

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

BETWEEN:

**GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE
MINISTER OF EDUCATION**

**APPELLANT/
RESPONDENT ON CROSS-APPEAL**

-AND-

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

**RESPONDENT/
APPELLANT ON CROSS-APPEAL**

(continued)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. Defence for Children International Canada (“**DCI-Canada**”) seeks to provide this Court with the relevant interpretive tools derived from the *United Nations Convention on the Rights of the Child* (“**CRC**”),¹ a treaty that Canada has ratified as binding upon it as a matter of international law, for purposes of analyzing the effect of a legislative invocation of s. 33 of the *Canadian Charter of Rights and Freedoms* (“**Charter**”).

2. Central to the issues on this appeal is the question of the power of the courts to review and scrutinize the constitutionality of legislation that is shielded by legislative invocation of section 33 of the *Charter*. More particularly, this court will be asked to assess whether courts retain the jurisdiction to declare and review children’s rights, regardless of a valid section 33 declaration.

3. This question has far-reaching consequences for children. The temporal nature of children’s rights means that one of the most important safeguards embedded in section 33, being the requirement to renew the s. 33 declaration after five years, is rendered ineffective. Within a short period of time, children become adults; therefore 5 years of insulation from scrutiny in the context of children’s rights is significant. Furthermore, the inability of children to vote, means that the proclaimed benefit of s. 33, which is to put decisions back in the hands of democratically elected officials, is of little or no import to children who do not themselves have a right to vote and do not play a role in the electoral process.

4. In the result, children’s rights are uniquely vulnerable to remaining outside the democratic calculus of section 33. Not being a part of the democratic dialog prompting a section 33 declaration, the courts are the only avenue through which to determine whether any legislation benefiting from section 33 protection is violative of their constitutional rights. The courts are the principal avenue for children through which to vindicate constitutional rights where section 33 denies any direct avenue to express themselves on point.

5. The paradox of the notwithstanding clause is that when children are most in need of judicial protection from rights infringement, section 33 can be invoked to circumvent that process.

¹ *Convention on the Rights of the Child*, [Can. T.S. 1992 No. 3](#).

This result does not align with Canada’s international law obligations assumed pursuant to the *CRC* and other human rights treaties that Canada has ratified.

PART II – STATEMENT OF ISSUES

6. DCI-Canada takes no position on standard of review.

7. DCI-Canada takes no position on the facts of this appeal.

8. By its core mandate, DCI-Canada is well situated to provide a focused perspective to this court on how the notwithstanding clause may affect the rights of Children across Canada that are particularly informed by the *CRC*

9. This court will be asked to assess the relevance of Canada’s binding international legal obligations on the interpretation of s. 33 of the *Charter*. DCI-Canada will speak to the repercussions of a s. 33 declaration on the rights of children across Canada.

PART III – STATEMENT OF ARGUMENT

(I) Foundational Framework: The Role of International Law

(A) Presumption of Conformity

10. It is well established under Canadian law that international law forms part of the context in which statutes are enacted, and the resulting legislation is presumed to conform to Canada’s legal obligations absent clear legislative intent to the contrary.² The presumption of conformity applies even where there is no direct reference to international legal obligations.³

11. Values and principles that are enshrined in Canada’s treaty obligations and customary international law are relevant and persuasive sources of law for the purpose of interpreting domestic statutes.⁴

² *Hape v. the Queen*, [2007 SCC 26](#) at paras [39](#), [53](#) (per Lebel J.) [*“Hape”*]; accord: *Mason v. Canada (Citizenship and Immigration)*, [2023 SCC 21](#) at para [72](#) [*“Mason”*]; see additional citations at *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32](#) at para [31](#).

³ *Hape* at paras [35–39](#), [53–56](#).

⁴ *Hape* at paras [35–39](#), [53–56](#).

12. Individual and collective constitutional rights, including those afforded by the *Charter* should be interpreted in a manner consistent with particular international human rights obligations that Canada has ratified. *Charter* rights should be interpreted to offer no less protection than the protection recognized in international human rights treaties that Canada has ratified. This Court has consistently held that Canada's international human rights commitments inform the interpretation of *Charter* rights. In *Reference Re Public Service Employee Relations Act (Alta.)* ("*PSSRA*"), Dickson C.J. explained that international human rights law constitutes a "*relevant and persuasive source*"⁵ for *Charter* interpretation and that the *Charter* should generally be presumed to provide protection at least as great as that afforded by international human rights instruments ratified by Canada.⁶ The international norms embedded in the *CRC* which DCI-Canada seeks to elaborate will assist this court in resolving the principal issue of whether or not a legislative declaration under *Charter* section 33 precludes judicial review of the protected legislation.

13. In *Slaight Communications Inc. v. Davidson*, Chief Justice Dickson expounded on the presumption of conformity with international law in *Charter* interpretation, reiterating his earlier position in *PSSRA* that "[t]he content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the *Charter's* protection.'"⁷

14. In *Baker v. Canada (Minister of Citizenship and Immigration)*⁸, a case where DCI-Canada served as an intervenor, this Court found that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. This Court recognized the important role of international human rights laws as an aid in interpreting domestic law.

