S.C.C. File No. 41979

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

BETWEEN:

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION

Appellant/Respondent on Cross-Appeal

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

Respondent/Appellant on Cross-Appeal

Style of cause continued on next page

FACTUM OF THE INTERVENER DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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

SAVARDS LLP
26 Soho Street, Suite 400
Toronto, Ontario M5T 1Z7

Megan Savard
Mary Eberts
Tel: (416) 789-7843
megan@savards.ca

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto
78 Queen's Park Crescent E,
Toronto, Ontario M5S 2C3

Cheryl Milne
Tel: 416-978-0092
cheryl.milne@utoronto.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
500 – 99 Bank Street
Ottawa, ON K1P 6B9

Jean-Simon Schoenholz
Tel: (613) 780-1537
jean-simon.schoenholz@nortonrosefulbright.com

Agent for Counsel for the Intervener, David Asper Centre for Constitutional Rights

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITSH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, PUBLIC INTEREST LITIGATION INSTITUTE, ADVOCATES' SOCIETY, ALBERTA TEACHERS' ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, WOMEN'S LEGAL EDUCATION AND ACTION FUNDS INC., CENTRE FOR FREE EXPRESSION, FEDERATION OF ONTARIO LAW ASSOCIATIONS, CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, SASKATCHEWAN FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES AND CANADIAN TEACHERS' FEDERATION, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CLINIQUE JURIDIQUE JURITRANS, AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), SOUTH ASIAN BAR ASSOCIATION, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CANADIAN MEDICAL ASSOCIATION, DEFENCE FOR CHILDREN INTERNATIONAL – CANADA, WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION, START PROUD, JUSTICE FOR CHILDREN AND YOUTH, INTERNATIONAL COMMISSION OF JURISTS (CANADA)

Interveners

MLT Aikins LLP
1874 Scarth Street
Suite 1500 Center 1
Regina, Saskatchewan S4P 4E9

Deron Kuski, K.C.
Milad Alishahi
Bennet Misskey
Jacob Paczko
Tel: (306) 347-8404
dkuski@mltaikins.com

Counsel for the Appellant

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Léa Desjardins
Tel: (613) 786-0211
lea.desjardins@gowlingwlg.com

Agents for Counsel for the Appellant

McCarthy Tétrault LLP
66 Wellington Street, W. Suite 5300
TD Bank Tower
Toronto, Ontario M5K 1E6

Adam Goldenberg
Ljiljana Stanic
Bennett Jensen
Eric Freeman
Tel: (416) 601-8357
agoldenberg@mccarthy.ca

Counsel for the Respondent

Department of Justice Canada
Complexe Guy-Favreau
200 boulevard René-Lévesque West, Tour Est, 9th Floor
Montreal, Quebec H2Z 1X4

François Joyal
Michelle Kellam
Tel: (514) 283-4934
francois.joyal@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

Department of Justice Canada
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8

Zoe Oxaal
Tel: (613) 295-0765
SCCAgentCorrespondantCSC@justice.gc.ca

Agents for Counsel for the Intervener, Attorney General of Canada

Alberta Justice Constitutional and Aboriginal Law
10th Floor, Oxford Tower
10025 - 102A Avenue N.W.
Edmonton, Alberta T5J 2Z2

Malcolm Lavoie, K.C.
Leah M. McDaniel
Tel: (780) 422-7145
Malcolm.lavoie@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Léa Desjardins
Tel: (613) 786-0211
lea.desjardins@gowlingwlg.com

Agents for Counsel for the Intervener, Attorney General of Alberta

Attorney General of Manitoba
1205 - 405 Broadway Ave
Winnipeg, Manitoba R3C 3L6

Deborah L. Carlson
Tel: (204) 229-0679
Deborah.Carlson@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Léa Desjardins
Tel: (613) 786-0211
lea.desjardins@gowlingwlg.com

Agents for Counsel for the Intervener, Attorney General of Manitoba

Ministère de la Justice du Québec
Direction du droit constitutionnel et autochtone
1200, route de l'Église, 4e étage
Québec, Quebec G1V 4M1

Fiona Émond
Isabelle Brunet
Samuel Chayer
Tel: (418) 643-1477
fiona.emond@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec

Noël et Associés, s.e.n.c.r.l.
225, montée Paiment
2e étage
Gatineau, Quebec J8P 6M7

Pierre Landry
Tel: (819) 771-7393
p.landry@noelassocies.com

Agents for Counsel for the Intervener, Attorney General of Quebec

Attorney General of British Columbia
Legal Services Branch
1301 - 865 Hornby Street
Vancouver, British Columbia V6Z 2G3

Mark Witten
Rory Shaw
Tel: (604) 660-3093
mark.witten@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

Michael Sobkin Law Corporation
331 Somerset Street West
Ottawa, Ontario K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
msobkin@sympatico.ca

Agents for Counsel for the Intervener, Attorney General of British Columbia

Attorney General of Ontario
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9

Joshua Hunter
Maie Stevenson
Tel: (416) 908-7465
joshua.hunter@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Graham Ragan
Tel: (613) 786-8699
graham.ragan@gowlingwlg.com

