Docket: CACV4329

IN THE COURT OF APPEAL FOR SASKATCHEWAN

(ON APPEAL FROM THE COURT OF KING'S BENCH OF SASKATCHEWAN)

BETWEEN:

GOVERNMENT OF SASKATCHEWAN
AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT
(*Respondent/Applicant*)

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT
(*Applicant/Respondent*)

AND:

THE ADVOCATES' SOCIETY

PROPOSED INTERVENOR

APPLICATION OF THE PROPOSED INTERVENOR,
THE ADVOCATES' SOCIETY

(Pursuant to Rule 17 of the *Court of Appeal Rules*)

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TAKE NOTICE that this Application is hereby made to the Court of Appeal for Saskatchewan, pursuant to Rule 17 of *The Court of Appeal Rules*, for an Order: (i) granting The Advocates' Society ("**The Society**") leave to intervene in this Appeal; (ii) permitting The Society to file a factum not exceeding 20 pages; and (iii) permitting The Society to make oral submissions of up to 15 minutes at the hearing of this Appeal, or on such further and other terms as this Honourable Court may permit.

AND FURTHER TAKE NOTICE that in support of this Application, The Society will rely on the Affidavit of Sheree Conlon, KC, affirmed July 11, 2024 (the "**Conlon Affidavit**"), a Brief of Law, and such further and other materials as counsel may advise and this Honourable Court may permit.

THE GROUNDS UPON WHICH THIS APPLICATION IS BASED are as follows:

1. This Appeal raises an issue of fundamental importance to the structure of Canada's constitutional democracy and the roles of courts and legislatures within that structure, namely, do the courts retain the jurisdiction to scrutinize, and issue a declaration with respect to, legislation subject to a pre-emptive invocation of the notwithstanding clause in subsection 33(1) of the *Canadian Charter of Rights and Freedoms* (respectively, the "**Notwithstanding Clause**" and the "***Charter***")? The Society seeks to assist this Honourable Court in its assessment of that critical question.

2. The Society has an interest in this Appeal and will leverage its expertise to provide unique and useful submissions:

   (a) The Society was established in 1963 as a professional association for trial and appellate lawyers. Over more than 50 years, The Society has steadily grown its membership and now represents more than 6,000 advocates across Canada. The Society has members in the territories and in every province of Canada, including Saskatchewan;

   (b) The Society has a Board of Directors and various standing committees that allow The Society to benefit from many different perspectives and that make The Society more effective in representing the interests of advocates and litigants across Canada;

(c) The Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice. The issue in this Appeal engages the heart of The Society's mandate;

(d) The issue raised by this Appeal has implications that extend beyond those of the immediate Parties. The Society has an interest in these broader implications, including the importance of the courts' role in Canada's constitutional structure. Members of The Society, and the litigants they represent, will be directly and significantly affected by the outcome of this Appeal, particularly since the Appeal will determine whether courts remain open to litigants and their counsel despite an invocation of the Notwithstanding Clause;

(e) The Society routinely intervenes in court proceedings at all levels across Canada. The Society's submissions have been expressly cited by courts in their reasons for decision at all levels and on numerous occasions, including a number of cases that relate to constitutional issues or issues of significant public importance. The Society is also regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform. Further particulars about The Society's past court interventions can be found in the Conlon Affidavit; and

(f) Given the depth and breadth of The Society’s intervention and advocacy experience and expertise, The Society believes that it has a valuable perspective to offer to the Court about the issues in this Appeal.

3. If granted leave to intervene, The Society would take no position with respect to the following matters:

(a) Whether the Respondent's pleadings amendment with respect to section 12 of the *Charter* should have been allowed;

(b) Whether the doctrine of mootness should have been considered and applied;

(c) The underlying facts relevant to the merits of the dispute between the Appellant and the Respondent. In this regard, The Society does not intend to file any additional evidence or to seek any findings of fact in this case; and

(d) The merits or substance of the legislation that is the subject of the Respondent's constitutional challenge.

4. Rather, The Society proposes to limit its submissions to the availability of judicial scrutiny of, and declaratory relief with respect to, legislation subject to a pre-emptive invocation of the Notwithstanding Clause. The Society's position is that courts retain the jurisdiction to render a decision in the form of declaratory relief about whether legislation subject to the Notwithstanding Clause limits the rights and freedoms enshrined in sections 2 and 7 to 15 of the *Charter* and whether those limits are justified under section 1. The Notwithstanding Clause enshrines the supremacy of the legislature and shields the law from being rendered inoperable for at least five years. It does not, however, protect it from judicial scrutiny.

5. The Society proposes that its submissions focus, in particular, on the factors that should guide a court's determination of whether to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause. More specifically, The Society intends to propose a threshold test to guide a court's determination of whether to exercise its jurisdiction in this regard. The proposed test is primarily intended to be used as a gatekeeper at the start of a proceeding. The proposed test can also be considered after a full hearing on the merits, together with the established test for declaratory relief, to determine whether a declaration is appropriate despite the invocation of the Notwithstanding Clause.

6. The Notwithstanding Clause is a unique feature of Canada's constitution that engages fundamental aspects of Canada's constitutional democracy. A test tailored to the uniqueness and significance of the Notwithstanding Clause is appropriate.

7. A draft outline of the factum that The Society would submit if granted leave to intervene, summarizing the position that The Society proposes it would take, is attached as **Exhibit "A"** to the Conlon Affidavit.

8. There will be no prejudice to any party if The Society is granted leave to intervene. The Society will work to avoid duplication between its submissions and those of the Parties or any other intervenors. The Society will not enlarge the record before the Court. The Society will not seek any costs and asks that none be awarded against it. The Society will comply with the timelines set by the Court and will not delay these proceedings.

9. Such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of July, 2024.

Brendan MacArthur-Stevens / Casey Stiemer
Brooke Mantei

Counsel for the Proposed Intervenor, The Advocates' Society

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AND:

THE ADVOCATES' SOCIETY

PROPOSED INTERVENOR

AFFIDAVIT OF SHEREE CONLON, KC

(In support of The Advocates' Society's Application to Intervene)

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Counsel for the Respondent (Applicant/Respondent), UR Pride Centre for Sexuality and Gender Diversity

I, Sheree Conlon, of the City of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the Vice-President of The Advocates' Society ("**The Society**"). As such, I have knowledge of the matters set out below. I believe that all of the information in this affidavit is true.

2. I am a Partner at Nijhawan McMillan & Conlon Barristers in Halifax, Nova Scotia. I was called to the Bar of Nova Scotia in 1997. I also received my King's Counsel designation in 2017. I have been a member of The Society since 2017, a member of the Board of Directors since 2018, and a member of the Executive Committee since 2022. I have served as Vice-President since June 25, 2024.

3. This Affidavit is filed in support of The Society's application for leave to intervene in this Appeal. The Society's objective is to assist this Honourable Court in deciding one of the issues before it, while not expanding the issues, causing any prejudice to the Parties, or delaying the proceedings.

The Society

4. The Society was established in 1963 as a professional association for trial and appellate lawyers. Over more than 50 years, The Society has steadily grown its membership and now represents more than 6,000 advocates across Canada. The Society has members in the territories and in every province of Canada, including Saskatchewan. The Society is incorporated federally pursuant to the *Canada Not-for-Profit Corporations Act*, SC 2009, c 23.

