

English Translation of the Judgment of the Court

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

Nos.: 500-09-029537-214, 500-09-029539-210, 500-09-029541-216
500-09-029544-210, 500-09-029545-217, 500-09-029546-215
500-09-029549-219, 500-09-029550-217
(500-17-108353-197) (500-17-109731-193) (500-17-109983-190)
(500-17-107204-193)

DATE: February 29, 2024

CORAM: THE HONOURABLE MANON SAVARD, C.J.Q.
YVES-MARIE MORISSETTE, J.A.
MARIE-FRANCE BICH, J.A.

No. 500-09-029537-214
(500-17-108353-197)

WORLD SIKH ORGANIZATION OF CANADA
AMRIT KAUR

APPELLANTS – Intervenors

v.

ATTORNEY GENERAL OF QUEBEC
RESPONDENT – Defendant

and

ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
IMPLEADED PARTIES – Plaintiffs

and

CANADIAN HUMAN RIGHTS COMMISSION
QUEBEC COMMUNITY GROUPS NETWORK
MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC – PDF QUÉBEC
AMNISTIE INTERNATIONALE, SECTION CANADA FRANCOPHONE
LIBRES PENSEURS ATHÉES
IMPLEADED PARTIES – Intervenors

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and
THE LORD READING LAW SOCIETY
IMPLEADED PARTY

No. 500-09-029539-210
(500-17-107204-193) (500-17-108353-197) (500-17-109731-193) (500-17-109983-190)

MOUVEMENT LAÏQUE QUÉBÉCOIS
APPELLANT/INCIDENTAL RESPONDENT – Intervenor
v.

ENGLISH MONTREAL SCHOOL BOARD
MUBEENAH MUGHAL
PIETRO MERCURI
RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs

and
ATTORNEY GENERAL OF QUEBEC
JEAN-FRANÇOIS ROBERGE, in his official capacity
SIMON JOLIN-BARRETTE, in his official capacity
IMPLEADED PARTIES – Defendants

and
ICHRAK NOUREL HAK
NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC
FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
IMPLEADED PARTIES – Plaintiffs

and
CANADIAN HUMAN RIGHTS COMMISSION
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And

QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
FÉDÉRATION DES FEMMES DU QUÉBEC
WOMEN'S LEGAL EDUCATION AND ACTION FUND
INTERVENORS

No. 500-09-029541-216

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THE LORD READING LAW SOCIETY
APPELLANT – Intervenor

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ATTORNEY GENERAL OF QUEBEC
RESPONDENT – Defendant

and

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LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC
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IMPLEADED PARTIES – Plaintiffs

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CANADIAN HUMAN RIGHTS COMMISSION
QUEBEC COMMUNITY GROUPS NETWORK
MOUVEMENT LAÏQUE QUÉBÉCOIS
IMPLEADED PARTIES – Interveners

No. 500-09-029544-210

(500-17-107204-193)

FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
APPELLANT – Plaintiff

v.

JEAN-FRANÇOIS ROBERGE, in his official capacity
SIMON JOLIN-BARRETTE, in his official capacity
ATTORNEY GENERAL OF QUEBEC
RESPONDENTS – Defendants

and

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PUBLIC SERVICE ALLIANCE OF CANADA (PSAC)

IMPLEADED PARTY – Intervenor

and

**CANADIAN HUMAN RIGHTS COMMISSION
QUEBEC COMMUNITY GROUPS NETWORK
MOUVEMENT LAÏQUE QUÉBÉCOIS
THE LORD READING LAW SOCIETY**
IMPLEADED PARTIES

No. 500-09-029545-217
(500-17-109731-193)

**ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
LEGAL COMMITTEE OF THE COALITION INCLUSION QUÉBEC**
APPELLANTS – Plaintiffs

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT – Defendant

and

THE LORD READING LAW SOCIETY
IMPLEADED PARTY – Intervenor

and

**CANADIAN HUMAN RIGHTS COMMISSION
QUEBEC COMMUNITY GROUPS NETWORK
MOUVEMENT LAÏQUE QUÉBÉCOIS**
IMPLEADED PARTIES

and

**CHRISTIAN LEGAL FELLOWSHIP
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Incidental appeal of the English Montreal School Board *et al.*

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SIMON JOLIN-BARRETTE, in his official capacity

APPELLANTS/INCIDENTAL RESPONDENTS – Defendants

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RESPONDENTS – Plaintiffs

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ENGLISH MONTREAL SCHOOL BOARD

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Incidental appeal of the Quebec Community Groups Network

ATTORNEY GENERAL OF QUEBEC
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SIMON JOLIN-BARRETTE, in his official capacity
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ICHRAK NOUREL HAK
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RESPONDENTS/INCIDENTAL IMPLEADED PARTIES – Plaintiffs

and

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JUDGMENT

[1] In a judgment dated April 20, 2021,¹ the Superior Court, District of Montreal (the Honourable Mr. Justice Marc-André Blanchard), declared certain provisions of the *Act respecting the laicity of the State*² of no force or effect under two aspects, otherwise confirming the validity of the *Act*. The following are the relevant conclusions of the judgment (whose scope will be discussed later and whose components will be re-examined in detail):

[TRANSLATION]

FOR THESE REASONS, THE COURT:

[...]

In file 500-17-108353-197 (The Hak file)

[1128] **GRANTS** the application in part;

[1129] **DECLARES** that the first paragraph of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, read in conjunction with the first paragraph of s. 8 of that statute, infringes s. 3 of the *Canadian Charter of Rights and Freedoms*;

[1130] **DECLARES** that this infringement is not justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms*;

[1131] **DECLARES** that the first paragraph of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, is of no force or effect pursuant to s. 52 of the *Canadian Charter of Rights and Freedoms*;

[1132] With legal costs, including the costs of experts;

[1133] **DISMISSES** the other applications and interventions;

[1134] Without legal costs.

¹ *Hak c. Procureur général du Québec*, 2021 QCCS 1466 [“Trial Judgment”].

² CQLR, c. L-0.3 [“Act”].

In file 500-17-109731-193 (The Lauzon file)

[1135] **DISMISSES** the application and intervention;

[1136] Without legal costs.

In file 500-17-109983-190 (The English Montreal School Board file)

[1137] **GRANTS** the application in part;

[1138] **DECLARES** that the first paragraph of s. 4, ss. 6, 7, 8, 10, the first and second paragraphs of s. 12, ss. 13, 14 and 16, read in conjunction with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, infringe s. 23 of the *Canadian Charter of Rights and Freedoms*;

[1139] **DECLARES** that these infringements are not justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms*;

[1140] **DECLARES** that the first paragraph of s. 4, ss. 6, 7, 8, 10, the first and second paragraphs of s. 12, ss. 13, 14 and 16, read in conjunction with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, are of no force or effect pursuant to s. 52 of the *Canadian Charter of Rights and Freedoms* as regards any person, whether natural or legal, entitled to the guarantees under s. 23 of said Charter;

[1141] With legal costs, including the costs of experts, for the plaintiffs.

In file 500-17-107204-193 (The FAE file)

[1142] **DISMISSES** the application and intervention;

[1143] Without legal costs.

[2] The Attorney General of Quebec as well as Mtre Simon Jolin-Barrette, in his capacity as Minister of Immigration, Diversity and Inclusiveness (as he then was), and Mr. Jean-François Roberge, in his capacity as Minister of Education (as he then was),³ appeal from the conclusions set out in paragraphs 1128 to 1132 of the Trial Judgment (conclusions pertaining to the inoperability of paragraph 1 of Schedule III of the *Act* in conjunction with s. 8 para. 1 of the *Act*, in light of s. 3 of the *Canadian Charter of Rights*

³ The Attorney General and Ministers Jolin-Barrette and Roberge are hereinafter collectively referred to as the "AGQ".

*and Freedoms*⁴). The President of the National Assembly, François Paradis (as he then was),⁵ intervenes before this Court on this subject, submitting various arguments pertaining to parliamentary privilege, which the Trial Judgment discussed in connection with the debate regarding s. 3 of the *Canadian Charter*.

[3] The AGQ also appeals from the conclusions set out in paragraphs 1137 to 1141 of the Trial Judgment (conclusions pertaining to the inoperability of certain provisions of the *Act* in light of the rights guaranteed by s. 23 of the *Canadian Charter*). The Mouvement laïque québécois⁶ also appeals from these conclusions, as does the organization Pour les droits des femmes du Québec – PDF Québec.⁷

[4] Under various angles, the following persons or groups of persons also appeal the other conclusions of the Trial Judgment, which dismissed all or part of their recourses or interventions:

- Fédération autonome de l'enseignement;⁸
- Ichrak Nourel Hak, the National Council of Canadian Muslims and the Corporation of the Canadian Civil Liberties Association;⁹
- Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and the Legal Committee of the Coalition Inclusion Québec;¹⁰
- the World Sikh Organization of Canada and Amrit Kaur;¹¹
- The Lord Reading Law Society.¹²

[5] The English Montreal School Board, Mubeenah Mughal and Pietro Mercuri¹³ as well as the Quebec Community Groups Network¹⁴ also appeal by way of incidental appeal.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*“Canadian Charter”* or *“Charter”*, depending on the context].

⁵ Hereinafter referred to as the “President”.

⁶ Hereinafter referred to as the “MLQ”.

⁷ Hereinafter referred to as “PDF Québec”.

⁸ Hereinafter referred to as the “FAE”.

⁹ Hereinafter collectively referred to as the “Hak Group”.

¹⁰ Hereinafter collectively referred to as the “Lauzon Group”.

¹¹ Hereinafter collectively referred to as the “Kaur Group”.

¹² Hereinafter referred to as “Lord Reading”.

¹³ Group hereinafter referred to as the “EMSB”.

¹⁴ Hereinafter referred to as the “QCGN”.

[6] Some of the appellants or incidental appellants are concurrently impleaded parties in one another's files. Lastly, the other parties that have come before the Court are there only as impleaded parties or intervenors (the President, the Fédération des femmes du Québec and the Women's Legal Education and Action Fund,¹⁵ the Canadian Human Rights Commission,¹⁶ the Quebec English School Boards Association,¹⁷ Amnistie Internationale, section Canada francophone,¹⁸ the Public Service Alliance of Canada¹⁹ and the Christian Legal Fellowship²⁰).

[7] There is no need, at this point, to set out the details of each of the appeals, incidental appeals and interventions nor to immediately describe the various points of view argued by each party. Suffice it to say, for now, that the debate on appeal is, for the most part, an echo of the debate that took place before the Superior Court, bolstered by the participation of new intervenors and augmented by additional arguments regarding the errors which, as the various parties contend, are allegedly found in the Trial Judgment. Moreover, as we will see, although the parties can be divided into two groups — for or against the *Act* — the approaches sometimes differ significantly among the members of a given group, who have submitted a variety of grounds of appeal. It is therefore simpler to provide the details later, within each of the sections of the Court's analysis set out below.

[8] It is worth noting immediately, however, that such analysis will lead to a partial reversal of the Trial Judgment. In that regard, the Court, like the trial judge, is of the opinion that:

- the *Act* is valid with respect to the constitutional division of powers set out in the *Constitution Act, 1867*;²¹
- the *Act* does not offend the unwritten principles or the architecture of the Canadian Constitution, nor does it offend any pre-Confederation statute or principle having constitutional status;
- ss. 33 and 34 of the *Act*, which, respectively, override ss. 1 to 38 of the *Charter of Human Rights and Freedoms*²² and ss. 2 and 7 to 15 of the *Canadian Charter*, comply with the notwithstanding clauses provided for in those charters (s. 52 of the former and s. 33 of the latter), provisions whose

¹⁵ Hereinafter collectively referred to as the "FFQ".

¹⁶ Hereinafter referred to as the "CHRC".

¹⁷ Hereinafter referred to as the "QESBA".

¹⁸ Hereinafter referred to as "Amnistie".

¹⁹ Hereinafter referred to as "PSAC".

²⁰ Hereinafter referred to as the "Fellowship".

²¹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 ["CA 1867"].

²² CQLR, c. C-12 ["Quebec Charter"].

use is subject only to the requirements of form set out in *Ford v. Quebec (Attorney General)*,²³ which requirements have been met in the case at bar;

– given these valid override provisions, the *Act* is protected from the judicial scrutiny thereof which could otherwise have been carried out under ss. 2 and 7 to 15 of the *Canadian Charter* and ss. 1 to 38 of the *Quebec Charter*, and there is no reason to examine the matter or consider a declaratory judgment or any other redress;

– the *Act* does not infringe s. 28 of the *Canadian Charter* or s. 50.1 of the *Quebec Charter* (sexual equality);

– s. 6 and paras. 1 and 6 of Schedule II of the *Act* (prohibition on the wearing of religious symbols by the President/Vice-Presidents of the National Assembly and the Minister of Justice) do not infringe s. 3 of the *Canadian Charter* (right to be qualified for membership in a legislative assembly);

– s. 8 para. 1 of the *Act*, as it applies to the persons referred to in the first paragraph of Schedule III of said statute (obligation for members of the National Assembly to have their face uncovered when exercising their functions), infringes the rights entrenched in s. 3 of the *Canadian Charter*, without being justified under s. 1 thereof, and it must consequently be declared of no force or effect under s. 52 of the *Constitution Act, 1982*;²⁴

– the enumerations carried out by the government before the *Act's* adoption do not depart from any constitutional or legislative rule.

[9] In the Court's opinion, however, the *Act* does not infringe s. 23 of the *Canadian Charter*, nor does it affect the educational language rights that provision guarantees to Canadian citizens belonging to Quebec's English linguistic minority. The Trial Judgment will therefore be reversed on that point.

[10] Before presenting the Court's reasons for arriving at these conclusions, a few preliminary observations are in order, followed by a description of the *Act's* content and a summary of the Trial Judgment.

²³ [1988] 2 S.C.R. 712 [*Ford*].

²⁴ Being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [*CA 1982*].

I. PRELIMINARY OBSERVATIONS

[11] That the *Act* is controversial obviously comes as no surprise. Indeed, it gives rise to a genuine and legitimate debate, to which the recent remarks of our colleague, Mainville, J.A., in *A. B. c. Procureur général du Québec*²⁵ can be applied:

[TRANSLATION]

[38] As I pointed out in another context, when questions arise, as here, about the relationship between the state and religions, with respect to which deep differences of opinion can reasonably exist in a free and democratic society, the courts should tread with care and circumspection, given the diversity of approaches to these questions and the difficulty in arriving at a uniform understanding of the meaning of religion in society. The role and impact of religion in society, as well as the forms of public expression of religious convictions and its place within public institutions, differ depending on time and context. They vary based on shifting sociological and ideological factors, national traditions and the requirements imposed by the protection of the rights and freedoms of others and the preservation of public order in a given society. Moreover, the concept of religious symbolism and its place in the public sphere are not viewed in the same way by every society. Divergent visions of these issues can therefore exist within a given society and from one society to another, without necessarily resulting in the conclusion that one vision rather than another inevitably leads to the violation of freedom of religion.

[Reference omitted]

[12] While there is heated public debate about the *Act's* impact on the freedoms of religion and expression, and about the very scope of these freedoms, the debate is just as heated regarding the right to equality, particularly sexual equality.

[13] One can certainly have many different views on the *Act* and its appropriateness, whether from a political, sociological or moral perspective. This judgment, however, will evidently consider only the legal aspect of the debate. Like the Superior Court before it, the Court here is acting as part of a process — one initiated by various groups of litigants — to examine the *legality* of the *Act*, and it is not ruling on the wisdom of enacting it. The Court's scope of intervention is therefore limited.

[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

²⁵ 2023 QCCA 999 (judge alone).

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.

II. OVERVIEW OF THE DISPUTE

A. Overview of the Act

[15] The *Act respecting the laicity of the State*, as passed and assented to on June 16, 2019, contains thirty-six sections and three schedules, all preceded by an eight-paragraph preamble. It is divided into six chapters:

- the first (ss. 1 to 5) asserts the laicity of the Quebec State and specifies the scope of the *Act* and the general obligations arising therefrom;
- the second contains a single provision (s. 6), which prohibits the persons listed in Schedule II of the *Act* from wearing a religious symbol in the exercise of their functions;
- the third (ss. 7 to 10) requires the persons listed in Schedules I and III of the *Act* to exercise their functions with their face uncovered (with some exceptions) and also obliges those receiving public or parapublic services to uncover their face, temporarily, for identification or security reasons;
- the fourth (ss. 11 to 17), under the heading “MISCELLANEOUS PROVISIONS / DISPOSITIONS DIVERSES”, provides that the *Act* prevails over previous and subsequent legislation (with some exceptions), deals with the application of the *Act*, prohibits accommodations relating to ss. 6 and 8, and specifies the scope or effects of certain standards;
- the fifth (ss. 18 to 30) amends the *Quebec Charter* and the *Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*;²⁶
- the sixth and final chapter contains transitional and final provisions (ss. 31 to 36), two of which are of particular importance for purposes of this dispute: through ss. 33 and 34 the legislature exercises the override power available to it under s. 52 of the *Quebec Charter* and s. 33 of the *Canadian Charter*.

²⁶ CQLR, c. R-26.2.01 [“*State Religious Neutrality Act*”].

[16] We turn now to a more detailed examination of these provisions.

[17] It should be noted that, with some exceptions, the following paragraphs will not reproduce the provisions of the *Act*, whose text is, however, appended to this judgment.

1. Preamble

[18] The preamble, whose legal effect is limited, as it is primarily interpretative, sets out the reasons that informed the drafting of the *Act* as well as its purpose. It therefore includes a declaration of legislative intent — that is, the premise that forms the basis for the *Act* and is intended as a compromise between collective rights, individual rights and the desire to strengthen the principle of state religious neutrality which, using the expression “State laicity”, is elevated to the rank of paramount component of Quebec’s legal order.

[19] How does the *Act* implement this stated intent?

2. Chapter I: Affirmation of the Laicity of the State (ss. 1 to 5)

[20] Sections 1 and 2 of the *Act* first establish the very principle of laicity of the Quebec State and define it:

- | | |
|---|---|
| 1. The State of Québec is a lay State. | 1. L’État du Québec est laïque. |
| 2. The laicity of the State is based on the following principles: | 2. La laïcité de l’État repose sur les principes suivants : |
| (1) the separation of State and religions; | 1° la séparation de l’État et des religions; |
| (2) the religious neutrality of the State; | 2° la neutralité religieuse de l’État; |
| (3) the equality of all citizens; and | 3° l’égalité de tous les citoyens et citoyennes; |
| (4) freedom of conscience and freedom of religion. | 4° la liberté de conscience et la liberté de religion. |

[21] *A priori*, these two provisions substantially reflect the current state of the law, except as regards one point, where they establish an unprecedented formal link.

