

**IN THE COURT OF APPEAL FOR SASKATCHEWAN**

BETWEEN:

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY  
THE MINISTER OF EDUCATION

APPELLANT  
(Respondents/Applicant)

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT  
(Applicant/Respondent)

AND:

THE ADVOCATES' SOCIETY, AMNESTY INTERNATIONAL CANADIAN SECTION  
(ENGLISH SPEAKING), ATTORNEY GENERAL FOR NEW BRUNSWICK, ATTORNEY  
GENERAL OF ALBERTA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,  
CANADIAN CIVIL LIBERTIES ASSOCIATION, JOHN HOWARD SOCIETY OF  
SASKATCHEWAN, JUSTICE FOR CHILDREN AND YOUTH, SASKATCHEWAN  
FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES, CANADIAN  
TEACHERS' FEDERATION, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA,  
and WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervenors

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**FACTUM OF THE INTERVENOR WOMEN'S LEGAL EDUCATION  
AND ACTION FUND INC.**

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FILED BY:

**GERRAND RATH JOHNSON LLP**

Barristers and Solicitors  
700-1914 Hamilton Street  
Regina, SK S4P 3N6

Lawyer in charge of file: Barton Soroko  
Phone: 306 522 3030  
Fax: 306-522-3555  
Email: [bsoroka@grj.ca](mailto:bsoroka@grj.ca)

**As Agent for:**

**DENTONS CANADA LLP**

250 Howe St 20<sup>th</sup> floor,  
Vancouver, BC V6C 3R8

Lawyer in charge of file: Morgan Camley  
Phone: 604 648 6545  
Fax: 604 683 5214  
Emails: [morgan.camley@dentons.com](mailto:morgan.camley@dentons.com) / [kay.scorer@dentons.com](mailto:kay.scorer@dentons.com)

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## PART I - INTRODUCTION

1. This litigation centres on the constitutionality of the Appellant's amendments to the *Education Act*,<sup>1</sup> including the addition of section 197.4. Section 197.4 requires parental or guardian consent where a student under the age of 16 seeks to use their "new gender-related" name or identity at school. When a *Charter* challenge to these amendments was raised, the Appellant invoked section 33 of the *Charter*.<sup>2</sup> The Appellant now argues that as a result of its invocation of section 33, this Court has no role in considering violations of the *Charter* in judicial review and has no ability to issue declaratory relief.
2. LEAF submits that judicial review and declaratory relief are fundamental roles of the judiciary in the recognition and protection of *Charter* rights.
3. In particular, LEAF submits that a purposive reading of section 33 of the *Charter* clearly includes the availability of judicial review and declaratory relief after section 33 has been invoked. A purposive reading of section 33 is one that recognizes democratic accountability and substantive equality as core considerations of *Charter* interpretation.
4. The availability of judicial review and declaratory relief upholds the core principle of democratic accountability. The democratic accountability principle underlying section 33 depends on an informed public that meaningfully participates in the electoral process. Judicial review of *Charter* compliance plays a fundamental role in providing members of the public with the information they need to critically assess the legislature's actions prior to voting.
5. The availability of judicial review and declaratory relief also upholds the core principle of substantive equality. Substantive equality requires considering the group that is being impacted by the legislation in its full context, including any persistent systemic disadvantages that have operated in respect of that group. In this case, the community affected is among the most vulnerable in our society: transgender and non-binary children and youth who cannot vote. When section 33 is invoked to shield a law that violates the rights of such a marginalized community, judicial review

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<sup>1</sup> [Education Act](#), 1995, SS 1995, c E-0.2, s. 197.4.

<sup>2</sup> [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

acts as an institutional recognition of discrimination, both for the group experiencing that harm and for the public more generally. This interpretation aligns with the principles of substantive equality.

