SCC 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,
SIMON JOLIN-BARRETTE, in his official capacity

RESPONDENTS
(Appellants on Cross-Appeal)

– and –

MOUVEMENT LAÏQUE QUÉBÉCOIS
FRANÇOIS PARADIS, in his official capacity

RESPONDENTS

(*Style of cause continued on next page*)

FACTUM OF THE INTERVENER SAMARA CENTRE FOR DEMOCRACY

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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AND BETWEEN:

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APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

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

APPELLANTS
(Respondents on Cross-Appeal)

– and –

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RESPONDENTS
(Appellants on Cross-Appeal)

– and –

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

RESPONDENTS

(*Style of cause continued on next page*)

AND BETWEEN:

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT

APPELLANT
(Respondent on Cross-Appeal)

– and –

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RESPONDENTS
(Appellants on Cross-Appeal)

AND BETWEEN:

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

APPELLANTS
(Respondents on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

AND BETWEEN:

THE LORD READING LAW SOCIETY

APPELLANT
(Respondent on Cross-Appeal)

– and –

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant on Cross-Appeal)

(*Style of cause continued on next page*)

– and –

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PART I – OVERVIEW AND FACTS

1. The Samara Centre for Democracy/*Centre Samara pour la démocratie* ("the Samara Centre") intervenes in this appeal on two points. Can legislatures properly invoke s. 33 of the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*") pre-emptively? And if they can, does such invocation insulate the legislation from judicial review? These questions are before this Court for the first time.[2]

2. Canadian democracy is sustained through the interaction of the three foundational branches of government: legislative, executive, and judicial. This tripartite structure, established by the *Constitution Act*, 1867,[3] ensures a balance of power through distinct but interdependent institutions, with each answerable to the other as vital allies in democracy.[4] Within this structure, courts are not external to democracy – they are integral to the democratic process.[5] So too is the legislature.[6]

3. Section 33 of the *Charter* has a unique relationship with democracy. Pre-emptive invocation of s. 33 (the "notwithstanding clause" or "override") of the *Charter*, or an insulation of laws from judicial scrutiny each undermine the critical role of the judiciary in upholding minority rights within the three-branched structure of Canadian constitutional democracy. The judiciary's distinct and complementary role must be considered against the backdrop of a recent change in the application of the override.[7] That is, of the approximately two-dozen uses of the notwithstanding clause since its enactment, its early uses were largely administrative or symbolic.[8] Over 80 percent of s. 33 invocations since 2000, however, have targeted the rights of specific minority or vulnerable groups,

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [*Charter*].
[2] While this Court has considered s. 33 previously, its consideration has not extended to the questions presently before the Court: *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712.
[3] *The Constitution Act, 1867* [*Constitution Act*, 1867]. See also *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), at paras 70, 136 [*Secession Reference*].
[4] *R v Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668 at paras 20, 57, 125; *Vriend v Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493 at paras 138-39 [*Vriend*]. See also Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997), 35 Osgoode Hall LJ 75.
[5] *Vriend*, *supra* note 5 at paras 139, 176.
[6] Peter Russel, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293 at 301.
[7] Peter W Hogg & Wade Wright, *Constitutional Law of Canada, 5th Edition* (Toronto: Thomson Reuters, 2007) (loose-leaf edition updated 1 July 2024, Release No 1) at Part III (Civil Liberties), Ch 39 (Override of Rights), Section II (History of s. 33).
[8] *Ibid.*

often in a pre-emptive manner.[9]

PART II – INTERVENER'S POSITION

4. **Pre-emptive Use of Section 33 Not Permitted:** The Samara Centre respectfully submits that a purposive approach to *Charter* interpretation, and a consideration of the fundamental and organizing principles of the Constitution (namely, democracy, rule of law, and the protection of minorities), support the conclusion that s. 33 cannot be invoked pre-emptively.

