Court File No. 41231

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 on next page*)

FACTUM OF THE INTERVENER,
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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(Style of cause continued)

AND BETWEEN:

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

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RESPONDENTS ON CROSS-APPEAL

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT/
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AND BETWEEN:

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

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

RESPONDENTS

AND BETWEEN:

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LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC

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AND BETWEEN:

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APPELLANT/
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– and –

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Asper Centre argues that in accordance with principles central to the judicial role, including judicial independence,[1] constitutionalism and the rule of law,[2] the court has the power, and sometimes the obligation, to engage with *Charter* claims arising in the s. 33 context to ensure access to justice and the supremacy of the constitution.

PART II – ISSUE

2. The Asper Centre addresses the issue respecting the effects of invoking s. 33 on judicial review and the judiciary's power to issue declarations of rights violations to argue that it is appropriate and properly within the Court's jurisdiction to render such a declaratory judgment.

PART III – ARGUMENT

Effect of a Section 33 Declaration on the Power of the Court

3. There is no specific language in s. 33 which ousts the jurisdiction of the courts. A majority of the Court of Appeal of Saskatchewan ("SKCA") decided in *UR Pride*[3] that s. 33 does not deprive the superior court of jurisdiction.[4]

4. Section 33 does not modify the content of the rights and freedoms referred to, or what constitutes a reasonable limit to them. Accordingly, the *Charter* guarantee remains in place, in its original language, and will become fully enforceable again once the declaration has expired, in five years' time or less.

5. Subsection 24(1) of the *Charter* provides that anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent

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[1] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3.
[2] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at paras 70, 72 [Secession Reference].
[3] *Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 [UR Pride].
[4] *Ibid* at paras 101, 122.

jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.[5]

6. A declaration pursuant to s. 33(1) does not make a right or freedom any less guaranteed than it was before the declaration was made. Rather, the specific effect of the declaration is clearly described: the legislation protected by the declaration "shall have such operation as it would have but for the provision of the *Charter*" invoked by the declaration. The legal effect of the s. 33 declaration is not to remove or limit the *Charter* guarantee, but to protect the otherwise offending legislation from a finding of invalidity based upon inconsistency with the *Constitution* under s. 52(1), i.e., it temporarily saves the "operation" of the legislation. The SKCA held that this protection from s. 52 means that a court cannot issue a declaration of invalidity under s. 52.[6]

7. Similarly, it may be said that the s. 33 declaration does not make a court any less a "court of competent jurisdiction" where allegations about a s. 33 declaration are to be made. As this Court noted in *Power*, "courts play a fundamental role in holding the executive and legislative branches of government to account in Canada's constitutional order."[7] As further noted in *R v Sullivan*, the task of determining whether "a law is inconsistent with the Constitution" is "an ordinary judicial task of determining a question of law."[8]

Source of the Power of the Court

8. In *Ford*,[9] this Court considered arguments about the form and content of a declaration made under s. 33. Before the Court on that occasion was the general declaration applicable to all Quebec legislation, which the Court described as apparently "enacted as part of the well-established legislative policy and practice at the time of including the standard override provision in every Quebec statute, as well as a declaration specific to the *Charter of the French Language.*[10]

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[5] Robert Leckey goes so far as to suggest that it is open to a court to order *Charter* damages under s. 24(1) even where s. 33 is invoked: Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause," (2019) 28:4 *Constitutional Forum constitutionnel - Special Issue - Notwithstanding Clause*, pp 1-8, at 5.

[6] UR Pride, *supra* note 3 at para 105.
[7] *Canada (Attorney General) v Power*, 2024 SCC 26 at para 56.
[8] *R v Sullivan*, 2022 SCC 19 at paras 43 and 44.
[9] *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712.
[10] *Ibid* at 736.