[22] Indeed, the various federal and provincial constituent states of the Canadian federation are lay states (even though this adjective is not often used to describe them), that is, they are [TRANSLATION] “independent from the clergy and the church, and more generally from any religious denomination”.²⁷ Admittedly, the expression “separation of church and state” (or “separation of state and religions”) is not common in Canadian and Quebec law, but this separation represents two realities:²⁸ there is no official religion in Canada or in the provinces²⁹ and, in the exercise of their powers and functions, state entities no longer have operational ties with religions or their institutions (although some intersecting points remain³⁰). They are subject to a now well-established duty of religious neutrality.³¹ That duty results “from an evolving interpretation of freedom of conscience and religion”³² and coexists with that freedom, which is now enshrined in the Canadian and Quebec charters. This religious neutrality requires the state to respect the exercise,

²⁷ *Trésor de la langue française informatisé*, “*laïque*” [“lay”] (B-1), online: TLFi (atilf.fr).

²⁸ See: Rosalie Jukier and José Woehrling, “Religion and the Secular State in Canada”, in Javier Martínez-Torrón & W. Cole Durham, Jr. (General Reporters) and Donlu D. Thayer (ed.), *Religion and the Secular State: National Reports*, Madrid, Servicio publicaciones facultad derecho Universidad Complutense Madrid, 2015, 155, p. 159: “In Canada, neither state neutrality in matters of religion, nor the separation of church and state, is explicitly affirmed in the Constitution, but the courts have gradually inferred such principles from freedom of religion and the prohibition against religious discrimination.”

²⁹ This had already been pointed out by Taschereau, J. in *Chaput v. Romain*, [1955] S.C.R. 834, p. 840, cited in *Saumur v. Procureur général du Québec*, [1964] S.C.R. 252, p. 256, and in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, pp. 324-325.

³⁰ For example, as the British sovereign, the King of Canada, who is Canada’s head of state, is the head of a church, at least in name. As a further example, in matters of education, s. 93 of the *CA 1867* confers rights based on religious attributes. Pursuant to a 1997 constitutional amendment, which inserted s. 93A in the *CA 1867*, s. 93 no longer applies to Quebec.

³¹ See, for example: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, paras. 66-67 (the latter paragraph refers, in particular, to the “clear distinction between churches and public authorities”).

Admittedly, the preamble to the *Canadian Charter*, which is Part I of the *CA 1982*, states the following:

Whereas Canada is founded upon	Attendu que le Canada est fondé
principles that recognize the	sur des principes qui reconnaissent la
supremacy of God and the rule of	suprématie de Dieu et la primauté du
law: [...].	droit : [...].

The preamble to the *Canadian Bill of Rights*, S.C. 1960, c. 44, also mentions the supremacy of God. The *CA 1867* contains no such reference, nor does the *Quebec Charter*.

In *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 [“*Saguenay*”], the majority was of the view that the reference to the “supremacy of God” in the *Canadian Charter* does not authorize the state “to consciously profess a theistic faith” (para. 147), that it “cannot be relied on to reduce the scope of a guarantee that is expressly provided for in the charters” (para. 148) and that it does not limit the scope of freedom of conscience and religion, nor does it “have the effect of granting a privileged status to theistic religious practices” (para. 149). This reference, therefore, does not in any way reduce the state’s obligation of religious neutrality nor the principle of separation of church and state.

On this topic, see also: Bertrand Lavoie, “Neutralité et culture publique commune : quelle place pour la religion au sein des institutions publiques?”, (2019) 38:2 *Politique et Sociétés* 57, p. 71 and footnote 28.

³² *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 71 (majority reasons of Gascon, J.), citing, in particular, the reasons of LeBel, J. in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, paras. 66-67.

on a full and equal basis, of individuals' freedom of religion, but, at the same time, prevents it from engaging in any religious practice or adopting or favouring a belief, including through its representatives.³³ In this respect, one can indeed speak of the separation of church and state.³⁴

[23] Where the *Act* breaks new ground, perhaps, is by expressly including “the equality of all citizens / *l'égalité de tous les citoyens et citoyennes*” as one of the constituent principles of laicity. The principle of equality, a fundamental characteristic of democratic societies, is already guaranteed in our legal system by s. 15 of the *Canadian Charter* (as regards the state) and by s. 10 of the *Quebec Charter* (this section guarantees the full and equal exercise of the rights recognized by that charter and applies to state actors as well as to private actors). The likely reason the *Act* links the principle of equality to laicity lies in the tensions between religious precepts and equality, particularly sexual equality and, more generally, gender equality or gender identity equality.

[24] Following this affirmation of laicity and the principles on which it is based, s. 3 of the *Act*, which is a general provision, requires all of the state's constituent institutions (that is, parliamentary, government and judicial institutions) to comply with s. 2 (and implicitly with s. 1) “in fact and in appearance / *en fait et en apparence*”. Section 4, which establishes the right of every person to lay state institutions and public services, adds thereto the requirement to comply with s. 6 of the *Act* (prohibition on the wearing of religious symbols by certain persons)³⁵ and the duty of neutrality set out in the *State Religious Neutrality Act*. Subject to some limited exceptions, that duty primarily requires public servants to act, in the exercise of their functions, without favouring or hindering any person because of the person's religious affiliation or non-affiliation or because of their own religious convictions or beliefs or those of a person in authority.³⁶

[25] While s. 5 of the *Act*, which concludes its Chapter I, does not call into question the application of the principle of laicity to the courts listed in s. 3 para. 2(3) of the *Act*, it leaves it to the Conseil de la magistrature³⁷ to establish the rules for implementing that principle with respect to judges of the Court of Québec, the Human Rights Tribunal, the

³³ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 84 (majority reasons of Gascon, J).

³⁴ In Canada, however, the separation of church and state does not prevent certain interconnections (not all of which are unanimously accepted, as a matter of fact): for example, in Quebec, the state continues to subsidize private religious schools that meet the requirements of the *Act respecting private education*, CQLR, c. E-9.1, while making their educational program subject to the multiple requirements of the *Education Act*, CQLR, c. I-13.3. It must subsidize them equally, however, without favouring worshippers from any one persuasion, including with respect to private lay institutions, and vice versa.

³⁵ One might wonder why the legislature saw fit, in s. 4, to order compliance with s. 6 of the *Act*, a provision which would obviously apply to the persons concerned even in the absence of such an enjoinder.

³⁶ See ss. 4 to 7 of the *State Religious Neutrality Act*, provisions whose validity none of the parties in the case at bar is contesting.

³⁷ Entity created by the *Courts of Justice Act*, CQLR, c. T-16, ss. 247ff.

Professions Tribunal and the municipal courts, as well as with respect to presiding justices of the peace. This provision is likely explained by the respect for the constitutional principle of judicial independence,³⁸ on both individual and institutional levels.³⁹ Section 5, however, does not apply to the Court of Appeal or to the Superior Court, which courts are covered only by s. 3 para. 2(3) of the *Act*.⁴⁰ Presumably, the same consideration for judicial independence, coupled with a concern for the constitutional division of powers as regards this subject matter (s. 96 of the *CA 1867*), explains this legislative choice.

3. Chapters II and III: Prohibition on Wearing Religious Symbols (s. 6) and Services With Face Uncovered (ss. 7 to 10)

[26] In its ss. 6 to 10, the *Act* establishes two standards of conduct specifically intended, on the basis of appearance, to ensure the laicity enshrined in its initial provisions.

[27] Thus, s. 6 of the *Act* prohibits certain state representatives, officials or mandataries from wearing religious symbols when they exercise their functions. Moreover, barring exceptions (s. 9), ss. 7 and 8 of the *Act* require the personnel of government departments and of public and parapublic government bodies, as well as members of the National Assembly and other persons who work in the public or parapublic sector, to act with their face uncovered (even where wearing religious symbols is otherwise permitted). In certain specific cases,⁴¹ this obligation may be extended to persons or partnerships that enter into a contract with the state or receive financial assistance from it (s. 10). The *Act* also requires persons who seek a public service to uncover their face if doing so is necessary to allow their identity to be verified or for security reasons (s. 8 para. 2).

[28] As s. 6 is a provision at the very core of this debate, it is useful to reproduce it at this point:

6. The persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions.

A religious symbol, within the meaning of this section, is any object, including clothing, a symbol, jewellery, an

6. Le port d'un signe religieux est interdit dans l'exercice de leurs fonctions aux personnes énumérées à l'annexe II.

Au sens du présent article, est un signe religieux tout objet, notamment un vêtement, un symbole, un bijou,

³⁸ For a discussion of this principle, see: *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, paras. 31-33 (joint reasons of Karakatsanis, Wagner and Côté, JJ., for the Court). See also: below, para. [86].

³⁹ The legislature's desire to respect judicial independence is also evident in s. 12 para. 4 of the *Act*, which excludes "judicial institutions / *institutions judiciaires*" (as well as parliamentary institutions, incidentally) from any ministerial oversight. See below, para. [86].

⁴⁰ These two judicial institutions are also excluded from the oversight scheme established in s. 12 of the *Act*.

⁴¹ See below, para. [37].

adornment, an accessory or headwear, that	une parure, un accessoire ou un couvre-chef, qui est :
(1) is worn in connection with a religious conviction or belief; or	1° soit porté en lien avec une conviction ou une croyance religieuse;
(2) is reasonably considered as referring to a religious affiliation.	2° soit raisonnablement considéré comme référant à une appartenance religieuse.

[29] The definition of religious symbol, the first element guiding the application of this prohibition, is limited to an “object / *objet*” of religious significance, be it clothing, a symbol, jewellery, an adornment, an accessory, headwear or some other item. Thus, it does not extend to physical characteristics, such as a beard, for example, or a tattoo, even where these are religious indicators: the legislature did not want to target something that relates to bodily integrity itself. Moreover, a prohibited object is one that satisfies either of the following conditions: it is worn in connection with a religious conviction or belief or it can reasonably be considered as referring to a religious affiliation. While it cannot be said that this definition will not give rise to debate as to its interpretation, it provides a general idea of the objects the legislature intends to prohibit for purposes of s. 6.⁴²

[30] To properly identify the scope of this provision, however, one must look beyond the mere definition of religious symbol — obviously, the provision must be read in conjunction with Schedule II, which effectively draws up an *exhaustive* list of the persons targeted by the prohibition, namely:

- (1) the President and Vice-Presidents of the National Assembly (the President — or, as a replacement, any of the Vice-Presidents — chairs the meetings of the Assembly, directs its services and represents it⁴³);
- (2) administrative justices of the peace, clerks and sheriffs referred to in the *Courts of Justice Act* or clerks referred to in the *Act respecting municipal courts*,⁴⁴ and bankruptcy registrars;
- (3) members of Quebec’s multi-functional administrative bodies and administrative tribunals ⁴⁵ (entities exercising regulatory and/or adjudicative functions that are specifically state functions);

⁴² This topic will be discussed in paras. [197]ff below.

⁴³ See: *Act respecting the National Assembly*, CQLR, c. A-23.1, particularly ss. 19-24; National Assembly, Directorate forittings and Parliamentary Procedure, *Standing Orders and Other Rules of Procedure*, 43rd Leg., 21st ed. (provisional ed.), September 2023, particularly ss. 1-11.2.

⁴⁴ CQLR, c. C-72.01.

⁴⁵ The complete list of these bodies is set out in para. 3 of Schedule II of the *Act*.

- (4) commissioners appointed under the *Act respecting public inquiry commissions*,⁴⁶ as well as lawyers or notaries acting for such a commission;
- (5) arbitrators (whether dispute or grievance arbitrators) appointed by the Minister of Labour whose name appears on a list drawn up by that minister in accordance with the *Labour Code*⁴⁷ (who, likewise, also exercise adjudicative functions);
- (6) the Minister of Justice and Attorney General of Quebec, the Director of Criminal and Penal Prosecutions, criminal and penal prosecuting attorneys, as well as lawyers and notaries of the state and its various entities (with some exceptions), including legal managers;
- (7) persons who exercise the function of lawyer and are employed by a prosecutor governed by art. 9 para. 2 or 3 of the *Code of Penal Procedure*⁴⁸ (save as excepted) and are acting in criminal or penal matters before the courts or with third persons;
- (8) lawyers and notaries acting before the courts or with third persons pursuant to a legal services contract entered into with various public entities (and who therefore represent those entities — and, consequently, the state — in their dealings with others);
- (9) peace officers who exercise their functions mainly in Quebec; and
- (10) principals, vice principals and teachers of educational institutions under the jurisdiction of a school service centre established under the *Education Act* or under the *Act respecting the Centre de services scolaire du Littora*⁴⁹ (namely, public schools providing preschool, primary and secondary education; teaching staff in private schools offering such programs are not covered, nor are those in CEGEPs and universities).

[31] As can be seen, in the exercise of their functions, the persons listed in Schedule II therefore hold a typically state power or convey a strong embodiment of the state's mission or of the requirements of state neutrality. It is they, and they alone, who are prohibited by s. 6 of the *Act* from wearing religious symbols. Any other person who works for, with or on behalf of the Quebec State has the right to wear religious symbols in the exercise of their functions (subject to the restriction imposed by s. 8 para. 1, below), which, in the legislature's view, is not contrary to state laicity. This is why it has limited the

⁴⁶ CQLR, c. C-37.

⁴⁷ CQLR, c. C-27.

⁴⁸ CQLR, c. C-25.1.

⁴⁹ S.Q, 1966-67, c. 125.

prohibition against such symbols solely to the persons listed in Schedule II of the *Act*. Moreover, s. 6 of the *Act* does not apply to private entities (except insofar as a person from the private sector acts as mandatary of the state in the cases provided for in Schedule II), nor to the conduct of individuals in their private lives. Nor does it apply to the public space in general, where religious symbols may be worn without restriction.

[32] As for the obligation to provide and receive public services with one's face uncovered, it is governed by ss. 7 to 10. We will reproduce only ss. 7 and 8, which are the foundation of this chapter of the *Act*:

7. For the purposes of this chapter, "personnel member of a body" means a member of the personnel of a body listed in Schedule I or a person listed in Schedule III who is considered to be such a member.

8. Personnel members of a body must exercise their functions with their face uncovered.

Similarly, persons who present themselves to receive a service from a personnel member of a body must have their face uncovered where doing so is necessary to allow their identity to be verified or for security reasons. Persons who fail to comply with that obligation may not receive the service requested, where applicable.

For the purposes of the second paragraph, persons are deemed to be presenting themselves to receive a service when they are interacting or communicating with a personnel member of a body in the exercise of the personnel member's functions.

7. Pour l'application du présent chapitre, on entend par « membre du personnel d'un organisme » un membre du personnel d'un organisme énuméré à l'annexe I ainsi qu'une personne mentionnée à l'annexe III qui est assimilée à un tel membre.

8. Un membre du personnel d'un organisme doit exercer ses fonctions à visage découvert.

De même, une personne qui se présente pour recevoir un service par un membre du personnel d'un organisme doit avoir le visage découvert lorsque cela est nécessaire pour permettre la vérification de son identité ou pour des motifs de sécurité. La personne qui ne respecte pas cette obligation ne peut recevoir le service qu'elle demande, le cas échéant.

Pour l'application du deuxième alinéa, une personne est réputée se présenter pour recevoir un service lorsqu'elle interagit ou communique avec un membre du personnel d'un organisme dans l'exercice de ses fonctions.

[33] To fully grasp the scope of these provisions, one must consider Schedules I and III of the *Act*, because the rule set out in s. 8 para. 1 applies only to the persons listed in these Schedules, as s. 7 specifies.

[34] Broadly speaking, it can be said that Schedule I covers all public and parapublic institutions and organizations, from government departments to childcare centres, from state-owned enterprises to municipalities, public transit corporations, school service centres, general and vocational colleges as well as university-level institutions,⁵⁰ and others. The services provided by the “personnel member[s] / *membre[s] du personnel*” of these bodies must be provided by them with their face uncovered.

[35] As for Schedule III, it applies to a variety of persons exercising public or parapublic functions or providing public or parapublic services. For example, these include⁵¹ members of the National Assembly and National Assembly personnel members and Lieutenant-Governor staff members,⁵² elected municipal officers (save as excepted⁵³), members of the board of directors of a school service centre, members of administrative tribunals (including arbitrators referred to in the *Labour Code*), peace officers, as well as physicians, dentists and midwives who practise in a public health institution, and persons recognized as subsidized home educational childcare providers and their personnel.

[36] Consequently, none of the persons referred to in ss. 7 and 8 para. 1 can exercise their functions other than with their face uncovered,⁵⁴ except as provided for in s. 9 (persons whose face is covered for health reasons, because of a handicap or because their functions or tasks require it).

[37] Lastly, s. 10 permits, but does not oblige, the bodies listed in Schedule I as well as the parliamentary institutions defined in s. 3 of the *Act* to require, from any person with whom they enter into a contract or to whom they grant financial assistance, that the services be provided by persons with their face uncovered “if the contract or the granting of financial assistance is for the provision of services that are inherent in the body’s mission or if the services are performed in its personnel’s place of work / *lorsque ce contrat ou l’octroi de cette aide financière a pour objet la prestation de services inhérents à la mission de l’organisme ou lorsque les services sont exécutés sur les lieux de travail du personnel de cet organisme*”. Thus, under these conditions, the subcontracting or outsourcing of public or parapublic services can lead to an extension of the rule requiring services by persons with their face uncovered.

⁵⁰ Namely, the institutions governed, respectively, by the *General and Vocational Colleges Act*, CQLR, c. C-29, and s. 1 paras. 1 to 11 of the *Act respecting educational institutions at the university level*, CQLR, c. E-14.1.

⁵¹ For a complete list of the persons referred to in Schedule III of the *Act*, readers may consult the *Act*, which is appended in its entirety to this judgment.

⁵² Who is, himself, not covered by ss. 7-8 and Schedule III of the *Act*.

⁵³ On this point, see para. 2 of Schedule III.

⁵⁴ It should be noted in passing that Schedules I and III very largely include, under one name or another, the persons referred to in Schedule II. In any event, pursuant to s. 6, these persons are prohibited from wearing a religious symbol covering their face.

[38] As for the obligation imposed by s. 8 paras. 2 and 3 on those *receiving* services offered by the bodies or persons mentioned in Schedules I and III, it is limited: when they present themselves to receive such a service, they must “have their face uncovered where doing so is necessary to allow their identity to be verified or for security reasons / avoir le visage découvert lorsque cela est nécessaire pour permettre la vérification de [leur] identité ou pour des motifs de sécurité”. Once this verification has been completed, or the security requirements have been met, beneficiaries can receive the service with their face covered.

[39] It seems appropriate to point out here, as the parties opposed to the *Act* have submitted, that s. 8 of the *Act* primarily affects women who, due to their religious convictions, wear a niqab or burqa, which clothing is also prohibited under s. 6. It should be noted, however, that except when they exercise functions covered by the *Act*'s schedules, these persons are free to wear such clothing by reason of their religious convictions: indeed, subject to compliance with the rule established in s. 8 para. 2 (which requires only brief unveiling),⁵⁵ women who wear a niqab or burqa are not excluded from places of all kinds where the state is active or offers its services and, as users of these services or as “private players”,⁵⁶ they have full access to the state or “paragovernmental” space. Moreover, they are not excluded from the public sphere in general⁵⁷ — the *Act* shows no interest in that area, nor, for that matter, is it concerned with their private lives.

4. Chapter IV: Miscellaneous Provisions (ss. 11 to 17)

[40] We turn now to the miscellaneous provisions found in ss. 11 to 17 of the *Act*.

