

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

BETWEEN:

GOVERNMENT OF SASKATCHEWAN
AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT
(Appellant)

and

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT
(Respondent)

(Style of cause continued on next page)

FACTUM OF THE INTERVENER
PUBLIC INTEREST LITIGATION INSTITUTE

(Rule 42 of the Rules of the Supreme Court of Canada)

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TABLE OF CONTENTS

	Pages
PARTS I & II – OVERVIEW AND LEGAL ISSUES FOCUSED ON BY INTERVENER...	1
PART III – PILI’S ARGUMENTS.....	12-21
I – Section 33 Is Purely Responsive and Cannot Be Invoked Pre-Emptively.....	12-18
II – Section 33 Is Not a Constitutional Privative Clause Precluding All Forms of Judicial Review of Legislation Invoking It.....	18-19
III – Declaratory Relief Is Not Limited To Declaring That Legislation Would Violate The Charter But For Section 33’s Invocation.....	20
IV – Judicial Review of Legislation Pre-Emptively Invoking Section 33 Would Not Be Moot, Hypothetical, or Non-Justiciable.....	21
PART VII – ALPHABETICAL TABLE OF SOURCES.....	22

PARTS I & II : OVERVIEW AND LEGAL ISSUES FOCUSED ON BY INTERVENER

1. The fundamental question raised in this appeal concerns the scope of the judicial role in litigation involving legislation invoking s. 33 of the *Canadian Charter of Rights and Freedoms*.

Public Interest Litigation Institute's submissions on this issue are as follows:

- a) Section 33 can only be invoked in legislation enacted *in response* to a judgment of a court of competent jurisdiction and cannot be invoked *pre-emptively*. Legislation pre-emptively invoking s. 33 represents an unlawful attempt to amend s. 33 in circumventing the unanimous consent formula for amendments to the *Charter*;
- b) Section 33 is not a constitutional privative clause precluding all forms of judicial review of legislation invoking it. For instance, judicial review can include scrutiny of whether s. 33 has been illegally pre-emptively invoked (rather than *responsively*);
- c) Declaratory relief is not limited to declaring that a law would violate the *Charter* but for s. 33's invocation. A court could declare that s. 33 has been illegally pre-emptively invoked, after which it could lawfully review whether a law violates the *Charter*;
- d) Judicial review of legislation pre-emptively invoking s. 33 would not be moot, hypothetical, or contrary to the principles of justiciability.

2. Significantly, s. 197.4 of [*The Education Act, 1995, S.S. 1995, c. E-0.2*](#) was not enacted *in response* to a court judgment but rather in advance of the Saskatchewan Court of King's Bench adjudication of the Pronouns Policy after the proceedings had been instituted.

PART III: PILI'S ARGUMENTS

I. Section 33 Is Purely Responsive and Cannot Be Invoked Pre-Emptively

3. *Ford* was partially wrongly decided in authorizing s. 33's pre-emptive invocation. *Ford* ignored the clear intent of the *Charter*'s Framers for s. 33 to operate as a safety valve for legislatures to invoke in response to court judgments declaring legislation to unjustifiably infringe one or more *Charter* provisions to which s. 33 applies.¹ *Ford* has also been undermined by subsequent jurisprudence and generates harsh and unjust results, including omnibus invocations of s. 33 that could never occur if s. 33 was correctly only used responsively.

4. The view that no weight should be placed on the *Charter* Framers' intent as to s. 33's nature and purpose² as a purely responsive mechanism should be dismissed. This is particularly, but not exclusively, the case for Attorneys General – such as the Attorney General of Ontario –

¹ e.g., [Library of Parliament, "The Notwithstanding Clause of the Charter" \(Pub. No. 2018-17-E\)](#).

