

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)**

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD,  
MUBEENAH MUGHAL and PIETRO MERCURI**

**APPELLANTS**  
(Respondents on Cross-Appeal)

-and-

**ATTORNEY GENERAL OF QUÉBEC,  
JEAN-FRANÇOIS ROBERGE, in his official capacity,  
SIMON JOLIN-BARRETTE, in his official capacity**

**RESPONDENTS**  
(Appellants on Cross-Appeal)

-and-

**MOUVEMENT LAÏQUE QUÉBÉCOIS  
FRANÇOIS PARADIS, in his official capacity**

**RESPONDENTS**

*(Style of cause continued on next page)*

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**MOTION RECORD OF THE PROPOSED INTERVENER,  
FEDERATION OF ONTARIO LAW ASSOCIATIONS**

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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AMRIT KAUR**

**APPELLANTS**  
(Respondents on Cross-Appeal)

-and-

**ATTORNEY GENERAL OF QUÉBEC**

**RESPONDENT**  
(Appellants on Cross-Appeal)

AND BETWEEN:

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

**APPELLANTS**  
(Respondents on Cross-Appeal)

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**RESPONDENTS**  
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-and-

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

**RESPONDENTS**

AND BETWEEN:

**FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT**

**APPELLANT**  
(Respondents on Cross-Appeal)

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AND BETWEEN:

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

**APPELLANTS**  
(Respondents on Cross-Appeal)

-and-

**ATTORNEY GENERAL OF QUÉBEC**

**RESPONDENT**  
(Appellants on Cross-Appeal)

AND BETWEEN:

**THE LORD READING LAW SOCIETY**

**APPELLANT**  
(Respondent on Cross-Appeal)

-and-

**ATTORNEY GENERAL OF QUÉBEC**

**RESPONDENT**  
(Appellant on Cross-Appeal)

-and-

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**IN THE SUPREME COURT OF CANADA**  
**(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)**

**B E T W E E N:**

**ENGLISH MONTREAL SCHOOL BOARD, et al.**

**APPELLANTS**  
**(Respondents on Cross-Appeal)**

**-and-**

**ATTORNEY GENERAL OF QUÉBEC, et al.**

**RESPONDENTS**  
**(Appellants on Cross-Appeal)**

**-and-**

**MOUVEMENT LAÏQUE QUÉBÉCOIS, et al.**

**RESPONDENTS**

---

**NOTICE OF MOTION OF THE PROPOSED INTERVENER,**  
**FEDERATION OF ONTARIO LAW ASSOCIATIONS**  
**(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)**

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**TAKE NOTICE** that the Applicant, the Federation of Ontario Law Associations (“**FOLA**”) hereby applies to a Judge of this Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156, for an Order:

- (a) Granting FOLA leave to intervene in this appeal;
- (b) Permitting FOLA to file a factum not exceeding ten (10) pages in length;
- (c) Permitting FOLA to present oral argument not exceeding five (5) minutes in length; and
- (d) Any further or other order that the Judge may deem appropriate.

**AND TAKE FURTHER NOTICE** that the following documents will be relied upon in support of the Motion:

- (a) The Affidavit of Ian Hu, sworn on May 20, 2025;
- (b) The Memorandum of Argument of FOLA, dated May 20, 2025; and
- (c) Such further and other material as counsel may advise and this Honourable Court may permit.

**AND TAKE FURTHER NOTICE** that the grounds for the Motion are:

1. FOLA is a provincial legal association with a genuine and substantive interest in the following issue of public importance raised on appeal: whether the pre-emptive use of the notwithstanding clause limits the inherent and core jurisdiction of the superior courts;
2. FOLA seeks leave to intervene before this Honourable Court to provide its unique and helpful perspective on this sole issue;
3. Since 1980, FOLA has advocated for the justice system and legal practitioners in Ontario. With its affiliate association, the Toronto Lawyers' Association, FOLA represents 46 county and district law associations composed of approximately 12,000 members. FOLA provides a unique perspective as it is Ontario's only legal association operating in every area of the province, including rural and underserviced areas;
4. FOLA's primary role is to uphold the administration of justice by providing informed and practical guidance to regulators, the courts, the Federal Government, the Ontario Legislature, and other actors within the legal community. FOLA is consistently consulted on issues affecting access to justice, the rule of law, the independence of the courts and the practice of law in Ontario. FOLA sits on multiple working groups, committees, and consultative bodies facilitated by the courts, the Law Society and other justice sector participants;
5. FOLA has a unique perspective and understanding of the exigencies of the rule of law and the courts' critical role in upholding it to: (1) maintain public confidence in the administration of justice; and (2) help safeguard Canadian democracy;

6. Given its decades long advocacy for access to justice in often rural and underserved areas, its diverse membership, and as an active participant in the justice system, FOLA has a legitimate and direct interest in the outcome of this appeal on the issue of the jurisdiction of the superior courts. This interest is based on the following:
  - a. The inherent and core jurisdiction of our superior courts to interpret the law is crucial to the public's right to access the courts. This jurisdiction is fundamental to fostering the rule of law, rather than rule *by* law;
  - b. In granting a declaration of invalidity (or a suspended declaration of invalidity), the superior courts perform a function essential to both the rule of law and the democratic process by determining the impact of legislation on constitutional rights. Individuals are entitled to know whether government action improperly infringes upon their rights under the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "**Charter**"). The electorate is entitled to know whether government action is consistent with the *Charter* in order to meaningfully evaluate their elected officials;
  - c. FOLA is composed of a diverse membership of legal professionals, including those in rural and underserved areas. These lawyers face unique challenges when executing their positive duty to pursue all legal remedies and defences available to their clients under law. This includes advocating to safeguard their clients' rights to access the courts;
  - d. FOLA's diversity of membership gives it a distinct and relevant insight into the practical realities of frontline lawyers as they seek to advocate for justice in a fair, balanced and accountable legal system. Public confidence in the administration of justice requires that individuals be able to access the courts to determine whether government legislation violated their *Charter* rights;
  - e. FOLA has a genuine interest in maintaining the inherent and core jurisdiction of the superior courts to scrutinize whether government action complies with the *Charter* when the notwithstanding clause is proactively invoked;



