File No. 41979

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

GOVERNMENT OF SASKATCHEWAN
AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT /
RESPONDENT ON CROSS-APPEAL
(Respondent)

- and -

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT /
APPELLANT ON CROSS-APPEAL
(Appellant)

- and -

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PART I – OVERVIEW OF THE POSITION AND FACTS

1. This appeal raises a defining question for Canada's constitutional democracy and for the protection of marginalized communities: whether the operation of section 33 of the *Charter*[1] can displace the judiciary's responsibility to review and invalidate an unconstitutional law. It cannot.

2. The effect of s. 33, when validly invoked, is not to prevent courts from reviewing the law's constitutionality—it is to shield the law from the effects of a court's declaration of invalidity. Even when s. 33 of the *Charter* is properly invoked, the courts can still rule on the underlying violation of rights and freedoms and declare the invalidity of an unconstitutional law, notwithstanding the fact that the legal effects of that invalidity will be suspended until the s. 33 declaration expires.

3. This distinction matters not only because it best accords with the text and constitutional principles that underpin the *Constitution*, but also because the courts' capacity to identify and declare unconstitutional laws is foundational to ensuring meaningful access to justice for trans communities and other marginalized groups who rely on the judiciary to recognize and articulate the constitutional harms they face. Properly understood, s. 33 does not displace *Charter* rights. It follows that challenges to legislation protected by s. 33 are not moot, that they call for adjudication on the merits, that the courts must declare invalidity where there is incompatibility with the *Constitution*, and that Attorneys General must still justify impugned laws under s. 1—failing which they must accept the legal consequences that flow from that choice.

4. Of note, this appeal does not require this Court to revisit its decision in *Ford*.[2] That case addressed the formal requirements governing the invocation of s. 33. By contrast, this appeal concerns the legal effects of such an invocation once made. It provides the Court with its first opportunity to interpret how s. 33 operates in relation to s. 52 and the courts' remedial authority.[3] The Court's answer will define the constitutional boundaries of the notwithstanding clause and its place within Canada's system of constitutional supremacy—for legislatures, for courts, and for those, including vulnerable trans youth, who must live with the concrete consequences of its invocation.

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1 *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, s. 33 [***Charter***].

2 *Ford c. Québec (Procureur général)*, [1988] 2 SCR 712.

3 *Organisation mondiale sikhe du Canada c. Québec (PG)*, 2024 QCCA 254, para 338 [***Hak***].

PART II – ISSUES AND POSITION

5. Juritrans takes the following positions on the issues in this appeal:

i. The text and constitutional architecture of the *Constitution*[4] confirm that courts retain jurisdiction and responsibility to review, and declare unconstitutional, legislation inconsistent with *Charter* rights—even where such legislation is protected by s. 33;

ii. The invocation of s. 33 does not render constitutional challenges moot, as rights remain in force and alleged violations persist while the declaration is in effect;

iii. This interpretation is supported by the fundamental constitutional principles of democracy, the protection of minorities, and access to justice.

PART III – ARGUMENT

A. The Text and Architecture of the Constitution Confirm that Courts Can Review Legislation Protected by s. 33 and Declare its Invalidity

6. This appeal arises out of a legislature's decision to invoke s. 33 of the *Charter* to silence the courts' constitutional voice, arguing that "while the s. 33 declaration is in effect, the specified *Charter* rights do not apply to the protected law, and courts cannot decide whether the law violates those rights."[5]

7. It is Juritrans's position that, even when s. 33 is properly invoked to shield a law from the effects of its unconstitutionality, the courts retain jurisdiction to make a declaration of invalidity. This declaration of invalidity will be effectively suspended, immediately and automatically, by the effect of the s. 33 declaration, until the latter expires. In the words of the Court of Appeal for Saskatchewan, "S. 33(2) enables the Act or provision to operate regardless of whether it unreasonably limits a specified right or freedom, by suspending the invalidating effect of s. 52 of the *Constitution Act, 1982*."[6] The *Charter* rights, on the other hand, never cease to apply nor are they suspended.

8. This conclusion flows, firstly, from the text of the notwithstanding clause itself, which at ss. 33(1) and 33(2) states that the law or provision protected by the s. 33 declaration *shall operate* notwithstanding its incompatibility with the *Charter* rights derogated from:

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4 *Constitution Act*, *1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [***Constitution***].

5 Appellant's Factum, para 23, **Appellant's Factum (hereinafter "A.F."), p. 7.**

6 *Saskatchewan (Minister of Education) v. UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74, para 7 [***UR Pride***] [emphasis added].

