KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 23**

Date: **2024 02 16**
Docket: KBG-RG-01978-2023
Judicial Centre: Regina

BETWEEN:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

APPLICANT

- and -

GOVERNMENT OF SASKATCHEWAN AS REPRESENTED BY THE MINISTER OF EDUCATION, CONSEIL DES ÉCOLES FRANSASKOISES, CHINOOK SCHOOL DIVISION, CHRIST THE TEACHER CATHOLIC SCHOOL, CREIGHTON SCHOOL DIVISION NO. 111, GOOD SPIRIT SCHOOL DIVISION, GREATER SASKATOON CATHOLIC SCHOOLS, HOLY FAMILY ROMAN CATHOLICS SEPARATE SCHOOL DIVISION #140, HOLY TRINITY CATHOLIC SCHOOLS, HORIZON SCHOOL DIVISION, ILE-A-LA CROSSE SCHOOL DIVISION NO. 112, LIGHT OF CHRIST CATHOLIC SCHOOLS, LIVING SKY SCHOOL DIVISION NO. 202, LLOYDMINSTER CATHOLIC SCHOOL DIVISION, LLOYDMINSTER PUBLIC SCHOOL DIVISION, NORTH EAST SCHOOL DIVISION, NORTHERN LIGHTS SCHOOL DIVISION NO. 113, NORTHWEST SCHOOL DIVISION #203, PRAIRIE SOUTH SCHOOL DIVISION, PRAIRIE SPIRIT SCHOOL DIVISION, PRAIRIE VALLEY SCHOOL DIVISION, PRINCE ALBERT CATHOLIC SCHOOL DIVISION, REGINA CATHOLIC SCHOOLS, REGINA PUBLIC SCHOOLS, SASKATCHEWAN RIVERS SCHOOL DIVISION, SASKATOON PUBLIC SCHOOL, SOUTH EAST CORNERSTONE PUBLIC SCHOOL DIVISION #209, AND SUN WEST SCHOOL DIVISION

RESPONDENTS

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION, GENDER DYSPHORIA ALLIANCE AND PARENTS FOR CHOICE IN EDUCATION, LEAF WOMEN'S LEGAL EDUCATION & ACTION FUND, JOHN HOWARD SOCIETY

INTERVENORS

- and -

REGINA CIVIC AWARENESS AND ACTION NETWORK & OUR DUTY CANADA GROUP

PROPOSED INTERVENORS

Counsel:

Adam Goldenberg, Ljiljana Stanić, Eric Freeman Bennett Jensen and Sean Sinclair	for the applicant
Deron Kuski, K.C. and Milad Alishahi	for the Government of Saskatchewan
Nicholas Cann, K.C. and Jolene Horejda	for the 27 named School Boards
Leif Jensen and Daniel LeBlanc	for intervenor, Canadian Civil Liberties Association
Andre F. Memauri	for intervenors, Gender Dysphoria Alliance and Parents for Choice in Education
Morgan Camley and Barton Saroka	for intervenor, LEAF Women's Legal Education & Action Fund
Pierre E. Hawkins	for intervenor, John Howard Society of Saskatchewan
Christa Nicholson, K.C.	for proposed intervenor, Regina Civic Awareness and Action Network
Paul E. Jaffe	for proposed intervenor, Our Duty Canada Group

JUDGMENT
February 16, 2024

MEGAW J.

INTRODUCTION

[1] The legal landscape with respect to this proceeding has significantly and

fundamentally changed since the commencement of the original proceedings which culminated in the court's judgment of September 28, 2023 (*UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, 2023 SKKB 204 [*Judgment*]). As a result of the change, the applicant, UR Pride Centre for Sexuality and Gender Diversity [UR Pride] seeks to amend its pleading to advance an allegation pursuant to s. 12 of the *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*]. UR Pride further seeks to amend the facts pled and the remedies sought to accord with the reality that new legislation has been introduced replacing the Policy (Use of Preferred First Name and Pronouns by Students [Policy]) and which invokes the Notwithstanding Clause contained at s. 33(1) of the *Charter*.

[2] The legislative change, in turn, leads the respondent, the Government of Saskatchewan, to apply to have the entirety of the existing allegations dismissed on the grounds this Court is now without jurisdiction. The Government of Saskatchewan also vigorously opposes those proposed amendments which include a new section of the *Charter*, and which plead certain new allegations. In addition, the Government of Saskatchewan seeks to have the existing claim and the proposed amendment of that claim dismissed on the grounds that they are now rendered moot due to the invocation of the Notwithstanding Clause.

[3] I have determined that the application to amend must be granted in its entirety, in keeping both with *The King's Bench Rules* and the generally applied practice of this Court. I have further determined that the court continues to have jurisdiction to hear and determine the *Charter* issues raised by the amended originating application, even though the Notwithstanding Clause of the *Charter* has been invoked. I determine that the exercise of this jurisdiction is discretionary. While I determine this

jurisdiction exists, I decline to decide at this stage whether this discretion should be exercised in these circumstances. That decision should await the completion of the evidence and argument on the originating application.

[4] In light of the decision on the issue of jurisdiction and the fact this matter is proceeding in its entirety, I decline to consider the issue of mootness at this stage. However, I do this without prejudice to the Government of Saskatchewan's ability to raise this issue again should the circumstances so dictate.

[5] Finally, I determine the applicant shall be entitled to costs with respect to the application to amend the originating application. Costs shall be in the cause with respect to the applications brought by the Government of Saskatchewan. I determine that the actual assessment of costs shall be left to be determined at the conclusion of these proceedings upon application by either party.

[6] My reasons follow.

BACKGROUND

[7] The original background to this matter is set forth completely in the *Judgment*. I set out here those portions of that history which are relevant to the applications now before the court. This recitation is not intended to be complete, but rather sufficient to provide an understanding of where this matter now stands and to allow for a resolution of the issues raised by the applications.

[8] In August 2023, the Government of Saskatchewan, through the Minister of Education, caused to be prepared the Policy. That Policy was directed to be enforced in all of the school divisions in the Province of Saskatchewan. Specific to these proceedings, the Policy provided that parental consent was required if a student under

the age of 16 years old sought to use a preferred name, gender identity, or gender expression. The specific wording set forth at page 4 of the Policy was:

> Given the sensitivity of gender identity disclosure, when a student requests that their preferred name, gender identity, and/or gender expression be used, parental/guardian consent will be required for students under the age of 16.
>
> For students 16 and over, parental consent is not required. The preferred first name and pronoun(s) will be used consistently in ways that the student has requested.
>
> In situations where it is reasonably expected that gaining parental consent could result in physical, mental or emotional harm to the student, the student will be directed to the appropriate school professional(s) for support. They will work with the student to develop a plan to speak with their parents when they are ready to do so.

[9] The Policy was disseminated to the various school divisions in the province and was mandated to be in place and in force as of August 22, 2023. The expectation of the Government of Saskatchewan was that the Policy would be applied in its entirety and without exception to any school division or individual school.

[10] On August 31, 2023, UR Pride filed an originating application seeking to have the Policy declared to be in violation of s. 7 and s. 15(1) of the *Charter* and that such violations could not be justified in a free and democratic society pursuant to s. 1 of the *Charter*. Seeking to prevent the ongoing implementation of the Policy pending a hearing on the merits of the application, UR Pride also sought an interim and interlocutory injunction. At that stage, the Government of Saskatchewan put in issue the appropriateness of injunctive relief being granted and further put in issue UR Pride's standing to commence the proceedings.

[11] The issues of UR Pride's standing to bring these proceedings and the appropriateness of an interlocutory injunction issuing were argued on September 19,

2023. The *Judgment* was then rendered on September 28, 2023, granting to UR Pride public interest standing to bring the action and further directing that an interlocutory injunction was to issue enjoining the implementation and enforcement of the Policy pending determination of the *Charter* issues by this Court.

[12] Following this Court rendering its decision, the Government of Saskatchewan introduced legislation to amend *The Education Act, 1995*, SS 1995, c E-0.2, to effectively include the terms of the Policy within that legislation. That legislation is found at Statutes of Saskatchewan, 2023, Chapter 46 and it received Royal Assent on October 20, 2023 (*The Education (Parents' Bill of Rights) Amendment Act, 2023*, c 46, [*Amending Act*]). The specifics of that amendment are:

> **"Consent for change to gender identity**
>
> **197.4**(1) If a pupil who is under 16 years of age requests that the pupil's new gender-related preferred name or gender identity be used at school, the pupil's teachers and other employees of the school shall not use the new gender-related preferred name or gender identity unless consent is first obtained from the pupil's parent or guardian.
>
> (2) If it is reasonably expected that obtaining parental consent as mentioned in subsection (1) is likely to result in physical, mental or emotional harm to the pupil, the principal shall direct the pupil to the appropriate professionals, who are employed or retained by the school, to support and assist the pupil in developing a plan to address the pupil's request with the pupil's parent or guardian.
>
> (3) Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this section is declared to operate notwithstanding sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*.
>
> (4) Pursuant to section 52 of *The Saskatchewan Human Rights Code, 2018*, [SS 1979, c S-24.1] this section operates notwithstanding *The Saskatchewan Human Rights Code, 2018*, particularly sections 4, 5 and 13.
>
> (5) No action or proceeding based on any claim for loss or damage resulting from the enactment or implementation of this section or of a regulation or policy related to this section lies or shall be commenced

> against:
>
> (a) the Crown in right of Saskatchewan;
>
> (b) a member or former member of the Executive Council;
>
> (c) a board of education, the conseil scolaire, the SDLC or a registered independent school; or
>
> (d) any employee of the Crown in right of Saskatchewan or of a board of education, the conseil scolaire, the SDLC or a registered independent school.
>
> (6) Every claim for loss or damage resulting from the enactment or implementation of this section or of a regulation or policy related to this section is extinguished".

[13] In particular, ss. 197.4(3) of the *Amending Act* invoked the Notwithstanding Clause contained at ss. 33(1) of the *Charter* to declare that the legislation would operate notwithstanding ss. 2, 7, and 15 of the *Charter*. The legislation also provided that the provisions would operate notwithstanding ss. 4, 5, and 13 of *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 (s. 197.4(4) *Amending Act*).

[14] Following the receipt of royal assent to the *Amending Act*, the Policy was rescinded in its entirety by the Government of Saskatchewan and is no longer in vigour. This occurred shortly following the coming into force of the amending legislation.

[15] With this seismic shift in the legal underpinnings of the litigation, the applicant determined to continue the litigation but concluded it would be necessary to amend the existing originating application. The proposed amendments seek to incorporate the legislative amendment which had occurred, and to seek remedies different than those contained in the original pleading. While these proposed amendments will be discussed in further detail in this judgment, for the purposes of this background they are identified as follows:

(a) Delete the original requested relief for a declaration pursuant to ss. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*] with respect to the alleged violations of ss. 7 and 15 of the *Charter*;

(b) Delete the request for interim and interlocutory injunctive relief;

(c) Seek a declaration of the court that the *Amending Act* and the Policy violates ss. 7 and 15 of the *Charter*; and

(d) Seek a declaration pursuant to ss. 52(1) of the *Constitution Act* that the amending legislation limits the right of gender diverse students under the age of 16 not to be subjected to cruel and unusual treatment as guaranteed by s. 12 of the *Charter* and that such limit is not justified pursuant to s. 1 of the *Charter*.

[16] In addition to the above proposed amended relief, UR Pride also seeks to introduce amendments to its grounds for making the application. In the main, those proposed changes were to reflect the reality of the amending legislation. As well, UR Pride advances additional grounds alleging certain intentions of the Government of Saskatchewan introducing the *Amending Act*.

[17] UR Pride also seeks the ability to continue to challenge the now withdrawn Policy before the court. It appears this relief continues to be sought out of an abundance of caution if the other substantive amendments are not granted. It is understood that if it is permitted to proceed with its challenge of the *Amending Act*, it will not be proceeding further with its challenge of the Policy.

[18] The Government of Saskatchewan opposes certain of the proposed

amendments including the relief sought pursuant to s. 12 of the *Charter*, certain wording advanced by UR Pride in its grounds for further relief, and the request for declaratory relief sought with respect to the *Amending Act* and the Policy. The Government of Saskatchewan does not oppose the amendments sought to permit the application to reflect the existence of the *Amending Act*. However, overall it seeks a complete dismissal of the proceedings at this stage due to the invocation of the Notwithstanding Clause of the *Charter*.

[19] To that end, the Government of Saskatchewan has brought two applications which it submits mandate that these proceedings be brought to a full and complete conclusion. The Government of Saskatchewan applies firstly for a determination that the invocation of the Notwithstanding Clause found at ss. 33(1) of the *Charter* completely removes from the court any and all jurisdiction to determine allegations of a violation of s. 7 or s. 15 of the *Charter*. The Government of Saskatchewan further applies to have the issues in the litigation determined to be moot in light of the use of the Notwithstanding Clause and to have the proceedings dismissed as a result.

ISSUES

[20] The applications raise the following issues for the court's determination:

1. What is and what is not in issue on these applications?

2. What is the purpose of making reference to judicial activism?

3. Should leave be granted to amend the pleadings?

    a. What is the applicable test to determine an application to amend

pleadings?

b. What is the nature of the amendments that are sought to be made?

c. Is the use of the originating application an appropriate pleading to determine *Charter* issues?

d. Do any of the proposed amendments constitute prejudice or injustice to the Government of Saskatchewan?

e. Do the proposed amendments introducing an allegation of a breach of s. 12 of the *Charter* fail to disclose a reasonable cause of action?

f. Are any of the proposed amendments scandalous, frivolous, or vexatious?

g. Do any of the proposed amendments constitute an abuse of the process of the court?

4. Is the court's jurisdiction ousted by the invocation of the Notwithstanding Clause?

5. If the court continues to have jurisdiction, should it be decided now whether to exercise that jurisdiction?

6. Should the court decide the issue of mootness?

7. Costs

DECISION

1. What is and what is not in issue on these applications?

[21] Both due to certain arguments advanced by the Government of Saskatchewan and to ensure this judgment is read in its proper context, what is and is not in issue at this stage of these proceedings is set forth at the outset of these reasons. As will be expressed throughout these reasons, the court has not yet been charged with determining whether any provisions of the *Amending Act* (or the Policy), are contrary to any provisions of the *Charter*. All that is presently before the court is whether, procedurally, UR Pride should be granted leave to amend its pleading and whether the Government of Saskatchewan is entitled to a complete dismissal of the proceedings without any consideration of the *Charter* issues. Should the matter proceed, ultimately the court will be asked to consider the *Charter* allegations.

[22] Furthermore, the appropriateness of the decision by the Government of Saskatchewan to introduce the requirements found originally in the Policy, and now situated in the *Amending Act*, is not either an issue before the court nor something upon which the court can or should provide comment. The function of the court is not to opine on the appropriateness of decisions taken by the legislative branch of government to introduce policy nor upon any such policy decisions taken by the Government of Saskatchewan. To make such comment would be to see the court wrongly intrude into the legislative field and would expose the judicial branch to legitimate criticism of an inability to stay within its correct constitutional lane when charged with making decisions involving challenges to governmental action.

[23] The appropriateness of the Legislature's decision to invoke ss. 33(1), the Notwithstanding Clause of the *Charter*, is similarly not something upon which this

Court can or should comment. Again, the decision to invoke this clause is within the realm of a policy decision by the legislative branch of government. Whether that clause ought properly to be used is not something upon which the opinion of the court may be sought, nor may it be given. For clarification, the issue of whether this clause has been validly invoked is not an issue before the court in these proceedings.

[24] The importance of these observations, and their application here, are important for an understanding of these reasons. As will be discussed *infra*, the roles of the respective actors in the constitutional democracy of Canada are critical to its operation. Each participant understanding and applying its respective role and ensuring that it properly respects the roles of the other constitutional participants, ensures that society is able to function, and the Rule of Law continues to be both applied and respected.

2. What is the purpose of making reference to judicial activism?

[25] The Government of Saskatchewan has argued in the materials filed that if the court acts with respect to this matter it would be engaging in something which it identifies as "judicial activism". While this phrase is not defined in the materials, it appears it is being invoked in a somewhat pejorative sense to imply that determining rights issues pursuant to the *Charter* in these circumstances is, in some fashion, seeing the court as acting inappropriately, beyond its scope, and perhaps in a non-judicial fashion. While further comment will be made on this issue in these reasons, to ensure the matter is dealt with appropriately I address it at the outset. I find such suggestion belies a misunderstanding of the role of the judiciary in our constitutional democracy, and the role of the court in upholding the Rule of Law.

[26] To accurately place arguments of judicial activism, I am guided by the

helpful and direct comments of Kent Roach in "The Myths of Judicial Activism" (2001), 14 SCLR (2d) 297 at 298:

> In this essay, I will argue that the term judicial activism is ultimately not a helpful way to structure debate about judicial review under the *Charter* or other modern bills of rights that allow rights as interpreted by the Court to be limited and overridden by ordinary legislation. The label judicial activism obscures more than it illuminates and allows commentators to criticize the Court and the *Charter* without really explaining their reasons for doing so. It hints at, if not judicial impropriety, at least judicial overreaching, while hiding often controversial assumptions made by the critics of judicial activism about judging, rights and democracy. Such assumptions need to be revealed and unpacked for all the world to see.

[27] Suggesting that a court should refrain from acting in a legitimate dispute between two parties on the basis that to do so would be judicial activism does little more than attempt to dissuade a court from doing precisely that which it is both constitutionally charged to do, and which fulfils its function in a free and democratic society. It might further suggest to the general public that by engaging in a review of fundamental rights pursuant to the *Charter*, the court is doing something wrong, or at least beyond its purview.