5. **Effect of Pre-Emptive Use:** The Samara Centre argues, in the alternative, that the pre-emptive use of s. 33 does not preclude judicial review and declaratory relief. That is, a law that invokes s. 33 at the time of its enactment must nonetheless remain open to review by the courts, and subject to declaratory relief. This interpretation is supported by a purposive and dynamic reading of s. 33, which recognizes the essential role of judicial oversight in protecting vulnerable groups from legislative overreach, as well as the recent decision from the Saskatchewan Court of Appeal in *UR Pride*.[10]

PART III – ARGUMENT

A. Section 33 Cannot Be Invoked Pre-emptively

6. The text of s. 33 of the *Charter*, in both its English and French-language versions, is silent with respect to whether it can be invoked pre-emptively. There is therefore a "gap" in the text, necessitating an analysis of the provision's context, and underlying purpose,[11] often referred to as the purposive or textual approach to *Charter* interpretation (hereinafter, the "purposive" approach

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[9] *Act respecting the laicity of the State*, CQLR c L-0.3, s 34 (override used to ban religious symbols in public service; See *Hak c Procureur général du Québec,* 2021 QCCS 1466); *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14, ss 214, 217 (override applied to restrict English-language services and access to justice); *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46, s 197.4(3) (override used to restrict gender identity rights; See *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan*, 2024 SKKB 23); *Marriage Amendment Act*, 2000, SA 2000, c 3, s 5(1.1)(a) (override to bar same-sex marriage); *Keeping Students in Class Act*, 2022, SO 2022, c 19, s 13(1) (override used to limit education workers' right to strike, later repealed).

[10] *Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 [*UR Pride*].

[11] *Telus Communications Inc v Federation of Canadian Municipalities*, 2025 SCC 15 at para 30 [*Telus*]; *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 (CanLII), [2002] 2 SCR 559 at para 26 [*Bell ExpressVu*]; *Mason v Canada (Citizenship and Immigration),* 2023 SCC 21 at para 69; R *v Basque*, 2023 SCC 18 at para 63; *Auer v Auer*, 2024 SCC 36 at para 64; *Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 42.

to interpretation).[12]

I. Purposive Interpretation of Section 33

i. Purpose – The Final, but Not Unilateral or Pre-Emptive, Word

7. Section 33, and the context of the *Charter* more broadly, reflect a constitutional compromise and a dual purpose to a) entrench fundamental rights and freedoms across Canada; and b) allow legislatures to override rulings of constitutional invalidity.[13]

8. The legislative history of s. 33 reflects a consistent federal and provincial intention to grant legislatures the "final word" in limited circumstances,[14] but not a unilateral or pre-emptive one. The relevant Hansard and statements from key participants in the drafting[15] of the *Charter* confirm that s. 33 was not intended to foreclose dialogue between the legislatures and judiciary. Then-Justice Minister Jean Chrétien described its purpose as the provision of "flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy".[16] In a similar vein, then-Premier of Alberta Peter Lougheed, a key proponent of the notwithstanding clause's inclusion into the *Charter*, emphasized that s. 33 would give legislatures the "final say" on major public policy issues.[17] Additional statements from participants confirm this understanding.[18]

9. The use of this terminology implies that courts retain a role in interpreting and applying the *Charter* and that judicial review must precede any legislative override. As a matter of ordinary meaning, having the "last" or "final" word necessarily presumes an exchange of views in which prior words have been spoken. Interpreted in context, "the final word" does not authorize unilateral or pre-emptive action. Rather, it affirms a sequence in which courts first assess *Charter* compliance, and

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[12] *UR Pride*, *supra* note 11 at para 60; *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at 344 [*Big M*] and *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 53 [*Toronto*]; *Canada (Attorney General) v Power*, 2024 SCC 26 at para 25.

[13] Canada, House of Commons, *Debates*, 32nd Parl, 1st Sess, No 181, Vol 12 (20 November 1981) at 13043–13044 (Jean Chrétien).

[14] Library of Parliament, "The Notwithstanding Clause of the Charter" (22 August 2024) (See statements from: Allan Blakeney, then-premier of Saskatchewan, Roy McMurtry, then-Attorney General of Ontario and then-Prime Minister Pierre Elliott Trudeau).

[15] *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10 at para 25.