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.	**33**. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.
(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.	(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

9. Importantly, ss. 33(1) and 33(2) define the effect of the s. 33 declaration *on the protected law*: they ensure its continued *operation* (son *effet*). Sections 33(1) and 33(2) do not speak to the impact of the s. 33 declaration on the courts' jurisdiction to review the law or make any judicial declarations thereupon.[7]

10. More specifically, the effect of the s. 33 declaration on the protected law is to ensure its continued *operation* (son *effet*)—not its continued *consistency* (*compatibilité*) with the *Charter* provisions referred to in the legislature's s. 33 declaration, nor its continued *validity* (*validité*). This choice of language is telling when read alongside s. 52:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

11. As Grégoire Webber aptly points out, these terms correspond to distinct steps in the application of the doctrine of invalidity.[8] Pursuant to s. 52, the courts will declare any law that is

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7 See *UR Pride*, 2025 SKCA 74, para 78.

8 This doctrine reflects the analytical sequence inherited from the United Kingdom's constitutional tradition, originating in the *Colonial Laws Validity Act, 1865* (UK), 28 & 29 Vict, c. 63 and carried into Canadian law through the supremacy clause, being s. 52 of the

"inconsistent" (*incompatible*) with the *Constitution* to be "invalid" (*invalide*), which results in the law being "of no force or effect" (*inopérante*):

> [T]he doctrine of invalidity charts a series of steps, each one related to the other even though each is analytically distinct: from inconsistency ('repugnancy') to invalidity ('unconstitutionality,' 'voidness') to inoperability ('no force or effect'). The progression from the first to the second and from the second to the third of these steps is not a matter of discretion, but rather inheres in the very relationship between superior and inferior law. In the face of inconsistency, the inferior law is, as provided for in the supremacy clause, 'of no force or effect.[9]

12. This appeal presents the Court with its first opportunity to examine the terms used in s. 33 in regard to the effects of the clause[10], an interpretation that must be informed by its interaction with s. 52[11] and the analytical sequence governing the effect of a declaration of invalidity—from inconsistency, to invalidity, to inoperability.

13. In essence, when a court identifies an inconsistency between an impugned law and the *Charter*, it must declare the law invalid.[12] As a matter of course, absent an invocation of s. 33, that declaration would automatically lead to the further conclusion that the law is inoperative.[13] Despite this usual automatism, it is important to note that this Court has observed that there is a "clear distinction between declaring an Act unconstitutional and determining the practical and legal effects that flow from that determination,"[14] most notable when the court suspends a declaration of invalidity or when a different legal doctrine restricts its retrospective reach. Should the legislature invoke s. 33(2) to breathe new life into this unconstitutional law, the latter will once

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Constitution: Grégoire Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71 UTLJ 510 at 521-523, Intervener **Clinique juridique Juritrans's Book of Authorities (hereinafter "I.B.A."), Tab 1** [**Webber**]. See also *Re Manitoba Language Rights*, [1985] 1 SCR 721, paras 51-52.

9 Webber at 521, **I.B.A., Tab 1** [emphasis added].

10 See *UR Pride*, 2025 SKCA 74, paras 58-59; Webber at 518, **I.B.A., Tab 1.** See also *Hak*, 2024 QCCA 254, para 338.

11 See *Canada (AG) v. Power*, 2024 SCC 26, para 27 [***Power***]; *Reference re Senate Reform*, 2014 SCC 32, para 26.

12 See *Ontario (AG) v. G.*, 2020 SCC 38, para 137.

13 See e.g. *Canada (AG) v. Hislop*, 2007 SCC 10, para 82 [***Hislop***]; *R. v. Ferguson*, 2008 SCC 6, para 35 [***Ferguson***].

14 *Ontario (AG) v. G.*, 2020 SCC 38, para 121 quoting *Air Canada v. British Columbia*, [1989] 1 SCR 1161, p. 1195. See also *Schachter v. Canada*, [1992] 2 SCR 679, p. 716 [***Schachter***].

more have force and effect—or *operate*—in spite of the declaration of invalidity previously pronounced by the court.[15] Section 33 does not void or undo this previous declaration of invalidity; it simply suspends it until the effect of s. 33(2) lapses per the terms of s. 33(3).

