Court of Appeal for Saskatchewan

Docket: CACV4329

Citation: *Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74

Date: 2025-08-11

Between:

Government of Saskatchewan as represented by the Minister of Education

Appellant
(Respondent/Applicant)

And

UR Pride Centre for Sexuality and Gender Diversity

Respondent
(Applicant/Respondent)

And

The Advocates' Society, Amnesty International Canadian Section (English Speaking), Attorney General for New Brunswick, Attorney General of Alberta, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, John Howard Society of Saskatchewan, Justice for Children and Youth, Saskatchewan Federation of Labour, Canadian Union of Public Employees, Canadian Teachers' Federation, Trial Lawyers Association of British Columbia, Women's Legal Education and Action Fund Inc.

Intervenors
(Non-parties)

Before:	Leurer C.J.S., Jackson, Caldwell, Schwann and Tholl JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Chief Justice Robert W. Leurer
In concurrence:	The Honourable Justice Georgina R. Jackson The Honourable Justice Lian M. Schwann The Honourable Justice Jerome A. Tholl
In dissent:	The Honourable Justice Neal W. Caldwell

On appeal from:	2024 SKKB 23, Regina
Appeal heard:	September 23–24, 2024

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Leurer C.J.S.

I. OVERVIEW

[1] The *Canadian Charter of Rights and Freedom*s guarantees enumerated rights and freedoms, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The *Charter* is part of Canada's Constitution and, therefore, any law inconsistent with it "is, to the extent of the inconsistency, of no force or effect" (*Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

[2] However, it is also a central part of Canada's constitutional architecture that Parliament and the Legislatures are entitled to the last word on the *operation* (*l'effet*) of legislation in the face of certain *Charter* rights. This feature is found in s. 33 of the *Charter*, which allows Parliament or a provincial legislature to declare that an Act or a provision thereof shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*. The principal issue in this appeal is whether, when such a declaration is made, there remains a role for the courts to determine if *Charter* rights have been limited.

[3] This proceeding arises in the context of the use of s. 33 in connection with s. 197.4 of *The Education Act, 1995*, SS 1995, c E-0.2 [*Education Act*]. This provision, added to the *Education Act* by *The Education (Parents' Bill of Rights) Amendment Act, 2023*, SS 2023, c 46, s 4 [*Amendment Act*], requires the consent of a parent or guardian before teachers and other employees of a school can use a new gender-related preferred name or gender identity of a pupil under 16 years of age.

[4] Section 197.4(3) of the *Education Act* relies on s. 33(1) of the *Charter* to declare that s. 197.4 is to "operate notwithstanding sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*". According to s. 33(3) of the *Charter*, unless it is renewed, this declaration "shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration". No party to this appeal questions the Legislature's authority to enact s. 197.4 or the immunity that s. 197.4(3) bestows on s. 197.4 from the invalidating effect of a declaration of inconsistency under s. 52 of the *Constitution Act, 1982* – for the five-year period of the declaration.

[5] Section 197.4 of the *Education Act* replaced a policy that the Ministry of Education had previously adopted [Policy]. In the summer of 2023, the UR Pride Centre for Sexuality and Gender Diversity [UR Pride] commenced an action against the Government of Saskatchewan as represented by the Minister of Education [Government] alleging that the Policy violated ss. 7 and 15(1) of the *Charter*. After the *Amendment Act* was passed, UR Pride applied to amend its originating application to include a request for a declaration that s. 197.4 limits the rights of gender diverse students under ss. 7, 12 and 15(1) of the *Charter*, as well as for other relief. Over the Government's opposition, a Court of King's Bench judge granted these amendments. The judge also dismissed several applications by the Government seeking to put an immediate end to UR Pride's action: *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2024 SKKB 23, [2024] 11 WWR 75 [*Chambers Decision*].

[6] The Government appeals from the *Chambers Decision*. It asserts that the Legislature's invocation of s. 33 nullifies the jurisdiction of the Court of King's Bench to determine whether s. 197.4 of the *Education Act* limits the rights of any person under ss. 7 and 15(1) of the *Charter*. It also says that it is not open to UR Pride to assert that the provision violates s. 12 of the *Charter*. Finally, the Government maintains that the repeal of the Policy makes the challenge to it moot.

[7] Section 33 of the *Charter* does not have the effect the Government ascribes to it. Section 33 accomplishes what it says: for the period covered by a s. 33 declaration, the Act or provision subject to it, in this case s. 197.4 of the *Education Act*, "shall have such operation as it would have but for the provision of [the] Charter referred to in the declaration" (s. 33(2)). In other words, s. 33(2) enables the Act or provision to operate regardless of whether it unreasonably limits a specified *Charter* right or freedom, by suspending the invalidating effect of s. 52 of the *Constitution Act, 1982*. A declaration made pursuant to s. 33 does not mean that the Act or provision does not limit the referenced *Charter* right or freedom – here being ss. 2, 7 and 15(1) of the *Charter* – nor does it nullify the jurisdiction of the Court of King's Bench to issue a declaration to that effect.

[8] In this Court, the Government's opposition to the amendments requested by UR Pride to its originating application is premised on the suggestion that they amount to an abuse of process,

which they are not. Accordingly, there is no basis to interfere with the judge's decision to grant permission to UR Pride to make those amendments.

[9] Two points must be emphasized about these conclusions.

[10] First, the parties to this appeal have raised the important, but narrow, question of whether the Court of King's Bench has the *jurisdiction* to issue a declaration should it find that s. 197.4 of the *Education Act* limits the rights of any person under ss. 7 and 15 of the *Charter*. However, the *decision* of whether to grant such declaratory relief is discretionary. This judgment does not decide if that discretion should be exercised. Stated more clearly, while the Court of King's Bench has the power to answer the question of whether s. 197.4 limits ss. 7 and 15 *Charter* rights, it is left to that Court to determine if it should do so.

[11] Second, and flowing from the last statement, this judgment does not determine that s. 197.4 of the *Education Act* operates in a way that limits any person's *Charter* rights. The Government has not conceded this point. However, as that issue is not before the Court, these reasons do not address it.

[12] Finally, while I disagree with the Government about the effect of the s. 33(1) declaration found in s. 197.4(3) of the *Education Act*, I agree with one important argument that it has made. The revocation of the Policy, coupled with the absence of any allegation or evidence that any person has suffered harm because of it, renders the challenge to the Policy moot. For these reasons, all claims for relief in relation to the Policy must be struck from UR Pride's originating application.

[13] In sum, UR Pride's originating application may be amended to request a declaration that s. 197.4 of the *Education Act* limits the rights of persons under ss. 7, 12 and 15(1) of the *Charter*. The Court of King's Bench has the jurisdiction to determine whether s. 197.4 limits the rights of persons under ss. 7 and 15(1) of the *Charter* and to issue a declaratory judgment, should it so choose. Since s. 197.4(3) does not say that s. 197.4 operates notwithstanding s. 12 of the *Charter*, UR Pride may also seek a declaration that s. 197.4 is of no force or effect because it results in a violation of that *Charter* right. However, the parts of UR Pride's originating application seeking to have the Policy declared to be unconstitutional must be struck. So qualified, UR Pride's litigation may continue in the Court of King's Bench.

II. BACKGROUND

A. The Policy and the *Amendment Act*

[14] The Policy, titled "Use of Preferred First Name and Pronouns by Students", was adopted by the Government on August 22, 2023. Among other things, it required that a school obtain the consent of a parent or guardian for educators to use a preferred name, gender identity or gender expression of a student under the age of 16.

[15] Nine days later, on August 31, 2023, UR Pride initiated a constitutional challenge to the Policy. In its original form, UR Pride's originating application sought a declaration that the Policy limited the right to security of the person, as guaranteed by s. 7 of the *Charter*, and the right to equality, as guaranteed by s. 15(1) of the *Charter*, and that such violations cannot be justified pursuant to s. 1 of the *Charter*. UR Pride also requested a declaration that the Policy is of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[16] On September 28, 2023, the judge enjoined the implementation and enforcement of the Policy, pending a final judgment in connection with UR Pride's action: *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2023 SKKB 204.

[17] Following the grant of this injunction, the Legislative Assembly of Saskatchewan passed the *Amendment Act*. Section 4 of it added s. 197.4 to the *Education Act*. Section 197.4(1) largely replicates the Policy. It states as follows:

> (1) If a pupil who is under 16 years of age requests that the pupil's new gender-related preferred name or gender identity be used at school, the pupil's teachers and other employees of the school shall not use the new gender related preferred name or gender identity unless consent is first obtained from the pupil's parent or guardian.

[18] Section 197.4(3) declares that s. 197.4 is to operate notwithstanding three of the rights guaranteed by the *Charter*. It states as follows:

> **Responsibilities of parents and guardians**
> (3) Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this section is declared to operate notwithstanding sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[19] Shortly after the *Amendment Act* came into force, the Government revoked the Policy.

B. The applications

[20] This new legislation prompted UR Pride to apply to amend its originating application. Three aspects of its draft amended originating application are important in this appeal.

[21] First, the proposed pleading acknowledges that the Policy had been withdrawn but continues to seek a declaration that, prior to this occurring, it had limited the *Charter* rights of gender diverse students. It also adds an allegation that the Policy violated the right against cruel and unusual punishment, guaranteed by s. 12 of the *Charter*.

[22] Second, the draft amended pleading includes a request for a declaration that s. 197.4 of the *Education Act* limits the rights of gender diverse students under ss. 7, 12 and 15 of the *Charter* and that none of these limits are reasonable and demonstrably justifiable pursuant to s. 1 of the *Charter*.

[23] Third, UR Pride sought to amend its originating application to seek a declaration under s. 52 of the *Constitution Act, 1982*, that s. 197.4 of the *Education Act* is of no force or effect because it unreasonably and unjustifiably violates s. 12 of the *Charter*, implicitly acknowledging that the operation of s. 33 prevents it from seeking such a declaration in respect of the allegation that s. 197.4 limits rights under ss. 7 and 15 of the *Charter*.

[24] The Government opposed UR Pride's amendment requests on several grounds. The Government also brought two applications to have UR Pride's action stayed or dismissed. In the first of these applications, the Government requested an order striking UR Pride's originating application on the footing that the recission of the Policy had rendered any controversy over it moot. On a contingent basis, the Government also asked for an order striking any references to the Policy from the originating application, should it be amended.

[25] The Government's second application depended on the proposition that the use of s. 33 shielded the ss. 7 and 15 *Charter* issues from judicial scrutiny. To this end, the Government requested an order determining four "Threshold Issues", which it identified as follows:

> i. Does the invocation of section 33 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in section 197.4 of *The Education Act 1995* oust the jurisdiction of the Court to review that section for compliance with sections 2, 7 and 15 of the *Charter* and/or to declare that section to be of no force or effect to the extent of non-compliance?

> ii. Alternatively, if the Court retains such jurisdiction, should it nevertheless decline to determine whether section 197.4 of *The Education Act, 1995* complies with sections 7 and 15 of the *Charter* and/or to provide a declaration respecting the same?
>
> iii. Further, or in the alternative, does the invocation of section 33 of the *Charter* in section 197.4 of *The Education Act, 1995* render the relief sought by [UR Pride] with respect to sections 7 and 15 of the *Charter* moot, and, if so, should the Court decline to exercise its discretion to hear these issues notwithstanding its mootness?
>
> iv. If any of the above issues is determined in the affirmative, does this fully dispose of [UR Pride's] claims with respect to sections 7 and 15 of the *Charter* such that they should be dismissed or struck pursuant to Rule 7-1(3)?

[26] Within the same application, the Government requested orders that the relief UR Pride sought based on ss. 7 and 15 of the *Charter* "is moot and the Court should decline to exercise its discretion to determine said issues" and that the allegations are "an abuse of process, doomed to fail and/or are frivolous and vexatious".

C. The *Chambers Decision*

[27] The judge granted UR Pride's application to amend its originating application. He dismissed the two motions brought by the Government.

[28] Regarding UR Pride's request to amend its originating application, the judge reviewed the principles that apply to an application to amend pleadings. In this context, he rejected the Government's argument that the relief UR Pride sought pursuant to s. 12 of the *Charter* could only be obtained in an action commenced by way of statement of claim (see paras 45–58). He concluded that the amendments would cause no prejudice or injustice to the Government (see paras 59–72). The judge also rejected the Government's contentions that the allegation of a breach of s. 12 failed to disclose a reasonable cause of action (see paras 84–103), that the amendments were scandalous, frivolous or vexatious (see paras 104–110) and that the amendments were otherwise an abuse of process (see paras 111–123).

[29] The judge next addressed the Government's application to determine the four threshold questions referenced in paragraph 25 of these reasons. As a preliminary matter, he agreed with the Government that he should answer the question respecting whether the valid invocation of s. 33 of the *Charter* had removed s. 197.4 of the *Education Act* from any sort of judicial review (see paras 124–127). He concluded that the use of s. 33 "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 … the *Charter*" (at para 147 and, more broadly, see paras 128–166). He also determined that the Court retained the discretion to decline to exercise this jurisdiction and that the decision about whether to do so should await evidence and argument on the amended originating application (see paras 167–169). He likewise declined to answer any question about mootness (see paras 4 and 170–171).

[30] Finally, the judge awarded UR Pride costs for the application to amend its originating application and ordered that costs for the Government's applications shall be in the cause.

III. ISSUES

[31] The parties agree that there are three issues presented in this appeal, and generally as to how to express them. These questions, which contain several subsidiary issues, provide an appropriate framework to decide this appeal. They will be answered in the following order:

(a) Did the judge err in holding that the s. 33 declaration contained in s. 197.4 of the *Education Act* did not oust the Court's jurisdiction to determine whether that provision limits the rights of gender diverse students under ss. 7 and 15(1) of the *Charter*?

(b) Did the judge err in granting leave to UR Pride to amend its originating application to plead that s. 197.4 of the *Education Act* violates s. 12 of the *Charter*?

(c) Did the judge err in not striking UR Pride's originating application on mootness grounds?

IV. ANALYSIS

A. The jurisdiction issue

1. Introduction

[32] The first issue the Government invited the judge to answer was whether the invocation of s. 33 of the *Charter* in s. 197.4 of the *Education Act* served to "oust the jurisdiction of the Court

to review that section for compliance with sections 2, 7 and 15 of the *Charter* and/or to declare that section to be of no force or effect to the extent of non-compliance". Section 2 of the *Charter* is not raised by UR Pride, so any discussion in relation to it may be put to one side. Therefore, the question confronting this Court is limited to whether the judge erred in holding that the s. 33 declaration found in s. 197.4(3) of the *Education Act* did not oust the Court's jurisdiction to determine if, and therefore to declare that, s. 197.4 of that Act limits the rights of gender diverse students under ss. 7 and 15(1) of the *Charter*.

[33] The Government's position is, as stated in its factum, that any judicial review of a statute that is the subject of a s. 33 declaration "is limited to assessing whether the requirements of form under s. 33 have been met". Since UR Pride does not challenge the *Amendment Act* based on form requirements, the Government says that the courts have *no* remaining role. In advancing this position, the Government agrees that, but for the declaration contained in s. 197.4(3) of the *Education Act*, the courts *would* have a role in determining the consistency of s. 197.4 of the *Education Act* with the *Charter*. However, it contends that the effect of the Legislature's s. 33 declaration is to render ss. 2, 7 and 15 of the *Charter* inapplicable to s. 197.4 with the result that laws that are subject to a s. 33 declaration cannot be inconsistent with the *Charter*. Thus, the Government says, the courts have no jurisdiction to assess whether the legislation limits those rights.

[34] For its part, UR Pride agrees that s. 33 enables s. 197.4 to operate despite ss. 7 and 15(1) of the *Charter*. However, it maintains that this does not mean that the legislation does not necessarily limit the rights of gender diverse students that are guaranteed under those *Charter* provisions. Rather, according to UR Pride, s. 33 only shields s. 197.4 from the ordinary functioning of s. 52(1) of the *Constitution Act, 1982*, which declares that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

[35] In view of the parties' positions, this Court must interpret s. 33 of the *Charter*. As has already been noted, the judge ultimately agreed with UR Pride's position. Because what is at issue is the interpretation of the Constitution, this Court applies the correctness standard in its review of the meaning the judge ascribed to s. 33. Under this standard of review, "an appellate court must *always* engage in a *de novo* analysis and thereby substitute its own view of the correct answer for

a trial judge's legal conclusion" (*R v MacKenzie*, 2013 SCC 50 at para 54, [2013] 3 SCR 250, emphasis in original). This renders the judge's reasons less important than his bottom-line conclusion. The correctness standard of review demands that this Court consider the matter afresh. In doing so, these reasons address the arguments that were put to the Court in this appeal.

[36] One of the Government's principal arguments is that the Supreme Court of Canada has already decided the issue before the Court. After addressing that submission, these reasons will review and apply the principles of constitutional interpretation to answer the overarching issue of whether s. 33 removes the courts' jurisdiction in a case like this one.

2. Key constitutional provisions

[37] This appeal requires a careful examination of s. 33 of the *Charter* and s. 52 of the *Constitution Act, 1982*. Section 33 of the *Charter* appears, with s. 32, under the heading "Application of Charter". These two provisions state as follows:

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in

Application de la charte

32 (1) La présente charte s'applique :

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Restriction

(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.

Dérogation par déclaration expresse

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.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en

effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(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.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

[38] Section 52 of the *Constitution Act, 1982*, of which the *Charter* is part, states as follows:

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Primauté de la Constitution du Canada

52 (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

3. The Supreme Court has not decided the issue

[39] The Government argues that the Supreme Court of Canada has already determined that any judicial review of a statute which is the subject of a s. 33 declaration is restricted to assessing whether the requirements of form under s. 33 have been met. In offering this submission, it concedes in its factum that "the Supreme Court of Canada has not been tasked with deciding this point directly". Nonetheless, it asserts that "there are numerous references in Supreme Court of Canada *Charter* jurisprudence that clearly and consistently endorse this interpretation". In advancing this position, the Government principally emphasises *Ford v Québec (Attorney General)*, [1988] 2 SCR 712 [*Ford*], and *Devine v Québec (Attorney General*), [1988] 2 SCR 790 [*Devine*], which was released contemporaneously with *Ford*. It also refers to *R v Hess; R v Nguyen*, [1990] 2 SCR 906 at 926 [*Hess; Nguyen*]; *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406 at 435–436 [*Potash*]; *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*]; *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 at para 79 [*Thomson Newspapers*]; *Gosselin v Québec (Attorney General*), 2002 SCC 84 at para 15, [2002] 4 SCR 429 [*Gosselin*]; and *Law Society of*

British Columbia v Trinity Western University, 2018 SCC 32 at para 199, [2018] 2 SCR 293 [*Trinity Western*].

[40] If the Supreme Court has decided the question, this Court would be required to carefully evaluate whether it is open to us to revisit the issue within the principles established in *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, or whether as a matter of *stare decisis*, we are bound to simply follow that Court's decision. However, the ensuing analysis demonstrates that the Supreme Court has not yet determined the issue of the courts' jurisdiction in a case like this one.

a. *Ford* and *Devine*

[41] *Ford* involved a challenge to parts of Québec legislation that prohibited the use of commercial signs written in languages other than French and required businesses to use only the French versions of their names, said to amount to a violation of freedom of expression, as guaranteed by s. 2(b) of the *Charter*. *Devine* arose in the same context and adopted the ruling in *Ford*. In response to the process surrounding the patriation of the Constitution in 1982, the National Assembly of Québec invoked s. 33 in two separate enactments. The *Act respecting the Constitution Act, 1982*, SQ 1982, c 21, was an omnibus bill, introducing s. 214 into the *Charter of the French Language*, that subjected all Québec laws to the *Charter*'s notwithstanding clause. Later, the National Assembly of Québec again invoked s. 33 of the *Charter* in s. 52 of the *Charter of the French Language* (*An Act to amend the Charter of the French Language*, SQ 1983, c 56, s 52). Section 214 applied to the entirety of the *Charter of the French Language*, whereas s. 52 only applied to s. 58, which was also amended at the time.

[42] The first question in the two cases was whether the s. 33 declaration enacted in the *Charter of the French Language* was valid (*Ford* at 732 and *Devine* at 812). The Court's focus was on the manner and form of the invocation of a s. 33 override, as identified in the following passage (*Ford* at 734):

> The issue of validity … is whether a declaration in this form is one that is made in conformity with the override authority conferred by s. 33 of the *Canadian Charter of Right and Freedoms*. There are additional issues of validity applicable to s. 214 of the *Charter of the French Language* arising from the manner of its enactment, that is, the "omnibus" character of the Act which enacted it, and from the retrospective effect given to s. 214.

[43] Earlier, in *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 746 [*Manitoba Language Reference*], the Supreme Court had confirmed that "where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity". *Ford* and *Devine* laid out the requirements of form for s. 33 to be validly invoked.

[44] The following extract from *Ford* explains the requirements for activating s. 33 and contains the passage that the Government presently identifies as the Supreme Court's determination of the jurisdiction question at issue in this appeal (at 740–741):

> 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*.
>
> (Emphasis added)

[45] The Government argues that the emphasised passage amounts to a decision by the Supreme Court that a court cannot review legislation for *Charter* consistency once it has been determined that s. 33 was validly invoked. This submission ignores the context in which the Supreme Court's comments were offered and, in particular, the issue it was called to decide.

[46] To reiterate, the task confronting the Court in *Ford* was to determine the requirements for validly invoking s. 33. At the beginning of the paragraph in question, the Court acknowledged differing interpretations of the notwithstanding clause but concluded they were irrelevant to construing the *requirements* of s. 33. The Supreme Court's comments on the *requirements*, going to form only, and not of substantive review, were thus directed to assessing the decision made by the National Assembly of Québec to invoke s. 33. The effect of the s. 33 declaration, if validly made, was not in dispute before the Court. I agree in this regard with the view that, in "[r]ejecting the utility of a deeper analysis into the provision's purpose, or its relationship with other constitutional features, *including* the doctrine of parliamentary sovereignty, the Court simply turned to its interpretation of the textual demands outlined in section 33(1) and found that Quebec had complied with them" (Eric M. Adams, "*Ford* Focus: Constitutional Context and the Notwithstanding Clause" (2023) 32:3 Const Forum Const 33 at 40, 2024 CanLIIDocs 494 [Eric M. Adams, "*Ford* Focus"]; see also Stéphane Beaulac, "Clause de dérogation et *stare decisis* horizontal, ou comment revoir et compléter l'arrêt *Ford* à la Cour suprême du Canada" (2024) 75 UNBLJ 184 at 185–186).

[47] *Ford* does not foreclose judicial review for *Charter* consistency when confronted with a s. 33 declaration. Rather, insofar as is relevant to this appeal, the *ratio* of *Ford* is that Parliament or a provincial legislature does not need to offer a substantive justification for the decision to *invoke* s. 33 for the declaration to be valid, for instance that the *Charter* rights included in the declaration "could reasonably be contemplated as being put in issue by the legislation in question" (*Ford* at 739). Put differently, "judicial review has no role to play in adding extraneous substantive preconditions to the legislative *decision* to invoke the clause beyond the requirements set out in the provision itself" (Eric M. Adams, "*Ford* Focus" at 34, emphasis in original).

[48] In summary, *Ford* and *Devine* stand for the proposition that "[s]ection 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" (*Ford* at 740). Those decisions do not support the Government's assertion that the issue of the courts' jurisdiction to review legislation invoking s. 33 has previously been decided.

b. *Hess; Nguyen*

[49] In *Hess; Nguyen*, two individuals were convicted of sexual intercourse with a female under the age of 14 pursuant to s. 146(1) of the *Criminal Code*. The Supreme Court was called upon to decide whether that provision, which expressly removed the defence of honest but mistaken belief of age, infringed ss. 7 or 15 of the *Charter* and whether any such infringement could be justified under s. 1. The majority found a s. 7 infringement that was not saved by s. 1 of the *Charter*. While there had been no s. 33 declaration in that case, the Government relies on the following passage from the dissenting judgment of Wilson J., which was made in the context of her discussion of s. 1 of the *Charter* (at 926):

> Finally, it seems to me important to address McLachlin J.'s observation that "to hold that s. 1 can never as a matter of law be applicable to *Charter* rights falling within certain categories is to rewrite the *Charter*" (p. 953). I agree that one cannot say that s. 1 is not relevant or "applicable" to the rights and freedoms that the *Charter* protects. Indeed, whenever legislation that is not insulated from judicial review by s. 33 of the *Charter* infringes *Charter* rights or freedoms, the government is fully entitled to try to justify the legislation under s. 1 of the *Charter*.
>
> (Emphasis added)

[50] Self-evidently, the issue before the Court did not involve s. 33 of the *Charter*. Justice Wilson's point is easily understood without any reference to s. 33, namely that whenever legislation infringes *Charter* rights or freedoms, the government is fully entitled to try to justify the legislation under s. 1 of the *Charter*.

c. *Potash*

[51] In *Potash*, the Supreme Court considered whether a statutory provision granting certain search powers to inspectors violated s. 8 of the *Charter*. Section 33 had been invoked in relation to a subparagraph of one of the provisions. The decision is complex, with two sets of reasons on behalf of the nine judges who participated in the disposition of the appeal. The reasons of La Forest J. attracted the concurrence of five other judges. Justice L'Heureux-Dubé also delivered reasons. These were concurred in by four other judges, including two who had joined in La Forest J.'s reasons. In her judgment, L'Heureux-Dubé J. stated as follows (at 435–436):

> Additionally, at the time the offences were committed the fourth paragraph of s. 22(*e*) *ACAD* [*Act respecting Collective Agreement Decrees*, RSQ, c D-2] was the subject of an exception to s. 8 of the *Charter*, adopted in accordance with its s. 33. This fourth paragraph was inserted in the *ACAD* by the *Act to amend Various Legislation respecting Labour Relations*, S.Q. 1984, c. 45, s. 35 of which expressly provided for an exception to ss. 2 and

> 7 to 15 of the *Charter*. There is no doubt as to the validity of such an exception, since it has been recognized by this Court (*Ford v. Quebec (Attorney General*), [1988] 2 S.C.R. 712, at pp. 741-42 (*per curiam*)). Accordingly, although the respondents argued that the fourth paragraph of s. 22(*e*) is in breach of s. 8 of the *Charter*, the Court does not have to consider this point in view of the constitutionally valid exception. However, the validity of this fourth paragraph in light of s. 24.1 of the Quebec *Charter* will have to be considered.
>
> (Emphasis added)

[52] The Government submits that the emphasized words imply that the effect of a s. 33 declaration is to immunize legislation from judicial review for *Charter* consistency. Respectfully, the passage is too oblique to draw such a significant conclusion. For example, nothing in this passage states that the Court *cannot* review the legislation for *Charter* consistency, as one might expect if the question were at issue. To the contrary, the statement is permissive, holding only that "the Court does not have to consider [the possible s. 8 *Charter* breach] in view of [the valid s. 33 declaration]" (emphasis added). In any event, the fourth paragraph of s. 22(e) of the *Act respecting Collective Agreement Decrees*, RSQ, c D-2, was not at issue on appeal, which may explain why the judgment of La Forest J. did not address it.

d. *Vriend*

[53] The issue in *Vriend* was whether the exclusion of sexual orientation as a prohibited ground of discrimination in several pieces of Alberta's human rights legislation violated s. 15(1) of the *Charter* and could not be saved by s. 1. The Supreme Court concluded that s. 15(1) had been breached and remedied such by reading language into the legislation in question. The Government relies on the majority judgment of Iacobucci J., in which he characterized s. 33 as "establish[ing] that the final word in our constitutional structure is in fact left to the legislature and not the courts" (at para 137).

