CACV4329

IN THE COURT OF APPEAL OF SASKATCHEWAN

BETWEEN:

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION

Appellant

AND:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

Respondent

AND:

THE ADVOCATES' SOCIETY, AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), ATTORNEY GENERAL FOR NEW BRUNSWICK, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, JOHN HOWARD SOCIETY OF SASKATCHEWAN, JUSTICE FOR CHILDREN AND YOUTH, SASKATCHEWAN FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES, CANADIAN TEACHERS' FEDERATION, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervenors

FACTUM OF THE INTERVENOR, THE ATTORNEY GENERAL OF ALBERTA

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TABLE OF CONTENTS

Part I – Introduction

1. When Parliament or a provincial legislature invokes section 33 of the *Charter*, the issue of whether the legislation violates *Charter* rights becomes an abstract question that courts cannot answer by way of a declaration.

2. Declarations are judicial statements made with respect to *actual* legal states of affairs occurring in real cases over which the court has jurisdiction. Abstract questions do not refer to actual legal states of affairs, do not occur within the context of real cases over which the court has jurisdiction, and can only be answered by courts through non-judicial advisory opinions. Courts have no inherent jurisdiction to issue advisory opinions – they gain such jurisdiction only through statutory reference procedures. Under existing reference procedures, only the Governor in Council and the Lieutenant Governor in Council of each province may pose abstract reference questions to the Court.

3. On this basis, when section 33 is invoked, claimants have no ability to seek declaratory relief from the Court, and the Court has no jurisdiction to provide such relief.

Part II – Jurisdiction and Standard of Review

4. Alberta takes no position.

Part III – Summary of Facts

5. Alberta takes no position.

Part IV – Points in Issue

6. Alberta takes no position.

Part V – Argument

A. *Declarations and advisory opinions are different functions of the Court*

7. Declarations are "authoritative statements of legal states of affairs" – they "set out the parameters of a legal state of affairs or the legal relationship between the parties" and "primarily confirm or deny the legal rights of the parties."[1]

8. A declaration does not provide consequential or coercive relief, but *does* confirm the legal rights of the parties, or the relationship between them.[2] For this reason, declarations are only possible in the context of a real case over which the court has jurisdiction[3] – that is, where the court has authority over both the persons and subject matters before it.

9. A different function that courts occasionally undertake is the issuance of advisory opinions. Questions put to a court by way of reference result in answers that are "only advisory, and will have no more effect than the opinions of the Law Officers"[4] – Law Officers being the lawyers employed by the executive branch of government. *Like* declarations, advisory opinions do not provide consequential or coercive relief. *Unlike* declarations, advisory opinions do not result in legally binding statements of rights,[5] do not rest on real cases, and do not stem from the traditional jurisdiction of the court.

10. When a court issues an advisory opinion, it exercises a legal function, *but does not exercise a judicial function*. Advisory opinions are not judgments.

11. Because advisory opinions do not inherently provide authoritative statements of rights, they can answer abstract legal questions without definitively stating how the law applies to a real

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[1] *Shot Both Sides v Canada*, 2024 SCC 12 at paras 65-66, 490 DLR (4th) 585 [*Shot Both Sides*].
[2] *Ibid* at para 65.
[3] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46, [2010] 1 SCR 44 [*Khadr*].
[4] *Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta v Attorney-General for the Dominion of Canada and the Attorney-General for the Province of British Columbia*, 3 DLR 509 at 517 (UK JCPC).
[5] Even though they are often treated as if they are binding.

case. For example, in *Reference re Same-Sex Marriage*, the Governor in Council referred the following question to the Supreme Court:

> Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs? [6]

12. The Supreme Court answered the question in the affirmative,[7] even though it could not undertake a section 1 justification analysis, and even though it only had a proposed act on the topic of civil marriage before it.[8]

B. *Courts do not have inherent jurisdiction to issue advisory opinions*

13. Jurisdiction refers to a court's power to exercise its authority over persons and subject matters – it is about "competence to decide."[9]

14. Courts have an "extremely wide jurisdiction" when considering declaratory relief.[10] However, this does not mean that courts may opine on any issue that a party may raise. For example, the principle of justiciability suggests that courts should not opine "about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding."[11]

15. Jurisdiction also requires that a distinction be drawn between the judicial task of issuing a declaration and the non-judicial task of issuing an advisory opinion. No jurisdiction is exercised

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[6] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 2, [2004] 3 SCR 698.
[7] *Ibid* at para 56. The Court expressed its opinion in a markedly conditional grammatical mood: "*If* a promulgated statute *were* to enact compulsion, we conclude that such compulsion *would almost certainly* run afoul of the *Charter* guarantee of freedom of religion": para 56.
[8] *Ibid*. The Court did say that it "seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*": para 58.
[9] *Québec (Attorney General) v Guérin*, 2017 SCC 42 at para 70, [2017] 2 SCR 3, Brown and Rowe JJ concurring.
[10] *Shot Both Sides*, *supra* note 1 at para 67.
[11] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 35, [2018] 1 SCR 750.

where an individual merely opines on a legal issue without judicial authority to determine rights and have that opinion enforced.