9. The Court considered arguments that the language of the declaration under s. 33 should not simply refer to the number of the section or paragraph of the *Charter* containing the right but rather should describe the right in more detail. It described the rationale for this argument being that "the nature of the guaranteed right or freedom must be sufficiently drawn to the attention of the members of the legislature and of the public so that the seriousness of what is proposed may be perceived and reacted to through the democratic process."[11]

10. The Court describes this emphasis on a fully informed democratic process as seeming to require a *prima facie* justification by the government of the decision to exercise the s. 33 authority. It concludes that there is nothing in the language of s. 33 that requires such content in the declaration. The s. 33 declaration, it concludes, "is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden."[12]

11. *Ford* clarifies that the government does not have to include a justification in its declaration under s. 33. It sets out the requirements for the form of such declarations. However, the *Ford* case also does not rule out that the issue of justification under s. 1 for the exclusion of constitutional protection may remain an issue at subsequent stages in the life of a declaration under s. 33. As further developed below, the role for the court in these circumstances flows, in considerable measure, from the place and character of the court in Canada's constitutional order.

12. As more governments have begun to use the s. 33 declaration pre-emptively (before a court rules that legislation violates a right under the *Charter*),[13] the question is now whether a court could consider, at that early stage, *Charter* compliance issues in the protected statute.

13. Positions on the issue range from a denial that there is a role or jurisdiction for judicial review after a s. 33 declaration had been made, to criticism that to do so would be a political act and contrary to democratic principles.[14] An important issue is where the court gets its power to

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[11] *Ibid* at 738.
[12] *Ibid*.
[13] See *Protecting Elections and Defending Democracy Act, 2021*, S.O. 2021, c. 31, s. 53.1(1); *An Act respecting French, the official and common language of Québec*, S.Q. 2022, c. 14, ss. 121, 217; and *Keeping Students in Class Act, 2022*, S.O. 2022, c. 19, s. 13(1).
[14] *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, 2024 QCCA 254 at paras 338-369 and as discussed in UR Pride, *supra* note 3 at para 123.

give voice to its opinion about the constitutionality of a statute if an order under s. 52 had been foreclosed by s. 33.

14. Generally speaking, Canadian courts have recognized that declaratory relief in constitutional cases can be granted by a superior court relying on either s. 52(1) or s. 24(1).[15] In the absence of judicial pronouncement, scholars have pointed to the text of the section and the noted "absence of a privative or ouster clause"[16] as well as the lack of mention of judicial review[17] to support the court's exercise of jurisdiction to determine the legislation's consistency with the *Charter*.[18]

15. Subsection 24 (1) provides that anyone whose *Charter* rights have been "infringed or denied" may apply to a court of competent jurisdiction "to obtain such remedy as the court considers appropriate and just in the circumstances." Although a s. 33 declaration arguably does not "infringe" rights, merely rendering them inoperable for a period, it may well be argued that the declaration "denies" rights. A court could determine that a declaration of a *Charter* violation is appropriate and just in the circumstances.

16. Moreover, even if a declaration under s. 33 may preclude the issue of an order under s. 52, it does not remove s. 52 from the *Constitution Act*. The "no force or effect" provision of s. 52(1) may be precluded from operating by s. 33, but there is nothing in s. 33 or a declaration under it which would prevent a court from determining whether a statute is inconsistent with the *Charter*,

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[15] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 24(1), 52(1). See also Diane Shnier and Malcolm Rowe, "The Limits of the Declaratory Judgment" (2022), 67 *McGill LJ* 295 [Shnier & Rowe] at 323.

[16] Grégoire Weber, "Notwithstanding Rights, Review or Remedy? On the Notwithstanding Clause and the Operation of Legislation," (2021) 71:4 UTLJ 510-38 at 518.

[17] Weber, *ibid*; Eric M. Adams and Erin R.J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the Charter," (2022) 26:2 *Rev. Const. Stud.* 121; and Robert Leckey, "Legislative Choices in Using Section 33 and Judicial Scrutiny" in Peter L. Biro, ed. *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*, (Montreal & Kingston: McGill-Queen's University Press, 2024).