5. In addition to its Board of Directors comprised of advocates from across Canada, The Society has several other standing committees with representatives from across the country, including the following: (a) the Standing Committee on Advocacy and Practice; (b) the Standing Committee on Collegiality, Mentoring, and Membership; (c) the Young Advocates Standing Committee; (d) the Mid-Career Advocates' Standing Committee; and (e) the Diversity and Inclusion Standing Committee. These various groups allow The Society to benefit from many different perspectives and make The Society more effective in representing the interests of advocates and litigants across Canada.

6. The Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, protection of the role and independence of the judiciary, and the promotion of access to, and improvement of, the administration of justice. The Society has established a respected presence within the legal

profession and the judiciary. As such, it is regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform. Through regular submissions of papers and briefs, The Society presents its views and initiates needed reforms to the legal system.

7. The Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession, the administration of justice, and access to justice. The Society has, for more than 30 years, reviewed cases before the courts and identified cases in which it believes it should seek intervenor status with respect to matters of substantive law or procedure, based on the importance of the case to the profession and to the public.

8. Guided by these principles, The Society has previously sought and obtained intervenor status in cases at all levels of court. The Society's submissions have been expressly cited by courts in their reasons for decision at all levels and on numerous occasions. A select number of cases that relate to constitutional issues and other issues of significant public importance include the following, listed in reverse chronological order:

(a) *Anderson v Alberta,* 2022 SCC 6 (test for advance costs in the context of a First Nation's litigation of constitutional claims against the federal and provincial governments);

(b) *R v Chouhan*, 2021 SCC 26 (constitutionality of the repeal of peremptory challenges to jurors in criminal trials);

(c) *Crowder v British Columbia (Attorney General)*, 2019 BCSC 1824 (validity of provisions of British Columbia's Supreme Court Civil Rules purporting to limit the number of experts a party may tender at trial on the issue of damages arising from personal injury or death);

(d) *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 (discretion of provincial regulator to accredit law school in light of mandatory requirements for law students); The Society also intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 518) and the Ontario Divisional Court (2015 ONSC 4250);

(e) *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (companion appeal to *Trinity Western University v Law Society of Upper Canada*,

2018 SCC 33); The Society also intervened in the proceedings before the Court of Appeal for British Columbia (2016 BCCA 423);

(f) *Groia v Law Society of Upper Canada*, 2018 SCC 27 (professionalism and civility in the courtroom); The Society also intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 471), the Ontario Divisional Court (2015 ONSC 686), and the Law Society Appeal Panel (2013 ONLSAP 41); the Court of Appeal, Divisional Court, and Appeal Panel all referenced The Society's *Principles of Civility for Advocates* in their respective reasons;

(g) *Alberta v Suncor Energy Inc*, 2017 ABCA 221 (protection of legal privilege in the face of statutory disclosure obligations);

(h) *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 (protection of litigation privilege in the face of statutory disclosure obligations);

(i) *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 (constitutionality of provisions of the *Income Tax Act* that require the production of potentially privileged documents);

(j) *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 (constitutionality of various provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, as applied to lawyers and notaries in view of sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") and the protection of solicitor-client privilege);

(k) *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 (companion appeal to *Hryniak v Mauldin*, 2014 SCC 7, a case about the proper approach to summary judgment application, in which The Society's submissions on access to justice and the traditional trial process are expressly referred to in the Supreme Court's reasons);

(l) *R v Nedelcu*, 2012 SCC 59 (whether section 13 of the *Charter* precludes the use of civil discovery evidence to impeach the credibility of an accused who chooses to testify at their criminal trial);

(m) *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764 (the Court of Appeal for Ontario requested that The Society appear as *amicus curiae* in the

omnibus hearing of five appeals under the new rule governing Summary Judgment in the Ontario *Rules of Civil Procedure*); and

(n) *Children's Lawyer for Ontario v Goodis*, 2005 CanLII 11786 (ON CA), 75 OR (3d) 309 (scope of standing to be accorded by the Court to an administrative tribunal whose decision is attacked by way of judicial review).

The Issues on which The Society Proposes to Intervene

9. If granted leave to intervene, The Society would take no position with respect to the following matters:

(a) Whether the Respondent's pleadings amendment with respect to section 12 of the *Charter* should have been allowed;

(b) Whether the doctrine of mootness should have been considered and applied;

(c) The underlying facts relevant to the merits of the dispute between the Appellant and the Respondent. In this regard, The Society does not intend to file any additional evidence or to seek any findings of fact in this case; and

(d) The merits or substance of the legislation that is the subject of the Respondent's constitutional challenge.

10. Rather, The Society proposes to assist the Court by making submissions on the following legal issue: does the use of the Notwithstanding Clause oust the jurisdiction of courts to consider and provide declaratory relief as to whether the impugned legislation violates the *Charter*?

11. The Society's position on this issue is that courts retain the jurisdiction to render a decision in the form of declaratory relief about whether legislation subject to a pre-emptive invocation of the Notwithstanding Clause limits the rights and freedoms enshrined in sections 2 and 7 to 15 of the *Charter* and whether those limits are justified under section 1. The Notwithstanding Clause enshrines the supremacy of the legislature and shields the law from being rendered inoperable for at least five years. It does not, however, protect it from judicial scrutiny.

12. The Society proposes that its submissions focus, in particular, on the factors that should guide a court's determination of whether to consider the constitutionality of an impugned law subject to a pre-emptive invocation of the Notwithstanding Clause. More specifically, The Society intends to propose a test to guide a court's determination of whether to exercise its jurisdiction in this regard. The Society will avoid duplication of the Parties' submissions in addressing this issue.

The Society's Interest in This Appeal

13. The Society's members are lawyers who appear before courts and administrative tribunals across the country on a daily basis. Its membership comprises civil, criminal, and family litigators, including in government and private practice.

14. The Society's Executive Committee and its Board of Directors are of the considered view that the legal issues raised in this Appeal are of the utmost significance to the legal profession, to the advocates comprising The Society's membership, and to the members of the general public that The Society's members represent.

15. Whether a government's pre-emptive use of the Notwithstanding Clause in legislation entirely insulates that piece of legislation from *Charter* scrutiny by the courts is a question that cuts to the heart of Canada's constitutional democracy, the rule of law, and the proper functioning of the three branches of government. It is a question that bears directly on the advocacy work of The Society's membership and the rights and interests of the general public that The Society's members represent. As one of Canada's leading advocacy organizations, The Society has a significant interest in the disposition of this issue.

16. Moreover, given the depth and breadth of The Society's intervention and advocacy experience and expertise, The Society believes that it has a valuable perspective to offer to the Court about the issues in this Appeal.

No Prejudice to the Parties to This Appeal

17. There will be no prejudice to any party if The Society is granted leave to intervene. The Society will work to avoid duplication between its submissions and those of the Parties or any other intervenors. The Society will not enlarge the record before the Court. The Society will not seek any costs and asks that none be awarded against it. The Society will comply with the timelines set by the Court and will not delay these proceedings.

Draft Outline

18. A draft outline of the factum that The Society would submit if granted leave to intervene, summarizing The Society's proposed position, is attached as **Exhibit "A"** to this Affidavit.

19. In accordance with the fiat of this Honourable Court, dated April 16, 2024 (the "**Fiat**"), The Society's Brief of Law will shed further light on "the position it intends to take on the grounds of appeal identified by the parties" and "the nature of the argument [The Society] intends to advance and its relevance to these proceedings" (the Fiat at paragraph 6).