[54] Two observations must be made in relation to this remark. First, *Vriend* did not involve an application of s. 33, let alone the jurisdictional issue now before this Court. Second, in context, the words the Government relies on from *Vriend* merely indicate that s. 33 demonstrates how the remedy of reading in a prohibited ground does not limit the legislative process or democratic decision-making. I will return to discuss *Vriend* later in these reasons when I canvass more fully the roles of the legislatures and the courts.

e. *Gosselin, Thomson Newspapers* and *Trinity Western*

[55] In *Gosselin*, the Supreme Court mentioned that *An Act respecting the Constitution Act, 1982*, RSQ, c L-4.2, the same omnibus law invoking s. 33 that was discussed in *Ford*, "withdrew all Québec laws from the *Canadian Charter* regime for five years from their inception" and that the law was "immune from *Canadian Charter* scrutiny". Again, the intent of these words appears only from their context. The full paragraph of which they are a part states the following:

> [15] A preliminary issue arises in connection with s. 33 of the *Canadian Charter* — the "notwithstanding clause". By virtue of *An Act respecting the Constitution Act, 1982*, R.S.Q., c. L-4.2, the Quebec legislature withdrew all Quebec laws from the *Canadian Charter* regime for five years from their inception. This means that the Act is immune from *Canadian Charter* scrutiny from June 23, 1982 to June 23, 1987, and the programs part of the scheme is immune from April 4, 1984 to April 4, 1989 (see *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, ss. 4 and 5). It could be argued, therefore, that the scheme is protected from *Canadian Charter* scrutiny on s. 7 or s. 15(1) grounds for the whole period except for the four months from April 4, 1989 to August 1, 1989. This raises the further question of whether evidence on the legislation's impact outside the four-month period subject to *Canadian Charter* scrutiny can be used to generate conclusions about compliance with the *Canadian Charter* within the four-month period. In view of my conclusion that the program is constitutional in any event, I need not resolve these issues.
>
> (Emphasis in original)

[56] In context, the reference to the Act being "immune from *Canadian Charter* scrutiny" is easily understood to mean that it is shielded from the ordinary operation of s. 52(1) of the *Constitution Act, 1982*. Notably, the Court left for another day the question of whether evidence of the Act's impact during the period that was shielded by the s. 33 declaration "could be used to generate conclusions about compliance with the *Canadian Charter*" after the s. 33 declaration had expired.

[57] Equally distinguishable are the observations made in *Thomson Newspapers* (contrasting s. 3 with other enumerated rights and freedoms because a violation of s. 3 "cannot be insulated from *Charter* review by Parliament or a provincial legislature" (at para 79)), and *Trinity Western* (the invocation of s. 33 "exempts the infringement from constitutional scrutiny" (at para 199)). In both cases, the comments were offered after there had already been a judicial determination that the legislation was inconsistent with a *Charter* right. In neither case was the effect of a s. 33 declaration before the Court. The remarks in both are, therefore, easily understood as merely expressing that a law protected by the notwithstanding clause cannot be subject to a declaration made under s. 52 of the *Constitution Act, 1982*.

f. Conclusion on Supreme Court jurisprudence

[58] None of these Supreme Court of Canada cases turned on the question of the *effect* of a valid declaration made pursuant to s. 33, nor was the Supreme Court called to decide that issue. Given these realities and the steadfast history of care that has been demonstrated by that Court in pronouncing on important constitutional issues, those decisions should not be taken to have decided the issue now before this Court. Finally, as these reasons will demonstrate, points made in several of these cases stand in opposition to the position advanced by the Government in this appeal.

[59] Because the Supreme Court has not determined the issue, the question this Court must decide is whether s. 33 does more than simply to allow the legislation to operate – that is, to be shielded from the invalidating effect which would result from a declaration of inconsistency under s. 52 of the *Constitution Act, 1982* – even if it conflicts with a *Charter* right. Specifically, the issue is as follows: *Did the judge err when he held that the s. 33 declaration contained in s. 197.4 of the Education Act did not oust the Court's jurisdiction to determine if that provision limits the rights of gender diverse students under ss. 7 and 15(1) of the Charter?* The analysis of this issue begins by first reviewing the principles that must be applied to assign meaning to s. 33.

4. Principles of interpretation

a. Purposive textual approach

[60] Courts are to take a purposive approach to *Charter* interpretation. The early jurisprudence was summarized by Dickson J. (as he then was) in *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 344 [*Big M Drug Mart*]:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather

> than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.
>
> (Emphasis in original)

[61] Other decisions have emphasized that *Charter* provisions must be "interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts" (*Reference re Senate Reform*, 2014 SCC 32 at para 25, [2014] 1 SCR 704 [*Senate Reference*]). More recent jurisprudence has clarified that "within the purposive approach, the analysis *must begin* by considering the text of the provision" (*Québec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at para 8, [2020] 3 SCR 426 [*Québec inc.*], emphasis in original). This has led the Supreme Court to use the phrase "purposive textual interpretation" to describe the proper approach (*Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 53, [2021] 2 SCR 845 [*Toronto (City)*]). Even more recently, in *Canada (Attorney General) v Power*, 2024 SCC 26 at para 25, 494 DLR (4th) 191 [*Power*], Wagner C.J.C. and Karakatsanis J. summarized the "proper approach to *Charter* interpretation", as follows:

> [26] *The Charter* must be given a generous and expansive interpretation; not a narrow, technical or legalistic one (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). *Charter* provisions must be "interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts" (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 25).
>
> [27] A purposive approach considers constitutional principles. Indeed, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text" (*Reference re Senate Reform*, at para. 26).

[62] Although these authorities dealt with the proper interpretation of the *Charter*, of which s. 33 is a part, the approach they set out applies broadly to the interpretation of the Constitution as a whole, including s. 52. Thus, in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 394 [*Reference Re PSERA*], the Supreme Court did not distinguish the principles that apply to the proper interpretation of the *Charter* and other parts of the Constitution, stating as follows: "The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional

tradition, and by the history, traditions, and underlying philosophies of our society" (emphasis added, at 394).

[63] The uniformity of principles for constitutional interpretation generally was reiterated in *Senate Reference* (at paras 25–26), cited above in *Power*. More recently, in *Québec inc.*, the Supreme Court interchanged constitutional interpretation and *Charter* interpretation when discussing the imperative of beginning with the text (see paras 8–11). Thus, the purposive textual approach applies equally to the *Charter* and to the other parts of the Constitution that these reasons will discuss.

b. Use of headings and marginal notes

[64] In the context of an explanation of the purposive textual approach to constitutional interpretation, it is necessary to refer to the proper use of headings and marginal notes.

[65] In *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 [*Skapinker*], the Supreme Court observed that headings were deliberately included in the *Charter* and formed part of the resolution that Parliament debated, though marginal notes were not. Thus, the Court held that the *Charter*'s headings are properly considered when interpreting that constitutional document (at 376–377):

> It is clear that these headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology employed in the heading to the substance of the headlined provision. …
>
> …
>
> … I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

[66] Similarly, although assigned even less weight, the Supreme Court has invited courts to consider marginal notes when interpreting the Constitution. In this regard, in *R v Wigglesworth*, [1987] 2 SCR 541, after quoting the foregoing passage from *Skapinker*, Wilson J. instructed as follows (at 558):

> It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the *Charter*: see *Canadian Pacific Ltd. v. Attorney General of Canada*, [1986] 1 S.C.R. 678, at p. 682. The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them. I find some support in the marginal note therefore for the proposition that the opening words of s. 11 "charged with an offence" restrict the application of the section to criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences.

c. Attention to both English and French versions

[67] The principles of bilingual constitutional interpretation require special attention to both the English and French versions of the *Constitution Act, 1982*, as they are equally authoritative pursuant to s. 57:

English and French versions of this Act	**Versions française et anglaise de la présente loi**
57 The English and French versions of this Act are equally authoritative.	**57** Les versions française et anglaise de la présente loi ont également force de loi.

[68] From its very first decision interpreting the *Charter*, the Supreme Court has been attentive to differences between the English and French text (*Skapinker* at 378). Thus, it has adopted the approach of accounting for each version of the text of a constitutional provision, ensuring the equal authority and independence of both versions: Michael Beaupré, *Interpreting Bilingual Legislation*, 2d ed (Toronto: Carswell, 1986) at 201). In that sense, courts will attempt "to make ambiguous words coincide as much as possible with the scheme and objects of the Constitution Acts and with the overall system of the law" (Beaupré at 202).

[69] In a non-constitutional context, the Supreme Court has developed principles to deal with situations where the two versions are not completely consistent with each other. The Court in *R v S.A.C.*, 2008 SCC 47, [2008] 2 SCR 675, referred to the two-step approach laid out earlier in *Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269, and *R v Daoust*, 2004 SCC 6, [2004] 1 SCR 217, saying:

> [15] The first step is to determine whether there is discordance between the English and French versions of the provision and, if so, whether a shared meaning can be found. Where a provision may have different meanings, the court has to determine what kind of discrepancy is involved. There are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply: *Daoust*, at para. 27; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327. Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous: *Daoust*, at para. 28; Côté, at p. 327. Third, one version may have a broader meaning than the other. According to LeBel J. in *Schreiber*, at para. 56, "where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning".
>
> [16] At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent: *Daoust*, at para. 30.

[70] These principles of bilingual interpretation are consistent with the purposive textual approach to interpreting the Constitution, according to which the analysis begins with the text of a provision. Indeed, although decided prior to the aforementioned cases, in *Mahe v Alberta*, [1990] 1 SCR 342 at 369–370 [*Mahe*], the Supreme Court analyzed the text and the specific words in the context of the entire section, in light of the purpose of the provision and common sense. The Court also pointed out the ambiguity of one version of the text, whereas it deemed the other version to be clearer. On this point, the Court observed that "[i]t has been stated on several occasions by [the Supreme Court of Canada], that where there is an ambiguity in one version of the *Charter*, and the other version is less ambiguous, then the meaning of the less ambiguous version should be adopted" (at 370).

[71] With these principles in mind, the issue of whether s. 33 ousts the courts' jurisdiction in a case like this one remains to be decided.

5. Section 33 does not modify the *content* of *Charter* guarantees

[72] To begin, one largely uncontested point is this: a s. 33 declaration does not modify the content of the rights and freedoms that are referred to in the declaration, or what constitutes a reasonable limit to them under s. 1 of the *Charter*.

[73] This point is *largely* uncontested because, while the Government does not directly say that s. 33 has this effect, several of the secondary sources that it relies upon contain iterations of the idea that s. 33 should be approached on the basis that a declaration made under it effectively substitutes the legislature's interpretation of a *Charter* right — and what constitutes a reasonable

limit to it — for any possible meaning that a court might ascribe. Variations of this thought are raised directly, or by implication, in the writings of Geoffrey Sigalet, "Notwithstanding Judicial Review: Legal and Political Reasons Why Courts Cannot Review Laws Invoking Section 33" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 168 at 175–176 [Geoffrey Sigalet, "Notwithstanding Judicial Review"]; Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, UK: Cambridge University Press, 2019) 209 at 226–227, 232 [Dwight Newman on *Canada's Notwithstanding Clause*]; Maxime St-Hilaire and Xavier Foccroulle Ménard, "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 Const Forum Const 38 at 40; and Christopher Manfredi, "Courts, Legislatures, and the Politics of Judicial Decision-Making (or Perhaps the Notwithstanding Clause Isn't Such a Bad Thing After All)" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 184 at 191–194.

[74] The courts' mandate for reviewing legislation that is subject to a declaration made pursuant to s. 33 turns on the issue of whether a declaration effectively modifies the content of the specified rights and freedoms. As these reasons demonstrate, s. 33 does not have that effect; it does not modify the content of the rights that are referred to in a declaration made under that section. Indeed, the stability of the content of *Charter* rights and freedoms – that is, the meaning to be assigned to those rights and freedoms and what constitutes a reasonable limit to them under s. 1 – grounds the conclusion that the courts retain a role in determining whether legislation limits such rights despite the invocation of s. 33.

[75] The explanation for why s. 33 cannot be understood to modify the content of the rights that are referred to in a declaration made under that section begins with an examination of the constitutional text. Section 33(1) empowers Parliament or a provincial legislature to expressly declare in an Act "that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter" (emphasis added). In French, the text is that Parliament or a provincial legislature may adopt a law wherein it is expressly declared "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" (emphasis added).

[76] In a similar vein, s. 33(2) describes the effect of a declaration made under s. 33(1), by stating that "[a]n Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration" (emphasis added) and, in French, "[l]a loi ou la disposition qui fait l'objet d'une declaration conforme au present article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte" (emphasis added).

[77] Two points emerge from the emphasized words in ss. 33(1) and 33(2).

[78] The first point is that on the face of both s. 33(1) and s. 33(2), the object of the declaration is the Act of Parliament or the legislature, as the case may be. Thus, in both the English and French versions of the constitutional text, the effect of a declaration made under s. 33 is on the Act of Parliament or the legislature containing that declaration. In other words, the s. 33 declaration does not serve to modify the *Charter* right or freedom.

[79] The second point is that at least one effect of the s. 33 declaration is to allow for the continued operation of the statute, notwithstanding, or in spite of, the *Charter* right or freedom that is the subject of that declaration. Section 33(1) states that the Act *shall operate notwithstanding* (*a effet indépendamment*) the right or freedom. Section 33(2) directs that the Act shall have such *operation* (*a l'effet)* as it would have had but for the *Charter* right or freedom. Thus, both the English and French texts lead to the conclusion that, when a declaration is made that a law may *operate* notwithstanding a *Charter* right or freedom, it serves to overcome the effect of s. 52 of the *Constitution Act, 1982*. That provision, reproduced in its entirety earlier in these reasons, states that any law inconsistent with the provisions of the Constitution "is, to the extent of the inconsistency, of no force or effect" (emphasis added), and in French, "[la Constitution] rend inopérantes les dispositions incompatibles de toute autre règle de droit" (emphasis added).

[80] I agree, in this regard, with the Québec Court of Appeal in *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254, leave to appeal and cross-appeal to SCC granted 2025 CanLII 2818 [*Hak CA*], when it stated as follows:

> [328] … the use of s. 33 of the *Canadian Charter* has the effect of protecting the statute in question from the application of any of ss. 2 and 7 to 15 of the *Canadian Charter*, such that it operates without regard to these provisions, sheltered from the effects that would otherwise result from s. 52(1) of the [*Constitution Act*,] *1982*.
>
> (Emphasis added)

[81] By virtue of s. 33(3), a declaration under s. 33(1) can be effective for no more than five years, subject to renewal. As the Government correctly emphasized in its factum, the five-year limitation on any s. 33 declaration ensures that elected representatives who pass such a declaration are accountable to the citizens who elect them. During the period covered by the declaration, the legislation continues to operate – thus, it continues to be in force or effect – even if it is at odds with a selected *Charter* right or freedom. However, the s. 33 declaration is no longer effective once it expires, unless reenacted.

[82] This functioning of s. 33 is shown in *Ford*. As has been mentioned, the National Assembly of Québec had invoked s. 33 of the *Charter* in two different enactments. At this juncture, the simple but important point to draw from *Ford* is that, by the time the decision was rendered, more than five years had passed since s. 214 of the *Charter of the French Language* had come into force. The Supreme Court concluded that this meant that s. 214 had "ceased to have effect by operation of s. 33(3) of the *Canadian Charter of Rights and Freedoms* five years after it came into force" and noted that "it was not re-enacted pursuant to s. 33(4) of the *Charter*" (at 734). In contrast, the Court observed that s. 52 of the *Charter of the French Language* would "not cease to have effect by operation of s. 33(3) of the [*Charter*] until February 1, 1989" (at 735).

[83] None of this leads to the conclusion that s. 33 changes the *content* of the *Charter* rights mentioned in a declaration under that section. Rather, the contrary is true.

[84] An illustration of this proposition is found in the example of what occurs when s. 33 is invoked after a court has made a finding that the legislation at issue violates a *Charter* right. If, after that ruling, Parliament or a legislature declares under s. 33 that the legislation is to operate notwithstanding the *Charter* guarantee, then it may do so for a period up to five years. In this scenario, the functioning of the legislation continues and the meaning or content of the *Charter*-guaranteed right or freedom does not change. What is different is that during the period covered

by the s. 33 declaration, the legislation is allowed to operate notwithstanding that it conflicts with the mentioned *Charter* right.

[85] The opposite view, according to which the invocation of s. 33 changes the content or meaning of the prescribed *Charter* rights or freedoms, would lead to the conclusion that rights and freedoms have one meaning before s. 33 is invoked, a different one during the period of a s. 33 declaration, and then a meaning that reverts to its original after the declaration has expired. However, nothing in either the text or the purpose of s. 33 suggests that it functions in a way that *Charter* rights and freedoms have this chameleon-like nature – with meanings that change depending on whether a s. 33 declaration is itself in effect or has expired. The *Charter* is not written in disappearing ink that comes and goes every five years according to whether Parliament or a legislature has invoked s. 33. To the contrary, both the language of s. 33 and the operation of the five-year sunset provision demand that the content of the rights themselves remains unchanged.

[86] A conclusion otherwise would seem to be illogical and should not be taken to have been intended by the makers of our Constitution. In the words of Cartwright J. (as he then was) in *Vandekerckhove v Township of Middleton*, [1962] SCR 75 [*Vandekerckhove*], "There is ample authority for the proposition that when the language used by the legislature admits of two constructions one of which would lead to obvious injustice or absurdity the courts act on the view that such a result could not have been intended" (at 78–79).

[87] In *R v McIntosh*, [1995] 1 SCR 686 at para 81, McLachlin J. (as she then was) noted that although "Parliament can legislate illogically if it so desires…the courts should not quickly make the assumption that it intends to do so". Albeit in dissent in *McIntosh*, McLachlin J.'s instruction accords with the direction given in other cases, which hold that "[a]bsent a clear indication to the contrary, the courts must impute a rational intent to Parliament" (at para 81, see also *Morgentaler v The Queen*, [1976] 1 SCR 616 at 676; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 148, [2014] 1 SCR 433).

[88] These cases dealt with statutory interpretation, the methods of which cannot be unquestionably applied to constitutional documents. However, if Parliament is to benefit from a presumption of non-absurdity, so too should the same presumption apply to the makers of the Constitution who were concerned with crafting the country's foundational laws that are far more

difficult to amend. Moreover, the reasons why the canons of statutory interpretation do not always apply offer no justification for not considering these principles when assigning meaning to the Constitution.

[89] The main difference between constitutional interpretation and statutory interpretation goes to the living, evolving nature of constitutional norms (see *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 155). This difference has no bearing upon the readiness with which these norms might countenance absurdity. Indeed, when interpreting the *Charter*, the Supreme Court has found that it "should be interpreted in a way that maintains its underlying values and its internal coherence" (*Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 80, [2007] 2 SCR 391 (emphasis added)). The concern for internal coherence and non-absurdity are two sides of the same coin.

[90] To return to the words of McLachlin J. in *McIntosh*, given that there is no "clear indication" in the text of s. 33 that it is intended that the meaning of *Charter* rights are to shift back and forth, "the courts should not quickly make the assumption that [Parliament] intend[ed] to do so" (at para 81). As Cartwright J. suggested in *Vandekerckhove*, we should therefore opt for the non-absurd construction that remains available – that s. 33 does not have this effect.

[91] In summary, a declaration made pursuant to s. 33 of the *Charter* does not serve to modify the content of the specified rights and freedoms. Rather, the meaning of the right or freedom is unaffected by the declaration. Instead, s. 33 insulates the statute in question from the application of the rights mentioned in the declaration, such that the statute operates without regard to these provisions, sheltered from the otherwise invalidating effect of s. 52 of the *Constitution Act, 1982*.

[92] Ultimately, as has been noted, the Government does not directly suggest that a s. 33 declaration somehow modifies the content or meaning of any right referred to therein. It also agrees that a s. 33 declaration has the sheltering effect that has just been described. However, it asserts that the declaration has the further effect of removing any scope for judicial review of whether the legislation limits the rights mentioned in the s. 33 declaration. In advancing the latter idea, it asserts that, in effect, the *Charter* rights disappear completely – leaving no basis for the court to scrutinize whether the legislation limits or conflicts with the rights specified in the declaration. This argument is addressed in the next section of these reasons.

6. The constitutional text does not remove the Court's jurisdiction

[93] To reiterate, the words of s. 33 must be understood, at minimum, to have the effect of protecting the statute in question from the application of the rights mentioned in the declaration, such that the statute operates without regard to these provisions, sheltered from the effect that would otherwise result from s. 52(1) of the *Constitution Act, 1982*. UR Pride's submission is that s. 33 does nothing more. The starting point for its position is the use of *operate* in s. 33(1) and *operation* in s. 33(2). UR Pride adopts the view taken by Grégoire Webber, who argues that these words "help orient a reading of the legal effect of the clause that is focused on legislation and its operation and not on rights or review" ("Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021) 71 UTLJ 510 at 518). UR Pride makes other text-based arguments grounded on the writings of, among others, Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72 UTLJ 189 [Leckey and Mendelsohn].

[94] The Government's contention that a s. 33 declaration has additional effects is focused on the idea that, because (as it puts it) the rights mentioned in the declaration are "inapplicable", there is no basis for the Court to review whether the Act or provision operates in a way that limits those rights. The Government's submissions are reminiscent of the views of Maxime St-Hilaire, Xavier Foccroulle Ménard & Antoine Dutrisac ("Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-) Rejoinder", in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 132 at 142).

[95] In advancing this position, the Government argues that comparing the French version of the words *a effet* with other sections of the Constitution, notably s. 32(2) which delayed the effect of s. 15 of the *Charter* for three years after its adoption, renders the *Charter* rights inapplicable in the way just described when subject to a s. 33 declaration. The Government further submits that the location of s. 33 under the heading "Application of Charter/Application de la charte" and the marginal note above s. 33(1) "Exception where express declaration/Dérogation par déclaration expresse" supports its position that a s. 33 declaration operates "as an 'exception' to the *Charter*'s 'application'". The Government also argues that the words *as it would have but for*/*a l'effet qu'elle aurait sauf* in s. 33(2) reinforces the conclusion that a law that validly invokes s. 33 "must be

treated as though the *Charter* provisions selected do not apply". The Government asserts that the word *operate* in s. 33(1) is intrinsically connected to the words following it: *notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter*. It stresses the word *notwithstanding*/*indépendamment* to support its contention that the law becomes paramount over the selected *Charter* rights, which in its view would mean that the *Charter* provisions are inapplicable and therefore not subject to judicial review for any inconsistency with the law. The Government maintains that a s. 33 declaration gives a law "constitutional priority in the event of a potential conflict" and, therefore, cannot be inconsistent with the *Charter* provisions (citing Geoffrey Sigalet, "Notwithstanding Judicial Review" at 171).

[96] There is some cogency in the Government's position that a s. 33 declaration renders a specified *Charter* right *inapplicable* to the legislation, to use the Government's preferred term, if that term is understood as meaning, "incapable of being applied (to some case)" (*Oxford English Dictionary Online* (Oxford University Press, March 2025) sub verbo "inapplicable" [*OED Online*]). However, there are three caveats that lead to the conclusion that, based on the constitutional text alone, it cannot be said that the courts have no role to determine if the legislation that is subject to a s. 33 declaration nonetheless limits such rights.

[97] The first qualification relates to aspects of the text of s. 33 that the Government's argument largely ignores. The Government accuses UR Pride of taking a "literalist approach" and being "hyper focused" on the words *operate* (in s. 33(1)) and *operation* (in s. 33(2)). However, not only do the Government's submissions ignore that these words *are* used in the English text of s. 33, but it also ascribes an unusual meaning to those words by focusing on the French text of the Constitution.

[98] In keeping with the principles of bilingual constitutional interpretation discussed earlier, both language versions must be accounted for when ascribing meaning to the constitutional text. Properly interpretating s. 33 requires paying attention to two subject–verb predicate relationships: (1) the declaration "is in effect" or "shall cease to have effect" ("*en vigueur*" or "*cesse d'avoir effet*") (see ss. 33(2) and (3)); and (2) the Act or provision thereof "operates" or "shall have such operation" ("*a effet*" or "*a l'effet*") (see ss. 33(1) and (2)).