[28] With respect, both of these suggestions are wrong and introduce to the judicial decision-making process matters which are extraneous, political, and not properly part of the legal debate with which the court is singularly concerned. In short, it is imperative that none of the actors in our constitutional democracy either resile from acting, nor avoid responsibility for the completion of their fundamental duties in our society, due to unfounded and unwarranted allegations regarding the motives for acting when, quite clearly, those actors are operating within their correct and proper constitutional sphere.

[29] Furthermore, the use of this phrase also belies a misunderstanding of the

structure of judicial determinations, particularly in the area of rights observations pursuant to the *Charter*. It appears to be suggesting that individual judges, when determining fundamental rights issues, are flying solo without regard to precedent, or to the potential for appellate review of any, and all, decisions which might be rendered. A review of these reasons will illustrate that the authorities to which the court was directed, and those additional materials used by the court, directly guided the decisions to be made here.

[30] Moreover, while decisions in this regard are indeed made by individual courts, they are always subject to review, revision, and correction, by those courts which sit in judgment of the trial decisions made. The Court of King's Bench is a superior court established pursuant to s. 96 of the *Constitution Act* and it is a court of inherent jurisdiction. It is a trial court and typically a court of first instance with respect to the determination of legal disputes, such as those presented by the litigation being considered here. The decisions of the court are reviewable by the Saskatchewan Court of Appeal. The ability to have an appeal court weigh in on this Court's decisions is critically important to the proper functioning of our system of justice and to ensure the decisions are in accordance with the law. This is then, in turn, critically important to the recognition of the Rule of Law.

[31] Thus, to suggest a court, or a justice, would engage in some form of activism outside the scope of their jurisdiction, misses the mark as any decision is subject to this further review. Those that are affected by this Court's decisions, and hold the view that the decisions are incorrect, have the remedy of proceeding to seek appellate review.

[32] Such political discourse referring to activism from the bench ought properly to be confined to the political realm and has no place forming the subject

matter of legal discourse. Comments suggesting the court will not act in accordance with the law are misplaced and inappropriate. That is particularly so when dealing with litigation such as that now before the court. It is critically important that the parties, and the public, understand the roles occupied by each of the actors in the constitutional democracy. To achieve that understanding, it is critically important that each of those actors ensure that they accurately describe and respect the roles each is to occupy. In short, such veiled attacks on the court, its function, or its ability to determine the *lis* between the parties, is unwarranted and inappropriate.

[33] Not to be misunderstood, the above discussion is in no way to suggest that either the court or its decisions are beyond criticism. Of course, they are subject to criticism, and that criticism may well be robust and engaged. But such criticism must also be focused on legal doctrine and not doctrinal excess.

3. Should leave be granted to amend the pleadings?

(a) What is the applicable test to determine an application to amend pleadings?

[34] *The King's Bench Rules* provide for the amendment of pleadings as follows:

> **Amending a pleading**
>
> 3-72(1) A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:
>
> (a) before a statement of defence is filed, any number of times without the Court's permission;
>
> (b) subject to subrule (2), in the case of an action proposed as a class action, before a statement of defence is filed;

> (c) after a statement of defence is filed:
>
> (i) by agreement of the parties filed with the Court; or
>
> (ii) with the Court's prior permission, in any manner and on any terms that the Court considers just.

[35] As a preliminary consideration, counsel for UR Pride raised whether a formal application to amend is absolutely necessary if the matter is proceeding by way of originating application given the express wording of the Rule. In light of the arguments presented and the court's resolution of the application to amend, I will leave for another day the issue of whether specific leave is required where the pleadings do not include a statement of claim. In the situation before the court, given the existing proceedings, seeking specific leave put the opposing party on notice of the changes in the case it then had to meet. In light of the nature of this proceeding, this was the appropriate procedure to adopt here.

[36] The parties agree that the test to be applied to determine whether amendments to pleadings are to be granted is accurately set forth by Scherman J. in *Boisvert v Milton No. 292 (Rural Municipality)*, 2015 SKQB 2 at paras 7-9, 464 Sask R 28:

> **The Law Regarding Amendment of Pleadings**
>
> [7] Rule 3-72(3) of *The Queen's Bench Rules* provides that:
>
> 3-72
>
> ...
>
> (3) Parties shall make all amendments to their pleadings that are necessary to determine the real questions in issue between the parties.
>
> It is significant to note the Rule is mandatory and requires parties to make amendments necessary to determine the real questions in issue between the parties.

[8] Existing case law has established that the following principles apply to applications to amend pleadings:

> i.) Leave to amend is a discretionary remedy, but the practice is to allow amendments where it is necessary to determine the issues between the parties and it can be done without injustice to the other side;
>
> ii.) There is no injustice to the other side if it can be compensated in costs;
>
> iii.) The court's discretion is wide and should be exercised so as to ensure the real issues are dealt with as expeditiously and inexpensively as possible; and
>
> iv.) If the amendments are opposed, the court must consider the proposed amendments as if the opposing party had applied to strike the pleadings under Rule 7-9(2).

[9] The plaintiffs here argue the amendments should not be permitted because the pleadings could be struck under Rule 7-9(2) which provides as follows:

> 7-9
>
> ...
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> > (a) discloses no reasonable claim or defence, as the case may be;
> >
> > (b) is scandalous, frivolous or vexatious;
> >
> > (c) is immaterial, redundant or unnecessarily lengthy;
> >
> > (d) may prejudice or delay the fair trial or hearing of the proceeding; or
> >
> > (e) is otherwise an abuse of process of the Court.

[37] In *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 [*Cupola*], Leurer J.A. (as he then was) provided further explanation regarding the considerations on such an application by identifying that proposed amendments should be considered

according to their purpose, determining whether they constituted proper pleadings, and finally determining any potential prejudice which might arise to a party from allowing those amendments.

[38] In discussing the "purpose" of the proposed amendments, Leurer J.A. identifies the necessity of allowing amendments to ensure the true issues are before the court for determination:

> [45] The first principle relates to *purpose*. Amendments are allowed to enable the court to determine the true points of controversy that require a judicial determination. In keeping with the overarching purpose for allowing amendments, they are liberally granted when required for this reason. In *Frobisher Ltd. v Canadian Pipelines & Petroleums Ltd.* (1957), 10 DLR (2d) 338 at 432 (Sask CA) [*Frobisher*], Culliton J.A. (as he then was), stated:
>
> > While leave to amend is a discretionary right to be exercised by the Court, I think it can be said that the practice is for the Court to allow amendments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties. ...
>
> [46] Similarly, Rule 3-72(3) *requires* that the parties "shall make all amendments to their pleadings that are necessary to determine the real questions in issue". ...
>
> [Emphasis in original]

[39] The second principle requiring the pleading to be proper encompasses the necessity to consider whether the amendments could be struck pursuant to the provisions of Rule 7-9 and was explained by Leurer J.A. as follows:

> [48] The second principle that I wish to emphasize is often taken for granted. It is this: a proposed amendment must be a *proper pleading*. Speaking of an earlier generation of the *Rules* [*The King's Bench Rules*], in *Roussy v Red Seal Vacations Inc.*, 2011 SKCA 116 at para 14, 342 DLR (4th) 395 [*Roussy*], Richards J.A. stated that an amendment "should not be allowed if the result would be a pleading that could be struck pursuant to Rule 173" (at para 14). The modern reference would be to Rule 7-9(2), which allows a pleading to be

> struck for reasons that include that it: (a) discloses no reasonable cause of action or defence; (b) is scandalous, frivolous or vexatious; (c) is immaterial, redundant or unnecessarily lengthy; (d) may prejudice or delay the fair trial or hearing of the proceeding; or (e) is otherwise an abuse of the process of the court. I would understand the principle set out in *Roussy* to equally preclude an amendment that was improper for reasons other than it was susceptible to being struck under Rule 7-9 or which would be undone for other reasons. For example, as I will discuss, if the joinder of a party that is otherwise sanctioned by Rule 3-78 would nonetheless result in a pleading that would be immediately severed pursuant to Rule 3-80(2), the court would be justified in refusing to grant an amendment to effect the joinder.
>
> [Emphasis in original]

[40] The final principle discussed in *Cupola* is to determine whether the proposed amendments are potentially prejudicial to the other side:

> [49] The third principle of importance here is also mentioned in *Frobisher* [1957, 10 DLR (2d) 338 (Sask CA)] and relates to *potential prejudice*. This is what Culliton J.A. was referring to when he said that the court's practice is to "allow amendments to pleadings whenever it can be done *without injustice to the other side*" (*Frobisher* at 432, emphasis added). This is most often the key point of controversy when an amendment application is considered. When considering an amendment request, the court is also concerned with the question of whether material prejudice will be caused by the change in the pleading. For example, subject now to the legislative intervention on this issue, the expiration of a limitation period between the time of an initial pleading and an amendment may be a reason to deny an amendment (*vis. The Limitations Act*, SS 2004, c L-16.1, s 20).
>
> [50] If a party will be materially prejudiced by the amendment, the subsidiary question that arises is whether there is a way to ameliorate that prejudice or to prevent the injustice that would otherwise be occasioned by allowing the amendment. If the prejudice can be sufficiently ameliorated, then it will not generally stand in the way of allowing the amendment. *Beemer v Brownridge*, [1934] 1 WWR 545 at para 62 (CanLII) (Sask CA) is a *locus classicus* on pleadings amendments in this province. In it, Martin J. (as he then was) found the general rule to be as stated by Lord Esher in *Steward v North Metropolitan Tramways Co.* (1886), 16 QBD 556 (CA) at 558 [*Steward*] (citing *Clarapede & Co. v Commercial Union Association* (1883), 32 WR 262 (CA)), as follows:

> ... "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made." ...
>
> [51] Justice Martin also referred, to like effect, to the following passage from the judgment of Lord Justice Lindley in *Steward* (at 559):
>
> > ... I entirely agree with the terms in which the rule as to amendments has been laid down in the cases cited by the Master of the Rolls. I think an amendment ought always to be allowed except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs. ...
>
> [52] In addition to costs, another way that prejudice associated with the grant of an amendment can often be ameliorated is through the grant of an adjournment.
>
> [Emphasis in original]

[41] From the foregoing, I summarize the considerations for the court on any application to amend pleadings:

1. Amendments to pleadings are generally granted to ensure that the real matters in issue are before the court. While the court has a discretion regarding the granting of such proposed amendments, that discretion should be exercised broadly;

2. While generally it is anticipated the amendments will occur earlier in the proceedings, there is no bar to granting the amendments at any stage of the proceedings;

3. This is so unless the proposed pleadings are in some manner improper; and

4. The court must also consider whether the potential pleading will result in an injustice which cannot be remedied through further direction of the court.

(b) What is the nature of the amendments that are sought to be made?

[42] The applicant, UR Pride, seeks to amend the originating application in five respects:

1. It seeks to introduce into the litigation the recently passed ss. 197.4 of the *Amending Act* as the successor in issue to the previous Policy;

2. It seeks to advance a claim for additional *Charter* relief based on an allegation of a breach of s. 12 of the *Charter*;

3. It seeks to amend the wording pled with respect to the Policy to now show that the Policy has been rescinded;

4. It seeks to remove the request for injunctive relief and a declaration of invalidity of the legislation with respect to the claimed breaches pursuant to s. 7 and s. 15 of the *Charter*, but now seeks a declaratory judgment of the court regarding those *Charter* provisions; and

5. It seeks to introduce some additional grounds in support of the relief which it seeks.

[43] The Government of Saskatchewan objects to certain of the proposed

amendments as follows:

1. The relief requested pursuant to s. 12 of the *Charter* (or *Charter* relief in general) cannot be obtained through an originating application and must proceed by way of statement of claim;

2. The inclusion of a claim alleging breach of s. 12 of the *Charter* would result in prejudice and injustice to the Government of Saskatchewan;

3. The claim pursuant to s. 12 of the *Charter* does not disclose a reasonable cause of action;

4. The inclusion of a claim pursuant to s. 12 of the *Charter* and certain language pled imputing bad faith to the Government of Saskatchewan are scandalous, frivolous, or vexatious; and

5. The inclusion of a claim pursuant to s. 12 of the *Charter* and the language referred to in point 4 constitute an abuse of the process of the court.

[44] There is considerable overlap in the Government of Saskatchewan's various submissions concerning the points set forth in the preceding paragraph. Nevertheless, I determine to deal with each of those objections in turn.

(c) Is the use of the originating application an appropriate pleading to determine *Charter* issues?

[45] This is a procedural argument advanced by the Government of Saskatchewan which it submits ought to result in the applicant, essentially, having to do over that which has been done by using a different commencement document in

place of the originating application. The Government of Saskatchewan submits that this litigation should not have been commenced, and cannot be continued, in the fashion that it was, that is by way of an originating application. This objection was not raised at the time of the application in September. The Government of Saskatchewan now asserts that the new allegations invoking s. 12 of the *Charter*, and the existing pleadings, if they are to survive the application advanced by the Government of Saskatchewan, must proceed by statement of claim.

[46] In support of its position on this issue, the Government of Saskatchewan refers to the decisions of this Court in *R.L. Crain Inc. and Moore Corporation Limited and Lawson Business Forms Manitoba Ltd. v Couture, Restrictive Trade Practices Commission, and Lawson* (1983), 6 DLR (4th) 478 (Sask QB), and *Mistusinne (Resort Village) v Board of Education of Outlook School Division No. 32* (1988), 72 Sask R 243 (Sask QB). It is argued that these decisions determine that claims for relief pursuant to s. 52 of the *Constitution Act* and ss. 24(1) of the *Charter* may only be commenced by way of statement of claim.

[47] It is noted firstly that in both of the cited decisions, it appears the applicants there commenced the proceeding by way of a notice of motion. There is no indication in the decisions that reference is being made to what was commonly then known as an originating motion, now known as an originating application, or simply to a notice of motion. As a result, I am unable to accept the simple proposition that these decisions necessarily exclude the use of an originating application. However, I do not rest the decision on this issue on this basis.

[48] More germane to this issue, *The King's Bench Rules* at Rule 3-49(1)(h) provide as follows:

Actions started by originating application

3-49(1) An action may be started by originating application if the remedy claimed is:

...

(h) for a remedy pursuant to the Canadian Charter of Rights and Freedoms; or

...

[49] UR Pride submits that the introduction of this Rule post-dates the decisions cited by the Government of Saskatchewan and is therefore specific direction that an originating application may be used when relief pursuant to the *Charter* is sought.

[50] I agree with the submission of UR Pride in this regard. *The Queen's Bench Rules* (as they then were) underwent a complete revision in 2013. See generally in this regard the comments of Elson J. in *Veitch v Wollf*, 2017 SKQB 252 at para 9 [*Veitch*]. The present ability to pursue *Charter* litigation by way of originating application was specifically included as part of the new Rules. If there was previously an impediment to the use of this as a commencing document, the introduction of the new Rule removed any such restriction.

[51] I say "if" there was an impediment because in a decision of this Court not referred to in argument, it appears proceeding by motion was specifically sanctioned as an appropriate commencement document when *Charter* relief was sought. In *Leeson v University of Regina*, 2007 SKQB 252, 301 Sask R 316 [*Leeson*], the applicants commenced the proceedings by way of notice of motion. The respondents, there including the Government of Saskatchewan, objected to the procedure selected and submitted the proceeding should have been commenced by way of statement of claim.

In rejecting the submission, Laing C.J.Q.B., in his usual complete and practical manner, stated:

> [14] Rule 441(2) states, "Where under any statute an application may be made to the court or to a judge, such application shall be made by notice of motion unless the statute or the rules otherwise provide." *The Constitution Act, 1982* is a statute. Section 24(1) of the *Charter* simply states, ". . . may apply to a court of competent jurisdiction to obtain such remedy . . . ." Rule 13(1) does not detract from commencing a statutorily authorized application by motion as it simply says, "Except as otherwise provided, every action shall be commenced by the issue of a Statement of Claim in Form 2." Rule 441(2), *supra*, does otherwise provide. When one also considers Rule 5(4), which states that a proceeding should not be set aside solely because the wrong commencement document was employed, it is difficult to maintain that a party applying for relief pursuant to s. 24(1) of the *Charter* must issue a statement of claim. Indeed, applications pursuant to s. 24(1) of the *Charter* in criminal matters proceed by notice of motion. (Vide: *R. v. Higgins (1987)*, 40 D.L.R. (4th) 600 at 636-37 (Sask. C.A.).) It seems to me that the better view is that, if the motion cannot be determined on the basis of affidavits, the discretion exists under the *Rules* [*The King's Bench Rules*] for the Court to order the applicant at that point to prepare a statement of claim which would invoke all of the rules associated with an action or, alternatively, if issues can be defined without doing injustice to any party, that the matter be set down for the trial of such issues.

[52] This decision post-dates those authorities cited by the Government of Saskatchewan. It appears to take a contrary position to those decisions. It further appears to advance the modern approach to procedural issues, that being to view procedural issues through the lens of how those advance the substance of the matter in dispute, rather than to be concerned with the procedural aspects on a stand-alone basis.