7. Should FOLA be granted leave to intervene, its submissions will be unique and relevant to the issues on appeal, and will be useful to this Honourable Court.
8. FOLA's proposed submissions will focus on:
  - a. The manner in which s.96 of the *Constitution Act, 1867* (UK), 30& 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 ("***Constitution Act, 1867***"), has been historically interpreted to protect the jurisdiction of the superior courts to make declarations on the constitutionality of laws enacted by Parliament and provincial legislatures;
  - b. How, when properly construed, section 33 of the *Charter* does not limit the inherent jurisdiction of the superior courts to grant a declaration of invalidity (or a suspended declaration of invalidity in the alternative). Issued pursuant to subsection 52(1) of the *Constitution Act, 1982* (supremacy clause), a declaration of invalidity for want of *Charter* compliance is suspended by operation of subsection 33(3) of the *Charter*.
  - c. The operation of the declaratory relief. Specifically, unless the notwithstanding clause is renewed, the legislation will become of no force and effect by operation of the declaration after the expiration of the time limit contained in subsection 33(3) of the *Charter*;
  - d. The role of declaratory relief in fostering the democratic process and respect for the rule of law in the face of impugned government action;
  - e. The impact of a complete immunization of the state from judicial review when the notwithstanding clause is pre-emptively invoked; and
  - f. The effect this would have on the rule of law by allowing legislation to continue to be in force well past the temporal limits contained in subsection 33(3) of the *Charter*;
9. FOLA's submissions are detailed further in the Memorandum of Argument;
10. FOLA is uniquely qualified to assist the Court on these issues;

11. FOLA will suffer prejudice if leave to intervene in this appeal is denied. The determination of this appeal will have a significant impact on the ability of lawyers to advocate for their clients and uphold the rule of law. As such, FOLA has a legitimate and direct interest in the outcome of this appeal;
12. FOLA will take no position on the disposition of the appeal;
13. Granting leave to intervene to FOLA will not prejudice any of the parties;
14. If granted leave to intervene, FOLA will work collaboratively with the parties and other interveners to avoid duplicative submissions;
15. FOLA will take the record as it finds it and will not seek to supplement it, beyond a factum setting out its unique perspective on the issues before the Court;
16. FOLA will not seek costs in the proposed intervention and respectfully requests that none be awarded against it;
17. FOLA will abide by the schedule set by the Registrar for the filing of materials; and
18. Such further and other grounds as counsel may advise and this Court may permit.

Dated at Ottawa, Ontario, this 20<sup>th</sup> day of May, 2025.



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**NOTICE TO THE RESPONDENT TO THE MOTION:** A Respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a Judge or the Registrar, as the case may be.

If the motion is served and filed with the application for leave to appeal, then the Respondent may serve and file the response to the motion with the response to the application for leave to appeal.

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

**ENGLISH MONTREAL SCHOOL BOARD, et al.**

APPELLANTS  
(Respondents on Cross-Appeal)

-and-

**ATTORNEY GENERAL OF QUÉBEC, et al.**

RESPONDENTS  
(Appellants on Cross-Appeal)

-and-

**MOUVEMENT LAÏQUE QUÉBÉCOIS, et al.**

RESPONDENTS

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**AFFIDAVIT OF IAN HU**

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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**I, IAN HU**, of the Village of Midhurst, in the Province of Ontario, **MAKE OATH AND SAY:**

1. The Federation of Ontario Law Associations (“**FOLA**”) represents 46 law associations across Ontario. With FOLA’s affiliate, the Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers in every region of Ontario. Formerly known as the County and District Law Presidents' Association, FOLA has a long history of protecting the public’s ability to scrutinized government action and upholding the rule of law.
2. As the Director of Policy and Advocacy of FOLA, I have knowledge of the matters contained in this Affidavit. Where I make this Affidavit on information and belief, I have stated the source of the information and verily believe it to be true.

