) 37 Canadian Journal of Law & Jurisprudence 545.

of the framers of the Constitution that s. 33 not be used to impair irreparably the rights and freedoms guaranteed by the *Charter*.

29. If, at the conclusion of five years after a declaration is made under s. 33, a legislature does nothing or resolves not to re-enact the declaration, the constitutional status quo is restored, and the rights and freedoms are expected to regain fully their constitutional status.

30. If, however, a legislature chooses to re-enact a declaration under s. 33, there must be a real choice open to the legislature. In the event that the prior use of s. 33 by a legislature has irreparably impaired rights and freedoms, a subsequent legislature's choice to renew a declaration is rendered meaningless. A right subject to a declaration within the meaning of s. 33 must be capable of returning to its full normative force once the declaration expires, and the use of s. 33 cannot therefore cause irreparable damage to the right's normative intensity.

31. Otherwise, the legislature, as well as the electorate, would be deprived of the ability to restore the full constitutional force of rights and freedoms compromised by measures enacted by a prior legislature. The constitutional requirement underlying this feature of s. 33—namely, that a legislature reconsider the merits of the use of this provision—would have been amended. This confirms that s. 33 can authorize only temporary, and not irreparable, effects on rights and freedoms.

3. Recourse to s. 33 that results in an irreparable impairment of a right or freedom would constitute an unauthorized amendment to the Constitution

32. The legislative power conferred by s. 33 is broader than that provided for in s. 1, as it allows a statute to operate even when that statute limits a right or freedom set out in ss. 2 or 7 to 15 of the *Charter* without demonstrable justification under s. 1. It is, however, a power that is less broad than that conferred by the constitutional amending procedure, which is the only means by which an amendment to rights and freedoms can be made. Any use of s. 33 that would result in an irreparable impairment of any of the rights and freedoms guaranteed in ss. 2 or 7 to 15 of the *Charter* would constitute an unauthorized attempt to amend the Constitution of Canada.

33. The text and the conditions of application of s. 33 demonstrate, in and of themselves, that the rights and freedoms subject to it may not be irreparably impaired after one or more s. 33 declarations. It goes without saying that the interpretation of s. 33 must also take into account the broader context of the *Charter* and the Constitution of which it is part. That interpretation must respect the "basic constitutional structure" of the Constitution.[20] As this Court has stated, "... the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text".[21]

34. The rights and freedoms guaranteed by the *Charter* hold an essential place in Canada's constitutional structure.[22] They form the normative foundation that helps to ensure, among other commitments, the rule of law and the protection of minorities within a constitutional democracy.[23] Any sound interpretation of s. 33 must preserve this central role.

35. The use of s. 33 must therefore comply with s. 52(3) of the *C.A. 1982*, which provides:

Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.	La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

36. An amendment to ss. 2 or 7 to 15 of the *Charter* cannot be made unilaterally by a legislature under ss. 44 or 45 of the *C.A. 1982.* In this regard, it is sufficient to note that no legislature has jurisdiction unilaterally to amend or repeal the *Charter* or the rights and freedoms enshrined within it, including in ss. 2 or 7 to 15. Beyond this conclusion, it is not necessary for this Court to determine, in the present appeal, which amendment procedure would be required to authorize such a constitutional reform.

37. It follows that – subject to any constitutional amendment authorized by Part V of the *C.A. 1982* – all *Charter* rights and freedoms are permanently guaranteed. This implies not only

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20 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 50 [***Reference re Secession***]; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 49.

21 *Reference re Senate Reform,* 2014 SCC 32 at para. 26; *Power*, *supra* note 9 at para. 27.

22 *Reference re Secession*, *supra* note 20 at paras. 49 and 50.

23 *Ibid.* at paras. 72, 74 and 80-82.

that their legal effects can only be "suspended" within the limits set out in s. 33, but also that, as soon as a declaration under ss. 33(1) and (4) expires, those rights and freedoms must regain the full normative force that they had before the declaration was made. Otherwise, recourse to s. 33 would amount to an unauthorized constitutional amendment.