[53] In the litigation now before the court, the originating application provides a detailed recitation of the factual background, the grounds upon which the application is based, and the legal basis which UR Pride alleges supports their claim for relief pursuant to the *Charter* and pursuant to a declaratory judgment. It is not a notice of motion devoid of particulars. It contains such specific detail that it is akin to the type

of pleading one would expect to see in a statement of claim. This Court has stated consistently that the goal of *The King's Bench Rules* is to assist in the resolution of claims by the court. With respect to the changes made to the scope of application of the originating application, I now refer specifically to the comments of Elson J. in *Veitch* at para 9, as being applicable here:

> [9] ... Perhaps more importantly, the introduction of Rule 3 -49 coincided with a noticeable shift in the approach taken by Canadian courts to summary disposition of certain civil proceedings. In *Dyck v JCL Property Management Ltd.*, 2014 SKQB 274, 454 Sask R 238, Wilkinson J. addressed this shift in the context of an originating application for a declaration as to whether a deceased person held a particular interest in land. After reviewing the jurisprudence that existed before Rule 3 - 49, she said the following at paras. 34-36:
>
> > 34 There has, of late, been a significant doctrinal shift in the approach to summary procedures, favouring such approaches wherever appropriate in order to simplify and expedite court processes and thereby lessen the cost of litigation: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. While the *Park Derochie* [2013 SKQB 422] case, on which the applicant relies, preceded *Hryniak*, and while it was analyzed on the basis of the more stringent "full appreciation" test (namely, can the motions judge achieve a full appreciation of the evidence and issues required to make dispositive findings without the benefit of a trial), these considerations do not undermine its utility. In *Park Derochie*, the Court concluded a trial was not necessary on a question of contractual interpretation/parol evidence as the facts were simple, the conflicts in the evidence were not complex, the amounts involved did not exceed $35,000 and the agreement itself provided sufficient evidence to enable the Court to decide the issues. 35 This reasoning coheres with the premise underlying the remedy of declaratory relief. In *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2010 MBCA 71, 255 Man.R. (2d) 167, (appeal to SCC allowed in part, 2013 SCC 14, [2013] 1 S.C.R. 623) the Court of Appeal stated as follows:
> >
> > > [10] As Lazar Sarna, The Law of Declaratory Judgments, 3rd ed. (Toronto: Thomson Canada Limited, 2007) explains at p. 2, "[t]he inherent function of the court is to declare, in the sense of

> confirm, the rights of the parties seeking judicial intervention. The premise underlying the declaratory recourse is that judicial recognition of certain rights should not be withheld from the parties for reasons relating strictly to the procedural obstacles characteristic of other judicial remedies." A declaratory judgment "is a judicial statement confirming or denying a legal right of the applicant...
>
> [Emphasis is original]

...

[54] It is often stated that *The King's Bench Rules* are intended to serve the ends of justice and not be the master of the proceedings. Here, there is no indication given of what benefits would be gained by use of a different commencement document such as a statement of claim. Specifically, to paraphrase the comments of Laing C.J.Q.B in *Leeson*, there is no indication, or submission, to indicate, in any respect, that the issues here cannot be resolved through the use of an originating application.

[55] To achieve the purpose of resolving disputes expeditiously, *The King's Bench Rules* provide:

> **Orders respecting practice or procedure**
>
> **1-5**(1) To implement and advance the purpose and intention of these rules described in rule 1-3, the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.
>
> ...
>
> **Rule contravention, non-compliance and irregularities**
>
> **1-6**(1) If a person contravenes or does not comply with these rules, or if there is an irregularity in a commencement document, pleading, affidavit, Form or other document, a party may apply to the Court:
>
> (a) to cure the contravention, non-compliance or irregularity; or

...

[56] While not necessary to invoke these Rules in this instance, these curative provisions would be readily applied here to allow the action to move beyond this pleading issue. The procedure adopted by UR Pride provides extensive and complete information. It provides to the Government of Saskatchewan notice of the complete case it has to meet. The parties have indicated the evidence is to be presented by affidavit. This is all advanced both in accordance with the express wording of *The King's Bench Rules* and with the clear intent of moving this litigation forward. Nothing is to be gained by the use of any different procedural vehicle, even if that were required.

[57] Finally on this issue, and in any event, this very process was discussed in the *Judgment*. It was specifically noted there that the use of the originating application was the correct procedure to use:

> [54] It is also noted that the Government did not raise any suggestion that an originating application is an inappropriate vehicle by which to have the issues in this litigation determined. Indeed, it appears to be accepted, by the lack of objection, that the pleadings are those which will allow for an adjudication on the issues necessary to resolve the dispute between the parties. I have previously indicated that the pleadings in this matter are well drafted and succinctly set forth those matters to be considered by the court in determining both the interlocutory injunction application and the ultimate determination of the *Charter* issues.
>
> [55] Specifically, *The Queen's Bench Rules* [*The King's Bench* Rules] at Rule 3-49(1) set forth those actions which may be commenced by originating application. Specifically set forth is an action seeking a remedy pursuant to the *Charter*. That necessarily means this originating application is the exact method by which the challenge should be mounted.

[58] In my respectful view, the above comments resolved the issue of the correctness of the procedure adopted here. The matter is not eligible for re-argument and should have been taken as closed to further debate before this Court.

(d) Do any of the proposed amendments constitute prejudice or injustice to the Government of Saskatchewan?

[59] The Government of Saskatchewan asserts that the amendment to include a claim that the *Amending Act* breaches s. 12 of the *Charter* would result in prejudice and injustice to the Government of Saskatchewan. The argument advanced is that this prejudice and injustice occurs because the Legislature was unaware of such a potential claim when it set forth those specific *Charter* provisions contained in ss. 197.4(3) of the legislation and implemented the Notwithstanding Clause of the *Charter*. The argument goes on to assert that had the Government of Saskatchewan known of the potential s. 12 *Charter* claim, it would have included that provision within the invocation of the s. 33 Notwithstanding Clause. The Government of Saskatchewan uses wording in the brief filed which states that this outcome, with respect to the Legislature having covered off the existence of a s. 12 *Charter* claim, is "self-evident" (para. 26 brief regarding amendments) and the applicant is attempting to "exploit a technicality in the drafting of the Legislature [sic]..." (para. 32 brief regarding amendments). A strong current that runs throughout this argument is that the Government of Saskatchewan is attacking the *bona fides* of both the applicant and the pleading and in a less than veiled way suggesting that UR Pride has done something improper by now seeking a remedy based on a breach of s. 12 of the *Charter*.

[60] There may be no confusion but that what has caused the proposed amendments to be brought forward is not something the applicant did or failed to do. Rather, it is apparent that what has caused the sought for amendments is the action taken

by the Government of Saskatchewan to alter the available remedies for an alleged *Charter* breach. The pre-emptive invocation of the Notwithstanding Clause with respect to the specific *Charter* provisions pled has removed the ability to obtain certain relief, but it has not removed the applicant's allegation that there is harm being suffered here by the governmental action. Of course, that allegation has not yet been proven but it is the subject of an appropriate pleading. Again, as indicated at the opening of this decision, the correctness of that allegation is not now before the court for determination.

[61] With the introduction of the *Amending Act*, such decisions as were taken to launch the original proceeding has, apparently, been reviewed and reconsidered. The court is, of course, not entitled to know the solicitor/client discussions had to either launch the original pleading or to advance the amended pleading, but the court is entitled to observe the plainly obvious fact that the litigation landscape has been fundamentally altered by the introduction of the Notwithstanding Clause. The assertions by UR Pride as to damage being suffered by LGBTQ+ students under 16 years of age have not changed regardless of that legal landscape shift. Similarly, the denials by the Government of Saskatchewan of any such damage being suffered has also not changed. Against that backdrop, to now suggest that the applicant is not entitled to seek to advance an alternative claim or claims, not subsumed by the invocation of s. 33 of the *Charter*, is an assertion that is without merit.

[62] As a result of the foregoing, I am unable to determine that the applicant here engaged in activity which might be characterized as attempting to lull the Government of Saskatchewan into only taking the action it did. I am unable therefore to see any prejudice or injustice because the Government of Saskatchewan now states that the steps taken to invoke the Notwithstanding Clause were not far-reaching enough.

[63] In addition to the general argument outlined above, the Government of Saskatchewan also asserts it will suffer prejudice because the introduction of the s. 12 claim substantially alters the course of the action which had been commenced. In support of this contention, it is argued the s. 12 claim is materially different than the other claims for *Charter* relief advanced and will, therefore, require substantially different evidence to be marshalled.

[64] The admonition in the authorities that such amended claims should not alter the fundamental nature of the litigation is noted. In my respectful view, seeking to add a further section of the *Charter* to what is already *Charter* litigation is not fundamentally altering the nature of this litigation. Rather, it is in keeping with that which was advanced in the original pleading and is only adding to it.

[65] The ability to advance new claims or new causes of action by way of amendment to existing pleadings is generally accepted by the court. See generally: *Casbohm v Winacott Spring Western Star Trucks*, 2018 SKQB 15, 30 CPC (8th) 175; *Saskatchewan Institute of Applied Science and Technology v Hagblom Construction (1984) Ltd.*, 2003 SKQB 478, [2005] 1 WWR 390; *Harvey v Western Canada Lottery Corporation*, 2015 SKQB 102, [2015] 9 WWR 391.

[66] This action is, in total, a mere five months old. Only four months have elapsed since the Government of Saskatchewan introduced the Notwithstanding Clause. There have been no other procedural steps taken in furtherance of the sought for relief. There is no indication that the parties have completed gathering their evidence or completed any, much less all, steps prior to this matter proceeding to a hearing.

[67] Thus, even acknowledging, without accepting, that additional evidence will be required for a s. 12 claim does not amount to injustice or prejudice. It amounts

only to a need to proceed with the litigation in whatever manner the parties decide to advance their respective positions.

[68] I then turn specifically to the Government of Saskatchewan's assertion that the introduction of a s. 12 breach allegation will require the introduction of completely different evidence and arguments to the litigation. There is no basis provided for the indication that completely different evidence will need to be called with respect to the s. 12 claim as opposed to the claimed breaches of s. 7 and s. 15 of the *Charter*. UR Pride argues that such is not the case as the evidence to be proffered will necessarily overlap these *Charter* provisions and refers the court to several decisions which have dealt with allegations of both s. 7 and s. 12 *Charter* violations. In the circumstances before this Court, at this stage, I am unable to accept that the introduction of a s. 12 claim will in fact, cause the introduction of completely different evidence.

[69] Beyond this, the necessity of mounting a defence to a different legal argument does not necessarily, or axiomatically, constitute prejudice warranting relief in the form of denying the proposed amendment. Again, on a recurring theme, this action is very much at the beginning of the litigation. If in fact different, or other, evidence will need to be gathered and tendered, that is not a basis for denying an amendment. Indeed, that is the very nature of litigation as the various allegations advanced must be met as they arise.

[70] The parties have not proceeded to filing all of their evidence, nor has the matter proceeded to cross- examination on the affidavits. Accordingly, the suggestion that this matter has been in existence for some time is not in accordance with the facts that have transpired in this action. In light of the fact that the action is very much in its infancy and the evidence has neither been filed nor challenged, the further suggestion

that the amendments will result in an unacceptable delay is not supportable. There is nothing in the record to indicate that these amendments will cause inordinate delay, nor why these amendments should be presumed to cause any such delay.

[71] It is noted that the Government of Saskatchewan specifically recognizes in the brief filed that the applicant could advance a claim pursuant to s. 12 of the *Charter* if that was done by way of a separate statement of claim (para. 34 brief regarding amendments). During the argument, the position of the Government of Saskatchewan on this issue appeared to morph somewhat to become an assertion that UR Pride could not bring the s. 12 claim in any respect, but other individuals (identified as John Smith or Jane Smith by the court) could bring that same claim. It is unclear why other individuals would be able to bring a claim for certain relief, but this particular litigant would be barred from proceeding in that fashion. The court is unable to determine why this would be so. Why a separate proceeding or different parties would allow these alleged breaches of the *Charter* to proceed, but having them go forth in the existing litigation, is not reconcilable by the court.

[72] In conclusion on this issue, given the preliminary stage this litigation is at, to then suggest a different procedure or claimant would permit the s. 12 claim to proceed identifies quite clearly the absence of injustice or prejudice to this particular respondent. Rhetorically asked, how could there be such injustice or prejudice if it is not present for any such claim which could be advanced by any litigant opposing this amendment.

[73] Despite the arguments advanced, in the event it is permitted, the Government of Saskatchewan has then argued that this Court must, in some fashion, consider the situation the Legislature finds itself in and allow that constitutional body to act and take steps to consider and perhaps include s. 12 of the *Charter* within its

invocation of the Notwithstanding Clause. This, it is submitted, would move to remedy the injustice or prejudice which the Government of Saskatchewan submits it will have suffered by these particular amended pleadings, should the court determine to grant the amendments. As indicated, the Government of Saskatchewan further invites the court to accept clearly that the Legislature would have done exactly this had UR Pride been forthcoming initially in its intention to rely on this section and not lulled the Government of Saskatchewan into a false sense of security over the extent of the claim that would be advanced.

[74] It is noted there is no evidence provided to the court on these applications as to what the Legislature may have seen fit to do if a s. 12 of the *Charter* allegation had been brought earlier by UR Pride. Accordingly, it is not correct to state that the result is "self-evident" as the Government of Saskatchewan has asserted in its materials. But in any event, this Court is not permitted to either second guess the Legislature or presume to know what the content of legislation might have been had different information been available. Rather, this Court is empowered solely to deal with the legislation that is before it. While the Legislature is always at liberty to consider and, if determined necessary, to further amend legislative provisions, this Court is not free to presume either that those amendments will be made, or what those possible amendments might be.

[75] While not directly on point, the comments of Dickson C.J.C. in *R v Edward Books and Art Ltd.*, [1986] 2 SCR 713 at 783, are instructive in assessing the merits of this argument:

> I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable. The discussion of alternative

> legislative schemes that I have undertaken is directed to one end only, that is, to address the issue whether the existing scheme meets the requirements of the second limb of the test for the application of s. 1 of the *Charter* as set down in *Oakes* [*R v Oakes*, [1986] 1 SCR 103].

[76] The further comments of the British Columbia Supreme Court in *Canada (Attorney General) v Campbell*, 1999 CanLII 6139 (BCSC), are of additional assistance in this regard:

> [28] Under our system of government, it is essential that the courts respect the right of Parliament and of the legislative assemblies to exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation. This obligation is no less than that of the duty of the legislative and executive branches to respect and defend the independence of the judiciary. These are matters fundamental to our democratic beliefs, our history and our constitution. They should not be impinged upon lightly, if at all.
>
> [29] The result is that the legislative branch must be given free reign to introduce bills and to explore in debate the ramifications of proposed legislation. Legislatures are, nonetheless, bound by the rule of law. Should they pass legislation which the courts subsequently find to be unconstitutional, they are bound to respect such a ruling.

[77] And finally, the comments of the court in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 34-35, [2018] 2 SCR 765, are noted:

> [34] The development of legislation by ministers is part of the law-making process, and this process is generally protected from judicial oversight. Further, this Court's jurisprudence makes clear that, if Cabinet is restrained from introducing legislation, then this effectively restrains Parliament (*Canada Assistance Plan* [[1991] 2 SCR 525], at p. 560). This Court has emphasized the importance of safeguarding the law-making process from judicial supervision on numerous occasions. In *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, a majority of the Court stated that "[c]ourts come into the picture when legislation is enacted and not before" (p. 785). In *Canada Assistance Plan*, the Court underscored that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559).

> [35] Longstanding constitutional principles underlie this reluctance to supervise the law-making process. The separation of powers is "an essential feature of our constitution" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 52; see also *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 27). It recognizes that each branch of government "will be unable to fulfill its role if it is unduly interfered with by the others" (*Criminal Lawyers' Association*, at para. 29). It dictates that "the courts and Parliament strive to respect each other's role in the conduct of public affairs"; as such, there is no doubt that Parliament's legislative activities should "proceed unimpeded by any external body or institution, including the courts" (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 20). Recognizing that a duty to consult applies during the law-making process may require courts to improperly trespass onto the legislature's domain.

[78] All of this leads inexorably to the conclusion that what the Legislature might do is beyond the purview of this Court and is little more than speculation such as to be of no assistance in determining whether or not to grant the proposed amendments in this matter.

[79] However, I do provide some brief comment regarding the assertion that if the s. 12 claim is to be permitted to proceed, this Court "must" impose a stay of proceedings to permit the Legislature to now take steps to consider the introduction of further legislation to include s. 12 of the *Charter* within the Notwithstanding Clause or "must" grant an adjournment of the currently established timelines in this action (brief on amendments at para. 23). Specifically, I determine that neither path mandatorily follows for this Court from a decision to allow such an amendment.

[80] The legislative branch and the judicial branch of our constitutional democracy operate separately and entirely independently. They must both ensure appropriate oversight to ensure the ongoing adherence to the Rule of Law. To now suggest the judicial branch of government should hold back on its constitutional duties to permit the legislative branch to consider whether it ought to engage its process to

take further steps to remove a remedy from a litigant is to blur the lines identified in this paragraph. I decline to do that.

[81] The Government of Saskatchewan alternatively seeks an adjournment of the present timetable in these proceedings should the amendments be granted to include the s. 12 *Charter* relief, and a stay is not imposed. I similarly decline to so adjourn at this stage, based on the materials now before the court on this application. This is done without prejudice to either party to bring such adjournment requests by way of notice of motion before the court as they determine appropriate. In that event, the request will be considered based on the specific material produced and the arguments advanced. The court is not in a position to prejudge the necessity for an adjournment in the circumstances of this litigation.

[82] Thus, quite regardless of why s. 12 of the *Charter* was not previously specifically pled, the amendment can and should still proceed in light of the events which have occurred.

[83] I deal finally on this issue of injustice and prejudice, with the proposed amendments to change the language with respect to the claim advanced against the Policy. The proposed amendments with respect to the Policy simply seek to update the language used to reflect the reality of what has happened to the legal background of this dispute. It is appropriate that those amendments proceed to ensure that the complete and accurate position is before the court. Those amendments will be without prejudice to the Government of Saskatchewan's ability to argue again the mootness issue, should it decide to do so in the future.