[41] The first paragraph of s. 11 reinforces the *Act*'s objectives by ensuring its supremacy over subsequent legislation, unless there is an express legislative exception. The second paragraph qualifies this supremacy with regard to previous legislation: ss. 1 to 3 of the *Act* do not override previous legislation that is contrary thereto.

[42] Sections 12 and 13 set out a framework for the oversight and implementation of the *Act*, but this framework does not apply to parliamentary or judicial institutions.

[43] As for s. 14, it prohibits any accommodation that would derogate from the requirements of ss. 6 and 8 or adapt them to an individual's situation.

⁵⁵ We should perhaps mention the proviso arising from the majority Supreme Court opinion in *R. v. N.S.*, 2012 SCC 72: to the extent specified in that decision and according to the test established therein, women who wear a niqab or burqa could, when appearing as a witness, be required to uncover their face in court, in order to ensure trial fairness. See also: *El-Alloul c. Procureure générale du Québec*, 2018 QCCA 1611.

⁵⁶ Expression used in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 74 (majority reasons of Gascon, J).

⁵⁷ Unlike in France or Belgium, for example.

[44] Sections 15 and 16 stipulate, respectively, that the prohibition on wearing religious symbols is an integral part of the lawyer's or notary's legal services contract mentioned in para. 8 of Schedule II (s. 15), and that no employment contract, collective agreement or group agreement may contain any provision contrary to the *Act*, on pain of nullity (s. 16).⁵⁸

[45] Chapter IV of the *Act* concludes with s. 17, an interpretative provision designed to preserve Quebec's movable, immovable and toponymic heritage, which is marked by a religious history.

5. Chapter V: Amending Provisions (ss. 18 to 30)

[46] The amending provisions of Chapter V of the *Act* will not be discussed, save for those affecting the *Quebec Charter* and s. 1 of the *State Religious Neutrality Act*, as the validity of such amendments was challenged in first instance. Thus, ss. 18 and 19 of the *Act* amend the preamble and s. 9.1 of the *Quebec Charter* by introducing the notion of "State laicity / *laïcité de l'État*", which becomes a principle for interpreting and applying that charter. Section 21 of the *Act* amends s. 1 of the *State Religious Neutrality Act* to ensure consistency between these two statutes.

6. Chapter VI: Transitional and Final Provisions (ss. 31 to 36)

[47] Of the *Act's* six transitional and final provisions, three merit our attention.

[48] Section 31 sets out an exception to the application of s. 6 of the *Act*, by preserving the right of certain persons listed in Schedule II — and, in particular, the teaching personnel referred to in para. 10 thereof — to wear religious symbols in the exercise of the functions they held when the *Act* came into force, for as long as they exercise these functions within the same organization.

[49] Sections 33 and 34, which are based, respectively, on s. 52 of the *Quebec Charter* and s. 33 of the *Canadian Charter*, prescribe the following:

33. This Act and the amendments made by it to the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies apply despite

33. La présente loi ainsi que les modifications qu'elle apporte à la Loi favorisant la neutralité religieuse de l'État et visant notamment à encadrer les demandes d'accommodements pour un motif religieux dans certains organismes s'appliquent malgré les

⁵⁸ One might be tempted to question the usefulness of ss. 15 and 16: the first seems self-evident, but is perhaps intended to avoid questions about the application of s. 6 when the lawyer's or notary's legal services contract does not contain this requirement; the second does not seem necessary in view of s. 62 of the *Labour Code*, the ordinary rules of public law and arts. 1411 and 1499 C.C.Q.

sections 1 to 38 of the Charter of human rights and freedoms (chapter C-12).

articles 1 à 38 de la Charte des droits et libertés de la personne (chapitre C-12).

34. This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

34. La présente loi ainsi que les modifications qu'elle apporte par son chapitre V ont effet indépendamment des articles 2 et 7 à 15 de la Loi constitutionnelle de 1982 (annexe B de la Loi sur le Canada, chapitre 11 du recueil des lois du Parlement du Royaume-Uni pour l'année 1982).

[50] There is no need to comment on these override provisions here, as they will be fully discussed further below.

* * * * *

[51] To conclude this introduction to the *Act*, it is perhaps not inappropriate to note that the issue of state laicity has been the subject of a lengthy social and political conversation in Quebec. That conversation pre-dates the Quiet Revolution (although it effectively gained momentum in the 1960s) and led to the gradual laicization of a Quebec State that had long maintained a close, more or less formal, relationship with the Catholic Church (primarily), particularly in matters of education, where s. 93 of the *CA 1867* offered a guarantee based on a religious division between Catholicism and Protestantism (a division that disappeared in 1997). This transformation of the relationship between the Quebec State and religions is well summarized in the report of the Consultation Commission on Accommodation Practices Related to Cultural Differences, which was co-chaired by Professors Gérard Bouchard and Charles Taylor.⁵⁹

[52] Indeed, it is relevant to mention this report, which was published in 2008, since the *Act* — or at least its broad strokes and terminology — was informed by it: the report uses the concept of “*laïcité*” (the terminology adopted in the *Act*), “understood in the context

⁵⁹ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008 [“Bouchard-Taylor Report”], particularly at pp. 139-140. See also Professor Jocelyn Maclure’s report, in which he also presents a brief history of state laicity in Quebec (Exhibit EMSB-23-48), as well as the first pages of Professor Yvan Lamonde’s report, in which he does the same (Exhibit PGQ-8). The historical facts reported by Professor Jacques Beauchemin regarding the laicization of public elementary and secondary education since the Parent Report are also of interest (independent of his analysis of the effects of teachers wearing religious symbols) (Exhibit IN-MLQ-51).

* TRANSLATOR’S NOTE: The English version of the report uses the term “secularism” where its French version uses the word “*laïcité*”. It makes a point, however, of distinguishing between the societal process of “secularization” and the political-legal process of state “laicization”, which explains the use

of the broader ideal of neutrality to which the State must aspire if it wishes to treat citizens fairly”.⁶⁰ The Bouchard-Taylor Commission, as it came to be known, was established in 2007 in the wake of a series of highly publicized events concerning religious accommodation practices, and it carried out a lengthy investigation at the end of which it proposed, among other things, an “open” state secularism,⁶¹ based on four key principles: the moral equality of persons, freedom of conscience and religion, state neutrality towards religions, and the separation of church and state.⁶² These are the four pillars of laicity as it is defined in s. 2 of the *Act*.

[53] The Bouchard-Taylor Report also suggested that certain agents of the state who occupy “positions that strikingly exemplify State neutrality and whose incumbents exercise a power of coercion”,⁶³ namely the “president and vice-president of the National Assembly, judges and Crown prosecutors, police officers and prison guards”,⁶⁴ abide by a “form of circumspection concerning the expression of their religious convictions”⁶⁵ and refrain (or more precisely, be required to refrain) from wearing religious symbols.⁶⁶ As we know, s. 6 of the *Act* takes up this recommendation, although it has expanded the list of those who must refrain from such religious display by adding a number of persons whom the legislature apparently views as embodying the state, exercising a state power, fulfilling an essentially state mission or being required to display exemplary neutrality in the exercise of their functions. These additions include public elementary and secondary

of the word “laicity” — rather than “secularism” — in the English version of the *Act* where the French version of the *Act* refers to “*laïcité*”.

⁶⁰ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 135.

⁶¹ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, pp. 20, 140-153 and 288 (the latter page contains a succinct definition of “open secularism”, namely: “A form of secularism that allows displays of the religious in public institutions, for example, among the clientele and staff of schools and hospitals.”).

⁶² Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, pp. 135-136. This separation is defined as a “reciprocal autonomy. The State is free of all religious tutelage while religious associations are autonomous in their fields of jurisdiction, although they remain subject to the obligation to respect basic human rights and the legislation in force. On the one hand, religions do not enjoy a privileged link with the State. On the other hand, the churches must not be under State control [...]” (p. 136). This is the counterpart to open secularism.

⁶³ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 151.

⁶⁴ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 151, footnote 38.

⁶⁵ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 151.

⁶⁶ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 260 and p. 271 (recommendation G2).

school teachers, who, it would seem, are considered to embody one of the primary functions of the Quebec State. This inclusion was strongly criticized and was often at the heart of the debate (including in the case at bar, where the question of teaching staff has figured prominently, particularly in the evidence that was presented). In this respect, it should be noted that the *Act* departed from the Bouchard-Taylor Report, which did not recommend such a measure and even explicitly suggested the very opposite.⁶⁷

[54] We know that after the Bouchard-Taylor Report, the socio-political discussion on state neutrality and laicity continued, at varying degrees of intensity depending on the era and the government, culminating in the adoption of the *Act* in June 2019.

B. Trial Judgment

[55] At trial, the parties challenging the *Act* raised a number of grounds, which can be grouped as follows: on the one hand, constitutional arguments not fundamentally related to the *Canadian Charter* or the *Quebec Charter*; on the other, grounds based on these charters, primarily the former. In addition, there are two specific claims, one relating to potential remedies, the other to the enumerations conducted by the government prior to the passage of the *Act*. As mentioned above, the parties did not all put forth the same arguments, but we will dispense here with the differences between the precise arguments of each of them, since the Trial Judgment, in paragraphs 169 to 188, gives a succinct and accurate account thereof.

[56] After a detailed analysis of the grounds and arguments of the various parties, the Trial Judgment, as we saw at the outset,⁶⁸ largely rejected the challenge mounted by the parties opposed to the *Act*, except on two important points:

- it found that s. 8 para. 1 of the *Act*, insofar as it applies to members of the National Assembly (mentioned in para. 1 of Schedule III), violates s. 3

⁶⁷ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future – A Time for Reconciliation* (Report), Quebec, The Commission, 2008, p. 260:

As for the wearing by agents of the State of religious signs, we recommend that magistrates and Crown prosecutors, police officers, prison guards and the president and vice-president of the National Assembly be prohibited from doing so. However, we believe that all other government employees such as teachers, public servants, health professionals and so on should be authorized to wear religious signs. We believe that the rule of balance that underpins our entire approach dictates these two provisions (see, in this regard, section D of Chapter VII).

In its brief on the proposed state laicity bill, the Commission des droits et libertés de la personne et de la jeunesse also spoke out against a ban on the wearing of religious symbols by teachers (which, moreover, it considered contrary to the *Education Act*, whose s. 37 para. 3 stipulates that the school's educational project must respect not only the freedom of conscience and of religion of students and parents, but also that of "school staff / *membres du personnel de l'école*"). See: Commission des droits et libertés de la personne et de la jeunesse, *Mémoire à la Commission des institutions de l'Assemblée nationale : Projet de loi n° 21, Loi sur la laïcité de l'État*, CDPDJ, May 2019, pp. 68ff.

⁶⁸ Above, para. [1].

of the *Canadian Charter* (which provision protects the democratic rights of citizens), and does so in a manner that is not justified under s. 1 thereof; and

- it further found that s. 4 para. 1, ss. 6, 7, 8 and 10, s. 12 paras. 1 and 2, and ss. 13, 14, and 16, read in conjunction with para. 7 of Schedule I, para. 10 of Schedule II and para. 4 of Schedule III, are contrary to s. 23 of the *Canadian Charter* (which provision protects minority language education rights).

Consequently, the provisions in question were declared of no force or effect.

[57] In paragraph 4 of his judgment, the judge summarized his conclusions:

[TRANSLATION]

[4] In summary, for the reasons that follow, the Court finds that:

- The enumeration conducted by the State before the enactment of Bill 21 does not give rise to an injunctive order as requested by the Fédération autonome de l'enseignement;
- Bill 21 has all the attributes of legislation respecting public morals and public order, but does not fall within the federal criminal law jurisdiction under s. 91(27) of the *Constitution Act, 1867* because the rule of *stare decisis* dictates that to do so it must include a penalty, which Bill 21 does not;
- Rather, when Bill 21 is analyzed solely in terms of who it affects in the education sector, it falls within provincial jurisdiction pursuant to s. 92(16) of the *Constitution Act, 1867*, which deals with matters of a merely local or private nature in the province; the rest of Bill 21 falls under s. 92(4), which deals with the establishment and tenure of provincial offices and the appointment and payment of provincial officers, although ss. 13 to 16 of Bill 21, which pertain to collective agreements, fall under s. 92(13), which deals with property and civil rights in the province, whereas the amendment to the *Charter of Human Rights and Freedoms*, and therefore to the Quebec Constitution, stems from s. 45 of the *Constitution Act, 1982*;
- Pre-Confederation statutes, in this case the *Quebec Act (1774)*, the 1852 Act relating to “rectories” and the 1832 Hart Act cannot invalidate the provisions of Bill 21;
- Bill 21 violates neither Canada’s constitutional architecture nor the rule of law;

- Sections 5 and 6 of Bill 21 do not violate the principle of judicial independence;
- The amendment of the Quebec Charter does not require the application of any particular rule and can be done with a simple majority of the members of the National Assembly;
- The rule of *stare decisis* means that the ruling in *Ford* must be applied. Consequently, the legislature's use of the notwithstanding clauses is legally unassailable;
- The legislature's use of the notwithstanding clauses appears excessive, because it is overly broad, although it is legally unassailable given the current state of the law;
- The exercise of judicial discretion weighs in favour of refusing the application for a declaratory judgment, which is based on an unprecedented interpretation of the terms of s. 33 of the *Canadian Charter of Rights and Freedoms*;
- Section 28 of the Canadian Charter, which guarantees rights equally to both sexes, is solely interpretative and cannot be used on its own to invalidate legislation;
- The effect of the first paragraph of s. 8 of Bill 21 combined with the first paragraph of its Schedule III violates s. 3 of the Canadian Charter, and given the lack of any proof or demonstration under s. 1 of the Charter, it follows that the first paragraph of Schedule III of Bill 21 will be declared of no force or effect in light of s. 52 of the Charter;
- The first paragraph of s. 4, ss. 6, 7, 8, 10, the first and second paragraphs of s. 12, ss. 13, 14 and 16, read in conjunction with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III of Bill 21, infringe s. 23 of the Canadian Charter, as construed by the Supreme Court of Canada, which section provides guarantees for public minority language educational institutions;
- Those defending Bill 21 have failed to discharge the burden of demonstrating that these infringements are justified under s. 1 of the Charter;
- Section 52 of the Canadian Charter entails a declaration, in favour of any person or entity entitled to the guarantees under s. 23 of said Charter, that these sections are of no force or effect.

[References omitted]

[58] Although the judge did not mention it in the foregoing summary, he also dismissed the claim that the *Act* infringes the mobility rights guaranteed by s. 6 of the *Canadian Charter*.⁶⁹ Moreover, he dismissed the Lauzon Group's claim for damages.

C. Grounds of appeal

[59] Before this Court, the parties have for the most part repeated the debate that took place before the Superior Court, with their respective submissions being fueled by the reasons of the Trial Judgment and the arguments put forth by the parties authorized to intervene on appeal. No one, however, still maintains that the *Act* has an impact on persons under federal jurisdiction or that it infringes s. 6 of the *Canadian Charter* (mobility rights) or, in another vein, that it affects judicial independence,⁷⁰ subjects that will therefore not be discussed in the present judgment.

[60] The parties opposed to the *Act* have challenged its constitutionality on the basis of a number of distinct arguments, some of which are not mutually compatible, the parties having set forth diverging views on the characterization of the *Act*, for instance, its pith and substance for purposes of a division of powers analysis. In order to provide an overview and facilitate an understanding of these grounds of appeal, it is useful to group them into commonly used constitutional law categories. We will then address them in a pre-established order. In essence, intentionally distilled here to its principal elements, the challenge to the *Act* comprised two facets.

[61] One facet of the challenge to the *Act* relies on various constitutional constraints that existed before the *CA 1982*.

[62] This argument stems, on the one hand, from the division of legislative powers set out in ss. 91 and 92 of the *CA 1867*. Those opposed to the *Act* argue that, correctly characterized, the *Act* falls under s. 91(27) and comes within the federal criminal law power. They also assert, however, that in light of its pith and substance, the *Act* necessarily comes solely within Parliament's residual power under the first paragraph of s. 91 — that is, the power to “make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of Provinces / *faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces*”.

⁶⁹ Trial Judgment, paras. 922 to 938.

⁷⁰ The Kaur Group, however, still contests the validity of s. 5 of the *Act*, but based on a pre-Confederation supra-legislative principle, not on the basis of interference with judicial independence. We will come back to this later.

[63] The AGQ replies that the *Act's* pith and substance is something entirely different and that its enactment is authorized under three separate heads of power set out in s. 92, namely, its subsections 4 (The Establishment and Tenure of Provincial Offices), 13 (Property and Civil Rights in the Province) and 16 (Matters of a merely local or private Nature in the Province). The AGQ further argues that the trial judge made a number of errors in examining these issues, although he is of the view that the judge rightly concluded that, from a division of powers perspective, the *Act* is *intra vires*. Moreover, he argues that s. 45 of the *CA 1982* (which deals with the constitution of each province) could also be used to support the *Act*.

[64] The *Act's* opponents have also relied on arguments based on legislation pre-dating the *CA 1867* — i.e., the challenge founded on pre-Confederation statutes. These statutes, in the order they were argued at the hearing, are as follows (their full titles are set out in the footnotes): the *Quebec Act*⁷¹ of 1774, the *Hart Act*⁷² enacted by the legislature of Lower Canada in 1832, and the statute reforming the system governing rectories⁷³ — referred to in French as “*rectories*” — enacted by the Province of Canada in 1851 (and having received royal assent in 1852). According to the *Act's* opponents, each of these statutes contains provisions of a constitutional nature that are still in force, which provisions the *Act* violates, thereby rendering the *Act ultra vires* in that regard. The AGQ has replied, in essence, that no part of these statutes that might be relevant with regard to the *Act* is still in force as a component of our Constitution.

[65] Those opposed to the *Act* also rely on certain concepts recognized in Canadian constitutional case law — the unwritten principles and the architecture of Canada's Constitution — whose applicability to the case at bar the AGQ disputes. Finally, the *Act* is attacked from another angle, also based on the division of legislative powers, the argument being that the *Act* infringes s. 31 of the *Canadian Charter*. Thus, it is submitted that its enactment constitutes an attempt by the Quebec National Assembly to regulate religious observance, an area of jurisdiction asserted to fall within the exclusive purview of the Parliament of Canada.

[66] Under the second facet, the *Act* is challenged on the basis of the *Canadian Charter* and the *Quebec Charter*. Freedom of religion, which is protected under these charters (s. 2 of the *Canadian Charter* and s. 3 of the *Quebec Charter*) and is invoked in all its aspects (belief, expression, conscience), together with equality rights (s. 15 of the

⁷¹ *An Act for making more effectual Provision for the Government of the Province of Quebec in North America* (U.K.), 1774, 14 Geo. III, c. 83, reprinted in R.S.C. 1985, Appendix II, No. 2 [“*Quebec Act*”].

⁷² *An Act to declare persons professing the Jewish Religion intitled to all the rights and privileges of the other subjects of His Majesty in this Province* (L.-Can.), 1832, 1 Will. IV, c. 56-57 [“*Hart Act*”].