[99] The jurisdiction issue also depends on the legal effect of a declaration on its object – the Act or provisions affected by the declaration. This, in turn, demands the bilingual interpretation of the words *operates*/*operation* and *a effet*. The *OED Online* defines *operation* as the "Power to operate or produce effects; efficacy, force. Now chiefly *Law*" (emphasis in original). In French, the word *effet* in the legal sense has been defined to mean "*Conséquence juridique d'un acte, d'un fait, d'une décision*" (H. Reid and S. Reid, *Dictionnaire de droit québécois et canadien*, 6th ed (Wilson & Lafleur, 2023) sub verbo "effet"; see also *Dictionnaire de l'Académie française*, 9th ed (1992–2024) sub verbo "effet". Thus, *a effet* may be translated as having a legal consequence of an act, fact or decision. It is therefore a term that can be seen to be more ambiguous than the word *operation* in English since the French definition does not describe what comes of the legal consequence, while the English definition connotes *operation* as giving power "to operate or produce effects; efficacy, force" to its subject, in this case, the Act or provision that is the object of the s. 33 declaration.

[100] Not only is the French meaning more ambiguous, but *a effet* can also have a broader meaning than the English words *operate* or *operation*. In the Government of Canada's terminology and linguistic data bank, the term "*avoir effet*" – the infinitive verb of "*a effet*" – in the practice and procedural law context carries the same meanings as "have force and effect", "have effect", "have force", "have force or effect", "have operation", and "be operative" in English (see Government of Canada, *TERMIUM Plus*, online). Given this, the word *a effet* can either refer to "having force and effect", which implies validity, or simply mean "operation" as earlier described. As can be seen, the latter interpretation is the only meaning given to the English words, for which this narrower reading should be favoured according to the rules of interpretation.

[101] Accounting for all of this, an earlier expressed conclusion stands: on the face of both the English and French versions of s. 33(1) and s. 33(2), the object of a s. 33 declaration is the Act of Parliament or the provincial legislature, as the case may be. The object of a s. 33 declaration is not the *Charter* right itself.

[102] This stands in contrast to s. 32(2), by which the coming into force of s. 15 of the *Charter* was delayed. That provision states that s. 15 "shall not have effect until three years after [s. 32] comes into force" / "n'a d'effet que trois ans après l'entrée en vigueur du [s. 32]". This bears

emphasis because, in oral argument, the Government stressed that, as there is no contention that the legal effect of s. 32(2) was to make judicial review of s. 15 compliance unavailable for three years since the right was not yet applicable, the use of *a effet* in the French version of s. 33, interpreted consistently, would carry the meaning of temporarily suspending the applicability of the *Charter* provisions included in the declaration so as to also bar judicial review. However, it is a complete answer to this argument that, in contrast to ss. 33(1) and 33(2) where the subject of the verb is the legislation, in s. 32(2) the subject of the verb is the right itself.

[103] Throughout its factum, the Government couched its argument in the words of s. 52, repeatedly asserting that a law that is the subject of a s. 33 declaration cannot be found to be "inconsistent" with a right mentioned in the declaration. In analyzing this argument, it is impossible to look past the fact that UR Pride is not asking for a declaration that s. 197.4 of the *Education Act* is *inconsistent* with ss. 7 or 15(1) of the *Charter*, nor is it seeking a declaration that the legislation is of no force or effect under s. 52 based on such a finding. Instead, UR Pride is seeking a declaration that s. 197.4 *limits* such rights and that the limitation is not reasonable and demonstrably justifiable, as required by s. 1 of the *Charter*. More substantively, stepping beyond the words, there is no reason to conclude that simply because a s. 33 declaration protects legislation from being declared to be of no force or effect because of *Charter* inconsistency under s. 52 of the *Constitution Act, 1982*, a court has no jurisdiction to determine whether it operates in a way that limits the *Charter* rights. Indeed, the Government's argument otherwise simply *assumes* that the Court's jurisdiction is confined to issuing an order under s. 52, a point that is discussed later in these reasons.

[104] The second qualification relates to an unequivocal feature of the constitutional text, namely the period during which a s. 33 declaration may be valid. The period of *Charter* right "inapplicability", to use the Government's preferred term, that may be created by a s. 33 declaration is subject to a strict temporal limit; by operation of law, the *Charter* right once more becomes "applicable", to again use that term, if the s. 33 declaration is not renewed after five years. This is not, as the Government suggests, a hypothetical circumstance or event. It is, of course, uncertain if the Legislature will enact a new s. 33 declaration. However, it is certain as a matter of law that if the Legislature does not enact another s. 33 declaration, the *Charter* rights will again apply.

[105] These two qualifications lead to a final overarching one: the meaning that the Government seeks to assign to s. 33 by using the adjective *inapplicable* purports to oust the courts' jurisdiction in a case like this one based on inference or implication. In effect, the Government's argument is that the jurisdiction question is answered as soon as the word *inapplicable* is used in association with the rights referenced in a s. 33 declaration. However, the only express limitation on the courts' jurisdiction flows from the effect of s. 33(2). Both in English and in French, that provision reinforces the conclusion that, when a s. 33 declaration is made, an Act or provision operates notwithstanding certain rights; its effect is to negate the possibility that the legislation can be declared to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*, but it does no more.

[106] Because of these three qualifications, the answer to the question of whether a court has jurisdiction to determine if legislation sheltered under a s. 33 declaration limits *Charter* rights or freedoms referenced in such a declaration does not follow from the use of the terms *applicable* and *inapplicable.* Instead, an understanding of the effect of s. 33 on the courts' jurisdiction must come from a consideration of the actual text, in light of its purpose in the overall architecture of Canada's Constitution. This is the issue that will next be addressed.

7. Purpose of s. 33 and its place in the constitutional structure

[107] It is uncontroversial, as the Government observes in its factum, that "s. 33 of the *Charter* was a key part of federal-provincial negotiations that led to the adoption of the *Charter* in 1982" and that the "constitutionalization of rights and freedoms aroused provincial concerns about the expanded mandate accorded to judicial interpretations over those of an elected assembly". Indeed, many authors have identified the purpose of s. 33 to be to ensure that legislators have the last word so as to preserve a form of parliamentary sovereignty (see, generally, Peter W. Hogg & Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75 [Hogg and Bushell]; Library of Parliament, *The Notwithstanding Clause of the Charter* (HillStudies), Pub no 2018-17-E (Ottawa: Library of Parliament, 2024); Leckey and Mendelsohn; Eric M. Adams & Erin R.J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022) 27:1 Rev Const Stud 121; Dwight Newman on *Canada's Notwithstanding Clause*).

[108] In this regard, the observations offered by the Québec Court of Appeal in *Hak CA* on this subject are apposite:

> [228] … It bears reminding that this section is the fruit of a federal-provincial compromise (with the exception of Quebec) in the context of the process that led to the patriation of the Constitution in 1982. As everyone knows, the decision to enshrine a charter of rights and freedoms was the subject of much discussion — and dissent — during the 1980-1981 Conference of First Ministers. For some, the idea that courts could set aside statutes enacted by Parliament or provincial legislatures, insofar as these statutes violated rights and freedoms guaranteed by such a charter, was a source of concern and reluctance. There was a fear that the judiciary would usurp or neutralize the legislative power exercised by an elected assembly, thereby running counter to the principle of parliamentary sovereignty. The proposal to introduce an override power reserved for Parliament and the provincial legislatures was intended as a [TRANSLATION] "counterweight" to the broadened scope of judicial review resulting from the constitutionalization of rights and freedoms.
>
> (Footnote omitted)

[109] However, nothing in the remaining text or structure of the *Charter*, or the Constitution more generally, suggests that the idea of a legislative *last* word should be equated with a legislature having the *only* word on the issue of whether legislation limits *Charter* rights. To the contrary, an examination of s. 33 in the context of the overall architecture of the Constitution leads to a different conclusion.

[110] To reiterate, a declaration made under s. 33 has a finite period. It expires after five years, although it can be renewed. Therefore, to have durable effect, the Legislature's "last word" must be repeatedly expressed during a period within which the legislators will face the scrutiny of the ballot box. Recognizing this, many commentators have correctly pointed out that a proper expression of the purpose of s. 33 must not only recognize that it preserves an element of parliamentary sovereignty but that it does so in a way that encourages both *continual and repeated* democratic accountability. It also does so in a way that contemplates dialogue between the legislature, which may exercise the power to override certain guaranteed *Charter* rights and freedoms, and the courts, which are given the responsibility for interpreting (assigning meaning to) those guaranteed rights and freedoms (see Hogg and Bushell at 82–84; Dwight Newman on *Canada's Notwithstanding Clause* at 223 and 227; Leckey and Mendelsohn at 198–203; Eric M. Adams & Erin R.J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022) 27:1 Rev Const Stud 121 at 139, 142; Ian Peach & Richard Mailey,

"Weaving Section 33 into the *Charter* Project: Citizen Led Oversight as a Potential Way Out of the Legitimacy Conundrum" (2023) 32:3 Const Forum Const 53 at 56–57).

[111] The recognition of these broader purposes of s. 33 finds support in more than the academic literature. Indeed, the Supreme Court has provided guidance that is relevant to this issue, pointing in a decidedly different direction than the one suggested by the Government.

[112] As the Court noted in *Vriend*, "[w]hen the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy" (at para 131, see also *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 72, and *Power* at para 55). A dialogical relationship of mutual respect between the courts and the legislatures was behind the "redefinition of our democracy" that accompanied the adoption of the *Charter* (*M. v H.*, [1999] 2 SCR 3 at para 78). This shift, which *Vriend* emphasized, was "the deliberate choice of our provincial and federal legislatures" (at para 132) and assigned the courts as *trustees* of the *Charter*, including as to its interpretation. The instruction given in *Vriend* around this idea provides important context for the proper understanding of the effect of s. 33. It merits reproduction at length:

> [134] To respond, it should be emphasized again that our *Charter's* introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.
>
> [135] So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.
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> [136] Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
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> (Emphasis added)

[113] These are the paragraphs that preceded the previously discussed statement, relied upon by the Government, that "s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts". The full paragraph containing the words cited by the Government states as follows:

> [137] This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).
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> (Emphasis added)

[114] The emphasized words make the important point that s. 33 exemplifies how the remedy of reading in a prohibited ground does not limit the legislative process or democratic decision-making. The comment recognizes that, if a Legislature is unhappy with a court's conclusion on the issue, it can always exercise its power under s. 33 and allow legislation to operate. The direction given by the Supreme Court in *Vriend* is thus consistent with the proposition already expressed, namely that the use of the notwithstanding clause allows legislation to work even though the courts may have determined that the legislation limits a *Charter* right or freedom.

[115] Institutional dialogue among the branches of government presupposes an exchange of views that is vital to the democratic process. *Vriend* expanded upon this idea:

> [138] As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> [139] To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

(See also, *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 65, [2002] 2 SCR 559.)

[116] Adopting the Government's position that the pre-emptive use of s. 33 would foreclose the important dialogue that the Supreme Court has suggested was envisaged by the drafters of our Constitution. There is no principled reason why the courts' voice on whether legislation limits rights is legitimate if it is heard before s. 33 is invoked, but not after. Although said in a different context, the caution expressed by the Alberta Court of Appeal, that the "resulting dialogue between the courts and Parliament would be incomplete if the voices of courts … fell silent" (*R v Arcand*, 2010 ABCA 363 at para 89, 264 CCC (3d) 134), aptly describes the situation that would prevail if the courts are removed from the discourse between the courts and legislatures and Parliament when s. 33 is used pre-emptively. Indeed, dialogue would become monologue.

[117] Yet, the Government contends that the Constitution dictates that, while the courts have a legitimate role in assessing whether legislation limits *Charter* rights before a s. 33 declaration is made, that role disappears when s. 33 is invoked prospectively. In doing so, it draws on *Hak CA*, which came to a different conclusion than as expressed in these reasons as to the jurisdiction of the courts following a s. 33 declaration. While many statements from that decision accord with these reasons, these reasons do not adopt that Court's interpretation of the effect of a pre-emptive declaration made under s. 33 of the *Charter*.

[118] As part of its justification for concluding that the invocation of s. 33 insulates legislation from judicial review, the Québec Court of Appeal wrote that "to rule otherwise would be tantamount to indirectly doing what cannot be done directly". It went on to say:

> [349] … Indeed, it would be contradictory to allow the legislature to use s. 33 to escape the grasp of one or the other of ss. 2 or 7 to 15 of the *Canadian Charter* (including in relation to s. 1) and the effects of s. 52(1) of the *CA 1982*, while subjecting the statute to judicial review of its compliance with these very provisions, as if it had not been exempted from their application. In a way, this would impose a kind of penalty for the use of s. 33: the legislature would be free to invoke this section and declare that such and such a statute has effect notwithstanding ss. 2 or 7 to 15, but, if it did so, it would have to explain itself before the courts in the event of a legal challenge. It would then have to either try to show that the statute complies with these provisions (by arguing that there is no infringement or that the infringement, if any, is justified under s. 1 and, paradoxically, that recourse to art. 33 is unnecessary) or concede the infringement or lack of justification (expressly or by failing to defend itself) — all of this despite the fact that, given s. 33, the validity and effect of the statute cannot be impugned.

[119] Respectfully, judicial review of legislation following a pre-emptive s. 33 declaration does not involve the court doing indirectly what it cannot do directly. More specifically, it is not inconsistent with the Legislature's right to have the final word on the operation of the statute, as the legislation remains immune from any declaration of invalidity pursuant to s. 52 for the term of the declaration and any renewal. Judicial scrutiny is not a form of penalty for the use of s. 33; rather, it is what the Constitution contemplates as a salutary mechanism of dialogue. The government can decide if it will defend against such litigation by attempting to show that the legislation exempted from being declared invalid on *Charter* grounds nonetheless operates in a way that reasonably limits those rights. When called upon to do so, the government may respond in many different ways, a point returned to later in these reasons. In any event, the Court's function is no different than if the litigation had occurred before s. 33 was invoked.

[120] Returning to *Hak CA*, the Québec Court of Appeal also wrote as follows:

> [351] Absent such a constitutional review, determining the correctness of the legislature's political and legal choice in invoking s. 33 of the *Canadian Charter* is therefore left to the citizens, who will make their point of view known through the tools of parliamentary democracy (e.g. elections, lobbying of deputies, petitions submitted to legislature) and those that the Constitution places at the disposal of any person or group wishing to make their opinion known (such as the exercise of freedom of expression or freedom of peaceful assembly).

[121] The premise that the decision to invoke s. 33 is a political one which is beyond judicial purview is clearly correct. Its review on this account is left solely to the electorate. Indeed, the Constitution ensures that this occurs regularly by restricting the period of a s. 33 declaration to five years. As per *Ford*, the Court's role in determining the legality of the decision to invoke s. 33 is limited to a review of form only. However, for the reasons already given, this does not mean that the use of s. 33 defines the content of *Charter* rights and freedoms or that interpreting those rights and freedoms, and thus whether the legislation limits them, becomes solely a political rather than a legal question.

[122] The point of explaining why a s. 33 declaration does not modify the *content* of the rights guaranteed by the referenced *Charter* provisions is to demonstrate that there exists an appropriate legal standard against which a court is able to determine whether the operation of legislation that enjoys the benefit of a s. 33 declaration unreasonably limits those rights. The legal criteria that could be brought to bear in a judicial review are the same, whether a s. 33 declaration has been

made or not. This fact is important, because it answers any concern that an examination of whether s. 197.4 of the *Education Act* limits any of the delineated *Charter* rights in some way exceeds the courts' constitutional role. Clearly, but for the invocation of s. 33 of the *Charter*, the courts are not only equipped to answer this question but are called upon to do so. Indeed, as noted by the Québec Court of Appeal in *Hak CA*, "the question of whether a statute infringes ss. 2 or 7 to 15 of the *Canadian Charter*, without being justified under s. 1, is one courts can ordinarily answer by using the tools and methods specific to the law (i.e., 'by the application of legal principles and techniques'), which is what traditionally characterizes the 'justiciability' of a debate, without regard to its political dimensions" (at para 355, footnotes omitted). A corollary of the conclusion that the content or meaning of the *Charter* rights has not changed because of the s. 33 declaration is that the courts are equally equipped to answer the question of whether the legislation operates to limit the mentioned *Charter* rights after the declaration has been made as before.

[123] *Hak CA* implicitly asserts that a judicial review after s. 33 has been invoked prospectively is, in some way, contrary to democratic principles or the constitutional order more generally. However, the proposition that judicial review is illegitimate when s. 33 is invoked prospectively presupposes that the Constitution attaches no importance to any interest that the electorate may have in the legal consequences associated with the use of s. 33. That notion ignores the positive role that judicial review can play in Canada's democracy. Again, this is an idea expressed in *Vriend*:

> [140] There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in [*R v Oakes*, [1986] 1 SCR 103] at p. 136:
>
> > The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[124] The proper functioning of our constitutional democracy is enhanced, not impaired, if Canada's citizens, and legislators alike, are made aware when legislation that is allowed to operate by virtue of s. 33 does so in a way that limits *Charter* rights and freedoms.

[125] The conclusion that the courts lack jurisdiction to determine if legislation limits *Charter* rights after a s. 33 declaration is made is also at odds with Canada's constitutional architecture more generally. In this regard, the superior courts have remedial jurisdiction to grant declaratory relief and substantive jurisdiction that they are mandated to fulfill in order to determine constitutional issues. The jurisprudential lines supporting these two ideas intermingle, grounded as they both are in the jurisdiction of our country's superior courts as enshrined in s. 96 of the *Constitution Act, 1867*. Thus, the Government's proposed interpretation stands in conflict with the requirement that "the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text" (*Power* at para 27, referring to *Senate Reference* at para 26).

[126] The Government asserts that it would undermine confidence in the administration of justice if courts were to weigh in on whether legislation, sheltered from the invalidating effects of s. 52(1) of the *Constitution Act, 1982*, nonetheless limits the rights referred to in a s. 33 declaration. However, when asked during oral argument why this is the case, the only answer given was that there is always remedial consequence that flows from unjustified infringements of *Charter* rights. This response simply invites the question it purports to answer. Moreover, the statement is incorrect at law.

[127] Certainly, there is nothing unusual or out of place with a court making a declaration in the absence of the ability to grant any other form of relief. This principle is enshrined in s. 3-3 of *The King's Bench Act*, SS 2023, c 28, which provides that 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 mere declaratory judgment or order is sought".

[128] In *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*], Wagner J. (as he then was) described the appropriate use of a declaratory judgment in the following terms that have resonance in the circumstances of this appeal:

> [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 Métis 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 (Minister of 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.

[129] A court asked to grant a declaration must decide whether to exercise its jurisdiction to do so in accordance with the appropriate principles. However, the Government asserts a much stronger proposition. From its perspective, there is *no* circumstance in which such relief can be granted. This is at odds with the inherent jurisdiction that superior courts have to grant declaratory relief. In this regard, the authority of superior courts to grant declaratory relief exists independently of s. 52 of the *Constitution Act, 1982* and s. 24(1) of the *Charter.*

[130] The power to issue declarations – statements of the legal rights of parties – is an aspect of the inherent jurisdiction of superior courts (*Kourtessis v Minister of National Revenue*, [1993] 2 SCR 53 at 85 (per La Forest J.) and at 113–114 (per Sopinka J.) [*Kourtessis*]). In *Shot Both Sides v Canada*, 2024 SCC 12 at para 67, 490 DLR (4th) 585 [*Shot Both Sides*], the Supreme Court noted that "[c]ourts have an 'extremely wide jurisdiction' when issuing declaratory relief" (referring to Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters, 2016) at 37, and Rafal Zakrzewski, *Remedies Reclassified* (New York: Oxford University Press, 2005) at 158). The Court held that a claim for a breach of treaty rights was barred by an expired limitation period. However, it allowed a claim for declaratory relief to proceed.

[131] These principles were applied in *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, 377 CCC (3d) 420. In that decision, the British Columbia Court of Appeal found that a superior court can rely on its inherent jurisdiction to declare the conduct of state actors unconstitutional in circumstances where neither s. 24(1) nor s. 52 was available. The case involved the constitutionality of administrative procedures adopted by Corrections Services Canada [CSC] officials. Section 52 was not available because the problems were not with the constitutional administration of the applicable legislation, but with its maladministration by CSC officials (see para 216). Section 24(1) was not available because the plaintiff had been granted public interest standing and s. 24(1) is a personal remedy (see para 253). Nevertheless, the Court concluded that " a superior court judge has inherent jurisdiction at common

law to grant a public interest standing litigant declaratory relief that state conduct against a non-party violates the *Charter*" (at para 266).

[132] These authorities approach the courts' jurisdiction from a remedial perspective. It should also be understood from a substantive one. Section 96 of the *Constitution Act, 1867* constitutionally protects the inherent jurisdiction of superior courts, which is essential to maintain the rule of law and to protect the judicial role (see *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 17–21, [2013] 3 SCR 3 [*Criminal Lawyers'*]). It provides the powers for judicial review within limits, such as "the institutional roles and capacities that emerge out of our constitutional framework and values" (*Criminal Lawyers'* at para 24; see generally paras 22–26). In a case such as the present one, while s. 33 does not oust the courts' jurisdiction for judicial review, the Constitution limits the courts' ability to invalidate the impugned legislation pursuant to s. 52 of the *Constitution Act, 1982* in the face of a s. 33 declaration.

[133] The ability of a superior court to pronounce upon the constitutionality of legislation is a key aspect of its core jurisdiction under s. 96 of the *Constitution Act, 1867*. *Vriend* makes this point. Similarly, in *R v Ahmad*, 2011 SCC 6 at para 62, [2011] 1 SCR 110, after reviewing the jurisprudence, the Supreme Court accepted it to be "true that a superior court's ability to adjudicate the constitutional issues that come before it forms a part of the essential core [jurisdiction]".

[134] The majority of the Supreme Court in *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 SCR 291, said the following on the issue of core jurisdiction:

> [63] The core jurisdiction test aims to do more than simply protect historical jurisdiction. It also ensures that superior courts are not impaired in such a way that they are unable to play their role under s. 96. The superior courts' core jurisdiction includes the powers and jurisdiction essential to their role as the cornerstone of the unitary justice system and the primary guardians of the rule of law. These essential functions are not limited to inherent jurisdiction and powers in the traditional sense, but include <u>any subject-matter jurisdiction that meets this criterion</u>. …
>
> (Emphasis added)

[135] The substance of the Government's response to this jurisprudence is two-fold. First, it says that the declaratory relief requested here could not be granted because, by virtue of the s. 33 declaration, the *Charter* rights are inapplicable. Leaving aside the rejection of the idea of unvarnished inapplicability, this argument ignores the temporal limitation on the functioning of the s. 33 declaration. A "declaration by its nature merely states the law without changing anything"

(*Kourtessis* at 86). Here, a declaration by a superior court that s. 197.4 of the *Education Act* limits certain *Charter* rights, *if* that is found to be the case, would not disturb the effects of having invoked s. 33 in the *Education Act*. However, it may explain the legal state of affairs that would prevail if the use of s. 33 is not renewed or, minimally, be of assistance to any court called upon later to make an order under s. 52 of the *Constitution Act, 1982*.

[136] The Government's second response is that, even on its view, the courts would retain their core function because the legislation would still be subject to review for its compliance, in form, to ensure that a valid s. 33 declaration has been made by the Legislature. However, this proposition again simply invites the question it suggests has been answered, namely whether the Court has the jurisdiction to determine whether s. 197.4 limits any person's *Charter* rights.

[137] The question of whether the use of s. 33 precludes a judicial determination of this issue should also be considered in the context of the right of individuals to have access to a superior court to have their legal issues resolved. Chief Justice McLachlin said the following in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31, a case involving the constitutionality of court fees:

> [32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[138] Individuals who are affected by legislation that they believe limits their *Charter* rights have a public law dispute with the state and a right to have access to the courts to make arguments and adduce evidence to determine whether and how the dispute can be resolved. In the present context, the issues include whether s. 197.4 limits the rights that are protected by ss. 7 and 15(1) of the *Charter* and, if so, whether those limits can be justified under s. 1. Those issues do not disappear simply because s. 33 has been invoked. To the contrary, by operation of the sunset provision, the most that can be said is that there is a period during which the legislation can operate without being declared to be of no force or effect under s. 52. But the *Charter* itself remains in effect. As observed earlier, it is uncertain whether the Legislature will enact a new declaration. To repeat, what is not

uncertain is that if the Legislature does not do so — the *Charter* rights again "apply", to use the Government's preferred verb, after the five-year period.

[139] For these reasons, the Government's contention that UR Pride is seeking a hypothetical determination, or a declaration that will, in every case, have no practical effect, is not persuasive. There may well be reasons why a court might refuse to exercise its discretion to grant declaratory relief. However, the fact that such reasons might exist is not a basis to find that, as a matter of jurisdiction, a court has no power to do so (*Shot Both Sides* at paras 65–69).

[140] Finally, the Government supported its position with parts of the historical record resulting in the adoption of s. 33 as a piece of the 1982 constitutional compromise. Evidence of the debates leading to the patriation of the Constitution are admissible but are of minimal relevance given the inherent unreliability of the individual statements and speeches (*Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 506–507, and *Mahe* at 369). This is largely because of the limited perspectives and differing interests that various participants in the negotiations would have had. In any event, the historical record, at least as it was presented in argument in this Court, shows far less than the Government contends. It is replete with references to the section being intended to enable legislators to ensure that legislation may operate even if it is contrary to how the courts have, or even might, interpret the *Charter* – the "last" or "final" word. That this was the purpose behind s. 33 has already been accepted. However, the parts of the record referred to in argument before this Court do not disclose any intention to have provided legislators the *only* word on issues of *Charter* application.

8. This judgment does not decide if the jurisdiction to grant declaratory relief should be exercised

[141] This appeal requires this Court to answer the question as to whether the Court of King's Bench has the *jurisdiction* to issue a declaration if it finds that s. 197.4 of the *Education Act* limits the rights of any person under ss. 7 and 15 of the *Charter*. However, an affirmative answer does not entail a determination that this jurisdiction should be exercised. In other words, these reasons should not be interpreted as finding that the Court of King's Bench should ultimately go on to decide whether s. 197.4 of the *Education Act* limits the rights of any person under ss. 7 and 15 of the *Charter*.