6. The interpretation of section 33 advanced by the Appellant would result in an inequitable application of the *Charter*. Interpreting section 33 as prohibiting judicial review would result in the perpetuation of disadvantage with respect to the very communities the *Charter* was created to protect. The result would be one where the *Charter*'s democratic accountability and substantive equality guarantees are rendered meaningless.

7. The outcome of this decision will have significant impacts on the communities that LEAF serves. These communities include not only transgender and non-binary children and youth, but women and gender diverse persons of all ages and backgrounds. Should this Court adopt the Appellant's interpretation of section 33, it will create an unreviewable legislative tool that will be antithetical to the meaning and purpose of *Charter* protections. Such a use of section 33 could become common practice among governments to suspend the fundamental rights and freedoms of communities who already face severe marginalization due to the politicization of their very existence.

## **PART II - JURISDICTION AND STANDARD OF REVIEW**

8. LEAF takes no position on jurisdiction or standard of review.

## **PART III - SUMMARY OF FACTS**

9. LEAF relies on the facts as summarized by Justice Megaw.<sup>3</sup>

## **PART IV - POINTS IN ISSUE**

10. LEAF's intervention is focused on whether the invocation of section 33 ousts the jurisdiction of a court to consider whether a provision is *Charter* compliant and to grant declaratory relief.

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<sup>3</sup> *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, [2024 SKKB 23](#), at paras 7-19 [*UR Pride*].

## PART V - ARGUMENT

### *A. The availability of judicial review promotes the core section 33 consideration of democratic accountability and the core Charter consideration of substantive equality.*

11. This Court is asked to confirm the availability of judicial review and declaratory relief when section 33 has been invoked – a novel issue on which the Supreme Court has yet to opine.

12. The central tool of analysis when returning to first principles in *Charter* litigation is purposive interpretation.<sup>4</sup> A purposive Charter analysis involves considering the larger purpose of the Charter, the language used in the relevant provision(s), the role of the historical origins of concepts, and the meaning and purpose of other Charter rights and freedoms which are associated with the right or freedom in question. To decide whether section 33 permits judicial review, one must determine whether the availability of judicial review is consistent with the purpose(s) of section 33.

13. When a court is interpreting a constitutional provision, the inquiry must be conducted “in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.”<sup>5</sup> Interpretations of *Charter* provisions must also be considered in the context of the *Charter* as a whole. As the Supreme Court of Canada articulated in *R v Stillman*:

A *Charter* right must be understood “in the light of the interests it was meant to protect” [...], accounting for “the character and the larger objects of the *Charter* itself”, “the language chosen to articulate the specific right or freedom”, “the historical origins of the concepts enshrined” and, where applicable, “the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” [...]. It follows that *Charter* rights are to be interpreted “generous[ly]”, aiming to “fulfil[1] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection” (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question [...].<sup>6</sup>

14. In this case, interpreting section 33 with “a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*” requires upholding the core principles of democratic

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<sup>4</sup> *R. v Big M Drug Mart Ltd*, [1985] [1 SCR 295](#) at 344 [*Big M Drug Mart*].

<sup>5</sup> *R. v Oakes*, [1986] [1 SCR 103](#) at para 63 [*Oakes*].

<sup>6</sup> *R. v Stillman*, [2019 SCC 40](#) at para 21, [2019] 3 SCR 144.

accountability and substantive equality. Both concepts – articulated as principles, values, and rights enshrined in the *Charter* – are fundamental to the interpretation of section 33 and support a court finding that judicial review and declaratory relief must remain available.<sup>7</sup>

*i. Democratic Accountability*

15. The legislative power to override the *Charter*'s rights and freedoms is grounded in an underlying principle of democratic accountability. On this point, LEAF relies on UR Pride's submissions,<sup>8</sup> noting in addition that the Court of Appeal for Ontario recently referred to democratic accountability as section 33's "core principle".<sup>9</sup>