## I. Overview

3. In resolving this appeal, the Supreme Court of Canada will determine whether the inherent and core jurisdiction of Canada's superior courts to grant declaratory relief can be limited by operation of section 33 ("**notwithstanding clause**") of *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the "**Charter**").<sup>1</sup>
4. FOLA's mandate is to support Ontario lawyers in fulfilling their obligation to uphold the rule of law and advance the cause of justice in a fair, balanced and accountable justice system. FOLA has a genuine interest in maintaining the inherent and core jurisdiction of the superior courts to scrutinize whether government action complies with the *Charter* when the notwithstanding clause is proactively invoked. FOLA takes no position on the remaining issues on appeal.
5. The power to issue declaratory relief flows from the inherent and core remedial jurisdiction of the superior court. This core jurisdiction was affirmed by section 96 of the *Constitution Act, 1867 (UK)*, 30& 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 ("**Constitution Act, 1867**").<sup>2</sup> The availability of this remedy, even when it becomes operable only after five (5) years from the date of enactment pursuant to subsection 33(3) of the *Charter*, is essential to the proper functioning of our democracy.
6. Declaratory relief fosters the crucial dialogue between the courts and other branches of government within our constitutional order. The rule of law requires that the public and directly impacted individuals are informed of government compliance with the constitution. Public confidence in the administration of justice requires that individuals be able to access the courts to determine whether government legislation violated their *Charter* rights. The right to obtain this knowledge should exist irrespective of whether the

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>2</sup> *Constitution Act, 1867 (UK)*, 30& 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

operational effect of the declaration of invalidity is suspended by subsection 33(3) of the *Charter*. The inherent jurisdiction of superior courts to perform this function is foundational to holding governments accountable in our free and democratic society.

7. FOLA will give this Honourable Court a distinct and useful perspective by virtue of its decades long experience advocating for approximately 12,000 lawyers and the justice system as a whole. FOLA will provide this Honourable Court with the unique and helpful perspective of its members, especially those in rural and underserviced areas.
8. This affidavit will address:
  - a. My professional background;
  - b. FOLA's mandate and activities;
  - c. FOLA's unique expertise and insight into the administration of justice and rule of law;
  - d. FOLA's interest in this appeal; and
  - e. How FOLA's unique perspective can assist this Honourable Court in resolving the critical issue of whether section 33 limits the inherent and core jurisdiction of the superior courts.

## **II. Professional Background**

9. I am FOLA's Director of Policy and Advocacy. I was called to the bar of Ontario in 2008. I practiced law for over thirteen (13) years in Barrie and Toronto, starting in a small local practice and moving to in-house counsel as the face of LAWPRO, Ontario's legal malpractice insurer.
10. In January of 2024, I became FOLA's Director of Policy and Advocacy. In addition to my role as FOLA's Board advisor, I regularly speak with government regulators, elected officials and media on FOLA's perspectives on issues of fundamental importance to the legal profession and the administration of justice.
11. Prior to becoming the Director of Policy and Advocacy of FOLA, I was extensively involved in Ontario's legal profession and the broader community. I was:

- a. Chair of the Ontario Bar Association's Solo, Small Firm & General Practice Division (2016-2017);
  - b. Board Member representing the Central-East Region of the Ontario Bar Association (2016-2020);
  - c. Vice President of the Federation of Asian Canadian Lawyers (2011-2013);
  - d. Board Member of the American Bar Association's ABA TECHSHOW 2020;
  - e. Chair of the American Bar Association's Law Practice Today webzine (2017-2018);  
and
  - f. Leadership Member of the American Bar Association's Law Practice Division (2015-2019).
12. In addition to leading the above legal organizations, I have spoken at over 200 conferences and events on the administration of justice and legal education.

## **II. FOLA's Mandate and Activities Regarding the Administration of Justice**

13. As one of Ontario's leading legal organizations, FOLA is the only Ontario law association with an active presence in all regions of Ontario, representing 46 county and district law associations. Together with FOLA's affiliate, the Toronto Lawyer's Association, FOLA advocates on behalf of approximately 12,000 lawyers. They are the front lines of legal service delivery in Ontario.
14. Created in 1980 as an unincorporated association, FOLA was incorporated as a not-for-profit in 1990 to represent Ontario's county and district law associations. FOLA is considered a respected stakeholder within the legal community, providing well-informed and practical guidance to regulators, government officials and the courts.
15. FOLA continuously monitors and responds to issues concerning the legal profession and access to justice. FOLA is consistently involved in and consulted on issues surrounding access to justice, the rule of law, the independence of the Courts and the practice of law in county and district law associations. Alongside its role as an advocate of advocates, FOLA sits on several working groups, committees, and consultative bodies facilitated by the

courts, the Law Society, LiRN, the provincial government, and other justice sector participants. A select few examples include:

- a. Submissions to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts ([2019](#));
- b. Submissions to the Ministry of the Attorney General of Ontario's consultation in review of family legislation, regulations and processes ([2019](#));
- c. Submissions to the Attorney General of Ontario, Legal Aid Ontario and the Law Society of Ontario regarding the review of the Legal Aid Services Act ([2019](#));
- d. Submissions to the Ministry of the Attorney General of Ontario regarding Bill 190, the COVID-19 and Reforms to Modernize Ontario Act and the Notaries Act regarding Virtual Commissioning and Virtual Notarization ([2020](#));
- e. Submissions to the Ministry of the Attorney General of Ontario regarding the *Accelerating Access to Justice Act, 2021*, and reforms to the *Courts of Justice Act* and the Judicial Appointments Advisory Committee ([2021](#));
- f. Submissions to the Ministry of the Attorney General of Ontario regarding a Proposed Regulation on the Service of Summons under the Provincial Offences Act ([2021](#));
- g. Submissions to the Ministry of the Attorney General of Ontario on mandatory minimum compensation for Experiential Training for Articling Students ([2022](#));
- h. Submissions to the Federal Government's Consultation for the 2023 Federal Budget ([2023](#));
- i. Submissions to LSO on increased transparency in licensee reporting and disclosure to the public ([2024](#));

