CACV4329

THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT
(Respondent)

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT
(Respondent)

AND:

CONSEIL DES ÉCOLES FRANSASKOISES, CHINOOK SCHOOL DIVISION, CHRIST THE TEACHER CATHOLIC SCHOOL, CREIGHTON SCHOOL DIVISION NO. 111, GOOD SPIRIT SCHOOL DIVISION, GREATER SASKATOON CATHOLIC SCHOOLS, HOLY FAMILY ROMAN CATHOLICS SEPARATE SCHOOL DIVISION #140, HOLY TRINITY CATHOLIC SCHOOLS, HORIZON SCHOOL DIVISION, ILE-A-LA CROSSE SCHOOL DIVISION NO. 112, LIGHT OF CHRIST CATHOLIC SCHOOLS, LIVING SKY SCHOOL DIVISION NO. 202, LLOYDMINSTER CATHOLIC SCHOOL DIVISION, LLOYDMINSTER PUBLIC SCHOOL DIVISION, NORTH EAST SCHOOL DIVISION, NORTHERN LIGHTS SCHOOL DIVISION NO. 113, NORTHWEST SCHOOL DIVISION #203, PRAIRIE SOUTH SCHOOL DIVISION, PRAIRIE SPIRIT SCHOOL DIVISION, PRAIRIE VALLEY SCHOOL DIVISION, PRINCE ALBERT CATHOLIC SCHOOL DIVISION, REGINA CATHOLIC SCHOOLS, REGINA PUBLIC SCHOOLS, SASKATCHEWAN RIVERS SCHOOL DIVISION, SASKATOON PUBLIC SCHOOL, SOUTH EAST CORNERSTONE PUBLIC SCHOOL DIVISION #209, and SUN WEST SCHOOL DIVISION

NON-PARTIES
(Respondents)

FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I – INTRODUCTION

1. Section 33 of the *Charter of Rights and Freedoms*[1] affords the legislative branch the last word on legislation that violates the rights found at sections 2 and 7 to 15 of the *Charter*. This appeal concerns whether it has the "only word."[2]

2. Section 33 permits legislatures to declare that legislation "shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*," for a renewable period of up to five years. The Appellant argues that the invocation of section 33 ousts the court's jurisdiction to engage in judicial review. The Respondent proposes that courts can still grant declaratory relief. Courts, in fact, can do more: they can grant any just and appropriate *Charter* remedy that does not render legislation inoperable.

3. The Appellants misread section 33 as suspending *Charter* rights rather than limiting remedies. This interpretation misapprehends the text, intent, and effect of section 33. The invocation of section 33 does not suspend or eliminate *Charter* rights. Section 33 merely restricts the types of *Charter* remedies that a claimant can access.

4. After the legislature invokes the notwithstanding clause, courts retain jurisdiction to grant *Charter* remedies so long as they do not render the laws subject to section 33 inoperable. Section 33 does not bar claimants from accessing relief that can mitigate against the *Charter* harms they will endure from unconstitutional legislation or to remedy historical *Charter* breaches. Courts can still grant a range of practical remedies after a legislature invokes section 33. This means that the invocation of the notwithstanding clause does not render an otherwise valid *Charter* claim moot.

5. This interpretation of section 33 accords with the text of the provision, a purposive reading of section 33, the law of *Charter* remedies, and the principle of legality, an integral aspect of our constitutional order. This approach best reflects the role of courts and the balance struck between legislatures and the judiciary in liberal democracies. Conversely, the Appellant's interpretation would restrict access to *Charter* remedies in a manner that undermines fundamental tenets of our justice system.

PART II – JURISDICTION AND STANDARD OF REVIEW

6. The British Columbia Civil Liberties Association (the "**BCCLA**") takes no position on the jurisdiction or standard of review in this appeal.

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[1] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK),* 1982, c 11 (the "***Charter***").
[2] Eric M Adams, "Ford *Focus* Constitutional Context and the Notwithstanding Clause" ("**Adams - Constitutional Context**") (2023) 32:3 Constitutional Forum/Forum Constitutionnel 33 at 41.

PART III – SUMMARY OF FACTS

7. The BCCLA takes no position on the contested facts in this appeal.

PART IV – POINTS IN ISSUE

8. Invoking section 33 of the *Charter* does not oust the court's jurisdiction to engage in judicial review. Section 33 neither suspends *Charter* protections, nor bars *Charter* relief. It imposes a limitation on the type of *Charter* remedy that can be granted, precluding declarations that render legislation subject to section 33 inoperable. Judicial review is permitted following the invocation of section 33 to determine if the *Charter* remedies a claimant seeks can be granted.