Conclusion

20. I affirm this Affidavit in support of the The Society's application to be granted leave to intervene in this Appeal, with the right to file a factum of no more than 20 pages and to present oral argument at the hearing of the Appeal of no more than 15 minutes.

21. I am not physically present before the Commissioner for Oaths taking this Affidavit, but I am linked to the Commissioner for Oaths by video conference. I affirm this Affidavit remotely.

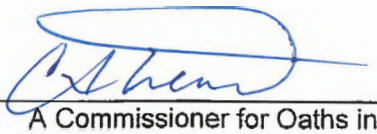
AFFIRMED BEFORE ME at the City of Calgary, in the Province of Alberta, this 11th day of July, 2024.

Commissioner for Oaths in and for Alberta

SHEREE CONLON, KC

Casey Stiemer
Barrister & Solicitor

This is Exhibit "A" referred to in the affidavit of Sheree Conlon, KC affirmed before me this 11th day of July, 2024



A Commissioner for Oaths in
and for the Province of Alberta

Casey Stiemer
Barrister & Solicitor

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PROPOSED INTERVENOR

OUTLINE OF THE PROPOSED FACTUM OF THE ADVOCATES' SOCIETY

(In support of The Advocates' Society's Application to Intervene)

TABLE OF CONTENTS

I. Introduction and Overview

1. This document provides an outline of The Advocates' Society's ("**The Society**") proposed factum should this Honourable Court permit The Society to intervene in *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)* (the "**Appeal**"). If granted leave to intervene, The Society will expand on the points addressed in this outline in its factum, which The Society will file in accordance with any direction received by this Court.

2. In accordance with the fiat of this Court, dated April 16, 2024, The Society has reviewed the facta of the parties and has tailored its submissions to avoid duplication and bring a fresh perspective. The Society's submissions are informed by the expertise and diverse perspectives of its membership across the country and anchored in The Society's significant experience intervening in cases, like this one, that are of significant public interest.

3. Although this Appeal engages several important questions, if granted leave to intervene, The Society will limit its submissions to the following issue:

(a) Did the Learned Chambers Judge err in finding that the Court remains empowered to review *The Education Act, 1995* for compliance with section 7 and subsection 15(1) of the *Canadian Charter of Rights and Freedoms* ("***Charter***") and to provide declaratory relief with respect to those provisions, despite the invocation of the notwithstanding clause in subsection 33(1) of the *Charter* (the "**Notwithstanding Clause**")?[1]

4. This issue is fundamental to the structure of Canada's constitutional democracy and the roles of courts and legislatures within that structure. The Society seeks to assist this Honourable Court in its assessment of this issue by making three primary submissions:

(a) Courts Retain Jurisdiction. A pre-emptive invocation of the Notwithstanding Clause does not oust the courts' jurisdiction to scrutinize legislation and issue declaratory relief. The text of the Notwithstanding Clause, constitutional principles, and *Charter* values support the existence of this jurisdiction in accordance with the courts' integral role in Canada's constitutional democracy. This conclusion furthers, rather than undermines, democracy and the dialogue between courts and legislatures.

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[1] *The Education Act, 1995*, SS 1995, c E-0.2; *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 [*Charter*].

(b) A Test Should Guide the Courts' Discretionary Decision to Exercise that Jurisdiction. To ensure that precious judicial resources are deployed effectively and efficiently, courts should be guided by a threshold test to determine whether to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause. While drawing on established doctrines, the test should be tailored to the unique character of the Notwithstanding Clause. The test can be used as a gatekeeper at the start of a proceeding and as a supplement to the current test for declaratory relief at the conclusion of a hearing on the merits.

(c) The Proposed Test. The Society proposes the following flexible test to guide the exercise of the courts' discretion (the "**Proposed Test**"). In determining whether to scrutinize legislation subject to the Notwithstanding Clause, courts should cumulatively assess and purposively weigh three factors, with regard to all the circumstances:

(i) Does the case raise a serious issue?

(ii) Is the case of significant public interest?

(iii) Does the impugned legislation target or uniquely prejudice a marginalized, vulnerable, or minority group?

5. The Proposed Test is rooted in the same principles that justify preserving the courts' jurisdiction to scrutinize legislation subject to the Notwithstanding Clause and issue declaratory relief. The Proposed Test will encourage courts to identify appropriate cases in which to scrutinize legislation, despite the invocation of the Notwithstanding Clause, in a principled and judicious manner.

6. The Society is not aware of any other party or proposed intervenor that is proposing a test to guide the courts' exercise of their jurisdiction. To avoid duplication, The Society will largely focus its submissions on the reasons for the Proposed Test and explaining the Proposed Test. The Society will devote less space in its factum to addressing its first submission that the invocation of the Notwithstanding Clause does not extinguish the courts' jurisdiction to review legislation and issue declaratory relief.

II. First Submission: Courts Retain the Jurisdiction to Scrutinize Legislation Subject to the Notwithstanding Clause and Issue Declaratory Relief

7. The Society respectfully submits that a court retains the jurisdiction to render a decision in the form of declaratory relief about whether legislation subject to a valid invocation of the Notwithstanding Clause limits the rights and freedoms enshrined in sections 2 and 7 to 15 of the *Charter* and whether those limits are justified under section 1.

8. The Notwithstanding Clause enshrines the supremacy of the legislature and shields the law from being rendered inoperable (at least for five years). It does not, however, protect it from judicial scrutiny. Although the Notwithstanding Clause permits the legislature to have "the final word",[2] it does not have the effect of silencing the critical and important dialogue between courts and legislatures.[3]

9. This conclusion is consistent with the text of the Notwithstanding Clause considered in light of recognized constitutional principles and *Charter* values.

10. Dealing first with the text, the interpretation of the *Charter* must be a "textually faithful exercise" because "the text remains of primordial significance".[4] The text of the Notwithstanding Clause does not purport to extinguish judicial scrutiny or declaratory relief.[5] Indeed, the text is silent on this issue. Subsections 33(1) and (2) of the *Charter* define the legal effect of the Notwithstanding Clause. The text of those subsections focuses exclusively on the *operation* of the legislation. The text says nothing about the availability of judicial scrutiny, or the ability of courts to issue declarations.

11. If Parliament intended to entirely foreclose judicial scrutiny—a significant step to say the least—it would have done so expressly. This is consistent with "the basic principle of statutory construction that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect".[6]

12. In addition to the text of the *Charter*, the Supreme Court of Canada has confirmed that, when interpreting *Charter* provisions, a court "may use unwritten constitutional principles as

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[2] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] at para 137, 1998 CanLII 816 (SCC).
[3] Grégoire Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71 Univ of Toronto LJ 510 at 524-525.
[4] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*Toronto*] at para 65.
[5] Webber at 524-525.
[6] *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 61, 1998 CanLII 771 (SCC).

interpretive aids",[7] including *Charter* values.[8] "These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[9] They also assist in "the delineation of spheres of jurisdiction" and "the role of our political institutions".[10]

13. When these constitutional principles and values are considered, it is clear that courts retain jurisdiction to issue declaratory relief despite the Notwithstanding Clause. Several principles and values support that conclusion, including constitutionalism, the rule of law, democracy, and the protection of minorities.