- j. Numerous submissions and/or consultations to the Law Society of Ontario and the judiciary on issues pertaining to the regulation of the legal profession and the practice of the law;
  - k. Regularly advocating on behalf of its members to justice sector stakeholders at all levels to advance the cause of justice and address the challenges inherent to our justice system; and
  - l. FOLA is regularly asked by and consults with members of the judiciary, regulators and legislators to provide the perspective of Ontario's law associations on issues of importance in the judicial sector, such as changes to legislation, the regulation of the legal profession, as well as the functioning of the judicial system.
16. FOLA regularly fosters collaboration amongst the diverse voices of law associations across Ontario, soliciting and cultivating the views of its membership to safeguard the administration of justice. It is consistent in highlighting the importance of access to justice, the role that courts play in upholding the rule of law and ensuring that members of the public know what the law is, as well as its limits.
17. FOLA will provide the unique position of Ontario's law associations representing approximately 12,000 lawyers from diverse areas of practice, many of which are in rural and underrepresented areas.

### **III. FOLA's Interest in this Appeal**

18. FOLA has a genuine interest in this appeal. Change to the inherent and core jurisdiction of the superior courts to address *Charter* challenges is an issue of significant public importance. Not only will it impact public confidence in the administration of justice, it will impact the ability of lawyers to advocate for their clients and uphold the rule of law.
19. As lawyers, we have a positive duty to our clients to raise all issues without fear; put forth every argument; and ask every question, however distasteful or unpalatable, so long as we believe it will help the client's case. As such, lawyers should endeavor to pursue all legal remedies and defences available to their clients, so long as they are permitted under law.



Lawyers are required, in the public interest, to not only know the law but safeguard their clients' rights to access the courts.

20. FOLA is consistently active in communicating the day-to-day realities confronted by lawyers and law associations in their shared role as guardians of the rule of law. In so doing, FOLA recognizes that the rule of law is fostered by the continuous existence of and access to the courts. The inherent jurisdiction of superior courts is the keystone of this access. It is crucial to maintaining the rule of law, as opposed to the rule *by* law.
21. With its diverse membership across Ontario, FOLA is able to provide the practical perspectives of legal professionals at the frontlines of the justice system, often practicing in rural and underserviced areas. FOLA's membership affirms that the rule of law requires the continuous existence of and access to the courts.

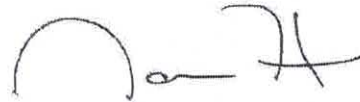
#### **IV. How FOLA Can Assist the Court in this Appeal**

22. In consolidating the perspectives of 46 law associations across Ontario, FOLA seeks to provide this Honourable Court with the following helpful and distinct perspective:
  - a. Section 96 of the *Constitution Act, 1867* protects the inherent and core jurisdiction of superior courts to declare a law to be unconstitutional and therefore of no force and effect absent Parliament or the legislatures invocation of the notwithstanding clause;
  - b. Properly construed, section 33 of the *Charter* does not limit the inherent jurisdiction of the superior courts to grant a declaration of invalidity (or a suspended declaration of invalidity in the alternative). Issued pursuant to subsection 52(1) of the *Constitution Act, 1982* (supremacy clause), a declaration of invalidity for want of *Charter* compliance is suspended by operation of subsection 33(3) of the *Charter*. Unless the notwithstanding clause is renewed, the legislation will become of no force and effect by operation of the declaration after the expiration of the time limit contained in subsection 33(3) of the *Charter*; and
  - c. In granting a declaration of invalidity (or a suspended declaration of invalidity in the alternative), the superior courts perform a function essential to both the rule of

law and the democratic process by determining the impact of legislation on constitutional rights. *Qua* the rule of law, a person is entitled to know whether government action improperly infringes upon their sections 2, and 7 to 15 *Charter* rights. *Qua* the democratic process, the electorate is given the opportunity to meaningfully evaluate their elected officials when the superior court declares whether government action is consistent with the *Charter*.

23. If granted leave to intervene, FOLA respectfully states that it intends to make submissions that will be useful to the Court and distinct from those of the Parties and other interveners. As set out above, FOLA possesses unique expertise and insight that allows it to respond to this issue on appeal.
24. It is in the interests of justice that FOLA be granted leave to intervene. FOLA will not unduly delay the proceedings.
25. I make this affidavit in relation to the within Motion and for no other or improper purpose.

**SWORN REMOTELY BEFORE ME** by )  
 Ian Hu located in the Village of Midhurst, )  
 in the Province of Ontario, before me in the )  
 City of Ottawa, in the Province of Ontario )  
 this 20th day of May, 2025, in accordance )  
 with O.Reg 431/20 )



**Ian Hu**



Lucie O. C. Atangana (LSO # 89325B)

*A Commissioner for Taking Affidavits*

## PART I - OVERVIEW

1. This appeal concerns the pre-emptive use of section 33 of the *Charter of Rights and Freedoms* (the “**Charter**”)<sup>1</sup> – the notwithstanding clause – and the constitutionality of Quebec’s *Act respecting the laicity of the State* (the “**Act**”).<sup>2</sup> The *Act* regulates the display of religious symbols for members of the Public Service and others who exercise government functions. The determination of this appeal will have significant implications for Canada’s constitutional order, the rule of law, and the principles of fundamental justice.
2. In resolving this appeal, the Supreme Court of Canada will determine whether the inherent and core jurisdiction of Canada’s superior courts to grant declaratory relief can be limited by operation of the notwithstanding clause. Representing over 46 law associations across Ontario, the Federation of Ontario Law Associations’ (“**FOLA**”) mandate is to support Ontario lawyers in fulfilling their obligations to uphold the rule of law and advance the cause of justice in a fair, balanced and accountable justice system. FOLA has a genuine interest in maintaining the inherent and core jurisdiction of the superior courts to scrutinize whether government action complies with the *Charter* when the notwithstanding clause is proactively invoked. FOLA takes no position on the remaining issues on appeal.