16. The constitutional principle of democratic accountability is based on robust voting rights that are protected by section 3 of the *Charter*. In *Working Families*, the Court of Appeal for Ontario explained the nature of the "symbiotic relationship" between sections 3 and 33 of the *Charter*, as follows:

The "sunset clause" in s. 33(3), which provides for the expiry of an invocation of the notwithstanding clause after five years, ensures any government that relies on this clause must face the electorate, protected by robust voting rights under s. 3, before it can be renewed. This symbiotic relationship between s. 33 and s. 3 militates for a broad and robust interpretation of voting rights under s. 3 to ensure s. 33's core principle of democratic accountability.<sup>10</sup>

17. One critical component of "robust voting rights" is the right to an informed vote.<sup>11</sup> The right to cast an informed vote guarantees access to information that could influence a citizen's

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<sup>7</sup> Both democratic accountability and substantive equality are anchored in express provisions of the *Charter*. However, to the extent that they are also unwritten constitutional principles, the Quebec Court of Appeal's holding in *Organisation mondiale sikhe du Canada c Procureur général du Québec*, [2024 QCCA 254](#) [*Hak*], regarding unwritten constitutional principles is not persuasive. In *Hak* the Court of Appeal of Quebec stated at para. 357 that *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 [*Toronto*] "neutralizes any attempt to invoke an unwritten principle of law or one of the main principles of our country's constitutional architecture to counter the effects of s. 33 of the Canadian Charter." However, *Toronto* stands for the inability to invalidate legislation on the basis of unwritten constitutional principles, not for the inability to use unwritten constitutional principles to interpret Charter provisions. To the contrary, the Supreme Court of Canada in *Toronto* expressly held that unwritten constitutional principles can be used as "interpretive aids" (para. 65). Unwritten constitutional principles can therefore assist in the interpretation of the application of section 33.

<sup>8</sup> Factum of the Respondent, at paras. 94-100.

<sup>9</sup> *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, [2023 ONCA 139](#) at para 58.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Figueroa v Canada (Attorney General)*, [2003 SCC 37](#), [2003] 1 SCR 912.

decision on how to vote. Judicial review of legislation that is subject to an override under section 33 promotes democratic accountability by ensuring that the voting public is informed of the effects of a law on *Charter* rights and freedoms when it comes time to cast their vote. On this point as well, LEAF relies on UR Pride's submissions.<sup>12</sup>

18. Democratic accountability also requires access to meaningful participation in the electoral process. In interpreting section 3 voting rights, the Supreme Court of Canada in *Figueroa* stated that the right of each citizen to participate in "the political life of the country" is the "central focus of s. 3" and, for that reason, the guarantee must extend beyond the "bare right to vote" to include rights of meaningful participation.<sup>13</sup>

19. Critical assessment of a government's legislative choices is a key element of meaningful participation in an electoral process. This critical assessment requires access to information about the constitutionality of legislation that is subject to section 33. Importantly, the process of judicial review requires governments to provide "reasoned justification for laws that limit the rights of those who hold views diverging from the prevailing wisdom of the day."<sup>14</sup> Scrutinizing, considering, and providing an opinion on the *Charter*-compliance of laws through declaratory relief is therefore essential. The availability of a declaration supports the rights to cast an informed vote and to meaningfully participate in the electoral process, thereby ensuring that the use of section 33 will be subject to a process of democratic accountability. This need is even more clear where section 33 is invoked pre-emptively, as it was in this case.

20. The *Charter*'s underlying principle of democratic accountability is buttressed by the *Charter* value of "the enhancement of democracy,"<sup>15</sup> which the Supreme Court has recognized to be one of the "accepted principles of constitutional interpretation."<sup>16</sup> Democracy is enhanced where communities are able to rely on the court for necessary assistance in critically and neutrally assessing a government's legislative choices.

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<sup>12</sup> Factum of the Respondent, at paras. 94-100.

<sup>13</sup> *Figueroa*, *supra* note 11 at para 26.