⁷³ *An Act to repeal so much of the Act of the Parliament of Great Britain passed in the Thirty-first year of the Reign of King George the Third, and Chaptered Thirty-one, as relates to Rectories, and the presentation of Incumbents to the same, and for other purposes connected with such Rectories* (Can.), 1852, 14 & 15 Vict., c. 175 [“*Rectories Act*”].

Canadian Charter and s. 10 of the *Quebec Charter*) serve as the touchstone for impugning the *Act's* validity. However, as the *Act* includes override provisions based, respectively, on s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter*, one must first address the question of the legality and scope of these override provisions.

[67] The parties defending the *Act* reply that the ruling in *Ford*⁷⁴ conclusively answers this question; their opponents argue that it does nothing of the sort and that the Court must examine the issue from a different perspective. The debate respecting s. 33 of the *Canadian Charter* also raises the question of the meaning and effect of s. 28 of that charter, a provision that, according to the parties opposed to the *Act*, guarantees sexual equality, a rule they say ss. 6 and 8 para. 1 of the *Act* contravene — regardless of the override provision. The same argument is repeated, to a lesser extent, as regards s. 50.1 of the *Quebec Charter* and s. 52 thereof. The parties defending the *Act* argue that s. 28 of the *Canadian Charter* and s. 50.1 of the *Quebec Charter* are strictly interpretative and cannot defeat the use of ss. 33 and 52 of these charters, respectively, even if, hypothetically, it were for the purpose of countering sex-based discrimination.

[68] As s. 33 of the *Canadian Charter* does not apply to its ss. 3 and 23, the parties opposed to the *Act* have relied on them in turn as a basis for invalidating ss. 6 and 8 of the *Act* and various provisions related to these two sections. The AGQ argues that the very wording of ss. 3 and 23 is such that they do not apply to the situation of the parties who purport to avail themselves thereof, such that they cannot succeed in the case at bar.

[69] One final point on the grounds of appeal. As we know, the Trial Judgment concludes that s. 8 of the *Act* in its entirety, without distinguishing among its paragraphs, infringes s. 23 of the *Canadian Charter* and is therefore of no force or effect by virtue of s. 52 of the *CA 1982*. The AGQ appeals from this conclusion. Before this Court, however, there is no longer any debate concerning paragraphs 2 and 3 of s. 8, which the parties opposed to the *Act* are no longer contesting, be it under s. 23 of the *Canadian Charter* or otherwise. The validity of the first paragraph of s. 8, however, is still firmly disputed.

[70] That being said, this judgment will be divided into two main parts, the first grouping arguments that are not related to fundamental rights, the second those that are, in the following general order:

Arguments not related to fundamental rights

- Constitutional division of powers;
- Pre-Confederation statutes;

⁷⁴ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

- Constitutional architecture and unwritten principles;
- Section 31 of the *Canadian Charter*.

Arguments based on fundamental rights

- Notwithstanding clauses: s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter*;
- Infringement of fundamental rights and declaratory and pecuniary remedies;
- Section 28 of the *Canadian Charter* and s. 50.1 of the *Quebec Charter*;
- Section 23 of the *Canadian Charter*;
- Section 3 of the *Canadian Charter*;
- Validity of the enumerations carried out in light of the charters.

III. ANALYSIS

PART I: CONSTITUTIONAL ARGUMENTS NOT RELATED TO FUNDAMENTAL RIGHTS

A. Division of legislative powers

[71] When the constitutionality of a statute enacted by Parliament or by a provincial legislature is challenged under s. 91 or s. 92 of the *CA 1867*, courts must apply a two-step analytical framework to resolve the dispute. They must first characterize the impugned statute and then, through a classification process, connect it to one (or more) of the subsections of those two provisions. The recent Supreme Court ruling in *Murray-Hall v. Quebec (Attorney General)*⁷⁵ provides a comprehensive updated summary of this framework, while also providing an example that is highly relevant to the instant case. That ruling (whose principles were reiterated in two subsequent Supreme Court decisions⁷⁶) and the case law it lists will guide us in the analysis that follows.

1. Analytical framework

[72] To characterize a statute challenged under s. 91 or s. 92 of the *CA 1867*, a court must identify its “pith and substance” — a well-established and colourful expression

⁷⁵ 2023 SCC 10 [“*Murray-Hall*”].

⁷⁶ *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5; *Reference re Impact Assessment Act*, 2023 SCC 23.

initially phrased as “the whole pith and substance”.⁷⁷ This concept first appeared long ago in the Privy Council’s case law in matters of Canadian constitutional law. Courts have repeatedly tried to further define its meaning and link it to the notion of classification, while always being careful not to confuse the two. Writing for a unanimous Supreme Court in *Murray-Hall*, Wagner, C.J. explained as follows:

[23] At the characterization stage, what must be determined is the pith and substance of the law (*Reference re Genetic Non-Discrimination Act*, at para. 28, citing *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 26). In its jurisprudence, the Court has described the aim of this exercise as being to identify the “dominant purpose” of the law (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29), its “dominant or most important characteristic” (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63) or its “leading feature or true character” (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-82). At the classification stage, in turn, what must be determined is whether the pith and substance thereby defined comes within one of the heads of power of the enacting legislature (*Reference re Firearms Act*, at para. 25).⁷⁸

[73] To these remarks, one may add those of Karakatsanis, J. in the *Reference re Genetic Non-Discrimination Act*,⁷⁹ in which she echoed the words of Binnie, J., who, in *Chatterjee v. Ontario (Attorney General)*, had expressed the matter in the form of a question: “What is the essence of what the law does and how does it do it?”⁸⁰ On the same subject, the Supreme Court also indicated that, in seeking out a law’s pith and substance, one strives to determine “[w]hat [...] the law [does] and why”.⁸¹

[74] Applying this concept can give rise to practical difficulties, as evidenced by the divergence of opinions between the majority and the minority in the *Reference re Genetic Non-Discrimination Act* and even between the various judges among those in the majority. In and of themselves, however, the remarks cited in the preceding paragraphs are hardly controversial, and they help clarify the meaning of the concept.

[75] In identifying a law’s pith and substance, one must consider both its purpose and its legal and practical effects. To determine the purpose of a law, one must consider both what is referred to as intrinsic evidence (that is, the actual text of the law, namely, its title, structure and provisions, including any purpose clauses) and extrinsic evidence (that is, the context at the time the law was enacted, which can be determined by referring to

⁷⁷ *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, p. 587 (P.C.).

⁷⁸ *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10.

⁷⁹ 2020 SCC 17, para. 29.

⁸⁰ 2009 SCC 19, para. 16.

⁸¹ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, para. 22.

sources such as parliamentary debates, preparatory work, government publications and other probative elements such as the reports of official commissions of inquiry).⁸²

[76] It should be added that, according to the Supreme Court's recent jurisprudence, this exercise must be rigorous. While this does not entail a narrow or formalistic approach,⁸³ a statute's characterization must nevertheless be as precise as possible and be based on an analysis of the "substance of the legislation".⁸⁴ Wagner, C.J., writing for the majority in the *References re Greenhouse Gas Pollution Pricing Act*, expressed this as follows:

[52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490.⁸⁵

[77] Additionally, while one must avoid "confus[ing] the purpose of the legislation with the means used to carry out that purpose",⁸⁶ as McLachlin, C.J. wrote in another unanimous judgment rendered by the Supreme Court's nine justices, this does not, however, imply that the means adopted are irrelevant. On this point, Wagner, C.J. further explained, providing the following nuances:

⁸² *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, para. 39; *Reference re Impact Assessment Act*, 2023 SCC 23, para. 62; *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, paras. 24-26; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 51; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 34; *Reference re Securities Act*, 2011 SCC 66, paras. 63-64.

⁸³ *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, para. 24.

⁸⁴ *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, para. 165 (reasons of Kasirer, J.), cited with approval in: *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, para. 26.

⁸⁵ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

⁸⁶ *Ward v. Canada (Attorney General)*, 2002 SCC 17, para. 25.

[53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. [...] [T]here may be cases in which an impugned statute's dominant characteristic or main thrust is so closely tied to its means that treating the means as irrelevant to the identification of the pith and substance would make it difficult to define the matter of a statute or a provision precisely. In such a case, a broad pith and substance that does not include the means would be the very type of vague and general characterization, like "health" or "the environment", that this Court described as unhelpful in *Desgagnés Transport*, at paras. 35 and 167 (citing *Assisted Human Reproduction Act*, at para. 190).⁸⁷

[78] Once a statute's pith and substance has been properly identified, it is necessary to determine its most appropriate classification. This entails ascertaining whether the statute truly falls within the head of power put forward to support it by the party claiming the statute was validly enacted. The following two paragraphs from the Supreme Court's unanimous opinion in the *Reference re Securities Act* provide a concise statement on this matter and specify how the classification process should be carried out:

[65] After analyzing the legislation's purpose and its effects to determine its main thrust, the inquiry turns to whether the legislation so characterized falls under the head of power said to support it — the classification stage (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15). This may require interpretation of the scope of the power. If the main thrust of the legislation is properly classified as falling under a head of power assigned to the adopting level of government, the legislation is *intra vires* and valid.

[66] Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction (*Canadian Western Bank*, at para. 30). This concept, known as the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter (in the way, for example, s. 95 of the *Constitution Act, 1867* does for agriculture and immigration).⁸⁸

⁸⁷ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

⁸⁸ 2011 SCC 66.

[79] At the beginning of the excerpt from Wagner, C.J.'s reasons in the *References re Greenhouse Gas Pollution Pricing Act*, reproduced above at paragraph [76], the Chief Justice stated that there were three distinct points on which he felt it was necessary to opine. The third point, which it is helpful to refer to here, quite conveniently addresses the appropriate relationship between characterization and classification. The Chief Justice had the following to say:

[56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create “a danger that the whole exercise will become blurred and overly oriented towards results”. The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.⁸⁹

[80] The foregoing, then, is the framework within which this Court must analyze the first issue to be resolved.

2. Characterization of the Act

[81] We have already set out a highly detailed examination of the *Act's* provisions,⁹⁰ and the frequent references to that part of the Court's reasons are intended to avoid unnecessary repetition going forward. It is nevertheless useful to once again consider the content of the *Act* in order to characterize it.

a. Intrinsic elements

[82] If we start by considering the intrinsic elements, we must first examine the *Act's* preamble, which was referred to above⁹¹ (and is cited in its entirety in the Appendix to these reasons). The preamble refers to the particular importance of laicity in Quebec. The *Act* enshrines its paramountcy in Quebec's legal order, but only as regards the state. The distant origins of this evolution and the more recent ones demonstrate that there is indeed a distinctive context here: in that regard — that is, with respect to the role of religion within society — nothing like the evolution experienced by Quebec society exists elsewhere in the country.⁹² Insofar as residents of Quebec do not represent the state in any manner, do not provide services on its behalf and do not interact with it in very specifically defined circumstances (such as when obtaining official documents for identification purposes,

⁸⁹ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

⁹⁰ See above, paras. [15] to [50].

⁹¹ Above, para. [18].

⁹² Above, paras. [51] to [54].

they are entirely free at all times to express their religious beliefs. This is so in their private lives — which goes without saying — as well as in public, which, for some, at times leads to a certain way of dressing as a sign of adherence to a strict orthopraxy stemming from a religious conviction. The *Act*, however, establishes a duty of circumspection for those who hold certain positions connected to the state or its constituent parts. Generally speaking, in the exercise of their functions, the individuals who perform the many acts for which the state is responsible must, barring exceptions, do so with their face uncovered. And for some, whose functions are such that they embody a specific and characteristically state mission (such as a coercive, investigative or adjudicative mission), laicity also dictates that they refrain from wearing a religious symbol in their official capacity.

[83] Sections 1 and 2 of the *Act* affirm the lay nature of the State of Quebec and break down such laicity into four separate foundational principles. As indicated earlier, for the most part this statement reflects the current state of the law which, in Quebec as elsewhere in Canada, is based on a separation of church and state: indeed, the constituent elements of the Canadian state are, in fact, lay elements.⁹³ While, admittedly, there is no legislative affirmation in the rest of Canada similar to that found in the *Act*, which confers a form of primacy on state laicity, this is but a difference of degree rather than essence, and the four principles set out in s. 2 of the *Act* are already solidly established in Canadian public law.

[84] There is one significant element that must be considered in determining the *Act*'s pith and substance. The *Act* is a counterpart to the *State Religious Neutrality Act* and follows on from it.⁹⁴ The purpose of the *State Religious Neutrality Act*, which came into force on October 18, 2017 under another government, was to embody the value featured in its title. At the time, its s. 1 read as follows: "This Act affirms the religious neutrality of the State [...]. To that end, the Act imposes a duty of religious neutrality, in particular on personnel members of public bodies in the exercise of the functions of office / *La présente loi affirme la neutralité religieuse de l'État [...]. À cette fin, elle impose notamment aux membres du personnel des organismes publics le devoir de neutralité religieuse dans l'exercice de leurs fonctions*".⁹⁵ This duty is specified, in particular, in its s. 4.⁹⁶ Its s. 10, which has since been repealed because it was replaced by the *Act*, had already enacted clothing restrictions.⁹⁷ Additionally, its ss. 11, 12, 13 and 14, which came into force

⁹³ Above, paras. [20] to [22].

⁹⁴ Above, para. [24].

⁹⁵ This section was amended in 2019, but still contains the same elements cited here.

⁹⁶ See above, para. [24].

⁹⁷ It read as follows:

10. Personnel members of a body must exercise their functions with their face uncovered.

Similarly, persons who request a service from a personnel member of

10. Un membre du personnel d'un organisme doit exercer ses fonctions à visage découvert.

De même, une personne qui se présente pour recevoir un service par

between October 18, 2017 and July 1, 2018, establish the conditions under which a “request for an accommodation on religious grounds / *demande d’accommodement pour un motif religieux*” may be granted and set out the factors to be considered in dealing with such a request. The existence of the *State Religious Neutrality Act* therefore indicates a desire to affirm the Quebec State’s laicity, in effect before this very word would appear in the legislation. Sections 11, 33 and 34 of the *Act*, by which the *Act* purports to take priority and to override the charters of fundamental rights, are an indication of the importance the legislature places on this policy approach.

[85] Another essential element that should be noted when examining the *Act* in its entirety is the calibration or tailoring of the measures used to apply the guiding principles it affirms. A careful reading of the *Act* reveals the rigorous nature of this calibration. As we have seen, the principles of laicity (s. 2) apply, notably, to “judicial institutions / *institutions judiciaires*” (s. 3 para. 2(3)) and to “government institutions / *institutions gouvernementales*” (s. 3 para. 2(2)). That said, the *Act* is very careful to tailor the scheme it establishes in light of the specific characteristics of each category of institution to which it applies.

[86] For example, the expression “judicial institutions / *institutions judiciaires*” (s. 3 para. 2(3)) means the Court of Appeal, the Superior Court, the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and the municipal courts. As indicated earlier,⁹⁸ in an evident effort to respect the principle of judicial independence, s. 5 of the *Act* entrusts the Conseil de la magistrature du Québec with the responsibility for establishing the rules translating the requirements of laicity for the judges and justices referred to in that very section. But what about judicial institutions whose judges are appointed under s. 96 of the *CA 1867*? As their status stems from the *Judges Act*,⁹⁹ which is a federal statute, and as it is the responsibility of the Canadian Judicial Council to oversee their conduct,¹⁰⁰ the *Act* does not specify how the principles set out in s. 2 could give rise to “rules”, within the meaning of s. 5, for these judges, nor who would establish such “rules”. Moreover, in the last paragraph of s. 12, the legislature places judicial institutions beyond the reach of the ministerial authorities responsible for the administration of the *Act*.¹⁰¹ While the *Act* admittedly sets out rules that seem to derogate from the *Canadian Charter* and the *Quebec Charter*, one cannot argue that, in and of itself, this exercise of legislative power interferes with judicial independence.

a body referred to in this chapter must have their face uncovered when the service is provided.

un membre du personnel d’un organisme visé au présent chapitre doit avoir le visage découvert lors de la prestation du service.

⁹⁸ Above, para. [25].

⁹⁹ R.S.C. 1985, c. J-1.

¹⁰⁰ *Judges Act*, R.S.C. 1985, c. J-1, ss. 59-62.1 and 79-160.

¹⁰¹ As mentioned above, para. [42].

[87] The same meticulous calibration is evidenced in several other parts of the *Act*. The principles of laicity (s. 2) also apply to “government institutions / *institutions gouvernementales*” (s. 3 para. 2(2)), namely, “the bodies listed in paragraphs 1 to 10 of Schedule I / *les organismes énumérés aux paragraphes 1° à 10° de l’annexe I*”. Section 4 adds a specific requirement to these principles, one that must be understood to also apply to the “government institutions” previously defined. To illustrate the point, it is useful to begin by noting that these institutions include, among others, bodies that, for ease of reference, may be labelled as the “Education Sector”¹⁰² and others that, again for ease of reference, may be labelled as the “Health and Social Services Sector”.¹⁰³ The *Act*, one sees, meticulously tailors the scope of the obligations or prohibitions it imposes. Take, as one example, the clarification added in the first paragraph of s. 4 of the *Act* by the words “State laicity requires compliance with the prohibition on wearing religious symbols under Chapter II of this Act [...] by the persons subject to that prohibition / *la laïcité de l’État exige le respect de l’interdiction de porter un signe religieux prévue au chapitre II de la présente loi [...] par les personnes assujetties à cette interdiction*”. Those persons are the

¹⁰² Paragraph 7 of Schedule I lists the following:

(7) school service centres established under the Education Act (chapter I-13.3), the Centre de services scolaire du Littoral established by the Act respecting the Centre de services scolaire du Littoral (1966-1967, chapter 125), the Comité de gestion de la taxe scolaire de l’île de Montréal, general and vocational colleges established under the General and Vocational Colleges Act (chapter C-29), and university-level educational institutions listed in paragraphs 1 to 11 of section 1 of the Act respecting educational institutions at the university level (chapter E-14.1).

7° les centres de services scolaires institués en vertu de la Loi sur l’instruction publique (chapitre I-13.3), le Centre de services scolaire du Littoral constitué par la Loi sur le Centre de services scolaire du Littoral (1966-1967, chapitre 125), le Comité de gestion de la taxe scolaire de l’île de Montréal, les collèges d’enseignement général et professionnel institués en vertu de la Loi sur les collèges d’enseignement général et professionnel (chapitre C-29) ainsi que les établissements d’enseignement de niveau universitaire énumérés aux paragraphes 1° à 11° de l’article 1 de la Loi sur les établissements d’enseignement de niveau universitaire (chapitre E-14.1).

¹⁰³ Paragraph 8 of Schedule I lists the following:

(8) public institutions governed by the Act respecting health services and social services (chapter S-4.2), except public institutions referred to in Parts IV.1 and IV.3 of that Act, joint procurement groups referred to in section 435.1 of that Act, and health communication centres referred to in the Act respecting pre-hospital emergency services (chapter S-6.2).