PART V – ARGUMENT

A. Courts Must Interpret Section 33 of the *Charter of Rights and Freedoms* as Part of the Constitution

9. "The *Charter* must be given a generous and expansive interpretation; not a narrow, technical or legalistic one"; its provisions must be interpreted broadly and purposively, and placed in their proper linguistic, philosophic, and historical contexts.[3] A purposive approach also considers constitutional principles.[4] Indeed, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement."[5] The assumptions that underlie the text and the way the constitutional provisions are intended to interact with one another must inform the interpretation, understanding, and application of the text of the *Charter*.[6]

10. Section 33 of the *Charter* provides that a legislature may, by statute, expressly declare that legislation "shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*".[7] The declaration expires after five years but can be truncated or renewed by the legislature. When a legislature makes such a declaration, the *Charter* specifies the following result:[8]

> 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.

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[3] *Canada (Attorney General) v Power*, 2024 SCC 26 ("***Power***") at ¶26-¶27.
[4] *Power* at ¶26-¶27.
[5] *Reference re Senate Reform*, 2014 SCC 32 at ¶26.
[6] *Power* at ¶26-¶27.
[7] *Charter*, s. 33(1).
[8] *Charter*, s. 33(2).

11. The only consequence of invoking section 33 is that the impugned legislation "shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration."[9] The provision continues the "operation" of the impugned legislation and provides no further relief. It is limited to ensuring that the legislation subject to section 33 operates, even if there is a prior or subsequent judicial finding of *Charter* non-compliance. It does not immunize legislation from *Charter* scrutiny or the granting of remedies other than those that prevent its continued operation.

12. Section 33 contains no language to suggest that its effect is to oust either judicial review or the availability of *Charter* relief that does not render legislation inoperative. An interpretation of section 33 that excludes all *Charter* remedies betrays the language of the provision and its place in the broader *Charter* framework. Such an interpretation cannot be read-in to the terms "operate" or "operation". The entire provision would have to be redrafted to achieve this effect. Courts are cautioned against undertaking such redrafting exercises, particularly in the *Charter* context, and especially when doing so would diminish the protection of *Charter* rights and freedoms. If the language of the provision does not allow for it to be read in a given manner, then it cannot be interpreted to have that meaning.

13. Section 33 is not formulated as a privative or ouster clause.[10] Other jurisdictions have adopted explicit ouster clauses. An explicit ouster clause would make it clear that the scope of the court's power was being curtailed. For example, the Queensland *Human Rights Act, 2019* explicitly ousts the jurisdiction of courts to grant declaratory relief:[11]

> The Supreme Court cannot make a declaration of incompatibility about a statutory provision if an override declaration is in force in relation to the provision.

14. *Charter* interpretation is not limited to reading the text. The *Charter* must be read in a generous and liberal manner, giving meaning to the rights and powers it contains.[12] There are no hierarchies among the *Charter*'s provisions.[13] Wherever conflicts appear to arise as between individuals with competing rights, or between individual rights and state powers, courts should interpret the provision to give effect to both.[14] The Appellants advance an interpretation that runs afoul of these principles by impermissibly privileging section 33 over other constitutional provisions, and state powers over individual rights.

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[9] *Charter*, s. 33(2).
[10] Gregoire Webber, "Notwithstanding Rights Review or Remedy? On the Notwithstanding Clause and the Operation of the Legislation" ("**Webber - On the Notwithstanding Clause**") (2021) 71 UTLJ 510 at 518.
[11] *Human Rights Act, 2019*, (Qld) s 53(3).
[12] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 ("***9147-0732 Québec***") at ¶7.
[13] *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at ¶¶23-27.
[14] *R. v. N.S.*, 2012 SCC 72 at ¶32.

15. Constitutional principles guide *Charter* interpretation. Courts use them to understand "the character and the larger objects of the *Charter* itself… the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined".[15] Constitutional principles inform "the assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text."[16] There are no hierarchies among constitutional principles such as constitutionalism, the rule of law, parliamentary sovereignty, and the separation of powers.[17] Constitutional interpretation should be guided by the reconciliation of those principles.[18] The Respondent and other interveners have outlined how constitutional principles, including the rule of law, protection of minorities, and democracy support an interpretation of section 33 that preserves some jurisdiction for the courts after its invocation.[19]

16. Courts have a duty "to act as vigilant guardians of constitutional rights and the rule of law."[20] Since the adoption of the *Charter*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy."[21] Courts play a fundamental role in holding the executive and legislative branches of government to account, particularly in relation to breaches of the *Charter*.