15. In *Baker*, Justice L'Heureux Dube stated that:

The values and principles of the Convention [CRC] recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the

⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987 CanLII 88 \(SCC\)](#), [1987] 1 SCR 313 [*"PSSRA"*] at para 57.

⁶ *PSSRA* at p. 349.

⁷ *Slaight Communications Inc. v. Davidson*, [1989 CanLII 92 \(SCC\)](#), [1989] 1 SCR 1038 [*"Slaight"*] at p. 1056; *PSSRA* at p. 349; see also *Hape* at paras 53-54 and 56.

⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 SCR 817](#).

Universal Declaration of Human Rights, recognizes that childhood is entitled to special care and assistance”. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959) in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.⁹

16. In result, the *CRC* and the principles arising therefrom, should be taken into account when determining the effect of s. 33 on the court’s ability to scrutinize a law that may have the effect of limiting children’s rights.

(II) The United Nations Convention on the Rights of the Child and Relevant International Treaties

17. The *CRC* was adopted by the United Nations General Assembly on November 20, 1989 and came into force on September 2, 1990.¹⁰ In essence, the Convention shifted the international view of children from being merely objects of protection to individuals with their own legal rights, whose interests ought to be considered in decisions affecting them.

18. Canada ratified the *CRC*¹¹ on December 13, 1991. As such, in analyzing whether a declaration under *Charter* s. 33 precludes judicial review of breaches of children’s rights, the courts should give credence to the international norms that are embedded in the *CRC*.

19. Articles 2, 3, 8, 12, 13, 29, 37 and 40 of the *CRC* contain protections and norms that protect the rights of the child and access to justice through the national legal systems of the parties to the Convention.

20. The *CRC* mandates the following protections:

- (a) The right not to be subject to discrimination, pursuant to Article 2
- (b) The best interests of the child, pursuant to Article 3

⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 71 (emphasis added).

¹⁰ *Convention on the Rights of the Child*, [Can. T.S. 1992 No. 3](#).

¹¹ *Ibid.*

- (c) The right to identity, pursuant to Article 8
- (d) The right to be heard, pursuant to Article 12
- (e) The right to expression, pursuant to Article 13
- (f) The right to development, pursuant to Article 29
- (g) The right not to be subject to, inter alia, cruel, inhuman or degrading treatment or punishment, pursuant to Article 37.
- (h) The right of children to fair treatment and meaningful procedural protections within legal proceedings affecting them, pursuant to Article 40.

21. This Court has also found that section 40 of the *CRC* provides that young people in conflict with the law should be treated in a manner consistent with “the promotion of the child’s sense of dignity and worth.”¹² This Court has expressly found that the necessity of providing procedural protections for young persons can be traced to Canada’s international commitments.¹³

22. *CRC* article 40 also requires that children be afforded special safeguards, care and legal protection by the courts on all matters relating to their best interest.¹⁴ When a child is affected by a government process, the main consideration should be the best interest of the child. That principle is contained in Article 3.1 of the *CRC*.¹⁵

23. The corollary of remedies accompanying rights recognized in *CRC* article 40 is paralleled in, article 2(3) of the *International Convention on Civil and Political Rights* (“*ICCPR*”)¹⁶ and in Article 8 of the *Universal Declaration of Human Rights* (“*UDHR*”)¹⁷ rendering it a common place throughout international human rights conventions and a principal foundation for international human rights law. This corollary relief mandates that states provide remedial relief through their competent national tribunals for acts violating the fundamental rights of their citizens and residents.¹⁸

¹² *R. v. D.B.*, [2008 SCC 25](#), [2008] 2 SCR 3 at para 60.

¹³ *R. v. K.J.M.*, [2019 SCC 55](#), [2019] 4 SCR 39 at para 137.

¹⁴ *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2018 ONCA 559](#) at para 51.

¹⁵ *Ibid.* at para 58.

¹⁶ *International Convention on Civil and Political Rights* Mar. 23, 1973, [999 U.N.T.S. 171](#) (“*ICCPR*”).

¹⁷ [Universal Declaration of Human Rights](#).

¹⁸ *UDHR* and *ICCPR*.

24. When a state violates human rights and deprives an individual of a remedy, the state breaches two separate obligations, which further exacerbates the harm to the individual or group.

25. What follows from this is that where a court is precluded from scrutinizing infringement on children's rights to express themselves, freedom from discrimination and precluded from the assessment of the best interest of a child, the protections enshrined for example in the *CRC*, may be lost. In essence, the children affected by the governmental law in this case, would not have an opportunity to have a court to assess their best interests and whether their rights to express themselves have been infringed.