8° les établissements publics visés par la Loi sur les services de santé et les services sociaux (chapitre S-4.2), à l’exception des établissements publics visés aux parties IV.1 et IV.3 de cette loi, les groupes d’approvisionnement en commun visés à l’article 435.1 de cette même loi et les centres de communication santé visés par la Loi sur les services préhospitaliers d’urgence (chapitre S-6.2).

individuals listed in Schedule II of the *Act*, namely, those who, it bears repeating, “in the exercise of their functions [...] hold a typically state power or convey a strong embodiment of the state’s mission or of the requirements of state neutrality”.¹⁰⁴ This means that, in the Education Sector, and pursuant to Schedule II of the *Act*, the prohibition on wearing religious symbols does not apply to all members of personnel, but only to “principals, vice principals and teachers of educational institutions under the jurisdiction of a school service centre established under the *Education Act* or under the *Act respecting the Centre de services scolaire du Littoral* (namely, public schools providing preschool, primary and secondary education [...])”.¹⁰⁵ These individuals are the face of the public education mission that the Quebec State has adopted. In the Health and Social Services Sector, on the other hand, the prohibition on wearing religious symbols does not apply, because the personnel of the bodies comprising that sector are not listed in Schedule II of the *Act*. As we will see below, however, some restrictions on clothing practices may nonetheless apply to that sector.

[88] In other words — and this is a hallmark of the *Act* — it specifically targets what it purports to apply to. A third aspect of the *Act* further bears out this phenomenon. *A priori*, the *Act* imposes restrictions on conduct that is otherwise legal: thus, in Quebec, it is obviously not forbidden to wear a religious symbol, be it in public or even more so in private, nor is it forbidden to cover one’s face in public out of religious conviction and voluntary adherence to a certain orthopraxy. That said, from among the restrictions or constraints the *Act* imposes, those that could hypothetically affect the largest number of people — because they are the restrictions or constraints that have the largest scope of application under the *Act* — are also those that there is every reason to believe are aimed at conduct that is, in reality and by far, the least widespread. In short, the scope of the restrictions is inversely proportional to the scale of the practice prohibited by these restrictions: the *Act* applies most broadly where the practice it seeks to target is both very strongly asserted but also highly marginal.

[89] Thus, looking at the *Act*’s provisions, one sees that Chapter III, which gives effect to the obligation of persons to exercise certain functions or seek services “with their face uncovered / *à visage découvert*”, is the part of the *Act* whose scope of application is the greatest. Through a definition — that of “personnel member of a body / *membre du personnel d’un organisme*” set out in s. 7 — the foregoing obligation applies to all persons employed by a body listed in Schedule I, as well as to all persons listed in Schedule III (s. 7 likens each such person to a “personnel member of a body / *membre du personnel d’un organisme*”), the latter schedule extending to much more than merely staff in Quebec’s civil service, within the strict or narrow meaning of that expression.¹⁰⁶ The first

¹⁰⁴ Above, para. [31].

¹⁰⁵ Above, para. [30] [reference omitted].

¹⁰⁶ Two paragraphs, among others, in Schedule III provide an indication of its scope: “(10) physicians, dentists and midwives, when those persons are practising in a centre operated by a public institution

paragraph of s. 8 prescribes that persons identified as personnel members of a body must exercise their functions with their face uncovered. And it seems highly plausible, if not certain, that those who cover their face out of adherence to an orthopraxy will also fall under s. 6. All persons who exercise state functions and are listed directly or indirectly in Schedule I, II or III of the *Act* are affected in this way. The scope of these restrictions, however, is greatly reduced when the situation does not involve exercising a function or providing services on behalf of the state, but rather “receiv[ing] a service from a personnel member of a body / *recevoir un service par un membre du personnel d’un organisme*”. In such a situation, the second paragraph of s. 8 specifies that a person’s obligation to present themselves with their face uncovered applies only “where doing so is necessary to allow their identity to be verified or for security reasons / *lorsque cela est nécessaire pour permettre la vérification de son identité ou pour des motifs de sécurité*”.¹⁰⁷

[90] If one compares the foregoing to some of the clothing practices and forms of orthopraxy introduced as evidence at trial, one must conclude that wearing a hijab (i.e., the Islamic headscarf) will not affect the receipt of services from a government body but will be a bar to exercising the functions of the persons listed in Schedule II of the *Act*, but of those persons only¹⁰⁸ — this is the effect of s. 6 of the *Act* and of the words “by the persons subject to that prohibition / *par les personnes assujetties à cette interdiction*” at the very end of the first paragraph of s. 4. For those who wear the niqab or the burqa, the impact will be considerable, to the point of depriving them of any prospect of employment in public or parapublic bodies under provincial jurisdiction. As for services provided by government bodies, however, they may be refused to such persons only where the verification of their identity or security reasons come into play and, as noted above, “[o]nce this verification has been completed, or the security requirements have been met, beneficiaries [will be able to] receive the service with their face covered”.¹⁰⁹ This, then, is the net effect of the *Act*.

[91] For purposes of characterizing the *Act*, it is unnecessary to re-examine ss. 11 to 17 in detail. They are implementing provisions for the *Act*’s substantive rules. It is worth noting, however, that as part of the calibration of the *Act*’s obligations and prohibitions,

referred to in paragraph 8 of Schedule I / *10° un médecin, un dentiste ou une sage-femme lorsque cette personne exerce sa profession dans un centre exploité par un établissement public visé au paragraphe 8° de l’annexe I*”; “(11) persons recognized as subsidized home educational childcare providers under the Educational Childcare Act (chapter S-4.1.1) and the persons directed by them / *11° une personne reconnue à titre de responsable d’un service de garde en milieu familial subventionné en vertu de la Loi sur les services de garde éducatifs à l’enfance (chapitre S-4.1.1) et les personnes qu’elle dirige*”.

¹⁰⁷ See above, para. [38].

¹⁰⁸ Above, para. [31].

¹⁰⁹ Above, para. [38].

s. 31 establishes a series of exceptions intended to protect the acquired rights of certain persons.¹¹⁰

b. Extrinsic elements

[92] Turning now to the extrinsic elements, we see from the debates in the National Assembly that the central purpose of the *Act* was at the forefront from the very moment the Bill was tabled. And the government member who piloted the Bill subsequently remained steadfast in his statements on the *Act*'s objective.

[93] When the Bill was tabled on March 28, 2019, the Minister of Immigration, Diversity and Inclusiveness, who was in charge of the Bill at that time, presented it as follows, emphasizing from the outset the calibration alluded to above:

[TRANSLATION]

The purpose of this Bill is to affirm the laicity of the State and to set out the requirements that follow from it.

To that end, the Bill provides that the laicity of the state is based on four principles: the separation of state and religions, the religious neutrality of the state, the equality of all citizens, and freedom of conscience and freedom of religion. It provides that parliamentary, government and judicial institutions are bound to adhere to these principles in pursuing their missions. However, with respect to judges of the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and the municipal courts, as well as presiding justices of the peace, responsibility for establishing rules translating the requirements of state laicity and for ensuring their implementation is assigned to the Conseil de la magistrature.¹¹¹

[94] In a press conference also held on March 28, 2019, the same Minister stated the following:

[TRANSLATION]

It is with great pride that, this morning, on behalf of the Government of Quebec, I tabled the draft Act respecting the laicity of the State. This is a historic step forward. State laicity is the logical outcome of the Quiet Revolution and the deconfessionalization of the Quebec school system.

[...]

¹¹⁰ Above, para. [48].

¹¹¹ National Assembly, *Journal des débats*, 42nd Leg., 1st Sess., Vol. 45, No. 26, March 28, 2019, p. 1833 (S. Jolin-Barrette).

This Bill proposes to enshrine state laicity as a formal principle, a fundamental value and as a tool for interpreting the laws of Quebec. So that our parliamentary, government and judicial institutions respect the concept of state laicity, to prohibit the wearing of religious symbols by persons in positions of authority, including teachers, to ensure that public services in Quebec are provided and received by persons with their face uncovered, and that no religious accommodation is possible when dealing with state laicity, particularly when it comes to receiving services with one's face uncovered.¹¹²

[95] Two months later, on May 29, 2019, the Minister spoke again as the National Assembly was in the process of passing the Bill in principle:

[TRANSLATION]

The Bill is an affirmation of state laicity, which is based on four principles: the separation of state and religions, the religious neutrality of the state, the equality of all citizens, and freedom of conscience and religion.

One thing is clear: at present, laicity in Quebec is incomplete, both in fact and in law. The purpose of this Bill is to give it substance and take a significant step forward. What we are proposing is a Quebec-inspired model of laicity that is as distinct from French-style laicity as it is from Canadian-style multiculturalism. From this Quebec model flow legislative measures that specify the requirements stemming from Quebec's choice to be a lay state.

[...]

Many have also told us that laicity begins with schools and, as the institutions that structure society, schools must be free from religious pressures, whether implicit or explicit. For the government and many other stakeholders, there's no doubt that teachers play a major role in our children's lives. The Supreme Court has recognized this, stating that because of the position of trust they hold, they exert considerable influence over their students. Their influence over this audience cannot be relativized, nor can the special mission with which they are tasked — let alone their position of authority and trust — be minimized. The same applies to children's freedom of conscience.¹¹³

[96] Moreover, while many aspects of the Bill were controversial, a reading of the debates in the National Assembly confirms one thing. At no point did anyone maintain

¹¹² Exhibit P-12 [HAK file], Official transcript of press conference held by Simon Jolin-Barrette on March 28, 2019, pp. 1-2.

¹¹³ National Assembly, *Journal des débats*, 42nd Leg., 1st Sess., Vol. 45, No. 46, May 29, 2019, pp. 3012-3013 (S. Jolin-Barrette).

that the purpose of the Bill was to punish, penalize or stigmatize persons whose religious beliefs would be subject to constraints by reason of the affirmation of state laicity through the measures proposed here. As the trial judge rightly concluded, the extrinsic evidence leaves no doubt [TRANSLATION] “that the government considers that laicity must become a formal principle and fundamental value of Quebec society”.¹¹⁴ In this regard, there is no factual basis whatsoever to support the argument that the *Act* is colourable legislation and has a hidden true purpose.

c. Effects of the Act

[97] The first and principal legal effect of the *Act* has been to bolster the principle of laicity by shifting it from its state of relative latency to that of a fundamental value in Quebec. This is the result of the convergent effect of the *Act*, the *State Religious Neutrality Act* and the *Quebec Charter*, the latter two having been amended by the *Act*: from deconfessionalization to state religious neutrality to laicity — the texts have evolved towards enshrining the lay state.

[98] There are also much more concrete legal effects. First, as regards the state, the *Act* has introduced various legal barriers to prevent a departure from the four principles affirmed in s. 2 of the *Act* and reinforced in s. 3. As previously mentioned,¹¹⁵ however, these principles are already largely part of the public law in force in Canada, including in Quebec. But there is much more. In all matters in which the state’s presence involves the general public, the state must be represented by persons required to work with their face uncovered, regardless of their religious beliefs. By contrast, users of the state’s services are required to uncover their face only in very specific cases of limited scope. Lastly, those who hold positions whose functions are highly representative of the state, as well as teachers and principals (or vice principals) — because they are the embodiment of authority in the public school sector — must refrain from wearing religious symbols in the exercise of those functions.

[99] One of the new scheme’s concrete effects — and not one of the least — is to limit access to employment in the public sector, in its broadest sense, to two distinct groups of people: those whose religion dictates that they cover their face in public and those who, also out of religious conviction, go out in public wearing clothing or another symbol that identifies them as belonging to a particular religious denomination. Persons in the first group virtually no longer have access to jobs in the public sector. Those in the second group largely still have such access, but they are shut out from a considerable list of functions that are highly representative of the state. For the second group of persons, this outcome is partially tempered by s. 31 of the *Act*, but the consequences of this new

¹¹⁴ Trial Judgment, para. 316.

¹¹⁵ See above, paras. [20] to [22].

scheme on a large number of individuals holding diverse religious convictions cannot be underestimated.

[100] Moreover, one cannot underestimate the potential effects of ss. 12, 13 and 14 of the *Act*. Pursuant to these provisions of the *Act*, as of March 27, 2019, disciplinary and oversight measures may be taken against any person listed in Schedules II and III of the *Act*, or referred to in s. 7, where such person refuses to comply with ss. 6 and 8 when those sections, or one of them, applies to that person. Moreover, the *Act* precludes any form of accommodation, derogation or adaptation (other than those specified in the *Act*) with respect to compliance with the requirements of ss. 6 and 8.

d. Conclusion on characterization

[101] Given the *Act*'s content, its relationship to the *State Religious Neutrality Act*, and the lengthy evolution that gave rise to the context in which it was enacted, and given what the extrinsic evidence indicates, one can come to the following conclusion regarding the pith and substance and true purpose of the *Act* when taken as a whole. Its purpose is to affirm the laicity of the state as a fundamental principle of Quebec public law, to establish the requirements that flow therefrom, to guarantee the right to lay parliamentary, government and judicial institutions and to regulate the conditions for the exercise of certain functions within those institutions and within state bodies.

[102] That being so, the AGQ is correct in arguing that the Trial Judgment contains an error regarding the characterization of the *Act*. With respect to ss. 6 and 8 of the *Act*, the judge wrote that those sections [TRANSLATION] “appear to be in the nature of provisions that deal with religion in a manner that is traditionally in relation to criminal law”¹¹⁶ (notwithstanding that the *Act* does not contain any penal provisions, nor *a fortiori* any criminal provisions, as the judge himself indeed noted). This characterization is unduly narrow and confuses the purpose of the *Act* with the means — and only some of those, in fact — used to achieve that purpose.¹¹⁷ The above-mentioned characterization, as proposed by the AGQ, is in line with reality. Given the rest of the trial judge’s analysis, however, that error is inconsequential.

3. Classification of the Act

[103] On this point, the AGQ claims that the trial judge erred in first considering whether, in virtue of s. 91(27) of the *CA 1867*, the *Act* could be classified under the federal head of power over the criminal law. Admittedly, according to settled jurisprudence, the judge should instead have determined whether the *Act* could be grounded in a provincial power,

¹¹⁶ Trial Judgment, para. 417.

¹¹⁷ In this regard, see: *Ward v. Canada (Attorney General)*, 2002 SCC 17, para. 25.

since it is the provincial legislature, not the federal Parliament, that enacted it.¹¹⁸ That, however, is not the approach taken by the judge who, as we have just seen, was of the opinion that certain provisions of the *Act* [TRANSLATION] “deal with religion in a manner that is traditionally in relation to criminal law”.

[104] It is well established that there is no general or inherent connection between religion and criminal law¹¹⁹ (contrary to what some may be tempted to infer from the trial judge’s reasons¹²⁰). And the fact that the criminal law is sometimes concerned with public morality does not warrant likening every question of public morality to a subject matter that is fertile for criminal legislation. Ultimately, however, at the classification stage, the trial judge found that it was impossible for him to conclude that the *Act* encroaches on the federal criminal law power, because it is missing one essential element: it [TRANSLATION] “does not include sanctions of a type that could lead to its classification as criminal law”.¹²¹

[105] On this last point, one could readily adopt the trial judge’s finding, but this is unnecessary because the approach he adopted is the converse of the required approach. The question that should have been asked is: “Given the *Act*’s characterization, can it be grounded in one or more heads of power set out in s. 92 of the *CA 1867*?” The answer can only be yes, which the trial judge in fact acknowledged. As the judge explained,¹²² it is clear that, in various respects, the *Act* is connected simultaneously to subsections 4 (Establishment and Tenure of Provincial Offices, Appointment and Payment of Provincial Officers), 13 (Property and Civil Rights in the Province) and 16 (Matters of a merely local or private Nature in the Province) of s. 92.

[106] Lastly, there is no doubt that several provisions of the *Act*, such as its preamble, its ss. 1, 2 and 3, and the amendments it made to the preamble and s. 9.1 of the *Quebec Charter*, can be characterized under s. 45 of the *CA 1982* as amendments to the constitution of the province. That being said, there is no reason in principle why such amendments, even if enacted by invoking s. 33(1) of the *Canadian Charter*, are not valid, subject, of course, to s. 33(3).

4. Conclusion

[107] The *Act* attempts to reconcile certain profound trends in contemporary Quebec society. As fundamental as they are, these trends are not immutable and they continue to evolve. For example, the close connection between church and state that still existed

¹¹⁸ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, para. 19; *Procureur général du Québec c. Gallant*, 2021 QCCA 1701, para. 75.

¹¹⁹ *R. v. Edwards Books and Art. Ltd.*, [1986] 2 S.C.R. 713, p. 750.

¹²⁰ See, in particular, the Trial Judgment at paras. 382-384.

¹²¹ Trial Judgment, para. 434, and, more generally, paras. 429-436.

¹²² Trial Judgment, paras. 435-436.

in Quebec in the 1950s, or even later, no longer has the hold it did then. At that time, Catholicism still permeated many of Quebec's public institutions. For some, the wearing of religious symbols was a requirement taken for granted. Although this rather recent period in history left numerous traces, it is now a thing of the past. In 2019, faced with this situation and with the public debates it had sparked for over a decade, the legislature sought, by means of the *Act*, to work towards a balance between emerging and decidedly more topical themes. On the one hand, we find freedom of belief and freedom of religion, which have been firmly constitutionalized since 1982. In private and in public, each person is free to believe or not to believe, to practise the religion of their choosing or not to practise any religion, and to demonstrate this through the way they dress or otherwise. On the other hand, we find state neutrality and laicity. The state does not encourage or discourage any religion. But where the state's presence is felt most acutely through the exercise of certain state-intensive or other functions, it affirms its neutrality by requiring the persons who are invested with those functions and represent the state to refrain from wearing any visible religious symbol. Thus, in exercising their freedom of belief and religion, these mandataries or delegates of the state must comply with the constraints imposed by state neutrality and laicity. This is far removed from the criminal law and from Parliament's other heads of power.

[108] Ultimately, and for the reasons set out above, there are no grounds for allowing the appeals on the basis of the division of powers issue.

B. Pre-Confederation statutes

1. Preliminary considerations

[109] As previously mentioned, in support of their challenge, the parties opposed to the *Act* have invoked three statutes pre-dating the *CA 1867*: the *Quebec Act* (1774), the *Rectories Act* (1852) and the *Hart Act* (1832). At this point, it is useful to take a closer look at these statutes. As we shall see, the form and content of the last two of these evolved considerably over time, making it necessary to pay close attention to their filiation, genealogy and lineage, so to speak. The same exercise, however, is also required for the *Quebec Act*, since a number of laws passed after its adoption made significant changes to what had been enacted in 1774, the date it was assented to by the Parliament in Westminster.

[110] Several of these statutes, it must be said, make abundant use of approximate typography. Their spelling and syntax are largely archaic. They use a vocabulary teeming with solecisms, unnecessarily overlong passages and obsequious redundancies. As a result, they now make for rather arduous reading, sometimes resembling archival work. Nevertheless, if one takes the time to read and analyze them carefully, these statutes, despite their characteristics from another era, are for the most part explicit and clear.