## PART II - QUESTIONS IN ISSUE

3. The sole issue is on this Motion is whether to grant FOLA leave to intervene in this appeal.

## PART III - STATEMENT OF ARGUMENT

### A. FOLA satisfies the test for leave to intervene

4. Leave to intervene may be granted where a party (1) has a real and substantial interest or particular expertise in the subject matter before the Court; and (2) will provide submissions that are useful to the Court and different from those of the parties.<sup>3</sup> FOLA satisfies both prongs of the test for leave to intervene in this appeal.

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the “**Charter**”].

<sup>2</sup> *Act respecting the laicity of the State*, [CQLR c L-0.3](#) [**Act**].

<sup>3</sup> *Rules of the Supreme Court of Canada*, [SOR/2002-156](#), ss. 55 and 57(2)(b); *R v Barton*, [2019 SCC 33](#), at para. 52; *Reference re Workers’ Compensation Act*, [1983 \(Nfld\)](#), [\[1989\] 2 SCR 335](#), at 339 [**Workers’ Compensation**].

*i. FOLA has a real interest in the subject matter of this appeal*

5. FOLA is a provincial legal organization and a respected stakeholder within the legal community. FOLA regularly engages in advocacy for sound, policy-minded developments in the judicial system, whether in Ontario or Canada-wide. FOLA is the leading voice of legal associations comprised of judges, lawyers and other legal professionals in the province of Ontario<sup>4</sup>. FOLA is consistently active in monitoring and responding to issues concerning the legal profession and access to justice, while consolidating the views of its diverse membership, of legal experts, thereby possessing a unique vantage point for this appeal.<sup>5</sup>
6. FOLA has a deep interest in the protection of the superior courts' inherent jurisdiction. The power to issue declaratory relief flows from the inherent and core remedial jurisdiction of the superior courts. This core jurisdiction was affirmed by section 96 of the *Constitution Act, 1867*.<sup>6</sup>
7. The availability of declaratory relief is essential to the proper functioning of our democracy, even when the declaration of invalidity becomes operable only after five (5) years from the date of enactment of the notwithstanding clause pursuant to subsection 33(3) of the *Charter*. This is because declaratory relief fosters the crucial dialogue between the courts and other branches of government within our constitutional order. The rule of law requires that the public and directly impacted individuals are informed of government compliance with the constitution.
8. Likewise, public confidence in the administration of justice requires that individuals be able to access the courts to determine whether government legislation violated their *Charter* rights. The right to obtain this knowledge should exist irrespective of whether the operational effect of the declaration of invalidity is suspended by subsection 33(3) of the *Charter*. The inherent jurisdiction of the superior courts to perform this function is foundational to holding governments accountable in our free and democratic society.

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<sup>4</sup> Affidavit of Ian Hu, para. 13

<sup>5</sup> *Ibid.*, at para. 15-16

<sup>6</sup> *Constitution Act, 1867* (UK), 30& 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [*“Constitution Act, 1867”*].

9. FOLA seeks leave to intervene in this appeal as the ability of the courts to provide declaratory relief, even where Parliament or a legislature (collectively referred to as the “**legislatures**”) willfully and proactively invokes section 33, is a core competence of the courts and cannot be restricted by section 33. Change to the inherent and core jurisdiction of the superior courts to address *Charter* challenges will not only impact public confidence in the administration of justice, it will also impact the ability of lawyers to advocate for their clients and uphold the rule of law. As an association concerned with access to justice in often rural and underserviced areas across Ontario, FOLA possesses a unique expertise and insight into how the rule of law is fostered by the continuous existence of and access to the courts. The inherent jurisdiction of superior courts is the keystone of this access. It is crucial to maintaining the rule of law, as opposed to the rule *by* law.
10. The issues in this appeal will directly impact FOLA and its members, which maintain a duty to the courts and Canada’s justice system at large to uphold its integrity in all circumstances.<sup>7</sup> The duties of legal professionals require that they consistently act in a manner which maintains public confidence in the proper administration of justice and in the rule of law.

***ii. FOLA will make submissions that are useful and different***

11. If granted leave to intervene, FOLA respectfully states that its intended submissions will be useful to this Honourable Court, and distinct from those of the Parties and other interveners. To satisfy the “useful and different” submissions criterion, applicants for leave to intervene must provide submissions or have specific expertise that will shed light on the issues before the Court or impart the Court with new information on the matters at issue.<sup>8</sup>
12. FOLA's broad and diverse membership provides a wealth of knowledge and expertise on matters pertaining to the courts and judicial processes, as well as to the administration of justice. FOLA and its members are experienced with and regularly involved in public dialogue surrounding the protection of the core functions of the courts and of the prudent accountability mechanisms available within Canada’s judicial system.

**B. FOLA’s PROPOSED SUBMISSIONS**

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<sup>7</sup> *Ibid.*, at para. 17.

<sup>8</sup> *Workers’ Compensation*, at 340.