[142] Through its motion to strike, the Government takes the position that this litigation should not proceed. It has done so through the blunt assertion that the Court has no *jurisdiction* when s. 33 is invoked. Different governments, in different contexts, may not wish to object to an issue like that presented here being decided in litigation. However, if the Government is correct in its assertion, an implication is that in other contexts and in other cases, a government of the day cannot consent to similar litigation proceeding as a vehicle to obtain a judicial determination whether legislation sheltered by s. 33 unreasonably limits *Charter* rights and freedoms.

[143] The proper place for a determination of whether the issues raised in this litigation should be decided through the grant of declaratory judgment is in the context of the judicial exercise of the Court's discretion over that remedy. Declaratory relief "is granted by the courts on a discretionary basis" (*S.A. v Metro Vancouver Housing Corp.*, 2019 SCC 4 at para 60, [2019] 1 SCR 99; see also *Ewert* at para 83 and *Shot Both Sides* at para 67). In this case, the judge recognized the discretionary nature of the declaratory remedy but determined that it was inappropriate to decide, at this juncture of the litigation, whether the Court of King's Bench's jurisdiction should be exercised, stating as follows:

> [169] … 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.

[144] The Government has not appealed from this part of the *Chambers Decision* and UR Pride simply reiterates its agreement with the judge's decision to defer the question of whether declaratory relief is appropriate here. Given the positions taken by the parties, the invitation by one of the intervenors to establish criteria that would guide the exercise of that discretion must be declined. Rather, as the judge held, it is most appropriate to do so in the context of a more complete understanding of the case being advanced and the evidence to be provided in support of and in opposition to that case.

[145] It is, however, important to be clear about one matter that pertains to that discretion. The Government submitted that the Court should find that there is no jurisdiction in a case like this one because a government respondent has no incentive to take a position on whether a *Charter* right

has been limited, or whether the limitation, if one exists, can be justified under s. 1 of the *Charter*. It is best to leave to the Court of King's Bench the question of whether the position taken by a government respondent, regarding evidence and argument in response to litigation such as this, is a relevant consideration informing the exercise of its discretion to grant declaratory relief or not.

[146] For the moment, the emphasized point is that, while the Court of King's Bench has the jurisdiction to determine whether s. 197.4 of the *Education Act* operates in a way that limits ss. 7 and 15 *Charter* rights, this does not mean that it will or should do so. That issue is not before this Court and is not decided in these reasons.

9. Conclusion on issue A (jurisdiction)

[147] A s. 33 declaration does not repeal the *Charter* provisions in question or change their content. The *Charter* remains in effect. The judge did not err in holding that the declaration contained in s. 197.4 of the *Education Act*, made under s. 33 of the *Charter*, did not oust the jurisdiction of the Court of King's Bench to determine whether that provision limits the rights of individuals under ss. 7 and 15(1) of the *Charter*.

[148] Whether it is appropriate to determine that issue is another matter and one that is beyond the scope of this appeal. In this regard, as the judge held, the grant of declaratory relief remains in the discretion of the Court. Accordingly, these reasons do not address whether it is appropriate to grant declaratory relief in the circumstances of this case.

B. The amendment issue

1. The issue and standard of review

[149] The Government challenges the grant of leave to UR Pride to amend its originating application to plead that both the Policy and s. 197.4 of the *Education Act* breach s. 12 of the *Charter*.

[150] Since a decision to permit an amendment to a pleading involves the exercise of discretion, the judge's order attracts the standard of review described in *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161:

> [20] In summary, these cases confirm that appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

[151] The Government does not contend that the judge erred in his assessment of the facts. It also agrees that the judge identified the correct principles governing the amendment to pleadings, including those set out in *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 at para 47 [*Cupola Investments*]. The Government's argument is that the judge misapplied those legal principles. This allegation attracts a standard of review of correctness.

[152] In the briefest of terms, the Government contends that the judge erred by failing to find that pleading a breach of s. 12 of the *Charter* would result in an abuse of process because UR Pride advanced it "to achieve a 'different purpose' than to enable the Court to determine the 'true points in controversy'" between the parties. To buttress its submissions, the Government cites a statement made in *Cupola Investments* at paragraph 47, that, while "amendments are allowed to enable the court to determine the true points in controversy[,] amendments designed to achieve a different purpose may be refused". It also refers to *Sidhu v Sidhu*, 2008 BCSC 324 at para 24 [*Sidhu*], citing *Babavic v Babowech*, [1993] BCJ No 1802 (Lexis) (SC) at para 18, which emphasizes the flexibility of the abuse of process doctrine that may be invoked when the proposed amendment "is employed for some ulterior or improper purpose … [or] are without foundation or serve no useful purpose".

[153] The impermissible purpose the Government says that the requested amendment serves is the sidestepping of the application of the s. 33 declaration contained in s. 197.4(3) because, while it declares that s. 197.4 operates notwithstanding ss. 2, 7 and 15, it contains no reference to s. 12 of the *Charter*. It writes in its factum that there "was no suggestion that in retrospect, s. 12 should have been added sooner or that it would have necessarily been added if s. 197.4(3) of the *Act* had been declared to operate notwithstanding sections 2, 7 **to** 15 of the *Charter*" (emphasis in original).

2. The introduction of the s. 12 allegation is not abusive

[154] The Government correctly observes that a court should not grant an amendment if the pleading would constitute an abuse of process. This is because "a proposed amendment must be a *proper pleading*" (*Cupola Investments* at para 48, emphasis in original). Since a pleading that would constitute an abuse of process could be struck, it cannot be countenanced by the grant of leave to make such a pleading.

[155] It would seem that UR Pride is seeking to circumvent the Legislature's invocation of s. 33 of the *Charter* by applying to amend its claim to include a reference to s. 12. Indeed, this purpose was referred to in UR Pride's notice of application to amend:

> 22. The Outing Requirement and the Misgendering Requirement have been legislatively entrenched in section 197.4 of *The Education Act, 1995*. Subsection 197.4(3) pre-emptively invokes the Notwithstanding Clause to declare that section 197.4 operates notwithstanding sections 2, 7, and 15 of the *Charter*. Subsection 197.4(3) does not refer to section 12 of the *Charter*, which guarantees the right not to be subjected to any cruel and unusual treatment.
>
> 23. The Amended Originating Application seeks, among other things, an Order under section 52(1) of the *Constitution Act, 1982* declaring section 197.4 of *The Education Act, 1995* to be of no force and effect as it limits the section 12 *Charter* right of gender diverse students under the age of 16 not to be subjected to cruel and unusual treatment, and this limit is not reasonable and cannot be demonstrably justified in a free and democratic society under section 1 of the *Charter*.
>
> …
>
> 27. The Court has jurisdiction to determine whether section 12 has been infringed by the Outing Requirement and the Misgendering Requirement and to grant remedies for the same, including a declaration that section 197.4 of *The Education Act, 1995* is of no force and effect (and thus cannot operate) pursuant to section 52(1) of the *Constitution Act, 1982*.
>
> (Emphasis in original)

[156] This purpose is also clearly identified in the draft amended originating application that was filed as part of UR Pride's amendment application:

> 15.13. In any event, and as noted above, the Notwithstanding Clause has not been invoked in section 197.4 of *The Education Act, 1995* to override section 12 of the *Charter*. This Court unquestionably has jurisdiction to determine whether section 12 has been infringed — in other words, whether section 197.4 of *The Education Act, 1995* and its Outing and Misgendering Requirements violate the right of gender diverse students under the age of 16 not to be subject to any cruel and unusual treatment — and to grant remedies for same, including a declaration that the provision is of no force and effect (and thus cannot operate) pursuant to section 52(1) of the *Constitution Act, 1982*.

[157] Other parts of the record, referred to in the Government's factum, also lead to the conclusion that UR Pride would not have sought to advance a claim based on s. 12 of the *Charter* if the Legislature had not invoked s. 33 or had it included s. 12 of the *Charter* within the scope of the s. 33 declaration. However, these facts are several steps away from a finding that allowing UR Pride to plead a breach of s. 12 is to achieve an improper purpose or will otherwise constitute an abuse of process.

[158] Two findings made by the judge that are unchallenged in this appeal are apposite. First, the proposed pleading alleging a breach of s. 12 of the *Charter* discloses a reasonable claim. The sustainability at law of the proposed pleading was a contested issue before the judge. He ultimately devoted 20 paragraphs of the *Chambers Decision* setting out why he rejected the Government's argument that the s. 12 *Charter* pleading should not be allowed because it did not disclose a legally sustainable basis to sue (see paras 84–103). This judgment should not be read as deciding that the allegation of a breach of s. 12 is viable at law because it is simply not an issue before us. The relevant point is that the judge's finding on this question was not contested by the Government in this appeal.

[159] Second, the Government also does not challenge the judge's conclusion that the proposed pleadings concerning s. 12 of the *Charter* are not scandalous, frivolous or vexatious. After a thorough analysis of the case law and the pleadings, he found that the proposed pleadings were made to advance the claim and he was "unable to conclude the language used is baseless, degrading, or even advanced for an ulterior purpose", adding that a "plain reading of the words suggests that they identify the position to be advanced by UR Pride" (at para 110). This Court must, therefore, accept that the allegation of a breach of s. 12 of the *Charter* is not a scandalous, frivolous or vexatious assertion.

[160] Crucially, the Government's abuse-based arguments amount to an indirect invitation to this Court to revisit these conclusions. Thus, for example, in its factum, the Government relies on the statement made in *Sidhu* that the abuse of process doctrine may be invoked when a claim is advanced "without foundation or serve[s] no useful purpose" (at para 24, emphasis added). It similarly submits in its factum that "[i]f a Section 12 claim had merit then it would have been in the UR Pride Originating Notice at the outset" (emphasis added).

[161] While, in other situations, an evaluation of the merits of a proposed claim might bear on the question of whether allowing the pleading would constitute an abuse of process, this is not appropriate here because there has been no appeal from the judge's findings that the pleadings disclose a reasonable claim and are not scandalous, frivolous or vexatious. Accordingly, these reasons do not address the suggestions that UR Pride's claim under s. 12 is baseless or the claim under it has been overridden by the reference to s. 7 of the *Charter* in the s. 33 declaration, or any other merits-based arguments. The Government did not directly advance these arguments before us, and this Court does not have the benefit of submissions from any parties on these points.

[162] What the Government did argue is that UR Pride's amendments are precluded because of what this Court said in *Cupola*. However, the Government's reliance on *Cupola Investments* is misplaced. The paragraph containing the passage relied upon by the Government states as follows:

> [47] **The converse of the idea that amendments are allowed to enable the court to determine the true points in controversy is that amendments designed to achieve a different purpose may be refused**. This was the case in *Scharnagl*, in which this Court upheld the refusal to allow an amendment to name additional defendants so that their discovery evidence could be read in evidence against them at the trial. Justice Richards (as he then was) held that the appeal could "be resolved on the basis that, in all of the circumstances, *the plaintiff had a positive obligation to show why it was necessary to add the respondents as parties* and that he failed to discharge that obligation" (at para 20, emphasis added). He then noted that the "authorities make it clear that a person should not be named as a defendant in an action simply for purposes of obtaining rights of discovery". It therefore followed that, "having been examined as a non-party, an individual should not be added as a party merely to allow his or her discovery transcript to be read in at trial" (at para 25).
>
> (Italic emphasis in original, bold emphasis added by the Government)

[163] This passage says that pleadings must serve a legally relevant purpose that is related to advancing the aims of the litigation. Since the Government has not appealed the judge's determination that the pleadings disclose a reasonable claim, this Court must accept that there is sufficient *legal merit* to the allegation of a breach of s. 12 of the *Charter* to justify its inclusion in the action. This Court must likewise accept that, although the proposed pleadings may cast the Government in an unflattering light, they are not scandalous, frivolous or vexatious. Instead, in the words of the judge, the proposed amendments regarding s. 12 "identify the position to be advanced by UR Pride" (at para 110). In this context, the pleadings, by their very nature, fulfill the purpose of a pleading. In short, *Cupola Investments* does not assist the Government's argument that the addition of the s. 12 allegation is abusive.

[164] Nevertheless, the Government maintains that the introduction of the s. 12 *Charter* allegation will constitute an abuse of process because it was not made when the claim was initiated. The Government's contention that it is abusive for UR Pride to expand the basis for a *Charter* challenge to include allegations not initially advanced presupposes that it is impermissible for a party to change its legal theories for liability after an action has been commenced. No authority is offered for this proposition. The examples are legion of litigants being granted the right to amend their claim to expand the causes of action pleaded and the parties against whom relief is claimed after an action has been commenced. (See, for example only, *Michel v Saskatchewan*, 2023 SKCA 97 at paras 23, 32; *May v SaskPower*, 2024 SKKB 4 at paras 11–27; *Intact Insurance Company v R.J. Tulik Excavating Inc.*, 2018 SKQB 23 at para 48; *Dundee Realty Corp. v Regina (City)*, 2014 SKQB 73; *Pollock v Sasktech Inspection Ltd.*, 2013 SKQB 409 at paras 47–53; *Branco v American Home Assurance Company*, 2010 SKQB 267 at paras 6, 11–13, 357 Sask R 274; *Potash Corp. of Saskatchewan Inc. v Mosaic Potash Esterhazy Ltd. Partnership*, 2010 SKQB 18, 373 Sask R 1; *Seagrove Capital Corp. v Leader Mining International Inc.*, 2000 SKQB 230 at paras 7–8, 193 Sask R 273; *Romanic v Hartman*, [1986] 5 WWR 610 (CanLII) (Sask QB) at paras 37–42.)

[165] This action is, from a procedural perspective, in its infancy. As the judge observed, at the time these matters were before him, the action was a "mere five months old": "[o]nly four months have elapsed since the Government of Saskatchewan introduced the Notwithstanding Clause", and there had been "no other procedural steps taken in furtherance of the sought for relief". He added that there "is no indication that the parties have completed gathering their evidence or completed any, much less all, steps prior to this matter proceeding to a hearing" (at para 66). He also rejected the Government's contention that the addition of the allegations regarding s. 12 meant "the introduction of completely different evidence" (at para 68). Taken together, these statements answer any concern that might arise from the timing of the introduction of the pleading that s. 197.4 of the *Education Act* is inconsistent with s. 12 of the *Charter*.

[166] What remains standing is the suggestion that it is improper for UR Pride to take advantage of the Legislature's decision not to declare that s. 197.4 operates notwithstanding s. 12 of the *Charter*. In answer to this contention, it must be noted that the Legislature thought fit to declare that s. 197.4 shall operate notwithstanding s. 2 of the *Charter* even though UR Pride had not alleged a breach of the freedoms guaranteed by it in its challenge to the Policy. It was similarly

open to the Legislature to make a declaration that the provision shall operate notwithstanding s. 12 of the *Charter*, at the time that s. 197.4 was passed.

[167] It may be that if UR Pride had originally pleaded that the Policy violated s. 12 of the *Charter*, the Legislature would have also declared that s. 197.4 would operate notwithstanding that *Charter* right. However, the judge correctly noted as follows:

> [118] … 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.

[168] The judge also concluded that he was "unable to determine that [UR Pride] here engaged in activity which might be characterized as attempting to lull the Government of Saskatchewan into only taking the action it did" (at para 62). There *may* have been scope for an abuse allegation if UR Pride's evolving pleadings were done as a matter of tactics, in the sense that it had deliberately delayed introducing the allegation of a breach of s. 12 into the litigation until after the Legislature had invoked s. 33. However, even in this situation it is a complete answer that it is ultimately up to the Legislature to determine the scope of a *Charter* override (see *Ford* at 741). After all, if the Legislature wishes that s. 197.4 to operate notwithstanding s. 12 of the *Charter*, it retains the power to make that declaration by way of a further amendment to the *Education Act*.

[169] In any event, as the judge stated, there is no evidence that UR Pride delayed the introduction of its s. 12 *Charter* allegation for tactical reasons. All that the record shows is that UR Pride reviewed the scope of the s. 33 declaration and determined that it did not allow the legislation to operate if it were found to be inconsistent with that *Charter* right. It was within its purview to do so.

[170] Whether UR Pride now seeks to advance a breach of s. 12 because it was of the view that, until the s. 33 declaration was enacted by the Legislature, it had a better chance on the facts and the law to obtain relief by claiming a violation of ss. 7 and 15(1) of the *Charter*, or for some other reason, is beside the point. There is no basis to conclude that it is now improper for UR Pride to advance arguments not covered by the s. 33 declaration under s. 197.4(3) of the *Education Act*.

3. Conclusion on issue B (addition of s. 12 *Charter* allegation)

[171] The judge did not err in finding that UR Pride would not be abusing the court's processes by amending its pleadings to allege that s. 197.4 of the *Education Act* gives rise to a breach of s. 12 of the *Charter*. Since the allegation of such an abuse was the only basis for challenging the judge's decision to allow UR Pride to amend its pleadings, his decision to permit the amendments must stand.

C. The mootness issue

1. Subsidiary questions

[172] As just discussed, the judge granted UR Pride leave to amend its originating application to advance a claim based on s. 12 of the *Charter*. He also determined that the Court had jurisdiction to provide declaratory relief but observed that the "decision of whether or not to grant declaratory relief is discretionary for this Court" (at para 167). He concluded, however, that in the circumstances of this case, a decision as to whether to exercise that discretion "should await the introduction of evidence and the advancement of arguments based on that evidence" (at para 169). The judge also considered the Government's argument that UR Pride's claims should be dismissed because they were moot. More specifically, the Government argued before the judge that the claims against the Policy had been rendered moot by its revocation and that the claims relating to s. 197.4 were moot because of the invocation of s. 33 of the *Charter* and, therefore, should not be decided by the Court.

[173] The Government framed its mootness argument with reference to *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*], wherein the Supreme Court specified that courts must adopt a two-step analysis to determine whether a case should be dismissed on mootness grounds, as follows:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[174] The judge declined to address the issue of mootness, reasoning as follows:

> [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.

[175] The Government maintains that the judge erred in his analysis. It mounts a two-part challenge to the judge's reasons.

[176] First, the Government says that the judge erred in principle when he concluded that he had the discretion to defer an answer on the mootness point. It submits in its factum that the judge "was required to determine if the matter was moot and, if so, whether the Court should exercise its discretion to decide the issue notwithstanding its mootness based on an evaluation of the factors set out in *Borowski*" (emphasis added). In oral argument, the Government maintained that by deferring a decision on mootness it, in effect, rendered the question of mootness itself moot.

[177] Second, the Government asserts that, had the judge engaged in the two-step *Borowski* analysis, he would have dismissed all the claims as moot.

[178] The Government's first criticism of the judge's reasoning has merit. It cannot be said that the mootness "issue may arise in the future depending on whether or not the court exercises its discretion with respect to granting declaratory relief" (at para 171). While a court retains broad discretion to order the sequencing of hearings and, in appropriate cases, to stay proceedings, this is not what the judge purported to do. Rather, the judge's statement that the mootness issue may arise in the future conflates the discretion to refuse declaratory relief with the discretion that a court has to not decide a question where there is no live controversy between the parties. In the context of this case, by putting off a decision until evidence was tendered, the judge was not *deferring* the mootness question, he was de facto deciding it.

[179] The judge's error in principle requires this Court to examine the mootness question afresh. In doing so, the allegations challenging s. 197.4 of the *Education Act* must be considered separately from the attack against the Policy. The argument that the claims against s. 197.4 should

be dismissed on mootness grounds are not persuasive, but the claims regarding the Policy have merit and it should therefore be struck on the basis of mootness.

2. Claims regarding s. 197.4 are not moot and, in any event, should be allowed to proceed

[180] The Government submits that the invocation of s. 33 of the *Charter* precludes the existence of a live controversy to be litigated. It also asserts that, on a proper application of the criteria relevant at the second stage of the *Borowski* analysis, the questions relating to whether s. 197.4 limits the rights of gender diverse students under ss. 7 and 15 of the *Charter* should not be decided.

[181] UR Pride's s. 12 *Charter* claim against s. 197.4 of the *Education Act* is clearly not moot because the s. 33 declaration in s. 197.4(3) of the Act does not specify that *Charter* right. Accordingly, s. 197.4 of the Act will be of no force or effect under s. 52(1) of the *Constitution Act, 1982* if it unreasonably and unjustifiably violates the s. 12 *Charter* rights of gender diverse students.

[182] However, nor are the claims that s. 197.4 limits the rights of individuals guaranteed by ss. 7 and 15(1) of the *Charter* moot. In this regard, *Borowski* instructs that a moot case is one in which "no present live controversy exists which affects the rights of the parties" or "the required tangible and concrete dispute has disappeared and the issues have become academic" (at 353). These descriptions do not apply to the ss. 7 and 15(1) *Charter* claims made against s. 197.4.

[183] The Government's mootness argument is predicated on the Court's inability to issue a declaration under s. 52(1) of the *Constitution Act, 1982*. Because the Legislature has declared that s. 197.4 operates notwithstanding ss. 7 and 15(1) of the *Charter*, the Government describes the allegations that the legislation limits those rights to be "purely hypothetical" and "purely theoretical". The Government's argument builds from the assertion that "the *Constitution* legally dictates how any potential inconsistency is resolved" (emphasis added). This statement evidently refers to the fact that s. 33 shelters the law subject to the declaration from s. 52 of the *Constitution Act, 1982*. However, for the reasons already provided, this is well-removed from the conclusion that no other remedy – such as a declaration – may be given if the Court were to find that s. 197.4 nonetheless limits an individual's ss. 7 and 15(1) protected *Charter* rights.

[184] The Government's argument also ignores the temporal limitation on a s. 33 declaration. Again, as emphasized at several junctures, by operation of law, the declaration *will* expire five years from the date it came into force, unless it is renewed by the Legislature. At least three consequences follow from these indisputable facts.

[185] First, much of the Government's argument presupposes that it is hypothetical that the rights guaranteed by ss. 7 and 15(1) of the *Charter* will ever apply to s. 197.4 of the *Education Act* because s. 33 was invoked. However, this has matters backwards. As previously outlined, according to law, the Act's operation will cease to be shielded from the application of those *Charter* rights if the declaration is not renewed. What *is* hypothetical is that the law may continue to operate despite its potential limits on *Charter* rights because a new declaration *might* be issued.

[186] Second, as has been noted, the reality is that, if s. 197.4 is declared to limit the *Charter* rights under either or both sections, then, minimally, it may be of assistance to any court called upon to make an order under s. 52 of the *Constitution Act, 1982*.

[187] Third, also as reviewed earlier, the Court's determination may be informative to both the Legislature, if asked to renew the s. 33 declaration, and to the electorate to which the legislators are answerable. As previously examined, one of the purposes of the five-year sunset of a s. 33 declaration is to place its exercise by the legislature under regular democratic oversight. A proper understanding of the legal consequences of employing the s. 33 override is apt to be of interest to many electors.

[188] For these reasons, the claim for declaratory relief in relation to whether s. 197.4 of the *Education Act* unreasonably limits rights under ss. 7 and 15 of the *Charter* is not moot. However, if the contrary view were to be taken, the same considerations warrant allowing the litigation to continue.

[189] *Borowski* instructs that the discretion to allow an otherwise moot proceeding to forge ahead is to be exercised with an eye to the three basic rationale for the enforcement of the mootness doctrine. These are (a) the presence of an adversarial context which "helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" (at 358–359), (b) the "concern for judicial economy", which derives from a "need to ration scarce judicial resources

among competing claimants" (at 360), and (c) the "need for the Court to demonstrate a measure of awareness of its proper law-making function" (at 362). *Borowski* emphasizes that the analysis is not a mechanical one. Instead, the "presence of one or two of the factors may be overborne by the absence of the third, and vice versa" (at 363).

[190] There is clearly a robust adversarial context present here to resolve the issues of whether s. 197.4 limits the ss. 7 and 15(1) *Charter* rights of individuals. In this regard, the Government has been fully engaged to date and must respond to the related claim that s. 12 of the *Charter* is violated by s. 197.4.

[191] The issues are self-evidently important and there is no concern as to whether their determination is within the proper law-making function of the Court, for the reasons already given.

[192] As for judicial economy, because UR Pride is entitled to proceed with its allegation that s. 197.4 is inconsistent with s. 12 of the *Charter*, the Court of King's Bench will hear evidence and consider argument on that issue. As I have indicated, it is clearly not moot because s. 197.4(3) does not specify s. 12 of the *Charter*. As the judge observed, the evidence for UR Pride's claims under ss. 7 and 15 will overlap with those under s. 12 (see *Chambers Decision* at para 68; see also *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76). In addition, the temporal limitation of s. 33 favours allowing the ss. 7 and 15(1) claims to continue, as it will save litigation resources that would be expended on these same claims after the s. 33 declaration expires, should it not be renewed.

[193] For all these reasons, UR Pride's request for a declaration that s. 197.4 of the *Education Act* limits the ss. 7 and 15 *Charter* rights of gender diverse students should not be dismissed for mootness reasons.

3. Claims regarding the Policy are moot and should not be litigated

[194] Different considerations are at play regarding UR Pride's request for a declaration in connection with the Policy.

[195] To recall, the Policy was promulgated on August 22, 2023. Other than a description of how the Policy was intended to operate, UR Pride's originating application contains no allegation that the Policy was implemented before its enforcement was enjoined on September 28, 2023, and, indeed, there is no evidence that this occurred at all. To the contrary, in its amended originating application, UR Pride asserts that the Policy was "adopted without any consideration for the potential detrimental impacts that it could have had on gender diverse students under the age of 16" (emphasis added). The Policy has now been rescinded. Given these facts, borrowing the language of *Borowski*, "there is no longer a live controversy or concrete dispute as the substratum of [UR Pride's action against the Policy] has disappeared" (at 357).

[196] Applying *Borowski*'s two-stage approach, it becomes necessary to consider whether, even in the absence of a live controversy, it is appropriate to exercise the Court's discretion to allow the challenge against the Policy to proceed.