16. A legal opinion is not an exercise of jurisdiction *unless* it proceeds (1) from the mouth or pen of a person with the authority to exercise jurisdiction and (2) in a situation where the grant of that jurisdiction applies. For example, a judge who opines about one of her cases to a fellow judge behind closed doors is not exercising a jurisdiction to decide.

17. An advisory opinion is an example of a situation where the author may be a judge, yet not be acting in a judicial capacity so as to constitute an exercise of jurisdiction. When a court issues an advisory opinion, there is no person or subject matter properly before the court. The court does not *determine* rights in the sense of an authoritative pronouncement. An advisory opinion is the same function performed by the law officers of the Crown (who are not judges). An advisory opinion may have a *legal* function, but it does not have a *judicial* function.

18. As far back as the fourteenth century,[12] the Crown has often looked to its legally trained judges for advice. However, this practice has *never* been understood as a judicial activity, and many jurisdictions have resisted the practice as a result.

19. For example, in 1793, justices of the U.S. Supreme Court refused to answer 29 questions submitted by President Washington with respect to operation of treaties between the United States and France. The justices cited "strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments."[13]

20. In Canada, the practice of answering advisory questions is allowed *despite* recognition by the Supreme Court that they are of a non-judicial nature. In 1910, in *Re References by the*

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[12] "The Validity of the Restrictions on the Modern Advisory Opinion" (1977) 29:2 Me L Rev 305 at 307.
[13] Manley O. Hudson, "Advisory Opinions of National and International Courts. I. National Courts" (1924) 37:8 Harv L Rev 970 at 976.

Governor-General in Council,[14] several provinces challenged the reference practice, arguing that the federal government's broadly framed power to ask questions of the Supreme Court was unconstitutional because the answers requested were "of an entirely advisory and non-judicial character, not by way of the exercise of functions of a court of appeal nor of a court for the administration of the laws of Canada."[15]

21. A majority of the Supreme Court disagreed with this position, holding that the non-judicial character of advisory opinions did not preclude them, as a matter of constitutionality, from exercising the duty granted them in the *Supreme Court Act*[16], to hear, consider, and answer questions referred to them by the Governor in Council. Fitzpatrick CJ held that although a judge should "be cautious how he *extra-judicially* answers questions," it should not be forgotten that judges "*as citizens* are bound to perform all the duties which are imposed upon them by either the Dominion or the local legislature."[17] Anglin J reasoned that though "Parliament could have provided for the creation of a body of law officers and have imposed upon it the duty of advising upon such questions," "I know of nothing to prevent its requiring the discharge of such duties by lawyers who happen to be members of this court."[18] Judges who answer reference questions do so not as judges, but as citizens fulfilling statutory duties.

22. Because advisory opinions are non-judicial, they are a function that courts may *only* exercise when a statute delegates that authority. This authority is limited to the reference question procedure provided for in various statutes, whereby the Governor in Council or the Lieutenant Governor in Council refers a question to the designated court for consideration. There is neither inherent nor statutory jurisdiction to issue advisory opinions apart from this statutory procedure.

23. The non-judicial character of advisory opinions is evident in legislation that provides for reference questions. Reference legislation specially provides that advisory opinions provided

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[14] *Re References by the Governor-General in Council*, (1910) 43 SCR 536 at 543.
[15] *Ibid* at 543.
[16] RSC 1906, c 139.
[17] *Re References by the Governor-General in Council*, *supra* note 14 at 551. [emphasis added]
[18] *Ibid* at 593-4.

under statute are to be treated as judgments because it would not otherwise be the case. Because advisory opinions are not judgments, it is necessary for reference legislation to state, for example, that "the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court."[19] In Saskatchewan, this Honourable Court is specifically instructed to "certify to the Lieutenant Governor in Council its opinion and reasons on the matter referred in the same manner as in the case of a judgment."[20] The Lieutenant Governor in Council may further include in the terms of the reference that this Court's opinion "shall be *deemed* a judgment."[21] These special provisions would not be necessary if advisory opinions were naturally a type of judgment that courts could make.

C. Where section 33 is invoked, the Court is limited to providing advisory opinions

24. A reference question is an abstract question with an abstract answer. Similarly, the question of whether legislates violates certain *Charter* rights even though the legislature has invoked section 33 is an abstract question with an abstract answer. The actual practice of courts in constitutional litigation supports this view.

25. Except as a form of shorthand, courts do not *merely* declare that an act violates a certain *Charter* right or freedom.[22] Rather, Courts declare that an act is inconsistent with the Constitution and is therefore of no force and effect. Only these latter declarations fully describe the actual legal state of affairs when legislation is challenged.