[16] Canada, House of Commons, *Debates*, 32nd Parl, 1st Sess, No 181, Vol 12 (20 November 1981) at 13043 (Jean Chrétien). Emphasis added.

[17] House of Commons Debates, 32nd Parl, 1st Sess, No 43 (2 November 1981) at 13042.

[18] Library of Parliament, "The Notwithstanding Clause of the Charter" (22 August 2024).

only then may legislatures respond by invoking s. 33.

ii. Context – The Constitution's Fundamental & Organizing Principles

10. A key contextual feature of s. 33 is that it coexists alongside and is inextricable from the fundamental organizing principles of the Constitution. These principles form part of Canada's constitutional architecture and guide the interpretation of the *Charter* where the text is silent or ambiguous.[19] In *Secession Reference*, this Court identified the following non-exhaustive list of principles: federalism, democracy, constitutionalism and the rule of law, and accommodation and protection of minorities.[20]

11. This Court has unanimously identified these principles as the Constitution's "lifeblood" – so essential that they are the fundamental organizing principles of the constitutional order and seldom articulated.[21] To resolve uncertainty in the written text as to pre-emptive use, this Court may properly look to these fundamental organizing principles.

12. Democracy: A democracy derives legitimacy from the participation of, and accountability to, the people it governs.[22] A functioning democracy "requires a continuous process of discussion" whereby the executive is held accountable to the electorate through "democratic legislatures" and the public "interplay of ideas".[23]

13. This collaboration between the legislatures and courts, sometimes referred to as *democratic dialogue,* has two key parts:

    i. *Ongoing, inclusive debate*: A healthy democracy thrives on a continuous discussion and exchange of ideas.[24]

    ii. *Mutual accountability*: Neither the legislature nor the Courts have a monopoly on rights determination. Legislatures can respond to court rulings—even by using s. 33 of the *Charter*. Justice Iacobucci, in *Vriend*, described this back-and-forth as a respectful institutional exchange

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[19] *Toronto*, *supra* note 13 at paras 49, 55-56.
[20] *Secession Reference*, *supra* note 4 at paras 32, 48, 79.
[21] *Ibid at paras* 51, 62.
[22] *Ibid at paras* at para 67.
[23] *Ibid at paras* at paras 67-68, 150.
[24] *Ibid* at paras 64-65, 67-68, 150. See also *Vriend*, *supra* note 5 at paras 136-142; *Bell ExpressVu*, *supra* note 12 at para 65.

that strengthens democracy by recognizing the distinct but complementary roles of each branch.[25]

14. Democracy is an interpretive guide of the Constitution.[26] A judicial declaration—whether upholding or striking down a law—strengthens ongoing democratic dialogue and reinforces accountability between legislatures and courts. A court's careful evaluation illuminates the concrete impact of rights limitations, better equipping the public with information to hold lawmakers to account, an essential moderating feature embedded within the structure of s. 33. Further, a declaration may reveal crucial guidance relevant to the legislature's five-year renewal decision under s. 33(3) with respect to how the legislation might be revised or tailored to achieve *Charter* compliance or limit the infringement. Pre-emptive invocation of s. 33 undermines the informed political debate necessary for meaningful democratic accountability and silences the requisite inter-institutional dialogue essential to democracy,[27] a fundamental organizing principle of our constitution.

15. Rule of Law: The rule of law is a "fundamental postulate of our constitutional structure" that provides society with a sense of stability, reliability, and protection against arbitrary government action.[28] Within a society grounded in the rule of law, one expects to see a particular sequence in which courts can perform their role: that is, legislation is enacted and potentially challenged, judicial review ensues, and legislative use of s. 33 may follow. Citizens' access to the courts, in that sequence, strengthens ongoing democratic dialogue and reinforces accountability between legislatures and courts.