[197] There can be little concern that this litigation would provide a robust adversarial environment to decide the issues around the constitutionality of the Policy. Indeed, it is possible, if not likely, that much of the evidence and arguments that might be advanced to decide the point will come up in the course of examining whether s. 197.4 of the *Education Act* limits the rights guaranteed by ss. 7, 12 and 15(1) of the *Charter*. However, this also demonstrates the absence of the need to spend state resources to inquire into the constitutionality of the Policy or to pass judgment on that issue in the exercise of the Court's law-making function.

[198] To be clear, the conclusion that UR Pride cannot pursue a declaration that the Policy is inconsistent with the *Charter* does not determine the question as to whether its adoption is relevant in the proceedings. That is a matter to be decided, in first instance at least, by the judge of the Court of King's Bench called upon to determine the validity of UR Pride's claims that s. 197.4 of the *Education Act* limits the rights of gender diverse students guaranteed by ss. 7, 12 and 15(1) of the *Charter*.

4. Conclusion on issue C (mootness)

[199] The judge erred in deferring a decision on the Government's mootness argument. The application of the relevant principles leads to the conclusion that UR Pride's challenge to the Policy

should be dismissed because the issues related to it are moot. Otherwise, UR Pride's claim should be allowed to proceed.

V. OVERALL CONCLUSION

[200] The Court of King's Bench has the jurisdiction to determine whether s. 197.4 of the *Education Act* limits the rights of individuals under ss. 7 and 15(1) of the *Charter* despite the s. 33 declaration in s. 197.4(3) and has jurisdiction to issue a declaratory judgment. Because s. 197.4(3) does not include a declaration that s. 197.4 operates notwithstanding s. 12 of the *Charter*, UR Pride may also seek a declaration that s. 197.4 is of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* based on a violation of that *Charter* right.

[201] The judge therefore did not err in allowing UR Pride to amend its originating notice to request this relief. However, the portions of UR Pride's originating application seeking to have the Policy declared to be unconstitutional must be struck for mootness.

[202] None of this decides whether s. 197.4 of the *Education Act* limits any person's ss. 7, 12 and 15(1) *Charter* rights. That issue was not before this Court and these reasons do not address that question. Moreover, although the Court of King's Bench has the power to determine whether s. 197.4 of the *Education Act* limits any person's ss. 7 and 15(1) *Charter* rights notwithstanding the Legislature's use of s. 33, there is no finding contained in this judgment that it will or should do so. Whether to answer that question remains in the discretion of the Court of King's Bench.

[203] The Government has prevailed on part of one issue, but otherwise its appeal is dismissed. The issues on which UR Pride has achieved success occupied much more of the written and oral submissions made to the Court. For these reasons, I would not disturb the judge's costs order, and I would grant UR Pride the costs of this appeal in the overall cause. That is to say, the award of costs in this appeal is subject to it succeeding on the merits of its claims.

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Jackson J.A."

Jackson J.A.

I concur. "Schwann J.A."

Schwann J.A.

I concur. "Tholl J.A."

Tholl J.A.

Caldwell J.A. (in dissent)

I. OVERVIEW

[204] In this appeal from the decision in *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23, [2024] 11 WWR 75 [*Chambers Decision*], between the Government of Saskatchewan as represented by the Minister of Education [Saskatchewan] and UR Pride Centre for Sexuality and Gender Diversity [UR Pride], this Court is asked to provide an interpretation of s. 33 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], i.e., the so-called *notwithstanding clause*.

[205] I begin my reasons by identifying what this appeal is not about. Individuals hold different political and moral opinions about the appropriateness of s. 197.4 of *The Education Act, 1995*, SS 1995, c E-0.2 [Section 197.4]. Questions about the legality of that provision in the context of the Legislature's invocation of the notwithstanding clause are questions about the scope of s. 33 of the *Charter* and the consequent constitutional validity of its invocation under Section 197.4. They are not questions about the merit of the policy reasons for that invocation or for the enactment of that provision. Addressing an equivalent context, the Québec Court of Appeal prefaced its

reasons in *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254 [*Hak CA*], leave to appeal and cross-appeal to SCC granted 2025 CanLII 2818, with the following:

> [14] Of course, one cannot overlook the fact that legal issues often have a political connotation (in the broadest sense) or are inseparable from the political context (in the same broad sense). This is not unusual: after all, laws, like charters that protect rights and freedoms, are themselves the legal expression of a political will, that of legislatures or constitutional framers. At times, therefore, the law is not far removed from politics. Nonetheless, it is through the legal lens alone that the many questions submitted to the Court in this file will be decided.
>
> (Emphasis added)

[206] At root, the legal issue in this appeal is whether, when a legislature makes a declaration prospectively invoking s. 33 of the *Charter*, the judicial branch has any constitutional role to play — whether that be in the dialogue between the electorate and the legislative branch of government as it relates to the legislation in which the declaration is made or otherwise. I have read the reasons of the Chief Justice in answer to this question, and there is much with which I agree. To identify specific points of interpretive concurrence, I agree with the Chief Justice that a declaration under s. 33 of the *Charter* made in an Act to the effect "that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15":

(a) does not affect the interpretation of the rights or freedoms identified in the declaration; and

(b) nullifies the invalidating effect of s. 52 of the *Constitution Act, 1982* with respect to that Act or provision for the period in which the declaration has effect pursuant to the sunset and renewal provisions in ss. 33(3) to (5) of the *Charter*.

[207] However, I am led, by the democratic principles enshrined in our contemporary Constitution, including the historic constitutional roles of the legislative and judicial branches of government, to a different interpretation of the notwithstanding clause than that which the Chief Justice has adopted. As to the principal point of interpretive difference, I cannot agree that a declaration made pursuant to s. 33 of the *Charter* has no effect on the jurisdiction or constitutional authority of the courts to determine under s. 1 of the *Charter* whether an Act or provision is demonstrably justified as a reasonable limit on the overridden rights and freedoms or to determine

whether the Act or provision satisfies standards of fairness and reasonableness applicable in respect of what are sometimes called *qualified rights* (i.e., ss. 7, 8, 9 and 12 of the *Charter*).

[208] I depart from the Chief Justice because, in my judgment, once the legislative branch has invoked the notwithstanding clause, the judiciary would overstep its constitutional role if it were to interject itself into the democratic process – into the dialogue between the electorate and their representatives. For the reasons given in *Hak CA*, I agree with the Québec Court of Appeal that the judicial branch has no jurisdiction to determine or to declare whether an Act or provision that is subject to a pre-emptive s. 33 declaration would, but for that declaration, unreasonably limit the *Charter*-guaranteed rights and freedoms specified in it.

[209] A declaration under s. 33 of the *Charter* is a legislature's decision to suspend the invalidating effect of s. 52 of the *Constitution Act, 1982* as well as to suspend the guarantee of rights and freedoms set forth in s. 1 of the *Charter*. Where a legislature has prospectively invoked s. 33, that invocation is the first, last and only word constitutionally allowed on the matter in the dialogue between the two branches of government. It signals the end of debate between the two branches, leaving the political or policy merits of the Act or provision to be determined by the electorate. They may, by re-electing the enacting legislators, effectively affirm the law or, by removing them from office, open the door to repeal of the declaration and the impugned legislation (see *Hak CA* at paras 226–227; *Working Families Coalition (Canada) Inc. v Ontario (Attorney General)*, 2023 ONCA 139 at para 56, 478 DLR (4th) 710 [*Working Families CA*], reversed on other grounds, 2025 SCC 5 [*Working Families SCC*]); see also *Ford v Québec (Attorney General)*, [1988] 2 SCR 712 [*Ford*]).

[210] In reaching this conclusion, I adopt without reservation the thorough reasoning of the Québec Court of Appeal in *Hak CA* with respect to the following legal issues:

(a) the scope and prospective use of s. 33 of the *Charter* (at paragraphs 213 to 234);

(b) the interpretation of *Ford* (*Hak CA* at paragraphs 244 to 279);

(c) the unavailability of declaratory relief once s. 33 of the *Charter* has been invoked (at paragraphs 312 to 359); and

(d) the application of the doctrine of mootness in such circumstances (at paragraphs 378 to 405).

[211] It follows from this that, even though it seems probable that Section 197.4 would implicate legal or equality rights but for the s. 33 declaration it contains, the courts are without jurisdiction to address UR Pride's claims that Section 197.4 unreasonably limits the rights of individuals guaranteed by ss. 7 and 15(1) of the *Charter*. Those claims are moot, even if only for the duration of the s. 33 declaration. If the impugned provision remains in force after that declaration has expired without being renewed (which is but a remote possibility), the courts may properly adjudicate whether Section 197.4 unreasonably limits or is a demonstrably justified limit of *Charter*-guaranteed rights and freedoms.

[212] In terms of the result in this appeal, for the reasons given in the Chief Justice's judgment, I would strike from the originating application filed by UR Pride all claims for relief in respect of the *Use of Preferred First Name and Pronouns by Students* policy. I further agree with the Chief Justice that the Chambers judge's decision to defer ruling on the mootness of UR Pride's claims was an error. But, contrary to the Chief Justice, I conclude that the claims in relation to *The Education Act, 1995* are moot and that it is not in the interests of justice that they be determined at this time.

[213] For the reasons that follow, I would allow the appeal and set aside the *Chambers Decision*. In its place, I would grant Saskatchewan's application pursuant to Rule 7-1 of *The King's Bench Rules* for an order declaring that, as a result of the invocation of the notwithstanding clause, the courts are without jurisdiction to determine or to declare whether Section 197.4 violates s. 7 or s. 15(1) of the *Charter*. I would also reverse the decision granting UR Pride leave to amend its originating application to claim declaratory relief in respect of s. 12 of the *Charter*. In the overall result, I would allow the appeal and dismiss all of UR Pride's claims in this matter.

II. REASONS

[214] The parties framed this appeal as involving three issues about the effect of the invocation of the notwithstanding clause in Section 197.4:

(a) Did the Chambers judge err by ruling that the courts retain jurisdiction to determine and declare whether Section 197.4 unreasonably limits legal and equality rights under ss. 7 and 15 of the *Charter*?

(b) Did the Chambers judge err by granting UR Pride leave to amend its originating application to plead that Section 197.4 violates the legal right under s. 12 of the *Charter*?

(c) Did the Chambers judge err by failing to strike UR Pride's originating application under the doctrine of mootness?

[215] Each of these issues asks in some measure whether the judiciary is precluded from determining and declaring, under s. 1 of the *Charter*, whether Section 197.4 unreasonably limits or is a demonstrably justified limit of *Charter*-guaranteed rights and freedoms. The central question is whether the judicial branch is left with jurisdiction or a function to fulfil after a legislature makes a declaration prospectively invoking s. 33 of the *Charter*.

[216] As noted, I agree with the Chief Justice that a declaration under s. 33 of the *Charter* does not affect the interpretation of the rights or freedoms identified in the declaration and that a s. 33 declaration nullifies the invalidating effect of s. 52 of the *Constitution Act, 1982* for the period in which the declaration has effect. I do not intend to add to or detract from the Chief Justice's judgment in these regards. In addressing the three issues identified by the parties in the reasons that follow, I expand upon points of difference with the Chief Justice's judgment. Where I adopt the analysis of a legal issue by the Québec Court of Appeal in *Hak CA*, I do so without alteration to or deviation from that Court's persuasive reasons, although I acclimatise that reasoning to the context at hand.

A. The Chambers judge erred by ruling that the courts retain jurisdiction to determine and declare whether Section 197.4 unreasonably limits legal and equality rights under ss. 7 and 15 of the *Charter*

1. *Ford*: Section 33 of the *Charter* establishes requirements as to form only

[217] The parties do not dispute that the decision in *Ford* established the requirements of a validly made declaration under s. 33 of the *Charter*. The decision in *Ford*, in my view, also supports the

within interpretation of the scope of the notwithstanding clause when it is invoked prospectively. In this regard, I adopt the reasoning of the Québec Court of Appeal in *Hak CA*, where that Court explained the Supreme Court's interpretation of s. 33 in *Ford*:

> [248] As the trial judge rightly pointed out [in *Hak c Procureur général du Québec*, 2021 QCCS 1466 at para 274 [*Hac SC*]], in *Ford*, the Supreme Court found that such a declaration, even in omnibus legislation, was made in conformity with the override authority conferred by s. 33 of the *Canadian Charter*, which lays down only requirements of form [*Ford* at 740-743]. The excerpt from *Ford* quoted by the judge in paragraph 724 of his reasons is unambiguous on this point.
>
> [249] According to the Supreme Court, s. 33 simply requires "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*" [*Ford* at 741]. Moreover, in its view, such a declaration will be sufficiently express "if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden" [*Ford* at 741]. "There is no reason why more should be required under s. 33," it wrote [at 741].
>
> [250] The Supreme Court clarified that the judicial review of the exercise of the override authority conferred by s. 33 of the *Canadian Charter* is strictly limited to an analysis of the requirements of *form* set out in that section. In the passage the trial judge quoted *in extenso* at paragraph 724 of his judgment, the Supreme Court wrote, among other things:
>
> > 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. [*Ford* at 740]
>
> [251] Moreover, the Supreme Court ruled out any need to analyze the divergent opinions, referred to hereinabove, regarding s. 33 of the *Canadian Charter* (the importance of Parliamentary and legislative supremacy versus the seriousness of the decision to override rights and freedoms). It was of the view that "[t]hese two perspectives are not […] particularly relevant or helpful in construing the requirements of s. 33" [*Ford* at 740].
>
> [252] The Supreme Court also rejected the claims, echoed here in different words by some of the parties opposed to the Act, to the effect that this form of enactment reflects an impermissibly "routine" exercise of the override authority, if not a "perversion" thereof or even an attempt to amend the *Canadian Charter*. It considered that these were "essentially submissions concerning permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override" [*Ford* at 743]. Indeed, the Supreme Court reiterated that "there is no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of the authority conferred by s. 33" [at 743]. Consequently, courts cannot require legislatures to explain or justify the appropriateness of the legislative policy behind the exercise of the override power. Nor can they require legislatures to demonstrate the existence of a link or relationship between the overriding statute and the guaranteed rights or freedoms being overridden. The Court will return to this matter further below [at 269].
>
> (*Hak CA*; emphasis added)

[218] In short, *Ford* stands for the proposition that s. 33 of the *Charter* establishes requirements as to form *only*: "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*" (*Ford* at 741; and, generally, at 740–743). This requirement is satisfied by declaratory reference to "the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden" (at 741). There is no question these requirements were satisfied under s. 197.4(3) of *The Education Act, 1995* with respect to ss. 2, 7 and 15 of the *Charter*, and, therefore, the invocation in that provision is valid:

> **197.4**(3) Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, this section is declared to operate notwithstanding sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[219] As the Court in *Hak CA* noted, the corollary to the precept that s. 33 speaks to form only is also made in *Ford*. Given the principal issue in this appeal, it cannot be overemphasised that the decision in *Ford* addressed the *prospective* invocation of the notwithstanding clause by the National Assembly of Québec. With that in mind, the associated dictum in *Ford* is that "there is no warrant in s. 33" for "submissions concerning permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override" (at 740). I agree with the Québec Court of Appeal where, to reiterate, it stated (at para 252):

> …Consequently, courts cannot require legislatures to explain or justify the appropriateness of the legislative policy behind the exercise of the override power. Nor can they require legislatures to demonstrate the existence of a link or relationship between the overriding statute and the guaranteed rights or freedoms being overridden. …

[220] *Ford* is, therefore, a complete answer to the first issue in this appeal. As the reasons that follow demonstrate, arguments that the structure of the Constitution, its architecture, its unwritten principles, or other of its provisions might impose unsubstantiated but substantive requirements on the exercise of s. 33 of the *Charter* are not persuasive.

2. Section 33 of the *Charter* restores parliamentary supremacy (temporarily)

[221] I depart from the Chief Justice's interpretation of *Ford* and therefore of s. 33 of the *Charter* due to a fundamentally different understanding of the democratic principles enshrined in our Constitution. While I am in complete alignment with the reasoning of the Québec Court of Appeal in *Hak CA* in this regard, I will explain my own understanding.

[222] Canada is and has been since 1867 a representative democracy where elected representatives, whether elected to Parliament or a provincial legislature, enact laws, establish institutions and otherwise make decisions affecting the day-to-day lives of citizens and others who are subject to its laws. With the patriation of the Constitution, Canada evolved its democracy from one of parliamentary supremacy to one of constitutional supremacy. Prior to 1982, under parliamentary sovereignty, federal and provincial legislators had the *only* word on legislation falling within the heads of power respectively ascribed to them by the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5. While the judicial branch adjudicated disputes as to which level of the legislative branch was constitutionally entitled to enact laws in a specific area and otherwise interpreted the Constitution, the courts had no constitutional or extraconstitutional authority to nullify laws that were within the power of a legislature to enact (among others, see Vanessa MacDonnell & Phillippe Lagassé, "Investigating the Legal and Political Contours of Unwritten Constitutional Principles after *City of Toronto*", in Maxime St-Hilaire et al, eds, *Unwritten Constitutionalism* (Toronto: LexisNexis, 2023) 51 at 59-61).

[223] The evolution to a constitutional democracy, one in which the judiciary has a role in ensuring the constitutionality of laws that are validly made under a head of power, was brought about by the preamble to the *Charter* and s. 52 of the *Constitution Act, 1982*. The preamble states, in relevant part, that Canada is founded upon principles that recognise the rule of law. Section 52 enshrines the principle that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Under our contemporary framework of constitutionalism, the legislative branch of government is still empowered with lawmaking, but the validity of the laws made by a legislature is now subject to the constraints imposed by the *Constitution Act, 1982* – and constitutional validity is determined by the judicial branch. That is so unless s. 33 of the *Charter* has been invoked by a legislature.

[224] The notwithstanding clause is an absolute exception to the principle expressed in s. 52 of the *Constitution Act, 1982*, but it is not an exception to the rule of law; it is an exception to constitutional supremacy that, when validly invoked (*Ford*), reaches back to and restores the historic Diceyan-hierarchy of a parliamentary democracy in specific circumstances for a limited time (see the summary in *The Notwithstanding Clause of the Charter* (HillStudies), Pub no 2018-

17-E (Ottawa: Library of Parliament, 2024) at 2 [HillStudies]). This conclusion is manifest in the wording of s. 33(1) of the *Charter*, which states that a legislature "may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter".

[225] The origins of the notwithstanding clause are well documented; as HillStudies outlines:

> …It appears that a notwithstanding provision for the Charter was first proposed by Saskatchewan in the summer of 1980 during the deliberations of the Federal-Provincial Continuing Committee of Ministers Responsible for Constitutional Affairs. It was seen as a compromise between those for and those against an entrenched Charter. The differences in view at that time, however, were too wide to be breached by this proposed compromise.
>
> The idea of a notwithstanding clause next surfaced during the Federal-Provincial Conference of First Ministers held in Ottawa from 8 to 13 September 1980. On 11 and 12 September 1980, the Government of Quebec circulated to the other provinces a document entitled "A Proposal for a Common Stand of the Provinces." This discussion paper attempted to find common positions on a number of issues. In relation to the Charter, the proposal was to entrench fundamental and democratic rights, and to make legal and non-discrimination rights subject to a notwithstanding provision. This discussion paper, which came to be known as the "Chateau consensus," was never really agreed to by all the provinces; eventually, even Quebec backed away from it.
>
> Once the September 1980 Federal–Provincial Conference of First Ministers had broken down, activity continued in the parliamentary, judicial and diplomatic arenas. Finally, on 28 September 1981, the Supreme Court of Canada rendered its decisions on three constitutional reference cases that had come to it from the Courts of Appeal of Manitoba, Newfoundland and Quebec. The Supreme Court concluded that the federal government had the strict legal right to engage in unilateral constitutional patriation but that, according to convention, it would need some degree of provincial support – less than unanimity but more than two provinces – to proceed.
>
> Consequently, throughout October 1981, a number of meetings took place among federal and provincial officials and ministers in preparation for a Federal–Provincial Conference of First Ministers to be held from 2 to 5 November 1981. One measure proposed at different times and in different forms by Alberta, British Columbia and Saskatchewan was the possibility of a notwithstanding provision.

(at 2-3; see also: Roy Romanow, John White and Howard Leeson, *Canada …Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984); as to the origins of a notwithstanding clause in Westminster history, see Geoffrey Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review" (2024) 61 Osgoode Hall LJ 63 at 70–71).

[226] Following the First Ministers' Conference, several participants made their views clear on the role of the notwithstanding clause. Some, like the then Premier of New Brunswick, Richard

Hatfield, expressed reservations over its use, while others, including the then Premier of Saskatchewan, Alan Blakeney, espoused a more positive view (HillStudies at 4):

> Allan Blakeney, then premier of Saskatchewan, described how he believed the notwithstanding clause would be used by Parliament and the legislatures:
>
> > It contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so w[e]ll for so many centuries.

[227] The learned constitutional scholars Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, loose-leaf (2024-1) 5th ed, vol 2 (Toronto: Thomson Reuters, 2007) at §39:1, wrote that "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*" (emphasis added). In HillStudies, the authors described this effect as "pierc[ing] the wall of constitutional entrenchment and resurrect[ing], in particular circumstances, the sovereignty of Parliament or a legislature" (at 2). In his article "Parliamentary Sovereignty in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 189 at 189-90, constitutional solicitor John Lovell states that "[i]t is undisputed that the framers of the *Canadian Charter of Rights and Freedoms* inserted s. 33 – the so-called Notwithstanding Clause that enables ordinary statutes to override many of the *Charter*'s constitutional rights – in order to allay concerns over an undue erosion of parliamentary sovereignty".

[228] In *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 SCR 845 [*Toronto (City)*], when addressing the minority's reasoning that unwritten constitutional principles could be used to invalidate legislation, Wagner C.J.C. and Brown J., for the majority of the Supreme Court, described the "limited right of legislative override" in s. 33 of the *Charter* as an "undeniable aspect of the constitutional bargain":

> [60] We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to its understanding of what the

> Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., Constitutional Dialogue: Rights, Democracy, Institutions (2019), 209, at p. 232). Were, however, a court to rely not on s. 2(b) but instead upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" only. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being unwritten, are not "set out" in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.
>
> (Emphasis added)

[229] The events that I expect lead the majority of the Supreme Court in *Toronto (City)* to remark that the notwithstanding clause is "an undeniable aspect of the constitutional bargain" are summarised in HillStudies (at 3-4):

> **4 November 1981 First Ministers' Conference**
>
> The First Ministers' Conference seemed to be at a stalemate on 4 November 1981 when the federal Minister of Justice, Jean Chrétien, and the Attorneys General of Ontario and Saskatchewan, Roy McMurtry and Roy Romanow, worked out a possible compromise. The text of the agreement, completed overnight and without Quebec's participation, included entrenchment of a charter of rights with a notwithstanding provision applicable to fundamental freedoms, legal rights and equality rights.
>
> According to Mr. Chrétien, it was only then that the federal government had agreed that legal and equality rights could be overridden. That said, Prime Minister Pierre Elliott Trudeau was persuaded to agree to the extension of the notwithstanding provision to fundamental freedoms, but only on condition that the provision as a whole be subject to a five year sunset and re-enactment clause. Consequently, in public session on 5 November 1981, all governments, except that of Quebec, signed the constitutional accord containing the notwithstanding provision.
>
> The matter was not finished, however. As then worded, section 33 would have allowed for an override not only of section 15 equality rights, but also of section 28, which guaranteed the equality of men and women. As a result of a massive pressure campaign organized by feminist and human rights groups across Canada, both federal and provincial governments agreed to withdraw any reference to section 28.

[230] While the passage from *Toronto (City)* quoted above describes the retroactive use of s. 33 of the *Charter* following a court decision, I fully agree with the interpretation of the scope of the notwithstanding clause when a legislature prospectively exercises its "limited right of legislative override" set out by the Québec Court of Appeal in *Hak CA*:

> [220] Subsection 33(1) of the *Canadian Charter* thus allows Parliament or a provincial legislature to enact a statute that overrides its ss. 2 and 7 to 15. Those sections enshrine what one author has described as [TRANSLATION] "the classic fundamental freedoms [including freedom of religion], the legal rights applicable to the criminal process and the

provision guaranteeing equality rights" [Jean Leclair, "Le recours aux clauses de dérogation aux droits et libertés dans un contexte fédéral: l'exemple canadien", (2023) 30 *Jus Politicum: Revue de droit politique* 105, p. 111]. As for the override, it must be set out in a statute and must be stated expressly.

[221] Pursuant to s. 33(2), when Parliament or the legislature correctly invokes s. 33(1), the statute (or the provision of the statute) "shall have such operation as it would have but for the provision of this Charter referred to in the declaration / *a l'effet qu'elle aurait sauf la disposition en cause de la charte*". The scope of this subsection will be examined further below, but, for now, it should be noted that the use of s. 33 defeats a judicial declaration of inoperability that could otherwise be made under s. 52 of the [*Constitution Act, 1982*].

[222] Moreover s. 33(3) imposes a temporal limit on the override power, in that the override declaration can only be in force for a period of up to five years, after which it ceases to have effect. Pursuant to s. 33(4), however, Parliament or the legislature may re-enact it for a further maximum period of five years (s. 33(5)). In all circumstances, however, the fact remains that use of the notwithstanding clause under the *Canadian Charter* has a limited duration and must be reconsidered by the legislature no later than five years after it comes into force.

[223] The very wording of s. 33 of the *Canadian Charter* gives rise to three observations.

[224] First, the *purpose and effect* of s. 33, which is based on the principle of parliamentary sovereignty, are to enable Parliament and the legislatures to enact a statute notwithstanding the rights and freedoms set out in the *Charter*'s ss. 2 and 7 to 15. Insofar as s. 33(1) is correctly applied, s. 33 allows a given statute to be protected from constitutional review under those other sections. Though this statement seems rather simplistic at first glance, it is nonetheless worth repeating, since some may confuse a matter that involves the interpretation of this constitutional provision, on the one hand, with one that involves a consideration of its expediency, on the other. As this provision is an integral part of the Constitution, the role of the courts is simply to determine its scope and the conditions for its implementation, not whether its existence or its use is appropriate.