(e) Do the proposed amendments introducing an allegation of a breach of s. 12 of the *Charter* fail to disclose a reasonable cause of action?

[84] The parties agree that the appropriate test to be applied to determine whether a claim may be struck at this stage as disclosing no reasonable cause of action is whether it is plain and obvious the claim will necessarily fail. The Government of Saskatchewan cites the summarizing comments of this Court in *Reed v Dobson*, 2021 SKQB 252 at para 59, referring to the comments of the Supreme Court of Canada in *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, [2020] 2 SCR 420:

> [59] While disagreeing respecting the final disposition of the appeal, all judges agreed on the relevant legal principles applicable to applications to strike a pleading on the basis that it fails to disclose a reasonable cause of action. These principles are as follows:
>
> 1. The test is whether the claim has "no reasonable prospect of success" or it is "plain and obvious the action cannot succeed": *Babstock* at paras 14 and 87 citing *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], and *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959;
>
> 2. The facts as pled are assumed to be true "unless they are manifestly incapable of being proven": *Babstock* at para 87 quoting *Imperial Tobacco*;
>
> 3. The pleading should be read as generously as possible and should not be defeated because of drafting deficiencies: *Babstock* at para 88;
>
> 4. The threshold to strike a pleading is high and applies to determinations of fact, law, and mixed fact and law: *Babstock* at paras 87 and 90;
>
> 5. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: *Babstock* at paras 14 and 90; and
>
> 6. The correct posture for the court to adopt is to consider whether the pleadings as they stand, or may reasonably be amended, disclose a question that is not doomed to fail:

Babstock at para 90.

[85] To disallow the proposed amendment regarding the inclusion of s. 12 in the requested *Charter* relief on the basis that it discloses no reasonable cause of action, it must be clear that the claim has no reasonable chance of success and is necessarily doomed to failure. This is a low bar to allow such pleadings to proceed.

[86] The discussion of this test in *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45, is instructive:

> **IV. Analysis**
>
> A. The Test for Striking Out Claims
>
> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, at para 15; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, at p 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v B.D.*, 2007 SCC 38, [2007] 3 SCR 83; *Odhavji Estate; Hunt; Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR.735.
>
> [18] Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.
>
> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims,

> without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
>
> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] AC 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All ER 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[87] The court is also referred to the comments of Barrington-Foote J. (as he then was) in *Venture Construction Inc. v Saskatchewan (Highways and Infrastructure)*, 2015 SKQB 70 at para 11, [2015] 10 WWR 467:

> [11] This statement reflects the fact that the phrase "reasonable chance of success" must be interpreted generously. A claim should not be struck unless it is "hopeless" or, as *Hunt* [[1990] 2 SCR 959] puts it, has a radical defect. The plaintiff need not show that it will succeed. The question is whether there is some chance of success. The threshold for a claim to survive, as many courts have said, is low. There are many questions which have not been clearly asked or answered by the courts, and even where the answer seems clear, the law will sometimes evolve.

[88] In this regard, at this stage, I am hesitant to engage in a full and complete review of the claim now sought to be advanced pursuant to s. 12 of the *Charter* together with any shortcomings it may have. I do not think it correct to review the proposed claim in such detail given the low threshold to be met to allow the claim to proceed. Rather, it must be determined whether the claim is hopeless, devoid of merit, or a like characterization. Discussion on the ultimate success or failure of the claim, should it be permitted to proceed, must then await the receipt of evidence and submissions at the ultimate hearing of the matter.

[89] The Government of Saskatchewan firstly submits that the amending legislation is not "treatment" administered by an agent of the state as stipulated in s. 12 of the *Charter*. It is then argued further that the effect of the amending legislation cannot be determined to be "cruel and unusual". Accordingly, it is argued that a claim of a violation of s. 12 of the *Charter* is necessarily doomed to failure.

[90] With respect to the issue of treatment in s. 12 of the *Charter*, the Government of Saskatchewan refers to the decision of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 48, [2004] 1 SCR 76 [*Canadian Foundation*], where the majority judgment of the Supreme Court of Canada determined that actions by parents did not constitute treatment by the state in the context of s. 43 of the *Criminal Code*, RSC 1985, c C-46:

> 48 Section 43 exculpates corrective force by parents or teachers. Corrective force by parents in the family setting is not treatment by the state. Teachers, however, may be employed by the state, raising the question of whether their use of corrective force constitutes "treatment" by the state.
>
> [Emphasis in original]

[91] Furthermore, the Government of Saskatchewan then appears to submit that the legislation does not introduce any form of treatment and cites the following

passage from *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 612 [*Rodriguez*]:

> ... There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under s. 12. ...

[92] UR Pride further cites *Rodriguez* and *Canadian Foundation* in support of its argument of an ongoing consideration and expansion of the definition of what can be considered treatment by the state. It is argued that the legislation results in "misgendering" and "outing" of a gender diverse student under the age of 16. This, it is submitted, constitutes treatment pursuant to s. 12 of the *Charter*. It is then argued this treatment is being done by state employees in the form of educators. That which may be determined treatment by a state actor is not a closed set and should not be determined to be such on this application. It is submitted this will be a live issue as the ultimate hearing of this matter.

[93] Again, the purpose of reviewing whether a reasonable cause of action is disclosed is not to determine whether or not ultimate success will be achieved. It is also not to engage in actual or complete analysis of the arguments being advanced. Therefore, it is not to determine whether the applicant has a steep hill to climb to establish any breach pursuant to s. 12.

[94] On the basis of the arguments advanced, I am unable to state that the legislation simply cannot be considered to be treatment by a state actor. What may be considered to be treatment remains open for further consideration. And, whether educators' actions under the legislation are to be considered state enforcement of a treatment remains an issue for consideration. I refer to the comments in this regard in *Canadian Foundation*. UR Pride has recognized the claim here is in somewhat

uncharted territory. However, that UR Pride has a steep hill to climb in this regard does not mean it should not be given the opportunity to engage in the climb in an effort to illustrate that the incline can be conquered.

[95] The Government of Saskatchewan argues that the requirement of parental consent cannot be considered to be "cruel and unusual" thereby removing it from a s. 12 analysis. It is stated categorically that the prohibition on using pronouns, gender identification, or other names, absent parental consent cannot be considered grossly disproportionate to that which is appropriate, nor can it be incompatible with human dignity (para. 73 brief regarding amendment). The Government of Saskatchewan then engages in a fully supportive argument of the amending legislation and its salutary effects of including parents in these types of discussions with respect to their children.

[96] The short response to these arguments at this very preliminary stage is, quite simply, that the court does not know this to be the case. As identified in the *Judgment*, the Supreme Court of Canada has stated that gender diverse individuals have been marginalized in our society. In *Hansman v Neufeld*, 2023 SCC 14 at paras 84-87, 481 DLR (4th) 218, the court stated:

> [84] The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our country has been marked by discrimination and disadvantage. Although being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" (J. Drescher and E. Haller, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals*, 2018 (online)), transgender and other gender non-conforming individuals were largely viewed with suspicion and prejudice until the latter half of the 20th century.
>
> [85] Indeed, transgender people occupy a unique position of disadvantage in our society, given the long history in psychiatry "of conflating [transgender and other 2SLGBTQ+] identities with mental illness" and even resorting to harmful "conversion therapy" to

"resolve" gender dysphoria, and "recondition" the individual to reduce "cross-gender behavior" (A. Veltman and G. Chaimowitz, "Mental Health Care for People Who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer" (2014), 59:11 *Can. J. Psychiatry* 1, at pp. 1-2; American Psychological Association, Task Force on Gender Identity and Gender Variance, *Report of the Task Force on Gender Identity and Gender Variance* (2009), at p. 27). As the British Columbia Human Rights Tribunal has recognized, "[u]nlike other groups . . ., transgender people often find their very existence the subject of public debate and condemnation" (*Oger v. Whatcott (No. 7)*, 2019 BCHRT 58, 94 C.H.R.R. D/222, at para. 61). They are stereotyped as diseased or confused simply because they identify as transgender (*Nixon v. Vancouver Rape Relief Society (No. 2)*, 2002 BCHRT 1, 42 C.H.R.R. D/20, at paras. 136-37).

[86] Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced (see *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018* (September 2020)). Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare (Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022), at p. 10; *XY v. Ontario (Government and Consumer Services) (No. 4)*, 2012 HRTO 726, 74 C.H.R.R. D/331, at paras. 164-66). And despite encountering a higher incidence of justiciable legal problems, studies have also found that transgender people have traditionally faced greater access to justice barriers than the broader population, in part due to a lack of explicit human rights protections (J. James et al., *Legal Problems Facing Trans People in Ontario*, TRANS*forming* JUSTICE Summary Report 1(1), September 6, 2018 (online); see also Department of Justice Canada, at p. 11).

[87] Significant legal advancements in transgender rights have only come in the last 35 years, with most change taking place in the last decade (S. Singer, "Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice" (2020), 35 *C.J.L.S.* 293, at p. 298). Once forced to advance claims of discrimination on the ground of "physical disability" (B. Findlay et al., *Finding Our Place: Transgendered Law Reform Project* (1996), at pp. 20-21), gender identity and/or expression are now prohibited grounds of discrimination in human rights codes across the country and included

> within the prohibition against hate speech under the *Criminal Code*, R.S.C. 1985, c. C-46 (see *Alberta Bill of Rights*, R.S.A. 2000, c. A-14; *Human Rights Code*, R.S.N.B. 2011, c. 171; *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1; *Human Rights Act*, R.S.N.S. 1989, c. 214; *Human Rights Act*, S. Nu. 2003, c. 12; *Human Rights Act*, S.N.W.T. 2002, c. 18; *Human Rights Code*, R.S.O. 1990, c. H.19; Human Rights Act, R.S.P.E.I. 1988, c. H-12; *Charter of human rights and freedoms*, CQLR, c. C-12; *Human Rights Act*, R.S.Y. 2002, c. 116; *The Human Rights Code*, C.C.S.M., c. H175; *The Saskatchewan Human Rights Code*, 2018, S.S. 2018, c. S-24.2; *An Act to amend the Canadian Human Rights Act and the Criminal Code*, S.C. 2017, c. 13).

[97] That which is considered to be cruel and unusual was discussed in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 735, the court stated:

> The respondent alleges a violation of s. 12 for essentially the same reasons that he claims s. 7 is infringed. He submits that the combination of s. 27(1)(*d*)(ii) and 32(2) constitutes cruel and unusual punishment because they require that deportation be ordered without regard to the circumstances of the offence or the offender. He submits that in the case at bar, the deportation order is grossly disproportionate to all the circumstances and further, that the legislation in general is grossly disproportionate, having regard to the many "relatively less serious offences" which are covered by s. 27(1)(*d*)(ii).
>
> I agree with Pratte J.A. that deportation is not imposed as a punishment. In *Reference as to the effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, Duff C.J. observed at p. 278 that deportation provisions were "not concerned with the penal consequences of the acts of individuals". See also *Hurd v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 594 (C.A.), at pp. 606-07, and *Hoang v. Canada (Minister of Employment and Immigration)* [(1990), 13 Imm. L.R. (2d) 35], *supra*. Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines treatment as "a process or manner of behaving towards or dealing with a person or thing ...." It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not cruel and unusual.
>
> The general standard for determining an infringement of s. 12 was set out by Lamer J., as he then was, in the following passage in *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072:

> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell* [[1977] 2 SCR 680], *supra*, at p. 668, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately.

[98] In *R v Boudreault,* 2018 SCC 58 at para 45, [2018] 3 SCR 599 this was stated as follows:

> [45] Since the victim surcharge constitutes a form of punishment, the next step is to determine whether that punishment is cruel and unusual. As this Court has stated many times, demonstrating a breach of s. 12 of the *Charter* is "a high bar": *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24. The impugned punishment must be more than merely disproportionate or excessive. Rather, "[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society": *Lloyd*, at para. 24, citing *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26; see also *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. It is only on "rare and unique occasions" that a sentence will infringe s. 12, as the test is "very properly stringent and demanding": *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417.

[99] The deleterious effect of the legislation on gender diverse youth (a marginalized part of society), if indeed there is any such negative effect, will have to be the subject of evidence to be called. That evidence will then inform the debate of whether the legislated requirements may be considered to be cruel and unusual punishment: is such prohibition abhorrent or intolerable to society. While this is acknowledged to be a high bar, that does not prevent the applicant from proceeding

with the claim. The question for determination will be whether prohibiting any gender diverse students from expressing their gender diversity is incompatible with human dignity. Then, if so, can such action be justified in a free and democratic society pursuant to s. 1 of the *Charter*.

[100] Finally on this issue, the Government of Saskatchewan argues that any hypothetical advanced to illustrate cruel and unusual punishment cannot be far-fetched. By advancing this prong of the argument, it appears the Government of Saskatchewan is suggesting that those cases where a gender diverse minor will be met with adverse reception or consequences if required to obtain parental consent, constitutes such a minority of situations that it is to be considered far-fetched.

[101] Again, at the risk of over-repeating, at this very preliminary stage I am unable to accept this assertion either as factually correct or even relevant to the inquiry now being made. In short, these arguments can only be entertained in light of an evidentiary background. Are there such minors? What are the risks to them? How prevalent are any such risks? How serious or severe are any such risks? While this is not, of course, exhaustive of the issues to be considered and debated, these are the types of issues that will require an evidentiary background to be provided and challenged. That evidentiary background that is accepted by the court will then inform the considerations pursuant to s. 12 of the *Charter*.

[102] Moreover, the Government of Saskatchewan's full and absolute defence of the legislation at this application stage is something that is better left to a consideration of whether any breach (should one be ultimately found) can be justified in a free and democratic society. This, of course, entails a review of s. 1 of the *Charter*.

[103] It follows from all of the foregoing on this issue, that I am unable to conclude the claim pursuant to s. 12 of the *Charter* will necessarily fail. A difficult claim, a novel claim, or even a steep climb claim, is not analogous to a doomed claim. There is no basis here to deny the applicant the opportunity to establish their claim.

(f) Are any of the proposed amendments scandalous, frivolous, or vexatious?

[104] The criteria to assist in the determination of whether a proposed pleading is scandalous, frivolous, or vexatious has been set forth in *Siemens v Baker*, 2019 SKQB 99 at paras 22-26, [2019] 5 CTC 129:

> [22] *Sagon v Royal Bank of Canada (1992)*, 105 Sask R 133 (Sask CA) is the seminal case relating to striking a pleading. It is especially relevant for present purposes because it addressed an application alleging a statement of claim was deficient, in part, because it was scandalous, frivolous, vexatious, and an abuse of process. Respecting arguments that the pleading ran afoul of what are now Rules 7-9(2)(b) and 7-9(2)(e), Sherstobitoff J.A. said this:
>
> > [18] Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing [than the ground of disclosing no reasonable cause of action]. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of res judicata will likely apply to any subsequent efforts to bring new actions based on the same facts. Odgers on *Pleadings and Practice*, 20th Ed. says at pp. 153-154:
> >
> > > "If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the

> story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved." (footnotes omitted)

[19] Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under rule 173. Bullen and Leake [*Precedents of Pleadings*, 12th ed.] defines the power as follows at pp. 148-149:

> "The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will m a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done'.
>
> "The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction." (footnotes omitted)

[23] Although these terms are often used interchangeably, it is helpful to differentiate among them. A pleading will qualify as "scandalous" if it levels degrading charges or baseless allegations of misconduct or bad faith against an opposite party. See: *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119 at para 45, 418 Sask R 96 [*Paulsen*] and the authorities cited there. Courts in British Columbia, for example, have described a scandalous pleading as "one that is so irrelevant that it will involve the parties in useless expense and prejudice the [pursuit] of the action by involving them in a dispute apart from the issues". See: *Turpel-Lafond v British Columbia*, 2019 BCSC 51 at para 23, 429 DLR (4th) 131 [*Turpel-Lafond*] quoting from *Woolsey v Dawson Creek (City)*, 2011 BCSC 751 at para 28.

[24] A pleading will qualify as "vexatious" if it was commenced for an ulterior motive (other than to enforce a true legal claim) or maliciously for the purposes of delay or simply to annoy the defendants. See: *Paulsen*, at para 46. Put another way, it is vexatious

if it does not assist in establishing a plaintiff's cause of action or fails to advance a claim known in law. See: *Turpel-Lafond*, at para 23.

[25] A pleading will qualify as "frivolous" if it is plain or obvious or beyond reasonable doubt the claim it advances is groundless and cannot succeed. See: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980; *Paulsen* at para 47; and *Wayneroy Holdings Ltd. v Sideen*, 2002 BCSC 1510 at para 17.

[26] Finally, the concept of a pleading qualifying as an abuse of process is somewhat more expansive than the other categories identified above. In *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152, 345 DLR (4th) 152, for example, the Court of Appeal described it at para. 36 as "a flexible concept not restricted by the requirements of issue estoppel" reflecting "the inherent power of a judge to prevent an abuse of his or her court's authority". Writing for the court, Richards J.A. (as he then was) elaborated at para. 38 as follows:

> [38] The need to maintain the integrity of the adjudicative process sits at the heart of the concept of abuse of process. The Supreme Court of Canada explained this point as follows in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77:
>
> > [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> See also: *Cameco Corp. v. Insurance Co. of State of Pennsylvania*, 2010 SKCA 95, [2010] 10 W.W.R. 385 per Cameron J.A. at paras. 47-50

[105] The discussion of abuse of process will be relevant to the issue following. I include it in this citation for purposes of completeness.