² As contended by several Attorneys General in *English Montreal School Board, et al. v. Attorney General of Quebec* ([SCC No. 41231](#)).

who have advanced positions on s. 33 contrary to the Attorney General of their province at the time the *Charter* was adopted who stated that s. 33 is a purely responsive mechanism.³

5. First, the Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (at para. 46) expressly held that evidence such as the “Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution should... be considered” in interpreting the *Charter*. This Court has also cited statements made by the then-Prime Minister and Premiers during the *Federal-Provincial Conference of First Ministers on the Constitution* immediately preceding the *Charter*’s adoption⁴ – in which s. 33 was expressly discussed. This aligns with the purposive approach to *Charter* interpretation under which the text, purpose, and historical and philosophical background of *Charter* provisions is to be considered.⁵ The purpose of *Charter* provisions can often be divined from the *Charter* Framers’ intent, and nothing in this Court’s jurisprudence identifying the text as the starting point of *Charter* interpretation displaces the purposive approach.⁶

6. As concerns s. 33, the views contemporaneously expressed as to its purpose at the time of the *Charter*’s adoption by the Prime Minister and Minister of Justice of Canada, and the Premiers of Saskatchewan, Ontario, and Alberta⁷ are clear: s. 33 is to be invoked by legislatures in response to court decisions under the *Charter* with which they disagree.⁸ The importance of the views expressed by these central actors responsible for negotiating, drafting and adopting the *Charter* in identifying s. 33’s purpose cannot be understated. Indeed:

[438] The Charter was, in essence, a binding agreement entered into by the federal government on one side and the provincial governments (with the exception of Quebec) on the other. It was a way to constitutionally affirm individual protections against those governments established by the *British North America Act, 1867* (now the *Constitution Act, 1867*). In parallel to patriation, the federal and provincial governments, as the successors to the Imperial Crown, agreed to a rights document to protect those who were subject to their authority. [...]

³ See [Attorney General of Ontario’s Factum in EMSB](#), at paras. 23-25.

⁴ e.g., *Quebec (Attorney General) v. 9147-0732 Quebec inc.*, 2020 SCC 32, at para. 20; *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, at paras. 105, 112, 138, 144-147, 184.

⁵ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at paras. 116-117.

⁶ e.g., *John Howard Society of Saskatchewan v. Saskatchewan*, 2025 SCC 6, at paras. 34-37; *Taylor*, at paras. 105, 112, 138, 144-147, 184 (including footnote 3).

⁷ Other Premiers do not appear to have commented on s. 33 when the *Charter* was adopted.

⁸ [Library of Parliament, “The Notwithstanding Clause of the Charter” \(Pub. No. 2018-17-E\); Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, p. 128; House of Commons Debates, 32nd Parliament, 1st Session: Vol. 12, 20 November 1981, pp. 13042–13043.](#)

[439] The negotiations leading to the *Charter* took place over a series of federal-provincial conferences, primarily between First Ministers. Even where discussions took place between other ministers or government officials, the dominant method of negotiation and conflict resolution was the practice of holding a conference between the federal and provincial levels of government [...]. As drafts were being studied, consultations took place with various stakeholders in order for them to present their perspectives (see Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 57, 1st Sess., 32nd Parl., February 13, 1981); however, these groups were petitioners, not participants [...]. The ultimate negotiations remained between the representatives of the federal and provincial governments (D. Gibson, *The Law of the Charter: General Principles*, at pp. 38-39).

[440] The *Charter*... was designed with these actors in mind. As Professor K. Swinton explains, it is necessary to “keep in mind the concerns of the federal and provincial governments in drafting and agreeing to the *Charter*. Their focus was its effect on their own governmental operations” (“Application of the Canadian Charter of Rights and Freedoms (ss. 30, 31, 32)”, in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 41, at p. 48 (emphasis added)). This explains why the protections enshrined in the *Charter* are replete with references to the federal and provincial levels of government...⁹

7. It is undeniable that the inclusion of s. 33 in the *Charter* was part of the constitutional bargain for securing sufficient provincial support for a constitutional bill of rights to be adopted.¹⁰

8. As a matter of judicial notice, a memorandum prepared for the federal Minister of Justice dated November 17, 1981 also makes it clear that s. 33 was intended to be a purely responsive mechanism to be invoked by legislatures in respect of court judgments with which they disagree:

The federal government felt that a notwithstanding clause was both unnecessary and undesirable.... Nevertheless, in reaching a consensus with the provinces with respect to the Charter of Rights and Freedoms, the federal government felt it was preferable to include a notwithstanding clause applicable to certain rights rather than delete or dilute rights... **The notwithstanding clause is a safety valve which will ensure that legislatures rather than judges have the final say on important matters of public policy. By using the override clause unforeseen situations will be able to be corrected without the need to seek constitutional amendments... Overriding the courts’ interpretation of the Charter will not be done lightly by any Canadian government. Politically there would have to be very sound and widely accepted reasons for such a provocative act.**¹¹ (emphasis added)

⁹ *Dickson v. Vuntut Gwitchin First Nation*, [2024 SCC 10](#), per Rowe J., dissenting on another point. See also *Taylor v. Newfoundland and Labrador*, [2026 SCC 5](#), at para. 184, footnote 3.