4. Judicial analysis of a potential irreparable impairment of rights and freedoms guaranteed by ss. 2 or 7 to 15 of the Charter

38. The exceptional and limited power conferred by s. 33 justifies and requires a court to assess the constitutionality of its use. The courts remain guardians of the Constitution and may consider the compliance of any statute with the Constitution.[24]

39. In cases in which s. 33 is invoked, this judicial responsibility includes the role of examining whether the use of s. 33 would result in an irreparable impairment of a right or freedom, as any such use would exceed the constitutional limits of this exceptional legislative power.

40. In this case, as in many other contexts,[25] this Court need not establish a definitive or exhaustive test. A court could assess the impact of any statute invoking s. 33 by examining the specific circumstances of each use and by conducting a contextual analysis. The following analytical framework should guide a court in its assessment of any use of s. 33 to determine whether it involves an irreparable impairment:

i) *First, does the use of s. 33 lead to the permanent denial of a right or freedom protected by ss. 2 or 7 to 15 of the Charter?* Repeated declarations under s. 33 could amount, at a certain point, to abolishing the very right or freedom in question. As demonstrated

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24 See *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 155 and 169; *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para. 64; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 70; *Power*, *supra* note 9 at para. 56.

25 See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23-28; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 16 and ff.; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 57.

by the jurisprudential criteria developed by this Court to assess the effect of a statute on a right or freedom, the fundamental purpose of the rights and freedoms guaranteed by the *Charter* is to enable their exercise, and not simply to enshrine their existence on paper. Thus, a statute accompanied by an express declaration made under s. 33 authorizing unreasonable searches and seizures would have the effect, if such a declaration were repeatedly renewed, of abolishing the very right to protection from such practices as guaranteed by s. 8 of the *Charter*. The prolonged impossibility of exercising a right or freedom would, in practice, be tantamount to denying its very existence, which can be done only through a constitutional amendment.

ii) *Second, does the statute have the effect of impairing the rights or freedoms in question in such a way that they cannot be fully and concretely restored once the declaration under s. 33 expires?* The loss of means essential to the exercise of a right or freedom could produce effects that would subsist beyond the expiry of any declaration under s. 33. For example, the freedom of the press, guaranteed under s. 2(b) of the *Charter*, could disappear if independent newspapers and media were prohibited from carrying on business for a prolonged period. Similarly, freedom of religion, guaranteed under s. 2(a) of the *Charter*, could disappear if places of worship were declared illegal for a prolonged period. And freedom of association, guaranteed in s. 2(d) of the *Charter*, could disappear if all trade unions were declared illegal and prohibited from engaging in any activity for a prolonged period. Such scenarios would amount to constitutional amendments that exceed the unilateral power of a legislature.

iii) *Third, does the statute, by its exorbitant nature, result in an immediate and irreparable negation of the minimum conditions for maintaining the free and democratic society enshrined in our Constitution and the constitutional culture based on respect for rights and freedoms it guarantees?* As this Court stated in *Oakes*, the very purpose of entrenching the *Charter* is to ensure that "Canadian society is to be free and democratic".[26] For this reason, the courts must be guided by the values and principles

[26] *R v. Oakes*, [1986] 1 S.C.R. 103 at p. 136 [***Oakes***].

essential to such a society, which include "respect for the inherent dignity of the human person".[27] A legislative measure fundamentally irreconcilable with human dignity could cause, from the outset, an impairment of a right or freedom that could not be remedied by the subsequent lifting of a declaration under s. 33. Thus, a statute that invokes s. 33 to allow arbitrary executions or slavery would violate a constitutional limit, since such a statute would not be temporarily limited to maintaining the effect of the statute inconsistent with *Charter* rights or freedoms, but would immediately abolish the very conditions of a free and democratic society. The restoration of rights and freedoms at the expiry of the declaration would become impossible, regardless of the duration of the invocation of s. 33. In such a case, the irreparable impairment would be apparent as soon as the statute comes into force, without it being necessary to await the renewal of a declaration.

