[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.

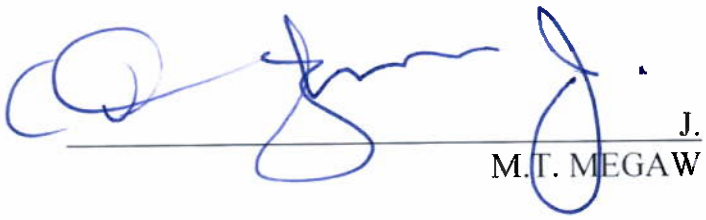
[173] With respect to the two applications brought by the Government of Saskatchewan, a final determination has not yet been made. As a result, I determine those costs shall remain in the cause.

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]