[106] Under this issue, in addition to again asserting the s. 12 *Charter* claim is without merit, the Government of Saskatchewan points to the following wording used by UR Pride in the amended originating application:

> 15.4 The amendments in Bill 137 similarly preserve the brutality of the Misgendering Requirement in situations where it is "reasonably expected that obtaining parental consent ... is likely to result in physical, mental or emotional harm to the pupil." As with the Policy, Bill 137 required that the student be "direct[ed] ... to the appropriate professionals, who are employed or retained by the school, to support and assist the pupil in developing a plan to address the pupil's request with the pupil's parent or guardian". To the extent that those professionals are employees of the school, they may only do so while harmfully misgendering and deadnaming the student.
>
> 15.5 Aware of the devastating effect the new section 197.4 of *The Education Act, 1995* would have on gender diverse students under 16, the Government of Saskatchewan tried to ensure it would be shielded from judicial scrutiny and escape legal accountability and liability. Among the amendments included in Bill 137 were:
>
> > (a) the pre-emptive invocation of the Notwithstanding Clause to declare that section 197.4 operates notwithstanding section 2, 7, and 15 of the *Charter* (but not section 12);
> >
> > (b) the pre-emptive invocation of section 52 of *The Saskatchewan Human Rights Code, 2018* to declare that section 197.4 operates notwithstanding *The Saskatchewan Human Rights Code, 2018*, particularly sections 4, 5, and 13;
> >
> > (c) the bar on any action or proceeding for any loss or damage resulting from the enactment or implementation of section 197.4 or of a regulation or policy related thereto against the Crown in right of Saskatchewan, or any employee thereof; a member or former member of the Executive Council; or board of education, the conseil scolaire, the Saskatchewan Distance Learning Centre (the "**SDLC**") or a registered independent school, or any employee thereof; and

> (d) the extinguishment of every claim for loss or damage resulting from the enactment or implementation of section 197.4 or of a regulation or policy related thereto.
>
> ...
>
> 44.1 Section 197.4 of *The Education Act, 1995* deprives gender diverse students of their section 7 *Charter* right not to be deprived of security of the person except in accordance with the principles of fundamental justice. Sections 7 provides that:
>
> > Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> >
> > [Emphasis added]

[107] The Government of Saskatchewan asserts that the wording employed is designed solely to annoy, embarrass, and harass, the Government of Saskatchewan. UR Pride recognizes that the wording used may place the respondent in an "unflattering light", but it argues that does not cause the statements to veer into the realm of scandalous, vexatious, or even an abuse of process.

[108] UR Pride is asserting various claims that seek to establish the Government of Saskatchewan has wrongly advanced the Policy and the legislation to the detriment of a certain defined segment of the population. They seek to assert these claims pursuant to the *Charter* regarding cruel and unusual punishment, a denial of equality rights, and a denial of the fundamental principles of justice. They further seek to assert that the violation of these fundamental rights cannot be justified in a democratic society. They have not yet proven any of their allegations, and the merits of their claims have, of course, not been commented upon by the court.

[109] In my respectful view, the language used, while direct and perhaps considered to be less than delicate is neither vexatious nor scandalous. Whether the behaviour alleged can be established through evidence tendered must await another

day. Any legitimate concerns with the language used in advancing the various claims can then be considered in conjunction with the evidence tendered, the law as it then exists, and the arguments advanced by the parties to the litigation. I am unable to determine the language used is inappropriate for litigation such as that before the court.

[110] On the basis of that which is before the court, I am unable to conclude the language used is baseless, degrading, or even advanced for an ulterior purpose. A plain reading of the words suggests that they identify the position to be advanced by UR Pride. They are part of the entire case sought to be advanced. Of course, whether or not they can be established on the evidence is another matter. There is no bar on them being used in the pleadings here.

(g) Do any of the proposed amendments constitute an abuse of the process of the court?

[111] Finally, the Government of Saskatchewan refers the court to the discussion of what constitutes abuse of process. In the immediately preceding section, authority is cited to assist in the determination of whether a pleading constitutes an abuse of process. Additionally, in *Walker v Mitchell*, 2020 SKCA 127 at paras 17-20, [2021] 4 WWR 555, the following was stated:

> **IV. ISSUES**
>
> [17] The question posed in this appeal is whether the Chambers judge erred in striking the appellant's claim pursuant to Rule 7-9(2)(e) as an abuse of process.
>
> **V. ANALYSIS**
>
> [18] The Supreme Court of Canada in *Toronto v C.U.P.E., Local 79*, 2003 SCC 63 at para 51, [2003] 3 SCR 77 [*Toronto*], stated that "the doctrine of abuse of process concentrates on the integrity of the adjudication process". The doctrine employs the inherent power of the court to prevent misuse of its procedure in a way that would bring the

administration of justice into disrepute:

> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v Coles* (2000), 51 OR (3d) 481 (CA), at para 55, per Goudge J.A., dissenting (approved [2002] 3 SCR.307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 WLR 347 at p 358, [1990] 2 All ER 990 (CA).
> >
> > (Emphasis in original)

...

[20] Neva McKeague and Christine Johnston's *2019–2020 Saskatchewan Queen's Bench Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2019) at 445 provides a useful summary of the law regarding abuse of process:

> **Subrule (2)(e): Abuse of the process of the court**
>
> This subrule is available on a more broadly conceived basis than is the form of protection afforded by subrule 7-9(2)(a), which should not be overlooked when applying to strike out a statement of claim as amounting to an abuse of process: *Dagenais v Dagenais*, 2007 SKCA 117. In an application to strike under subrule 7-9(2)(a), the court is to presume the truth of the contents of a statement of claim. This principle does not, however, apply to an application made under subrule 7-9(2)(b) or (e): *Pelletier Estate v Uteck*, 2008 SKQB 218; *Dagenais v Dagenais*, 2007 SKCA 117; *Haug v Loran*, 2017 SKQB 92.
>
> This ground merely spells out the inherent jurisdiction that the court has always had to protect itself from being used for

> baseless, manifestly unsound actions: *Chapman Estate v O'Hara* (1988), 46 DLR (4th) 504, [1988] 2 WWR 275 (Sask CA), aff'g [1987] TWL QB87117 (QB). See also *R v Janvier*, [1985] 5 WWR 59, 41 Sask R 90 (QB); *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, 74 DLR (4th) 321; *Mahon v Mahon* (1982), 21 Sask R 10, 30 RFL (2d) 130 (QB); *Morrison v Heming* (1921), 61 DLR 103 (Sask KB); *Sharp v Edsam Holdings Ltd.* (1999), 176 Sask R 248 (QB).
>
> Abuse of process is a "flexible doctrine": *Robert L. Conconi Foundation v Bostock*, 2016 SKQB 399. The order striking on the basis of abuse of process is discretionary and will be granted only in clear and obvious cases. It makes no difference whether the order is sought under this rule or under the inherent jurisdiction of the court: *Gordon International Ltd. v Rosen* (1985), 40 Sask R 165 (QB). See also *Boulding v Hall*, 1999 SKQB 264.

[112] I determine that the Government of Saskatchewan's argument that these proceedings amount to an abuse of process appears to be as follows. The specific abusive conduct may be broken down into three categories, based on the arguments advanced. The first appears to be that UR Pride is engaged in conduct identified as "litigation by instalment". The second appears to be a repetition of the argument that UR Pride is attempting to circumvent the amending legislation introduced by the Government of Saskatchewan. The final argument asserts that an "intense delay" occasioned by the introduction of a s. 12 *Charter* argument is contrary to the Foundational Rules of the court which seek to advance claims expeditiously, encourage honest and open communication, identify the real issues between the parties, and refrain from filing applications which do not further the purpose and intention of *The King's Bench Rules*, and therefore advancing a new claim is abusive in these circumstances. All of the discussion on conduct is taken from Rule 1-3(2) of *The King's Bench Rules*.

[113] The argument advanced in support of this being litigation by instalment is that the s. 12 *Charter* violation was not identified until after the legislation was passed. The Government of Saskatchewan refers the court to the decision of *Bear v*

Merck Frosst Canada & Co., 2011 SKCA 152, 345 DLR (4th) 152, and the following particular passages at paras. 76-78:

> [76] In my opinion, the Bear and Rybchinski Actions are abuses of process. Messrs. Bear, Gurnsey and Rybchinski were putative members of the plaintiff class Mr. Wuttunee and then Messrs. Choquette and Derusha sought to represent through the efforts of MLG. When the *Wuttunee* [2009 SKCA 43] certification effort failed, MLG then assisted Messrs. Bear, Gurnsey and Rybchinski to step forward in a new effort to certify a class of which Messrs. Wuttunee, Choquette and Derusha are now putative members. Moreover, the Bear Action was commenced the very next day after the Supreme Court of Canada denied leave to appeal and thereby confirmed that the action started by Mr. Wuttunee would not proceed as a class action. The pleadings in the Bear and Rybchinski Actions borrow heavily from the *Wuttunee* pleadings and are said to reflect the lessons learned from *Wuttunee*. There is nothing in the Bear and Rybchinski Actions that could not have been advanced in *Wuttunee*.
>
> [77] It would be naïve, in my respectful view, to think that MLG's common involvement with *Wuttunee* and with the Bear and Rybchinski Actions is of no import or consequence in the abuse of process analysis. Those actions must be seen as part of a common effort, effectively piloted or coordinated by MLG, to certify a Vioxx class action against Merck. This does not mean that these claims are MLG's claims in any legal sense of the word. It is only to say that MLG's across-the-board involvement cannot be overlooked when determining if this sort of approach undermines the integrity of the adjudicative process.
>
> [78] Seen in light of all of the relevant circumstances, the Bear and Rybchinski Actions must be considered to be an effort to litigate by instalment and thus to be abuses of process.

[114] This decision identified that the litigation had been resolved by judicial determination and the party at issue attempted to return the matter to court with a further "instalment".

[115] The concept of litigation by instalment is succinctly explained in *Gilewich v Gilewich*, 2007 SKCA 44 at paras 7-8, 293 Sask R 148:

> [7] The doctrine of abuse of process is explained in *The Doctrine of Res Judicata in Canada* by Donald Lange [Donald J. Lange, The Doctrine of Res Judicata in Canada, 2d ed. (Markham: Butterworths, 2004)]. In *Gough v. Newfoundland and Labrador* [2006 NLCA 3] the Court noted that the abuse of process by relitigation is sometimes described at p. 361 as:
>
> > … a rule against litigation by instalment… In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. …
>
> [8] In *Rowell v. Manitoba* [2006 MBCA 14] and the issue of litigation by instalment, the court stated:
>
> > 26. There is no doubt that a litigant must exhaust his available remedies when the opportunity arises. It constitutes an abuse of process to advance a claim on one ground and lose, and then advance the same claim against the same party on another ground which could have and should have been raised in earlier proceedings.
>
> [Footnotes omitted]

[116] Here, there has been no final judicial pronouncement. Indeed, this Court has been exceedingly clear in the *Judgment,* and throughout this decision, that no determination has yet been made on the merits of the claims being advanced. As a result, this application to amend to plead a new claim cannot be seen as an instalment as there has, quite obviously, been no earlier or previous resolution.

[117] If it is being suggested that the Government of Saskatchewan's introduction of the legislation constitutes such an end to the litigation, as appeared to be the inference during submissions, I find I must respectfully disagree. That the Government of Saskatchewan has introduced this legislation and that it has validly invoked s. 33 of the *Charter* cannot and must not be considered to be a final or a judicial determination of the *lis* between the parties. Rather, while it is an event which has occurred which will most certainly affect the litigation between the parties, it in no way prevents the party here from advancing new or different claims. Whether those claims

will be successful is, of course, a matter to be determined following the hearing of the case. It is only a judicial pronouncement which is of any moment with respect to this particular discussion.

[118] The Government of Saskatchewan again then argues that to allow the amendments to include a s. 12 *Charter* allegation would somehow allow the applicant to circumvent the legislation and the Legislature. While a response to this position is set forth earlier in these reasons, I repeat that the court is not entitled to guess at the Legislature's wishes. Rather, the court (and the litigants for that matter) are required to take the legislation as they find it. There may be no suggestion of impropriety in a litigant seeking to advance arguments seemingly not covered by the legislation in question.

[119] The Government of Saskatchewan suggests there has been an "intense delay" (para. 117 brief regarding amendments) and this action is "at a relatively late stage in the proceedings" (para. 113 brief regarding amendments) thereby warranting a judicial determination that the applicant is acting contrary to the foundational rules of *The King's Bench Rules* found at Rule 1-3.

[120] I determine to summarily dismiss the suggestion that the manner of proceeding here could be considered in breach of these foundational rules or that there is evidence of inappropriate actions here. There may be no suggestion through these amendments that the applicant has either delayed matters or failed to engage in honest and open communication. The attempt to impute ill-motive is not borne out by any of the material filed on the various applications nor is it borne out by the actions of UR Pride in these proceedings.

[121] To again suggest there is any sort of delay here is, respectfully, to ignore that which is plain and obvious and beyond debate: this action is five months old. While much has been done in the litigation in that short time period, there may be no reasonable suggestion there has been delay or that the litigation is in its late stages.

[122] The applicant advanced a claim originally based entirely on those matters that were before it: the Policy and no advance invocation of the Notwithstanding Clause. The Legislature changed these pillars of the litigation by introducing amending legislation and invoking the Notwithstanding Clause. UR Pride seeks to continue to advance a claim regarding what it describes as misgendering and outing. Simply and directly put, it is doing nothing improper or untoward by seeking litigation routes which avoid the actions taken by the legislature.

[123] It follows therefore, that I determine the applicant has not engaged in any abuse of the process of the court by advancing these amendments. I note in passing that certain of the wording used in the grounds for the application were not, in fact, amendments, as they appeared in the original notice of application. Regardless, there is no abuse of the process of the court in this situation.

4. Is the court's jurisdiction ousted by the invocation of the Notwithstanding Clause?

[124] The Government of Saskatchewan applies pursuant to Rule 7-1 of *The King's Bench Rules* for an order determining that as a result of the invocation of the Notwithstanding Clause of the *Charter* in ss. 197.4(4) of the *Amending Act*, this Court is without jurisdiction to continue with an examination of the legislation to determine or to declare whether or not it violates ss. 7 or 15 of the *Charter*. In short, the Government of Saskatchewan argues that it has the power to determine whether a court

of superior jurisdiction will be able to act, and further, that it has the sole prerogative to decide to do away with any and all forms of judicial oversight. The Government of Saskatchewan advances this argument on the basis that a valid invocation of s. 33(1) of the *Charter* necessarily and completely removes the legislation from judicial review. According to the Government of Saskatchewan's position, the jurisdiction of the court is ousted and the ability of the judicial branch of the constitutional democracy is summarily terminated.

[125] The first step in the development of this issue is to determine whether it is appropriate to decide it at this stage of the proceedings or whether it should remain as one of the issues to be decided at the ultimate hearing of this matter. Rule 7-1 of *The King's Bench Rules* provides:

> **Application to resolve particular questions or issues**
>
> 7-1(1) On application, the Court may:
>
> (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of:
>
> (i) disposing of all or part of a claim;
>
> (ii) substantially shortening a trial; or
>
> (iii) saving expense;
>
> (b) in the order mentioned in clause (a) or in a subsequent order:
>
> (i) define the question or issue or, in the case of a question of law, approve or modify the issue agreed to by the parties;
>
> (ii) fix time limits for the filing and service of briefs, an agreed statement of facts or any other materials required for the hearing; and

(iii) set out any other direction to organize the hearing;

(c) stay any other application or proceeding until the question or issue has been decided; or (d) direct that different questions of fact in an action be tried by different modes.

(2) If the question is a question of law, the parties may agree on:

(a) the question of law for the Court to decide;

(b) the remedy resulting from the Court's opinion on the question of law; and

(c) the facts, or may agree that the facts are not in issue.

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may:

(a) strike out a claim or order a pleading to be amended;

(b) give judgment on all or part of a claim and make any order it considers necessary;

(c) make a determination on a question of law; and

(d) make a finding of fact.

(4) Division 2 of Part 5 applies to an application pursuant to this rule unless the parties agree otherwise or the Court orders otherwise.

(5) A determination of a question or issue mentioned in subrule (1) is final and conclusive for the purposes of the action, subject to the determination being varied on appeal.

[126] The methodology behind the application of this provision was described in *Weisbeck v Regina (City)*, 2018 SKQB 60 at paras 9-13, 18 CPC (8th) 376:

ANALYSIS

Applications under Rule 7-1: Is this an appropriate case to determine an issue before the trial?

[9] Rule 7-1 permits the court to order that an issue or question be heard before a trial, if it will achieve the purpose of disposing of all

or part of a claim, substantially shortening the trial, or saving expense. That Rule reads as follows:

[10] Rule 7-1 requires a two-step process. First, one or more of the parties must apply for an order that a question or issue be heard or tried. The court then decides if the question or issue is appropriate for determination under the Rule. If so, the court may accept the question as defined by the parties or may itself define the question or issue to be determined, and the procedure to be followed. The second step is hearing the issue so defined, making a determination on that issue, and fashioning an appropriate remedy: *Venture Construction v Saskatchewan (Ministry of Highways and Infrastructure)*, 2015 SKQB 470, [2015] 10 WWR 467; *Reed v Dobson*, 2017 SKQB 273 [*Reed*].