<sup>14</sup> Hon. Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021) at 36-37, cited in underlying [decision at para 155](#).

<sup>15</sup> *Reference re Secession of Quebec*, [1998] SCR 217 at para 52.

<sup>16</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 41, [2018] 2 SCR 293.



21. An interpretation of section 33 that restricts a court’s ability both to examine a law and to make declarations about its *Charter* compliance deprives citizens of the information needed to participate meaningfully in the electoral process, which – as elaborated upon in the next section – is particularly significant when a law impacts the rights of marginalized communities.

*ii. Substantive Equality*

22. The protection of marginalized groups through substantive equality is also a fundamental principle, value, and right enshrined in the *Charter* that is relevant to the interpretation of constitutional text.<sup>17</sup> The Supreme Court of Canada recently affirmed that equality is a fundamental democratic value, and one that is the “broadest of all guarantees.”<sup>18</sup> Indeed, equality applies to and supports all other rights guaranteed by the *Charter*.<sup>19</sup>

23. The Supreme Court of Canada has continued to recognize the role of substantive equality in *Charter* interpretation, in contrast with the more diminished concept of formal equality. While the principle of substantive equality has been developed primarily through section 15 jurisprudence, it plays a role in interpreting other provisions of the *Charter*. For example, in *R v Big M Drug Mart*, in interpreting section 2(a) of the *Charter*, the Supreme Court of Canada considered equality to be a paramount and central value under section 1: “[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon section 15 of the *Charter*.”<sup>20</sup> In *R v Le*, in interpreting section 9 of the *Charter*, the Supreme Court relied on substantive equality principles when finding that a section 9 analysis must consider “the larger, historic and social context of race relations between police and the various racial groups and individuals in our society.”<sup>21</sup> In *Saskatchewan Federation of Labour*, the Supreme Court of Canada considered the *Charter* values of “[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” in interpreting section 2(d) of the *Charter*, with reference to the vulnerability of employees.<sup>22</sup>

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<sup>17</sup> *Oakes*, *supra* note 5 at para 64.

<sup>18</sup> *Hansman v Neufeld*, [2023 SCC 14](#), 481 DLR (4th) 218, at paras 9 and 82 [*Hansman*].

<sup>19</sup> *Andrews v Law Society of British Columbia*, [\[1989\] 1 SCR 143](#).

<sup>20</sup> *Big M Drug Mart*, *supra* note 4 at 336.

<sup>21</sup> *R v Le*, [2019 SCC 34](#) at para 75, [2019] 2 SCR 692.

<sup>22</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#), [2015] 1 SCR 245, at paras 53-55.

24. The role of equality as an interpretive consideration in all provisions of the *Charter* is confirmed by the operation of section 28, which states: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons” (emphasis added). Section 28 anchors the role of substantive gender equality in *Charter* interpretation.<sup>23</sup>

25. As the cases above demonstrate, interpretations of *Charter* provisions must be consistent with substantive equality. Substantive equality “requires attention to the ‘full context of the claimant group’s situation’...and to the ‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to that group’s members.”<sup>24</sup>

26. When considering whether legislation should be reviewed after section 33 has been invoked, and to uphold the principle of substantive equality, courts must consider the group that is being impacted by the legislation in their full context, including any persistent systemic disadvantages that have operated in respect of that group. When section 33 is invoked to shield a law that perpetuates those systemic disadvantages, judicial review and declaratory relief provide public and institutional recognition of that discrimination.

27. The full context in the present case is the lived experience of transgender and non-binary children and youth. The marginalization of transgender persons in Canada, including children and youth, is well-documented. The Supreme Court of Canada has recognized that the history of transgender persons has “been marked by discrimination and disadvantage”; that they “often find their very existence the subject of public debate and condemnation”; and “that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced.”<sup>25</sup>

28. The availability of declaratory relief in instances where the group impacted faces persistent systemic disadvantage is the only interpretation of section 33 which would serve not to perpetuate disadvantage. Restricting judicial review when section 33 is invoked would result in government-

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<sup>23</sup> Section 28 also creates a substantive right that is not at issue in this appeal. [see Katherine de Jong, “Sexual Equality: Interpreting s. 28” in AF Bayefsky & M Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 521-22.]