[111] Before examining these three legislative texts in turn, it is worthwhile highlighting some of the questions they raise. Does each of them enjoy constitutional status? Are they part of what may be referred to as the “formal constitution” of Quebec, or rather its “material constitution”? More specifically, is each of these laws supra-legislative in scope? Should all three be treated on an equal footing, or should they be distinguished one from the other? Lastly, in the present day, what impact is each of them likely to have on the *Act*’s constitutionality?

[112] Constitutional law often draws a distinction between a “formal” constitution and a “material” constitution,¹²³ a distinction which, in many respects, parallels that also drawn between a “rigid” constitution and a “flexible” one.¹²⁴ In addition to certain unwritten principles¹²⁵ and certain constitutional conventions,¹²⁶ a material constitution can also include simple legislation, which can be amended like any other law enacted by a local legislature. By contrast, a written component of the constitution that can only be amended by means of a special and more restrictive procedure, other than that by which a legislature can amend a law, will be characterized as “formal” or “rigid”. Based on these distinctions, we can, where appropriate, identify the supra-legislative nature of certain laws. In other words, the status of laws of a supra-legislative nature means that they are, sometimes to varying degrees, and sometimes also by mere convention, beyond the reach of the formerly central and fundamental British constitutional law principle of parliamentary sovereignty.

[113] These questions call for important nuances, as the following example illustrates. From among the intervenors in this case who defend the *Act*, one of them explicitly and unhesitatingly conceded during oral arguments before the Court that the *Quebec Charter* is an “ordinary” law and that the legislature can amend it by a law passed by a simple majority vote in the National Assembly. This is correct. But no doubt because of the specific purpose of the *Quebec Charter*, said legislature can only derogate from its provisions in accordance with its s. 52 — that is, by stating in no uncertain terms its intention to enact a rule that “applies despite the Charter / *s’applique malgré la Charte*”. This, too, is correct, and it is what the legislature did in adopting s. 33 of the *Act*. Taken together, these characteristics give the *Quebec Charter* a special status among “ordinary”

¹²³ See: Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, pp. 10-11, nos. I.10-I.12.

¹²⁴ See: Jacques-Yvan Morin and José Woehrling, *Les constitutions du Canada et du Québec : du régime français à nos jours*, 2nd ed., t. 1 “Études”, Montreal, Thémis, 1994, pp. 125-131.

¹²⁵ Illustrated in judgments such as the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [“*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*”], or the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

¹²⁶ Illustrated in judgments such as *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

laws, which explains why it is frequently referred to as a quasi-constitutional statute.¹²⁷ And there is little doubt that it can be classified among the laws that make up Quebec's "material" constitution. This is so, notwithstanding that its s. 52 can be repealed like any other provision of any other law, without recourse to a special constitutional amending procedure that applies to formal, written constitutions of a supra-legislative nature. In reality, what gives the *Quebec Charter* a special status is, more than anything else, a constitutional political convention: while not impossible, it is highly unlikely that a majority government in the National Assembly would risk reversing or weakening the *Quebec Charter's* special status. For the same reason, it is hard to imagine that, more than 300 years after its enactment, a British government with a majority in the House of Commons would risk repealing or eroding the *Act of Settlement*¹²⁸ on a matter that has been the cornerstone of judicial independence, here and elsewhere, since 1701. Thus, by convention, certain laws that are not part of a written constitution but are part of the material constitution of a state governed by the rule of law, have a scope that may, by analogy, resemble the supra-legislative scope of a formal, written constitution.

[114] The trial judge was fully aware of these nuances and understood the importance of this aspect in the present case. He addressed this matter succinctly, but explicitly, in his reasons.¹²⁹ As we know, the principle of parliamentary sovereignty applied, on a respective scale, to both the British Parliament and to the colonial legislatures (at least from a certain point in their existence), be it the legislature of Quebec, of Lower Canada or of the Province of Canada, and it applied and continues to apply to the legislature of the Province of Quebec after the *CA 1867* (and *a fortiori* after the *CA 1982*). Between 1774 and 1982, however, the evolution of the relevant laws, be they imperial, colonial or local laws, or then post-Confederation laws, had the obvious effect of diminishing the supra-legislative character of the pre-Confederation statutes, although the latter cannot all be likened to one another. We must therefore examine them one by one to determine whether, endowed or not with supra-legislative status, one or more of them can defeat certain provisions of the *Act*.

[115] It is the evolution of Canadian constitutional law between the aforementioned dates — 1774 and 1982 — that provides the solution to the problem addressed here.

2. The Quebec Act

[116] The *Quebec Act* is an act of the Parliament of London, and thus an "imperial act". This therefore distinguishes it at the outset from the *Hart Act* of 1832 and the *Rectories*

¹²⁷ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 152; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 ["*Communauté urbaine de Montréal*"], para. 15.

¹²⁸ (U.K.), 1701, 12 & 13 Will. III, c. 2.

¹²⁹ Trial Judgment, notably at paras. 570 to 584, and in several other portions of the reasons in first instance.

Act of 1852, which were enacted, respectively, by the legislature of Lower Canada and that of the Province of Canada. Although only the English version of the *Quebec Act* has force of law, it does not seem out of place in these reasons to occasionally mention the translation that accompanies the original and is reproduced in the appendices to the Revised Statutes of Canada, 1970 and the Revised Statutes of Canada, 1985. While the *Quebec Act* deals with a number of subjects, it is chiefly ss. V, VI, VII and VIII that are of interest here. We will come back to this later.

[117] It is generally agreed that, compared to the October 1763 *Royal Proclamation*, which appeared in the wake of the *Treaty of Paris* signed the previous February, the *Quebec Act* was a means for clarifying and tempering the initial conditions of occupation, which the British Crown had seemed intent on establishing in Quebec shortly after the French defeat. Today, however, it makes little difference whether this measure was driven in part by the British government's magnanimity or by a more coldly political and self-interested purpose, namely that of allowing the inhabitants of the territory to preserve their religion and laws in order to have them conform more willingly to the wishes of the colonial authority. As we know, that colonial authority was faced with the first manifestations of the American Revolution, and the demographics of the former New France were not such as to facilitate its integration into the British colonial empire. The fact is, then, that s. V of the *Quebec Act* re-established or (according to another interpretation) partially confirmed the rights of the faithful and clergy who professed "the Religion of the Church of Rome / *la Religion de l'Église de Rome*". In addition, s. VI allowed the Crown to favour the "Protestant Religion / *Religion Protestante*" by supporting its clergy with rights derived from lands owned from then on by the Crown, s. VII modified the oath of allegiance to the King so as to make it possible for Catholics to take that oath, and s. VIII confirmed that the civil law of Canada would apply to all civil disputes.

[118] That was the general thrust of this imperial law. Several documents at that time had already anticipated this development. We will limit ourselves to mentioning one of them, a document that forms part of those that presumably convinced the metropole authorities, i.e., those of the British parent state, to legislate as they did. The document is a report by Francis Maseres, who was Attorney General of the Province of Quebec as of March 1766 and who provided the following description to the metropole authorities regarding the situation he found upon his arrival from London:

The grounds upon which the French demand a toleration of the Catholic religion, are partly the reasonableness of the thing itself, they being almost universally of that religion, and partly the stipulation made on that behalf in the fourth article of the definitive treaty of peace, and which is expressed in these words: "His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; he will consequently give the most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according

to the rites of the Romish church, as far as the laws of Great Britain permit." These last words, "as far as the laws of Great Britain permit," render the whole stipulation in favour of this toleration very doubtful; for it may reasonably be contended, that the laws of England do not at all permit the exercise of the Catholic religion.

For in the first place, these words seem to refer to some degree of toleration of the Catholic religion, already actually subsisting in some part of the British dominions, and by virtue of the laws of Great Britain; and if so, they convey no right to any toleration at all, because no degree of toleration is already actually allowed by the laws of Great Britain in any part of the British dominions.¹³⁰

[119] Maseres then set out to demonstrate the existence of a radical incompatibility between the apparent content of the *Royal Proclamation* and the actual state of affairs elsewhere in the British dominions. Indeed, since the reign of Elizabeth I, Catholics in Great Britain, as elsewhere in these dominions, had enjoyed *no* religious tolerance. Ecclesiastical supremacy was attached to the Crown in perpetuity, whereas it is of the very essence of Catholicism and the papacy that the pope, rather than a crowned head of Europe, is the supreme authority in spiritual matters. According to Maseres, it was therefore necessary to consider an actual relaxation of the scheme still prevailing elsewhere in the empire:

Upon these reasons we may conclude, that the exercise of the Catholic religion cannot, consistently with the laws of Great Britain, be tolerated in the province of Quebec. Yet that it should be tolerated is surely very reasonable, and to be wished by all lovers of peace and justice and liberty of conscience.

By what authority then shall it be tolerated? this is the only question that remains. Shall the King alone undertake to tolerate it? [...] The authority of Parliament seems to be a much safer foundation to establish this measure upon, in a manner which neither the new English inhabitants of the province can Contest, nor the French Catholics suspect to be inadequate.¹³¹

[Transcribed as is]

It seems likely that this perception was one of the factors behind s. V of the *Quebec Act*.

¹³⁰ Francis Maseres, "Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec, 1766", in Adam Shortt and Arthur G. Doughty (eds.), *Documents Relating to the Constitutional History of Canada, 1759-1791*, Ottawa, S.E. Dawson, 1907, pp. 179-180.

¹³¹ Francis Maseres, "Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec, 1766", in Adam Shortt and Arthur G. Doughty (eds.), *Documents Relating to the Constitutional History of Canada, 1759-1791*, Ottawa, S.E. Dawson, 1907, p. 181.

[120] Through its s. XII, the *Quebec Act* created a Legislative Council, whose members were appointed by the royal authority, and which was vested with the power to make Ordinances for “the Peace, Welfare and good Government / *la Police, le bonheur et le bon gouvernement*” of the Province. The Ordinances, which were to be transmitted to London, could be disallowed by the royal administration (through his Majesty’s Order in Council), in which case they became void from the moment of such disallowance (s. XIV).

[121] The following are excerpts of the most striking portions of the *Quebec Act*, the ones that best provide a true picture of the control mechanism thus put into place according to the colonial policy of the metropole in 1774:

“V. And, for the more perfect Security and Ease of the Minds of the Inhabitants of the said Province”, it is hereby declared, That his Majesty’s Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King’s Supremacy, declared and established by an Act, made in the first Year of the Reign of Queen Elizabeth, over all the Dominions and Countries which then did, or thereafter should belong, to the Imperial Crown of this Realm; and that the Clergy of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.

VI. Provided nevertheless, That it shall be lawful for his Majesty, his Heirs or Successors, to make such Provision out of the rest of the said accustomed Dues and Rights, for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy within the said Province, as he or they shall, from Time to Time, think necessary and expedient.

[...]

VIII. [...] all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by his Majesty, his Heirs and Successors, shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinances that shall, from Time to Time, be passed in the said Province by the Governor, Lieutenant Governor, or Commander in Chief, for the Time being, by and with the Advice and Consent of the Legislative Council of the same, to be appointed in Manner herein-after mentioned.

[...]

XIV. Provided also, and be it enacted by the Authority aforesaid, That every Ordinance so to be made, shall, within six Months, be transmitted by the Governor,

or, in his Absence, by the Lieutenant-governor, or Commander in Chief for the Time being, and laid before his Majesty for his Royal Approbation; and if his Majesty shall think fit to disallow thereof, the same shall cease and be void from the Time that his Majesty's Order in Council thereupon shall be promulgated at Quebec.

XV. Provided also, That no Ordinance touching Religion, or by which any Punishment may be inflicted greater than Fine or Imprisonment for three Months, shall be of any Force or Effect, until the same shall have received his Majesty's Approbation.

[122] Sections V and VI thus established a framework for the coexistence of Catholicism and Protestantism in Quebec, encouraging a reciprocal toleration where “no degree of toleration [was] already actually allowed by the laws of Great Britain in any part of the British dominions”, as Attorney General Maseres had pointed out some time before the *Quebec Act* was assented to. Here, by contrast, the Catholic clergy retained its means of subsistence, and the Crown provided comparable support to the Protestant clergy to ensure its upkeep.

[123] With respect to property and civil rights, s. VIII, a provision that foreshadowed s. 92(13) of the *CA 1867*, maintained the situation as it had existed before 1763. The maintenance of the pre-1763 *status quo*, which can be found at various stages of subsequent developments, heralded s. 129 of the *CA 1867*.

[124] Lastly, in their own way, ss. XIV and XV enshrined the supra-legislative nature of the *Quebec Act*, but with a very different meaning than that attributed to this adjective today. Thus, while it was lawful for the “Council for the Affairs of the Province of Quebec / *Conseil pour les affaires de la province de Québec*” (s. XII) to adopt such Ordinances as it deemed appropriate, these could not survive any royal disallowance as expressed from London (s. XIV) and, if they dealt with religion, they could not take effect without first having received such assent (or approval) from the sovereign, also expressed from London (s. XV). This is a far cry from a formal, written constitution, whose interpretation falls to the judiciary and which assigns legislative powers according to a fixed list of substantive criteria (as is the case with ss. 91 and 92 of the *CA 1867*) or which sets out a series of fundamental rights whose content is specified (as is the case with the *Canadian Charter*). There is no doubt, however, that in 1774, the *Quebec Act* set out a significant part of Quebec's formal constitution. And that constitution provided for a form of supra-legislative control, as “His Majesty's Order[s] in Council” could override the decisions of the colonial legislature and deprive them of any effect.

[125] Subsequent constitutional reforms, spanning nearly a century and a half, would profoundly transform the institutions put into place by the *Quebec Act*. That period calls for a brief overview, from which, as previously stated, one constant emerges. If we bear

in mind, as a guiding thread, what happened to the supra-legislative nature of imperial laws, we note that it was consistently eroded, to the point of eventually being entirely supplanted by the legislative supremacy of the local legislatures and subsequently the Canadian constituent authority.

[126] Less than 20 years after the *Quebec Act* came into force, the *Constitutional Act, 1791*¹³² made some major changes to the configuration of colonial institutions.

[127] The *Constitutional Act, 1791* repealed certain provisions of the *Quebec Act* and amended the constitution of the Province of Quebec by creating two new provinces, Lower Canada and Upper Canada. As we know, these are the predecessors of present-day Quebec and Ontario. Their territory coincided in part with that of these two future provinces, which came into being in 1867. But above all, the *Constitutional Act, 1791* introduced an (embryonic) form of representative government, by adding an elected Legislative Assembly to the Legislative Council with which each province was henceforth endowed (ss. XIII-XXV). Here, too, in the manner of future s. 129 of the *CA 1867*, the laws “in force / *en force*” on the “Commencement of this Act / *commencement de cet Acte*” remained in force in each new province, until repealed or varied by the respective authorities within each such province (s. XXXIII).

[128] The royal oversight power, exercised by assenting to or disallowing the laws passed in these colonies, remained in place, however, with a few modifications (ss. XXX-XXXII). Section XXXV of the *Constitutional Act, 1791*, which was much more explicit than s. XV of the *Quebec Act*, confirmed or completed a set of rules respecting the maintenance of the clergy, both Protestant and Catholic, by means of “accustomed Dues and Rights / *Dûs et Droits accoutumés*”, “Tythes / *Dixmes*” and “Rents and Profits / *Rentes et profits*” levied for that purpose. Subject to the clarifications set out below, that same section reiterated an important feature of the *Quebec Act* — the explicit recognition of the Catholic clergy and its attributes. The importance of the issue of religion at the time is clear from the detailed provisions that follow (ss. XXXVI-XLI). We will return to this subject below, as this facet requires a closer look. This is corroborated by s. XLII, which lists several aspects of the scheme governing religious worship, which aspects are, by means of a categorical reservation, enshrined as it were in the constitution as interpreted by the Parliament in Westminster. As we shall see below, since these aspects refer in fact to initiatives by colonial legislatures concerning one of the subjects reserved with respect to religion, the path laid out for these legislatures is very narrow, as s. XLII shows:

XLII. [...] whenever any Act or Acts shall be passed by the Legislative Council and Assembly of either of the said Provinces, [...] every such Act or Acts shall, previous to any Declaration or Signification of the King's Assent thereto, be laid before both

¹³² (U.K.), 31 Geo. III, c. 31, reprinted in R.S.C. 1985, Appendix II, No. 3.

Houses of Parliament in Great Britain; and that it shall not be lawful for his Majesty, his Heirs or Successors, to signify his or their Assent to any such Act or Acts, until thirty Days after the same shall have been laid before the said Houses, or to assent to any such Act or Acts, in case either House of Parliament shall, within the said thirty Days, address his Majesty, his Heirs or Successors, to withhold his or their Assent from such Act or Acts; and that no such Act shall be valid or effectual to any of the said Purposes, within either of the said Provinces, unless the Legislative Council and Assembly of such Province shall, in the Session in which the same shall have been passed by them, have presented to the Governor, Lieutenant Governor, or Person administering the Government of such Province, an Address or Addresses, specifying that such Act contains Provisions for some of the said Purposes herein-before specially described, and desiring that, in order to give Effect to the same, such Act should be transmitted to England without Delay, for the Purpose of being laid before Parliament previous to the Signification of his Majesty's Assent thereto.

[129] It therefore appears that there was a shift, albeit a relative one, towards parliamentary sovereignty. This manifested itself in two ways. The *Constitutional Act, 1791* established an initial, rudimentary, form of elective democracy in Canada's two provinces. On certain sensitive issues, notably those relating to religion, the royal power to assent to and disallow laws, which had been confirmed by s. XIV of the *Quebec Act* and was part of the royal prerogative, was henceforth dependent on the goodwill of the Parliament in Westminster.

[130] The *Constitutional Act, 1791* was followed by another imperial statute, the *Union Act, 1840*.¹³³ Under the latter's terms, Lower Canada and Upper Canada were merged to become the Province of Canada. Like the provinces it replaced, the Province of Canada had a Legislative Council and a Legislative Assembly. Just as the *Quebec Act* had relaxed the oath of allegiance requirement, the *Union Act, 1840* henceforth allowed persons whose religion prohibited them from swearing the traditional oath to replace it with a solemn affirmation.¹³⁴ Here, too, the laws enacted in Lower Canada and in Upper Canada, and still in force, continued to be in force as is, until repealed or amended by the legislature of the Province of Canada (s. XLVI). As for the laws passed by the latter, the mechanism for the sovereign's assent or disallowance remained in place (ss. XXXVII-XXXIX). The *Union Act, 1840* also allowed the legislature of the Province of Canada to modify the electoral map, the apportionment of elected representatives within the territory, as well as certain aspects of the electoral procedure. That said, any law containing such measures could only be presented to the Governor for royal assent if it had been passed by a two-thirds majority of the members of the Council and the

¹³³ (U.K.), 3 & 4 Vict., c. 35, reprinted in R.S.C. 1985, Appendix II, No. 4.

¹³⁴ Those primarily contemplated here were the Quakers, coreligionists whose solemn affirmation had been tolerated in Nova Scotia since 1759.

Assembly (s. XXVI). In short, significant though they were, the changes made by the *Union Act, 1840* to the existing constitutional order appear less consequential than those introduced successively by the *Quebec Act* and the *Constitutional Act, 1791*, at least in terms of legislative decision-making.