16. Protection of Minorities: The protection of minorities was a central motivation behind the *Charter*'s enactment.[29] Courts are mandated to safeguard the rights of those excluded from majoritarian

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[25] *Vriend*, *supra* note 5 at para 139.
[26] *Secession Reference*, *supra* note 4 at para 62.
[27] Caitlin Salvino, "The Section 33 Democratic Accountability Concept: Proposing a Two-Pronged Approach for Judicial Review" (2023) 56:3 UBC L Rev 845 at 859; Robert Leckey and Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 98 SCLR (2d) 189.
[28] *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 at 142; *Secession Reference*, *supra* note 4 at para 70.
[29] *Secession Reference*, *supra* note 4 at para 81.

politics. As this Court has affirmed since *Thorson*,[30] and more recently in *Downtown Eastside*,[31] access to courts—particularly through public interest standing—ensures that marginalized communities can participate in democracy, challenge discriminatory laws, and hold legislatures to account.[32]

17. This organizing principle of minority protection is further reflected in various constitutional provisions, including protections for language, religion, and education rights.[33] Minority protection is also specifically reinforced by s. 27 of the *Charter*, which requires an interpretive approach to the *Charter*'s provisions that both "*preserves*" and "*enhances*" Canada's multicultural heritage.[34] These are not neutral terms: "preserve" implies protection from erosion, while "enhance" demands active advancement.[35] As this Court's decision in *Multani* demonstrates, s. 27 requires that legislation affecting minority communities be subject to careful deliberation. Pre-emptive invocation of s. 33 weakens such deliberation. Evidence before this Court indicates that a threatening and polarized environment may decrease the participation of various groups in society.[36]

18. Without the perspectives of impacted communities, legislation risks causing significant harm to affected minority communities whose voices have been muted and marginalized by unwelcoming contemporary spaces of public discourse in Canada, as set out in the evidence before this Court.[37] For instance, Muslim minorities – some of whom are impacted by the subject Bill C-21 and have brought the present challenge through public interest parties – are amongst the most frequent subjects of polarized public discourse.[38] A judicial challenge can be, at times, one of the few meaningful ways minority communities can continue to engage.[39]

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[30] *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 SCR 138 at 145 [*Thorson*].
[31] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].
[32] *Ibid.*
[33] See *Charter*, *supra* note 1, ss 2(a), 15(1), 23, 27, 28; *The Constitution Act, 1867*, *supra* note 4, s 93.
[34] See *Big M*, *supra* note 13 at para 99; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 78.
[35] *Merriam-Webster Online Dictionary, sub verbo* "Preserve," and "Enhance" (accessed 19 May 2025).
[36] Appellants' Joint Record before the Supreme Court of Canada ("AJR"), Parts II, III, IV, Record before the Quebec Court of Appeal ("QCCA Record"), Vol 31, Paul Eid Expert Report at para 9, p 10202.
[37] AJR, QCCA Record, Vol 18, lchrak Nourel Statement Hak at para 32, p 5642; Vol 32, Eric Hehman Expert Report at paras 20, 21, 36, pp 10551, 10552, 10557.; Vol 2, Affidavit of Basir Naqvi, at paras 10-11, p 494.6; Vol 2, Affidavit of Imane Melab, at paras 15, p 494.23.
[37] *Thorson*, *supra* note 31 at 145; *Downtown Eastside*, *supra* note 32.
[38] AJR, QCCA Record, Vol 31, Paul Eid Expert Report at para 12, p 10203.
[39] *Ibid* at paras 8-13, p 10202-10203.

II. Dynamic Interpretation of Section 33

19. Writing for the majority of the Court in *Telus*, Justice Moreau observed that when confronted with new social and technological realities, statutory provisions must be interpreted dynamically to reflect their purpose.[40] Per *Telus*, significant contemporary social and technological realities must inform the interpretation of s. 33. Relevant contemporary realities include the transformation of public discourse.