[11] The first step, as Chief Justice Popescul noted in *Reed*, requires a "judgment call" as to whether determining the issue or question prior to trial makes practical sense and will be fair to the parties. Just because there is a significant issue or point of law that is central to the case does not mean the issue should necessarily be decided in advance of the trial. Considerations of time, expense, and fairness to the parties must all be taken into account. At paras. 20, 22-25, the Chief Justice wrote:

> 20 In deciding the first step of the two-step process, namely, whether the question or issue is appropriate for determination under this Rule, the court must perform a preliminary assessment as to whether separating an issue or issues from the main trial is just and would perform a useful purpose. In doing so, the court should view Rule 7-1 through the lens of the Foundational Rules, and in particular Rule 1-3, which states that the purpose of the Rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost efficient way.
>
> ...
>
> 22 In my view, Rule 7-1 is far more expansive and less restrictive than former Rule 188. Rule 7-1 does not require undisputable facts and the issue or question to be determined is not restricted to points of law. Accordingly, the breadth of Rule 7-1 is considerably larger than former Rule 188.
>
> 23 The judgment call that needs to be made here, quite simply, is whether a "hearing", by *viva voce* evidence or affidavit evidence in advance of the trial makes practical sense and would be fair to the parties. That is, is it more likely than

> not that having the discreet issues determined in advance of the trial would save time and expense, be more convenient and not compromise fairness? This is often a challenging call to make in advance of a process since it is difficult to predict whether the severance of issues will shorten and simplify, or lengthen and complicate, the process. Nonetheless, the court must use its best judgment, based upon the information before it, to decide whether to bifurcate in advance of the trial.
>
> 24 On the one hand, reading Rule 7-1, in light of Rule 1-3, provides a strong indication that courts should be willing to grant remedies that potentially provide a timely and cost efficient result without sacrificing fairness and justice.
>
> 25 On the other hand, the presumption has always been that the most efficient way to resolve an action is to decide all issues at once in one trial or proceeding. Experience has shown that sometimes an attempt to save time and money by splitting litigation up into small pieces does not work.
>
> [12] As I stated earlier, the jurisprudence suggests that a two-step process is to be employed when dealing with an application under Rule 7-1. However, the two steps can be combined into one in appropriate cases, for instance where the first step is readily dealt with, and the parties have proceeded on the basis of a single chambers appearance in which they are ready to argue the Rule 7-1 application on its merits. In such circumstances, formulaic adherence to a process that requires two separate appearances and two separate hearings would serve no purpose: *A.D. v E.D.*, 2007 SKQB 50, 294 Sask R 80; *CAF Custom Apparel Farm v Morguard Real Estate Investment Trust*, 2013 SKQB 123.
>
> [Emphasis in original]

[127] I am satisfied here that deciding this "threshold issue" now is appropriate in these circumstances. While UR Pride has referred to those principles applicable to the issue of whether to bifurcate trial matters, I am satisfied that deciding this threshold issue now allows the parties to know where the litigation is headed; it resolves a substantive and substantial issue in advance of trial; it provides for a savings by permitting the parties to know what preparation will need to be done for the hearing; and finally it reduces the complication of the ultimate hearing.

[128] With that determination on the preliminary issue, I then move on to the central issue of whether the court's jurisdiction has been ousted.

[129] In support of the Government of Saskatchewan's interpretation, the court is referred to: *R v Horner* 2013 SKQB 340, 367 DLR (4th) 455 [*Horner*], *Hak c Procureur général du Québec*, 2021 QCCS 1466 [*Hak*], and *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [*Ford*]. I do not find these decisions opine that the jurisdiction of the court is necessarily ousted by invocation of the Notwithstanding Clause. In fact, I determine that the *ratio decidendi* of *Hak* determines that a court does indeed continue to have such jurisdiction in the face of the invocation of the Notwithstanding Clause, but further determines not to exercise its discretion to grant the declaratory relief requested.

[130] In *Horner*, Schwann J. (as she then was) was faced with determining whether ss. 15(1) of the *Charter* applied to certain provisions of *The Workers' Compensation Act*, RSS 1978, c W-17 and amendments thereto. In that case, the Government had not invoked the Notwithstanding Clause and it was argued by the plaintiff that, as a result, *Charter* rights could not be waived. In the course of her reasons, the learned justice stated as follows:

> [51] Section 33 enables governments to override specified *Charter* protected rights (including s. 15 equality rights) and thereby be free from the invalidating effect of those provisions. "...The override power, if exercised, would remove the statute containing the express declaration from the reach of the *Charter* provisions referred to in the declaration without the necessity of any showing of reasonableness or demonstrable justification". (Peter W. Hogg, *Constitutional Law of Canada*, 5 ed, looseleaf, (Toronto: Carswell, 2007) vol. 2, at p 39-2) The practical effect of this legal principle is that the override would insulate the statute from judicial scrutiny.
>
> [52] With that legal backdrop in mind, I turn to the flaws in Ms. Horner's argument. First, the suggestion government must invoke a s.

> 33 declaration in this circumstance to override s. 15 of the *Charter* is premised on the underlying assumption that Saskatchewan knew the legislation was *Charter* non-compliant, yet purposefully proceeded to enact just such a law in the face of this legal reality. To be clear, for purposes of this application alone, a *Charter* infringement has been assumed for the sake of argument. There is no evidence Saskatchewan enacted the impugned legislation knowing full well the legislation was constitutionally flawed. Furthermore, as Saskatchewan submits, the impugned legislation is remedial in nature inasmuch as it was designed to address and respond to a perceived *Charter* issue which solidified when s. 15 of the *Charter* came into force.
>
> [53] Second, there appears to be no authority for the proposition that a government must invoke the notwithstanding clause in every occasion where *Charter* protected rights are involved. While it is true that invocation of s. 33 insulates legislation from *Charter* attack and judicial scrutiny, there is nothing which requires governments to legislate this provision into statute. Surely governments have the legislative freedom to enact what they perceive to be constitutionally sound legislation. By opting not to invoke s. 33 (the legislative norm in Canada), government merely exposes the legislation to the possibility of a *Charter* challenge but whether that challenge has merit and can succeed is another matter entirely. Ironically for Ms. Horner, had the government invoked the notwithstanding clause as she suggests they should, her claim would have been foreclosed and beyond judicial review.
>
> [Emphasis in original]

[131] I do not determine that this judgment decides the issue of the court's jurisdiction here. This is so for two reasons. Firstly, the Notwithstanding Clause had not been invoked in the legislation being considered there. As a result, any comments regarding that clause and its effect are *obiter dicta* and not binding in the situation now being faced by the court. Indeed, the comments made were not done with any amount of analysis and appear to be little more than off-hand commentary unconnected with the actual matters at issue in that litigation and to which the court there was directed to decide.

[132] Secondly, the choice of words by Schwann J. are interesting. In para. 51, she refers to "the practical effect" of the invocation of the Notwithstanding Clause is to "insulate the statute from judicial scrutiny". Indeed, the use of the Notwithstanding Clause will generally be to practically remove the legislation from judicial review because of the necessary result that such a legislative provision, if in violation, cannot be struck down or otherwise limited in its application. This is a practical observation rather than a judicial determination.

[133] The Government of Saskatchewan similarly asserts that *Hak* has determined that judicial review is unavailable once s. 33 of the *Charter* is invoked. In *Hak* the Superior Court of Quebec was tasked with considering the constitutionality of Quebec's *Loi 21, Loi sur la laïcité de l'État*. For the purposes of this decision, I summarize that legislation as having prohibited public sector employees from wearing symbols of their religion in the workplace.

[134] The Superior Court of Quebec conducted a full hearing into the constitutionality of the legislation. This hearing included the receipt of evidence and the advancing of full submissions by all of the parties involved. The legislation included the invocation of ss. 33(1) of the *Charter*. Despite this invocation, the court heard the complete application before rendering its judgment. Ultimately, the court declined to exercise its discretion to grant certain declaratory relief.

[135] At para. 4 of *Hak*, bullet point 10, the court stated:

> [4] ...
>
> - L'exercice de la discrétion judiciaire milite en faveur du refus de la demande de jugement déclaratoire qui s'appuie sur une interprétation jusqu'à ce jour inédite des termes de l'article 33 de la *Charte canadienne des droits et libertés*;

[Footnotes omitted]

[English Version : Appendix A]

[136] However, this statement must be considered in the context of the actual reasons given by the court for declining to exercise its jurisdiction here:

> **11.3 Le jugement déclaratoire a titre de réparation**
>
> [785] La FAE [Fédération autonome de l'enseignement] cherche à obtenir un jugement déclaratoire voulant que les dispositions de la Loi 21 portent atteinte aux articles 2 et 15 de la Charte canadienne et aux articles 3 et 10 de la Charte québécoise malgré le recours aux clauses dérogatoires par le législateur. Selon elle, cette demande et le jugement qui en résulterait permettraient d'attirer l'attention des membres de l'Assemblée nationale et de la population québécoises sur la nature des droits et libertés violés afin que ceux-ci puissent réagir en conséquence par voie du processus démocratique à la fin du délai de cinq ans prévu à l'article 33(3) de la Charte canadienne.
>
> [786] L'article 33 de la Charte énonce :
>
> > 33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.
> >
> > (2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.
> >
> > (3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.
> >
> > (4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).
> >
> > (5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).
>
> [787] Lauzon invite le Tribunal à déclarer que la Loi 21 porte atteinte à la liberté de conscience et de religion, à la liberté d'expression et au droit à l'égalité garantis par les chartes canadienne et québécoise d'une

façon qui ne se justifie pas dans le cadre d'une société libre et démocratique parce que l'utilisation des clauses dérogatoires permet uniquement qu'on ne donne pas effet à une loi qui porte atteinte à un droit protégé. Selon elle, le libellé des articles 33 de la Charte et 52 de la Charte québécoise, tout comme la compétence inhérente des Cours supérieures et leurs devoirs d'interpréter les lois, y compris celles qui font l'objet d'une clause de dérogation, ainsi que l'article 24(1) de la Charte autorisent le Tribunal à accorder le jugement déclaratoire recherché.

[788] Elle argue que ces déclarations constituent une intervention judiciaire nécessaire dans les circonstances exceptionnelles qui sous-tendent la contestation judiciaire. D'une part, elle postule que celles-ci serviraient à informer le débat public, ce qui s'avèrera nécessaire dans l'éventualité où l'Assemblée nationale devrait débattre de l'opportunité de renouveler l'utilisation de la clause de dérogation et, d'autre part, ces déclarations prendraient effet sans délai dans l'éventualité d'un non-renouvellement de l'application des clauses de dérogation. Finalement, à ce sujet, elle ajoute que ces déclarations d'inconstitutionnalité informeraient l'analyse du Tribunal quant au bien-fondé de la demande pour dommages-intérêts réclamés par les demanderesses.

[789] Pour le PGQ [Procureur général du Québec], comme le jugement déclaratoire repose sur une contestation d'une violation des articles 2 et 15 de la Charte et que l'utilisation de la clause de dérogation de l'article 34 de la Loi 21 soustrait ces droits garantis du pouvoir de révision du Tribunal, il s'ensuit selon lui que le Tribunal ne peut donner suite à la demande de jugement déclaratoire. Selon lui, comme une réparation convenable et juste au sens de l'article 24 de la Charte doit découler de la violation d'un droit fondamental causée par la conduite ou un acte commis par l'État pour la même raison qu'explicitée auparavant, cette demande ne peut recevoir l'aval du Tribunal.

[790] La FAE se réclame, entre autres, de l'arrêt *El-Alloul c. Procureure générale du Québec* [2018 QCCA 1611] pour demander au Tribunal de prononcer un jugement déclaratoire quant à la conformité constitutionnelle de la Loi 21. Dans cet arrêt, la Cour d'appel note le contexte factuel singulier devant lequel se retrouvait la requérante *El-Alloul*, ce qui entraînait des difficultés réelles pour identifier la procédure judiciaire adéquate et appropriée dans de telles circonstances.

[791] Elle énonce que l'article 24(1) de la Charte peut assurément servir d'assise au prononcé d'un jugement déclaratoire. Ainsi, à l'évidence, dans la mesure où le Tribunal reconnaît la violation de

droits constitutionnels, normalement, il doit pouvoir accorder une réparation.

[792] La Cour d'appel affirme que les tribunaux peuvent rendre des jugements déclaratoires sans cause d'action et peu importe si une mesure de redressement consécutive peut suivre. Cependant, il importe de souligner qu'en ce faisant, la Cour d'appel rappelle le caractère discrétionnaire d'un tel remède.

[793] Bien qu'il ne faille pas appliquer une démarche procédurière rigide, le Tribunal ne donnera pas suite à la demande de jugement déclaratoire notamment parce que, d'une part, contrairement à l'affaire *El-Alloul*, il existe bel et bien un débat de nature constitutionnelle entre les parties en l'instance.

[794] D'autre part, avec l'utilisation des clauses de dérogation, le législateur place le débat constitutionnel dans un contexte bien particulier. Le Tribunal ne se retrouve pas dans une impasse procédurale comme dans *El-Alloul*. De plus, dans cette affaire, le contexte factuel militait fortement pour l'émission d'un remède, alors qu'ici, à charge de redite, l'utilisation des clauses de dérogation enlève toute effectivité réelle à cet égard.

[795] Le Tribunal doit se montrer soucieux de respecter la séparation des pouvoirs entre ceux qu'exercent la branche législative et la branche judiciaire. Ainsi, le Tribunal doit éviter d'utiliser le pouvoir discrétionnaire qu'il possède en la matière pour émettre ce qui s'apparente, à plusieurs égards, à une opinion judiciaire qui porte sur une question purement théorique reposant de plus sur des considérations hypothétiques. En effet, le substrat factuel repose sur la prémisse voulant que le législateur pourrait décider de ne pas utiliser à nouveau l'article 33 de la Charte.

[796] Le Tribunal exerce sa discrétion judiciaire pour ne pas donner suite à une telle demande.

[797] Premièrement, parce que la question posée s'avère théorique puisqu'elle vise à contourner le contexte factuel existant à ce jour pour en suggérer un, hypothétique, qui repose sur l'absence de l'utilisation des clauses de dérogation par le législateur.

[798] Deuxièmement, et de façon plus importante, parce que bien qu'en apparence, il faut donner un sens aux mots utilisés à l'article 33 qui ne parle que de l'effet de l'utilisation de la clause de dérogation, ce qui n'exclurait pas une demande de jugement déclaratoire, il n'en demeure pas moins que de faire un tel débat constitue une façon indirecte de faire quelque chose que l'on ne peut faire directement.

> [799] Avec égard, bien que les droits et libertés constituent un sujet de la plus haute importance, il faut éviter d'hypothéquer un système judiciaire déjà suffisamment occupé avec des recours qui ne débouchent pas sur un résultat concret.
>
> [800] Voilà pourquoi le Tribunal rejette cette demande.
>
> [Emphasis in original]
>
> [Footnotes omitted]
>
> [English Version: Appendix B]

[137] The court's acceptance of both its jurisdiction and its obligation is succinctly set forth in the following extracts:

> [775] Certains pourraient rétorquer que le législateur jouit du pouvoir absolu de rédiger et d'adopter les lois. Cela demeure vrai. Mais dans la mesure où seul le recours à l'urne constitue le remède approprié à l'égard de l'exercice de ce pouvoir, il convient que la société civile connaisse, d'une part, la façon dont ce pouvoir s'exerce et, d'autre part, les conséquences qu'entraîne un tel exercice, et ce, a fortiori, lorsque l'on traite de droits et libertés fondamentaux.
>
> [776] Ainsi, 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.
>
> [777] En termes plus concrets, il faudrait possiblement que le législateur doive et puisse expliquer en cas de contestation, à tout le moins *prima facie*, non pas la légitimité politique ou juridique du recours aux clauses de dérogations, ou pour reprendre les termes de l'arrêt *Ford*, exiger une justification *prima facie* suffisante de la décision d'exercer le pouvoir dérogatoire, mais simplement l'existence d'une certaine connexité entre la suspension des droits et libertés et les objectifs poursuivis par la législation en question. Ainsi, cela permettrait au Tribunal, en cas de contentieux quant à la portée de l'utilisation des clauses de dérogation, d'en apprécier le caractère juridiquement nécessaire pour que le législateur puisse atteindre la finalité qu'il recherche et ce, tout en respectant la très grande latitude dont il jouit.
>
> [Footnotes omitted]

[English Version : Appendix C]

[138] The court in *Hak* appears to have accepted its ability to determine the constitutionality of legislation despite the presence of the Notwithstanding Clause, however it declined to exercise its discretion to render any form of declaratory judgment on the issue presented. This is not equivalent to a determination of there being no jurisdiction as is suggested by the Government of Saskatchewan here in support of its arguments. In fact, I determine it is quite the opposite as there was recognition of the court's jurisdiction but a declination by the court to exercise that available jurisdiction.

[139] Finally, on the decisions cited in support of the Government of Saskatchewan's assertions, and upon which it argues supports its claim for the immunity from judicial review of legislation upon invocation of the Notwithstanding Clause, the Government of Saskatchewan refers the court to *Ford*. There, the Supreme Court of Canada determined the minimal formal requirements of legislation which seeks to invoke s. 33 of the *Charter*, and whether such invocation would apply retroactively. On the issue of the formal requirements, the court stated at 740-742:

> In the course of argument different views were expressed as to the constitutional perspective from which the meaning and application of s. 33 of *the Canadian Charter of Rights and Freedoms* should be approached: the one suggesting that it reflects the continuing importance of legislative supremacy, the other suggesting the seriousness of a legislative decision to override guaranteed rights and freedoms and the importance that such a decision be taken only as a result of a fully informed democratic process. These two perspectives are not, however, particularly relevant or helpful in construing the requirements of s. 33. Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a *prima facie*

> justification of the decision to exercise the override authority rather than merely a certain formal expression of it. There is, however, no warrant in the terms of s. 33 for such a requirement. A legislature may not be in a position to judge with any degree of certainty what provisions of the *Canadian Charter of Rights and Freedoms* might be successfully invoked against various aspects of the Act in question. For this reason it must be permitted in a particular case to override more than one provision of the *Charter* and indeed all of the provisions which it is permitted to override by the terms of s. 33. The standard override provision in issue in this appeal is, therefore, a valid exercise of the authority conferred by s. 33 in so far as it purports to override all of the provisions in s. 2 and ss. 7 to 15 of the *Charter*. The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*. ...