Agents for Counsel for the Intervener, Attorney General of Ontario

Public Interest Litigation Institute
1030 Berri Street – Suite 102
Montreal, Quebec H2L 4C3

Lawrence David
Tel: (343) 961-6186
ldavid@clg.org

Counsel for the Intervener, Public Interest Litigation Institute

Blake, Cassels & Graydon LLP
855 2nd Street SW, Suite 3500,
Bankers Hall East Tower
Calgary, Alberta T2P 4J8

Brendan MacArthur-Stevens
Spencer Livingstone
Brenna Haggarty
Tel: (403) 260-9603
brendan.macarthur-stevens@blakes.com

Counsel for the Intervener, Advocates' Society

Field Law
2500, 10175 101 Street NW
Edmonton, Alberta T5P 4S7

Joël Michaud
Elisa Carbonaro
Tel: (780) 423-3003
jmichaud@fieldlaw.com

Counsel for the Intervener, Alberta Teachers' Association

Michael Sobkin Law Corporation
331 Somerset Street West
Ottawa, Ontario K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
msobkin@sympatico.ca

Agents for Counsel for the Intervener, Alberta Teachers' Association

Nanda & Company
10007 - 80 Avenue N.W.
Edmonton, Alberta T6E 1T4

Avnish Nanda
Anna J. Lund
Tel: (780) 916-9860
avnish@nandalaw.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

Dentons Canada LLP
77 King Street West, Suite 400 Toronto-Dominion Centre
Toronto, Ontario M5K 0A1

Morgan L. Camley, KC
Kay Scorer
Mélanie Power
Tel: (604) 648-6545
morgan.camley@dentons.com

Counsel for the Intervener, Women's Legal Education and Action Funds Inc.

Dentons Canada LLP
99 Bank Street
Suite 1420
Ottawa, Ontario K1P 1H4

David R. Elliott
Tel: (613) 783-9699
david.elliott@dentons.com

Agents for Counsel for the Intervener, Women's Legal Education and Action Funds Inc.

Conway Baxter Wilson LLP
400 - 411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Marion Sandilands
Logan Stacks
Henna Mohan
Tel: (613) 288-0149
msandilands@conwaylitigation.ca

Counsel for the Intervener, Centre for Free Expression

Black & Associates
352 Elgin Street
Ottawa, Ontario K2P 1M8

Babacar Faye
C. Katie Black
Tel: (613) 617-6699
babacar@black-law.ca

Counsel for the Intervener, Federation of Ontario Law Associations

Goldblatt Partners LLP
20 Dundas St W,
Suite 1039
Toronto, Ontario M5G 2G8

Christine Davies
Karin Galldin
Kailun Chen
Tel: (416) 977-6070
cdavies@goldblattpartners.com

Counsel for the Intervener, Canadian Bar Association

Goldblatt Partners LLP
270 Albert Street
Suite 1400
Ottawa, Ontario K1P 5G8

Colleen Bauman
Tel: (613) 482-2463
cbauman@goldblattpartners.com

Agents for Counsel for the Intervener, Canadian Bar Association

Leblanc Jensen
1810 McAra Street
Regina, Saskatchewan S4N 6C4

Dan LeBlanc
Leif Jensen
Tel: (306) 881-0246
dan@leblancjensen.ca

Counsel for the Intervener, Canadian Civil Liberties Association

Juristes Power Law
50 O'Connor Street, Suite 1313
Ottawa, Ontario K1P 6L2

Millie Lefebvre
Tel: (613) 702-5564
mlefebvre@powerlaw.ca

Agents for Counsel for the Intervener, Canadian Civil Liberties Association

Goldblatt Partners LLP
20 Dundas Street West
Suite 1039
Toronto, Ontario M5G 2C2

Steven M. Barrett
Melanie Anderson
Tel: (416) 977-6070
sbarrett@goldblattpartners.com

Counsel for the Intervener, Saskatchewan Federation of Labour, Canadian Union of Public Employees and Canadian Teachers' Federation

Goldblatt Partners LLP
270 Albert Street
Suite 1400
Ottawa, Ontario K1P 5G8

Colleen Bauman
Tel: (613) 482-2463
cbauman@goldblattpartners.com

Agents for Counsel for the Intervener, Saskatchewan Federation of Labour, Canadian Union of Public Employees and Canadian Teachers' Federation

Hunter Litigation Chambers
2100 – 1040 West Georgia Street
Vancouver, BC V6E 4H1

Aubin P. Calvert
Devin Eeg
Tel: (604) 891-2400
acalvert@litigationchambers.com
deeg@litigationchambers.com

Counsel for the Intervener,
Trial Lawyers Association of British Columbia

Norton Rose Fulbright Canada LLP
500 – 99 Bank Street
Ottawa, ON K1P 6B9

Jean-Simon Schoenholz
Tel: (613) 780-1537
jean-simon.schoenholz@nortonrosefulbright.com

Agents for Counsel for the Intervener, Trial Lawyers Association of British Columbia