(III) Section 33 of the Charter: The Notwithstanding Clause

26. Section 33 of the *Charter* allows Parliament or the legislature of a province to derogate from section 2, section 7-14 and section 15 of the *Charter*. S. 33(3) but purports to offer a democratic corrective by mandating that a s. 33 declaration be renewed within 5 years.¹⁹

27. The critical question for this Court is whether a section 33 declaration precludes a judicial determination that the legislative action protected by the Notwithstanding Clause breaches *Charter* rights, not the current validity of that law for the duration of section 33 protection. Some of the *Charter* rights violations that the court would be precluded from assessing, include the child's rights to express themselves, the right to an identity, freedom from discrimination, the right to be heard and to fair treatment. These rights are also captured under articles 1-8 of the *CRC*. Canada's international obligations with respect to the rights of the child must also inform the degree of protection that the children are entitled to under section 7 of the *Charter*.²⁰

(A) Section 33(3) Protection Diminished in the Context of Children's Rights

28. The temporal safeguard contained in section 33(3), which requires the renewal of a s. 33 declaration after 5 years offers limited protection for children where rights may be suspended for the duration of their childhood.

¹⁹ Section [33\(3\)](#) of the [Charter](#).

²⁰ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004 SCC 4](#), [2004] 1 SCR 76 at para [186](#).

29. A child remains a child for a short period of time. Therefore, by the time the government is mandated to account for the declaration after five years, affected children will be adults. This limits the safeguard and increases the need for judicial scrutiny of children's rights and interests before the expiration of five years.

30. An interpretation of the Notwithstanding Clause that limits judicial scrutiny when human rights and more specifically children's rights are at issue, would not conform with Canada's obligations, both domestically and internationally, to ensure that children's rights are not breached and when those rights are breached, that there are effective remedies available.

(B) Exclusion of Children from the Democratic Process

31. Moreover, children do not have a right to vote. Therefore, revising the s. 33 declaration after the passage of five years by elected officials does not assist in the protection of children's rights lost in the interim.

32. *Charter* section 33 is a majoritarian instrument that negates minority interests, here, the rights of the child, where children have no democratic voice. Children have a very limited platform as it relates to the electoral process. It follows that one of the few avenues for their interests to be heard and expressed are through judicial intervention and scrutiny of laws of the government of the day. To the extent that s. 33 precludes such scrutiny, it may result in a breach of Canada's international obligations enunciated in the *CRC*. Section 33, as a constitutional legislative tool, is antithetical to the purpose of constitutional rights entrenchment and fundamental human rights. It should not be interpreted to preclude constitutional accountability by way of at least declaratory relief. This is particularly the case where the children's interest at issue may be an interest or right that is held by a further minority within that group as is the case with the Saskatchewan legislation under review.

33. International human rights instruments, including the *CRC* article 3, confirm the primacy of the best interest principle.²¹ Section 33 declaration should not oust robust judicial scrutiny of the best interest principle put into question by the Saskatchewan legislation. It is settled

²¹ *Kanathasamy v. Canada (Citizenship and Immigration)*, [2015 SCC 61](#), [\[2015\] 3 SCR 909](#) at para [37](#).

law in the constitutional context, particularly with regard to Charter issues that it is the prerogative and duty of the courts to say what the law is.²² The judiciary is the guardian of the Constitution.²³ The interest of the child is central to any decisions that concern the child.²⁴

34. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSA*²⁵, this court found that the *CRC* weighed in favour of interpreting section 91 of the *Youth Protection Act*,²⁶ in a manner consistent with Canada's obligations under the *CRC*. In addition, the court found that the *YPA* should be read in a manner that gave the tribunal all the corrective powers it needed to ensure that the child whose rights have been encroached upon had the fullest and most effective protection available.²⁷

35. The same interpretation should be extended to s. 33 notwithstanding clause. That section ought to be given the most broad and liberal interpretation in light of the *CRC* and Canada's other international obligations related to constitutionally entrenched individual and collective rights. This Court ought to adopt the interpretation of s. 33 that offers the most possible protection to the right of the child. This includes availing the court with the opportunity to review governmental laws that deprive the child of fundamental human right protections and freedom from discrimination. Constitutionally entrenched children's rights would mean very little if they can simply be insulated from scrutiny by ordinary legislation. Even though the legislation may remain valid for the duration of the section 33 invocation, the courts ought to retain the jurisdiction to issue a declaration of unconstitutionality where children's rights are breached.

²² *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at para 12 citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) at p. 175.

²³ *Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145 at p. 155.

²⁴ *W. (V.) v. S. (D.)*, 1996 CanLII 192 (SCC), [1996] 2 SCR 108 at para 76.

²⁵ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSA*, 2024 SCC 43.

²⁶ *Youth Protection Act*, CQLR, c. P-34.1, s. 91.

²⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSA*, 2024 SCC 43 at para 62.

PARTS IV & V – COSTS AND ORDER SOUGHT

36. DCI-Canada takes no position on the ultimate disposition of the Appeal. It seeks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2026.

A handwritten signature in black ink, appearing to read "H. Scott Fairley, as agent for".

H. Scott Fairley

N. Joan Kasozi

Counsel for the Intervener,

Defence for Children International – Canada

PART VI – TABLE OF AUTHORITIES

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