[225] Second, and just as obviously, a number of rights set out in the *Canadian Charter* are excluded from the application of s. 33, including democratic rights (ss. 3 to 5), mobility rights (s. 6), language rights (ss. 16 to 22) and minority language educational rights (s. 23). Legislatures, therefore, cannot use s. 33 to override these rights.

[226] Lastly, it should be noted that the maximum duration of an override provision enacted under s. 33 (five years) is equal to the maximum term of the House of Commons or of a legislative assembly according to s. 4(1) of the *Canadian Charter* (a provision that cannot be overridden). Thus, the use of the notwithstanding clause will have to be reconsidered by the government duly elected in an election in which, pursuant to s. 3 of the *Canadian Charter* (another provision that cannot be overridden), every citizen will have had the right to vote. Authors Leckey and Mendelsohn [in Robert Leckey and Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts and the Electorate", (2022) 72:2 UTLJ 189 at 198] view this mechanism as conferring a democratic role on citizens, in that a legislature will in principle have to answer to the electorate for the use of s. 33:

> Critically, five years is the maximum term of legislative bodies. Implicit in section 33, then, is a link to general elections, one that the nomenclature of 'sunset clause' fails to highlight. The idea of expiry and reconsideration applies not only to the decision to activate the notwithstanding clause but

> also to the legislature that so decided. Before renewing an express declaration after its maximum term, the members of the legislative assembly will have faced the voters. Consequently, '[v]oters act democratically as the ultimate check on the use of the notwithstanding clause.'

[227] In the Ontario Court of Appeal decision in *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, the majority also emphasized the role of the electorate in situations in which a legislature uses the notwithstanding clause, noting that: "[t]he notwithstanding clause was expressly and clearly invoked. The formal (and only) requirement for its invocation was complied with. The invocation will expire after five years, and the electorate will be able to consider the government's use of the clause when it votes".

[228] A final word on s. 33 of the *Canadian Charter*. It bears reminding that this section is the fruit of a federal-provincial compromise (with the exception of Quebec) in the context of the process that led to the patriation of the Constitution in 1982. As everyone knows, the decision to enshrine a charter of rights and freedoms was the subject of much discussion — and dissent — during the 1980-1981 Conference of First Ministers. For some, the idea that courts could set aside statutes enacted by Parliament or provincial legislatures, insofar as these statutes violated rights and freedoms guaranteed by such a charter, was a source of concern and reluctance. There was a fear that the judiciary would usurp or neutralize the legislative power exercised by an elected assembly, thereby running counter to the principle of parliamentary sovereignty. The proposal to introduce an override power reserved for Parliament and the provincial legislatures was intended as a [TRANSLATION] "counterweight" to the broadened scope of judicial review resulting from the constitutionalization of rights and freedoms. Author Marie Paré writes:

> [TRANSLATION]
>
> The enshrinement of the Charter had the effect of extending the power of Canadian courts to review the constitutionality of legislation. Although parliamentary sovereignty is a cardinal principle of our political system, we must not forget that the Constitution is Canada's supreme law. Consequently, the proposed constitutionalization of rights and freedoms aroused fears among provincial governments that their legislative powers would be undermined by the courts, which led to the inclusion of the notwithstanding clause — a compromise that made the November 1981 agreement possible.

[229] In the same vein, Eugénie Brouillet and Félix-Antoine Michaud assert that:

> [TRANSLATION]
>
> […] It was precisely the inclusion of this clause in the patriation and constitutional amendment proposal that largely contributed to increasing the number of provinces willing to approve it from two to nine. Pierre Elliott Trudeau, Prime Minister of Canada at the time, put it this way:
>
> > [ORIGINAL ENGLISH] [I]t is a way that the legislatures, federal and provincial, have of ensuring that the last word is held by the elected representatives of the people rather than by the courts. [END OF ORIGINAL ENGLISH]

> We must therefore not lose sight of the fact that the existence of this clause in the Charter is the "fruit of one of the most significant compromises in the history of Canadian federal-provincial relations".
>
> (Footnotes omitted; emphasis added)

[231] In short, the notwithstanding clause allows a legislature to prescribe by law a temporary override to the guarantee under s. 1 of the *Charter* of a s. 2 freedom or a ss. 7 to 15 legal or equality right. Of course, to have meaningful constitutional effect, the override must also nullify the standards of fairness and reasonableness as are applied in respect of qualified rights like ss. 7, 8, 9 and 12 of the *Charter*. This means that, when accompanied by a validly made declaration under s. 33, a statutory limit on those rights and freedoms is not subject to judicial review under s. 1 of the *Charter* or otherwise under constitutional or extraconstitutional means.

[232] Which is to say that, when the notwithstanding clause is invoked, the constitutional function of the justificatory mechanism under s. 1 of the *Charter* ceases to apply, and it would be judicial overreach for the courts to require the executive or legislative branch of government to "explain or justify the appropriateness of the legislative policy behind the exercise of the override power... [or to] require legislatures to demonstrate the existence of a link or relationship between the overriding statute and the guaranteed rights or freedoms being overridden" (*Hak CA* at para 252).

3. Declaratory relief is not available when s. 33 of the *Charter* has been invoked

a. Declaratory relief is not available under s. 96 of the *Constitution Act, 1867* when s. 33 of the *Charter* has been invoked

[233] Because a statutory limit imposed on *Charter*-guaranteed rights and freedoms is not subject to judicial review under s. 1 of the *Charter* once the notwithstanding clause has been invoked, any declaration of invalidity made pursuant to s. 96 of the *Constitution Act, 1867* during the period of invocation would tatter the umbrella of protection afforded by s. 33 of the *Charter*. This was the conclusion reached by the Québec Court of Appeal in *Hak CA*, with which I agree:

> [348] Consequently, the use of s. 33 of the *Canadian Charter* not only exempts the statute in question from the application of ss. 2 or 7 to 15 (and, implicitly, from the application of s. 52(1) of the [*Constitution Act, 1982*]), it also exempts it from the judicial review of its constitutionality in light of these provisions (except, of course, as regards the very requirements for invoking s. 33, as established in *Ford*).

> [349] Constitutional logic dictates such an interpretation of s. 33 of the *Canadian Charter*: as the trial judge wrote [in *Hak SC*], to rule otherwise would be tantamount to indirectly doing what cannot be done directly. Indeed, it would be contradictory to allow the legislature to use s. 33 to escape the grasp of one or the other of ss. 2 or 7 to 15 of the *Canadian Charter* (including in relation to s. 1) and the effects of s. 52(1) of the [*Constitution Act, 1982*], while subjecting the statute to judicial review of its compliance with these very provisions, as if it had not been exempted from their application. In a way, this would impose a kind of penalty for the use of s. 33: the legislature would be free to invoke this section and declare that such and such a statute has effect notwithstanding ss. 2 or 7 to 15, but, if it did so, it would have to explain itself before the courts in the event of a legal challenge. It would then have to either try to show that the statute complies with these provisions (by arguing that there is no infringement or that the infringement, if any, is justified under s. 1 and, paradoxically, that recourse to art. 33 is unnecessary) or concede the infringement or lack of justification (expressly or by failing to defend itself) — all of this despite the fact that, given s. 33, the validity and effect of the statute cannot be impugned.
>
> [350] As the Supreme Court has pointed out, however, one cannot "permit legislation to operate 'notwithstanding a provision included in section 2 or sections 7 to 15'" [*Toronto (City)* at para 60] and, at the same time, allow judicial review of their compliance with those provisions, that is, their legality with respect thereto. These two propositions are irreconcilable.
>
> [351] Absent such a constitutional review, determining the correctness of the legislature's political and legal choice in invoking s. 33 of the *Canadian Charter* is therefore left to the citizens, who will make their point of view known through the tools of parliamentary democracy (e.g., elections, lobbying of deputies, petitions submitted to the legislature) and those that the Constitution places at the disposal of any person or group wishing to make their opinion known (such as the exercise of freedom of expression or freedom of peaceful assembly).
>
> (Emphasis added)

[234] In *Hak CA*, the Court went on to conclude that neither ss. 33(3) or (4) of the *Charter*, i.e., the sunset and renewal provisions of the notwithstanding clause, affected its determination (at paras 352–356). Then, the Court summarised:

> [356] But, in the case at bar, this [non-justiciability of the debate about infringement without regard to its political dimensions] is not the obstacle to judicial review — rather, it arises from s. 33 itself. As Cory and Iacobucci, JJ. wrote in [*Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] at para 137], this provision "establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts / *a pour effet, dans notre régime constitutionnel, de laisser le dernier mot au législateur et non aux tribunaux*". Of course, s. 33 can be used by the legislature after a court has ruled and pointed out a statute's constitutional flaws, but it can also be used preventively, in which case it cuts short the discussion: the legislature has the last word from the outset.
>
> [357] Furthermore, the ruling in [*Toronto* (*City)*] neutralizes any attempt to invoke an unwritten principle of law or one of the main principles of our country's constitutional architecture to counter the effects of s. 33 of the *Canadian Charter*. Neither the rule of law ("*primauté du droit*") nor democracy, the protection of minorities or the role of superior courts in maintaining and fostering our constitutional order can justify such a judicial

> review — that is, a review of a statute's conformity with provisions whose application the legislature has explicitly overridden through s. 33 of the *Canadian Charter* — and prevail over the text and context of that section.
>
> [358] Except as regards its own conditions of application, s. 33 thus operates as a kind of "constitutional privative clause" ("*disposition d'inattaquabilité constitutionnelle*") that limits the judicial review protected by s. 96 of the [*Constitution Act, 1867*]. The power of the courts to review the exercise of the legislature's authority, a power guaranteed by s. 96 of the [*Constitution Act, 1867*], is thereby limited to the sole issue of determining whether the requirements for invoking s. 33 of the *Canadian Charter* have been satisfied, which, as we saw earlier, makes it possible to reconcile these two provisions and have them coexist. The courts, therefore, cannot be asked to perform the judicial review the parties opposed to the Act are seeking in the case at bar, nor can they be asked to make a judicial declaration in that regard.
>
> (Underlining added for emphasis)

[235] When expressing the conclusion drawn under the parallel provision to s. 33 of the *Charter* in s. 52 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Québec Charter*], the Court in *Hak CA* said that "a statute containing a declaration that complies with this provision is immune from judicial review of its conformity with the provisions of the *Québec Charter* from whose application it has been exempted, *and there can be no question of any remedy whatsoever, declaratory or otherwise*" (at para 359; emphasis added).

[236] Notably in this regard, the Québec Court of Appeal had earlier, when addressing whether the holding in *Ford* ought to be revisited (*Hak CA* at paras 286–299), ruled that, although they can be found persuasive when interpreting *Charter* rights, relying on the presumption of conformity with non-binding international instruments "to add substantive requirements to s. 33 of the *Canadian Charter* would be contrary to the very wording of this provision and the clear intention of the *Charter's* framers" (at para 295). I agree; international laws or conventions must not be used to discover an unwritten s. 33 remedy when it would patently contradict the text of the Constitution. As the Québec Court noted, Canada's notwithstanding clause has "no true equivalent" in international law (at para 294). That Court cited from François Chevrette and Herbert Marx, *Droit constitutionnel: Principes fondamentaux:Notes et jurisprudence*, 2d ed revised and updated by Han-Ru Zhou (Montreal: Thémis, 2021) at 1173, where the authors wrote that s. 33 "does not have a real equivalent in other Western democracies". In a similar vein, the courts are not entitled to interpret the *Charter* as providing for an unwritten remedy that would only be available to benefit a specific group of individuals, here referring to children. The drafters of the *Charter*'s text plainly

did not contemplate that any certain set of individuals would have *greater* protection of the law than others (see s. 15(1)).

[237] Lastly under this rubric, the rule of law and the confines of the judicial role in parliamentary supremacy do not support the continued availability of declaratory relief once s. 33 of the *Charter* has been invoked. In *Hak CA*, the Court wrote:

> [232] Nonetheless, this nearly 42-year-old debate should not cause us to lose sight of the role of Parliament and the legislatures when they invoke s. 33. Professor Leclair notes quite rightly that by remaining focused on [TRANSLATION] "the power of the courts to counter parliamentary sovereignty", the tenor of current debates obscures the important [TRANSLATION] "issue of how such a power of deconstitutionalization should be exercised" by Parliament and the legislatures, and contributes to the idea that Parliament and the legislatures have "no role to play in protecting rights and freedoms". In the same vein, Professors Karazivan and Gaudreault-DesBiens note that use of the notwithstanding clause should require genuine democratic debate by parliamentarians and be exercised sparingly:
>
> > The notwithstanding clause can thus be seen as Canada's hyphen between political and legal constitutionalism. In most cases, the Canadian legal system follows legal constitutionalism's ideal where courts are able to curb an errant legislature by applying an entrenched bill of rights to invalidate legislation. Conversely, the legislatures, having democratically debated on a certain policy, can occasionally demand to have the last word over the judiciary; they are, to keep the same terminology, able to curb an errant court. But if legislatures are to use the powers granted by section 33, we expect that they display strong democratic deliberation of the same magnitude as what is found in societies which embrace political constitutionalism and rely on Dicey's "common sense" and politically responsible parliamentarians. In view of the laconic procedural and substantive limitations in section 33 (compared with international treaties), there is no choice but to rely on the tradition of restraint on the part of parliamentarians who should consider the opportunity to trigger section 33 as narrowly as possible.
> >
> > [Underlining added by the Québec Court of Appeal]
>
> [233] In a recent article, Professor Dominique Leydet also highlighted this fundamental legislative responsibility, and more specifically that of parliamentarians, including, of course, the members of the National Assembly:
>
> > [TRANSLATION]
> >
> > Indeed, it seems to me that if we want to strengthen the structure protecting fundamental rights, we should also highlight the essential role that parliamentarians and legislatures are called upon to play in this undertaking. By focusing too much on the role of the courts in guaranteeing rights — in other words, by making this guarantee the sole concern of the courts — we run the risk of taking away the sense of responsibility of the other players in the constitutional and democratic order, particularly legislatures. We also run the risk of reinforcing the

> perception that rights are foreign objects that do not form part of democratic debate, a set of constraints imposed from the outside on the democratic will, rather than values and principles that must contribute from within to the process of forming that democratic will.
>
> [Underlining added by the Québec Court of Appeal]

> [234] The present dispute will undoubtedly not put an end to these debates, which, it must be said, raise issues that go far beyond the mere interpretation of s. 33 of the *Canadian Charter* and involve mainly political rather than legal questions. The role of the legislature itself in defending and promoting rights and freedoms cannot be left out of the equation.

[238] Professor Newman makes this same point – about s. 33 ensuring that legislatures take their democratic responsibilities seriously – quite poignantly in Peter L. Biro ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) at 78 [Newman]:

> …to remove power is to remove responsibility. The more matters that move from legislative control to judicial control, the less responsibility legislators bear. Arguments for taking away roles from parliaments and legislatures on the basis one wishes there were better debates lead toward removing more responsibility and thus are likely to further worsen democratic processes. Treating parliamentarians like infants risks making them such.

[239] Parliamentary sovereignty is undeniably a principle of our Constitution's architecture (see *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189 at paras 56–58; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 57), and it cannot be given short shrift for any reason. As the Supreme Court made clear in the securities reference, our parliamentary sovereignty is circumscribed by constitutional constraints. That remains so unless the notwithstanding clause is invoked.

[240] In *R v Chouhan*, 2021 SCC 26, [2021] 2 SCR 136, Rowe J. reviewed his Court's jurisprudence and the literature on the limited extent of the judicial reach, writing:

> **A. Separation of Powers: the Courts and the Legislature**
>
> [129] Constitutionalizing statutory provisions is contrary to the separation of powers between the legislature and the judiciary. The separation of powers has been described by this Court as the "backbone of our constitutional system" (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3).
>
> [130] While the legislature "chooses the appropriate response to social problems, makes policy decisions and enacts legislation", the judiciary "interprets and applies the law, ... acts as judicial arbiters" and ensures that laws and government action conform to constitutional norms (G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), p. 105, § 3.131, referring to *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136; *New Brunswick Broadcasting Co.*

v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, at p. 389; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 28; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at para. 39). The legislative and judicial branches have distinct roles and institutional capacities (*Criminal Lawyers' Association*, at para. 29). Accordingly, as McLachlin J. (as she then was) explained in *New Brunswick Broadcasting Co.*:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other. [at 389, emphasis added by Rowe J.]

[131] This is so because courts are "not fitted" to get "involved in a review of legislative policy" (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 392, per Le Dain J.). In a similar vein, McIntyre J., dissenting in *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, said a judge cannot strike down legislation merely because the legislature's decision is bad policy: "Parliament has the necessary resources and facilities to make a detailed inquiry [and] has the capacity to make a much more extensive inquiry into matters concerning social policy than has the Court" (p. 1101). As McIntyre J. held in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at p. 493, "it is not for the Court ... to postulate some alternative which in its view would offer a better solution to the problem, for to do so is to enter the legislative field" (see also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 796 and 801, per La Forest J., concurring).

[132] Therefore, with respect to the *Charter*, the role of the courts "is to protect against incursions on fundamental values, not to second guess policy decisions" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 194, per La Forest J., concurring, see also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1199, per Lamer J. (as he then was); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136).

[133] When "struggling with questions of social policy and attempting to deal with conflicting [social] pressures, 'a legislature must be given reasonable room to manoeuvre'" (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at p. 627, citing *Edwards Books*, at p. 795, see also H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 825, para. X.54). Parliament has better knowledge of social problems and is better equipped to deal with such problems through legislation (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61). Therefore, democratically elected legislatures are in a better position to weigh competing interests and evaluate policy options for complex social issues (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993). In our constitutional democracy, legislatures must have the means to respond to societal changes through ordinary statutes (W. R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985), 11 Queen's L.J. 1, at p. 2).

[241] To emphasise the starkness of the separation of legislative and judicial powers in Canada during the era of parliamentary supremacy under our (pre-1982) Constitution, I refer to the decision in *Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta v Attorney-General for the Dominion of Canada*

and the Attorney-General for the Province of British Columbia (1912), 3 DLR 509, 1912 CanLII 407 (UK JCPC). In that case, addressing "commentary on the wisdom of such an enactment" prior to analysing the constitutional validity of the *Supreme Court Act*, RSC 1906, c 130, s 60, under the division of powers in the *British North America Act*, 1867, 30-31 Vict, c 3 (UK), Earl Loreburn, L.C., speaking on behalf of the Judicial Committee of the Privy Council, said (at 512):

> A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. <u>It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional law of Canada.</u>
>
> (Emphasis added)

[242] The point being that, if the Court of King's Bench were to tell the legislators in this province that they ought not to enact laws like Section 197.4, even though the Legislature has the constitutional power to do so, while also telling the public that the law is invalid because it ought not to have been enacted, then the Court would depart from its legitimate function under our Constitution; it would be pronouncing upon the policy choices of the Legislature, which are exclusively the business of the electorate and are of no concern to the Courts under parliamentary supremacy. The point was made recently by Kilback J. (as he then was) in *Canadian Pacific Railway v Saskatchewan*, 2024 SKKB 157 at paras 244–246, 499 DLR (4th) 573 [*CP Railway*], in these terms:

> [246] … [T]he role of the judiciary is not to apply only the law of which it approves or deems fair; nor is it to second guess the wisdom of law reform undertaken by legislatures. Within the boundaries of the Constitution, legislatures can set the law as they see fit, and the wisdom and value of legislative decisions are subject only to review by the electorate. See: *Imperial Tobacco*, at para 52; [*Wells v Newfoundland*, [1999] 3 SCR 199] at para 59. See also: *Attorneys General (Provinces) v Attorney General (Canada)*, (1912), 3 DLR 509 at 512-513 (JCPC).

[243] Addressing a so-called constitutional principle or right not contained in our written Constitution, Wagner C.J.C. and Brown J. in *Toronto (City)* described reliance on unwritten constitutional principles, "in whole or in part, to invalidate legislation" as "judicial error", particularly given the notwithstanding clause (at para 60). Quoting from *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 66, [2005] 2 SCR 473 [*Imperial Tobacco*], a majority of the Supreme Court in *Toronto (City)* agreed that "there is good reason to insist that 'protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text *and the ballot box*'" (at para 59; emphasis in original). The majority concluded that, "In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*)" (at para 59; emphasis in original).

[244] In my opinion, to fail to meaningfully engage with the core principles of parliamentary supremacy, principally the separation of judicial and legislative powers, when interpreting s. 33 of the *Charter* is to ignore the foundations of our Constitution and the purpose of the notwithstanding clause within it. When those principles are taken into account, it is evident that a valid invocation of the notwithstanding clause fully displaces the courts' jurisdiction and authority under s. 96 of the *Constitution Act, 1867* to determine and declare whether the Act or provision in question complies with the *Charter* rights and freedoms from which it has been exempted.

b. Declaratory relief is not available under s. 24(1) of the *Charter* when s. 33 has been invoked

[245] With respect to whether there exists any residual or co-existing power to grant declaratory relief under s. 24(1) of the *Charter* in the face of a s. 33 declaration, I am again in full agreement with the reasoning of the Québec Court of Appeal in *Hak CA*:

> [360] Lastly, it is just as untenable to suggest that s. 24(1) of the *Canadian Charter* alone empowers courts to grant a remedy despite the use of s. 33 — which would necessarily oblige them to first review the statute's conformity with the provisions from which it has been exempted, thus engaging in an exercise that is precisely what s. 33 precludes. This is therefore not possible. …
>
> [361] Section 24 of the *Canadian Charter*, whose first subsection is relevant here, prescribes the following:
>
> > 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent

> jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 24(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[362] Subsection 24(1) cannot be read in a vacuum, as that would be contrary to the teleological and contextual analysis of the written provisions of the Canadian Constitution. That said, s. 33 is assuredly part of the interpretative context of s. 24(1). Insofar as s. 33 makes it possible to exempt a statute from the application of certain rights and freedoms protected by the *Canadian Charter*, it goes without saying that the guarantee offered by that *Charter* no longer has effect, thereby precluding the application of s. 24(1), which cannot in itself generate a right to judicial review: if ss. 2 or 7 to 15 do not apply, there can be no remedy for a violation of these provisions. This conclusion must follow, failing which s. 33 would be partly neutralized. As Iacobucci and Arbour, JJ. wrote in [*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 31, [2003] 3 SCR 3], "no part of the Constitution can abrogate or diminish another part of the Constitution", and this is what would result if s. 24(1) were given such an autonomous — and decontextualized — effect.

…

[364] But while it is true that "all government power must be exercised in accordance with the Constitution", as enshrined in s. 32(1) of the *Canadian Charter* and s. 52(1) of the [*Constitution Act, 1982*], and that courts "have the duty" to ensure that this power is exercised "in accordance with the Constitution", this does not entitle courts to ignore the effects of s. 33 of the *Canadian Charter* and carry out a judicial review that this provision does not allow. Indeed, s. 33 is a provision of the Constitution, and its use, when made in accordance with the requirements set out in *Ford*, is itself in accordance with the Constitution. This difference between the situation of the applicant in [*Canada (Prime Minister) v Khadr*, 2010 SCC 3], which did not involve s. 33 of the *Canadian Charter*, and that of the parties opposed to the *Act* in the present case is fundamental: through s. 34 of the [impugned Act], the Quebec legislature complied with the Constitution by invoking s. 33 of the *Canadian Charter* in a manner that respects the formalities established by the Supreme Court in *Ford*; consequently, no judicial review of the *Act's* compliance with the constitutional provisions from which it was validly exempted can be exercised and no remedy, not even a declaratory one, can be granted under s. 24(1) of the *Canadian Charter*.

[365] As for [*Ewert v Canada*, 2018 SCC 30] and [*Gosselin v Québec (Attorney General)*, 2002 SCC 84] they do not support the position that, notwithstanding s. 33 and because of s. 24(1) of the *Canadian Charter*, superior courts can rule on a statute's conformity with the provisions of the *Canadian Charter* from whose application the statute has been exempted. Indeed, *Ewert* did not deal with s. 33 of the *Canadian Charter*, which was not at issue, and the comments made therein cannot be transposed to the present dispute. As for *Gosselin*, in this respect it simply confirmed the meaning and scope to be given to s. 33 of the *Canadian Charter*, as we saw earlier [*Gosselin* at para 15].

[366] But *Gosselin* also dealt with s. 45 of the *Quebec Charter*, a provision that does not enjoy the supremacy conferred by s. 52 of that charter on the rights set out in its ss. 1 to 38. For Bastarache, J., dissenting, this meant that "that right is unenforceable" ("*le respect de ce droit ne peut pas, en l'espèce, être obtenu en justice*") [at para 304]. McLachlin, C.J. replied to that statement by pointing out that, in her opinion, even if a statute infringing

> this provision cannot be invalidated by the courts, the courts can still, where rights have been violated, "declare that this is so" [at para 96].
>
> [367] This comment, however, is but *obiter*, and refers only to the specific situation of economic and social rights guaranteed by the *Quebec Charter* (ss. 39 to 48). More importantly, McLachlin, C.J.'s comment clearly does not address the effects of s. 33 of the *Canadian Charter* and cannot contradict her previous comments about this provision, which exempts the statute not only from ss. 2 and 7 to 15 of the *Canadian Charter* but also from judicial review based on these provisions. It certainly cannot be inferred from her comments that s. 24(1) of the *Canadian Charter* should be given a standalone purpose and that the courts should be permitted, even from a strictly declaratory perspective, to review a statute's conformity with the provisions of the *Canadian Charter* that the legislature intended to override by invoking s. 33.
>
> [368] For all these reasons, the conclusion is obvious: the use of s. 33 of the *Canadian Charter* shields the statute from judicial review of its compliance with the provisions referred to in the override declaration and excludes any potential remedy (even if merely declaratory and, *a fortiori*, pecuniary), because s. 24(1) cannot serve as a basis for such a review or remedy.
>
> (Emphasis added)

[246] In short, the valid invocation of the notwithstanding clause fully neutralises the courts' jurisdiction and authority to determine and declare whether the Act or provision in question complies with the *Charter* rights and freedoms from which it has been exempted, even when pre-emptively invoked.