14. The effect of s. 33(2) is the same when the clause is invoked pre-emptively, with the only difference being that the court's declaration of invalidity is suspended immediately, such that it never rendered the impugned and protected law inoperative. The result is a legal posture in which "such legislation is inconsistent with one or more of the rights and freedoms guaranteed in sections 2 and 7-15 of the *Charter*, the legislation is invalid but not inoperative."[16]

15. In Juritrans's submission, s. 33 thus permits the Court to issue a declaration of invalidity, with the declaration's operative effect deferred until the expiry of the s. 33 declaration.[17] Functionally, this is equivalent to the Court issuing a suspended declaration of invalidity. A suspended declaration of invalidity does not negate the conclusion that a law is unconstitutional; it postpones the legal consequences of that conclusion.[18] Section 33 operates in the same way: it permits the continued operation of a law without displacing the underlying constitutional determination.

16. This interpretation is also congruent with the constitutional principle of the separation of powers: it respects the legislature's decision to maintain the operation of a law under s. 33 while preserving the courts' core role in determining constitutionality and granting appropriate remedies, its "most meaningful function under the *Charter.*"[19] Moreover, this Court has already rejected the suggestion that the existence of s. 33 diminishes the judicial role in constitutional adjudication: "[t]he court cannot shirk its responsibility to remedy constitutional violations simply because s. 33 permits Parliament or a legislature to exceptionally override certain Charter rights and freedoms."[20]

17. It is significant that this Court has in fact, on multiple occasions, insisted on the courts' *obligation* to grant a declaration of invalidity when faced with an unconstitutional law:

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15 See *UR Pride*, 2025 SKCA 74, para 84.
16 Webber at 524, **I.B.A., Tab 1.**
17 See Webber at 535, **I.B.A., Tab 1.**
18 See *Ontario (AG) v. G.*, 2020 SCC 38, para 117; *Schachter*, [1992] 2 SCR 679, p. 716.
19 *Nelles v. Ontario*, [1989] 2 SCR 170, p. 196, cited in *Power*, 2024 SCC 26, para 31.
20 *Ontario (AG) v. G.*, 2020 SCC 38, para 137.

> "[w]hen a court determines that a law violates the *Charter* in a manner that cannot be justified in a free and democratic society under s. 1, the court must grant the appropriate remedy";[21]
>
> "If the effect of the legislation is in violation of the *Charter*, and a challenge of the constitutionality of the law is made before the courts, then the courts are commanded under s. 52 of the *Constitution Act, 1982* to declare the section inoperative or to amend it when permissible…";[22]
>
> "Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament."[23]

18. Given that the invocation of s. 33 permits legislation to operate "notwithstanding" certain *Charter* rights, but does not render such legislation constitutionally compliant, the courts retain their duty to declare the legislation invalid when they find it to be unconstitutional. Properly understood, s. 33 thus allows a legislature to maintain the operative force of legislation despite a constitutional inconsistency for a limited period—no more, and no less.

B. The Invocation of s. 33 Does Not Render Constitutional Challenges Moot

19. Saskatchewan argues that where s. 33 has been invoked to shield a law from the effects of a declaration of invalidity, any constitutional challenge brought while the notwithstanding clause is in force is moot.[24] That position cannot be sustained.

20. Saskatchewan's position rests on the premise that invoking s. 33 displaces the application of the *Charter* rights identified in the declaration, such that no violation of these rights can arise. On that basis, it asserts that there is no live issue to meet the first step of the *Borowski* mootness analysis.[25]

21. Saskatchewan's premise is incorrect. As previously established, the *Charter* rights remain fully in force, and, with them, the alleged violations. Section 33 permits those violations to continue temporarily without judicial remedies taking immediate effect; it does not negate their

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21 *Ontario (AG) v. G.*, 2020 SCC 38, para 137 [emphasis added].

22 *Canada (AG) v. Mossop*, [1993] 1 SCR 554, p. 582 (Lamer C.J. and Sopinka and Iacobucci JJ.) [emphasis added]. See also *Power*, 2024 SCC 26, para 32; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, para 46.

23 *RJR-MacDonald Inc. v. Canada (AG)*, [1995] 3 SCR 199, para 136 [emphasis added].

24 See Appellant's Factum, para 102, **A.F., p. 28.** See also *Hak*, 2024 QCCA 254, para 379.

25 See Appellant's Factum, paras 110, 111, 115, **A.F., pp. 30-31.**

existence. Unlike in *Borowski* and related authorities, the legislature has not repealed the impugned law.[26] The latter continues to create ongoing violations of *Charter* rights with real-world consequences for vulnerable trans youths who must choose between being misgendered and deadnamed at school, or being outed to their parents through state action. Thus, there is a live dispute requiring adjudication on the merits. This is a complete answer to the mootness argument, such that the *Borowski* analysis need not proceed further. Saskatchewan's further reliance on the *Borowski* framework nonetheless reveals the internal inconsistency of this position.