17. As a polity that operates under a system of constitutional supremacy, the principle of legality is foundational to the Canadian democratic order and must inform the interpretation of section 33. Legality incorporates two related ideas: "that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action."[22] A court's ability to grant remedies in the *Charter* context must balance government autonomy with the need for government accountability.[23]

18. Section 33 forms part of the Canadian constitution and, like all provisions, must be read in harmony with the other constitutional provisions, including the remedies provisions at section 24 of the *Charter* and the protection of the core judicial function of superior courts in section 96 of the *Constitution Act, 1867.* Section 33 limits the remedies related to operability, but these other sections support a reading of

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[15] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at ¶55.
[16] *Power* at ¶27.
[17] *Power* at ¶79.
[18] *Power*.
[19] Factum of the Respondents, UR Pride Centre for Sexuality and Gender Diversity at ¶¶90-100.
[20] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 ("***Doucet-Boudreau***") at ¶110.
[21] *Power* at ¶55.
[22] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at ¶31.
[23] *Power* at ¶79.

section 33 that reserves some avenues for claimants to achieve practical recourse when a *Charter* violation occurs.

19. The history of a *Charter* provision is also relevant to its interpretation.[24] The notwithstanding clause builds on a tradition of similar provisions, designed to "*reduce* the instances of legislative rights infringements by requiring [legislatures] to explicitly state in law to operate outside of the constraints of the rights and freedoms otherwise protected."[25] Earlier rights-protecting statutes, like the *Canadian Bill of Rights*, could not bind future legislatures, and so notwithstanding provisions were added to these statues to compel future legislatures to "expressly declare" when laws would infringe protected rights.[26] This requirement for an express declaration was intended to create increased transparency, enhance public debate, and ensure a political cost for legislatures that infringed on rights, and thereby dissuade them from passing such rights-infringing legislation.

20. The *Charter's* notwithstanding clause requires infringements to be explicit, so that the public can hold the government to account. The structure of section 33 entrusts the electorate with holding governments accountable for their invocation of the notwithstanding clause.[27] The five-year sunset provision means that a government must face the public at the ballot box before it can renew the notwithstanding clause.[28] Litigation can "inject the perspectives of individuals and groups most directly impacted by the law into the constitutional debate."[29] Courts can inform the public of *if* and *how* a law violates a *Charter* right, and whether that violation is reasonably justifiable under section 1. This judicial guidance "might be especially important where the majoritarian parliamentary processes shut out a vulnerable minority."[30] The public can take account of this legal analysis when deciding how to vote.

21. The court below found that the legislature's invocation of the notwithstanding clause did not oust its jurisdiction to grant declaratory relief. It reasoned that clear wording would be required to oust its jurisdiction given "the historical and entrenched availability of judicial review and access to justice, and its importance to the protection of the Rule of Law."[31]

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[24] *9147-0732 Québec*, at ¶16, ¶20.
[25] Eric M Adams & Erin R J Bower, "Notwithstanding History: The Rights-Protecting Purpose of Section 33 of the Charter" ("**Adams & Bower – Notwithstanding History**") (2022) 26:2 Review of Constitutional Studies/Revue d'études constitutionelles 121 at 141.
[26] *Canadian Bill of Rights*, SC 1960 c 44, s 2; and see Adams & Bower – Notwithstanding History at 128-30.
[27] *World Sikh Organization of Canada v Quebec*, 2024 QCCA 254 ("***World Sikh Organization of Canada***") at ¶351.
[28] Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts and the Electorate" ("**Leckey & Mendelsohn – The Notwithstanding Clause**") (2022) 72 UTLJ 189 at 198-99.
[29] Adams & Bower – Notwithstanding History at 143.
[30] Leckey & Mendelsohn – The Notwithstanding Clause at 201.
[31] *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23 at ¶157.

22. The Québec Court of Appeal reached the opposite conclusion. In *World Sikh Organization v Québec,* the Québec Court of Appeal held that the invocation of section 33 ousted its jurisdiction to consider whether *Loi 21, Loi sur la laïcité de l'État* infringes on sections 2 and 7 to 15 of the *Charter*.[32] Leave has been sought to appeal this decision to the Supreme Court of Canada.

23. The Québec Court of Appeal's decision reveals a misapprehension about what the notwithstanding clause does. Downplaying the actual text of the provision, some have argued that section 33 "suspend[s] or set[s] aside" any *Charter* rights included in the invocation legislation.[33] When the effect of section 33 is conceptualized in this way, there is no scope for judicial review, because there is no "valid and in force" *Charter* right for the legislation to infringe.[34] The Québec Court of Appeal appears to have adopted this reading of section 33.[35]

24. This is an incorrect interpretation of section 33. It does not suspend *Charter* rights or otherwise cause them to disappear. The correct interpretation considers the provision's text and purpose. Section 33 allows legislation to operate notwithstanding that it unreasonably infringes a *Charter* right; it merely limits claimants from seeking those remedies that would prevent legislation from operating.