[247] To be clear about this, arguments that the courts retain an "inherent jurisdiction" – somehow existing outside the conferrals of power under and the constraints within the Constitution – to declare lawfully enacted legislation unconstitutional are wholly uncoupled from our constitutional paradigm. In *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 30, [2013] 3 SCR 3, Karakatsanis J., for the majority of the Supreme Court, held that "the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries".

c. The continued availability of declaratory relief when s. 52 of the *Constitution Act, 1982* has been suspended by an invocation of s. 33 of the *Charter* is syllogistically false

[248] Respectfully, the argument that the courts still enjoy the jurisdiction or authority to grant declaratory relief regarding the constitutional validity of exempted legislation even though an

invocation of the notwithstanding clause suspends the operation of s. 52 of the *Constitution Act, 1982* is untenable. That proposition is syllogistically false.

[249] If the judiciary were found to somehow retain the power to declare that legislation would be invalid but for the invocation of s. 33, that would affirm the continued availability of a s. 52 remedy – that of a *suspended declaration of invalidity* (see *Reference re Manitoba Language Rights*, [1985] 1 SCR 721); a remedy that has lately been called into question (see *Ontario (Attorney General) v G*, 2020 SCC 38, [2020] 3 SCR 629 [*Ontario v G*]). Assessed logically, the proposition is internally contradictory because it belies the assertion that s. 52 of the *Constitution Act, 1982* is suspended when a legislature invokes s. 33 of the *Charter*.

d. Declaratory relief is not justified by notions of constitutional dialogue when s. 33 of the *Charter* has been invoked

[250] Judicial review of legislation for compliance with the Constitution is an important aspect of our constitutional democracy, but it is not immutable.

[251] Unless the notwithstanding clause has been invoked, a "dialogue among the branches" about the constitutional validity of legislation may occur between the executive and legislative branches of government, on the one hand, and the judiciary, on the other (*Vriend* at para 139). That conversation would conclude when a majority of the Supreme Court of Canada says whether the law in question is a justified limit on rights or freedoms under s. 1 of the *Charter*. That said, where a limit is not justified in the eyes of the Court, the dialogue would continue if the legislature revised or replaced the legislation in question in a way that invited further challenge as to its compliance with the *Charter*.

[252] For the reasons already given, the invocation of s. 33 of the *Charter* ousts the courts' jurisdiction to review and declare Acts and provisions invalid when, absent that invocation, they might contravene certain *Charter*-guaranteed rights and freedoms; the notwithstanding clause is the "ultimate 'parliamentary safeguard'" (*Vriend* at para 178), which overrides judicial review of legislation for its compliance with certain *Charter*-guaranteed rights and freedoms.

[253] Yet there is a suggestion in this appeal that declarative relief remains necessary in the context of a s. 33 declaration as part of the constitutional dialogue. This is said to be so because

judicial opinion is necessary to properly understand the *Charter* rights or freedoms as well as the political or policy ramifications of legislation containing an override of those rights. This proposition, however, conflates the constitutional dialogue between the judicial branch and the legislative and executive branches of government with the democratic dialogue between the electorate and their elected representatives and with the parliamentary debate that occurs in a legislature.

[254] When the constitutional validity of legislation is determined in litigation brought before the courts and then s. 33 of the *Charter* is invoked by a legislature after a court decision, the dialogue is constitutional, primarily occurring (but not exclusively) between the legislative/executive and judicial branches of government (see, generally, Peter W. Hogg, Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 Osgoode Hall LJ at 75–124 [*Charter Dialogue*]). Aside from parliamentary debate about the policy merits of a piece of legislation, a separate conversation contemporaneously transpires between the electorate and their elected representatives, which is a democratic dialogue recognised and protected by ss. 3 to 5 of the *Charter* (provisions that are not subject to being overridden by a legislature under s. 33). In this scenario – when s. 33 is invoked reactively to a court decision – participants in the democratic dialogue and in parliamentary debate will have the benefit of judicial thought about a statute's compliance with the *Charter* (*Charter Dialogue* at 83–84).

[255] However, when s. 33 is invoked prospectively, the *Charter* allows competent legislative bodies to enact laws without interference from the judiciary. In this latter scenario, rather than legitimately contributing to the democratic dialogue or to parliamentary debate, declaratory relief would be equivalent to gratuitous advice because policy considerations are beyond the ambit of the courts when the only issue is the validity of the laws under the constitutional division of powers (*Reference re Firearms Act (Can.)*, 2000 SCC 31 at para 57, [2000] 1 SCR 783; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 3, [2015] 1 SCR 693 [*Quebec v Canada*]). Even in circumstances where the courts have the jurisdiction to pronounce on legal rights, Karakatsanis J., writing for the majority in *Ontario v G*, observed that "there may be cases where an immediate declaration could create legal rights that could narrow the range of

constitutional policy choices available to the government *or undermine the effectiveness of its policy choices*" (at para 130, emphasis added).

[256] In the usual course, absent invocation of the notwithstanding clause, a declaration as to whether *Charter* rights have been infringed is still often more of a comment on political discourse and less of a legal determination. And, after s. 33 has been invoked, it would be a wholly political comment. But, as La Forest J. wrote in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at 277, 111 DLR (4th) 385:

> …courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.
>
> (Emphasis added)

See also *R v Edwards*, 2024 SCC 15 at para 80, per Kasirer J. for the majority.

[257] In *Vriend*, Iacobucci J. (for himself and Cory J.) wrote:

> [136] Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> (Emphasis added)

[258] Writing for the majority in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 34, [2003] 3 SCR 3 [*Doucet-Boudreau*], Iacobucci and Arbour JJ. said, "In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts

overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government" (at para 34).

[259] Nothing in our Constitution in this context serves to elevate the judiciary above the electorate or the elected members of a legislative assembly, inviting judges to play the special role of enlightening voters and their elected representatives, each engaged in the democratic process, with judicial thought on a matter of politics or social policy. The fact that litigation, such as the proceedings before the Court of King's Bench in this case, attempts to place an issue of public or societal concern before a court cannot itself imbue that court with the constitutional authority to opine or advise everyone else as to that court's thoughts on the politics of the matter in the face of a legislature's invocation of the legislative override.

[260] This is not to say that the courts should never communicate with the public or that doing so is inherently flawed or judicial hubris. Communication from the judiciary is obviously required at times. However, the asymmetric dialogue that results from the prospective invocation of the notwithstanding clause is neither a flaw nor gap in our Constitution – nor is it contrary to the rule of law. It is an intended feature of our democracy that preserves the hierarchy and separation of judicial and legislative powers under parliamentary supremacy in specific instances for a limited time. As Professor Newman remarks, the courts should not approach the interpretation of s. 33 of the *Charter* with the assumption or belief that it is restricted by other aspects of our Constitution or that it could be better modelled to suit other parts of the *Charter* (Newman at 71). Quite the opposite; properly understanding s. 33's role as a constitutional reset button might lend to a better understanding of other features of our democracy.

[261] In our free and democratic society, the role of the electorate is "as the ultimate check on the use of the notwithstanding clause" (Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72 UTLJ 189 at 198, citing Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2d ed (Toronto: LexisNexis, 2017) at §21.13; see also *Working Families CA* at para 53). Voters are constitutionally entitled and fully able to carry out their role without assistance from the judiciary. Where a legislature has invoked the notwithstanding clause, the electorate must be permitted to exercise their franchise rights free from unconstitutional interference or undue influence from members of

the judiciary. The same may be said of representatives elected to serve the public in debates in a legislative assembly – they must be allowed the autonomy to carry out their democratic duties. In *Charter Dialogue*, the learned professors wrote (at 76–77):

> …The view that the *Charter* is a "bad thing" is commonly based on an objection to the legitimacy of judicial review in a democratic society. Under the *Charter*, judges, who are neither elected to their offices nor accountable for their actions, are vested with the power to strike down laws that have been made by the duly elected representatives of the people.
>
> The conventional answer to this objection is that all of the institutions of our society must abide by the rule of law, and judicial review simply requires obedience by legislative bodies to the law of the constitution. However, there is something a bit hollow and unsatisfactory in that answer. The fact is that the law of the constitution is for the most part couched in broad, vague language that rarely speaks definitively to the cases that come before the courts. Accordingly, judges have a great deal of discretion in "interpreting" the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges. This problem has been captured in a famous American aphorism: "We are under a Constitution, but the Constitution is what the judges say it is".

[262] In this regard, the majority decision in *Toronto (City)* is applicable, *mutatis mutandis*, in the circumstances of this matter. In that case, the Court kicked to the kerb the role of unwritten constitutional principles on the basis that, if such principles were relied upon to invalidate legislation, a legislature could not "give continued effect to its understanding of what the Constitution requires by invoking s. 33" (at para 60).

[263] The instant amorphous notion, which the reasoning in *Toronto (City)* counters in this case, is essentially that, notwithstanding the "undeniable aspect of the constitutional bargain" (at para 60) recorded in writing in s. 33 of the *Charter*, the judicial branch of government ought to have the authority to declare invalid what some might see as "otherwise normatively deficient" legislation (at para 59), even where the declaration of invalidity would have no constitutional effect. If this is a principle of our democracy, it is untethered from our written Constitution. It does not persuade, furthermore, to say that the circumstances of constitutional dialogue and "duty" require the judicial branch to overstep its role under the written Constitution to ensure that the electorate is properly educated about a judge's views on a piece of legislation that is subject to a declaration under s. 33 of the *Charter*. As Brown and Rowe JJ. colloquially wrote, for the majority in *R v Sharma*, 2022 SCC 39 at para 107, the "call", with respect to a policy choice, "rests not with the preferences of judges, but with those collectively expressed by Parliament as representatives of the electorate".

[264] Once again, I return to the decision in *Hak CA*, where the same point is made:

> [408] As Deschamps, J. pointed out in 2005 [in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791], when speaking about the role of the courts:
>
> > [89] The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch. Professor Roach described the complementary role of the courts *vis-à-vis* the legislature as follows (K. Roach, "Dialogic Judicial Review and its Critics" (2004), 23 Sup. Ct. L. Rev. (2d) 49, at pp. 69-71):
> >
> > > [Some] unique attributes of courts include their commitment to allowing structured and guaranteed participation from aggrieved parties; their independence from the executive, and their commitment to giving reasons for their decisions. In addition, courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents.
> > >
> > > … The pleader in court has a guaranteed right of participation and a right to a reasoned decision that addresses the arguments made in court, as well as the relevant text of the democratically enacted law …
> > >
> > > Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.
>
> [409] In this sense, when the legislature invokes s. 33 of the *Canadian Charter*, it does not deprive the courts, but rather the general population, of the right to challenge the statute, a right that is fundamental in a democracy. Yet, it is the very Constitution that, through s. 33 of the *Canadian Charter*, which is an integral part of the [*Constitution Act, 1982*], makes it possible to exclude this function from those that courts ordinarily exercise, leaving it to the political bodies and the electorate to decide the matter. Since s. 33 of the *Canadian Charter* creates an exception to s. 52 of the [*Constitution Act, 1982*], the Court cannot disregard it and rule on a question that no longer (at least temporarily) falls within its power of judicial review. …
>
> (Emphasis added)

[265] The Québec Court made the foregoing statement while being cognisant of the argument that its interpretation of the notwithstanding clause meant that the *Charter* allows legislatures, "acting at the whim of the ideologies of the day, to capriciously override [*Charter*-guaranteed] rights and freedoms, subjecting each individual to the arbitrary will of the majority, wiping out the protection of minorities, despite such protection being one of the 'key considerations' for the enactment of the [*Charter*] and jeopardizing the freedoms and guarantees that are essential to democracy" (*Hak CA* at para 410, quoting from *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 81). The Court in *Hak CA* refuted that argument under the following reasoning:

> [411] With all due respect — because this is a serious subject — this debate, which in reality concerns the appropriateness of including a notwithstanding clause in a "charter of rights and freedoms", already took place, on the basis of the same arguments, and has been settled since 1982 in the case of the *Canadian Charter*…. Even if one were to think it politically regrettable that the framers incorporated s. 33 into the *Canadian Charter*…, the fact remains that it is not the role of the courts to seal the gaps, if any, in a constitutional (or legislative) choice that some consider ill-advised (but others, it should be noted, consider entirely justified).
>
> [412] Our civil society, whose weight and importance in protecting rights and freedoms cannot be ignored, is not without its means if it deems a legislature's use of s. 33 of the *Canadian Charter*… to be inappropriate. For example, the Ontario legislature recently inserted an override provision in the *Keeping Students in Class Act, 2022* [SO 2022, c 19], to exempt it from the application of s. 2(d) of the *Canadian Charter* (freedom of association, right to strike component), as well as the province's *Human Rights Code*. It is a matter of judicial notice that the legislature reversed course in the face of the outcry generated by this override provision and, on November 14, 2022, it repealed the statute that had come into force a few days earlier [*An Act to repeal the Keeping Students in Class Act, 2022*, SO 2022, c 20]. Thus, public backlash and the reaction of citizens can also act as a bulwark against the use of notwithstanding clauses.
>
> [413] In the same vein, the power of the electorate should not be understated: the democratic rights enshrined in s. 3 of the *Canadian Charter*, whether exercised federally or provincially, are not subject to s. 33 of the *Canadian Charter*. As a result, the electorate holds the ultimate power to defeat any government that has used (or abused) the override power conferred on it by this constitutional provision….
>
> (Emphasis added)

[266] To conclude its analysis on this point, the Court remarked in *Hak CA* on the role and individual responsibility of the members of a legislative assembly "in defending and promoting rights and freedoms, especially when the Constitution gives [the legislature] the final say, as the Supreme Court recognized in *Vriend* [at paras 137–139]". The task of legislating on rights and freedoms, wrote the Court, "is no ordinary matter and requires particular attention on the part of those involved in parliamentary debate — all the more so when they are considering overriding those rights and freedoms", which the Court said is "a subject that merits a full and rigorous examination" (at paras 414–415). Echoing Newman (at 78), if legislators are to be held to account in this regard, it must be done by their electors not the courts.

[267] Speaking for himself and Rothstein J. and Wagner J. (as he then was) in *R v Nur*, 2015 SCC 15 at para 132, [2015] 1 SCR 773, critiquing the use of hypotheticals by the majority in that case to invalidate mandatory minimums under the *Criminal Code* in circumstances where Parliament had made choices reflecting "valid and pressing objectives", Moldaver J. said, "it is not for this Court to frustrate the policy goals of our elected representatives based on questionable

assumptions or loose conjecture". In *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245, Rothstein and Wagner JJ., in dissenting reasons, wrote:

> [114] While *Charter* rights must be interpreted generously, this Court has cautioned that it is nevertheless "important not to overshoot the actual purpose of the right or freedom in question": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. (See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, per Abella J.) Our colleagues assert that affording deference to legislative choices erodes the role of judicial scrutiny (para. 76). In so doing, they overlook that within the Canadian constitutional order each institution plays a unique role. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.
>
> [115] This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions. As this Court recognized in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [at para 136]:
>
> > In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> (Emphasis added by Rothstein and Wagner JJ.)

See also *Quebec v Canada* where the majority of the judges agreed that it was up to Parliament to make a "contentious policy choice" (at para 1) and, "[a]s has been said many times, the courts are not to question the wisdom of legislation but only to rule on its legality" (at para 3). In *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 80, [2014] 3 SCR 31, Rothstein J. opened his dissenting reasons by writing that "Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers".

[268] In sum, when s. 33 is invoked prospectively by a legislature, the judicial branch ceases to be constitutionally entitled to instruct participants in the democratic dialogue and in the parliamentary debate about whether the Act or a provision in question complies with the *Charter*-guaranteed rights and freedoms identified in the declaration.

[269] In *Bacon v Saskatchewan Crop Insurance Corp.* (1999), 180 Sask R 20, [1999] 11 WWR 51 (CA), Wakeling J.A. wrote that "the law by which we are ruled is to a significant extent that which is legislated by Parliament when acting within its constitutional limits" (at

para 37). In *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, McIntyre J. expressed the opinion that, "legislation is the only way in which a legislature may infringe a guaranteed right or freedom" (at 599; see also the reasons of La Forest J. in *McKinney v University of Guelph*, [1990] 3 SCR 229 at 263). If my understanding of our Constitution is incorrect, then it is time that we collectively admit that the story we tell ourselves about Canadian democracy — that we are governed by the people (i.e., the *demo* in democracy) through their elected representatives — is at best incomplete and at worst self-delusional. If I am wrong, then we live in a country where a minimum of five unelected judges can always reverse the intent of 343 elected members of the House of Commons (and that of the elected members of the provincial Legislative and National Assemblies) through the exercise of their "great deal of discretion in 'interpreting' the law of the constitution, [where] the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges" (*Charter Dialogue* at 77). The narrative for that form of democracy is: "The people's will, subject to judicial review". Canada is not, despite argument seemingly to the contrary, a kritarchy; the judicial voice must not toll louder than the ballot.

e. Declaratory relief is not available because Saskatchewan cannot be compelled to participate in this litigation

[270] If the executive branch of government were to decline to participate in litigation regarding the validity of s. 33 exempted legislation, and since no law compels it to do so in the circumstances, then a full adversarial debate could not take place. The rule of law, the recognition of which is a founding principle of the Constitution (*B.C.G.E.U. v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 229; *Reference re Secession of Quebec* at paras 49 and 70), would be transgressed if the courts ruled on issues based on partial arguments founded on an incomplete record that failed to address cardinal questions. As is repeated below in respect of mootness, "[t]he requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 358–59 [*Borowski*]).

[271] While I do not mean to encourage it to do so, Saskatchewan could take the view that there is no need, as a matter of law, for any response to UR Pride's claims given the invocation of s. 33 of the *Charter* – other than to defend the form of the declaration, if that were challenged. It could stake a position of non-participation on the fact that any discussion would be hypothetical or

theoretical (see the mootness analysis below), leaving only matters of politics or policy motivation to be discussed in front of a court, matters that are typically not subjected to judicial scrutiny outside of a live controversy as to rights (see *R v Chouhan* at para 131; *Thorne's Hardware Limited v The Queen*, [1983] 1 SCR 106 at 111–112; *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12, 183 DLR (4th) 225 at paras 107–109; and *CP Railway* at paras 244–246).

[272] On the other hand, if the executive branch were ordered or compelled to participate in litigation challenging the constitutional validity of legislation that has been exempted from judicial review by the legislative branch, then it cannot be truthfully said that s. 52 of the *Constitution Act, 1982* or the guarantee under s. 1 of the *Charter* has been suspended.

4. Conclusion on the question of jurisdictional error

[273] No one, having read the text of s. 52 of the *Constitution Act, 1982*, can dispute the importance of the judiciary's role in our constitutional democracy of reviewing whether legislation complies with the Constitution, "[b]ut it remains that the judicial branch of government, like the other two branches of government—the executive and the legislative—fortify themselves by acting properly within their legitimate spheres of competence" (*Canada (Prime Minister) v Hameed*, 2025 FCA 118 at para 62). The words of McLachlin J. (as she then was), who wrote for the majority of the Supreme Court on the constitutional questions raised in *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389 [*N.B. Broadcasting*], are apposite:

> I add this. Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.
>
> Traditionally, each branch of government has enjoyed autonomy in how it conducts its affairs. The *Charter* has changed the balance of power between the legislative branch and the executive on the one hand, and the courts on the other hand, by requiring that all laws and government action must conform to the fundamental principles laid down in the *Charter*. As a practical matter, this means that, subject to the override provision in s. 33 of the *Charter*, the courts may be called upon to rule that laws and government acts are invalid. To this extent, the *Charter* has impinged on the supreme authority of the legislative branches. What we are asked to do in this case is to go further, much further. We are asked to say that the *Charter* not only removed from the legislative bodies the right to pass whatever laws they might choose to adopt, but that it removed the long-standing constitutional right of Parliament and the legislative assemblies to exclude strangers,

> subjecting the determination by the Speaker of what is disruptive of the operation of the Assembly to the superior review of the courts. I see nothing in the *Charter* that would mandate or justify taking the reallocation of powers which it effected to this extreme.
>
> (Emphasis added)

[274] In this matter, by deciding that the judiciary retains the authority to offer its opinion on the constitutional validity of Section 197.4 notwithstanding the Legislature's invocation of s. 33 of the *Charter*, the Chambers judge overstepped the courts' jurisdictional bounds under our written Constitution.

[275] As the courts have no constitutional jurisdiction, inherent jurisdiction or residual discretion to grant declaratory relief in the circumstances of this matter, I conclude that the Chambers judge erred by ruling that the declaration under s. 33 of the *Charter* set out in Section 197.4 did not oust the courts' jurisdiction to determine and declare whether that provision is a reasonable limit on the legal and equality rights under ss. 2, 7 and 15 of the *Charter*.

B. The Chambers judge erred by granting UR Pride leave to amend its originating application to plead that Section 197.4 violates the legal right under s. 12 of the *Charter*

[276] At the outset of the consideration of this issue, I must make it clear that, while UR Pride undoubtedly brought its application to amend to avoid Saskatchewan's invocation of s. 33 of the *Charter* (which does not expressly exempt Section 197.4 from s. 12), I see no impropriety on UR Pride's part for doing so. However, as I will explain, UR Pride's claims under s. 12 of the *Charter* cannot be allowed to proceed.

1. Permitting s. 12 claims would circumvent s. 33 of the *Charter*

[277] The decision in *Working Families CA*, in which the Ontario Court of Appeal explained its understanding of the Supreme Court's interpretation of s. 33 of the *Charter* in *Ford*, was overturned by the majority of the Supreme Court in *Working Families SCC* without addressing *Ford* or s. 33. Nonetheless, the notwithstanding clause is referred to twice in *obiter dicta* in the dissenting reasons of Rowe and Côté JJ.:

> [181] It would be contrary to the structure of the *Charter* to allow s. 3 to function as a backdoor to insulate expression which would otherwise be subject to legislative override. This point is especially salient in the instant case given that Ontario's legislature has invoked s. 33 of the *Charter* to ensure the legislation operates notwithstanding the freedom

> of expression contained within s. 2(b) of the *Charter* (*Protecting Elections and Defending Democracy Act*, 2021, S.O. 2021, c. 31). To import an expressive component into s. 3 is not only unsupported by our Court's jurisprudence, it would fly in the face of the legislature's clear legislative choice.
>
> …
>
> [255] Finally, we emphasize that there is no expressive component in s. 3. Recognizing such a component would blur the lines between ss. 2(b) and 3. It would also effectively provide a workaround of s. 33 of the *Charter*, as parties would be able to mount a s. 3 challenge against legislative provisions which would otherwise be subject to the override. Not only does this fly in the face of the legislature's clear choice to invoke s. 33, it would also undercut the basic structure of the *Charter*. Since s. 33 is not a live issue in the present case, we refrain from offering any substantive comments on its actual scope.
>
> (Emphasis added)

[278] Here, the Legislature has plainly invoked s. 33 of the *Charter* to ensure that Section 197.4 operates notwithstanding the comprehensive legal rights embedded in s. 7 of the *Charter* and the equality rights contained in s. 15(1). Drawing on the reasons of Rowe and Côté JJ. in *Working Families SCC,* it would be contrary to the structure of the *Charter* to recognise s. 12 as functioning as a backdoor that would insulate that legislation (which would otherwise not have to comply with ss. 7 and 15(1)) from the legislative override under s. 33 of the *Charter*. Which is to say in the latter respect that importing an equality right component ("equal protection and equal benefit of the law") into the legal right under s. 12, unsupported as it is by any jurisprudence, would blur the lines between s. 12 and s. 15(1), which are expressly demarked in the *Charter* as separate groups of legal rights and equality rights. Moreover, the inapposite migration of a discrimination claim toward the legal right under s. 12 would effectively provide a workaround of s. 33 of the *Charter* as Section 197.4 is subject to the s. 33 override of s. 15(1) of the *Charter*. All of this, as the dissenting judges note in *Working Families SCC*, "would fly in the face of the legislature's clear legislative choice" and "undercut the basic structure of the *Charter*" (at paras 181 and 255).

2. Permitting s. 12 claims would undermine the scope of ss. 2, 7 and 15

[279] In this case, UR Pride has complained that Section 197.4 constitutes an infringement of the legal rights of individuals pursuant to s. 7 of the *Charter* and the equality rights of individuals in s. 15(1) of the *Charter*:

> ***Legal Rights***
>
> **7.** 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.
>
> …

> ***Equality Rights***
>
> **15.**(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[280] Unlike the written text of the Constitution, which "promotes legal certainty and predictability" in the exercise of judicial review (*Reference re Secession of Quebec* at para 53), the strained, tactical nature of an allegation that Section 197.4 infringes the legal right "not to be subjected to any cruel and unusual treatment or punishment" in s. 12 of the *Charter* makes the equality rights articulated in s. 15(1) susceptible to being interpreted as "redundant and, in doing so, undermine[s] the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco* at para 65). It also guts the comprehensive nature of s. 7 legal rights recognised in Supreme Court jurisprudence (see *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486).

[281] As its text pertains to the alleged infringement of *Charter*-guaranteed rights, Section 197.4 provides:

> **Consent for change to gender identity**
>
> **197.4**(1) If a pupil who is under 16 years of age requests that the pupil's new gender-related preferred name or gender identity be used at school, the pupil's teachers and other employees of the school shall not use the new gender-related preferred name or gender identity unless consent is first obtained from the pupil's parent or guardian.
>
> (2) If it is reasonably expected that obtaining parental consent as mentioned in subsection (1) is likely to result in physical, mental or emotional harm to the pupil, the principal shall direct the pupil to the appropriate professionals, who are employed or retained by the school, to support and assist the pupil in developing a plan to address the pupil's request with the pupil's parent or guardian.