13. The Court of Appeal of Quebec has held that section 33 operated as a “*constitutional privative clause*”, thereby limiting the power of courts to review the conformity of an act with the relevant provisions where section 33 is proactively invoked.<sup>9</sup> From the perspective of legal professionals protecting access to justice in often rural and underserved areas, FOLA respectfully asks this Court to consider the broader implications of a constitutional order where the ability of the courts to review the legality and constitutionality of government action is restrained.

***i. Inherent and core jurisdiction: the jurisdiction of courts to review the constitutionality of government action is not limited by section 33***

14. If granted leave to appeal, FOLA will demonstrate that section 33 does not limit the inherent and core jurisdiction of superior courts, which are seen as the primary guardians of the *Charter*. The ability to review the constitutionality of legislation enacted by Parliament or a legislature is an integral function of the courts. This function is enshrined in section 96 of the *Constitution Act, 1867* and the unwritten constitutional principles that inform its interpretation. They require that the independence of courts be respected.<sup>10</sup>

15. In *MacMillan Bloedel Ltd. v. Simpson*, this Honourable Court held that the “*Canadian Constitution confers a special and inalienable status on what have come to be called the “section 96 courts”*”, in reference to the superior, district and county courts of each province and that this system “*cannot be destroyed or weakened*”.<sup>11</sup> The core jurisdiction of superior courts confers upon them an inalienable status.<sup>12</sup> While narrow, this jurisdiction is essential to the courts’ existence and to the crucial role of review they play within the Canadian justice system under the “*common law of public interest*”.<sup>13</sup>

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<sup>9</sup> *Organisation mondiale sikhe du Canada c. Procureur général du Québec*, [2024 QCCA 254](#), para. 358 [**QCCA Judgment**]

<sup>10</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1995 CanLII 57 \(SCC\)](#), [\[1995\] 4 SCR 725](#), para. 51 [**MacMillan**].

<sup>11</sup> *Ibid* at [para. 52](#).

<sup>12</sup> *Reference re Code of Civil Procedure (Que.)*, art. 35, [2021 SCC 27](#), para. 202 [**Reference re Code of Civil Procedure**]; *Macmillan*, *Supra* note 10 at para. 52

<sup>13</sup> *Babcock v. Canada (Attorney General)*, [2002 SCC 57](#), para. 59 [**Babcock**]; *Reference re Code of Civil Procedure*, *supra* note 12 at [para. 233](#); *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), para. 29 [**Trial Lawyers**];

16. FOLA states that section 33 of the *Charter* is not a license for unaccountable government action. It does not immunize the state from all forms of accountability and democratic scrutiny. The power of superior courts to exercise constitutional control flows from “*their very nature*”, and “*cannot be removed from them or unduly fettered*”.<sup>14</sup> This integral role, inherent to superior courts, requires that their core powers remain protected from legislative interference.<sup>15</sup> FOLA submits that the status of superior courts ensures that their integral functions remain protected, such that a restriction on a court’s ability to determine whether or not government action is compatible with the *Charter* strikes at the very integrity of this system. To preclude courts from a substantive review of the consistency of government action with the Constitution violates their inalienable status and their constitutional protection.<sup>16</sup>
17. The exercise of the Court’s inherent jurisdiction to review the consistency of legislation enacted by legislatures does not interfere with a government’s prerogative to determine permissible legislative policy. While this Honourable Court has recognized that the “*strict separation of powers is not a feature of the Canadian Constitution*”,<sup>17</sup> supervision of the exercise of public power is a fundamental aspect of the rule of law which keeps with the principle of the separation of powers.<sup>18</sup> Although an unwritten principle, the rule of law is fundamental to the Constitution and central to the interpretation of section 96 of the *Constitution Act, 1867*,<sup>19</sup> including this Honourable Court’s understanding of the core jurisdiction of superior courts, namely, to ensure the legality of “*exercises of public power*” and to protect from “*arbitrary government action*”.<sup>20</sup>
18. If granted leave to intervene, FOLA intends to submit that judicial review, even where of suspended consequence, is necessary where a legislature proactively invokes section 33. Without the inherent jurisdiction to make such declarations, legislators would effectively

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<sup>14</sup> *Reference re Code of Civil Procedure*, *supra* note 12 at [para. 51](#).

<sup>15</sup> *Ibid* at [para. 49](#).

<sup>16</sup> *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048, para.126 [U.E.S].

<sup>17</sup> *MacMillan*, *supra* note 11.

<sup>18</sup> *Reference re Code of Civil Procedure*, *supra* note 12 at [para. 46](#).

<sup>19</sup> *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 56 [**Toronto v. Ontario**]; see also Robert Leckey & Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts, and the Electorate” (2022) 72 UTLJ 189 at 197, online:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3841568](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841568) [perma.cc/P3Y8-Z96Z].

<sup>20</sup> *Reference re Code of Civil Procedure*, *supra* note 14.

deprive individuals of “*the means by which the courts supervise those who exercise statutory powers*”<sup>21</sup> by invoking s. 33 prior to any determination of the legality of government action. The Quebec Court of Appeal’s finding that the proactive use of section 33 completely precludes any review of the consistency of government action with the *Charter* places section 33 at odds with this principle under section 96.<sup>22</sup> In light of the principle that one part of the Constitution may not be used to abrogate another,<sup>23</sup> this raises a novel issue warranting a review of the framework established in *Ford*. This also calls for an elaboration of the principles to be applied where courts are asked to exercise constitutional control of government action.<sup>24</sup>

19. FOLA intends to respectfully request that this Honourable Court follow the Saskatchewan King’s Bench conclusion in *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan* on the jurisprudential role of its decision in *Ford* with respect to the interpretation of section 33. Specifically, that “*the decision in Ford does not provide any direction on whether or not such invocation necessarily removes a court’s ability to review and provide comment on the legislation at issue*”.<sup>25</sup>
20. FOLA intends to submit that judicial review is a central power within the core jurisdiction of superior courts, which this Honourable Court has always preserved against legislative interference.<sup>26</sup> Should leave to intervene be granted, FOLA’s submissions will solely focus on this issue.