41. The Attorney General of Canada does not advance these examples, however extreme they may seem, to suggest, in any way, that the impugned provisions in this case coincide with such scenarios. Rather, the aim is to show that there is no basis for the claim that the conditions for exercising s. 33 encompass only those recognized in *Ford* and do not restrict the jurisdiction of a legislature. To the contrary, s. 33 substantively circumscribes the exercise of legislative power.

C. The jurisdiction of the courts to declare a violation of ss. 2 or 7 to 15 of the *Charter* is not ousted by s. 33

42. Section 33 does not oust the inherent and fundamental jurisdiction of the superior courts to decide questions of law, as guaranteed by s. 96 of the *C.A. 1867*. There is therefore a relationship between the indisputable jurisdiction of the courts to rule on constitutional limits, including those addressed in sections A and B of this factum, and the jurisdiction of the courts reviewed in this section.

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27 *Ibid.*

43. The text and general scheme of s. 33 support the position that courts retain the power to declare that a statute violates the rights and freedoms subject to s. 33, even when a statute includes a declaration made under s. 33(1).

44. For the following reasons, a declaration under s. 33 does not remove the jurisdiction of a court: (1) despite the use of s. 33, the rights and freedoms in ss. 2 and 7 to 15 of the *Charter* continue to exist; (2) the judicial function of deciding a question of law is in no way excluded by the text of s. 33; (3) a judicial declaration that ss. 2 or 7 to 15 of the *Charter* is violated would be consistent with the purposes of s. 33; and (4) a judicial declaration that these provisions of the *Charter* have been violated is generally in the public interest.

1. Rights and freedoms continue to exist despite the use of s. 33

45. According to the very terms of ss. 33(1) and (2), the effect of a declaration made under s. 33(1) applies only to the Act of Parliament or of the legislature that contains the declaration. It does not affect the right or freedom guaranteed by the *Charter*:

(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.	(1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.
(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.	(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.
(emphasis added)	(nous soulignons)

46. The key words of s. 33 — "shall operate" and "shall have such operation as it would have" (in French, "*a effet*" and "*a l'effet qu'elle aurait*") — relate to an "Act or a provision of an Act in respect of which a declaration is made" under s. 33(1). They specify that the legal effect of s. 33 refers to that Act or provision, rather than to the rights and freedoms referred

to in the express declaration or to the jurisdiction of the court to review the compliance of the Act with those rights and freedoms.[28]

47. When s. 33 is not invoked, a legislative provision inconsistent with a right or freedom of the *Charter* is "of no force or effect" (in French, "*inopérante*"), pursuant to s. 52(1) of the *C.A. 1982*:

The 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.	La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.
(emphasis added)	(nous soulignons)

48. However, if, in accordance with s. 33, a statute expressly declares that a legislative provision operates notwithstanding a provision included in ss. 2 or 7 to 15 of the *Charter*, the legislative provision in question is thus protected from the consequence that this inconsistency would entail, namely, the loss of its legal force or effect. That is the only legal effect that s. 33 secures.

49. The conditional phrase "shall have such operation as it would have but for the provision of this Charter referred to in the declaration" in s. 33(2) supports the interpretation that invoking s. 33 does not eliminate the rights and freedoms in question. Their continued legal existence remains necessary to give meaning to this phrase. If the rights and freedoms were annulled or suspended, it would no longer be possible to consider the consistency of a statute with them and, consequently, no question would arise as to the legal effect of the statute. In such a scenario, the use of the conditional expression would not be necessary. Rather, this