[282] After the Legislature invoked the notwithstanding clause under ss. 197.4(3) and (4) of *The Education Act, 1995*, UR Pride asked the Court of King's Bench to permit an amendment to its notice of application to add claims for a declaration that ss. 197.4(1) and (2) of that Act infringe s. 12 of the *Charter*, which reads:

> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[283] Lastly, I note that this litigation does not ask whether s. 28 of the *Charter* imposes substantive limits on the reach of the notwithstanding clause with respect to gender equality rights.

a. Section 7 legal rights are comprehensive, and the s. 12 legal right is inapplicable in these circumstances

[284] In *Re B.C. Motor Vehicle Act*, the Supreme Court decided that the *legal* rights of individuals in ss. 8 to 14 of the *Charter* are specific instances of the "basic tenets of fairness upon which our legal system is based, which are now entrenched as a constitutional minimum standard by s. 7" (as affirmed in *R v Généreux*, [1992] 1 SCR 259 at 310). A s. 12 claim, therefore, does not add to or enhance UR Pride's claims under s. 7 of the *Charter*.

[285] In brief terms, ss. 8 to 14 address specific deprivations of the "rights to life, liberty and security of the person in breach of the principles of fundamental justice" found in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act* at para 29). They are examples of violations of the s. 7 right not in accordance with the principles of fundamental justice. The majority of the Court in *Re B.C. Motor Vehicle Act* wrote:

> [29] Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".
>
> …
>
> [63] Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.
>
> (Emphasis added)

[286] I draw two conclusions from *Re B.C. Motor Vehicle Act* relevant to the question at hand.

[287] First, s. 12 of the *Charter* is illustrative of the term *principles of fundamental justice* "in criminal or penal law". In *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, when considering whether the phrase *unusual treatment* took s. 12 outside the criminal, penal and

even quasi-penal contexts and having considered the jurisprudence, Sopinka J. observed that the cases in which the right had been found to apply all involved circumstances where "the individual is in some way within the special administrative control of the state" (at 611). That did not, however, include circumstances where the individual was subject to "the edicts of the *Criminal Code*, as are all other individuals in society" (at 611). Speaking in terms of both specifics and theory, Sopinka J. wrote that "The fact that, because of the personal situation in which [the appellant] finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to 'treatment' at the hands of the state. …There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' under s. 12" (at 611–612).

[288] In *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 , [2020] 3 SCR 426, Abella J. (for herself and Karakatsanis and Martin JJ., with the majority expressing agreement with her discussion of related *Charter* rights) summarised by writing:

> [127] The broad purposes of the legal rights in ss. 7 to 14 were described by McLachlin J. as being two-fold, "to preserve the rights of the detained individual and to maintain the repute and integrity of our system of justice" (*R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, at p. 179). These rights were "designed to ensure that individuals suspected of crime are dealt with fairly and humanely" (Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (6th ed. 2017), at p. 292; see also *Re B.C. Motor Vehicle Act*, at p. 503). They are, as Martin J. has recently put it, "the core tenets of fairness in our criminal justice system" (*Poulin*, at para. 5).
>
> (Emphasis added)

See also *R v Hills*, 2020 ABCA 263, reversed by *R v Hills*, 2023 SCC 2, which contain an extensive discussion of the s. 12 *Charter* right in the context of sentencing under the *Criminal Code*.

[289] Section 197.4 is neither a criminal nor a penal law, nor is it even a quasi-penal law. It does not place individuals "in some way within the special administrative control of the state" in the manner that the legislation did in cases where s. 12 has been found to apply; and there is in Section 197.4 no "active state process in operation, involving an exercise of state control over the individual". Meaning, s. 12 is inapplicable in this context.

[290] In my view, to hold that Section 197.4 is "treatment," without anyone being subject to an active process of state administrative or justice system control, would self-evidently fall outside

the bounds of the proper interpretation of s. 12 of the *Charter*. Moreover, as noted below, a rights-creeping exploration of the limits of s. 12 in this case would make a mockery of the s. 15(1) equality right. As Rothstein J. wrote (in dissent) in *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, "Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about" (at para 217).

[291] Second, if s. 12 were found to be applicable here in the education context, then it would be subsumed in UR Pride's original claim of a violation of the legal rights in s. 7 of the *Charter*, which guarantee has been overridden by the s. 33 declaration. While initial recourse to claim a "specific deprivation" of the legal right under s. 12 was (unavailable or) unnecessary in this case, it is spuriousness to submit that, even though the broader, more-encompassing right under s. 7 has been overridden, the narrower, specific example of a deprivation of s. 7 legal rights not in accordance with the principles of fundamental justice remains operational. Although the courts have entertained overlapping s. 7 and s. 12 claims in the criminal law context (e.g., *R v Bissonnette*, 2022 SCC 23 at paras 20–22, [2022] 1 SCR 597), I am of the view that the alleged infringement of legal rights complained of in this case would be properly addressable under s. 7 of the *Charter* were it not for the invocation of the notwithstanding clause validly derogating from that provision. In dissent in *Drover v Canada (Attorney General)*, 2025 ONCA 468, Miller J.A. instructively opined as follows:

> [69] Section 7 thus takes its colour from the other "Legal Rights" that ss. 8-14 enumerate. Just as s. 7 shapes the interpretation of s. 12 because they share a common heading and broad purpose (*9147-0732 Québec inc.*, at paras. 126-127, and 132-135), so too ss. 8-14 shapes the interpretation of s. 7. *B.C. Motor Vehicle* confirmed as much, stating that ss. 8-14 are "an invaluable key" to the meaning of s. 7's principles of fundamental justice, which in turn shape the scope of the three rights: at p. 503. Thus, because ss. 8-14 concern the administration of justice, s. 7 does too: *Prostitution Reference*, at pp. 1172, 1174-1175; *B. (R.)*, at paras. 23-25.
>
> [70] Accordingly, the assertion offered in dissent in *Gosselin* and *Chaoulli* that the "Legal Rights" heading cannot shape s. 7's scope cannot be correct: *Gosselin*, at para. 316, *per* Arbour J.; *Chaoulli*, at para. 198, *per* Binnie & LeBel JJ. It overlooks another interpretative rule, that Lamer C.J. followed, which requires courts to "take [headings] into consideration" because the framers "systematically and deliberately included [them] as an integral part of the *Charter*": *B. (R.)*, at paras. 24-25, quoting and applying *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 376-377.
>
> [71] Similarly, the argument that using ss. 8-14 to interpret s. 7 departs from *Big M*'s purposive approach to interpretation (*Gosselin*, at para. 316, *per* Arbour J.; *Chaoulli*, at para. 198, *per* Binnie & LeBel JJ.) and [*sic*] *must* be rejected. Far from prohibiting the use

> of the architecture of the *Charter* to interpret particular rights, *Big M* requires it. As Dickson C.J. emphasized, "the purpose of the right or freedom in question is to be sought by reference to … the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": at p. 344; see also *9147-0732 Québec inc.*: at paras. 7 and 13, *per* Brown & Rowe JJ., and at para. 126, *per* Abella J. The purposive approach is not a search for a right's broadest conceivable interpretation: *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at paras. 53-55.

[292] In short, s. 12 of the *Charter* is not engaged by Section 197.4 or, if engaged, the specific legal right s. 12 represents has been overridden through a reference to the general right under s. 7. In either case, UR Pride should not be permitted to challenge indirectly under s. 12 what it is unable to legally challenge directly under s. 7 of the *Charter*. Although s. 12 is not enumerated in Section 197.4, which is a technical issue under *Ford*, the Legislature has nonetheless exempted that provision from the application of the specific example of a deprivation of the "right to life, liberty and security of the person" not in accordance with the principles of fundamental justice that is s. 12 of the *Charter*.

[293] To put this in terms of UR Pride's application to amend its pleadings, the proposed amendment is baseless (frivolous) because s. 12 does not apply and, in any event, the Legislature, by validly derogating from s. 7 of the *Charter*, has overridden the specific illustration of the s. 7 right under s. 12 of the *Charter.* Either way, the proposed amendment ought to have been rejected.

b. Permitting s. 12 claims would blur *Charter* rights and freedoms

[294] UR Pride's proposed amendment is not saved by any argument that s. 15(1) equality rights – "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination" – may also be found in the specific deprivation of the legal right under s. 12 of the *Charter* – "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

[295] First, setting to the side the fact that the legal right under s. 12 is not engaged here, it cannot be argued that discriminatory state action, which expressly lies at the heart of s. 15(1) of the *Charter*, is the same as or analogous to "cruel and unusual treatment or punishment", which is the focal point of s. 12, so as to give rise to a potential claim.

[296] Second, although undetermined, it seems more than probable that, but for the s. 33 declaration it contains, Section 197.4 would engage most strongly with the rights of individuals

under s. 15(1) of the *Charter*, which the *Charter* heading describes as "equality before and under law and equal protection and benefit of law", as discrimination based on "gender identity" or as "gender-related" discrimination (both of which terms are used in s. 197.4(1) of *The Education Act, 1995*). Whether an infringement of s. 15(1) of the *Charter* by Section 197.4 could be justified under s. 1 of the *Charter* is the central issue that UR Pride seeks to pursue in this litigation and that Saskatchewan seeks to avoid debating outside the Legislative Assembly by invoking s. 33 of the *Charter*.

[297] As noted, UR Pride claims that Section 197.4 is a limit on the rights of individuals guaranteed by ss. 7 and 15 of the *Charter*. It chose not to make claims under s. 2 and makes no claim under s. 28. The claims it made are unquestionably tied to the interpretation in the jurisprudence of the two *Charter* rights in question, namely, ss. 7 and 15(1). Moreover, the Legislature has indicated, with the enumeration of ss. 2, 7 and 15 of the *Charter* in Section 197.4, its "understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions" ((*Toronto (City)* at para 60; *The Education Act, 1995*, s. 197.4(3)); see also Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Gregoire Webber and Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge UK: Cambridge University Press, 2019) 209 at 232). Put another way, the validity of the interaction between Section 197.4 and *Charter* rights is recognised by all involved as appropriately playing out under ss. 7 and 15(1), which are, at present, isolated from judicial review. This fact exenterates all merit from UR Pride's application to add claims under s. 12 of the *Charter*.

[298] Even assuming that s. 12 of the *Charter* were applicable in the context of Section 197.4 (which I do not accept), that fact would not assist with clearing the not-frivolous barrier to the success of UR Pride's amendment application. That is so because, if the issue of whether Section 197.4 is "cruel and unusual treatment or punishment" were debated and ruled upon and then – if necessary – justified (or not) as a reasonable limit on s. 12 of the *Charter*, a judicial declaration as to the content and outcome of that inquiry (regardless of result) would transgress the rule of law. The transgression would result from the fact that the analysis and declaration would occur without addressing whether Section 197.4 limits and is justifiable as a limit on ss. 7 and 15(1) *Charter* rights. Because it would ignore plainly more-applicable *Charter* rights, such a

declaration would in fact contradict the constitutional-dialogue purposes of judicial review, side-step the principles of declaratory relief and the doctrine of mootness, and result in an end-run around s. 33 of the *Charter*.

[299] Section 33 of the *Charter*, when validly invoked, closes judicial eyes to the written text of certain parts of our Constitution. Thus, UR Pride's lately found conception of the scope or content of s. 12 would render those constitutional rights enumerated in Section 197.4 redundant "and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco* at para 65). In that the proposed claims are an invitation to the courts to dispense with the written text of directly applicable provisions of the Constitution, the invitation must be declined. The rule of law provides a compelling reason to insist upon the maintenance of the primacy of ss. 7 and 15(1) in these circumstances.

[300] Put another way, what productive or democratic use could the parties, the courts, legal scholars, the electorate or democratically elected representatives make of a declaration of validity or invalidity that does not take into account the very text that "promotes legal certainty and predictability, and … provides a foundation and a touchstone for the exercise of constitutional judicial review" (*Reference re Secession of Quebec* at para 53)? For the Court of King's Bench to consider a strained, unstructured and politically tactical whack-a-mole allegation that Section 197.4 infringes the legal right under s. 12 of the *Charter* while being legally blinded to more-applicable but overridden rights would make a mockery of the legitimacy of the *Charter*.

[301] The rule of law "requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (*Imperial Tobacco* at para 67). The rule of law insists that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (*Imperial Tobacco* at para 66). As taught in *Toronto (City)*, this statement should be understood "as covering all possible bases for claims of right (i.e., 'unjust or unfair' or *otherwise normatively deficient*)" (at para 59; emphasis in original).

[302] Permitting the proposed amendment would be to lose sight of the fact that the public's true protection from the arbitrary use of the s. 33 legislative override power is the ballot box, as provided by ss. 3 to 5 of the *Charter*, which are not subject to it. The courts should have confidence

in the democratic process of elections to deal with arbitrary or impolitic use of the notwithstanding clause. That process has played out in this case – where members of the Legislative Assembly of Saskatchewan were put to seek re-election subsequent to the hearing of this appeal but which did not result in a change in government (for other examples of electorate response and varied uses of s. 33, see *Charter Dialogue*; and Newman at 81—82; and see *Hak CA* at para 412).

[303] The majority reasons in *Toronto (City)* criticised the invalidation of legislation that, while it might not be outright constitutionally invalid because s. 33 of the *Charter* had been invoked, still undermined democratic values or a sense of fairness. That criticism is equally levelled at arguments that Section 197.4 breaches s. 12 of the *Charter*. The belief in the application of s. 12 in the instant context fairly represents its proponent's response to Saskatchewan's invocation of s. 33, but it does not fit anywhere in the Constitution or the jurisprudence of which I am aware. Nor does it follow that, if the courts cannot see ss. 2, 7 and 15, they must focus their attention elsewhere. UR Pride's arguments would not be strengthened by pleading the more amorphous allegation that their claims of infringement properly lie under s. 12 of the *Charter*.

[304] All of which is to say that, if UR Pride must seek to find shelter from this legislation in far-off and uncharted waters of the Constitution because all the home ports are inaccessible, it misunderstands the democratic process and downgrades the importance of holding a government responsible to the will of the electors. As is obvious, I do not consider the proposed amendments to show a new or better way to challenge this legislation, but rather they represent a needless and fruitless departure from a known and charted course that has served us well in the past.

[305] In the result, I find that there is no basis to challenge the validity of Section 197.4 under s. 12 of the *Charter*.

3. Conclusion on the question of UR Pride's proposed amendments to its originating application

[306] From *Re B.C. Motor Vehicle Act*, s. 12 of the *Charter* is understood as being principally illustrative of a legal right in the context of "criminal or penal law", and Section 197.4 is neither a criminal nor a penal law. As s. 12 does not apply in the context of Section 197.4, the proposed claim should not have been permitted.

[307] Furthermore, were the Court of King's Bench to rely not on ss. 7 and 15 of the *Charter* but instead upon s. 12 to declare Section 197.4 invalid, the legislative override preserved by s. 33 of the *Charter* "would effectively be undone" by undermining what the Legislature has indicated is its "understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions" (*Toronto (City)* at para 60). Not only would this eviscerate the s. 33 override, it would also blur the delimitation of ss. 7 and 15(1) rights chosen by our constitutional framers. Therefore, by allowing s. 12 claims to proceed, when ss. 7 and 15(1) claims cannot, would be to destabilise the legitimacy of the *Charter* and transgress the rule of law. For these reasons, the amendments should have been rejected.

C. The Chambers judge erred by failing to strike UR Pride's originating application under the doctrine of mootness

1. UR Pride's claims are moot

[308] In brief terms, *Borowski* holds that the courts must refrain from deciding questions or ruling on debates where that will have no practical or concrete effect – i.e., "when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties" (at 353). When, in exceptional circumstances, it is in the interests of justice to do so, a court may exercise its discretion and answer such a question provided there is "the presence of an adversarial context" and concerns of judicial economy permit it (*Doucet-Boudreau* at para 18). However, a court must also "be sensitive to its role as the adjudicative branch in our political framework" (at para 18). A court may not cavalierly decide to determine the merits of a moot matter; it must proceed carefully and with restraint when asked to answer a moot question.

[309] As was the case in *Hak CA*, the question of whether Section 197.4 unjustifiably violates legal and equality rights of individuals is theoretical and moot since any answer that could be given by the courts would "have no concrete legal effect, because the Act would still have force and effect notwithstanding any infringement of these rights", "have no useful impact on the rights alleged to have been infringed", and "change nothing regarding the Act's application or the legal situation of those who are and will continue to be subject to it" (at para 379).

[310] For the reasons given in respect of the issue of jurisdictional error, UR Pride's claims are moot.

2. Declaratory relief is precluded under the doctrine of mootness in these circumstances

[311] As I interpret *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165, the Supreme Court effectively closed the door to the exercise of the courts' discretion to grant declaratory relief in the circumstances of this matter when it said:

> [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*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at pp. 830-33.
>
> (Emphasis added)

[312] Maxime St-Hilaire and Xavier Foccroulle Ménard in "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 Const Forum Const 38 at 44–46), put forward the argument that, where the notwithstanding clause has been invoked, "the courts have no jurisdiction to rule on the relationship between two legal norms, one of which, in this case a constitutional right, has been validly excepted from with respect to the other by virtue of an authorization expressly provided for in the supreme law". Such a question, they posit, "is, indeed, theoretical". I agree.

[313] The effect of the notwithstanding clause, which is to temporarily reinvigorate parliamentary supremacy and thereby to suspend judicial-review jurisdiction, cannot be disregarded when assessing the criteria governing the exercise of discretion to determine a moot matter. In cases such as this, the fact that the debate about a constitutional question is theoretical or hypothetical removes, in my view, any residual discretion on the part of the courts to answer the question under the doctrine of mootness. This conclusion follows from *Hak CA* and three decisions of the Supreme Court.

[314] In *Hak CA*, the Québec Court of Appeal criticised the concept of a "private reference" case (i.e., where a judge carries out an advisory function as opposed to an adjudicative one), critiquing

such a court for "departing from its judicial role and overstepping 'its proper law-making function' by acting in an essentially advisory manner, as if it were seized of 'a private reference', which is not appropriate" (at paras 398–401, citing *Borowski* at 362, 365 and 367). In this province, a process allowing the executive branch of government to obtain advisory opinions from the judicial branch exists under *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, but UR Pride is not entitled to avail itself of that procedure. The exclusiveness of that statutory regime precludes a court from mimicking its procedure in civil litigation by providing, without the jurisdiction to grant declarative relief, what can only be described as a judicial advisory opinion. The prospective use of s. 33 of the *Charter* means the judgment of the court would not affect the *Charter* rights alleged to have been infringed, or the application of Section 197.4, or the practical and legal circumstances of individuals who are subject to it.

[315] In *Reference re Secession of Quebec*, the Supreme Court commented on its advisory role in true reference cases versus its adjudicative role in civil litigation in response to a challenge by *amicus curiae* to the justiciability of the secession questions, stating (at para 25):

> In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.
>
> (Emphasis added)

[316] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11, [2016] 1 SCR 99, it was said, with respect to the residual discretion to grant declaratory relief in a moot matter, that:

> …The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342".

[317] In *Borowski*, the Court wrote (at 362):

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing

> judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 67.)
>
> (Emphasis added)

[318] The present matter matches each of the contexts referred to in the foregoing cases. Saskatchewan has legislatively overridden the rights at issue temporarily rendering questions about the constitutionality of Section 197.4 outside the courts' jurisdiction and a theoretical or hypothetical issue. Therefore, the Court of King's Bench, if it were to decide to pronounce judgment on those questions in the absence of jurisdiction and of a live dispute affecting *Charter* rights, and possibly without full argument, would be undoubtedly intruding into the role of the legislative branch (*Borowski* at 362).

[319] In this context, there is no room to exercise the courts' discretion to decide moot claims that seek only the extra-jurisdictional granting of declaratory relief about a theoretical infringement of *Charter* rights.

3. The criteria for the exercise of judicial discretion to hear moot claims have not been satisfied

[320] With regard to the speculative aspect of Saskatchewan's continued participation in this litigation, the practical utility of hearing this matter at this time is questionable at best. As noted, in *Borowski* the Supreme Court wrote that "[t]he requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" (at 359).

[321] I find it difficult to see how it could be in the interests of justice to answer a moot question if it is possible there may not be a full debate on that question. The rule of law requires more than a ruling based on incomplete argument that fails to address essential issues. If Saskatchewan chooses not to address whether Section 197.4 infringes rights that would be guaranteed by the *Charter* but for Saskatchewan's invocation of s. 33, while that question arguably remains debatable, UR Pride would be without an adversary with whom to debate. Where one side does not participate in a debate for a legally valid reason, what utility is there in its resolution? The

question, and any discussion about it, would be entirely theoretical or hypothetical and, as the Québec Attorney General remarked in its arguments in *Hak CA*, "would really only address the appropriateness of the Act, a subject that falls outside the scope of judicial scrutiny" (at para 387).

[322] Judicial economy tips the scales farther away from the exercise of discretion to hear this moot matter, regardless of whether Saskatchewan participates. Despite the effluxion of considerable time since its commencement, the litigation is at an early stage. No evidence has been submitted. No argument has been made. Indeed, there is no evidentiary base upon which to form an argument for or against infringement or justification. Although the presumption of constitutional validity is not likely in play (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] SCR 110 at para 16; Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, loose-leaf (2024-1) 5th ed, vol 2 (Toronto: Thomson Reuters, 2007) at §38:5), it also cannot be taken that infringement or non-infringement is self-evident or, if a limit is found, that it is patently unjustifiable. There is no guidance provided by a court whose decision is based on an incomplete record and no adversarial debate. Nothing in the law suggests that the Court of King's Bench would be doing service in the interests of justice by giving half-answers to moot questions.

[323] If Saskatchewan participates, it is relevant that any decision in this matter would be based on the current state of the law but its value as precedent would be in limbo until the s. 33 declaration expired without renewal and Section 197.4 remained law. Moreover, while lacking the force of precedent, the decision would still be subject to being distinguished by events and jurisprudence arising during that interregnum. It may never have value as a precedent because much may happen in the law and society between the decision and the expiry or revocation of the invocation of s. 33. A decision of that nature does not dispatch uncertainty in the law and would not alleviate the "social cost in leaving the matter undecided" (*Borowski* at 362), because the matter would effectively remain undecided. As such, a declaration made at this time would in no way preclude the necessity to revisit the issue in the future. Which is to say that hearing and deciding a moot matter of this nature may very well be a needless expenditure of judicial and party resources from the outset.

[324] The claims made by UR Pride are not "ripe" to be heard and determined due to Saskatchewan's prospective invocation of s. 33 of the *Charter*. The courts cannot engage in a true

disposition of rights during the five-year period that the notwithstanding clause is in effect, and this matter does not, at this time, give rise to the exceptional circumstances that would be conducive to a judicial determination of the moot questions it raises.

[325] In sum, the conditions that would allow the Court of King's Bench to rule on the moot question of whether Section 197.4 complies with ss. 7 and 15(1) of the *Charter* and, if not, whether the limits it imposes are justified, are not satisfied.

4. Conclusion on the question of mootness

[326] For the reasons given by the Chief Justice, I agree that the Chambers judge erred by declining to make a decision on the question of mootness. For the foregoing reasons, I conclude that the courts should not rule on whether Section 197.4 complies with ss. 7 and 15(1) of the *Charter* and on whether the limits it arguably imposes are justifiable. The provision is exempt from the application of s. 1 of the *Charter* and from judicial review for conformity with ss. 2, 7 and 15 of the *Charter*. This also means that determining whether the provision infringes *Charter*-guaranteed legal or equality rights is a moot issue and that a decision in that regard would have no practical legal effect because the provision would continue to apply.

[327] In my assessment, because the conditions that would allow the Court of King's Bench to answer a moot question have not been met, the Court should not rule on this matter.

III. SUMMARY

[328] This appeal is not about the merit of enacting Section 197.4. It is about whether the Saskatchewan Legislature's invocation of the notwithstanding clause of our Constitution precludes judicial review of that provision under s. 1 of the *Charter* to determine whether it imposes a reasonable limit on s. 2 freedoms and ss. 7 and 15 legal and equality rights.

[329] In my judgment, once the legislative branch has prospectively invoked the notwithstanding clause, the judicial branch has no jurisdiction to determine or to declare whether the Act or provision that is subject to a valid declaration under s. 33 of the *Charter* would, but for that declaration, limit the *Charter*-guaranteed rights and freedoms specified in it. A declaration under s. 33 is a legislature's decision to suspend the guarantee in s. 1 of the rights and freedoms that the

declaration identifies as well as to suspend the invalidating effect of s. 52 of the *Constitution Act, 1982*. In sum, the invocation of s. 33 of the *Charter* temporarily ends the debate between the judicial and legislative branches of government, leaving the political or policy merits of the Act or provision in question to the electorate to determine.

[330] I therefore conclude that the appeal must be allowed because the Chambers judge erred under each of the three principal issues raised in this appeal:

(a) he erred by ruling that, even though Saskatchewan had invoked s. 33 of the *Charter*, the courts retain jurisdiction to determine and declare whether Section 197.4 unreasonably limits the legal and equality rights under ss. 7 and 15 of the *Charter*;

(b) he erred by granting UR Pride leave to amend its originating application to plead that Section 197.4 violates the legal right under s. 12 of the *Charter*; and

(c) he erred by failing to strike UR Pride's originating application under the doctrine of mootness.

[331] In the result, I would set aside the *Chambers Decision*, and, in its place, I would:

(a) strike from UR Pride's originating application all claims for relief in respect of the *Use of Preferred First Name and Pronouns by Students* policy;

(b) grant Saskatchewan's application pursuant to Rule 7-1 of *The King's Bench Rules* for an order declaring that the courts are without jurisdiction to determine or to declare whether Section 197.4 violates s. 7 or s. 15 of the *Charter*; and

(c) deny UR Pride leave to amend its originating application to claim declaratory relief in respect of s. 12 of the *Charter*.

[332] Even though I would allow the appeal and dismiss all of UR Pride's claims against Saskatchewan, I would not award costs against it in the Court of King's Bench or in this Court because the matters at issue involve valid questions about the interpretation of s. 33 of the *Charter*.

"Caldwell J.A."

Caldwell J.A.