14. Starting with the principles of constitutionalism and the rule of law, courts retaining jurisdiction to scrutinize legislation and issue declaratory relief is consistent with the judiciary's role in Canada's constitutional structure "to uphold the Constitution" through "reasoned and principled decisions".[11] More specifically:

(a) A fundamental tenet of constitutionalism and the rule of law in Canada is the healthy and robust dialogue between courts and legislatures.[12] This dialogue has "the effect of enhancing democratic process, not denying it".[13] This is particularly so given the sunset provisions of the Notwithstanding Clause, pursuant to which the invocation of the Notwithstanding Clause is valid for only five years.[14] When a legislature invokes the Notwithstanding Clause in an effort to skirt judicial scrutiny, that pre-emptive invocation risks silencing that dialogue[15] and allows the legislature to "usurp the powers of the other [branches of government] simply by exercising its legislative power to allocate political power to itself unilaterally".[16] As a result, if the Notwithstanding Clause ousts judicial jurisdiction, the pre-emptive use of that Clause prevents the courts from fulfilling their constitutionally mandated

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[7] *Toronto* at para 65.
[8] *R v Clarke*, 2014 SCC 28 at para 12.
[9] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Reference re Secession*] at para 49, 1998 CanLII 793 (SCC).
[10] *Reference re Secession* at para 52.
[11] *Vriend* at para 136.
[12] *Vriend* at para 139; *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at paras 35-36.
[13] *Vriend* at para 139.
[14] *Charter*, s 33(4).
[15] The Honourable Mr Justice Michel Bastarache (as he then was), "Section 33 and the Relationship Between Legislatures and Courts" (2005) 143 Const Forum Const 1 at 3.
[16] *Reference re Secession* at para 74.

obligations. The legislative branch should not have the power to silence the courts completely in this dialogue or erase the courts' critical role in Canada's constitutional structure.

(b) In two cases, the Government of Saskatchewan proceeded with appeals of an adverse decision on the constitutionality of legislation despite the Government's own invocation of the Notwithstanding Clause, presumably to vindicate its view that the law did not offend the *Charter*.[17] This shows that there is tremendous value in judicial scrutiny even when the Notwithstanding Clause has been invoked. That value arises from fostering dialogue and clarifying the state of the law.

15. Turning next to the principles of democracy and the protection of minorities, a declaratory judgment about the effect of legislation subject to the Notwithstanding Clause on the fundamental rights and freedoms derogated from both protects minorities and enhances the democratic process. For example:

(a) Democracy "has always informed the design of our constitutional structure"[18] and the protection of minority rights "is itself an independent principle underlying our constitutional order."[19] Protecting minorities through "the process of constitutional judicial review that [the *Charter*] entails" promotes "the values inherent in the notion of democracy" such as "commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society".[20] Vulnerable minority groups must be "endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority" (emphasis added).[21] The courts are among those institutions.

(b) What a court says about the scope of *Charter* rights and the justification for their infringement matters to the public, whether the court strikes down the law or not.

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[17] *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90 (SCC); *Saskatchewan v Good Spirit School Division No 204*, 2020 SKCA 34, leave to appeal to SCC refused, 39212 (25 February 2021).
[18] *Reference re Secession* at para 62.
[19] *Reference re Secession* at para 80.
[20] *Reference re Secession* at paras 64, 81; *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] at 136, 1986 CanLII 46 (SCC).
[21] *Reference re Secession* at para 74 [emphasis added].

Judicial scrutiny and declaratory relief allow minorities to ensure their voices are acknowledged and addressed within the democratic process.

(c) Judicial scrutiny is particularly important where the impugned legislation affects vulnerable non-voting groups, such as children.[22] Children cannot participate in the democratic process and may be victims of those who legislate, act, and vote against their interests. When the rights and interests of children are at stake, the justification that voters can simply make their voices heard at the ballot box loses much of its force.

III. Second Submission: Courts Should Be Guided by a Threshold Test to Determine whether to Scrutinize Legislation subject to the Notwithstanding Clause

16. Although courts retain inherent jurisdiction to scrutinize legislation subject to the Notwithstanding Clause, that jurisdiction should be exercised judicially and on a principled basis. The Proposed Test will assist with this.[23]

17. The Notwithstanding Clause is a unique feature of Canada's Constitution. It engages fundamental aspects of Canada's constitutional democracy. A test tailored to the uniqueness and significance of the Notwithstanding Clause is appropriate.

18. The Government of Saskatchewan has expressed concerns about courts departing from their judicial role and "effectively stepping into a role assigned by the Constitution to the legislative branch".[24] The Proposed Test will "ensur[e] that courts play their proper role within our democratic system of government", and that scarce judicial resources are effectively and efficiently deployed.[25]

A. When the Proposed Test Should be Used

19. If this Court recognizes that courts have the jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and subsequently issue declaratory relief, courts of first instance may face two discretionary decisions at different stages of the proceedings: (1) on a preliminary basis, courts will have to decide whether to exercise their jurisdiction to

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[22] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General)*, 2004 SCC 4 at para 56.
[23] To be clear, The Society does not submit that the courts' jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and issue declaratory relief is conditional or qualified.
[24] The Appellant's Factum at paras 99-104.
[25] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 29.

proceed with scrutinizing the legislation *at all* (the "**Procedural Decision**"), and (2) at the conclusion of merits hearings, courts will have to decide whether to exercise their discretion to grant declaratory relief (the "**Remedy Decision**").

20. Primarily, The Society's Proposed Test would be used by the courts to guide their exercise of discretion in making the Procedural Decision. In this context, the Proposed Test would give rise to the type of inquiry that is appropriate to resolve "before trial" pursuant to Rule 7-1 of *The King's Bench Rules*. At this stage, the Proposed Test would be considered separately from the existing test on declaratory relief; the final determination of whether a declaration is appropriate in the circumstances should be made after a full hearing on the merits to avoid assessing claims in an evidentiary vacuum.[26]

21. In other words, the Proposed Test is primarily intended to be used on a preliminary basis to help courts address procedural and constitutional concerns specific to the context of a pre-emptive invocation of the Notwithstanding Clause. The existing test for declaratory relief is focused on remedy, which may only be issued after a full hearing on the merits. This focus makes it an awkward fit to make the Procedural Decision. In contrast, the Proposed Test, as a preliminary screening or gatekeeping mechanism, is focused on procedure in light of scarce judicial resources and the unique constitutional considerations inherent in the Notwithstanding Clause.

22. However, at the conclusion of the hearing on the merits, courts may still use the second and third factors of the Proposed Test in conjunction with the existing test for declaratory relief to make the Remedy Decision. The pre-emptive invocation of the Notwithstanding Clause raises unique constitutional considerations captured by the second and third factors of the Proposed Test. These factors would provide further guidance to courts about when to exercise their discretion to issue declaratory relief.

B. The Proposed Test is Consistent with the Principle of Judicial Economy

23. The efficient use of judicial resources justifies the creation of a test to guide the court's determination of whether to scrutinize legislation subject to the Notwithstanding Clause. Superior courts possess inherent jurisdiction "to ensure they can function as courts of law and fulfill their mandate to administer justice," which includes "the authority to […] ensure the machinery of the court functions in an orderly and effective manner".[27]

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[26] See e.g., *Hak c Procureur général du Québec*, 2021 QCCS 1466.
[27] *R v Cunningham*, 2010 SCC 10 at para 18.

24. Much like in the mootness and public interest standing contexts, the existence of the court's jurisdiction does not necessarily mean that the court should exercise it. A properly calibrated test will help identify cases that are worth the investment of the court's time and resources.