¹⁰ *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), at para. 60

¹¹ <https://primarydocuments.ca/wp-content/uploads/2025/01/ParliamentDebateBriefNov1981.pdf> at pages 32, 34.

9. The memorandum further highlights provincial insistence on the notwithstanding clause being tethered to court interpretation of rights and freedoms covered under s. 33. The memorandum states that “Some provinces felt that including a notwithstanding clause in the Charter of Rights and Freedoms would preserve the idea of the supremacy of Parliament.”¹² As concerns fundamental freedoms listed in s. 2: “Some provinces were concerned about **how the courts might construe** certain of the freedoms such as freedom of conscience.”¹³ (emphasis added) As for subjecting the legal rights listed in ss. 7 to 14 to s. 33, this was done because “some provinces were concerned that the test of ‘reasonable’ and ‘arbitrary’ which qualifies some rights could result in **unforeseeable and undesirable court decisions**.”¹⁴ (emphasis added) As concerns the equality rights entrenched in s. 15 of the Charter, here again, “some provinces were concerned about **how the courts would interpret these rights**.” (emphasis added). This is consistent with the views expressed by the Prime Minister, the Canadian Minister of Justice and the Premiers of Ontario, Saskatchewan, and Alberta at or immediately after the Federal-Provincial Conference of First Ministers on the Constitution held in 1980.¹⁵ This is a matter of judicial notice.

10. Referring to this incontrovertible and directly pertinent evidence of the *Charter* Framers’ intent does not risk stunting the *Charter*’s incremental growth as a living tree. Framers’ intent is part of the purposive approach – *not its antithesis*. For example, in *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, the majority referred to the transcript of the *Federal-Provincial Conference* in adopting an expansive interpretation of s. 6(3) of the *Charter*.¹⁶ Ironically, allowing s. 33 to be invoked pre-emptively raises this precise risk of stunting the living tree’s growth, as it deprives courts of their ability interpret and breathe life into the *Charter*’s guarantees.

11. Significantly, there is no evidence contemporaneous to the *Charter*’s adoption from any of the involved federal and provincial executive actors suggesting that s. 33 can be used pre-emptively. The Attorney General of Saskatchewan claims that nothing in the purpose of s. 33 prevents its pre-emptive invocation but cites no evidence or precedents.¹⁷ In fact, Saskatchewan

¹² Ibid, at page 32.

¹³ Ibid, at page 32.

¹⁴ Ibid., at page 33.

¹⁵ See footnote 11 above for quotations. The other premiers did not publicly comment on this issue.

¹⁶ See para. 184, footnote 3.

¹⁷ [Factum of the Attorney General of Saskatchewan](#) in *English Montreal School Board et al. v. Attorney General of Quebec et al.* (SCC No. 41231), at para. 74.

cites former Premier Allan Blakeney’s statement that s. 33 “[a]llows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region” (emphasis added) Saskatchewan further concedes that Premier Blakeney’s “view was shared and reiterated by many other framers of the *Charter*.”¹⁸ As such, Saskatchewan cannot rely on Framers’ intent without accepting that s. 33 was intended to be a purely responsive mechanism.

12. It is true that s. 33 does not state that it can only be used responsively. However, this argument is premised on a strictly textual reading incompatible with the purposive approach to *Charter* interpretation. Further, in *Ford*, this Court placed an extratextual limit on s. 33’s use by holding that it cannot be invoked retrospectively for laws passed before the *Charter*’s adoption.¹⁹ Ironically, restoring s. 33 as a purely responsive instrument would be consistent with this aspect of *Ford*, as the only laws passed before the *Charter*’s adoption in respect of which s. 33 could be invoked are those subsequently declared to violate any of ss. 2 or 7 to 15.