25. The decision below focused on whether a court can grant a declaration of *Charter* non-compliance after a government invokes the notwithstanding clause. The court focused on the availability of declaratory relief, the remedy the Applicant seeks in this action. However, because section 33 limits one category of remedies, specifically those that render legislation inoperable, courts can grant remedies *other than* a declaration even after a government has invoked the notwithstanding clause.[36]

26. That other *Charter* remedies remain available following the invocation of section 33 is consistent with the text of the provision. Section 33 only ousts the narrow set of remedies that would prevent legislation from operating. Many *Charter* remedies do not impair legislative operability. Moreover, section 33 does not allow a legislature to direct that a statute operates notwithstanding the remedies

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[32] *World Sikh Organization of Canada* at ¶368.
[33] Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" ("**St-Hilaire & Ménard – Nothing to Declare**") (2020) 29:1 Constitutional Forum 38 at 41.
[34] St-Hilaire & Ménard – Nothing to Declare at 44.
[35] *World Sikh Organization of Canada* at ¶360.
[36] Leckey & Mendelsohn – The Notwithstanding Clause at 209; Leonid Sirota, "Does the Charter's 'notwithstanding clause' exclude judicial review of legislation? Not quite!" ("**Sirota – Judicial Review**") (23 May 2019) *Concurring Opinion*.

provisions at section 24(1) and (2) of the *Charter*.[37] Courts should not read such a power into section 33 where it does not exist.

27. The availability of other *Charter* remedies is consistent with a purposive reading of section 33. The availability of other remedies promotes legality, by ensuring claimants have practical and effective ways to challenge legislation. The other remedies advance protection of minorities, by enabling courts to mitigate the harms that befall vulnerable minorities when legislation infringes their *Charter* rights and is not reasonably justified under section 1 yet continues to operate because of section 33.[38]

28. By granting *Charter* remedies, including those that protect minorities, courts safeguard Canada's democratic values. Much discussion of the notwithstanding clause and democracy has focused on the role of courts in educating the public so that they can vote in an informed manner. However, the Supreme Court of Canada reminds us that "the concept of democracy is broader than the notion of majority rule"; and courts have a foundational role to play in protecting "the values and principles essential to a free and democratic society" including "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[39] Interpreting section 33 to allow courts to grant other remedies ensures that they can play this critical role in protecting Canada's democratic values.

B. The Law of *Charter* Remedies

29. The law of *Charter* remedies must inform the interpretation of section 33. The law of *Charter* remedies has developed over the past four decades into a well-established, robust area of law. The correct interpretation of section 33 must be reconciled with the existing doctrine of *Charter* remedies.

30. The *Charter* guarantees not only the rights and freedoms of individuals in Canada but also remedies for their breach.[40] Granting remedies is the courts' "most meaningful function under the *Charter*."[41] The need for a purposive and generous approach to *Charter* interpretation "holds equally true for Charter

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[37] Sirota – Judicial Review.
[38] Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" **("Leckey – Advocacy Notwithstanding")** (2019) 28:4 Constitutional Forum/Forum constitutionell 1 at 5.
[39] *Vriend v. Alberta*, 1998 CanLII 816 at ¶¶140-142, citing *R. v. Oakes*, 1986 CanLII 46 at 136.
[40] *Power* at ¶31.
[41] *Power* at ¶31.

remedies as for *Charter* rights."[42] "Courts have a duty to determine the appropriate constitutional remedy for a *Charter* violation and to ensure that the remedy is commensurate with the extent of the violation."[43]

31. The law governing *Charter* remedies distinguishes between those remedies that preclude legislation from operating and those that do not. The internal frameworks governing different remedies also reveals that courts are already taking care not to overstep their proper role when granting relief.

32. Since the advent of the *Charter*, three sources of *Charter* remedies have been identified:

a. **section 52 of the *Constitution Act, 1982*:** provides for declaratory relief that legislation is unconstitutional, and thus rendered of no force and effect.

b. **section 24 of the *Charter of Rights and Freedoms***: provides a personal remedy for harms flowing from legislation or state conduct that is deemed unconstitutional, ranging from declarations of invalidity, exclusion of evidence, damages, or any form of relief that is just and appropriate in the circumstances.

c. **the inherent jurisdiction of section 96 courts through the common law**: provides remedies for harms flowing from legislation or state conduct that is deemed unconstitutional, ranging from declarations of invalidity, exclusion of evidence, damages, or any form of relief that is appropriate in the circumstances.