20. Online Discourse: Public discourse, which previously took place in physical locations (the proverbial "town square"), now also significantly takes place on online platforms, supplementing traditional venues.[41] This democratic deliberation unfolding online is characterized by polarization and hostility, often directed at minority groups, impacting democratic inclusion and resulting in systemic exclusion.[42]

21. Within such a setting, minority groups who are the subjects of legislation may encounter challenges in accessing public discourse, potentially limiting an ability to influence public dialogue and legislative processes. In this context, the judicial process assumes an even greater significance. It offers a forum for minorities to engage in evidence-based discourse reflecting key Canadian values —where special interest groups present facts which are bound by rules of reliability and relevance and evaluated by the courts. The legislative process, shaped by political aims, does not always perform the same function. Indeed, the record before this Court demonstrates that this process

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[40] *Telus*, *supra* note 12 at paras 34, 36, 155, 158.
[41] *Crookes v Newton*, 2009 BCCA 392 at para 25.
[42] AJR, QCCA Record, Vol 31, Paul Eid Expert Report at para 12, p 10203:

> Au Québec, une étude réalisée en 2019 par la Commission des droits de la personne et des droits de la jeunesse confirme que les musulmans, à l'instar d'autres groupes racisés, notamment les Noirs, sont particulièrement ciblés par des actes haineux dans l'espace public, y compris sur Internet. En outre, certains répondants musulmans ont déclaré se sentir affectés par les nombreux propos islamophobes et/ou arabophobes lus sur Internet qui, sans les cibler personnellement, stigmatisaient leur groupe d'appartenance… Les crimes haineux islamophobes se distinguent également des autres sous un autre rapport : entre 2010 et 2016, aucun autre groupe que les musulmans ne comprend une proportion aussi élevée de victimes de sexe féminin. Enfin, entre 2010 et 2017, les musulmans constituaient, ex aequo avec les Autochtones, le groupe comptant la plus forte proportion de femmes victimes d'un crime haineux violent.

did not exist within the legislative context of Bill C-21.[43]

22. Contemporary Invocations of Section 33: The second contemporary reality which ought to have a bearing on this Court's interpretation of s. 33 is the noted shift in the use of the override.[44] Section 33 has increasingly been deployed *not* as a last resort but as a pre-emptive tool in restricting the rights of marginalized communities, particularly religious minorities, LGBTQ+ individuals, and trans youth.[45]

23. The affidavits before this Court, for instance, convey how the affiants personally experience the human cost of such laws, particularly as members of religious minorities who feel that their religious expressions have been deemed incompatible with Quebec's public values.[46] For example, Norton Rose lawyer Gregory Bordan, despite practicing law since 1988, can no longer receive public mandates because he wears a kippa and a fringed undergarment as an Orthodox Jew.[47] Similarly, the evidence of affiants Carolyn Gehr and Basir Naqvi demonstrates that aspiring teachers and prosecutors are effectively barred from public sector roles due to their religious observance.[48]

24. This evidence reveals not only career barriers but a deeper message of exclusion: that certain identities are incompatible with public service and public values.[49] As the record in this case demonstrates, legislation that marginalizes minority participation may impact individuals beyond those in affected professions.[50] Such legislation legitimizes broader stigmatization and lines of

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[43] National Assembly of Québec, Journal des débats (Hansard), 42nd Legislature, 1st Session, Vol 45 No 58 (16 June 2019), Extraordinary Sitting (Bill 21 adoption), recording the use of the "procédure législative d'exception" to limit debate; see also National Assembly of Québec, Bill 21 proceedings page (noting "The Committee did not conclude its clause-by-clause consideration of the bill").

[44] Hogg & Wright, *supra* note 8.

[45] See note 10.

[46] AJR, QCCA Record, Vol 2, Affidavit of Carolyn Gehr at pp 494.14-494.18, Affidavit of Basir Naqvi at 494.6-494.8, Affidavit of Gregory Bordan at 494.19-494.22.

[47] AJR, QCCA Record, Vol 2, Affidavit of Gregory Bordan at paras 3-4, 7, 10-12, 18, pp 494.19-494.22.

[48] AJR, QCCA Record, Vol 2, Affidavit of Carolyn Gehr at paras 1, 4-5, 7, 12, 18, 20, pp 494.14-494.18.

[49] AJR, QCCA Record, Vol 2, Affidavit of Carolyn Gehr at pp 494.14-494.18, Affidavit of Basir Naqvi at pp 494.6-494.8, Affidavit of Gregory Bordan at pp 494.19-494.22; Vol 32, Eric Hehman Expert Report at pp 10545-10552, 10557.