13. The Framers’ vision of s. 33 as an instrument responsive to specific court decisions further reflects the limited and narrow circumstances in which it was intended to be used. Courts overwhelmingly declare laws inconsistent with s. 52(1) based on an infringement of a single *Charter* provision – occasionally two.²⁰ Never has a judgment held that a law violates all of ss. 2 and 7 to 15 of *Charter*. By contrast, legislatures are increasingly using s. 33 in an omnibus fashion – that is, to override all of the said provisions. Partially overruling *Ford* to prohibit s. 33’s invocation not only restores the Framers’ intent, it also prevents s. 33 from being used abusively. It is true that *Ford* holds that s. 33’s omnibus use is permissible; however, this conclusion flows from its antecedent error of disregarding the Framers’ intent by permitting s. 33’s pre-emptive use. It is ironic that *Ford* disregarded this intent while enabling Quebec – who did not participate in the Patriation debates on s. 33²¹ – to use s. 33 in a wholly unanticipated fashion.

14. This Court has articulated a purely responsive conception of s. 33 as “an undeniable aspect of the constitutional bargain” in *Toronto (City) v. Ontario (AG)*, [2021 SCC 34](#), at para. 60:

...s. 33 preserves **a limited right of legislative override**. Where, therefore, a court invalidates legislation using... the *Charter*, the legislature may give

¹⁸ [Factum of the Attorney General of Saskatchewan](#) in *English Montreal School Board et al. v. Attorney General of Quebec et al.* ([SCC No. 41231](#)), at paras. 24, 25.

¹⁹ *Ford*, at 743.

²⁰ e.g., *Carter v. Canada (AG)*, [2015 SCC 5](#), at para. 93; *R. v. J.J.*, [2022 SCC 28](#), at para. 114-115.

²¹ [Library of Parliament, “The Notwithstanding Clause of the Charter” \(Pub. No. 2018-17-E\)](#), at 3

continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions... (emphasis added)

15. As s. 33 was only intended to be – and, therefore, can only be – invoked in response to a court judgment, legislation pre-emptively invoking s. 33 is, in essence, a thinly-veiled constitutional amendment. However, s. 52(3) of the *Constitution Act, 1982* is clear that “[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada,” and amendments to the *Charter* – including s. 33 – can only be made using the unanimous consent formula for constitutional amendments codified in s. 41(3) of the said Act. Legislation pre-emptively invoking s. 33 is, in the absence of such unanimous consent, unconstitutional and is, therefore, of “no force or effect” within the meaning of s. 52(1).

16. In addition, the purely responsive nature and purpose of s. 33 precludes its pre-emptive legislative invocation to prevent a court from adjudicating a constitutional challenge under the *Charter* in impending or ongoing litigation. In the present case, s. 197.4 of *The Education Act, 1995* was enacted to *pre-empt* adjudication of the Pronouns Policy in litigation before the Saskatchewan Court of King’s Bench. The latter had yet to issue a judgment on the merits of the constitutional challenge, let alone one concluding that the Policy infringes the *Charter*. A declaratory judgment issued under s. 52(1) of the *Constitution Act, 1982* is a condition precedent to s. 33(1)’s responsive legislative invocation.

17. By definition, then, s. 197.4 is **not** responsive in the manner contemplated by the *Charter*’s Framers – even if it is, strictly speaking, a response to UR Pride’s constitutional *challenge*. As with all *Charter* provisions, however, s. 33 cannot be interpreted or applied in a manner that overshoots its purposes.²² Section 197.4 pre-emptively invoked s. 33 and this invocation was, therefore, unlawful. Further, “[l]egislating to pre-emptively end [a] court proceeding disrespects the administration of justice,”²³ – and this, including when the legislation invokes s. 33.

18. Relatedly, s. 33’s invocation is only responsive if the delay for appealing a court judgment rendered under s. 2 or ss. 7-15 of the *Charter* has expired. Section 33’s responsive invocation is not, therefore, limited to judgments of this Honourable Court. Section 33 may responsively be invoked in respect of interlocutory judgments – but only if the judgment declares a statutory provision inconsistent with one or more sections of the *Charter* to which s. 33 applies.