33. Section 52 provides claimants declaratory relief against *Charter*-infringing legislation, rendering it of no force and effect. It only applies to legislation and not state conduct. The availability of the remedy of striking down legislation is ousted by section 33, as it renders legislation "inoperable," preventing its ongoing operation.

34. Courts can rely on section 24 and inherent jurisdiction to grant a broad range of remedies to address a *Charter* infringement, including any form of relief that it considers appropriate and just in the circumstances. These sources of *Charter* relief can also be directed against state conduct in addition to government legislation.

35. Courts have granted *Charter* remedies including injunctions, constitutional exemptions, damages, costs, stays of proceedings, sentence reductions, the writ of *habeas corpus*, and the exclusion of evidence.

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[42] *Doucet-Boudreau* at ¶24.
[43] *Power* at ¶32.

Many of these remedies do not render legislation inoperable. Instead, they provide relief that reflect the nature of the *Charter* infringement and the interest of the claimant.

36. Section 24 "must be allowed to evolve to meet the different contexts in which *Charter* violations occur, and must remain flexible and responsive to the needs of a given case."[44] The language of section 24(1), in particular, "appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights" and that it "is difficult to imagine language which could give the court a wider and less fettered discretion."[45] Section 24(1) is "a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved."[46]

37. Courts can use section 24 and their inherent jurisdiction to grant remedies flowing from legislation or state conduct. The language of section 33 is limited to shielding the operability of "an Act or a provision thereof" and cannot be used to shield state conduct from judicial review.[47] The invocation of section 33 has no impact on a claim to a *Charter* remedy resulting from state conduct. For example, evidence is frequently excluded under section 24(2) to remedy past *Charter*-infringing state conduct Invocation of section 33 has no impact on an application to exclude evidence based on state conduct.

38. The invocation of section 33 does impact the availability of *Charter* remedies flowing from legislation, by ousting those remedies that would render the legislation inoperable. Many remedies remain potentially available after the invocation of section 33, yet a claimant must still establish that they are entitled to any requested remedy. However, these *Charter* remedies have their own internal frameworks to guide courts in determining if they are appropriate and just in the circumstances. The frameworks, read in conjunction with section 33, ensure the judicial branch does not overstep its constitutional role. Consider how section 24(2) is used to exclude evidence collected pursuant to unconstitutional legislation and *Charter* damages under 24(1).

C. The Exclusion of Evidence under Section 24(2)

39. Section 24(2) of the *Charter* provides accused persons the remedy of excluding evidence in criminal proceedings. Evidence can be excluded to address *Charter*-infringing state conduct or legislation. Section 33 cannot immunize state conduct from judicial review and thus courts always retain the ability to exclude evidence for *Charter*-infringing state conduct. When section 33 is invoked with

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[44] *Power* at ¶40.
[45] *R v 974649 Ontario Inc*., 2001 SCC 81 ("***974649 Ontario Inc.***") at ¶18 and *Mills v The Queen*, [1986] 1 S.C.R. 863, at p. 965
[46] *974649 Ontario Inc*. at ¶20.
[47] *Charter*, s. 33(2).

respect to legislation, courts retain the ability to exclude evidence, because granting such a remedy does not affect the operability of the legislation. Yet, even though the exclusion of evidence remains a theoretical possibility in both scenarios, a claimant must still prove their entitlement to the remedy.

40. There are three preconditions to a remedy under section 24(2):[48] (a) the applicant's rights or freedoms as guaranteed by the *Charter* must have been unjustifiably limited or denied; (b) the evidence must have been obtained in a manner that unjustifiably limited or denied a guaranteed right or freedom; and (c) having regard to all the circumstances, the admission of the evidence in the proceedings must be capable of bringing the administration of justice into disrepute. If the admission of evidence will bring the administration of justice in disrepute, then it will be excluded.

41. Section 24(2) remedies historical *Charter* breaches while section 33 precludes remedies that prevent the continued operation of state action. They serve disparate purposes. Section 33 does not hold a greater importance than section 24(2). Nothing in the text of section 33 permits it to limit the remedies available under section 24(2). The only reading of section 33 that permits section 24(2) to function as intended is to limit section 33 to barring remedies that prevent the continued operation of legislation, and not as a categorical denial of all forms of *Charter* relief. The latter reading is not supported by the text of the provision, a purposive reading of it, or any other accepted aides of statutory interpretation.