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[28] *UR Pride*, *supra* note 19 at para. 79. See also Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 University of Toronto Law Journal 510 at pp. 513, 520, 524 and 527-528 [**Webber, *Notwithstanding Remedy***]; Leckey and Mendelsohn, *The Notwithstanding Clause*, *supra* note 19; Grégoire Webber, Eric Mendelsohn and Robert Leckey, "The faulty received wisdom around the notwithstanding clause", *Policy Options* (May 10, 2019), online: https://policyoptions.irpp.org/2019/05/faulty-wisdom-notwithstanding-clause/.

expression assumes that there is a genuine question as to the legal effect of a statute precisely because it remains possible to assess its consistency with the relevant provision of the *Charter*. Section 33 provides that a statute "shall have such operation as it would have but for the provision of this Charter referred to in the declaration", a provision that, but for the invocation of s. 33, would deny the statute its legal effect.

50. In its analysis, the Court of Appeal of Quebec erred by failing to consider s. 33(2). This omission led the appellate court to conclude erroneously that a statute invoking s. 33 will "override" rights and freedoms and is therefore "protected from the judicial scrutiny thereof which could otherwise have been carried out".[29]

51. Emphasizing the word "notwithstanding" in s. 33(1) ("*indépendamment*" in French), the Court of Appeal contended that a statute invoking this section operates "notwithstanding" (independently of) the relevant provisions of the *Charter*, that is, "regardless of them, without taking them into account, such that the statute in question is protected from their application and placed outside their reach".[30]

52. By contrast, in *UR Pride*, a majority of the Court of Appeal for Saskatchewan considered s. 33 holistically and concluded that the use of s. 33 does not have the effect of denying the existence of the rights and freedoms referred to in an express declaration.[31]

53. As found by the majority of the Court of Appeal for Saskatchewan, none of the decisions relied upon by the Court of Appeal of Quebec on this point[32] concerned the interpretation of s. 33(2).[33] This appeal is the first time that this Court has been asked to rule on this provision.

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29 *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254 [**CAQ**] at paras. 8, 217, 271 and 312 (Translation of the Court of Appeal).
30 *Ibid.* at para. 317.
31 *Ur Pride*, *supra* note 19 at paras. 72-92.
32 CAQ, *supra* note 29 at paras. 320-327.
33 *UR Pride*, supra note 19 at para. 58.

2. The text of s. 33 does not oust the judicial function of deciding a question of law

54. When a court assesses "the consistency of a law with the requirements of the *Charter*", it exercises "an ordinary judicial power to determine a question of law".[34] Section 96 of the *C.A. 1867* protects the essential role of the superior courts to review the constitutional compliance of legislation.[35]

55. There is nothing in the text of s. 33 that would allow this provision to be understood as a privative or restrictive clause preventing superior courts from reviewing the effect on rights and freedoms of a statute containing a s. 33 declaration. Section 33 is to be interpreted so as to preserve meaningful access to justice, an essential condition for maintaining the rule of law.[36]

3. A judicial declaration of a violation of ss. 2 or 7 to 15 of the **Charter** *would be consistent with the purposes of s. 33*

56. In *Ford*, this Court held that neither the "constitutional perspective" of "legislative supremacy" nor that of emphasizing "the seriousness of a legislative decision to override guaranteed rights and freedoms" was "particularly relevant or helpful" in construing s. 33.[37]

57. If, as held by the Court of Appeal of Quebec,[38] parliamentary sovereignty were to be recognized as one of the purposes of s. 33, the recognition of a judicial power to declare a violation of rights and freedoms would be consistent with this purpose.

58. A judicial declaration that a statute violates ss. 2 or 7 to 15 of the *Charter* is not contrary to the principle of parliamentary sovereignty. On the contrary, such a declaration respects this

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34 *R. v. Sullivan*, 2022 SCC 19 at paras. 43 and 45.
35 *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 39; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 18; *UR Pride*, *supra* note 19 at paras. 129-133.
36 *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27 at para. 34.
37 *Ford*, *supra* note 3 at p. 740.
38 CAQ, *supra* note 29 at para. 224.

constitutional principle, insofar as it does not alter the legal effect of the legislation in question.