²² e.g., *R. v. Stillman*, 2019 SCC 40, at para. 22; *R. v. Poulin*, 2019 SCC 47, at paras. 53, 101, 113.

²³ *Chief Electoral Officer of Alberta v. Sylvestre*, 2025 ABKB 712, at para. 253.

19. As such, s. 33 will not have been lawfully responsively invoked if it responds to an interlocutory injunction staying the application of legislation pending the determination of its constitutionality on the merits. In such a case, s. 33's invocation will be premature, since considering an application for a s. 52(1) declaration to reveal a serious issue under the test for interlocutory injunctions is not the same as a final determination on the merits that the relevant provision violates the *Charter*. The invocation of s. 33 in response to an interlocutory injunction is fundamentally preventive, as its aim would be to prevent the court from adjudicating the *Charter* issues on their merits. This is – once again – illegitimate, unlawful, and contrary to the rule of law.

20. Further, provincial legislative invocation of s. 33 will not be truly responsive if it purports to respond to a judgment rendered by a court of a different province. Under the Canadian constitutional structure, judgments rendered by the courts of one province are only binding on courts of lower or coordinate jurisdiction within the province as a matter of vertical or horizontal *stare decisis*, respectively.²⁴ A legislature must therefore be bound by the judgment in respect of which it wishes to responsively invoke s. 33. The only exception is if provincial legislative invocation of s. 33 concerns a law that is identical or functionally equivalent to the law held to infringe one or more *Charter* provisions not subject to s. 33.

21. Finally, if this Court holds that s. 33 can only be invoked responsively, any legislation subsequently adopted by a Canadian legislature that applies to legislation pre-emptively invoking s. 33 will not be responsive because it does not respond to a declaration of invalidity issued under s. 52(1). In other words, laws pre-emptively invoking s. 33 prior to this Court's judgment holding that s. 33 can only be invoked responsively will not be saved by laws that attempt to protect s. 33's pre-emptive invocation in response to the Court's judgment. This is also true if legislation is enacted in response to the Court's judgment in *English Montreal School Board et al. v. Attorney General of Quebec et al.* ([SCC No. 41231](#)).

II. Section 33 Is Not A Constitutional Privative Clause Precluding All Forms of Judicial Review of Legislation Invoking It

22. Section 33 precludes judicial review of the constitutionality of legislative provisions in respect of which s. 33 has been validly invoked.²⁵ Consistent with this Court's purposive approach to *Charter* interpretation, s. 33 is only validly invoked if the legislature respects s. 33's underlying

²⁴ *R. v. Sullivan*, [2022 SCC 19](#), at para. 62.

²⁵ *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, [2024 QCCA 254](#).

purposes and its textual constraints – namely, the manner and form requirements identified in s. 33. Section 33’s pre-emptive use is antithetical to its underlying purpose as a *responsive* democratic safety valve in respect of *Charter* judgments with which the legislature disagrees. Courts can therefore conduct judicial review to determine whether s. 33 has been invoked pre-emptively. Judicial review of whether s. 33 has been invoked pre-emptively is fundamentally a question of manner and form; s. 33 can only be invoked in a *responsive manner*.

23. Importantly, judicial review of whether s. 33 has been invoked pre-emptively does not entail “importing into it grounds for substantive review of the legislative policy in exercising the override authority.”²⁶ PILI does not contend that *this aspect* of *Ford* is wrongly decided, and partly overruling *Ford* to prohibit pre-emptive invocation would not change the law on this point. Further, judicial review aimed at ensuring that s. 33 is invoked according to its intended purpose would not impose a substantive requirement of justification on legislatures seeking to invoke it – whether under the *Oakes* test or otherwise. However, *Charter* review will only be precluded if a court concludes that s. 33 has been invoked responsively and that the relevant legislation expressly declares that it will only operate notwithstanding the specific *Charter* provision(s) at issue in the court judgment to which the legislation invoking s. 33 actually responds.