***ii. Courts may provide declaratory relief without interfering with parliamentary supremacy***

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<sup>21</sup> *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), para. 28

<sup>22</sup> *QCCA Judgment*, *supra* note 9 at [paras. 347-350](#).

<sup>23</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#) at para. 42

<sup>24</sup> *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#), para. 42 [**Bedford**].

<sup>25</sup> *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, [2024 SKKB 23](#), para. 140 [**UR Pride**]

<sup>26</sup> *Trial Lawyers*, *supra* note 13 at para. 30; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [\[1997\] 3 S.C.R. 3](#), para. 88; *Reference re Code of Civil Procedure*, *supra* note 12, at [para. 65](#); *MacMillan*, *supra* note 10 at [para. 37](#).



21. If granted leave, FOLA will provide a unique and useful perspective on how the principle of parliamentary supremacy is consistent with the issuance of a declaration of *Charter* inconsistency when the notwithstanding clause has been pre-emptively invoked.
22. This Honourable Court has given precedence to the written text of the Constitution, such that unwritten principles alone, or in combination, cannot invalidate legislation.<sup>27</sup> FOLA intends to submit that, in applying a purposive approach to the interpretation of the *Charter*, this Honourable Courts' analysis must begin with the written text of the Constitution. Its constraints cannot be ignored.<sup>28</sup> Applying this approach to section 33, it is clear that section 33(2) is solely concerned with the operation of a law infringing section 2 and ss. 7 to 15 of the *Charter*.<sup>29</sup> It in no way constraining judicial review.
23. Moreover, the unwritten constitutional principles may serve to develop structural doctrines that are necessary for the coherence of the Constitution's architecture.<sup>30</sup> In *Reference re Secession of Quebec*, relying on its conclusions in *re Manitoba Language rights* ("**re Manitoba**"), this Honourable Court held that "*the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases*".<sup>31</sup> In so far as a written constitution provides legal certainty and predictability<sup>32</sup>, the rule of law requires that section 33 be interpreted in a manner that prevents the very chaos and uncertainty that this Honourable Court has found to be intolerable.<sup>33</sup>
24. FOLA submits that parliamentary supremacy is respected because the operation of the declaration of *Charter* inconsistency is suspended by operation of subsection 33(3) for the time prescribed by the notwithstanding clause (up to five (5) years) from the date of enactment. Furthermore, in light of section 33's silence on the role of the courts where the

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<sup>27</sup> *Toronto v. Ontario*, *supra* note 19 at [para. 58-60](#).

<sup>28</sup> *Quebec (Attorney General) v 9147-0732 Québec inc.*, [2020 SCC 32](#), paras. 8-11

<sup>29</sup> Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 UTLJ 510 at 520-522, online : [<https://ssrn.com/abstract=3935891>](https://ssrn.com/abstract=3935891)

<sup>30</sup> *Toronto v. Ontario*, *supra* note 19.

<sup>31</sup> *Reference re Secession of Quebec*, [1998] [2 SCR 217](#) at para.145.

<sup>32</sup> *Ibid* at [para. 53](#).

<sup>33</sup> *Re Manitoba Language Rights*, [1985] [1 S.C.R. 721](#) at paras. 83-84 [**re Manitoba**].

notwithstanding clause is invoked proactively, a declaration of invalidity that is suspended until the expiration of the time limit contained in subsection 33(3) is an example of a structural doctrine which serves to “fill gaps” in this silence.<sup>34</sup> Moreover, suspended declarations of invalidity are in line with the doctrine of necessity, pursuant to which the legislatures are empowered to take “*such necessary steps as are warranted*” based on the “*exigencies of the situation*”.<sup>35</sup>

25. Further, the operation of the Constitution’s supremacy clause is independent of judicial review. A declaration of right solely allows courts to exercise their functions of constitutional review and government accountability.<sup>36</sup> As held by this Honourable Court, the supremacy clause is mandatory and does not typically provide discretion to judges.<sup>37</sup> The effect of the supremacy clause in section 52(1) is such that legislation inconsistent with sections 2, 7 to 15 of the *Charter* remains operational for a maximum of five (5) years by operation of section 33(2) of the *Charter*.<sup>38</sup> Moreover, “[t]he fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving” a dispute.<sup>39</sup>

**iii. *The Court must consider the broader implications of a complete immunization of the state from the examination of the consistency of government conduct with the principles of fundamental justice guaranteed under the Charter***

26. FOLA will submit that the right of judicial review must be protected and is essential to Canadian democracy and to the rule of law.<sup>40</sup> As the Trial Judge had noted, the simple recognition of the rights guaranteed by the *Charter* favours a restrained use of the legislator’s powers to restrain them.<sup>41</sup> A suspended declaration of invalidity is aligned with the

<sup>34</sup> *Toronto v. Ontario*, *supra* note 19.

<sup>35</sup> *Re Manitoba*, *supra* note 33, para. 104.