LCM Avocats inc.
600 de Maisonneuve West, Suite 2600
Montréal, Quebec H3A 3J2

Laura Cardenas
Christophe Lavoie
Tel: (514) 447-9938
lcardenas@lcm.ca

Counsel for the Intervener, Clinique juridique Juritrans

Olthuis Van Ert
66 Lisgar Street
Ottawa, Ontario K2P 0C1

Gib van Ert, KC
Dahlia Shuhaibar
Tel: (613) 408-4297
gvanert@ovcounsel.com

Counsel for the Intervener, Amnesty International Canadian Section (English Speaking)

Stockwoods LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, Ontario M5K 1H1

Nader R. Hasan
Aimee Huntington
Tel: (416) 593-1668
naderh@stockwoods.ca

Counsel for the Intervener, South Asian Bar Association

Juristes Power Law
50 O'Connor Street
Suite 1313
Ottawa, Ontario K1P 6L2

Darius Bossé
Tel: (613) 702-5566
dbosse@powerlaw.ca

Agents for Counsel for the Intervener, South Asian Bar Association

Renouf Law
1710 Phipps McKinnon Bldg.
10020 - 101A Avenue NW
Edmonton, Alberta T5J 3G2

Simon Renouf, K.C.
Tel: (780) 424-6750 Ext: 225
renouf@renouflaw.com

Counsel for the Intervener, Criminal Trial Lawyers' Association

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Zain Naqi
Dantae Gagnier
Tel: (416) 598-1744
znaqi@lolg.ca

Counsel for the Intervener, Canadian Medical Association

Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
mfmajor@supremeadvocacy.ca

Agents for Counsel for the Intervener, Canadian Medical Association

Cambridge LLP
333 Adelaide Street West
Suite 400
Toronto, Ontario M5V 1R5

H. Scott Fairley
Joan Kasozi
Tel: (416) 477-7007 Ext: 324
sfairley@cambridgellp.com

Counsel for the Intervener, Defence for Children International – Canada

Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
mfmajor@supremeadvocacy.ca

Agents for Counsel for the Intervener, Defence for Children International – Canada

Ethos Law Group LLP
630 – 999 W. Broadway
Vancouver, British Columbia V5Z 1K5

Monique Pongracic-Speier, K.C.
Alanna Crouse
Idaresit Thompson
Tel: (604) 569-3022
monique@ethoslaw.ca

Counsel for the Intervener, West Coast Legal Education and Action Fund Association

Supreme Advocacy LLP
340 Gilmour Street
Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
mfmajor@supremeadvocacy.ca

Agents for Counsel for the Intervener, West Coast Legal Education and Action Fund Association

Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, Ontario M5H 2T6

Mathias Memmel
Abbas Kassam
Daniella Murynka
Thanoja Guanatheevam
Tel: (416) 865-4470
mmemmel@fasken.com

Counsel for the Intervener, Start Proud

Fasken Martineau DuMoulin LLP
55 rue Metcalfe
Bureau 1300
Ottawa, Ontario K1P 6L5

Sophie Arseneault
Tel: (613) 696-6904
sarseneault@fasken.com

Agents for Counsel for the Intervener, Start Proud

Justice for Children and Youth
55 University Avenue, Suite 1500
Toronto, Ontario M5J 2H7

Mary Birdsell
Allie McMillan
Tel: (416) 920-1633 Ext: 8229
mary.birdsell@jfcy.clcj.ca

Counsel for the Intervener, Justice for Children and Youth

Supreme Law Group
440 Laurier Ave. West
Suite 200
Ottawa, Ontario K1R 7X6

Moira S. Dillon
Tel: (613) 691-1224
mdillon@supremelawgroup.ca

Agents for Counsel for the Intervener, Justice for Children and Youth

Université de Montréal
3101, ch. de la Tour
Montréal, Quebec H3C 3J7

Karine Millaire
Tel: (514) 343-2137
karine.millaire.1@umontreal.ca

Counsel for the Intervener, International Commission of Jurists (Canada)

Conway Baxter Wilson LLP/S.R.L.
400-411 Avenue Roosevelt
Ottawa, Ontario K2A 3X9

Alyssa Holland
Tel: (613) 288-0149
aholland@conwaylitigation.ca

Agents for Counsel for the Intervener, International Commission of Jurists (Canada)

TABLE OF CONTENTS

PART I – OVERVIEW AND POSITION ON QUESTIONS IN ISSUE

"The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms… Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter."[1]

1. For decades, convention discouraged the use of the notwithstanding clause in section 33 of the *Canadian Charter of Rights and Freedoms*. The prospect of its abuse was theoretical; many assumed that invoking it would be tantamount to political suicide. These assumptions and conventions have now been displaced. The use of s. 33 as a legal, political and rhetorical tool is increasingly common. This appeal is an opportunity to assess and respond to the constitutional threat posed by the routine invocation of s. 33. It invites the Court, litigants and judges to navigate a new type of constitutional analysis. The David Asper Centre for Constitutional Rights (the "Centre") intervenes to provide practical guidance on what that analysis should look like.