<sup>24</sup> *Fraser v Canada (Attorney General)*, [2020 SCC 28](#) at para 42, [2020] 3 SCR 113.

<sup>25</sup> [Hansman](#), supra note 18.

sanctioned discrimination – against an already marginalized and disadvantaged group – being unnamed, unchecked, and entrenched in law. While a judicial declaration can serve to recognize and acknowledge a group’s experience of discrimination, judicial silence will have the opposite impact. It will affirm denials of discrimination – or worse, celebrations of discrimination – that may be circulating in the public sphere, and would allow discrimination to perpetuate and expand in the shadows. Judicial review in these cases brings the discrimination into the light for those experiencing it and makes the harm visible to all of society.

29. While the invocation of section 33 may enable a legislature to have the final word on the operation of a law, its purpose cannot be to silence judicial review of the impact of the law on fundamental rights and freedoms. Such an interpretation would essentially strip the *Charter* of its fundamental purpose as a human rights instrument. It would result in an application of the *Charter* that reinforces, perpetuates, and exacerbates disadvantage of marginalized communities contrary to sections 15 and 28, as well as the underlying constitutional principle of equality.

30. Judicial scrutiny is fundamental to the purposes of democratic accountability and substantive equality that underpin the *Charter* as a whole. It is necessary to ensure the preservation of an informed vote, to support meaningful participation in the democratic functions of society, and to institutionally acknowledge the rights of all persons in Canada.

***B. The impact on marginalized communities – especially non-voting populations – of barring access to declaratory relief is relevant to interpreting and applying section 33***

31. In considering the proper application of section 33, courts must be mindful of the absence of meaningful civic engagement for marginalized and disenfranchised communities. Ongoing access to the judiciary bolsters democratic accountability and substantive equality for these communities in particular. It is therefore these communities who are the most in peril on a restrictive reading of section 33.

32. In the underlying decision, Justice Megaw examined the availability of judicial review and declaratory relief when section 33 has been invoked. Justice Megaw engaged in a purposive analysis of the *Charter*. In this analysis, he considered:

- (a) the wording used in section 33(1) of the *Charter*;

- (b) the importance of citizens having ongoing access to the courts; and
- (c) the courts' historical and legislated ability to issue declaratory judgments which may have no substantive effect.<sup>26</sup>

33. While each of the above is critical and favours a determination that section 33 does not restrict judicial review, LEAF urges the consideration of additional factors in the analysis, namely: the experience of the community or communities directly impacted and affected by the invocation of section 33, and the experiences of those more broadly impacted. In this instance, the community directly impacted is among the most vulnerable in our society: non-voting transgender and non-binary children and youth. The communities more broadly impacted are those who are underrepresented in the legislature.

*i. Implications for the Community Directly Impacted - Transgender and Non-Binary Children and Youth*

34. Children and youth have limited access to the “tools of parliamentary democracy”.<sup>27</sup> Most importantly, they are unable to vote. They lack the ability to hold governments accountable at the ballot box, and therefore access to democratic accountability through the courts should be vehemently protected.

35. The Appellant's interpretation of section 33 creates an untenable inequality of democratic accountability – a two-tier application of the *Charter* that disadvantages groups not able to register their objection in elections. Voting citizens would have direct recourse to legislators when their rights are impacted by the invocation of section 33, while groups who are unable to vote would have no recourse through elections. Further, those groups would also lose their access to judicial review and declaratory relief. This would be antithetical to the principle of democratic accountability and to the functioning of meaningful democracy with checks and balances of the legislative arm through the judiciary.