[140] Contrary to what appears to be asserted by the Government of Saskatchewan, 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 (para. 39 threshold brief). Rather, that decision is confined to a resolution of only the issues identified above.

[141] In support of the position advanced on this aspect of the application, the Government of Saskatchewan argues forcefully that the Notwithstanding Clause was invoked validly here. It further forcefully argues that such invocation cannot and must not be questioned by the court. With those two propositions, there is no issue taken by the court. Indeed, at the outset of these reasons, the ability of the Government of Saskatchewan to invoke ss. 33(1) and the appropriateness of such invocation was clearly stated to be beyond the purview of the court to make comment. By conflating these truisms with the further conclusion that this necessarily puts all judicial review beyond the jurisdiction of the court is a leap of logic that cannot be made through the use of the authorities identified immediately above. Thus, stating that the minimal formal requirements for invocation have been widely accepted does not then lead to the

conclusion that judicial review of such legislation is prohibited. The issues are distinct and quite separate.

[142] The Government of Saskatchewan also invests time in relaying the thoughts and comments of some of the original actors in the drafting of the *Charter*, and in particular the inclusion of ss. 33(1), in support of the argument that the court is without jurisdiction to proceed any further once s. 33(1) of the *Charter* has been invoked. While these references to the original parties involved in the rarefied air of constitutional repatriation and introduction of an original designation of fundamental rights are always of historical interest, respectfully they are of little assistance in arriving at the appropriate interpretation to be applied to the constitutional provision at issue. In this regard, I refer to the comments of the Supreme Court of Canada in *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 507-509, which confirmed that what has been said by those involved is of limited, if any, assistance in determining legislative intention:

> Largely in consideration of this argument, Canadian courts have developed the rule that, in scrutinizing legislative intent for the purpose of determining constitutional validity, statement by members of the legislature during passage of the challenged Act are irrelevant and inadmissible. Several explanations of the rule have been put forward. Strayer has argued that the rule is sound because legislative motive is irrelevant to constitutional validity: "the essential factual issue here is that of effect ..." More convincingly, it has been argued that, considering the way in which the Canadian process of enactment differs from that of the United States, "Hansard gives no convincing proof of what the government intended..." Moreover, by allowing ambiguities in the statute to be resolved by statements in the legislature, ministers would be given power in effect to legislate indirectly by making such statements. "Cabinets already have powers enough without having this added unto them."
>
> If speeches and declarations by prominent figures are inherently unreliable (*per* McIntyre J. in *Reference re Upper Churchill Water Rights Reversion Act* [[1984] 1 SCR 297], *supra*, at p. 319) and "speeches made in the legislature at the time of enactment of the

> measure are inadmissible as having little evidential weight" (*per* Dickson J. in the reference *Re: Residential Tenancies Act 1979* [[1981] 1 SCR 714], *supra*, at p. 721), the Minutes of the Proceedings of the Special Joint Committee, though admissible, and granted somewhat more weight than speeches should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the *Charter* rather than a statute.
>
> Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?
>
> Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

[143] In Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72 UTLJ 189 at 197 [*Leckey*], this conclusion is stated as follows:

> … In answering this question, we heed the Supreme Court of Canada's caution that statements by those involved in constitutional drafting have limited interpretive value. Whatever the notwithstanding clause's conceptual origins or the provincial premiers' hopes for it, we view the interpretive task now as integrating it into the Constitution of Canada. The Court's recognition in recent decades that 'foundational principles of the Constitution' can influence the interpretation of constitutional text invites reconsideration of prior understandings and assumptions, including ones relating to section 33.
>
> …

[144] I accept that *Hak* determines a superior court does have such jurisdiction. However, there is no directly binding authority upon this Court directing the proper

interpretation of whether the court continues to have jurisdiction, I must return to basic principles to interpret s. 33 of the *Charter* and its effect on this Court's jurisdiction.

[145] There has been much scholarly debate on the issue of the court's existing jurisdiction in the face of a valid invocation of the Notwithstanding Clause. An excellent summary of this debate can be found in Kristopher E.G. Kinsinger's "The Evolving Debate Over Section 33 of the *Charter*" (https://ssrn.com/abstract=4462387), a chapter to appear in *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* [McGill-Queen's University Press; forthcoming].

[146] In particular, the parties have provided the court with the opposing arguments advanced by the *Leckey* paper and that advanced by Maxime St-Hilaire and Xavier Foccroulle Ménard in their paper, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29-1 *Constitutional Forum* 38, 2020 CanLIIDocs 3209.

[147] As will be developed *infra*, I determine that the use of the Notwithstanding Clause does not serve to oust the jurisdiction of the court to determine, and provide declaratory relief, as to whether or not the subject legislation is in breach of those sections of the *Charter* including in the invocation of the Notwithstanding Clause.

[148] I arrive at this conclusion utilizing the following analysis:

(i) By considering the wording used in s. 33(1) of the *Charter*;

(ii) By considering the importance of citizens having ongoing access to the courts; and

(iii) By considering the courts historical and legislated ability to issue declaratory judgments which may have no substantive effect.

(i) By considering the wording used in s. 33(1) of the *Charter*

[149] When interpreting constitutional provisions, words used in the enactment are of prime importance. In *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at paras 8-11, [2020] 3 SCR 426, the court stated:

> [8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 ("*Vancouver Island Railway*"), "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question": p. 88. This was reiterated in *Grant* [2009 SCC 32], where the Court stated that "[a]s for any constitutional provision, the starting point must be the language of the section": para. 15 (emphasis added). Recently, in *Poulin* [2019 SCC 47], the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.
>
> [9] This is so because constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain "the most primal constraint on judicial review" and form "the outer bounds of a purposive inquiry": B. J. Oliphant, "Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms" (2015), 65 *U.T.L.J.* 239, at p. 243. The Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Re PSERA*"), at p. 394; *Caron* [2015 SCC 56], at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted "the primacy of the written text of the Constitution": para. 36; see also para. 37.
>
> [10] Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53

> and 55; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, at paras. 21 and 126; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; *Big M Drug Mart* [[1985] 1 SCR 295], at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.
>
> [11] While acknowledging, at para. 71, that language is part of the analysis, and that "the text of the *Charter* matters", our colleague Abella J. stresses the direction in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, that the task of interpreting a constitution is fundamentally different from interpreting a statute, and that courts ought "not to read the provisions of the Constitution like a last will and testament lest it become one": p. 155. This felicitous phrase cannot, however, be taken as minimizing the primordial significance of constitutional text as it has since, and repeatedly, been recognized in this Court's jurisprudence: see, e.g., *Caron*, at para. 36; *Vancouver Island Railway*, at p. 88. It is not the sole consideration, but treating it as the first indicator of purpose is not in the least inconsistent with the principles of *Charter* interpretation; it is in fact constitutive of them.
>
> [Emphasis in original]

[150] In *Leckey*, the learned authors advance the following argument based on an interpretation of the language used in s. 33:

> We argue that, while the notwithstanding clause may give the legislature the 'last word' on whether a protected law can produce legal effects, it does not do so on the law's impact on rights and its justification. Nor does it make those questions legally meaningless or silence the judiciary. Instead, subsection 33(3), which limits each use of the notwithstanding clause to the maximum time between elections, assigns to the electorate an important role in assessing the legitimacy and justifiability of a protected law's impact on rights. As for the judiciary, it may support this democratic accountability. In appropriate cases, on application by a plaintiff with standing, a court may scrutinize a protected law in the light of arguments and evidence, declaring whether the law limits Charter rights and, if so, whether such limits are demonstrably justifiable in a free and democratic society. Such a declaration would not stop the law's operation. But that traditional Charter analysis could enhance the electorate's ability to play the constitutional role assigned to it by subsection 33(3).

[151] The words used in s. 33 of the *Charter* do not include any words which could be interpreted to remove the jurisdiction of the court to determine whether legislation violates any specific *Charter* provision, or even to place limits on the exercise of such jurisdiction. While certainly s. 33 prevents a court from striking down legislation or from, in any way, limiting the legislation's operation, the jurisdiction of the court is left untouched by such invocation. The invocation of this clause affirms that the doctrine of parliamentary supremacy remains in place such that the judicial arm of government is not necessarily able to oust the will of the legislative arm of government, in these circumstances. But it does not then necessarily mean that the judicial arm is to be rendered extraneous and powerless.

(ii) By considering the importance of citizens having ongoing access to the courts

[152] Such a silencing of judicial jurisdiction would run contrary to the principle that courts must be available for all citizens who feel aggrieved by a law. In *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 3 SCR 199 at para 136, McLachlin J. (as she then was) stated:

> 136 As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

[153] The fundamental principle that citizens must have unrestricted access to the court has been emphasized in various decisions, but the comments of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 36-40, [2014] 3 SCR 31, are particularly instructive here:

> [36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.
>
> [37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco* [2005 SCC 49]. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.
>
> [38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal's statement of the law ((1985), 20 D.L.R. (4th) 399, at p. 406):
>
> > . . . access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . . . Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have

> already indicated, interference from whatever source falls into the same category. [Emphasis added.]

> As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, per Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26).

> [39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel* [[1995] 4 SCR 725], "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference* [[1997] 3 SCR 3], at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

> [40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-69, *per* Newbury J.A.

[154] I conclude this aspect of this issue by emphasizing the necessity of there being ongoing access to the court and to judicial review of governmental action as recognized by various constitutional scholars. I refer firstly to Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 152:

> This judicial review function was continued after Confederation by virtue of section 129 of the *Constitution Act, 1867*. The courts have also held that attempts by the legislature to limit the

> ability of courts to review statutes or actions of public bodies to ensure consistency with the Constitution are unconstitutional. For example, in *Amex Potash Ltd. v Saskatchewan* [(1976), [1977] 2 SCR 576], the Supreme Court struck down a Saskatchewan statute that attempted to bar recovery of taxes that had been levied pursuant to an unconstitutional statute. The Court held that in a federal state, "the bounds of sovereignty are defined, and supremacy circumscribed." While courts could not question the wisdom of enactments, they did have a responsibility to ensure that the limits imposed by the constitution were observed: "it is the high duty of this court to ensure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power." The court held that any attempt by the legislature to prevent access to the courts for purposes of determining the constitutional validity of a statute would be an invalid infringement on this judicial role. The attempts by Saskatchewan to limit recovery of illegally levied taxes was an attempt to do indirectly what could not be done directly, and was also invalid.
>
> The guarantee of access to the courts for purposes of testing the constitutional validity of statutes or the actions of public bodies was confirmed and reinforced the *Constitution Act, 1982*. The preamble to the 1982 Act refers to the constitutional status of the rule of law. Furthermore, the Supreme Court has confirmed that the rule of law is a foundational principle of the Canadian constitutional order. The maintenance of the rule of law would be impossible if unconstitutional actions by legislatures or government could not be challenged in the courts. The Supreme Court has held that guarantees of access to the courts for the determination of individuals' legal rights is one aspect of the principle of the rule of law. Accordingly, it is the responsibility of the courts to make findings of consistency and/or inconsistency with the constitution and any attempt by the legislatures or by government to prevent the courts from fulfilling this function would be invalid.
>
> [Footnotes omitted]

[155] The fundamental importance of providing for and protecting the right of judicial review is further aptly set forth in Hon. Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021) at 36-37:

> **1) Judicial Review to Protect Democracy**
>
> One of the best defences of judicial review is the arguments that the entrenchment of constitutional rights is consistent with the

> fundamental principles of democracy. There is a strong argument that democracy cannot be explained simply in terms of majority rule and that adherence to certain fundamental values an principles is necessary for democracy to flourish. There is more to democracy than raw majority rule. A healthy democracy rests upon a legal framework that protects fundamental legal rights, guards against discrimination and marginalization of minorities, and encourages the engagement of citizens in the process of government. Implicit in that legal framework is a role for the courts. An obvious example would be judicial review to protect the right to vote, "a fundamental political right [and] a core tenet of our democracy" and a right that "underpins the legitimacy of Canadian democracy and Parliament's clam to power". The right to vote has been robustly defended by the courts, "unaffected by the shifting winds of public opinion and electoral interests", against legislative curtailment. Should majorities be entitled to deny that right to certain members of society, without having to justify the decision other than be the force of their numbers? The power of judicial review, requiring demonstrable justification for decisions to limit rights, enhances, rather than detracts from, democratic values. Similarly, free and open debate of public issues is essential to democracy, and the exercise of the power of judicial review to protect the fundamental freedoms of expression, opinion, and the press can be seen as enhancing and reinforcing democracy. Majorities of the day have a tendency to try to suppress the expression of unpopular views that threaten the status quo. Judicial review serves to bolster democratic values by requiring reasoned justification for laws that limit the rights of those who hold views diverging from the prevailing wisdom of the day. As noted in Chapter 1, even before the introduction of the *Charter*, the Supreme Court, at times, protected freedom of expression on the basis that I was necessary for democracy.
>
> [Footnotes omitted]

[156] And finally, this right is echoed by Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at paras 4.67-4.69:

> **(1) Judicial Review**
>
> **4.67** Judicial review is the procedure allowing superior court to look at a decision of a public body, and determine if the decision is within the scope of its powers as delegated by Parliament or a legislature. Judicial review is rooted in the basic tenets of constitutional law as a consequence of the relationship between the

> principles of Parliamentary sovereignty, the rule of law, and the inherent power of the courts to review the legality of actions in order to maintain an adequate balance between these two principles. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.
>
> **4.68** In addition to its constitutional duties, judicial review was historically motivated by the desire to ensure the predominance of the courts over administrative or "inferior" tribunals, and to provide remedies to those subject to unjust or illegal decisions by government agents. The rule of law is preserved because the courts always have the final word on legislative intent, and whether the administrative decision, as delegated, was properly within the decision-making power or jurisdiction of the administrative decision-maker.
>
> **4.69** Parliament or the legislature may, for the purposes of expertise, economy, efficiency or other *bona fide* reasons, intend to preclude any right to appeal any administrative decision to the superior courts. However, judicial review allows superior courts entrusted with an "inherent" jurisdiction under the rule of law to supervise the legality of any action, to perform its supervisory function and even quash decisions that are *ultra vires*. Intervention is thus possible, on judicial review, even where a strong privative clause was put in place by the legislature. As guardians of the rule of law and legislative supremacy, superior courts cannot have heir authority diminished by any legislative attempt to shiel and administrative decision from their supervisory powers. The inherent power of superior courts to review administrative action is, as seen above, constitutionally protected by section 96 to 101 of the *Constitution Act, 1867*. The result of this combination is that administrative action may sometimes not be appealed, but may always be judicially reviewed by the courts of inherent jurisdiction.
>
> [Footnotes omitted]

[157] This lengthy discussion of the historical and entrenched availability of judicial review and access to justice, and its importance to the protection of the Rule of Law, I conclude that to remove such a pillar would require clear wording to that effect. I have concluded there is no such wording, much less clear wording.

(iii) By considering the courts historical and legislated ability to issue declaratory judgments which may have no substantive effect

[158] While the court cannot strike down the legislation on the basis of a violation of either s. 7 or s. 15 of the *Charter*, the court does have both the legislated ability and the inherent jurisdiction to issue declaratory judgments. *The King's Bench Act*, SS 2023, c 28, provides as follows:

> **Declaratory judgments and orders**
>
> **3-3** A judge may make binding declarations of right whether or not any consequential relief is or can be claimed, and no action or matter is open to objection on the ground that a mere declaratory judgment or order is sought.

[159] Thus, the court has the power to issue declaratory judgments in situations like that now presented to the court. The Honourable Mr. Justice Malcolm Rowe & Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67 McGill LJ 295 at paras 1, 27-31, & 48-50 (QL), there is a discussion of what a declaratory judgment is, and the value it provides when issued in a proceeding:

> **Introduction: Purpose and Scope**
>
> **1** At common law, judicial power is typically limited to what is necessary to resolve the live dispute before the court and to give effect to the legal rights of the parties. This limits judicial power to adjudication, avoids intruding on the law-making function of the legislative branch, preserves judicial resources, and ensures the common law develops incrementally in response to submissions from interested parties in a true adversarial process. There are exceptions to this general rule, such as the court's ability to hear reference questions and moot disputes, but these neither detract from the operation of the general rule, nor do they undermine its rationale.

...

> **27** The factors a court must consider in determining whether to exercise its discretion and render a declaratory judgment also bear some resemblance to the doctrine of justiciability. Justiciability has been defined as "a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life." In determining whether a matter is justiciable, courts should consider, among other things: [T]hat the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute. The test for when a court should exercise its discretion to grant declaratory relief is similar because the reluctance to render bare declaratory judgments is motivated by similar concerns as to the appropriate role of courts and the proper scope of judicial authority.
>
> **28** Hearing moot disputes and answering reference questions are useful exceptions to the general common law rule that judicial authority is limited to what is necessary to resolve the live dispute before the court. So too is the declaratory judgment. It is an exception because while there must be a legal right and a legal dispute at stake, it is not a legal right or a legal dispute in the traditional sense of the terms, because no consequential relief is sought and no legal rights are actually exercised.