D. *Charter* Damages under Section 24(1)

42. The Supreme Court of Canada recognizes that monetary compensation may be an appropriate remedy for *Charter* infringements.[49] To establish an entitlement to *Charter* damages, a claimant must prove that their *Charter* right has been infringed, and that such an infringement was *not* reasonably justifiable under section 1. Robert Leckey explains: [50]

> Section 1 of the *Charter* requires rights-bearers to absorb the impact of reasonable, proportionate limits on their rights in pursuit of the general good. But where there is no basis to believe that the social benefit justifies the harm to rights, it might be appropriate and just to conclude that the regime's costs should not fall only on an identifiable, vulnerable class of individuals.

43. Once a claimant shows an *unjustifiable* infringement of *Charter* rights, courts must take account of additional constrains before granting damages. In *Ward* the Court emphasized that damages should

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[49] *Power* at ¶¶17, ¶118.
[50] Leckey – Advocacy Notwithstanding at 5.

compensate the claimant, vindicate the *Charter* right, and deter the state from future breaches.[51] Yet, these aims need to be weighed against countervailing factors, including the chilling effect that *Charter* damages can have on government conduct. Where the state establishes that "*Charter* damages would interfere with good governance… [then] damages should not be awarded unless the state conduct meets a minimum threshold of gravity."[52] Furthermore, absent passing legislation which is "clearly unconstitutional" or otherwise demonstrating "bad faith or abuse of power"[53] a legislature may be able to rely on a public law rule that provides them with limited immunity from damages "for harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional."[54]

44. The jurisprudence provides courts with guidance about when *Charter* damages should be awarded, and these principles provide sufficient safeguards against overuse of judicial powers following the invocation of section 33.

45. In the *World Sikh* case, some of the appellants sought *Charter* damages for infringement of their fundamental rights, "which did not cease to exist despite the legislature's use of the notwithstanding clause."[55] The Court held that it could not grant the requested pecuniary remedy. The refusal to award damages reflects its misinterpretation of section 33 as both suspending *Charter* rights and extending section 33 beyond the text to apply to section 24(1).

46. In the underlying claim, the government has passed legislation that may impact the availability of *Charter* damages. The statute invoking section 33 purports to bar anyone from suing the Crown in right of Saskatchewan, members of the executive council, and school officials and employees "for loss or damage resulting from the enactment or implementation" of the legislation.[56] This provision is not unprecedented: in 1998 the Alberta Government introduced *Bill 26, the Institutional Confinement and Sexual Sterilization Compensation Act* to cap the amount of compensation that individuals could recover on account of their sterilization by the Alberta Government under its provincial eugenics program. *Bill 26* also invoked the notwithstanding clause to shield the operation of the legislation.[57] The bill was quickly withdrawn by the Government, following significant public backlash.

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[51] *Vancouver (City) v. Ward*, 2010 SCC 27 ("***Ward***"), at ¶4.
[52] *Ward*, at ¶39.
[53] *Power* at ¶¶99-112.
[54] *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13 at ¶78.
[55] *World Sikh Organization of Canada* at ¶336.
[56] *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46, s 197.4(5).
[57] *Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act*, 2nd Sess, 24th Leg (1998), s 3.

47. There are two reasons to believe that such ouster provisions, as contained in the legislation underlying this litigation and Alberta's Bill 26, are invalid. First, they need to be read alongside section 96 of the *Constitution Act, 1867* and can only be given effect by a court if they do not "remove or unduly feter" the fundamental powers that "enable the superior courts to ensure the maintenance of the rule of law in our legal system."[58] Second, they are *ultra vires* to section 33 because the Supreme Court of Canada's decision in *Ford v Quebec* disallowed both retroactive and retrospective invocations of the notwithstanding clause.

E. Section 33 Cannot Be Invoked Retroactively or Retrospectively

48. In *Ford*, the Supreme Court of Canada interpreted section 33 as containing an important limit, "implicitly accepting the argument that a narrow interpretation of the notwithstanding clause is appropriate given its capacity to trench on otherwise guaranteed *Charter* rights and freedoms."[59] The Court in *Ford* held a retroactive invocation of the notwithstanding clause to be *ultra vires* to section 33 and thus of no force and effect.[60] A retroactive provision "is one that operates as of a time prior to its enactment."[61]

49. In *Ford*, the impugned provision invoked the notwithstanding clause and had come into force on June 23, 1982, but purported to take effect from a date two months earlier, on April 17, 1982. The Court held that the override provision could not be enacted retroactively, and it reached this conclusion by holding that retrospective uses of section 33 are also *ultra vires.*

50. A retrospective provision "is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event." [62] For example, legislation that invokes the notwithstanding clause to prevent or limit a claimant from seeking compensation for past *Charter* infringements would be retrospective. It is retrospective because it prevents or limits future claims on the basis of past harms.