59. The principle of parliamentary sovereignty does not require that the usual judicial function of deciding a question of law be set aside. Several comparable regimes illustrate how a declaratory power of the courts can perfectly coexist with respect for parliamentary sovereignty.

60. In the United Kingdom, the *Human Rights Act 1998* empowers the courts to declare that a statute is incompatible with the rights and freedoms recognized by that Act. Parliamentary sovereignty is protected by specifying that such a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given".[39]

61. Similar rights protection regimes exist in New Zealand and Australia, where the principle of parliamentary sovereignty also retains paramount constitutional importance. These regimes likewise give the courts declaratory powers, while specifying that a declaration of incompatibility does not have the effect of altering the legal effect of the statute in question.[40] It is to be noted that in New Zealand, the court's power does not flow from an express provision of the *New Zealand Bill of Rights Act*, but rather from "the usual function of the courts".[41]

62. Moreover, a judicial declaration that a statute violates ss. 2 or 7 to 15 of the *Charter* would be consistent with the democratic purpose of s. 33 of allowing the electorate and the legislature to assess whether the renewal of a declaration under s. 33(4) is justified.[42]

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39 *Human Rights Act 1998*, c. 42 (U.K.), s 4(6)(a).

40 See: *Charter of Human Rights and Responsibilities Act 2006* (Victoria), ss. 36(2) and 36(5)(a); *Human Rights Act 2004* (Australian Capital Territory), ss. 32(2) and 32(3)(a); *Human Rights Act 2019* (Queensland), s. 54(a); *New Zealand Bill of Rights Act, 1990*, s. 4 and *Attorney-General v. Taylor*, [2018] NZSC 104 at paras. 53 and 144 [***Taylor***]. For a study of these provisions, see Webber, *Notwithstanding Remedy supra* note 28 at pp. 528-533.

41 *Taylor*, *supra* note 40 at para. 53.

42 Leckey and Mendelsohn, *The Notwithstanding Clause*, *supra* note 19 at pp. 190 and 197-201.

63. As this Court has recognized, the right of citizens to vote includes the right to be "reasonably informed".[43] A judgment addressing the compatibility of a statute with the rights and freedoms guaranteed by the *Charter* would inform the evaluation, by voters and their representatives, of the justification of re-enacting a s. 33 declaration. Voters and their representatives are not always necessarily in a position to determine for themselves whether a law respects *Charter* rights and freedoms. Depriving these important actors in the democratic process of access to a judicial determination of the compatibility of a statute with constitutional rights and freedoms would frustrate an important accountability mechanism outlined in s. 33.[44]

4. A judicial declaration of a violation of ss. 2 or 7 to 15 of the Charter *would generally be in the public interest*

64. A judicial declaration that a statute protected by s. 33 violates a right or freedom would generally be in the public interest, even if such a declaration would not have its usual effect as long as the statute remains protected under s. 33.

65. A court would not be asked to decide a case that raises only moot or abstract issues, contrary to the conclusion of the Court of Appeal of Québec.[45] Several considerations may be relevant to a court's exercise of its discretion.

66. First, if a court finds that the statute protected by s. 33 is consistent with the rights and freedoms referred to in a declaration, the legislature would not be required to re-enact the declaration. In turn, if a court were to find that the statute protected by s. 33 was incompatible with rights and freedoms, the legislature would be required to re-enact a declaration if it

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43 *Working Families*, *supra* note 11 at para. 31.

44 Grégoire Webber, "The Notwithstanding Clause, the Operation of Legislation, and Judicial Review" in Peter Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*, McGill-Queen's University Press, 2024, 93 at pp. 94 and 104; Leckey and Mendelsohn, *The Notwithstanding Clause*, *supra* note 19 at pp. 198-201.

45 CAQ, *supra* note 29 at para. 242; Respondents' Factum, Attorney General of Québec at pp. 63-65, paras. 207-212.

sought to allow the statute to continue to operate. A judicial declaration could thus guide legislative action.