36. In *Organisation mondiale sikhe du Canada c Procureur général du Québec*, the Quebec Court of Appeal indicated that, following the invocation of section 33, determining the correctness

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<sup>26</sup> [UR Pride](#), *supra* note 3 at para 148.

<sup>27</sup> *Organisation mondiale sikhe du Canada c Procureur général du Québec*, [2024 QCCA 254](#) at para 351 [*Hak*].

of the decision is left to the citizens who can make their views known through political actions like elections, lobbying deputies, and petitions:

Absent such a constitutional review, determining the correctness of the legislature's political and legal choice in invoking s. 33 of the *Canadian Charter* is therefore left to the citizens, who will make their point of view known through the tools of parliamentary democracy (e.g., elections, lobbying of deputies, petitions submitted to the legislature) and those that the Constitution places at the disposal of any person or group wishing to make their opinion known (such as the exercise of freedom of expression or freedom of peaceful assembly).<sup>28</sup>

37. However, *Hak* fails to grapple with situations like the present: where those who are impacted by the use of section 33 cannot vote in elections and are unlikely to lobby deputies or to submit petitions to the legislature (or, are likely to face barriers to doing so), and may face serious risk if they attempt to engage in public assembly.

38. When the *Charter* rights of non-voting communities are violated, LEAF submits that a court's declaration can play a fundamental role in mitigating this inequality of democratic accountability. A public declaration makes the infringement(s) on *Charter* rights visible and evident to Canadian society in a way that allows the democratic accountability principle at the heart of sections 3 and 33 of the *Charter* to function as intended. Those with the right to vote will have access to the information they need to meaningfully engage their democratic institutions, including by voting and lobbying the government. This upholds the democratic accountability principle and the purpose of the *Charter* more generally by protecting the rights of communities, even those who cannot vote.

39. Judicial access becomes even more critical in situations of marginalized communities for whom the adverse impacts of a law would exacerbate existing discrimination. In the present case, while children and youth under the age of 16 do not have access to the ballot box, they do have access to the courts.

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<sup>28</sup> *Ibid.*

40. Transgender and non-binary youth are unable to vote, but also face significant marginalization in society. The availability of judicial consideration and declaratory relief is fundamental in the meaningful protection of this community's *Charter* rights.

41. As noted above,<sup>29</sup> transgender and non-binary communities experience disproportionate discrimination and disadvantage, and the existence of this community is the subject of public debate and condemnation. As a result, these communities face an increased risk of violence and adverse health impacts.<sup>30</sup>

42. In these instances, judicial review and declaratory relief by the court plays a vital and dignity-enhancing role for members of a community whose rights are infringed and who are already severely limited in their options for seeking democratic accountability and protection of their rights. Declaratory relief serves to publicly recognize the experience of a group whose rights are being infringed, and who, in the case of transgender and non-binary communities, have been subject to historical and ongoing persistent systemic disadvantage.<sup>31</sup> This is especially important in a public context wherein transgender youth are not believed to be credible narrators of their own identities and experiences of discrimination. In this context, it is even more necessary that courts publicly recognize the lived experiences of transgender youth. A judicial declaration makes the infringement visible to Canadian society in a way that allows the public to be informed of the need for the protection of these rights.

43. If judicial review and declaratory relief are prohibited, fundamental access to justice shall be eliminated for a community who has “traditionally faced greater access to justice barriers than the broader population.”<sup>32</sup> This unequal access to democratic accountability will further reinforce and amplify historic and ongoing marginalization and discrimination.

44. To interpret section 33 in a manner that deprives access to judicial review of *Charter* violations and declaratory relief undermines the *Charter*'s democratic accountability and

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<sup>29</sup> *Infra*, paragraph 27.

<sup>30</sup> *Hansman*, supra note 18, at paras 84 – 89.

<sup>31</sup> In *Shot Both Sides v. Canada*, [2024 SCC 12](#), the Court describes the unique tenor of declaratory relief, including its ability to assist in providing a clear statement on the legal rights of parties.