[160] The learned authors go on to explain the value of a declaratory judgment despite the inability to then grant consequential relief:

> ***D. The Tension Inherent in the Bare Declaratory Judgment***
>
> **29** There is a tension between settling a real dispute or determining rights on the one hand, but awarding no consequential relief on the other. What does it mean to have a right or resolve a live dispute if there is no consequential relief? What is a right if it is not enforceable? What is a legal dispute without legal rights that can be enforced? The limits courts have set out for when a declaratory judgment is appropriate can sometimes prove difficult to understand and apply in light of what a bare declaratory judgment is.
>
> **30** As discussed further below, the utility of the declaratory judgment lies in large part in its preventative quality -- a declaration can prevent a live dispute and a breach of legal rights that may give

> rise to damages or some other consequential remedy, by clarifying for the parties in advance what those rights are. Justice Dickson emphasized this "preventative role" of declaratory judgments in *Operation Dismantle* [[1985] 1 SCR 441], where he explained that "no injury' or wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty." But if the utility of a declaratory judgment lies in its ability to prevent a dispute, how can the existence of a genuine dispute also be a prerequisite?
>
> ...

[161] Finally, the importance of the presence of declaratory relief in public law situations is commented on in this article as follows:

> **IV. Declarations in Public Law**
>
> ***A. Rights under Statutes***
>
> **48** It is well established that declaring how a statute applies to an individual or a group can be useful and appropriate. For example, in *Daniels v. Canada (Indian Affairs and Northern Development)* [2016 SCC 12], the Supreme Court declared that the term "Indians" in section 91(24) of the *Constitution Act, 1867* includes Métis and non-status Indians. The Court reasoned that there was practical utility in delineating and assigning constitutional authority for these two groups: "A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute." Similarly, in *Canada (Citizenship and Immigration) v. Tennant* [2019 FCA 206], the Federal Court of Appeal considered whether declaring Mr. Tennant to be a citizen of Canada was appropriate declaratory relief. The issue was whether this declaration was really a declaration of fact, while the Federal Courts Rules only allow "a binding declaration of right." The Court held that status as a citizen of Canada by descent may be the subject of a declaration, as Canadian citizenship is a creature of statute, with no meaning apart from statute, and therefore it is not "solely" a declaration of fact.
>
> [Footnotes omitted]

[162] In *Ewert v Canada*, 2018 SCC 30 at paras 81-83, [2018] 2 SCR 165, the Supreme Court of Canada specifically comments on the appropriate use of declaratory relief:

> [81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88; see also *Federal Courts Rules*, SOR/98-106, r. 64. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33.
>
> [82] These criteria are met here. The Federal Court had jurisdiction over the substance of Mr. Ewert's claim: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 17. The question whether the CSC [Correctional Service Canada] is required to validate the impugned assessment tools for use with Indigenous inmates is a real, not a theoretical, one that has been the subject of proceedings spanning almost two decades. Mr. Ewert, as an Indigenous individual and an inmate subject to the CSC's decision making — including decision-making that affects critical aspects of his incarceration such as his security classification and the granting of parole — has a genuine interest in the resolution of this question. Finally, the federal Crown, and its representative, the Commissioner of the CSC, are proper parties to oppose the declaration.
>
> [83] A declaration is a discretionary remedy. Like other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question: see D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose- leaf), at topic 1:7330. Here, the grievance procedure created by s. 90 of the *CCRA* [*Corrections and Conditional Release Act*, SC 1992, c 20] arguably provides an alternative means by which Mr. Ewert could challenge the

> CSC's compliance with the obligation in s. 24(1) of the *CCRA*. It may be that in most cases, the existence of this statutory grievance mechanism would be a reason to decline to grant a declaration. However, in the exceptional circumstances of this case, a declaration is warranted.

[163] The availability of declaratory relief even if such declaration will have no practical impact on either the legislation or governmental decisions, was recognized by the Supreme Court of Canada in *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44, where the court determined to issue declaratory relief as a means to advise the government of the legal position of the applicant. The court stated at paras. 44-48:

> [44] This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.
>
> [45] Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.
>
> [46] In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*

> [[1985] 1 SCR 441], at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.
>
> [47] The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.
>
> IV. Conclusion
>
> [48] The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

[164] UR Pride has also referred the court to the decision of *Attorney-General v Taylor*, [2018] NZSC 104 for a discussion on the value of declaratory judgments issued by courts:

> *Consistency with judicial function?*
>
> [52] The second of the Solicitor-General's two principal submissions was that there was no jurisdiction to make a declaration because the judicial function is adjudicatory. Here, where there is no controversy over the interpretation of the 2010 Amendment and no action can be taken in relation to the declaration, the submission is that the High Court's action is purely advisory. This submission is made in the context of the statement by the Court of Appeal that a declaration of inconsistency:

> ... is not a declaration of right. It determines no legal rights and conveys no legal consequences as between the parties.

[53] But a declaration that s 80(1)(d) is inconsistent with the Bill of Rights is a formal declaration of the law and, in particular, of the effect of the 2010 Amendment on the respondents' rights and status. It provides formal confirmation they are persons who are disqualified to vote by a provision inconsistent with their rights. Further, the courts may make a declaration under the Declaratory Judgments Act 1908 even when there is no lis. Finally, the making of such a declaration is consistent with the usual function of the courts.

[54] There is some support for the latter proposition in the decisions of the Supreme Court of Canada in *Manitoba Metis Federation Inc v Canada (Attorney-General)*[2013 SCC 14] and in *Canada (Prime Minister) v Khadr* [2010 SCC 3] both of which are referred to in the more recent decision of *Mikisew Cree First Nation v Canada (Governor General in Council)*[2018 SCC 40]. A majority of the Court in the latter case indicated declaratory relief may be available post-enactment to provide a remedy in the context of a challenge to legislation on the basis it is inconsistent with s 35 of the Constitution Act 1982, which recognises and affirms aboriginal and treaty rights. In discussing the relief available post-enactment of legislation, Karakatsanis J noted that a declaration was available without a cause of action.

[55] Nor is the declaration without consequence. It would have some implications in the context of a complaint under the Optional Protocol to the ICCPR [the International Covenant on Civil and Political Rights]. Tipping J delivering the judgment of the Court of Appeal in *Moonen* [[2000] 2 NZLR 9 (CA)] noted that a "judicial indication" of inconsistency "will be of value should the matter come to be examined by the Human Rights Committee". And, the Court of Appeal suggested, "It may also be of assistance to Parliament if the subject arises in that forum."

[56] The making of a formal declaration is also another means of vindicating the right in the sense of marking and upholding the value and importance of the right.74 Accordingly, while Cooke P in *Temese v Police* [9 CRNZ 425 (CA)] indicated that a statement by the court of inconsistency "could be seen by some to be gratuitously criticizing [sic] Parliament by intruding an advisory opinion", Cooke P also suggested that, "possibly that price ought to be paid".

[Footnotes omitted]

[165] As a result of the foregoing, I conclude that the issuance of a declaratory judgment has purpose and meaning beyond necessarily interfering in the operation of legislation validly passed and enacted by the legislative branch of government. It is an "effective and flexible" remedy to provide legal comment on the actions taken by government. It permits the citizenry to continue to participate in the democracy and to challenge that which a government has done. It is doing that which the court is mandated to do pursuant to the *Constitution Act* and it is ensuring the court remains open, accessible, and relevant, to the ongoing debate of all matters in society. In a word, it is essential that the court's jurisdiction remain, and the oversight ability remains intact as a result of the foregoing observations.

[166] It follows from the foregoing, I determine this Court retains jurisdiction to provide declaratory relief with respect to ss. 7 and 15(1) of the *Charter* despite the invocation of ss. 33(1) of the *Charter*.

5. If the court continues to have jurisdiction, should it be decided now whether to exercise that jurisdiction?

[167] The decision of whether or not to grant declaratory relief is discretionary for this Court. That discretion is, of course, to be exercised judicially having considered all of the factors at issue. In this case, that would include having considered the evidence which is to be provided together with the arguments to be advanced. In the absence of this material, I am of the view that I do not have a sufficient basis upon which to exercise my discretion in this regard.

[168] In *Hak*, the court determined not to exercise its discretion in favour of making any declaratory judgment. It did that after a complete hearing on the merits.

While I am unable to simply transfer that refusal to exercise discretion to a similar result here, I am able to conclude that I am unable to make a judicial determination without all of the available information before me.

[169] As a result, in the circumstances of this case, I decline to make the further determination, at this stage of the proceedings, that the court will or should exercise its discretion in this regard. Rather, I determine that should await the introduction of evidence and the advancement of arguments based on that evidence. The court must be aware of the nature of the case being advanced and the evidence to be provided in support of and in opposition to that case. To determine now, in an evidentiary vacuum, that a discretionary remedy ought to be provided is not appropriate.

6. Should the court decide the issue of mootness?

[170] In light of the decisions made herein, this litigation is able to proceed with respect to an attack on the legislation pursuant to s. 12 of the *Charter* and with respect to seeking declaratory relief with respect to s. 7 and ss. 15(1) of the *Charter*.

[171] As a result, I decline to address the issue of mootness. That issue may arise in the future depending on whether or not the court exercises its discretion with respect to granting declaratory relief. Accordingly, while I decline to make any decision on mootness, I do so without prejudice to that issue being reintroduced in the litigation should the circumstances so dictate.

7. Costs

[172] UR Pride has been wholly successful on its application to amend the originating application. As a result of that success, I determine to exercise my discretion to grant costs to UR Pride in this regard. However, I determine the assessment of the

quantum of those costs should await the final determination of this matter. At the close of submissions, counsel indicated that UR Pride, if successful on this application, would be seeking an enhanced level of costs. I determine it is appropriate to let the entirety of the assessment of quantum be determined at the end of the litigation once a final determination on the claim has been made.

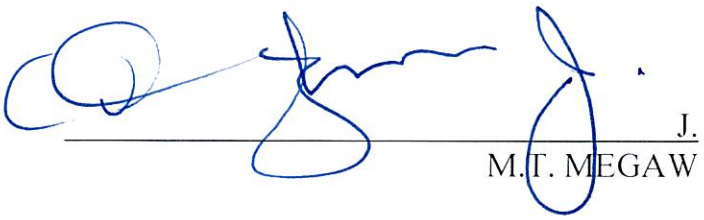
[173] With respect to the two applications brought by the Government of Saskatchewan, a final determination has not yet been made. As a result, I determine those costs shall remain in the cause.

CONCLUSION

[174] In the result, leave is granted to amend the originating application in the manner set forth in the application. The application by the Government of Saskatchewan on the threshold issue is dismissed insofar as this Court determines it has jurisdiction to hear the matters regarding the alleged breaches of s. 7 and ss. 15(1) of the *Charter*. The court does not determine at this stage whether to exercise its jurisdiction in this regard and reserves that issue to be determined following the receipt of evidence and submission in this regard. The court declines to determine the issue of mootness at this stage of the proceedings. This determination is made without prejudice to the Government of Saskatchewan's ability to reintroduce this issue following the hearing of this matter.

[175] In light of the determinations that have been made, the court seeks to have a date set to hear the remaining applications to obtain intervenor status in this litigation. The Local Registrar should canvas available dates with counsel so this remaining matter may proceed to hearing and determination.

[176] If either party determines to seek an adjournment of the current timelines set for this matter, they should make appropriate arrangements with the Local Registrar to obtain a date for the hearing of that application.



J.
M.T. MEGAW

APPENDIX A

[4] ...

- The exercise of judicial discretion militates in favor [sic] of refusing the request for a declaratory judgment which is based on a hitherto unpublished interpretation of the terms of section 33 of the *Canadian Charter of Rights and Freedoms*;

[Footnotes omitted]

APPENDIX B

[785] The FAE [Fédération autonome de l'enseignement] seeks to obtain a declaratory judgment stating that the provisions of Bill 21 infringe sections 2 and 15 of the Canadian Charter and sections 3 and 10 of the Quebec Charter despite the use of notwithstanding clauses by the legislator. According to her, this request and the resulting judgment would make it possible to draw the attention of the members of the National Assembly and the Quebec population to the nature of the rights and freedoms violated so that they can react accordingly by means of democratic process at the end of the five-year period provided for in section 33(3) of the Canadian Charter.

[786] Article 33 of the Charter states:

> 33. (1) Parliament or the legislature of a province may pass a law which expressly declares that it or any provision of it has effect independently of any particular provision of section 2 or sections 7 to 15 of this charter.
>
> (2) The law or provision declared in accordance with this section and in force has the effect that it would have except for the provision in question of the charter.
>
> (3) A declaration referred to in subsection (1) ceases to have effect on the date specified in it or, at the latest, five years after its coming into force.
>
> (4) Parliament or a legislature may re-enact a declaration referred to in subsection (1).
>
> (5) Subsection (3) applies to any declaration adopted under subsection (4).

[787] Lauzon invites the Court to declare that Bill 21 infringes on freedom of conscience and religion, freedom of expression and the right to equality guaranteed by the Canadian and Quebec charters in a way that does not is not justified in the context of a free and democratic society because the use of derogation clauses only allows us to not give effect to a law which infringes a protected right. According to her, the wording of articles 33 of the Charter and 52 of the Quebec Charter, as well as the inherent jurisdiction of the Superior Courts and their duties to interpret the laws, including those which are the subject of a derogation clause, as well as article 24(1) of the Charter authorize the Court to grant the declaratory judgment sought.

[788] She argues that these declarations constitute a necessary judicial intervention in the exceptional circumstances which underlie the legal challenge. On the one hand, it postulates that these would

serve to inform the public debate, which will prove necessary in the event that the National Assembly has to debate the advisability of renewing the use of the derogation clause and, on the other hand, these declarations would take effect without delay in the event of non-renewal of the application of the exemption clauses. Finally, on this subject, she adds that these declarations of unconstitutionality would inform the Court's analysis as to the merits of the request for damages claimed by the plaintiffs.

[789] For the PGQ [Procureur général du Québec], as the declaratory judgment is based on a challenge to a violation of articles 2 and 15 of the Charter and the use of the derogation clause of article 34 of Law 21 subtracts these guaranteed rights of the Court's power of review, it follows, according to him, that the Court cannot grant the request for a declaratory judgment. According to him, as a suitable and just remedy within the meaning of article 24 of the Charter must arise from the violation of a fundamental right caused by the conduct or an act committed by the State for the same reason as explained above, this request cannot receive the approval of the Court.

[790] The FAE relies, among other things, on the *El-Alloul v. Attorney General of Quebec* [2018 QCCA 1611] to ask the Court to pronounce a declaratory judgment regarding the constitutional conformity of Law 21. In this judgment, the Court of Appeal notes the unique factual context before which the applicant *El-Alloul* found herself, which led to real difficulties in identifying the adequate and appropriate legal procedure in such circumstances.

[791] It states that article 24(1) of the Charter can certainly serve as a basis for the pronouncement of a declaratory judgment. Thus, obviously, to the extent that the Court recognizes the violation of constitutional rights, normally, it must be able to grant relief.

[792] The Court of Appeal affirms that courts may issue declaratory judgments without cause of action and regardless of whether consequential relief may follow. However, it is important to emphasize that in doing so, the Court of Appeal recalls the discretionary nature of such a remedy.

[793] Although it is not necessary to apply a rigid procedural approach, the Court will not respond to the request for a declaratory judgment in particular because, on the one hand, unlike the *El-Alloul* case, it There is indeed a debate of a constitutional nature between the parties in this case.

[794] On the other hand, with the use of derogation clauses, the legislator places the constitutional debate in a very specific context.

The Tribunal does not find itself in a procedural impasse as in *El-Alloul*. Furthermore, in this case, the factual context strongly favored [sic] the issuance of a remedy, whereas here, to reiterate, the use of derogation clauses removes any real effectiveness in this regard.

[795] The Court must be careful to respect the separation of powers between those exercised by the legislative branch and the judicial branch. Thus, the Court must avoid using the discretionary power it possesses in the matter to issue what is similar, in several respects, to a judicial opinion which concerns a purely theoretical question based moreover on hypothetical considerations. Indeed, the factual basis is based on the premise that the legislator could decide not to use section 33 of the Charter again.

[796] The Court exercises its judicial discretion not to respond to such a request.

[797] Firstly, because the question asked turns out to be theoretical since it aims to circumvent the factual context existing to date to suggest a hypothetical one, which is based on the absence of the use of derogation clauses by the legislator.

[798] Secondly, and more importantly, because although on the surface it is necessary to give meaning to the words used in article 33 which only speaks to the effect of the use of the notwithstanding clause, which would not exclude a request for a declaratory judgment, the fact remains that having such a debate constitutes an indirect way of doing something that cannot be done directly.

[799] With respect, although rights and freedoms constitute a subject of the utmost importance, we must avoid burdening a judicial system that is already sufficiently busy with appeals that do not lead to a concrete result.

[800] This is why the Court rejects this request.

[Emphasis in original]

[Footnotes omitted]

APPENDIX C

[775] Some might argue that the legislator has absolute power to draft and enact laws. This remains true. But to the extent that only recourse to the ballot box is the appropriate remedy for with respect to the exercise of this power, civil society should know, on the one hand, how that power is exercised and, on the other hand, the consequences of such an exercise, especially when deals with fundamental rights and freedoms.

[776] Thus, the Tribunals, as guardian of the rule of law and the Constitution must inform this issue. knowledge of the fruits of their expertise.

[777] In more concrete terms, possibly the legislator must and can explain in the event of a dispute, at the very least *prima facie*, not political legitimacy or the use of notwithstanding clauses, or to use the terms *Ford*, require a *sufficient prima facie case* of the decision to exercise the overriding power, but simply the existence of a certain connection between the suspension of rights and freedoms and the objectives pursued by the legislation in question. Thus, it would allow the Court, in the event of a dispute as to the scope of the use of the clauses derogation, to assess whether it is legally necessary for the legislator can achieve the end it seeks and do so while respecting the very wide latitude it enjoys.

[Footnotes omitted]