[18] The Court below relied upon *obiter dicta* within various decisions of this Court to conclude that s.33 shields the statute from any judicial review yet discounted contradictory *obiter dicta* that would lead to an opposite conclusion.

and the extent of the inconsistency.

17. In a case where s. 24 was unavailable because the litigant was a public interest organization and not an individual, the British Columbia Court of Appeal ruled that the superior court nonetheless had authority to issue a declaration.[19] It described the declaration as "an important residual remedy"[20] and within the "inherent jurisdiction at common law"[21] of a superior court judge. The Court of Appeal stressed that it was important that public interest litigants have access to have available a range of remedial options, including declaratory judgments on behalf of individuals who "are often ill-positioned to bring their own lawsuits."[22]

18. The Court could also issue a declaration pursuant to the inherent jurisdiction of a superior court to issue this equitable remedy. This authority exists apart from s. 52 of the *Constitution Act*. The ability to pronounce on the constitutionality of legislation is a key aspect of the core jurisdiction of superior courts established pursuant to s. 96 of the *Constitution Act, 1867*.[23]

19. This Court has recently held that limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's behaviour.[24] Section 33 does not even attempt to bar a court from considering a violation argument.

Declarations

20. A declaratory judgment is a form of hypothetical judgment in which an applicant seeks the determination of a legal situation without any consequential relief.[25] Rowe and Shnier consider it well established that declarations are useful to clarify how a statute applies to individuals.[26]

21. A declaration of unconstitutionality has been recognized by this court as an effective and

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[19] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 at para 265.
[20] *Ibid*.
[21] *Ibid*, at para 266.
[22] *Ibid* at para 265.
[23] UR Pride, *supra* note 3 at paras 125-134. See also *Operation Dismantle v The Queen*, [1985] 1 SCR 441.
[24] *Shot Both Sides v Canada*, 2024 SCC 12.
[25] Shnier and Rowe, *supra* note 14 at 297.
[26] *Ibid* at 308.

flexible remedy for the settlement of real disputes."[27] *Dyson v. Attorney General* has been relied on in Canada as a mechanism for determining whether laws comply with the *Charter*.[28]

22. The potential differences between a declaration issued pursuant to s. 24(1) or s. 52(1) of the *Charter*, and a declaration issued pursuant to the inherent power of the Court are, according to Rowe and Shnier, not entirely clear.[29]

23. However, as we explore below, principles developed in the exercise of the power to issue declarations outside the constitutional realm will also be useful to the court in determining when it is appropriate to entertain an application for a declaration, or to issue one, in a constitutional matter, including one about a statute shielded by a declaration under s. 33.

24. The doctrine of mootness is a general policy that a court may decline to hear a legal matter that raises a merely hypothetical question.[30] A moot issue has been characterized as one where there is no live controversy; some would contend that a declaration under s. 33 may make issues of the constitutionality of the statute protected by the declaration within the doctrine of mootness, or "academic."[31]

25. According to this Court in *Borowski*,[32] a court may exercise discretion to decide a moot issue if at least three features are present. The first is whether there is an adversarial context, that is, where the factual situation is still in existence and there is a desire to pursue it as, say, a test case. Such a case might have a practical benefit to others in a similar situation.[33] The second is that hearing the case will be economically worthwhile. One situation where hearing the case would be economically worthwhile is where the case raises an issue of public importance of which a resolution is in the public interest.[34] The third feature is that the court would not depart from its traditional adjudicative role by addressing the issue.[35]

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[27] *R. v Gamble*, [1988] 2 SCR 595 at 649; *Solosky v. The Queen*, [1980] 1 SCR 821 at 830-833.
[28] Shnier and Rowe, *supra* note 14 at 302.
[29] *Ibid* at 324.
[30] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*].
[31] *Ibid*.
[32] *Ibid*.
[33] See for example *A.A.R. v. Alberta Hospital (Edmonton)*, 1999 ABQB 573 (CanLII).
[34] *Borowski*, *supra* note 30.
[35] *Ibid*.