2. The Centre takes no position on the facts. With respect to the issues, the Centre submits that s. 96 courts have the jurisdiction to rule on the constitutionality of s. 33-protected legislation and issue responsive remedies, including declaratory relief. Whether they *should* do so is a question of discretion, not jurisdiction. The argument has three parts:

a) The facial conflict between the rights guarantee in s. 1 and the notwithstanding clause in s. 33 is only resolved if s. 33 is understood as a temporary s. 1 justification.

b) The continued operation of s. 1 means courts have the jurisdiction to review the effect of s. 33-protected laws on *Charter* rights, and issue remedies for rights violations, including declarations about constitutionality and *Oakes* compliance. These are questions of law, to which the regular rules of *stare decisis* apply. They have no special metaphysical status and do not automatically unleash s. 52 to render the law inoperable as an independent force.

c) Courts should exercise discretion to issue declarations where doing so would respect the separation of powers and serve a recognized judicial function: vindicating rights, encouraging state *Charter* compliance, and preserving the court's institutional legitimacy.

PART II – STATEMENT OF ARGUMENT

A. Reconciling s. 33 and s. 1: the notwithstanding clause as an expression of s. 1

3. Section 33 of the *Charter* does not permit a law to operate "notwithstanding" s. 1. The result is a facial inconsistency. Section 1 guarantees *Charter* rights unless specific criteria are met.[2] Section 33 allows the state to violate some of those rights, even if the criteria are *not* met. In the

[1] Eugene Forsey, "The Notwithstanding Clause," HillStudies Publication No. 2018-17-E
[2] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103

face of increasingly frequent invocations of s. 33, this Court must develop a workable framework for assessing constitutional validity that allows it to co-exist with s. 1. In the Centre's submission, this framework begins with the understanding that s. 33 is a separate form of s. 1 "justification". Properly invoked, it is *itself* a "reasonable limit prescribed by law."

4. This approach accords with the historical development of s. 33.[3] The clause was added to later drafts of the *Charter* at the insistence of certain provinces. Importantly, this occurred after the drafters changed s. 1 from a descriptive to a normative provision. Early versions of s. 1 allowed the state to limit rights in ways that were "generally accepted" (or, on one occasion, "generally accepted with[in] a parliamentary system of government").[4] The drafters then changed s. 1 to permit only those limits that could "be demonstrably justified". This change made it harder for the state to legally infringe *Charter* rights: instead of enacting any law that the majority would accept, it now could enact only those laws that were normatively justifiable.[5] Against this backdrop, the provinces' insistence on adding the notwithstanding clause can only be read as a move to ensure that majoritarian democracy remained a valid constitutional limit on rights.

5. The two "justifications" that can make a rights limitation legal under s. 1 are thus normative (content-based *via Oakes*, which requires a good reason for the limit) and democratic (process-based *via* s. 33, which requires only that the limit be enacted by elected officials). But the justifications overlap in a way that supports their co-existence. The *Charter* must be interpreted according to "its underlying values and its internal coherence".[6] Its animating principles include the rule of law, the safeguarding of rights, the protection of minorities, respect for the separation of powers, federalism, and democracy. These principles inform the determination of legal questions, like a law's constitutionality, and the exercise of remedial discretion; this Court recently described them as "fundamental aspects of our constitutional order".[7] This constitutional order supports the co-existence of two s. 1 justifications, each grounded in different animating principles.

---

[3] *Quebec (Attorney General) v Kanyinda*, 2026 SCC 7, at paras 166-68 (*per* Rowe J., concurring)
[4] Robin Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid", (1982) UBC L Rev 11, at 14
[5] *Kanyinda*, at para 166 (*per* Rowe J., concurring)
[6] *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 80
[7] *Ontario (Attorney General) v G*, 2020 SCC 38, at paras 92-99.; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, at paras 32, 38, 46, 48-49, 76, 79-82

6. This leads to three points. First, any proper s. 33 invocation is a s. 1-compliant limit on the right infringed by the protected law. Second, s. 1's description of valid rights limitations as those which "can be demonstrably justified in a free and democratic society" informs the interpretation of s. 33. If this temporary majoritarian-democratic justification is by its nature "demonstrable", it ought to be reviewable: absent requiring the government to explain its decision (ruled out in *Ford*), only judicial review can produce the visibility, transparency, and institutional dialogue necessary for "demonstrability".[8] Third, as described below, the invocation of s. 33 raises a question of law, not a jurisdictional bar. The impact of s. 33 on certain *legal* conclusions and remedies in a constitutional case is an integral part of the analysis, not a bar to conducting it in the first place.

B. The three stages of constitutional review are the same in s. 33 and non-33 cases: accordance with rights, justification, and operability

7. When a court assesses a law for *Charter* compliance, it gives effect to the s. 1 guarantee that only "demonstrably justified limits" on rights will survive constitutional scrutiny. The assessment proceeds in three stages. First, it asks whether the law violates a *Charter* right. Second, it asks if that conflict is justified, either under the *Oakes* test or, when it applies, under s. 33. Third, if the infringement is not justified under *Oakes*, it asks what remedies should follow.[9]

a. Stage one: does the law violate a *Charter* right?