<sup>32</sup> *Hansman*, supra note 18, at para 86 citing J. James et al., Legal Problems Facing Trans People in Ontario, TRANSforming JUSTICE Summary Report 1(1), September 6, 2018 (online).

substantive equality principles. An interpretation of section 33 that allows a legislature to shield laws directly impacting transgender and non-binary children and youth from judicial scrutiny and declaratory relief is an untenable interpretation of the *Charter*.

***ii. Broader Implications for Communities Underrepresented in the Legislature***

45. In addition to the impact of restricting judicial review for transgender and non-binary children and youth, LEAF is gravely concerned about the broader implications of the Appellant's interpretation of section 33. Women – and in particular Black, Indigenous, and racialized women – are underrepresented in the legislature. Time and again, when legislators have invalidated women's experiences and denied them equality before the law – from uncertainty as to whether a woman is a “person”,<sup>33</sup> to pregnancy discrimination,<sup>34</sup> to workplace sexual harassment<sup>35</sup> – women have sought and found justice before the courts. Now, with the increased use of the notwithstanding clause, governments seek to foreclose one of the principal means by which women have accessed justice in this country.

46. The fear of the notwithstanding clause being employed to erode the rights of women and girls is not speculative. The religious symbols ban set out in *An Act Respecting the Laicity of the State*<sup>36</sup> prevents Muslim women from fully and equally exercising their freedom of expression and freedom of religion.<sup>37</sup> It is permitted to do so by virtue of the notwithstanding clause.

47. In an ideal world, rights that are recognized at law should be rights enforced and secured. Unfortunately, we know that this is not the case. Women's and other gender and sexual minorities' rights remain a subject of political debate in legislative assemblies and in elected officials' media appearances. These groups face a serious risk of having their hard-fought rights be legislatively gutted by the invocation of section 33. This includes, only as brief examples, a woman's right to

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<sup>33</sup> *Edwards v. Canada (Attorney General)*, [1929 CanLII 438](#), [1929] 1 DLR 98.

<sup>34</sup> *Brooks v. Canada Safeway Ltd.*, [1989] [1 SCR 1219](#) (LEAF as an intervenor).

<sup>35</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] [1 SCR 1252](#) (LEAF as an intervenor).

<sup>36</sup> *An Act Respecting the Laicity of the State*, [SQ 2019, c. 12](#).

<sup>37</sup> *Hak*, supra note 27, at para 807.

bodily and reproductive autonomy; the right for LGBTQ+ couples to marry and to adopt children; and employment protections for LGBTQ+ persons.<sup>38</sup>

48. All these rights – fundamentally protected by the *Charter* and recognized with the assistance of the judiciary as guardians of the *Charter* – are at risk of erosion.

49. An interpretation of section 33 which entirely ousts access to the courts enables its use against other vulnerable communities. Women in particular have been historically disenfranchised in Canada, and their right to participate in democracy in Canada has been fraught. Women have a well-documented history of requiring the courts to intervene when their rights have been infringed, denied, or ignored.

50. A principled interpretation of section 33 must be alive to the impact of a judicial review and declaration on those in society who experience persistent, systemic discrimination. In the context of provinces increasingly turning to section 33 to ensure the operability of their laws, it is imperative for courts to remain open to those whose rights, despite being enshrined in the *Charter*, are contingent on the public mood of the political majority. A framework that accounts for substantive equality must allow for government action to be subject to judicial review and declaratory relief when section 33 has been invoked.

### ***Conclusion***

51. Interpretations of section 33 of the *Charter* must align with the principles of democratic accountability and substantive equality. The availability of judicial review after section 33 has been invoked promotes democratic accountability by ensuring that the public is informed of the effects of a law on *Charter* rights and freedoms when it comes time to cast their vote. In order to meaningfully engage with the electoral process and ensure robust voting rights, citizens must be able to critically assess a government's legislative choices. Scrutinizing, considering, and providing an opinion on the *Charter*-compliance of legislation through the means of declaratory relief is how section 33 operates harmoniously with the *Charter*'s democratic imperative.