26. A statement that a *Charter* right has been violated is only a stepping stone to a declaration fully setting out the actual state of legal affairs. Where legislation is challenged, the role of the court is to "resolve conflicts between the Constitution and ordinary statutes",[23] and

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[19] *Supreme Court Act*, RSC 1985, c S-26.
[20] *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, s 3.
[21] *Ibid*, s 2(2). [emphasis added]
[22] One notable exception is *Re B.C. Motor Vehicle Act*, [1986] 2 SCR 486 at para 97, where the court did "declare [the impugned provision] inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*." However, this 'declaration' is in effect an answer to the reference question posed to the court, originally a reference by the Lieutenant-Governor in Council of British Columbia to the British Columbia Court of Appeal.
[23] *R v Sullivan*, 2022 SCC 19 at para 48, 472 DLR (4th) 521.

section 52 of the *Constitution Act, 1982*, provides that where an ordinary statute is *inconsistent* with the Constitution, the Constitution prevails.[24]

27. When section 33 is properly invoked, there is no "conflict" between the legislation and the Constitution for the Court to resolve. The *actual* state of legal affairs is that section 33 precludes any finding of inconsistency with the Constitution, as the law operates notwithstanding the right or the freedom at issue. In these circumstances, the jurisdiction of the court to issue declaratory relief is limited to declaring consistency with section 33.[25] Questions of whether the legislation violates *Charter* rights or is justifiable under section 1 are irrelevant – these are abstract determinations that can have no practical effect on the analysis or the actual state of legal affairs.

28. On this basis, when section 33 is invoked, a claimant who asks the court to determine whether the law violates a specific provision of the *Charter* is *not* asking about the actual legal state of affairs. They are not concerned with whether the law is inconsistent with the Constitution. Rather, they are looking for an answer to an abstract legal question. They are asking for an advisory opinion, *not* a declaration.

29. It is irrelevant that an underlying right may, in theory, persist even where a law operates notwithstanding the corresponding provision of the *Charter*. Courts do not apply abstract rights. Courts apply laws. Declarations do not state moral or philosophical rights. Declarations "confirm or deny the *legal* rights of the parties," the "*legal* state of affairs," or the "*legal* relationship between the parties."[26] When section 33 is invoked, unless the claimant can point to some operative source of law, other than the *Charter*, which provides the source of its alleged rights, it is not asking a justiciable question, let alone one which might be the subject of a declaration.

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[24] *Ibid* at para 48.
[25] As the Supreme Court did in *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 37: "Section 7 of *An Act respecting the Constitution Act, 1982*, is to the extent of this inconsistency with s. 33 of the Canadian *Charter*, of no force or effect … ."
[26] *Shot Both Sides, supra* note 1 at para 66. [emphasis added]

30. Declarations must also have "practical utility."[27] This practical utility must provide "real consequences"[28] for the parties or "authoritatively demonstrate to the defendant that he or she is infringing the claimant's rights."[29] Advisory opinions do not have "practical utility" in this sense, and so "courts will not generally grant a declaration that is *merely advisory*."[30] The fact that the theoretical recipient of the advice may be the public as a whole does not establish practical utility. When section 33 is invoked, a declaration would not "authoritatively demonstrate" that the government *is* infringing the claimant's rights – it would merely advise the public what *might* otherwise be the case if section 33 had not been invoked.

31. When section 33 is invoked with respect to a piece of legislation, the question of whether that legislation violates a certain provision of the *Charter* is an abstract question. Because abstract questions can only be answered in advisory opinions, the only parties who can ask these questions are the Governor in Council and the Lieutenant Governor in Council of each province. The Court has no statutory jurisdiction to answer abstract questions from any other parties.

Part VI – Relief

32. Alberta takes no position on the ultimate disposition of this appeal.

DATED at the City of Edmonton in the Province of Alberta, this 16th day of August, 2024.

Nathaniel Gartke Counsel for the Attorney General of Alberta	**David Kamal** Counsel for the Attorney General of Alberta

[27] *Ibid* at para 68.
[28] *Ibid* at para 68, citing David Wright, *Remedies*, 2d ed (Sydney, N.S.W.: Federation Press, 2014) at 284.
[29] *Ibid* at para 68, citing Rafal Zakrzewski, *Remedies Reclassified* (New York: Oxford University Press, 2005) at 159.
[30] *Ibid* at para 68, citing Zakrzewski at 159.

Part VII – Authorities

LEGISLATION

The Constitutional Questions Act, 2012, SS 2012, c C-29.01

Supreme Court Act, RSC 1985, c S-26

CASES

Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta v Attorney-General for the Dominion of Canada and the Attorney-General for the Province of British Columbia, 3 DLR 509 at 517 (UK JCPC)

Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 SCR 44

Ford v Quebec (Attorney General), [1988] 2 SCR 712

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26, [2018] 1 SCR 750.

Manitoba Metis Federation Inc. v Canada (Attorney General), 2013 SCC 14

Québec (Attorney General) v Guérin, 2017 SCC 42, [2017] 2 SCR 3

R v Sullivan, 2022 SCC 19, 472 DLR (4th) 521

Re B.C. Motor Vehicle Act, [1986] 2 SCR 486

Re References by the Governor-General in Council, (1910) 43 SCR 536

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698

Shot Both Sides v Canada, 2024 SCC 12, 490 DLR (4th) 585

SECONDARY SOURCES

Manley O. Hudson, "Advisory Opinions of National and International Courts. I. National Courts" (1924) 37:8 Harv L Rev 970

The Validity of the Restrictions on the Modern Advisory Opinion, (1977) 29:2 Me L Rev 305