25. There are certainly "occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts".[28] Courts have allowed litigation to proceed "in cases which raise an issue of public importance of which a resolution is in the public interest".[29] This need to ensure access to the courts is then balanced against the desire to preserve judicial resources.[30]

26. The common thread between mootness, public interest standing, and the discretion to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause is that in each case, the Court must strike a balance between:

(a) permitting access to the courts to litigate constitutional matters of public interest; and

(b) effectively and efficiently using scarce judicial resources.

27. The Proposed Test seeks to help courts strike this important balance.

C. The Proposed Test Ensures Jurisdiction is Exercised Consistently with the Constitutional Principles and *Charter* values that underpin the Existence of the Court's Jurisdiction

28. In addition to balancing access to justice and preserving judicial resources, a test rooted in well-recognized principles of constitutional interpretation will help preserve the relationship between courts and legislatures that is at the core of Canada's constitutional democracy.

29. Using unwritten constitutional principles in this way is recognized by the Supreme Court of Canada. For example, in *Toronto*, the Supreme Court affirmed that "unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture".[31]

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[28] *Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at para 22.
[29] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at 361, 1989 CanLII 123 (SCC).
[30] *Downtown Eastside* at para 23.
[31] *Toronto* at para 56.

30. The Proposed Test is one form of structural doctrine that will enhance the coherence of the *Charter*'s architecture. The Proposed Test will encourage a judicial exercise of jurisdiction, anchored in principle.

IV. Third Submission: Defining the Proposed Test

31. When determining whether to allow an action to proceed despite the pre-emptive invocation of the Notwithstanding Clause, The Society respectfully proposes that courts should adopt the Proposed Test, which involves cumulatively assessing and purposively weighing three factors with regard to all the circumstances:

(a) Does the case raise a serious issue?

(b) Is the case of significant public interest?

(c) Does the impugned legislation target or uniquely prejudice a marginalized, vulnerable, or minority group?

32. The Proposed Test guides the exercise of the courts' discretion. Unlike the *Oakes* test or the test for a mandatory injunction, the Proposed Test is not a rigid test. While courts should consider all the factors, they are not mandatory requirements. The weight given to each factor will depend on the circumstances of each individual case. For example, just because the impugned legislation does not target a marginalized, vulnerable, or minority group does not mean that the court should decline to scrutinize the law. In those circumstances, if the case otherwise raises a serious issue and the public interest in the case is high, the precious resources of the court may be well spent on scrutinizing the impugned legislation despite the Notwithstanding Clause.

33. Rather than a rigid exercise, the application of the Proposed Test should be consistent with and guided by constitutional principles and *Charter* values that support the existence of the courts' jurisdiction.

A. Does the case raise a serious issue?

34. Courts should be more inclined to accede to a request for judicial scrutiny of legislation subject to the Notwithstanding Clause if the claimants have raised a serious issue to be determined.

35. This threshold is informed by the "serious justiciable issue" threshold used in public interest standing.[32] Accordingly, "[t]he claim must be 'far from frivolous', although courts should not examine the merits of the case in other than a preliminary manner."[33] A claim that does not raise a serious issue is "so unlikely to succeed that its result would be seen as a 'foregone conclusion'".[34] Alternatively, there must be a "serious issue as to [the statute's] invalidity", similar to the threshold consideration used to determine whether a moot action should proceed.[35]

36. By screening out cases that do not raise a serious issue, judicial economy is achieved. At the same time, cases that raise a serious issue may justify the court's time and resources.

B. Is the case of significant public interest?

37. Cases that attract significant public interest in acquiring more information and analysis through judicial scrutiny weigh in favour of allowing the action to proceed.

38. This contextual factor is about identifying cases in which the courts' role as a participant in the dialogue that underpins Canada's democracy is particularly valuable. Dialogue between courts and legislatures increases the accountability of each branch of government.[36] For example, by engaging in judicial dialogue, court "decisions can be reacted to by the legislature by the passing of new legislation".[37]

39. The following factors, although not intended to be exhaustive, can be considered to determine whether a case is of significant public interest:

(a) Degree of Public Notoriety or Controversy. The court should consider whether the case attracts "considerable public notoriety or controversy". This element is drawn from the test for the defence of fair comment in the context of the tort of defamation, where the community has a genuine interest in greater information on the subject.[38] This definition adds a limit to the Proposed Test that recognizes that judicial resources should not be used on an issue that does not "transcend [the parties'] immediate interests", while remaining consistent with democratic

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[32] *Downtown Eastside* at para 37.
[33] *Downtown Eastside* at para 42 [citations omitted].
[34] *Downtown Eastside* at para 42.
[35] *Borowski* at 350.
[36] *Vriend* at para 139.
[37] *Vriend* at para 139.
[38] *Grant v Torstar*, 2009 SCC 61 at para 104.

principles that encourage accommodation of a wide variety of beliefs on issues of general importance.[39]

(b) Potential for Ramifications in Other Canadian Jurisdictions. The court should consider whether the case raises issues that could also arise in other Canadian jurisdictions. If yes, the importance of the courts' voice within the democratic process—and the public interest in the case—increases. This element ensures that judicial resources are dedicated to cases that further the court's constitutional role within Canada's democracy by promoting dialogue. If there is no potential for broader ramifications, the impact on the democratic process will be reduced. This Appeal raises a perfect example. The issues at stake in this Appeal are the subject of current or proposed legal reform in both New Brunswick and Alberta, and it is not difficult to imagine the issues in this case arising in other Canadian jurisdictions as well. In this context, this Court's perspective becomes even more important.

C. Does the impugned legislation target or uniquely prejudice a marginalized, vulnerable, or minority group?

40. Courts should be more inclined to scrutinize legislation subject to the Notwithstanding Clause if the case engages the rights and interests of marginalized or vulnerable minority groups.

41. This factor is consistent with the *Charter's* concern for protecting minorities against majority rule, as "the concept of democracy is broader than the notion of majority rule."[40] Allowing minorities to access judicial scrutiny of legislation subject to a pre-emptive invocation of the Notwithstanding Clause avoids "unjustly exclud[ing] [them] from participation in our political system" by denying access to judicial intervention where their interests may not have been considered.[41]

42. This factor is also rooted in the law on standing that provides that an individual who is "exceptionally prejudiced" is entitled to bring declaratory action to challenge the validity of a statute.[42] This threshold reflects the need to preserve judicial resources.

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[39] *Downtown Eastside* at para 73; *Reference re Secession* at paras 140-142.
[40] *Reference re Secession* at para 63; *Vriend* at para 140.
[41] *Vriend* at para 176; *Reference re Secession* at para 63.
[42] *Smith v The Attorney General of Ontario*, [1924] SCR 331 at 337, 1924 CanLII 3 (SCC).

43. When non-voting minorities, like children, are the subject of the impugned law, this factor would weigh heavily in favour of judicial scrutiny. This ensures that the non-voting minority has access to the courts when the ballot box is not available to them.

V. Conclusion

44. As mentioned, if granted leave to intervene, The Society will expand on the points in this outline in its factum to be filed with the Court.