24. Judicial review of whether s. 33 has been pre-emptively invoked does not entail the imposition of novel or unanticipated requirements. It is the critical mechanism for enforcing the *Charter* Framers’ intent that has been cavalierly disregarded to the detriment of *Charter* rights and freedoms. As *Ford* itself provides, s. 33 does not prevent judicial review of whether the conditions precedents to its lawful invocation have been satisfied. Indeed, *Ford* reviewed s. 33’s invocation by Quebec’s National Assembly in s. 7 of *An Act respecting the Constitution Act, 1982* and concluded that its retrospective invocation was unconstitutional and “of no force or effect” under s. 52(1).²⁷

25. Similarly, legislation purporting to prevent actions or proceedings relating to provisions intended to be immunized from *Charter* review under s. 33 cannot preclude judicial review of whether s. 33 has been unconstitutionally pre-emptively invoked. Nor can legislation extinguishing claims for loss or damage arising from the enactment or implementation of legislation invoking s. 33 operate unless a court concludes that s. 33 has not been invoked pre-emptively. These conclusions obtain even if this Court overturns the SKCA’s judgment on appeal.

²⁶ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at 740-741.

²⁷ *Ford*, at 745.

III. Declaratory Relief Is Not Limited To Declaring That Legislation Would Violate The Charter But For Section 33's Invocation

26. If this Court concludes that s. 33 cannot be invoked pre-emptively, it will be unnecessary to determine whether courts may issue declarations once s. 33 has been invoked. As s. 33's responsive use would always be preceded by a s. 52(1) declaration, a purely *responsive* invocation of s. 33 that respects its additional manner and form requirements precludes constitutional review under the *Charter* such that declaratory relief under s. 52(1) cannot be granted. A court may, however, issue a s. 52(1) declaration if it concludes that s. 33 has been invoked pre-emptively; or has been invoked responsively but without respecting all requirements of manner and form. A declaration of this nature would render the invoking legislation "of no force or effect" to the extent of its constitutional inconsistency – that is, as if s. 33 had never been invoked at all.

27. The court issuing the declaration would thus be entitled to disregard the statutory provision invoking s. 33 and to review the constitutionality of provisions sought to be immunized in light of the *Charter* protections the legislature attempted to override. This is in addition to the constitutional remedies of severance or reading down if the court concludes that s. 33's invocation is responsively overbroad. This can arise if s. 33 is invoked in respect of *Charter* provisions that were not at issue in the court judgment to which the invoking legislation is intended to respond.

IV. Judicial Review of Legislation Pre-Emptively Invoking Section 33 Would Not Be Moot, Hypothetical, or Non-Justiciable

(a) No Mootness Concerns

28. An application for declaratory relief under s. 52(1) alleging s. 33's impermissible pre-emptive invocation would avoid any mootness concerns. It would also satisfy the requirements for the issuance of declaratory relief generally.²⁸ Indeed, whether s. 33 has been unlawfully pre-emptively invoked is "a live controversy or concrete dispute"²⁹; the answer to this question determines the extent to which the court may review for *Charter* compliance the legislative provisions sought to be shielded by s. 33. If the answer is affirmative, *Charter* review can indeed be undertaken, such that the declaration will not be a "bare declaration" without practical effects on the parties' rights. The delineation of a legislature's constitutional authority to invoke s. 33 in a given case "will have enormous practical utility" for parties on both sides of the debate³⁰ – and

²⁸ *Taylor v. Newfoundland and Labrador*, [2026 SCC 5](#), at para. 43.

²⁹ *Borowski v. Canada (Attorney General)*, [\[1989\] 1 S.C.R. 342](#), at 357.

³⁰ *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016 SCC 12](#), at paras. 11-12.

this, regardless of whether the court concludes that s. 33 has been unlawfully pre-emptively invoked. The fact that the answer in a given case may be negative in that s. 33 has properly been invoked responsively does not render the debate academic or hypothetical.

29. As well, there is no doubt that the party seeking the declaration would have “a genuine interest” in pursuing it – namely, the assertion of their *Charter* rights in the face of a possibly unlawful invocation of s. 33. The relevant Crown named in such an application for declaratory relief would inevitably have “an interest in opposing the declaration sought”³¹ – unless the declaration was sought on consent for the purposes of affirming the parties’ shared belief that specific legislation invoking s. 33 is unconstitutional. This is likely to be a rare occurrence.