26. Principles relating to proceedings for declaratory judgments generally are also important guides in *Charter* proceedings with respect to s. 33 declarations. In *Solosky*, Dickson J. held that declaratory judgments are not normally granted when a dispute is merely an academic matter or is purely hypothetical.[36] A court must consider the reality of the dispute and whether the declaration will have any practical effect in resolving the issues.[37]

27. In this case, key elements to support the court hearing the *Charter* challenge and issuing a declaration are present. There is clearly an adversarial relationship between the government and the applicants. The legislation has, according to the record, deprived many members of minorities the opportunity to have employment or to progress in it. The pain of those legislative consequences does not go away during the five-year period the declaration is in force. The government, as sponsor of the declaration, is clearly opposed in interest to those who are suffering from it. Moreover, the proceeding will have a practical benefit, discussed below.

The Role of the Court with Respect to Pre-emptive Section 33 Declarations

28. To appreciate the court's role, the responsibilities and capacities of both the legislature and the courts are to be looked at.

29. The *Charter* itself sets one of the important dimensions of the relationship between the two. Section 1 requires government to justify any *Charter* violation with reference to a range of factors.

30. Section 33 is generally understood to have been put in the *Charter* to allay concerns that the *Charter* and litigation under it present a threat to Parliamentary supremacy. However, s. 33 does not change the essential nature of our democracy. Rather than a parliamentary democracy, it is now a constitutional democracy.[38] Legislatures have retained, in s.33, some elements of their former pre-eminence, but they, like citizens and courts are now subject to the *Charter*.

31. Section 33 provides for only a five-year period when the operation of a statute may proceed

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[36] *Solosky*, *supra* note 27 at 832.
[37] *Ibid.*
[38] *Vriend v. Alberta*, [1998] 1 SCR 293 at para.131, quoting Chief Justice Dickson ("Keynote Address", in *The Cambridge Lectures 1985* (1985), at pp. 3-4). See also UR Pride, *supra* note 3 at para 112.

without being stopped by s. 52. After that, the declaration must be renewed, or the Act will be unshielded and open to attack under the *Charter*. Renewal depends on a number of factors: who is in power at the time of expiry, whether the electorate is pleased with the operation of the declaration, whether its opponents or those hurt by it can develop enough electoral strength to challenge the incumbent or make it change its policy. It will also depend on whether the people are aware of whether the Act is consistent with the *Charter*. That issue can be particularly important where the legislation affects the rights of a relatively powerless minority.

32. Where the declaration protects legislation with a serious effect on relatively powerless minorities, it is unlikely they will be able to muster enough support at the polls to prevent the issuance of a declaration or overturn a government or policy in favour of protecting the legislation.

33. Where the government holds a majority, it could have arranged that the override be sped through the legislative process without much opportunity for anyone to register disapproval or dissent. The legislature may operate in a way that makes it difficult to make effective representations through political avenues (attending legislative committees, lobbying members).

34. Minority citizens have a better chance of influencing events by bringing a court case alleging *Charter* violations, especially if they can act in concert, or align with public interest litigation groups. The court process is open to the public and could be covered in the media. The relative openness of the court proceedings could generate broader discussion of the issues, which in turn might help those affected by the law to gather support. The groups affected by the legislation will have access to the courts because of the courts' role in a constitutional democracy, discussed below.

35. Even though the court cannot make an order under s. 52 striking out the protected legislation, the proceedings in court will thus have a practical effect. Moreover, if the court finds *Charter* violations, it might be more difficult for the government to renew the s. 33 declaration. With the greater public awareness generated by the court case, for example, slipping the renewal quickly through the legislature with no public awareness might be more difficult.[39]

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[39] Caitlin Salvino, "The Section 33 Democratic Accountability Concept: Proposing a Two Pronged Approach for Judicial Review" (2023) 56 U.B.C. L. Rev. 845 at 886. See also UR Pride, *supra* note 3 at para. 165.