51. The Supreme Court of Canada in the *Ford* case held that retroactive legislation was *ultra vires* by relying on the rule of statutory interpretation that directs that provisions should not be presumed to have retrospective effect:[63]

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[58] *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at ¶51.
[59] Adams - Constitutional Context at 40.
[60] *Ford v Quebec (Attorney General),* 1988 CanLII 19 ("***Ford***") at 745.
[61] Elmer A Driedger, "Statutes: Retroactive Retrospective Reflections" ("**Driedger – Statutes**") (1978) 56 Can Bar Rev 264 at 268.
[62] Driedger – Statutes at 268.
[63] *Ford* at 744 quoting *Re Athlumney* [1898] 2 QB 547 at 551-52.

> a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

52. The Court went on to hold that both retroactive *and* retrospective uses of section 33 were *ultra vires* to the language of the section.[64] The legislature cannot oust *Charter* remedies for past harms using section 33 because the provision cannot be used retrospectively to impair an existing right or obligation. Legislatures cannot bar remedies for past harms with explicit ouster provisions like the one contained in the legislation underlying this litigation or Alberta's *Bill 26*. They also cannot do it indirectly by invoking section 33 and then applying to strike a pre-existing *Charter* claim.

53. A reading of section 33 that bars any form of *Charter* relief for past harms means that even remedies that do not engage the continued operability of legislation would be unavailable. Vulnerable persons would not be able to obtain financial compensation for state abuses. These remedies would be barred even though they do nothing to impact the continued operation of legislation. Denying access to these remedies would also undermine fundamental tenets of our criminal and civil justice systems and do so without clear wording in section 33 to support such an extreme effect.

F. Section 33 Poses a Limitation, Not a Bar on *Charter* Remedies

54. Section 33 does not bar *Charter* remedies, such as the exclusion of evidence in criminal proceedings, damages in certain contexts, access to the writ of *habeas corpus*,[65] or other forms of relief. Instead, the provision limits courts from granting relief that would render *Charter* infringing legislation inoperable. Interpreting section 33 as merely limiting some types of *Charter* remedies fits with the robust, flexible approach to *Charter* remedies that Canadian courts have developed over the past 40 years.

55. The case of *British Columbia Civil Liberties Association v Canada (Attorney General)*[66] illustrates this robust, flexible approach. In *BCCLA,* the applicant sought a declaration that the federal government's scheme for administrative segregation breached the *Charter*. The British Columbia Court of Appeal held that it was not the statute that was the source of the harm, but rather the federal government's 'conduct'. Since the source of the harm was state conduct, rather than the statute, the BCCLA could not access section 52 remedies. The Court of Appeal also held that, as a public interest standing litigant, the BCCLA could not obtain relief under section 24(1).

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[64] *Ford*, at 744.
[66] 2019 BCCA 228 ("***BCCLA***").

56. With these limitations, the Court of Appeal determined it was appropriate to grant a remedy through exercise of its inherent jurisdiction.[67] It fashioned declarations on the unconstitutional aspects of the administrative segregation framework, and then provided the federal government time to address them.

57. *BCCLA* highlights the diversity and robustness of *Charter* relief, and that courts and claimants regularly navigate legal limitations to determine which remedies are "appropriate and just in the circumstances."[68]

58. The invocation of section 33 imposes narrow limits on the availability of *Charter* remedies. Section 33 prevents a claimant from accessing any remedy that would render legislation inoperable. However, a claimant can still apply for other remedies in the circumstances, including those to help mitigate the harm caused by the impugned legislation or state conduct.

59. *Charter* remedies are not going to be granted in every case because the internal frameworks governing them require courts to assess whether a requested remedy is appropriate and just in the circumstances. If it is not, then the internal framework serves as a complete bar to the claim. A court cannot determine whether a requested remedy should be granted at the outset of an action. It must review the evidence and engage with the legal issues to determine what relief, if any, is appropriate.

G. The Availability of *Charter* Remedies Underscores that Judicial Review is not Moot

60. A legislature's invocation of section 33 does not render an otherwise valid application for judicial review of legislation moot because a court can grant declaratory relief or any other *Charter* remedy that does not prevent the legislation from operating.