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<sup>38</sup> See for example: *R v. Morgentaler*, [1988] 1 SCR 30; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698; *Vriend v. Alberta*, [1998] 1 SCR 493; .



52. The availability of judicial review after section 33 has been invoked promotes substantive equality because it attends to the experience of the community or communities affected by the invocation of section 33. In this case, the community affected is among the most vulnerable in our society: transgender and non-binary children and youth who cannot vote. When section 33 is invoked to shield a law that violates the rights of such a marginalized community, judicial review acts as a measure of recognition and information: it institutionally acknowledges the group experiencing the discrimination and informs others of the equality rights violations. In so doing, substantive equality is upheld.

53. This Court must not promote an interpretation of section 33 that undermines the edifice of the *Charter*. To do so would be to risk the ongoing use of section 33 to erode the rights that marginalized communities have gained through forty years of *Charter* litigation and advocacy.

#### **PART VI - RELIEF SOUGHT**

54. LEAF takes no position on the disposition of this appeal.

55. LEAF seeks no costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15 day of August, 2024.

Per: \_\_\_\_\_



**Barton Soroka**

**As Agent For**

**DENTONS CANADA LLP**

Morgan Camley

Counsel for the Intervenor, LEAF

## PART VII - AUTHORITIES

### Case Law

1. *Andrews v Law Society of British Columbia*, [\[1989\] 1 SCR 143](#).
2. *BCGEU v British Columbia (Attorney General)*, [\[1988\] 2 SCR 214](#).
3. *Brooks v. Canada Safeway Ltd.*, [\[1989\] 1 SCR 1219](#).
4. *Edwards v. Canada (Attorney General)*, [1929 CanLII 438](#), [1929] 1 DLR 98.
5. *Figueroa v Canada (Attorney General)*, [2003 SCC 37](#), [2003] 1 SCR 912.
6. *Frank v Canada (Attorney General)*, [2019 SCC 1](#), [2019] 1 SCR 3.
7. *Fraser v Canada (Attorney General)*, [2020 SCC 28](#), [2020] 3 SCR 113.
8. *Hansman v Neufeld*, [2023 SCC 14](#), [2023] 6 WWR 381.
9. *Janzen v. Platy Enterprises Ltd.*, [\[1989\] 1 SCR 1252](#).
10. *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#), [2018] 2 SCR 293.
11. *Organisation mondiale sikhé du Canada c Procureur général du Québec*, [2024 QCCA 254](#).
12. *R v Big M Drug Mart Ltd.*, [\[1985\] 1 SCR 295](#).
13. *R v Le*, [2019 SCC 34](#), [2019] 2 SCR 692.
14. *R v Oakes*, [\[1986\] 1 SCR 103](#).
15. *R v Stillman*, [2019 SCC 40](#), [2019] 3 SCR 144.
16. *Reference re Secession of Quebec*, [\[1998\] SCR 217](#).
17. *Reference re Provincial Electoral Boundaries (Sask.)*, [\[1991\] 2 SCR 158](#).
18. *Shot Both Sides v. Canada*, [2024 SCC 12](#).
19. *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#), [2015] 1 SCR 245,
20. *Sauvé v Canada (Chief Electoral Officer)*, [2002 SCC 68](#), [2002] 3 SCR 519.
21. *Toronto (City) v Ontario (Attorney General)*, [2021 SCC 34](#), 462 DLR (4th) 1.
22. *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, [2024 SKKB 23](#).
23. *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, [2023 ONCA 139](#).

### Statutes

1. *Education Act, 1995*, [SS 1995, c E-0.2](#).
2. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being *Schedule B to the Canada Act 1982 (UK)*, [1982, c 11](#).