VI. Table of Authorities

CASE LAW

Authorities		Paragraph References
1.	*Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC).	8, 14, 14(a), 38, 41
2.	*Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.	10, 12, 29
3.	*Ordon Estate v Grail*, [1998] 3 SCR 437, 1998 CanLII 771 (SCC).	11
4.	*R v Clarke*, 2014 SCC 28.	12
5.	*Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC).	12, 14(a), 15(a), 39(a), 41
6.	*Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62.	14(a)
7.	*RWDSU v Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90.	14(b)
8.	*Saskatchewan v Good Spirit School Division No 204*, 2020 SKCA 34.	14(b)
9.	*R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).	15(a)
10.	*Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4.	22
11.	*British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27.	18
12.	*Hak c Procureur général du Québec*, 2021 QCCS 1466.	20
13.	*R v Cunningham*, 2010 SCC 10.	23
14.	*Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.	25, 35, 39(a)
15.	*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC).	25, 35
16.	*Grant v Torstar*, 2009 SCC 61.	39(a)
17.	*Smith v The Attorney General of Ontario*, [1924] SCR 331, 1924 CanLII 3 (SCC).	42

SECONDARY SOURCES

Authorities		Paragraph References
18.	Grégoire Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71 Univ of Toronto LJ 510 (QL).	8, 10
19.	The Honourable Mr Justice Michel Bastarache (as he then was), "Section 33 and the Relationship Between Legislatures and Courts" (2005) 143 Const Forum Const 1.	14(a)

STATUTES, REGULATIONS, AND RULES

Authorities		Paragraph References
20.	*The Education Act, 1995*, SS 1995, c E-0.2.	3(a)
21.	*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, ss 2, 7-15, 30.	3(a), 4(a), 7, 9, 10, 12, 14(a), 14(b), 15(a), 15(b), 30, 33, 41

Docket: CACV4329

IN THE COURT OF APPEAL FOR SASKATCHEWAN

(ON APPEAL FROM THE COURT OF KING'S BENCH OF SASKATCHEWAN)

BETWEEN:

GOVERNMENT OF SASKATCHEWAN
AS REPRESENTED BY THE MINISTER OF EDUCATION

APPELLANT
(*Respondent/Applicant*)

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

RESPONDENT
(*Applicant/Respondent*)

AND:

THE ADVOCATES' SOCIETY

PROPOSED INTERVENOR

BRIEF OF LAW OF THE PROPOSED INTERVENOR, THE ADVOCATES' SOCIETY

(In support of The Advocates' Society's Application to Intervene)

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I. INTRODUCTION AND OVERVIEW

1. The Advocates' Society ("**The Society**") provides this Brief of Law in support of its application to intervene in this Appeal. The Society respectfully submits that, if granted leave to intervene, the depth and breadth of The Society's expertise and experience will be of assistance to this Honourable Court in deciding the issues before it.

2. This Appeal raises an issue of fundamental importance to the structure of Canada's constitutional democracy and the roles of courts and legislatures within that structure, namely, whether courts retain the jurisdiction to scrutinize, and issue a declaration in respect of, legislation subject to a pre-emptive invocation of the notwithstanding clause in subsection 33(1) of the *Canadian Charter of Rights and Freedoms* (respectively, the "**Notwithstanding Clause**" and the "***Charter***").[1]

3. As one of Canada's leading advocacy organizations, The Society has a significant interest in the disposition of this issue. The outcome of this Appeal will directly impact the advocates comprising The Society's membership and the litigants that The Society's members represent. The legal issues raised in this Appeal are of the utmost significance to the legal profession.

4. If granted leave to intervene, The Society will argue that courts retain the jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and issue declaratory relief. The text of the Notwithstanding Clause, constitutional principles, and *Charter* values support this conclusion. However, the existence of that jurisdiction does not mean it should be exercised in all cases. The Society's submissions will focus primarily on a proposed multi-factorial test that will assist courts in identifying appropriate cases — in a principled and judicious manner — to scrutinize legislation despite a pre-emptive invocation of the Notwithstanding Clause (the "**Proposed Test**").

5. To assist this Honourable Court in assessing The Society's proposed intervention, The Society has appended a detailed outline of its proposed factum to the Affidavit of Sheree Conlon, KC, affirmed July 11, 2024 (the "**Conlon Affidavit**"). In accordance with this Court's direction, The Society has reviewed the facta of the parties to this Appeal to avoid duplication and to ensure that The Society brings a fresh and helpful perspective.

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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.

II. ISSUE

6. The only issue before this Honourable Court in this Application is whether to grant The Society leave to intervene in this Appeal.

III. ARGUMENT

7. In its fiat dated April 16, 2024 (the "**Fiat**"), this Honourable Court noted that the factors the Court will consider on an application for leave to intervene are set out in Rule 17 of *The Court of Appeal Rules (Civil)* and summarized in *Mosten Investment Ltd v Manulife Financial*.[2]

8. The Fiat also directed that proposed intervenors should provide submissions on certain enumerated factors. Those enumerated factors are set out below:

(a) Basis of The Society's Interest in the Appeal. The Society has a significant interest in whether courts retain the jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and issue declaratory relief. The outcome of this Appeal will directly impact The Society's membership and the litigants they represent. The issues raised in this Appeal are of the utmost significance to the legal profession and Canada's constitutional democracy.

(b) The Position The Society Intends to Take on the Grounds of Appeal. The Society will take the position that courts retain the jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and issue declaratory relief, but that courts should be guided by the Proposed Test in identifying cases in which it is appropriate to exercise that jurisdiction.

(c) The Nature and Relevance of the Argument The Society Intends to Advance. The Society's submissions will focus on the Proposed Test in deciding whether to scrutinize legislation subject to the Notwithstanding Clause. If this Honourable Court concludes that a pre-emptive invocation of the Notwithstanding Clause does not oust the courts' jurisdiction to issue declaratory relief, courts of first instance require direction about when and how to exercise that jurisdiction. The Proposed Test will ensure that precious judicial resources are used effectively and efficiently.

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[2] *Mosten Investment LP v The Manufacturers Life Insurance Company o/a Manulife Financial*, 2019 SKCA 141 at para 4.

(d) What The Society's Participation Will Add to the Proceedings. The Society intends to assist the Court by leveraging its significant expertise and experience intervening in court cases to propose a principled approach to exercising the courts' jurisdiction. The Society's participation will not delay proceedings, prejudice the parties, widen the *lis*, or turn the Court into a political arena.

9. The Society expands on these factors in greater detail in the sections that follow.

A. The Basis of The Society's Interest in this Appeal

10. The Society is a national professional association for trial and appellate lawyers representing approximately 6,000 advocates, including both civil and criminal litigators in government and private practice.[3] The Society has leaders and members in all Canadian provinces, including Saskatchewan.[4] It is Canada's premier advocacy organization.

11. The Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice.[5] The Society has a Board of Directors and various standing committees that allow The Society to benefit from many different perspectives and that make it more effective in representing the interests of advocates and litigants across Canada.[6]

12. The Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession, the administration of justice, and access to justice.[7] Courts have previously recognized The Society's ability to assist as an intervenor in cases that involve issues affecting advocates and the rights of litigants.[8]

13. The issue raised by this Appeal about the Notwithstanding Clause has implications that extend far beyond the immediate parties. Indeed, it is difficult to imagine a question of greater importance to the legal profession as a whole. Whether a government's pre-emptive use of the Notwithstanding Clause entirely insulates that piece of legislation from *Charter* scrutiny by the courts is a question that cuts to the heart of Canada's constitutional democracy, the rule of law, and the proper functioning of the three branches of government. The Court's decision in this Appeal will determine whether courts remain open to litigants and their counsel despite a pre-

[3] Affidavit of Sheree Conlon, KC, affirmed July 11, 2024 [Conlon Affidavit] at para 4.
[4] Conlon Affidavit at para 4.
[5] Conlon Affidavit at para 6.
[6] Conlon Affidavit at para 5.
[7] Conlon Affidavit at para 7.
[8] Conlon Affidavit at para 8.

emptive invocation of the Notwithstanding Clause. This impact raises concerns about access to justice, particularly for minority groups.