22. Saskatchewan further asserts that, because the *Charter* rights listed in its s. 33 declaration no longer apply, it need not justify the impugned law under s. 1 nor defend it on the merits.[27] Saskatchewan then relies on that absence of justification to argue that the requirement of an adequate adversarial context at the discretionary stage of the *Borowski* analysis is not met. This reasoning produces perverse effects. The alleged absence of an adversarial context arises directly from the Attorney General's own position that the *Charter* does not apply. In this way, the executive generates the very conditions it invokes to resist adjudication, thereby placing control over the justiciability of the *Charter* challenge in its own hands.

23. Under Juritrans's interpretation, the *Charter* challenge raises live issues between the parties with real—albeit deferred—consequences.[28] It follows that the Attorney General must justify the impugned law under s. 1, or accept that a court will forego the s. 1 analysis in the absence of such a justification.[29] This interpretation preserves the internal coherence of constitutional adjudication and ensures that the availability of judicial review is governed by constitutional principle, not by the unilateral position of the executive.

24. Saskatchewan argues that the deferred effect of a declaration of invalidity introduces uncertainty, noting that "[t]he Legislature may repeal, amend, renew or replace the legislation for

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26 See *Borowski v. Canada (AG)*, [1989] 1 SCR 342, p. 354, citing *Moir v. The Corporation of the Village of Huntingdon*, 19 SCR 363 and *Alberta (AG) v. Canada (AG)*, [1938] 4 DLR 433 (UK JCPC).

27 See Appellant's Factum, paras 118-119, **A.F., p. 32.** See also *Hak*, 2024 QCCA 254, para. 387ff.

28 See Webber at 534.

29 See e.g. *R. v. Boudreault*, 2018 SCC 58, para 97; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, paras 278-280; *R. v. Ruzic*, 2001 SCC 24, para 91.

any number of reasons."[30] This is equally true in every constitutional challenge. Courts do not decline to hear cases on the basis that the legislature might act one way or another in the future. Even where a government signalled a possible recourse to s. 33, courts have refused to allow such speculation to influence their adjudication.[31] The court takes the situation as it stands and, at present, Saskatchewan's s. 33 declaration is due to expire in approximately two years; the Court should not, as Saskatchewan itself suggests, "speculat[e] about future legislative action."[32]

25. Finally, while it is true that a declaration of invalidity will not grant immediate relief to the Respondents, that does not render the dispute moot. In fact, the relief that would be granted by a declaration of invalidity in this case is no more hypothetical than that promised by a suspended declaration of invalidity. When this Court issues such declarations, it does so on the very premise that the remedy it is granting—and suspending—will never take effect. Such suspensions are granted on the basis that the legislature will use the time of the suspension to amend or replace the impugned law, or maybe even invoke the s. 33 clause, in whatever way it deems fit.[33] Yet, the Court proceeds on the basis that its constitutional determination is both necessary and meaningful to address the incompatibility between the impugned law and the *Charter*, knowing that the *Charter* violations will continue until the suspension ends.[34] The same logic applies here.

C. An Interpretation of s. 33 that Bars Adjudication Would Undermine Democracy, Minority Protection, and Access to Justice

26. The Appellant advances that s. 33 grants legislatures the last word as to what the *Charter* demands.[35] As the Court of Appeal rightly observed, however, the final word does not mean the only word.[36] Section 33 was not intended to silence the courts; rather, it reflects a constitutional compromise, reconciling the entrenchment of rights with parliamentary sovereignty through a system of checks and balances.[37] To serve that purpose, the clause cannot operate to mute either

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30 See Appellant's Factum, para 114, **A.F., p. 31.**
31 See *Toronto (City) v. Ontario (AG)*, 2018 ONCA 761, para 8.
32 See Appellant's Factum, para 113, **A.F., p. 31.**
33 See *Ontario (AG) v. G.*, 2020 SCC 38, para 137; *Ferguson*, 2008 SCC 6, para 65; *Schachter*, [1992] 2 SCR 679, p. 815.
34 See *R. v. Albashir*, 2021 CSC 48, para 52 [***Albashir***]; *Hislop*, 2007 SCC 10, paras 89-91.
35 See Appellant's Factum, para 24, **A.F., p. 7.**
36 See *UR Pride*, 2025 SKCA 74, para 109.
37 See *Hak*, 2024 QCCA 254, para 228.