67. For example, in 2018 the Legislature of Saskatchewan enacted the *School Choice Protection Act*,[46] invoking s. 33 in response to a declaration of unconstitutionality by the Court of Queen's Bench against certain provisions of the *Education Act, 1995*.[47] Following the decision of the Court of Appeal that the *Education Act, 1995* was consistent with the *Charter*,[48] the *School Choice Protection Act* was not brought into force by proclamation. The province's action with respect to s. 33 was guided by the judicial determination as to whether a *Charter* right had been violated.

68. The courts have recognized the usefulness of judicial declarations as guidance for constitutional actors on the applicable legal framework. In *Canada v. Khadr*, this Court issued a declaration of a *Charter* violation in order to provide the applicable "legal framework".[49]

69. Second, a judicial declaration would constitute an important source of information for the electorate when it is called upon during an election to assess the merits of the legislature's decision to invoke s. 33. Irrespective of whether the issue is explicitly debated during an election campaign, the judicial determination would ensure that voters, legislators, and civil society have all the necessary information to make the legislature's recourse to s. 33 an issue of democratic accountability, should they so choose.

70. Third, judicial declarations of violation of a right affirm the legitimacy of the right holder's claim.[50]

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46 *The School Choice Protection Act*, S.S. 2018, c. 39.

47 *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*, 2017 SKQB 109.

48 *Saskatchewan v. Good Spirit School Division No. 204*, 2020 SKCA 34.

49 *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 47. See also *Shot Both Sides v. Canada*, 2024 SCC 12 at paras. 65-69.

50 *UR Pride*, *supra* note 19 at paras. 138-139. See also *Taylor*, *supra* note 40 at para. 56: "The making of a formal declaration is also another means of vindicating the right in the sense of marking and upholding the value and importance of the right"; *Gosselin v. Québec (Attorney General),* 2002 SCC 84 at para. 96.

71. The Court of Appeal for Saskatchewan,[51] the Court of King's Bench for Saskatchewan,[52] and the Superior Court of Quebec[53] have all recognized the court's jurisdiction to assess the compliance of a statute with ss. 2 or 7 to 15 of the *Charter* despite the use of s. 33, all the while recalling that a court retains the discretion to refuse to issue a declaration where appropriate.

D. The scope of this Court's decision in *Ford*

72. The arguments presented by the Attorney General of Canada concerning substantive limits inherent in s. 33 do not relate to issues already decided by this Court. Rather, they invite this Court to recognize that, in *Ford*, it was not asked to consider every issue regarding the constitutional limits and scope of s. 33.[54]

73. The decision in *Ford* "is only an authority for what it actually decides".[55] In that case, this Court decided three issues regarding the Quebec legislature's use of s. 33 in *An Act respecting the Constitution Act, 1982*.[56] These issues addressed the wording of a legislative declaration under s. 33, whether it was possible to include a declaration in an omnibus statute, and whether a declaration could operate retroactively.[57]

74. This Court's holding that "[s]ection 33 lays down requirements of form only" and that "there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority"[58] must be read in the context of that case, in light of the specific issues it decided.

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51 *UR Pride*, *supra* note 19 at para. 74.
52 *UR Pride Centre for Sexuality and Gender Diversity v. Government of Saskatchewan*, 2024 SKKB 23 at paras. 124-148.
53 *Hak c. Procureur général du Québec*, 2021 QCCS 1466 at paras. 785-800.
54 See Grégoire Webber, "The Notwithstanding Clause and the Precedent in *Ford*: *le dit et le non-dit*" (2023) 32 Constitutional Forum 13.
55 *R v. Henry*, 2005 SCC 76 at para. 53; *R v. Kirkpatrick*, 2022 SCC 33 at para. 85.
56 *An Act respecting the Constitution Act, 1982*, CQLR, c. L-4.2.
57 *Ford*, *supra* note 3 at pp. 740-745.
58 *Ibid.* at p. 740.