14. There is nothing more important to The Society and its members than the health and order of Canada's legal system — a system that The Society's members each take an oath to uphold when they become members of their provincial bar. The Society has a significant interest in the proper interpretation of the Notwithstanding Clause and the effect of that interpretation on the role of advocates and the rights of Canadians. The Society also has a significant interest in the preservation of valuable judicial resources, which is one of the central aims of the Proposed Test.

B. The Position The Society Intends to Take on the Grounds of Appeal

15. Although this Appeal engages several important questions, The Society intends to take a position on only the following ground of appeal:

(a) Did the Learned Chambers Judge err in finding that the Court remains empowered to review *The Education Act, 1995*[9] for compliance with section 7 and subsection 15(1) of the *Charter* and to provide declaratory relief with respect to those provisions, despite the invocation of the Notwithstanding Clause?

16. The Society seeks to assist this Honourable Court in its assessment of this issue by making three primary submissions:

(a) Courts Retain Jurisdiction. A pre-emptive invocation of the Notwithstanding Clause does not oust the courts' jurisdiction to scrutinize legislation and issue declaratory relief. The text of the *Charter*, constitutional principles, and *Charter* values support this conclusion.

(b) A Test Should Guide Whether to Exercise that Jurisdiction. To ensure that precious judicial resources are deployed effectively and efficiently, courts should be guided by a threshold test to determine whether to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause.

(c) The Proposed Test to Exercise that Jurisdiction. The Proposed Test, to be used primarily as a gatekeeping mechanism, encourages courts to consider three factors: (1) does the case raise a serious issue? (2) is the case of significant public

[9] *The Education Act, 1995*, SS 1995, c E-0.2.

interest? and (3) does the impugned legislation target or uniquely prejudice a marginalized, vulnerable, or minority group?

C. The Nature and Relevance of The Society's Submissions

17. In addition to setting out the nature and relevance of these submissions below, The Society has provided an outline of its proposed factum attached as **Exhibit "A"** to the Conlon Affidavit. If granted leave to intervene, The Society will expand on these submissions in its factum.

i. Courts Retain the Jurisdiction to Scrutinize Legislation Subject to the Notwithstanding Clause and Issue Declaratory Relief

18. If granted leave to intervene, The Society will respectfully submit that a court retains its jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause and make a declaration as to whether that legislation limits the rights and freedoms protected by sections 2 and 7 to 15 of the *Charter*. The Notwithstanding Clause enshrines the supremacy of the legislature and protects the law from inoperability. It does not, however, protect it from judicial scrutiny.

19. This conclusion is consistent with the text of the Notwithstanding Clause considered in light of recognized constitutional principles and values. The text does not purport to extinguish judicial scrutiny and the courts' jurisdiction to issue declaratory relief.[10] Indeed, it is silent on this issue. When relevant constitutional principles and *Charter* values are considered, it is clear that courts retain the jurisdiction to scrutinize legislation subject to the Notwithstanding Clause.[11]

20. The constitutional principles of constitutionalism and the rule of law support this interpretation of the Notwithstanding Clause. A fundamental tenet of constitutionalism and the rule of law in Canada is the healthy and robust dialogue between courts and legislatures.[12]

21. In addition, the constitutional principles of democracy and protection of minorities support this interpretation of the Notwithstanding Clause. A declaratory judgment about the effect of legislation subject to the Notwithstanding Clause on the fundamental rights and freedoms protects minorities and enhances democratic processes and values by informing public debate.[13]

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[10] Grégoire Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71 Univ of Toronto LJ 510 (QL) at 524-525.
[11] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*Toronto*] at para 65; *R v Clarke*, 2014 SCC 28 at para 12; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Reference re Secession*] at para 74, 1998 CanLII 793 (SCC) at paras 49, 52.
[12] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] at para 139, 1998 CanLII 816 (SCC).
[13] *Reference re Secession* at paras 64, 74, 81.

Protecting minorities through "the process of constitutional judicial review that [the *Charter*] entails" promotes "the values inherent in the notion of democracy".[14]

ii. A Threshold Test Should Guide Courts When Determining Whether to Scrutinize Legislation Subject to the Notwithstanding Clause

22. Although courts retain inherent jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause, that jurisdiction should be exercised judicially and on a principled basis. The Proposed Test will assist with this.

23. The Notwithstanding Clause is a unique feature of Canada's constitution that engages fundamental aspects of Canada's constitutional democracy. A test tailored to the uniqueness and significance of the Notwithstanding Clause is appropriate. The Proposed Test will "ensur[e] that courts play their proper role within our democratic system of government," and that scarce judicial resources are effectively and efficiently deployed.[15]

24. In the preliminary stages of a constitutional challenge, the Proposed Test would guide the courts when determining whether to exercise their discretion to assert their jurisdiction to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause *at all*. In this context, the Proposed Test is separate from the existing test for declaratory relief, which is better suited for determination after a hearing on the merits. In Saskatchewan, the Proposed Test would give rise to the type of inquiry that is appropriate to resolve "before trial" pursuant to Rule 7-1 of *The King's Bench Rules*.

25. However, after a hearing on the merits, the second and third factors of the Proposed Test may be considered in conjunction with the existing test for declaratory relief. These factors help courts ensure its discretion is exercised judicially in accordance with its constitutional role.

26. The efficient use of judicial resources justifies the creation of a test to guide the courts' determination of whether to scrutinize legislation subject to a pre-emptive invocation of the Notwithstanding Clause.[16] Much like in the mootness and public interest standing contexts, the existence of the court's jurisdiction does not automatically mean that the court should exercise it. However, there clearly remains "occasions when public interest litigation is an appropriate

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[14] *Reference re Secession* at paras 64, 81; *R v Oakes*, [1986] 1 SCR 103 at 136; 1986 CanLII 46 (SCC).
[15] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 29.
[16] *R v Cunningham*, 2010 SCC 10 at para 18.

vehicle to bring matters of public interest and importance before the courts".[17] A properly calibrated test would help identify cases that are worth the court's time and resources. The Proposed Test would strike a balance between permitting access to the courts to litigate constitutional matters of public interest and efficiently using scarce judicial resources.

27. In addition to balancing access to justice and preserving judicial resources, a test rooted in well-recognized principles of constitutional interpretation will help preserve the proper relationship between courts and legislatures that is at the core of Canada's constitutional democracy. Unwritten constitutional principles "can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture".[18] The Proposed Test is one form of "structural doctrine" that will enhance the "coherence" of the *Charter's* "architecture" by encouraging a judicial exercise of jurisdiction, anchored in principle.

iii. Defining the Proposed Test

28. The Society proposes that courts should adopt the Proposed Test to identify appropriate cases for judicial scrutiny when the Notwithstanding Clause has been pre-emptively invoked. The Proposed Test involves cumulatively assessing and purposively weighing three factors with regard to all the circumstances: (a) does the case raise a serious issue? (b) is the case of significant public interest? and (c) does the impugned legislation target or uniquely prejudice a marginalized, vulnerable, or minority group? The Proposed Test is intended to be flexible—it is not a list of rigid or mandatory requirements.