branch: silencing the courts would be fundamentally incompatible with the constitutional principle of democracy and the very mechanism of dialogue and accountability that s. 33 is meant to foster.[38]

27. The principle of democracy is fundamental to Canada's constitutional order[39], allowing the public to vote on decisions made by a government and to challenge the exercise of its power.[40] That accountability, however, depends on transparency. For the political safeguards embedded in s. 33 to operate meaningfully, the public must know whether the law shielded by its invocation infringes *Charter* rights.[41] Judicial determinations identifying such infringements are therefore indispensable: they inform public debate and ensure that a legislature's decision to override rights is made in full awareness of its constitutional consequences. The ability to bring a claim alleging a *Charter* violation, spark public debate, and obtain a determination of that claim are cornerstones of the rule of law.[42] They cannot depend on whether a legislature has chosen to invoke s. 33.[43]

28. This is especially true where the rights at issue are those of minorities, who are underrepresented in the electoral process.[44] It is even more so for trans youth who, while directly affected by the impugned legislation, do not enjoy the right to vote under s. 3 of the *Charter* and therefore cannot rely on the democratic safeguards said to justify the operation of s. 33. In such circumstances, the protection of minorities—an organizing principle of the constitutional order reflected in the *Charter*[45]—takes on particular importance. An interpretation of s. 33 that prevents adjudication would leave affected groups without meaningful recourse precisely when they are most vulnerable to majoritarian decision-making. The present appeal is emblematic of that risk.

29. The interpretation advanced by Juritrans attenuates this effect: it ensures that, at the very least, minorities who believe that their rights have been unconstitutionally curtailed may access the courts

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38 See *Vriend v. Alberta*, [1998] 1 SCR 493, para 139; *Ontario (AG) v. G.*, 2020 SCC 38, para 98.

39 See *Reference re Secession of Quebec*, [1998] 2 SCR 217, para 61 [***Re Secession***].

40 See *Re Secession*, [1998] 2 SCR 217, paras 66-68, 78.

41 See Robert Leckey and Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts and the Electorate", (2022) 72:2 U. Toronto L.J. 189, p. 190, **I.B.A., Tab 2.**

42 See *Trial Lawyers Association of British Columbia v. British Columbia (AG)*, 2014 SCC 59, para 39; *British Columbia (AG) v. Council of Canadians with Disabilities*, 2022 SCC 27, para 34.

43 See *UR Pride*, 2025 SKCA 74, para 138.

44 See Bakht & Collins, "A Case for Constitutional Guardrails on Section 33 of the *Charter* of Rights and Freedoms" (2024) 33:2 *Constitutional Forum* 1, pp. 5-6.

45 *Re Secession*, [1998] 2 SCR 217, paras 79-81.

and obtain authoritative judicial determinations, even where legislation continues to operate under s. 33. Because such determinations may take the form of declarations of invalidity with deferred effect, they need not be relitigated upon expiry of the declaration. In this way, "the full practical effect of a judicial declaration of unconstitutionality is delayed, not denied."[46] This approach promotes access to justice and judicial economy, reduces the financial and psychological burdens of repeated litigation, and avoids conferring on legislatures a de facto extension of the override beyond its five-year limit.

30. On this interpretation, s. 33 gives effect to the constitutional principles of democracy, the protection of minorities, and access to justice—principles that this Court has deemed must "influence the application and interpretation of our Constitution."[47]

31. Finally, recognizing that courts may issue declarations of invalidity whose effects are deferred until the expiry of a s. 33 declaration respects the distinct institutional roles of courts and legislatures.[48] Courts determine whether a law complies with the Constitution; legislatures decide whether, and for how long, to maintain its operation notwithstanding that determination. This is the balance the Constitution demands.

PART IV – SUBMISSIONS ON COSTS AND ORDER SOUGHT

32. As a non-profit organization, Juritrans does not claim any costs and requests that no costs be awarded against it.

33. Juritrans takes no position regarding the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, June 9, 2026

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46 Webber at 535, **I.B.A., Tab 1** [emphasis added].
47 *Re Secession*, [1998] 2 SCR 217, para 81.
48 See *Albashir*, 2021 CSC 48, para 30.

PART V –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine

Doctrine ***(cont'd)*** **Paragraph(s)**