[131] One aspect of this evolution, however, deserves special mention. Section XLII of the *Constitutional Act, 1791* and s. XLII of the *Union Act, 1840* are virtually identical. The differences between them are purely matters of form: the first refers to “the said Provinces [of Lower Canada and Upper Canada]”, while the second refers to “the said Province [of Canada, resulting from the Union]”. Both texts list a range of issues that, in one way or another, relate to the Protestant or Catholic religion, maintenance of the clergy and management of ecclesiastical affairs. Both subject colonial laws that address these many issues to a separate procedure leading to the sovereign’s assent or disallowance. Both in fact specify that this procedure will be applied in the case of any law that is passed by a colonial legislature and whose provisions “in any Manner relate to or affect the Enjoyment or Exercise of any Form or Mode of Religious Worship”.¹³⁵ This scheme, which came into effect in 1791, and which may be seen as an extension of s. XV of the *Quebec Act*, had therefore been in force for almost 50 years at the time of Union, and would remain in existence for some years thereafter.

[132] Another milestone was reached some 14 years later, in 1854, with the enactment of a new imperial law, *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other Purposes*.¹³⁶ Despite what its title implies, the effect of this statute went far beyond the constitution of the Legislative Council of the Province of Canada. The statute also transformed the respective attributions of the Parliament in Westminster and the colonial legislature — doing so in the following terms and in a way that it is important to note here:

VI. The Forty-second Section of the said recited Act of Parliament, providing that in certain Cases Bills of the Legislative Council and Assembly of Canada shall be laid before both Houses of Parliament of the United Kingdom, is hereby repealed; and, notwithstanding anything in the said Act of Parliament or in any other Act of Parliament contained, it shall be lawful for the Governor to declare that he assents in Her Majesty’s Name to any Bill of the Legislature of Canada, or for Her Majesty to assent to any such Bill if reserved for the Signification of Her Pleasure thereon, although such Bill shall not have been laid before the said Houses of Parliament; and no Act heretofore passed or to be passed by the Legislature of Canada shall

¹³⁵ This is the wording of s. XLII of the *Union Act, 1840*. Section XLII of the *Constitutional Act, 1791* uses the wording “in any Manner relate to or affect the Enjoyment or Exercise of any religious Form or Mode of Worship”.

¹³⁶ (U.K.), 1854, 17 & 18 Vict., c. 118. See also: *The Statute Law Revision Act* (U.K.), 1872, 35 & 36 Vict., c. 63.

be held invalid or ineffectual by reason of the same not having been laid before the said Houses, or by reason of the Legislative Council and Assembly not having presented to the Governor such Address as by the said Act of Parliament is required.

Thus, as regards legislation relating to religion and to the arrangements for worship on the territory of Quebec, the scheme that had begun with the *Constitutional Act, 1791* came to an end. The matters covered by s. XLII of the *Union Act, 1840* were now matters within the purview of the colonial legislature — although the Governor retained the power to refuse to assent to legislation.

[133] The gradual, sustained and increasing shift towards the legislative and constitutional autonomy of the local legislatures continued with the *Colonial Laws Validity Act, 1865*,¹³⁷ which shortly preceded the *CA 1867*. It seems that some doubts remained as to what the progressive changes in the wording of the texts had been able to achieve up to that point. The British Parliament therefore considered it desirable to clarify matters. The preamble to this 1865 statute notes, in particular, that “Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty’s Colonies”, such that “it is expedient that such Doubts should be removed”. This is what the *Colonial Laws Validity Act, 1865* set out to do, on two levels. First, it incorporated a restrictive notion of the laws of the British Parliament that were to extend to the colonies (we will nevertheless continue to refer to them as “imperial laws” here): such a law was to apply only when it “is made applicable to such Colony by the express Words or necessary Intendment of [the] Act” (s. 1). Second, the British Parliament reiterated that in the presence of a repugnancy between an imperial law and a colonial law, the latter, to the extent of such repugnancy, “shall [...] be and remain absolutely void and inoperative » (s. 2). But it is important not to misunderstand Parliament’s objective here. Clearing up any ambiguity on this subject, the late Professor Hogg and his co-author stated the following on this point:

By narrowly defining the class of imperial statutes, and thereby confining the doctrine of repugnancy, the Act was intended to extend rather than restrict the powers of the colonial legislatures. Nevertheless, the Act did leave the colonial legislatures powerless to alter any imperial statute which by its own terms applied to the colony. If the colony wished to alter or repeal such an imperial statute it had to persuade the imperial Parliament to enact the required law.¹³⁸

¹³⁷ (U.K.), 28 & 29 Vict., c. 63.

¹³⁸ Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 1, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §3:2, p. 3-4.

This downgraded the status of British reception statutes, the latter being a notion that is still fully applicable today.¹³⁹ It is understood that “[absent] express Words or necessary Intendment of any Act of Parliament” (s. 1), such statutes could be amended or repealed by a local legislature within its fields of jurisdiction.

[134] The CA 1867 would have little to say on the matter considered here,¹⁴⁰ except that, like s. VIII of the *Quebec Act*, s. XXXIII of the *Constitutional Act, 1791* and s. XLVI of the *Union Act, 1840*, it apportioned among the newly created legislative bodies the powers hitherto exercised by the legislature of the Province of Canada. Indeed, s. 129 of the CA 1867, a keystone of our Constitution, states the following:¹⁴¹

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the

129. Sauf toute disposition contraire prescrite par la présente loi, — toutes les lois en force en Canada, dans la Nouvelle-Écosse ou le Nouveau-Brunswick, lors de l’union, — tous les tribunaux de juridiction civile et criminelle, — toutes les commissions, pouvoirs et autorités ayant force légale, — et tous les officiers judiciaires, administratifs et ministériels, en existence dans ces provinces à l’époque de l’union, continueront d’exister dans les provinces d’Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick respectivement, comme si l’union n’avait pas eu lieu; mais ils pourront, néanmoins (sauf les cas prévus par des lois du parlement de la Grande-Bretagne ou du

¹³⁹ For a recent example, see: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, in which the Supreme Court relied, in particular, on a 1731 British statute, *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (U.K.), 1731, 4 Geo. II, c. 26, to render judgment.

¹⁴⁰ Neither the power of disallowance provided for in ss. 56 and 57 of the CA 1867, on the one hand, nor the one provided for in its s. 90, on the other hand, are useful for purposes of the matter before us. The former ceased to have effect as a result of the *Statute of Westminster* (see below) and constitutional amendments, and the latter fell into disuse.

¹⁴¹ Only the English version of the CA 1867 has the force of law. The Court, however, will follow the Supreme Court of Canada’s consistent practice of citing the French translation of the CA 1867 in its judgments. See, for example: *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 (relevant provisions reproduced in the appendix thereto); *Reference re Senate Reform*, 2014 SCC 32, paras. 50, 71 and 84; *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 12; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, p. 220.

Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande), être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature en vertu de la présente loi.

[135] The next important date was 1931, when a law enacted by the British Parliament, the *Statute of Westminster*,¹⁴² received royal assent. With this penultimate step, the evolution that the *Quebec Act* had modestly begun in 1774 was almost complete. First, it appears that the *Colonial Laws Validity Act, 1865* had not dispelled all the doubts it had set out to eliminate, as is clear from the Privy Council's decision in *Nadan v. The King*.¹⁴³ The case concerned the effect of a provision of the Canadian *Criminal Code* (s. 1025), which had abolished appeals authorized by the prerogative of the sovereign in criminal matters. Relying both on this ancient prerogative enshrined in the case law and on the content of two British statutes — the *Judicial Committee Act, 1833*¹⁴⁴ and the *Judicial Committee Act, 1844*¹⁴⁵ — the Privy Council concluded that the Canadian Parliament could not, by means of s. 1025 of the *Criminal Code*, suppress appeals lodged this way. In other words, s. 1025 fell under s. 2 of the *Colonial Laws Validity Act, 1865* and was therefore void and inoperative in that case. In order to resolve the existing uncertainty surrounding the scope of the laws enacted by the Parliament in Westminster, an imperial conference held in 1930 once again considered the matter. It concluded that there was now a constitutional convention precluding the extension of imperial laws in the manner illustrated by *Nadan v. The King*.

[136] The third paragraph of the preamble to the *Statute of Westminster*, said statute having been enacted following these discussions, affirmed the existence of the constitutional convention in question:¹⁴⁶

[...] whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said

Considérant qu'il est conforme au statut constitutionnel consacré de statuer que nulle loi émanant désormais du Parlement du Royaume-Uni ne doit s'étendre à l'un

¹⁴² *Statute of Westminster, 1931* (U.K.), 22 Geo. V. c. 4, reprinted in R.S.C. 1985, Appendix II, No. 27 ["*Statute of Westminster*"].

¹⁴³ [1926] A.C. 482 (P.C.).

¹⁴⁴ *Judicial Committee Act, 1833* (U.K.), 3 & 4 Will. IV, c. 41.

¹⁴⁵ *Judicial Committee Act, 1844* (U.K.), 7 & 8 Vict., c. 69.

¹⁴⁶ Although only the English version of the *Statute of Westminster* has force of law, the Court will cite the French translation that accompanies the English text in the appendices to the Revised Statutes of Canada, 1985.

Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion: [...]

quelconque desdits Dominions comme partie de la législation de ce Dominion, sauf à la demande et avec l'agrément de celui-ci; [...]

Thus, in 1931, in order to give full effect to this convention, a scheme was established between, on the one hand, federal or provincial laws, and, on the other hand, imperial laws, a scheme that was much more restrictive for the latter than the one that had existed at the time the *Statute of Westminster* was assented to. One need only reproduce a few of this statute's provisions to fully grasp its effects:

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

2. (1) La Loi de 1865 relative à la validité des lois des colonies ne doit s'appliquer à aucune loi adoptée par le Parlement d'un Dominion postérieurement à la proclamation de la présente loi.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

(2) Nulle loi et nulle disposition de toute loi édictée postérieurement à la proclamation de la présente loi par le Parlement d'un Dominion ne sera invalide ou inopérante à cause de son incompatibilité avec la législation d'Angleterre, ou avec les dispositions de toute loi existante ou à venir émanée du Parlement du Royaume-Uni, ou avec tout arrêté, statut ou règlement rendu en exécution de toute loi comme susdit, et les attributions du Parlement d'un Dominion comprendront la faculté d'abroger ou de modifier toute loi ou tout arrêté, statut ou règlement comme susdit faisant partie de la législation de ce Dominion.

[...]

[...]

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion

4. Nulle loi du Parlement du Royaume-Uni adoptée postérieurement à l'entrée en vigueur de la présente Loi ne doit s'étendre ou être censée s'étendre à un Dominion, comme partie de la législation en vigueur dans ce Dominion, à moins

has requested, and consented to the enactment thereof.

qu'il n'y soit expressément déclaré que ce Dominion a demandé cette loi et a consenti à ce qu'elle soit édictée.

[...]

[...]

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

7. (1) Rien dans la présente Loi ne doit être considéré comme se rapportant à l'abrogation ou à la modification des Actes de l'Amérique du Nord britannique, 1867 à 1930, ou d'un arrêté, statut ou règlement quelconque édicté en vertu desdits Actes.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(2) Les dispositions de l'article deux de la présente Loi doivent s'étendre aux lois édictées par les provinces du Canada et aux pouvoirs des législatures de ces provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

(3) Les pouvoirs que la présente Loi confère au Parlement du Canada ou aux législatures des provinces ne les autorisent qu'à légiférer sur des questions qui sont de leur compétence respective.

[137] Sections 2 and 4 thus exempted federal and provincial laws enacted after the *Statute of Westminster* from the application of the *Colonial Laws Validity Act, 1865*. This created the possibility that a Canadian legislature could take it upon itself to unilaterally amend the *CA 1867*, which of course could have compromised the balance between federal and provincial levels of government within the Canadian federation. Consequently, s. 7(1) of the *Statute of Westminster* was intended to prevent such an eventuality.¹⁴⁷

¹⁴⁷ Hogg and Wright explain as follows:

Before the Statute of Westminster, the supremacy of the B.N.A. Act was derived from the fact that it was an imperial statute protected from alteration by the Colonial Laws Validity Act. Therefore, when it was proposed to destroy the protected status of imperial statutes generally, Canada insisted on the exemption of its constituent statute. That was the reason for s. 7 of the Statute of Westminster.

[References omitted]

(Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 1, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §3:3, p. 3-7).

[138] A final hurdle was overcome with the *Canada Act 1982*.¹⁴⁸ From then on, all legislative supremacy within the Canadian territory devolved to the local legislatures, including the Canadian Parliament. Consequently, s. 7(1) of the *Statute of Westminster* lost its *raison d'être*.¹⁴⁹ The powers still covered by this provision after 1931 now fell under the authority of the various constituent entities listed in ss. 38 and 41 to 45 of the *CA 1982*. Depending on the subject matter over which these constituent entities purport to exercise their sovereignty, unanimity or a less restrictive formula applies.

* * * * *

[139] Based on the foregoing and the historical data gathered here, what assessment can be made of how the Canadian Constitution evolved into what it is today? A few points deserve a closer look before we draw any conclusions from the whole of our discussion.

[140] The first observation that emerges very clearly from this journey spanning more than two centuries is the core notion of devolution.¹⁵⁰ Throughout the period in question, there was a gradual devolution of legislative and constitutional sovereignty from Great Britain to Canada (and therefore to Quebec, to the extent of the legislative powers over which it has jurisdiction). With hindsight, it is clear that this progression was irreversible, and that it only grew stronger over time. Indeed, in 1982, at the end of this long evolution, the former federal and provincial colonies, which were still firmly present as such in the *CA 1867*, together inherited *all* of the powers that had hitherto been exercised in Canada by the Parliament in Westminster. Along the way, the very nature of the government in place changed completely, beginning with the military regime introduced in 1760, which can be said to have imposed a reign, for a fairly short time, that did not include sharing any of the executive power. This was followed for several years by a colonial government rooted primarily in the exercise of the royal prerogative and in the instructions given by the metropole to the governor of the colony, but in which local subjects were formally consulted. Although under the *Quebec Act*, prominent citizens were brought in to assist the governor and to participate, sometimes closely, in legislative activity, this was still a long way from even a primitive form of representative government.

[141] That said, while this legislative activity was subject to a specific constraint for over a century, the situation continued to evolve over the years. Admittedly, the requirement for royal assent, as well as the accompanying power of disallowance, established an institutional framework to contain and even hinder legislative initiatives taken in the colony. Nevertheless, according to certain reputedly reliable constitutional history sources, it would seem that over time these two potentially conflicting ideas — the royal

¹⁴⁸ (U.K.), 1982, c. 11.

¹⁴⁹ As did its s. 4.

¹⁵⁰ Simply defined, the term “devolution” is to be understood here as the attribution of powers from one legal person to another, in this case from the government of the metropole to that of the colonies.

veto on the one hand and local legislative sovereignty on the other — simply evolved in opposite directions, with London's refusal to assent to laws or its exercise of the power to disallow such laws gradually declining and becoming less frequent as the principle of responsible government and the coincident legitimacy and subsequent sovereignty of a legislative assembly within the colony gained in importance.¹⁵¹

[142] Clearly, for a long time, these restrictive characteristics of the local constitution (i.e., the requirement of royal assent, particularly for reserved laws, and the power of disallowance in certain cases) remained politically controversial, as demonstrated by one of the 92 resolutions passed by the Legislative Assembly of Lower Canada in February 1834,¹⁵² which resolutions were a powerful harbinger of the Rebellion of 1837, the Durham Report and the *Union Act, 1840*. None of the foregoing, however, is strictly speaking a form of supra-legislative control in any way comparable to modern judicial review of the constitutionality of laws. For the most part, and for the majority of the period prior to the *CA 1867*, the situation involved the exercise by the sovereign, assisted by his Privy Council, of the executive power that belonged to him — the power through which he expressed his authority in the colonies. Although s. XLII of the *Constitutional Act, 1791* and of the *Union Act, 1840* conferred on the Parliament in Westminster a supervisory power over this exercise of sovereign authority — a power imposed on the King and one which might even be said to henceforth have given Parliament the last say if it so wished

¹⁵¹ In *Parliamentary Government in the British Colonies*, 2nd ed., London, Longmans, Green, 1894, author Alpheus Todd wrote the following on this subject, at p. 157:

In the case of colonies having responsible government, this right of veto is, however, very sparingly exercised. Wherever that system has been introduced, her Majesty's government has, as a general rule, refrained from interfering with colonial legislation; except in cases specified in the royal instructions to the governors, which almost exclusively refer to matters of Imperial relation, and not of mere local concern. [Reference omitted]

Further on, noting that "the experiment of incorporating the principle of 'responsible government' into the political institutions of a colony was first applied to Canada, before it was introduced elsewhere" (p. 173), he added that, in the case of laws "reserved" for royal assent in the metropole "[m]ost of these cases, however, occurred prior to the concession of 'responsible government;' since then the number of bills reserved has been considerably reduced, and gradually lessened to a minimum" (p. 174).

¹⁵² We therefore find the following in this long, incensed enumeration that its authors intended for the government of the metropole:

84. Resolved, That besides the grievances and abuses beforementioned, there exist in this Province a great number of others [...] that this House points out as among that number:—
[...]

10thly. The too frequent reservation of Bills for the signification of His Majesty's pleasure, and the neglect of the Colonial Office to consider such Bills, a great number of which have never been sent back to the Province, and some of which have even been returned so late that doubts may be entertained as to the validity of the sanction given to them—a circumstance which has introduced irregularity and uncertainty into the Legislation of the Province, and is felt by this House as an impediment to the re-introduction of the Bills reserved during the then preceding Session.

(Legislative Assembly of Lower Canada, *The Ninety-two Resolutions of the House of Assembly of Lower Canada*, Quebec, February 21, 1834, in Great Britain, House of Commons, *Public Documents Relating to Lord Aylmer's Administration of the Government of Lower Canada*, London, England, C.W. Whittingham, 1836, pp. 39-42).

to avail itself thereof — here, too, the power of review remained resolutely within the political sphere. Decisions were therefore guided by the political imperatives of colonial management at that time, not by legal considerations of a supra-legislative nature. It bears reminding once again that the practice of enshrining the protection of individual liberties and fundamental rights in laws conceived of as parts of the formal or material constitution was not part of the British tradition of the time.

[143] Secondly, it should be noted that the appeal record as it stands indicates no judicial precedent — not a single one¹⁵³ — in which a court has upheld a constitutional challenge to legislation of Quebec, Lower Canada or the Province of Canada on the basis of fundamental rights affirmed in the *Quebec Act*. Moreover, in the rare instances in which this imperial law appears in the jurisprudence, some of its most fundamental provisions, such as s. V, are treated as being essentially declaratory.¹⁵⁴ Indeed, the idea of a judicial challenge to a statute based on the written constitution would continue to arouse genuine suspicions for a long time after 1774.¹⁵⁵ It may well be asserted, as it was during oral arguments before the Court, that the submissions of the *Act's* opponents based on the *Quebec Act* had never before been articulated because the opportunity to do so advisedly had never before arisen. While this may be one way of looking at things, it is certainly not the only one that might come to mind in this day and age to someone who wishes to account for the uninterrupted and prolonged silence in the case law on a possible interaction between this 1774 imperial law and the protection of fundamental rights in our current positive law.