8. The first stage asks if the subject law violates a *Charter* right. This stage is analytically distinct from and must be completed prior to the question of justification.[10] Section 33 plays no role in the analysis at this stage. The court must determine whether there is a substantive underlying rights violation before moving to the question of justification (where s. 33(1) is relevant) or remedy (where s. 33(2) is relevant).

b. Stage two: justification under *Oakes* and s. 33

9. Once the court determines that a law violates a right, it must decide if the violation is justified. In cases not involving s. 33, the *Oakes* test governs. For s. 33-protected laws, the court

---

[8] See e.g.: the Alberta Teachers' Association; the Centre for Free Expression; Women's Legal Education and Action Fund Inc.; the Canadian Bar Association; and Canadian Medical Association

[9] Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 UTLJ 510

[10] *R v Oakes,* 1986 CanLII 46 (SCC), [1986] 1 SCR 103

must *also* consider whether the law is justified under s. 33(1); it will be if the government has complied with s. 33(1)'s formal requirements.[11]

10. This Court should direct judges to complete the *Oakes* analysis in each case, and before assessing the s. 33 justification. *Oakes* remains impactful even when s. 33(1) temporarily overrides it and pre-determines the outcome. *Oakes* answers a live question that s. 33 does not. Section 33 focuses on the impugned law, confirming that foundational principles (e.g., federalism and democracy) justify upholding it. *Oakes,* in contrast, focuses on the *deprivation*; it defines the "extent of the inconsistency", enabling conclusions about whether the law can be salvaged in a way that maintains the s. 1 guarantee.[13] In some cases, the *Oakes* and s. 33 justifications may co-exist: if the government "would have enacted the law as modified by the court"– e.g., by clearing up ambiguous terms, reading in clarifications or rephrasing overbroad language – then the law remains operable under s. 33 *and* *Oakes* operates as an analytical guide to its application.[14] Depending on the case, the *Oakes* analysis will generate either an alternative s. 1 justification or a set of unique conclusions that inform the question of remedy (discussed further below).

c. Stage three: The discretionary question of remedy

11. The question of a law's constitutionality is separate from its "practical and legal effects".[12] The first two stages of the constitutionality analysis (compliance and justification) are questions of law, to which the regular rules of *stare decisis* apply.[13] Once the court answers these legal questions, it has a principled discretion to determine the appropriate response (if any). Where a law is protected by s. 33(1), that discretion is limited in a specific way: the wording of s. 33(2) explicitly limits remedies to those that permit the law to "have such operation as it would have but for the provision of this *Charter* referred to in the declaration." The court cannot issue any remedy that would interfere with the "operation" of the law – but other remedies remain available.[14]

---

[11] *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712
[12] *Ontario (Attorney General) v G*, 2020 SCC 38, at para 121; *R v Albashir*, 2021 SCC 48, at para 40; *R v Sullivan*, 2022 SCC 19, at paras 56-57
[13] *R v Sullivan*, 2022 SCC 19
[14] *R v Varennes,* 2025 SCC 22 at para 85; *Reference re Secession of Quebec,* 1998 CanLII 793 (SCC), [1998] 2 SCR 217, at para 102.

i. The trigger for the remedy analysis: the need to consider remedial options for s. 33-justified laws

12. On the Centre's proposed analysis, a rights-limiting law may be constitutionally justified *solely* under s. 33. This would be novel – but if legislatures continue to invoke s. 33, such outcomes may become common. Therefore, this Court should offer guidance on whether a judge who finds that a s. 33-protected law violates *Oakes* should embark on a remedial analysis *at all*, given the s. 33 justification. In the Centre's submission, they should, for three reasons:

13. **First**, the s. 1 guarantee continues to operate in the face of s. 33. The clause limits the available remedies, not the rights themselves. Individual violations still require remedies.[15]

14. **Second**, the justification from s. 33 is temporary. Because laws are permanent and s. 33 invocations are not, the conclusion that a law is justified *only* under s. 33 is, in effect, a conclusion that the law *will become unconstitutional* if not amended or repealed. In such cases, the applicant has established the "threat" of a future *Charter* breach, opening the door to remedies under both section 24(1) and the common law.[16] This may justify issuing a declaration, which can serve the democratic purpose of telling lawmakers and the public in advance that a law is *Charter*-compliant, liable to be changed or struck down, or defective in a way that can be easily cured.[15] The "threat" of a future *Charter* breach may also justify other types of remedy.

15. **Third**, no law exists in a vacuum. Most s. 33-protected laws interact with other statutes, as well as informal directives and conventions. The continued operation of an *Oakes* non-compliant law may well render other statutes and state actions unconstitutional, creating alternative bases for relief. Conversely, because s. 33 only applies to some rights, claimants can (and do) advance multiple overlapping claims, only some of which can be justified by s. 33. In such cases, the court must remedy any violation to which s. 33 does not apply; to the extent this overlaps significantly with a right to which s. 33 *does* apply, the court must have jurisdiction to consider both.[17]

---

[15] See e.g: the Federation of Ontario Law Associations, Amnesty International Canadian Section (English Speaking), and the Attorney General of Canada. See also *Nelles v Ontario*, 1989 CanLII 77 (SCC), [1989] 2 SCR 170, at p. 196; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 , at para 55; *Mills v The Queen,* 1986 CanLII 17 (SCC), [1986] 1 SCR 863, at para 63

[16] *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), at paras 9-10, [1985] 1 S.C.R. 441; *R v Varennes,* 2025 SCC 22 at para 70

[17] See, e.g., *Working Families Coalition (Canada) Inc. v Ontario*, 2023 ONCA 139, at paras 9-10, 48-136; upheld (s. 33 issue not appealed further) 2025 SCC 5

ii. Declarations about the law's compliance with Charter rights – s. 24(1) and common law – do not interfere with operation