(b) No Justiciability Concerns

30. An application for a declaration under s. 52(1) that a law pre-emptively invoking s. 33 is of no force or effect would easily satisfy this Court’s “flexible approach” to justiciability.³² Section 52(1) is “the cornerstone of constitutionalism” and enforcing the supremacy of the Canadian constitution is an inherently judicial task³³ necessarily involving a concrete factual matrix and an adversarial legal debate.³⁴ While s. 33 does provide a constitutional jurisdictional basis for legislatures to override rights listed in ss. 2 and 7 to 15, it does not confer them with the ultimate jurisdiction to determine whether the constitutional conditions precedent to s. 33’s invocation have been fulfilled.³⁵ *Ford* itself shows this to be true, having concluded that s. 33’s retrospective invocation by the National Assembly in s. 7 of *An Act respecting the Constitution Act, 1982* was unconstitutional and declaring it to be “of no force or effect” under s. 52(1).

31. At the end of the day, s. 33 forms part of the constitutional bargain leading to the *Charter*’s adoption and the Framers’ intent was for this democratic safety valve to operate responsively. As *Ford* erred in disregarding it – and in light of the unconscionable results – this Honourable Court is eminently well-positioned to provide the needed corrective. Canadians deserve nothing less.

THE WHOLE RESPECTFULLY SUBMITTED THIS 4th DAY OF MAY 2026



Lawrence David, JD/BCL, LL.M

³¹ *Ewert v. Canada*, [2018 SCC 30](#), at para. 81.

³² *Highwood Congregation of Jehovah’s Witnesses v. Wall*, [2018 SCC 26](#), at para. 34

³³ e.g., *R. v. Albashir*, [2021 SCC 48](#), at paras. 42, 47.

³⁴ *MacKay v. Manitoba*, [\[1989\] 2 S.C.R. 357](#), at p. 361

³⁵ *Highwood Congregation*, at para. 34.

PART VII – ALPHABETICAL TABLE OF SOURCES

JURISPRUDENCE	PARAGRAPHS
<i>Borowski v. Canada (Attorney General)</i> , [1989] 1 S.C.R. 342	28
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5	13
<i>Chief Electoral Officer of Alberta v. Sylvestre</i> , 2025 ABKB 712	17
<i>Daniels v. Canada (Indian Affairs and Northern Development)</i> , 2016 SCC 12	28
<i>Dickson v. Vuntut Gwitchin First Nation</i> , 2024 SCC 10	6
<i>Ewert v. Canada</i> , 2018 SCC 30	29
<i>Ford v. Quebec (Attorney General)</i> , [1988] 2 S.C.R. 712	3, 12, 13, 23, 24, 30, 31
<i>Highwood Congregation of Jehovah's Witnesses v. Wall</i> , 2018 SCC 26	30
<i>John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)</i> , 2025 SCC 6	5
<i>MacKay v. Manitoba</i> , [1989] 2 S.C.R. 357	30
<i>Organisation mondiale sikhe du Canada c. Procureur général du Québec</i> , 2024 QCCA 254	22
<i>Quebec (Attorney General) v. 9147-0732 Québec inc.</i> , 2020 SCC 32	5
<i>R. v. Albashir</i> , 2021 SCC 48	30
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	5
<i>R. v. J.J.</i> , 2022 SCC 28	13
<i>R. v. Poulin</i> , 2019 SCC 47	17
<i>R. v. Stillman</i> , 2019 SCC 40	17

<i>R. v. Sullivan</i> , 2022 SCC 19	22
<i>Re B.C. Motor Vehicle Act</i> , [1985] 2 S.C.R. 486	5
<i>Taylor v Newfoundland and Labrador</i> , 2026 SCC 5	5, 6, 10, 28
<i>Toronto (City) v. Ontario (Attorney General)</i> , 2021 SCC 34	7, 14

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Constitution Act, 1982 / Loi constitutionnelle de 1982 , s. 44(d), 52(1), 52(3),	15, 16

LEGISLATION	PARAGRAPHS
The Education Act, 1995 , S.S. 1995, c. E-0.2, s. 197(4)	2, 16

JUDICIAL NOTICE	PARAGRAPHS
Canadian Inter-Governmental Conference Secretariat, Federal–Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981	6
House of Commons Debates, 32nd Parliament, 1st Session: Vol. 12, 20 November 1981	6
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