[50] AJR, QCCA Record, Vol 31, Paul Eid Expert Report at para 12, p 10203; Vol 2, Affidavit of Carolyn Gehr at pp 494.14-494.18, Affidavit of Basir Naqvi at pp 494.6-494.8, Affidavit of Gregory Bordan at pp 494.19-494.22.

exclusion in democratic society.[51]

25. In this context, the role of courts in upholding the rights of minorities is indispensable. Courts must provide a structured venue for fact-based and inclusive dialogue, allowing claims to be heard on the merits and grounded in evidence.[52] Through doctrines like public interest standing, courts enable representatives and organizations to advocate on behalf of groups excluded from dominant forums.[53] This role of courts is not merely corrective, but foundational, in a democracy. Justice Laskin, as he then was, writing for a majority of this Court in *Thorson*, observed that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[54]

B. Effect-of Pre-Emptive Use

26. Alternatively, if the Court determines that the legislature may properly invoke s. 33 pre-emptively, the Samara Centre submits that such pre-emptive use must be limited. The actual text of s. 33 does not eliminate the role of judicial oversight. Rather, it notes that once s. 33 is invoked with respect to a provision, the provision shall continue to "operate".[55] Therefore, the text only speaks to one of the two general remedies under the *Charter*, each with a distinct function, respectful of the separation of powers.[56]

27. Section 52(1) renders laws inoperative, whereas s. 24(1) empowers courts to grant any remedy that "justice" and "fairness" require, short of striking down the impugned law.[57] As s. 33 expressly removes the judicial ability to render a law inoperative, but is otherwise silent, the principle of *expressio unius est exclusio alterius* suggests that other judicial remedies, including declaratory relief

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[51] AJR, QCCA Record, Vol 18, Sworn statement of lchrak Nourel Hak, at para 32, p 5642; Vol 32, Eric Hehman Expert Report at paras 20, 21, 36, pp 10551, 10552, 10557.
[52] *Thorson*, *supra* note 31 at 145; *Downtown Eastside*, *supra* note 32.
[53] *Ibid.*
[54] *Ibid*; see also *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at 234.
[55] *Charter*, *supra* note 1, s 33.
[56] *Schachter v Canada*, 1992 CanLII 74 (SCC), [1992] 2 SCR 679 at 719-720; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 144.
[57] Hogg & Wright, *supra* note 8 at Part III (Civil Liberties), Ch 40 (Enforcement of Rights), Section 1 (Section 52(1)); Canada, Parliament *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl, 1st Sess, No 36, Vol 4 (12 January 1981) at p 19 (Jean Chrétien).

under s. 24(1), remain available.[58] In short, if pre-emptive use is permitted, the judiciary must retain the jurisdiction to determine whether the legislation limits *Charter* rights, as this does not conflict with the wording of the legislative override, as recently confirmed in *UR Pride*.

28. Judicial review following invocation does not alter the prevailing legal framework—Parliament's intentions are duly implemented—but it serves to clarify the "legal state of affairs".[59] Section 33 both upholds parliamentary sovereignty and encourages this dialogue between legislatures—who can override certain *Charter* rights—and courts, which interpret those rights.[60] Judicial scrutiny remains important even after a pre-emptive s. 33 invocation, as such measures expire every five years and require legislative renewal. Judicial declarations can serve to enhance legislative debate and public discourse during the consideration of five-year renewals, thereby strengthening democratic accountability. Such declarations may also have additional practical value: legislation may be adjusted to reflect the perspectives expressed by the court.[61]

29. Finally, there is no principled basis for allowing judicial scrutiny prior to the invocation of s. 33, but not afterwards.[62] Judicial scrutiny is not a penalty for invoking s. 33, but an anticipated process within the Constitution.[63]

PART IV and V – SUBMISSION ON COSTS AND ORDER SOUGHT

30. The Centre does not seek costs and requests that no costs be ordered against it.

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[58] *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, at para 27.
[59] *UR Pride*, *supra* note 11 at para 135.
[60] *Ibid* at para 110.
[61] *Ibid* at para 187.
[62] *Ibid* at para 116.
[63] *Ibid* at para 119.

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

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