16. In constitutional challenges involving s. 33, the proper remedy will often be a declaration setting out (a) which *Charter* rights (if any) are violated, (b) whether the law survives the *Oakes* test, and (c) what changes the law (if any) would need to survive the expiry of s. 33 protection. There is both common law and, now, s. 24(1) jurisdiction to grant broad declaratory relief for *Charter* violations, provided the applicant has standing.[18] Courts hearing constitutional cases retain their inherent jurisdiction, which is not disturbed by the fact that the alleged harm involves the *Charter*. Indeed, the term "court of competent jurisdiction" in s. 24(1) presumes "the existence of jurisdiction from a source external to the *Charter* itself."[19] At least one provincial appellate court has accepted that when neither s. 24(1) nor s. 52(1) remedies are available, the court may exercise its inherent jurisdiction to declare that the state has violated the *Charter*.[20] In *Operation Dismantle,* both Chief Justice Dickson and Justice Wilson (concurring) appeared to accept as a premise that declaratory relief for *Charter* breaches could flow from s. 24(1), s. 52(1), *or* at common law.[21]

17. Declarations can be expansive. As a form of *Charter* relief (or common law relief for *Charter* violations), they can provide legal guidance and suggest a constitutional state of affairs.[22] Indeed, some level of detail is arguably a democratic necessity: "the necessary process of dialogue…cannot occur if the legislature does not know how or why its enactments violate the *Charter*."[23] Democracy does not benefit from depriving the public of information that would enable its informed participation. And the political cost is limited: even where the separation of

---

[18] *Ewert v Canada,* 2018 SCC 30, at para 81; *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342, at pp. 356, 360-62; *Canada (Prime Minister) v. Khadr,* 2010 SCC 3, at paras 46-48; *Doucet-Boudreau,* at paras 51 (majority), 105, and 143 (dissent)

[19] *Singh v Canada (Minister of Employment and Immigration)*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177 at para 78, *per* Wilson J. See also Diane Shnier and The Honourable Justice Malcolm Rowe, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill LJ 295 at 324.

[20] *British Columbia Civil Liberties Association,* at paras 255–72

[21] *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, at paras 9, 109

[22] *Shot Both Sides v Canada*, 2024 SCC 12 at paras 66, 73–4; *Canada (Prime Minister) v Khadr,* 2010 SCC 3, at para 45; Rowe and Shnier, at 318

[23] *British Columbia Civil Liberties Association v Canada (Attorney General*), 2019 BCCA 228 at paras 153, 213, 267

powers prohibits courts from issuing more robust remedies, a declaration often remains appropriate because it is "more deferential to the other branches of governments."[24]

18. Declarations do not impede a law's operation under s. 33(2). Saskatchewan's jurisdictional argument to the contrary[25] rests on the defunct premise that s. 52 automatically renders a law inoperable as soon as a judge finds it conflicts with the *Charter*; if true, this would violate s. 33(2). On Saskatchewan's theory, "when a law is unconstitutional, courts and other decision-makers have no remedial discretion – s. 52(1) renders unconstitutional laws of no force or effect from the moment of their enactment."[26] While this had arguable support in the caselaw until 2020, this Court laid it to rest in *Ontario v G*.[31] As a result, courts can analyze and answer the legal questions – does the law justifiably violate a *Charter* right? – without automatically invoking any particular remedy, including s. 52.

iii. Robust individual remedies do not interfere with operation

19. Courts can grant robust individual remedies under s. 24(1) – up to and including stays of proceedings – without interfering with a s. 33(2)-protected law's "operation". A series of analogies makes the point: Constitutional exemptions do not interfere with the operation of laws whose invalidity is suspended. Statutory criminal courts, which lack s. 52 jurisdiction, can make unconstitutionality findings and stay proceedings without disrupting the operation of the subject provision.[27] Long before the *Charter*, claimants could seek individual relief from statutes and state actors *via* common law principles and remedies, including many now included in s. 7.[28] In all these scenarios, the law remains operational despite the availability of individual remedies.

---

[24] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 258; *Khadr,* at para 39

[25] Factum of the Appellant (Respondent on Cross-Appeal) Attorney General of Saskatchewan, at paras 56-59

[26] *Ontario (Attorney General) v G*, at para 87; *R v Albashir*, 2021 SCC 48, at para 39; *R v Sullivan*, 2022 SCC 19, at para. 55, citing *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54

[27] *R v Lloyd,* 2016 SCC 13 at para 15; *R v. A.B.,* 2015 ONCA 803 at para 12. This could also be as an exercise of the inherent jurisdiction to refuse to apply unconstitutional laws: see *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, at para 257

[28] See *R v Oickle*, 2000 SCC 38, at paras 29-31

20. Personal remedies should not undermine the legislature's will or the spirit of s. 33.[29] When considering remedies beyond a declaration, courts must weigh the interests underlying s. 33, practical considerations like judicial economy, the importance of vindicating rights, and the public's interest in uncovering violations and furthering democratic dialogue.[30] Courts should also consider whether the personal remedy is temporary or ancillary. *Permanent* constitutional exemptions, for example, risk usurping the legislature's role. Temporary exemptions do not.[31]