75. Accordingly, this holding cannot be interpreted to exclude the recognition of constitutional limits to the power provided for in s. 33 that find their source in the text of s. 33 read in light of the *Charter* and the Constitution as a whole. Nor does it exclude the recognition that a superior court retains jurisdiction to find a violation of ss. 2 or 7 to 15 of the *Charter* despite a legislature's use of s. 33.

76. Indeed, contrary to what was argued before and rejected by this Court in *Ford,* none of the constitutional limits identified by the Attorney General of Canada would require "a *prima facie* justification of the decision to exercise the override authority";[59] would invite courts to rule on "permissible legislative policy in the exercise of the override authority"; or would require courts to express an opinion about "a particular exercise of the authority conferred by s. 33".[60] What is more, the constitutional limits identified by the Attorney General of Canada would in no way require a justification of the legislature's recourse to s. 33.

77. Maintaining that s. 33 applies solely to the rights and freedoms guaranteed by ss. 2 and 7 to 15 of the *Charter*, and does so only on a temporary basis, entails that it is for the courts to determine whether the legislature has complied with these limits. A party alleging that these limits have not been respected would have to demonstrate that the use of s. 33 exceeds one or another of these limits. Moreover, the fact that s. 33 leaves open the possibility for courts to declare that a statute, even when it contains a declaration under s. 33(1), violates rights and freedoms does not require a justification of the legislature's recourse to s. 33.

78. In summary, the Attorney General of Canada relies on the text of s. 33, read in light of its context and the scheme of the Constitution, to justify an interpretation that highlights substantive constitutional limits on s. 33, while preserving the legislature's ability to have recourse to it.

79. This appeal provides an opportunity to clarify the law to ensure that the equilibrium at the heart of our constitutional democracy between the exercise of legislative power and respect for fundamental rights and freedoms is maintained. The position that s. 33 applies only to

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59 *Ibid.* at p. 741.
60 *Ibid.* at p. 743.

ss. 2 and 7 to 15 of the *Charter*, that no use of s. 33 can result in an irreparable impairment of those rights and freedoms, and that s. 33 does not deprive the superior courts of their jurisdiction to declare a statute inconsistent with these rights and freedoms secures this equilibrium. Indeed, it ensures "the continued relevance and, indeed, legitimacy of Canada's constituting document".[61]

PART IV – SUBMISSIONS CONCERNING COSTS

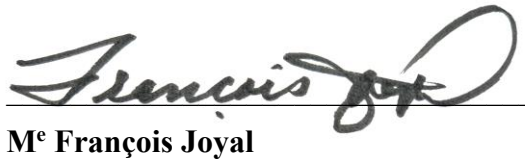
80. The Attorney General of Canada is not seeking costs.

PART V – ORDERS SOUGHT

81. The Attorney General of Canada takes no position on the outcome of the appeal.

82. The Attorney General of Canada is seeking leave to present oral arguments not exceeding 30 minutes at the hearing, in person.

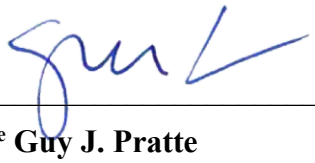
Montréal, September 17, 2025



M^e François Joyal
M^e Michelle Kellam
M^e Marjolaine Breton
Department of Justice Canada

Counsel for the Intervener
Attorney General of Canada

Montréal, September 17, 2025



M^e Guy J. Pratte
M^e Nadia Effendi
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Co-Counsel for the Intervener
Attorney General of Canada

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61 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 23.

PART VI – TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Legislation *(cont'd)* **Paragraph(s)**

Case Law

Case Law *(cont'd)* **Paragraph(s)**

Case Law *(cont'd)* **Paragraph(s)**

Secondary Sources

Secondary Sources ***(cont'd)*** **Paragraph(s)**