29. The application of the Proposed Test should be consistent with and guided by constitutional principles and *Charter* values that support the existence of the court's jurisdiction. The Proposed Test draws from the related tests used to assess public interest standing and mootness because they have similar justifications, although the tests for mootness and public interest standing are too broad textured to be a full answer in Notwithstanding Clause cases.

30. On the threshold "serious issue" branch of the Proposed Test, a court must find that the claim is "'far from frivolous' although courts should not examine the merits of the case other than in a preliminary manner".[19] Like in public interest standing cases, a claim that does not raise a

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[17] *Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at para 22; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at 361, 1989 CanLII 123 (SCC).
[18] *Toronto* at para 56.
[19] *Downtown Eastside* at para 42.

serious issue is "so unlikely to succeed that its result would be seen as a 'foregone conclusion'".[20] Alternatively, there must be a "serious issue as to [the statute's] invalidity", similar to the threshold used to determine whether a moot action should proceed.[21]

31. Courts should be more inclined to accede to a request for judicial scrutiny of legislation subject to a pre-emptive invocation of the Notwithstanding Clause where the claimants have raised a serious issue to be determined. Screening out cases that do not raise a serious issue is consistent with judicial economy. At the same time, cases that raise a serious issue may justify the court's time and resources.

32. The "public interest" branch of the Proposed Test is about identifying cases in which the courts' role as a participant in the dialogue that underpins Canada's democracy is particularly valuable. To determine whether a case is of significant public interest, the courts should consider the following non-exhaustive list of factors:

(a) Courts should consider whether the case attracts "considerable public notoriety or controversy". This element draws from the test for the defence of fair comment in the context of the tort of defamation, where the community has a genuine interest in greater information on the subject.[22] This definition adds a limit to the Proposed Test that recognizes that judicial resources should not be used on an issue that does not "transcend [the parties'] immediate interests", while remaining consistent with democratic principles that encourage accommodation of a wide variety of beliefs.[23]

(b) The court should consider whether the case raises issues that could also arise in other Canadian jurisdictions. If yes, the importance of the courts' voice within the democratic process—and the public interest in the case—increases.

33. Cases that attract significant public interest in acquiring more information and analysis through judicial scrutiny weigh in favour of exercising the court's jurisdiction.

34. On the third branch of the test, whether the legislation targets or uniquely prejudices a marginalized, vulnerable, or minority population, courts should consider the *Charter's*

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[20] *Downtown Eastside* at para 42.
[21] *Borowski* at 350.
[22] *Grant v Torstar*, 2009 SCC 61 at para 104.
[23] *Downtown Eastside* at para 73; *Reference re Secession* at paras 140-142.

fundamental objective of protecting minorities against majority rule. Indeed, "the concept of democracy is broader than the notion of majority rule."[24] Allowing minorities to proceed with judicial scrutiny avoids "unjustly exclud[ing] [them] from participation in our political system" by denying access to judicial scrutiny where their interests may not have been considered.[25]

35. Courts should be more inclined to scrutinize legislation where the case engages the rights and interests of marginalized or vulnerable minority groups. When vulnerable non-voting minorities, like children, are the subject of the impugned law, this factor would weigh heavily in favour of judicial scrutiny. This ensures that the non-voting minority has access to the courts when the ballot box is not available to them.

D. What The Society's Participation Adds to This Appeal

36. The Society, as an association of advocates who appear before courts and tribunals every day to argue for the recognition and vindication of their clients' rights, is well-placed to make these submissions as an intervenor. The Society has a strong record of contributing to matters related to the fair and equitable administration of justice and offers a unique and independent perspective on the importance of the courts' retaining jurisdiction in the face of the Notwithstanding Clause.

37. In recognition of the depth and breadth of its experience and expertise, courts have granted The Society leave to intervene in many cases of importance to Canada's justice system.[26]

38. The Society is not aware of any other party or proposed intervenor that is proposing a test to guide the courts' exercise of their jurisdiction. To avoid duplication, The Society will focus its submissions on the reasons for the Proposed Test and explaining the Proposed Test. The Society will only briefly address its first submission that the Notwithstanding Clause does not extinguish the courts' jurisdiction to scrutinize legislation and issue declaratory relief to provide context for

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[24] *Reference re Secession* at para 63; *Vriend* at para 140.
[25] *Vriend* at para 176; *Reference re Secession* at para 63.
[26] See e.g., *Anderson v Alberta*, 2022 SCC 6; *R v Chouhan*, 2021 SCC 26; *Crowder v British Columbia (Attorney General)*, 2019 BCSC 1824; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518; *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423; *Groia v Law Society of Upper Canada*, 2018 SCC 27; *Groia v The Law Society of Upper Canada*, 2016 ONCA 471; *Joseph Groia v The Law Society of Upper Canada*, 2015 ONSC 686; *Alberta v Suncor Energy Inc*, 2017 ABCA 221; *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52; *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7; *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8; *R v Nedelcu*, 2012 SCC 59; *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764; *Children's Lawyer for Ontario v Goodis*, 2005 CanLII 11786 (ON CA), 75 OR (3d) 309.

its submissions on the Proposed Test. Although the Respondent has addressed this issue in detail in its factum, this first submission is necessary to frame The Society's Proposed Test.

i. The Society Will Not Unduly Delay Proceedings, Prejudice the Parties, or Widen the Lis

39. There will be no prejudice to any party if The Society is granted leave to intervene. The Society will actively work to avoid duplication between its submissions, the parties, and any other intervenors. The Society will comply with all timelines established by the Court. The Society will not enlarge the record before the Court or delay the proceedings. The Society does not intend to file any additional evidence or to seek any findings of fact in this case.

ii. The Society Will Not Turn the Court into a Political Arena

40. The Society is an independent, apolitical organization. If granted leave to intervene, The Society's intervention will not turn the Court into a political arena. The Society will take no position with respect to the underlying facts relevant to the merits of the dispute between the Appellant and Respondent. It will also take no position on the merits or substance of the legislation that is subject to the Respondent's constitutional challenge. Rather, The Society is only proposing to make submissions on the legal issue pertaining to the court's role and jurisdiction.

IV. NO COSTS

41. The Society will not seek costs in this Appeal and asks that no award of costs be made against it in this Application or in this Appeal if leave is granted.

V. ORDER SOUGHT

42. The Society respectfully requests an Order: (i) granting The Society intervenor status in this Appeal; (ii) permitting The Society to file a factum not exceeding 20 pages; and (iii) permitting The Society to make oral submissions of up to 15 minutes at the hearing of this Appeal, or on such further and other terms as this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of July, 2024.

Brendan MacArthur-Stevens / Casey Stiemer
Brooke Mantei

Counsel for the Proposed Intervenor,
The Advocates' Society

VI. TABLE OF AUTHORITIES

CASE LAW

SECONDARY SOURCES

STATUTES, REGULATIONS, AND RULES

	Authorities	Paragraph References
33.	*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, ss 2, 7-15, 30.	2, 4, 13, 15(a), 16(a), 18, 19, 21, 27, 29, 34
34.	*The Education Act, 1995*, SS 1995, c E-0.2.	15(a)