61. The doctrine of mootness provides that courts are not to hear matters where there is no live controversy before the court. Once the notwithstanding clause is invoked, there is no longer a "live controversy respecting the *operation* of the legislation"; however, there remains a live controversy with respect to the question of whether the legislation violates the *Charter*.[69] There might also be a question — as there is in the *World Sikh* case — about whether the Court should grant other *Charter* remedies. These situations are entirely unlike the case of *Borowski* where the challenged legislation had already

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[67] *BCCLA* at ¶¶ 255-274.
[68] *Charter*, s 24.
[69] Webber - On the Notwithstanding Clause at 534.

been struck down, and the plaintiff was asking the Supreme Court of Canada to opine, in the abstract, on whether section 7 and 15 *Charter* protections extended to fetuses.[70]

62. In this case, the court below determined that it would not strike the Respondent's claim at this stage on the basis of mootness. The Appellants argues that the lower court erred. The Appellants argue that this case is moot because a declaration of invalidity would have no practical effect.[71] The Respondents and other interveners have outlined the practical effects of declarations of invalidity including for educating the public, for providing guidance to the legislative branch, and for determining the validity of the legislation once the five-year sunset period expires.

63. Judicial review serves practical ends, even once section 33 is invoked. Beyond declarations, courts may grant other remedies to address specific instances of *Charter*-infringing legislation or conduct. Courts can grant such remedies because section 33 leaves their jurisdiction to engage in judicial review intact, except for those remedies that would render legislation inoperable. No remedies other than declaratory relief have been sought in this case, but they could be in others. If this court opts to strike this claim as moot, it must clearly limit its holding to this set of facts and not foreclose applicants in other cases from seeking *Charter* remedies following the invocation of the notwithstanding clause.

PART VI – RELIEF

64. The BCCLA seeks recognition that the invocation of section 33 of the *Charter* does not oust the court's jurisdiction to engage in judicial review, as claimants may still be able to obtain forms of *Charter* relief that do not render the impugned legislation inoperative.

Estimate of time required for the oral argument: 45 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Edmonton, Alberta this ___ day of _____, 2024

NANDA & COMPANY

Per_____
Avnish Nanda
Anna Lund
Solicitors for the Intervener, British Columbia
Civil Liberties Association

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[70] *Borowski v. Canada (Attorney General)*, 1989 CanLII 123.
[71] Factum of the Appellants, Government of Saskatchewan as Represented by The Minister of Education at ¶91.

PART VII – TABLE OF AUTHORITIES

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2. *Canadian Bill of Rights*, SC 1960 c 44	¶19
3. *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11	¶1, ¶¶10-11, ¶37, ¶57
4. *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46	¶46
Jurisprudence	**Cited At**
5. *Borowski v. Canada (Attorney General)*, 1989 CanLII 123	¶61
6. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228	¶¶55-56
7. *Canada (Attorney General) v Power*, 2024 SCC 26	¶9, ¶¶15-17, ¶30, ¶36, ¶¶42-43
8. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45	¶17
9. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62	¶16, ¶30
10. *Ford v Quebec (Attorney General)*, 1988 CanLII 19	¶48, ¶¶51-52
11. *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15	¶14
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13. *Mills v The Queen*, [1986] 1 S.C.R. 863	¶36
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16. *R. v. N.S.*, 2012 SCC 72	¶14
17. *R. v. Oakes*, 1986 CanLII 46	¶28
18. *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27	¶47
19. *Reference re Senate Reform*, 2014 SCC 32	¶9
20. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34	¶15
21. *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23	¶21
22. *Vancouver (City) v. Ward*, 2010 SCC 27	¶43
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26.	Adams, Eric M & Bower, Erin R J, "Notwithstanding History: The Rights-Protecting Purpose of Section 33 of the Charter" (2022) 26:2 Review of Constitutional Studies/Revue d'études constitutionelles 121	¶¶19-20
27.	Driedger, Elmer A, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Can Bar Rev 264	¶48, ¶50
28.	*Human Rights Act*, 2019, (Qld)	¶13
29.	Leckey, Robert, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 Constitutional Forum/Forum constitutionell 1	¶27, ¶42
30.	Leckey, Robert & Mendelsohn, Eric, "The Notwithstanding Clause: Legislatures, Courts and the Electorate" (2022) 72 UTLJ 189	¶20, ¶25
31.	Sirota, Leonid, "Does the Charter's 'notwithstanding clause' exclude judicial review of legislation? Not quite!" (23 May 2019) Concurring Opinion.	¶¶25-26
32.	St-Hilaire, Maxime & Ménard, Xavier Foccroulle, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Constitutional Forum 38	¶23
33.	Webber, Gregoire, "Notwithstanding Rights Review or Remedy? On the Notwithstanding Clause and the Operation of the Legislation" (2021) 71 UTLJ 510	¶13, ¶61