C. Principles guiding the exercise of remedial discretion respecting s. 33-protected laws

21. If this Court agrees that judges *can* issue declarations about s. 33-protected laws, it should provide guidance about when and how courts *should* do so. This should be informed by, first, the general principles of constitutional remedies: the importance of safeguarding rights, the public's interest in laws that are both effective and constitutional, and the distinct roles played by the courts and legislatures.[32] Second, justiciability doctrines are also relevant: (a) public interest standing, and the need to balance the rule of law and access to justice against the separation of powers; (b) ripeness, which governs courts' ability to remedy prospective *Charter* breaches;[33] and (c) mootness, and the need for laws to be reviewable.[34] Courts should consider the following factors:

A) Was s. 33 invoked pre-emptively, preventing meaningful dialogue? Provincial legislatures increasingly invoke s. 33 before the judiciary has ruled on a law's constitutionality.[35] In such cases, declarations serve a critical function, informing legislatures of their constitutional obligations and facilitating public debate.[36] They may spark debate about whether to maintain or amend the law. They may become evidence in Committee hearings. And, when s. 33 protection expires, they will inform the next legislature's choice about whether to re-invoke it.

---

[29] *R v Ferguson*, 2008 SCC 6, at paras 33-73
[30] *Ontario v G*, at paras 149-52
[31] *Ferguson*, at paras 33-73
[32] *Ontario (Attorney General) v G*, 2020 SCC 38, at paras 84-99.
[33] See *R v Harrer*, 1995 CanLII 70 (SCC), at para 42; *Varennes*, at paras 70-72
[34] *Council of Canadians with Disabilities* at paras 33-40; *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 15.
[35] See, for example, Ontario: *Keeping Students in Class Act, 2022*, SO 2022, c 19, *Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31 ; Saskatchewan: *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46
[36] Webber, *supra* note 10 at 535; Kent Roach, "Dialogic Remedies" (2019) 17:3 Int. J. Const L. 860

B) Is there a "genuine dispute," i.e., about the nature and scope of the rights at stake, and are the parties motivated to argue it? A definitive answer to a genuine legal issue can both help resolve debate and promote judicial economy by guiding other governments contemplating similar laws. This question will also require courts to balance, among other factors, a government-respondent's potential disinterest in participating against its motivations to do so: avoiding negative political consequences, and binding outcomes that could doom the impugned law in future or motivate affected individuals to seek constitutional exemptions in subsequent litigation.

C) Was the invocation of s. 33 based on misinformation about the constitution or a basic rule of law? If so, hearing the constitutional challenge serves both a corrective and a public education function, and satisfies the remedial purposes of ensuring "future state compliance with the *Charter*" and "avoid[ing] negatively impacting good governance."[37] As s. 33 has become more popular, misconceptions about how it works have distorted public understanding.[38] Declarations can clarify and protect the judiciary's legitimate role, and position voters to make informed choices about the values they want their governments to uphold.[39] The more that s. 33 is accompanied by delegitimizing rhetoric, the more important it is for courts clarify how the constitution works.[40]

D) How overt is the rights violation shielded by s. 33? The rule of law protects individuals from arbitrary state action and ensures a stable, predictable, and ordered society.[41] This requires that legislatures attempt to explain why statutes facially inconsistent with *Charter* rights should nonetheless be valid. This allows voters to make informed decisions at the ballot boxes.[42]

E) Are the rights of a vulnerable or disenfranchised group at stake? If so, the principle of democracy may favour judicial review and a declaration. That principle assumes that the public

---

[37] *R v Varennes,* 2025 SCC 22*,* at paras 76–77; see also *Council of Canadians with Disabilities*, at para 51

[38] Marion Sandilands, "Out of the Shadows: Responsive Judicial Review and the Resurgence of the Notwithstanding Clause" (2025) 34:1 Const Forum Const 19 at 24

[39] *Ibid*; Richard Stacey, "A Rule-of-Law Compliant Reading of Section 33: The Continuing Relevance of Lorraine Weinrib's Public Law Scholarship" (2025) 75:1 UTLJ 218 at 220.

[40] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at paras 53–6; Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 3rd ed (Toronto: Irwin Law, 2005) at 502–3. See also Webber, *supra* note 10; Caitlin Salvino, "The Section 33 Democratic Accountability Concept: Proposing a Two Pronged Approach for Judicial Review" (2023) 56:3 UBC L Rev 845

[41] *Reference re Secession of Quebec*, at para 70

[42] Stacey, *supra* note 40, at 220; *Ferguson*, at para 68

will *in fact learn about uses of s. 33* and cast an informed vote. When the affected group is disenfranchised or unpopular, this may not happen: minorities are by definition less able to affect the popular vote and may lack a platform to inform or mobilize others.[43] *Charter* review is especially meaningful in such cases. Alternatively, suspicious voters may unfairly assume that s. 33 hides illegal or unconstitutional conduct – that too can be dispelled by judicial review. In these cases, a declaration identifying the law's effect on rights is essential to the democratic process.