<sup>36</sup> *Daniels v. Canada*, [2016 SCC 12](#), para. 15[**Daniels**]; *Canada (Prime Minister) v. Khadr*, [2010 SCC 3](#) at para. 47 [**Khadr**].

<sup>37</sup> *Webber* *supra* note 29 ; see also *R v. Ferguson*, [2008 SCC 6](#), para. 47 [**Ferguson**]

<sup>38</sup> *Webber*, *supra* note 29 at pg. 521-523

<sup>39</sup> *Solosky v. The Queen*, [1980] 1 SCR 821, pg. 822 [**Solosky**].

<sup>40</sup> *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, [2008 SCC 26](#), paras. 13-14; *Canada (Attorney General) v. TeleZone Inc.*, [2010 SCC 62](#), para. 24-26 [**Telezone**]

<sup>41</sup> *Hak c. Procureur général du Québec*, [2021 QCCS 1466](#), at para. 757.

Constitution and serves to reinforce democratic accountability by fostering a better understanding of the law's impact on the rights of individuals for the electorate.<sup>42</sup> As Justice Marc-André Blanchard rightfully held at trial, “*les Tribunaux, en tant que gardien de la primauté du droit et de la Constitution se doivent d'éclairer cette connaissance des fruits de leurs expertises*” and even further, “*il faudrait possiblement que le législateur doive et puisse expliquer en cas de contestation, [...] simplement l'existence d'une certaine connexité entre la suspension des droits et libertés et les objectifs poursuivis par la législation en question*”.<sup>43</sup> Ultimately, the “[d]elineating and assigning” of constitutional authority that follows a declaration of right where the notwithstanding clause is proactively invoked is an exercise that is essential to the rule of law and is of practical utility.<sup>44</sup>

27. FOLA respectfully submits that it is crucial for this Honourable Court to consider the implications of the pre-emptive use of the notwithstanding clause on the principles of fundamental justice. A restriction on the fundamental principles of justice, while lawfully permitted by section 33 is nonetheless troubling.<sup>45</sup> This is especially so where such use escapes any form of accountability, in light of the ancient role of fundamental principles of justice, such as the right of *habeas corpus* and the fundamental importance of access to justice in Canada's constitutional arrangement.<sup>46</sup> FOLA respectfully urges this Honourable Court to consider the broader implications that a restriction of the principles of fundamental justice would have on Canada's constitutional order.<sup>47</sup>

28. FOLA further submits that while the issue of a derogation from the fundamental principles of justice has never been placed before the courts, it is a reasonable hypothetical situation<sup>48</sup> that is not far-fetched if the courts were to uphold the complete immunization of the state from judicial review where the notwithstanding clause is proactively invoked. A derogation from the principles of fundamental justice in such circumstance goes to the basic tenets and

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<sup>42</sup>Robert Leckey and Eric Mendelsohn *supra* note 19

<sup>43</sup> *Hak c. Procureur général du Québec*, [2021 QCCS 1466](#), paras. 775-777 [QCCS Judgment].

<sup>44</sup> *Daniels*, *supra* note 36 at [para. 12](#); *Borowski v. Canada (Attorney General)*, [\[1989\] 1 SCR 342](#), pg. 353 [Borowski]

<sup>45</sup> *QCCS Judgment*, *supra* note 43, at [para. 761](#).

<sup>46</sup> *Trial Lawyers*, *supra* note 13 at [para. 32](#).

<sup>47</sup> *Daniels*, *supra* note 44.

<sup>48</sup> *R v. Nur*, [2015 SCC 15](#), para.52.

principles of Canada's legal system and cuts to the integral notion of the administration justice.<sup>49</sup> Ultimately, such considerations will be crucial to the interpretation of s. 33 and to the consistency of government action with the Constitution.<sup>50</sup>

#### **PART IV – STATEMENT ON COSTS**

29. In this Motion and in its intervention if granted leave to intervene, FOLA does not seek costs and requests that no costs be ordered against it.

#### **PART V – ORDER SOUGHT**

30. FOLA respectfully requests an Order from this Court:

- a) Granting FOLA leave to intervene in this appeal;
- b) Permitting FOLA to file a factum not exceeding 10 pages in length; and
- c) Permitting FOLA to present oral argument not exceeding 5 minutes in length.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of May, 2025.




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**Black & Associates**

**C. Katie Black**

**Lucie Atangana**

Counsel for the Proposed Intervener,

Federation of Ontario Legal Associations

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<sup>49</sup> *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, paras. 61-64. [Re BC Motor Vehicle Act]

<sup>50</sup> *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para. 5

## PART VI - TABLE OF AUTHORITIES

CASES	Cited in paras.
<i>Babcock v. Canada (Attorney General)</i> , <a href="#">2002 SCC 57</a>	15
<i>Borowski v. Canada (Attorney General)</i> , <a href="#">[1989] 1 SCR 342</a>	26
<i>Canada (Attorney General) v. Bedford</i> , <a href="#">2013 SCC 72</a>	18
<i>Canada (Attorney General) v. TeleZone Inc.</i> , <a href="#">2010 SCC 62</a>	26
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<i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i> , <a href="#">2003 SCC 62</a>	18
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<i>MacMillan Bloedel Ltd. v. Simpson</i> , <a href="#">1995 CanLII 57 (SCC)</a> , <a href="#">[1995] 4 SCR 725</a>	14, 15, 17, 20
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