36. On the other hand, if the government defends the law in a reasonable manner, and explains the reasons for it, it might garner or reinforce public support. It may be able to advance an interest served by the law that is not constitutionally protected but is nonetheless serious and reasonable. Alan Blakeney, one of the authors of the *Charter*, argued that there are moral values which may not be protected by the *Charter*, but which the legislature will better be able to protect.[40] Such moral values may enable the government to succeed in a justification argument under s. 1. It is not inevitable that the court case would undermine the government. However, it would encourage the public debate and consideration that will benefit the legislative process. It is also consistent with what Hogg and Bushell have called the "dialogue" between courts and legislatures built into the *Charter*: courts review legislative action and legislatures can pass new legislation or invoke s. 33.[41]

37. If the s. 33 declaration is not renewed, a court decision rendered during the period it was in effect will guide the legislature in making changes to it to remove or ameliorate its unconstitutional provisions.

38. The courts and legislature act in this process in a way consistent with their place in the organization of the state and the powers and responsibilities assigned to them. Even though there are political dimensions to any invocation of s. 33, this does not mean that the court is acting politically when it hears a *Charter* challenge. In fact, the court has an obligation to stay within its judicial role and not stray beyond behaviour that is appropriate for the judiciary.

39. In that judicial role, the courts are the guardians of the rule of law, the fundament of our democracy. It is mentioned in the Preamble to the *Charter*,[42] and the Supreme Court of Canada has recognized it as "one of the underlying principles upon which the *Charter* is based."[43]

40. This Court said in the *Secession Reference* that the Constitution of Canada is "similar in principle" to the British Constitution and includes unwritten constitutional principles of

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[40] Dwight G. Newman, "Allan Blakeney and the Dignity of Democratic Debate on Rights" Chapter in David McGrane et al. eds, *Back to Blakeney: Revitalizing the Democratic State* (Regina: University of Regina Press, 2019) 71-82.
[41] Peter W Hogg and Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)", 19971997 35-1 *OHLJ* 75, 1997 CanLII Docs 578; UR Pride, *supra* note 3 at paras 115-116.
[42] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, Preamble.
[43] Secession Reference, *supra* note 2 at para 49.

democracy, judicial independence, federalism, constitutionalism, and protection of minorities.[44]

41. The SKCA notes that s. 96 of the *Constitution Act, 1867* protects the inherent jurisdiction of the superior courts, which is essential to the rule of law. The ability to pronounce on the constitutionality of legislation is a key aspect of the core jurisdiction of a superior court judge.[45]

42. The independence of the judiciary has been affirmed by this Court.[46] Independent of government and the executive, the Court may give an interpretation of the *Charter* that is developed by means of the reasoning and principles of the courts and past decisions on the *Charter*; its allegiance is to constitutionalism and the *Charter*.

Conclusion

43. To state that a court may not review a statute which has been passed pre-emptively with s. 33 protection is, in effect, to eliminate judicial review altogether in most cases. To approve the pre-emptive use of s. 33 will open the way to more use of the proactive shield, foreclosing the dialogue between courts and legislatures about the constitutionality of legislation. Why would legislatures ever wait until after an unfavourable judicial review to add s. 33 protection if pre-emptive use could bar it altogether? That result is inconsistent with the terms of the *Charter*, and inconsistent with the inherent and constitutional powers of the court. The safeguard for the legislature is the exercise of the court's discretion about whether to hear a challenge to pre-emptive use of the *Charter* in any particular case. The rules governing that discretion, set out above, have been judicially developed to keep the courts from taking on a particular case where it is inappropriate to exercise judicial power or exercise the judicial role.

PARTS IV AND V – SUBMISSIONS ON COSTS

44. The Asper Centre seeks no costs and asks that no costs be awarded against it.

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[44] *Ibid* at paras 44-48.
[45] UR Pride, *supra* note 3 at paras 132, 133.
[46] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, *supra* note 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2025

Per:

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