F) How much harm will the law cause? The greater and more widespread the harm, the more important it will be for courts to promptly consider whether it is effectively offset by competing interests and, if not, issue a responsive remedy – even if only a declaration neutralizing government gaslighting. A person whose rights are compromised by a valid law may feel vindicated by the court's recognition of that harm, confirmation that the law operates unfairly for them, and public condemnation of the harmful law.[44]

22. The outcome of this multi-factorial analysis will be context dependent. In the Centre's submission, it does not lend itself well to predictions about the rarity or frequency of declarative relief: rather courts should exercise discretion in *compelling* circumstances, taking into account the changing political norms around the use of s. 33.[45]

PART III – SUBMISSIONS ON COSTS

23. The Centre does not seek costs and asks that none be awarded against it.

PART IV – ORDER REQUESTED

24. The Centre requests permission to present oral argument on this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of June 2026.

Megan Savard, Mary Eberts, and Cheryl Milne
Counsel to the Intervener
David Asper Centre for Constitutional Rights

[43] *Reference re Secession of Quebec*, at para 74
[44] *Doucet-Boudreau,* at paras 55–59; *Ontario v G*, at paras 92–94; *Schachter v Canada,* 1992 CanLII 74 (SCC), [1992] 2 SCR 679 at 696*; Vancouver (City) v Ward,* 2010 SCC 27 at paras 25, 54; *Varennes,* at paras 76–77
[45] *R v Bouvette*, 2025 SCC 18, at para 198, (*per* Martin J., concurring)

PART VI – TABLE OF AUTHORITIES

Case Law

Case Law	Cited in paras.
Borowski v Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342	16
British Columbia (Attorney General) v Council of Canadians with Disabilities, 2022 SCC 27	21
British Columbia Civil Liberties Association v Canada (Attorney General), 2019 BCCA 228	16, 17
Canada (Prime Minister) v Khadr, 2010 SCC 3	16, 17
Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29	21
Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12	21
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62	13, 16, 21
Ewert v Canada, 2018 SCC 30	16
Ford v Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 SCR 712	6, 9
Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27	5
Little Sisters Book and Art Emporium v Canada (Minister of Justice), 2000 SCC 69	17
Mills v The Queen, 1986 CanLII 17 (SCC), [1986] 1 SCR 863	13
Nelles v Ontario, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170	13
Ontario (Attorney General) v G, 2020 SCC 38	10,18, 20, 21
Ontario (Attorney General) v Working Families Coalition (Canada) Inc., 2025 SCC 5	16
Operation Dismantle v The Queen,1985 CanLII 74 (SCC), [1985] 1 SCR 441	15, 16

Quebec (Attorney General) v Kanyinda, 2026 SCC 7	4
R v Albashir, 2021 SCC 48	11, 18
R v Bouvette, 2025 SCC 18	21
R v Harrer, 1995 CanLII 70 (SCC), [1995] 3 SCR 562	21
R v Lloyd, 2016 SCC 13	19
R v M. (C.A.), 1996 CanLII 230 (SCC), [1996] 1 SCR 500	21
R v Sullivan, 2022 SCC 19	11, 18
R v Varennes, 2025 SCC 22	11, 14
R v A.B., 2015 ONCA 803	18
R v Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103	2, 3, 4, 5, 6, 7 ,8 9, 10, 11, 12, 15, 16
R v Oickle, 2000 SCC 38	19
R v Ferguson, 2008 SCC 6	20, 21
Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217	5, 21
Schachter v Canada, 1992 CanLII 74 (SCC), [1992] 2 SCR 679	21
Shot Both Sides v Canada, 2024 SCC 12	17
Singh v Minister of Employment and Immigration, 1985 CanLII 65 (SCC), [1985] 1 SCR 177	16
Vancouver (City) v Ward, 2010 SCC 27	21

Secondary Sources	
Caitlin Salvino, "The Section 33 Democratic Accountability Concept: Proposing a Two Pronged Approach for Judicial Review" (2023) 56:3 UBC L Rev 845	21
Diane Shnier & Malcolm Rowe, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill LJ 295	16, 17
Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 UTLJ 510	7, 21

Marion Sandilands, "Out of the Shadows: Responsive Judicial Review and the Resurgence of the Notwithstanding Clause" (2025) 34:1 Const Forum Const 19	21
Richard Stacey, "A Rule-of-Law Compliant Reading of Section 33: The Continuing Relevance of Lorraine Weinrib's Public Law Scholarship" (2025) 75:1 UTLJ 218	21
Robert J. Sharpe & Kent Roach, The Charter of Rights and Freedoms, 3rd ed (Toronto: Irwin Law, 2005)	21
Robin Elliot, "Interpreting the Charter — Use of the Earlier Versions as an Aid", (1982) UBC L Rev 11	4
Kent Roach, "Dialogic Remedies" (2019) 17:3 Int JConst L 860	21

Constitutional Documents	
Constitution Act, 1982, s 52 (1), Schedule B to the Canada Act 1982 (UK), 1982, c 11	

Legislation	
An Act to Amend the Charter of the French Language, SQ 1988, c 54	18
Bill 28, *Keeping Students in Class Act, 2022*, SO 2022, c 19	21
Bill 307, *Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31	21
The Education (Parents' Bill of Rights) Amendment Act, SS 2023, c 46	21