¹⁵³ Although the reasons of Rand, Kellock, Estey and Locke, JJ. in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, do cite several legislative sources relied on by the *Act's* opponents and lend a certain weight to the arguments of the parties invoking the *Quebec Act* and various pre-Confederation statutes in support of their claims, this interpretation did not meet with the approval of a majority of the Supreme Court's judges. The trial judge's rigorous analysis of that decision in paras. 549 to 557 of his reasons are to be preferred to the aforementioned observations, which predate the *CA 1982* by three decades and were made well before the advent of contemporary texts such as the *Canadian Charter* and the *Quebec Charter*; in that regard, it should be noted in particular that the conclusion set out in para. 557 required a formal rebuttal from the appellants and, in any event, more than a reference to scattered minority reasons for judgment written more than 70 years ago.

¹⁵⁴ For example, see the judgment of the Circuit Court in *Roy c. Bergeron* (1867), 21 R.J.R.Q. 62, p. 77. Of course, the *Quebec Act* left a non-trivial jurisprudential mark, albeit a now outdated one: this is evidenced in the Court of Queen's Bench decisions in *Stuart v. Bowman* (1853), 3 L.C.R. 309 and *Wilcox v. Wilcox* (1857), 2 L.C.J. 1, commented on by John E.C. Brierley in "The Co-existence of Legal Systems in Quebec: 'Free and Common Socage' in Canada's 'pays de droit civil'", (1979) 20:1-2 *C. de D.* 277, pp. 284ff. But the *Quebec Act* never left such a mark on what we now refer to as human "rights and freedoms", for example in constitutional or quasi-constitutional texts such as the *Canadian Charter* or the *Quebec Charter*.

¹⁵⁵ See, for example, the difference in perspective between the majority reasons of the Court of Queen's Bench in *L'Union St-Jacques de Montréal c. Belisle*, published in (1872) *Rev. crit. de lég. et de jurispr.* 449-463, and the Privy Council decision in *L'Union St. Jacques de Montreal v. Belisle* (1874), 6 A.C. 31.

[144] Ultimately, the position that still, to this day, claims to give the *Quebec Act* supra-legislative scope — in the instant case with regard to freedom of religion — fails entirely to take into account the constitutional changes that marked the post-1931 period. As such, in the present matter, this position is anachronistic (which is not necessarily the case for all constitutional legislation of imperial origin). It must therefore be rejected. This is clear, in particular, from the passage taken from Pierre-Basile Mignault's work,¹⁵⁶ a work that some of the *Act's* opponents say has informed their arguments. The trial judge reproduced this passage in paragraph 527 of his reasons. Writing in 1895, Mignault contrasted the provisions of two imperial laws: the guarantee of free exercise of the Catholic religion contained in the *Quebec Act* and the legislative jurisdiction that s. 91 of the *CA 1867* confers on the Parliament of Canada in matters of marriage and divorce (subsection 26). After 1982, however, there can be no doubt that any incompatibility between these texts, if indeed any such contradiction might have existed, should be resolved in such a way that s. 91(26) of the *CA 1867* prevails in all respects over s. V of the *Quebec Act*. Time also brings about changes in constitutional matters.

[145] There is a third aspect of the issue worth highlighting: as noted above, there was a slow process of devolution from England to Canada between 1774 and 1982, but what was this devolution about, and what was its precise purpose?

[146] Originally, beginning with the *Quebec Act*, which served as the colony's constitution, its s. XII provided for the establishment of a "Council for the Affairs of the Province of Quebec / *Conseil pour les affaires de la Province de Québec*" which "shall have Power and Authority to make Ordinances for the Peace, Welfare and good Government, of the said Province, with the Consent of his Majesty's Governor / *aura le pouvoir et autorité de faire des Ordonnances pour la Police, le bonheur et bon gouvernement de la dite province, du consentement du Gouverneur*". The resemblance to the corresponding provision of s. 91 of the *CA 1867*, which refers to the authority "to make Laws for the Peace, Order and good Government / *de faire des lois pour la paix, l'ordre et le bon gouvernement*", already seems evident. Moreover, at first glance, the content of this legislative jurisdiction, that is, all subject matters over which it could be exercised, appears coextensive with the very notion of civil government. Of course, for some time, the apparent plenitude of the matters entrusted to the Council was only relative, since the consent of the governor, who continued to receive his instructions from London, remained a prerequisite and *sine qua non* for the effective exercise of this authority in all respects. This is why, initially, everything revolved around the way in which colonial institutions were to exercise the legislative powers conferred upon them.

[147] Yet it bears noting once again that, with the backing of London, this local jurisdiction continued to assert itself. Long before the British Parliament relinquished all legislative and constitutional jurisdiction over the territory of Quebec in 1982, an 1854

¹⁵⁶ Pierre-Basile Mignault, *Le Droit civil canadien*, t. 1, Montreal, C. Théoret, 1895, pp. 556-558.

statute had already transferred an important component of imperial jurisdiction from both Houses of that Parliament to the Legislative Assembly and Legislative Council of the Province of Canada.¹⁵⁷ A few years later, the *Colonial Laws Validity Act, 1865* continued in this vein and further limited the jurisdiction of the British Parliament under the doctrine of repugnancy. Henceforth, only certain imperial laws passed by the Parliament in London could take precedence in the colonies, and only on the strict condition that they were sufficiently explicit in their incompatibility with colonial laws.¹⁵⁸ Less than a century later, the *Statute of Westminster* pushed the devolution trend even further, although an important provision of this statute placed the “British North America Acts, 1867 to 1930 / *Actes de l’Amérique du Nord britannique, 1867 à 1930*”¹⁵⁹ beyond the reach of colonial legislatures. This fundamental reservation was addressed in the Schedule to the *CA 1982*, to which s. 52(2)(b) refers. From that point forward, all was said and done, and, since then, the *Quebec Act* no longer had any effect on federal or provincial laws.

[148] In other words, there is now an attempt to dig out, not to say exhume, a two-and-a-half-century-old English statute from ancient constitutional history, in order to lend it a meaning it never had in the minds of its drafters. The *Quebec Act* is an *ad hoc* imperial statute (in the sense that it fits within the context of a colonial conquest) that has not been mentioned in the case law for quite some time. Historians are still interested in it, rightly and advisedly so, but it does not belong in the courtroom to settle a controversy that is governed by entirely different modern constitutional constraints.

3. Pre-Confederation colonial laws

[149] To begin, it is relevant to remember the status of the two laws in question (the *Hart Act* and the *Rectories Act*): both were colonial statutes, and remained so for the duration of their existence. With that in mind, it is worth noting that it takes a firm basis for attributing a quasi-constitutional dimension — or, *a fortiori*, supra-legislative scope — to a statute. In this respect, the difference between these statutes and the *Quebec Act* seems obvious. Indeed, given its origins, the *Quebec Act* took its place alongside statutes such as the *Constitutional Act, 1791* or the *Union Act, 1840*, both of which undeniably had such quasi-constitutional or supra-legislative characteristics at the time they were enacted. As we have just seen, the fate of the *Quebec Act* after its adoption — that is, the gradual modification of its status through successive constitutional reforms, until 1982 — is determinative. That said, a similar observation applies to the other two statutes considered here, in that their current significance is the result of a long evolution and flows from various transformations subsequent to their enactment. Despite the possible tediousness of a chronological and detailed presentation of the legislation in question,

¹⁵⁷ See above, para. [132].

¹⁵⁸ See above, para. [133].

¹⁵⁹ See above, para. [136].

these laws, as well as certain other laws passed prior thereto, must be examined in detail in order to situate what is being considered here within its context.

a. **Rectories Act**

[150] If we attempt to summarize the main thrust of legislative developments up to 1982, we first note the existence, from the outset, of two fault lines that were already quite deeply etched into colonial society at the turn of the eighteenth and nineteenth centuries. In the early decades of the colony's existence, these fault lines could and did generate lasting friction and divisions in public opinion between Catholics (who were the majority and the vast majority of whom were French-speaking) and Protestants (most of whom were English-speaking). They did also, however, provoke sectarian reactions among the different denominations within what would long remain the Protestant minority, which was then already in full growth. The Church of Rome held an important place within what had been New France, and this was not likely to change in the short term. On the other hand, the existence in England (and, therefore, by hypothesis in the British colonies) of an official established church of which the monarch was the "head" (i.e., the Anglican Church), meant that these two religious institutions competed with one another, particularly with regard to their means of subsistence in the colony. Moreover, the Anglican Church itself faced a rivalry with various non-conformist denominations — such as the Presbyterians and Calvinists of the Church of Scotland, the Methodists, even the Baptists, Quakers or other dissidents, some of whom were arriving from the rebelling American colonies. Many took a dim view of the introduction in Canada of an "established" religion with tax privileges and the same "official" hold as the Anglican religion in England.

[151] The origins of the *Rectories Act* can be traced back to the *Quebec Act*, which was certainly not effusive in its details on the issue of religions as it existed in the Province of Quebec in 1774. It did, however, contain one provision, s. V, which was alluded to above and which was of vital importance to the local population. The provision, reproduced in para. [121], affirmed the following principle, namely that, in Quebec, "his Majesty's Subjects, professing the Religion of the Church of Rome [...] may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome / *les sujets de Sa Majesté professant la Religion de l'Eglise de Rome [...] peuvent avoir, conserver et jouir du libre exercice de la Religion de l'Eglise de Rome*". However, in the wake of this fundamental recognition, there were also concrete or practical difficulties — and in a way administrative issues — relating to the fate of the clergy and churches involved. In admittedly succinct terms, s. V provided for their financial upkeep, adding that "the Clergy of the said [Catholic] Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion / *le Clergé de la dite Eglise [catholique] peut tenir, recevoir et jouir de ses dûs et droits accoutumés, eu égard seulement aux personnes qui professeront la dite Religion*". This was all well and good. It was, however, immediately followed by s. VI, which provided that, in Quebec, it would

be lawful for the sovereign “to make such Provision out of the rest of the said accustomed Dues and Rights, for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy / *de faire telles applications du résidû des dits dûs et droits accoutumés, pour l’encouragement de la Religion Protestante, et pour le maintien et subsistance d’un Clergé Protestant*”.¹⁶⁰ The foundations had thus been laid for a *modus vivendi* which would require a certain amount of legislative oversight and which would give rise to somewhat fierce political controversy in later years.

[152] By contrast, the *Constitutional Act, 1791* seems almost verbose on the same issue. Eight of its sections, most of them lengthy and detailed, set out the precise manner in which the relationship between the colonial authorities and the churches then present in Upper and Lower Canada will be managed. Nevertheless, the focus is very much on the Church of England. Most of these provisions state that, in accordance with the instructions received from London, local colonial authorities will be entitled to take various important initiatives in the conduct of affairs affecting religions. They can be summed up as follows. The Catholic Church retains its “accustomed Dues and Rights / *Dûs et Droits accoutumés*”, but colonial authorities will distribute any surplus and “Tythes for Lands or Possessions occupied by a Protestant / *Dixmes sur les terres ou les possessions occupées par un Protestant*” so as to encourage, maintain and support a “Protestant Clergy / *Clergé Protestant*”, with any amendment to this scheme requiring royal assent (s. XXXV). Similarly, colonial authorities are empowered to “make [...] such [permanent] Allotment and Appropriation of [Crown] Lands, for the Support and Maintenance of a Protestant Clergy / *faire [...] telle concession et appropriation [permanentes] des Terres [de la Couronne] pour le soutien et l’entretien du Clergé Protestant*”, the whole in proportion and according to a calculation fixed by said statute (s. XXXVI). Sums so collected from “such Lands so allotted and appropriated / *de telles Terres ainsi concédées et appropriées*” will be used exclusively for “the Maintenance and Support of a Protestant Clergy within the Province in which the same shall be situated / *l’entretien et maintien d’un Clergé Protestant dans la Province dans laquelle elles seront situées*” (s. XXXVII). Moreover, colonial authorities are empowered to establish “Parsonages or Rectories / *Bénéfices ou Cures*” — this is the where the “rectories / *cures*”, or “*rectories*”, as the word would subsequently be translated into French, make their appearance. This is to be done “according to the Establishment of the Church of England / *suivant l’établissement de l’Eglise Anglicane*”, and the colonial authorities may “endow / *fonder*” these parsonages or rectories using the lands previously allotted by the Crown (s. XXXVIII). Colonial authorities are also empowered to designate an “Incumbent or Minister of the Church of England / *Bénéficiaire ou Ministre de l’Eglise Anglicane*” to officiate in these parsonages or rectories and enjoy therein “all Rights, Profits, and Emoluments thereunto belonging / *tous Droits, Profits ou Emolumens y appartenans*”

¹⁶⁰ This section was repealed many years later: *The Statute Law Revision Act* (U.K.), 1872, 35 & 36 Vict., c. 63.

(s. XXXIX). Spiritual and ecclesiastical matters will fall under the jurisdiction of the Bishop of Nova Scotia, by virtue of his authority under “his Majesty’s Royal Letters Patent / *Lettres Patentes Royales de Sa Majesté*” (s. XL). The Legislative Assembly and Legislative Council of each province may, by statute, amend the foregoing provisions respecting the lands allotted, the parsonages or rectories and the persons designated to officiate therein, but subject expressly to royal assent obtained in the manner subsequently described (s. XLI). We come now to the text which, from a constitutional point of view, is probably the most significant: it deals with the power reserved for the British Parliament over all of the foregoing (s. XLII). As previously mentioned,¹⁶¹ the text in this section of the *Constitutional Act, 1791* is virtually identical to the text that would be set out several decades later, upon the unification of Lower and Upper Canada, in the *Union Act, 1840*. Save for the addition of a few details, the content of the latter provision, also numbered s. XLII, remained essentially unchanged.

[153] Thus, for the period between two dates, that of the *Constitutional Act, 1791* and that of the *CA 1867*, these imperial laws governed a reality that both of them described with the same degree of acuity. They dealt with the relationship between the Catholic and Protestant churches, as well as between the Church of England and the other denominations forming part of Protestantism. They also addressed the role to be played by the colonial authorities in the maintenance of the religions active within the territory of Canada. The result was an arrangement that would dominate this relationship for over 50 years. With the imminent arrival of Confederation, sometime before 1867 this reality began to fade. Never again would it have the pre-eminence it had enjoyed when the imperial legislature, through methodical actions, enacted ss. XXXV to XLII of the *Constitutional Act, 1791* and then s. XLII of the *Union Act, 1840*. Here, as elsewhere, things changed with the passage of time.

[154] As previously pointed out, ss. XXXV to XLII of the *Constitutional Act of 1791* were already highly detailed on the subject. Section XLII of the *Union Act, 1840* reiterated the same rules, while clarifying the scope of some of them. For a proper understanding of what was at stake here, and how these matters were expressed at the time, it is worthwhile citing s. XLII at length (with the French translation of the original, taken from the appendices to the Revised Statutes of Canada 1985). On reading the text, one can see that its meaning tends to get lost behind its words:

XLII. And be it enacted, That whenever any Bill or Bills shall be passed by the Legislative Council and Assembly of the Province of Canada, containing any Provisions to vary or repeal any of the Provisions now in

XLII. Et qu’il soit statué, que lorsque le Conseil législatif et l’Assemblée Législative de la Province du Canada auront passé aucuns Bill ou Bills, qui contiendront aucunes dispositions changeant ou révoquant aucune des

¹⁶¹ Above, para. [131].

force contained in an Act of the Parliament of Great Britain passed in the Fourteenth Year of the Reign of His late Majesty King George the Third, intituled An Act for making more effectual Provision for the Government of the Province of Quebec in North America, or in the aforesaid Acts of Parliament passed in the Thirty-first Year of the same Reign, respecting the accustomed Dues and Rights of the Clergy of the Church of Rome; or to vary or repeal any of the several Provisions contained in the said last-mentioned Act, respecting the Allotment and Appropriation of Lands for the Support of the Protestant Clergy within the Province of Canada, or respecting the constituting, erecting, or endowing of Parsonages or Rectories within the Province of Canada, or respecting the Presentation of Incumbents or Ministers of the same, or respecting the Tenure on which such Incumbents or Ministers shall hold or enjoy the same; and also that whenever any Bill or Bills shall be passed containing any Provisions which shall in any Manner relate to or affect the Enjoyment or Exercise of any Form or Mode of Religious Worship, or shall impose or create any Penalties, Burdens, Disabilities or Disqualifications in respect of the same, or shall in any Manner relate to or affect the Payment, Recovery, or Enjoyment of any of the accustomed Dues or Rights herein-before mentioned, or shall in any Manner relate to the granting, imposing, or recovering of any other Dues, or Stipends, or Emoluments, to be paid to or for the Use of any Minister, Priest, Ecclesiastic, or Teacher, according to any Form or Mode of Religious Worship, in respect of his said Office or Function; or shall

dispositions maintenant en vigueur et contenues dans un Acte du Parlement de la Grande-Bretagne passé en la quatorzième année du Règne de feu Sa Majesté George Trois, intitulé, Acte pour pourvoir d'une manière plus efficace au Gouvernement de la Province de Québec dans l'Amérique du Nord, ou dans les Actes susdits du Parlement passés dans la trente-et-unième année du même Règne, relativement aux droits ou revenus ordinaires du Clergé de l'Eglise de Rome; ou changeant et révoquant aucune des diverses dispositions contenues dans le dit Acte mentionné en dernier lieu, relativement au partage et à l'appropriation de terres pour le soutien du Clergé protestant dans la Province du Canada, relativement à la constitution, érection ou dotation de Paroisses ou Rectoreries dans la Province du Canada ou à la présentation des bénéficiers ou ministres d'icelles, ou relativement à la manière dont tels bénéficiers ou ministres devront posséder icelles et en jouir; et aussi lorsqu'il aura été passé aucuns Bill ou Bills contenant aucunes dispositions qui pourront en aucune manière affecter ou avoir rapport à la jouissance ou exercice d'aucune espèce de culte religieux, ou qui imposeraient aucunes pénalités ou charges, ou pourront créer quelque incapacité ou disqualification, par rapport à tel culte, ou qui affecteront ou auront rapport à aucun paiement, recouvrement ou jouissance d'aucun des revenus ou droits ordinaires mentionnés ci-devant, ou qui auront en aucune manière rapport à la dotation, imposition ou recouvrement d'aucuns autres droits, salaires ou émolumens, qui devront être payés à aucun

in any Manner relate to or affect the Establishment or Discipline of the United Church of England and Ireland among the Members thereof within the said Province; or shall in any Manner relate to or affect Her Majesty's Prerogative touching the granting of Waste Lands of the Crown within the said Province; every such Bill or Bills shall, previously to any Declaration or Signification of Her Majesty's Assent thereto, be laid before both Houses of Parliament of the United Kingdom of Great Britain and Ireland; and that it shall not be lawful for Her Majesty to signify Her Assent to any such Bill or Bills until Thirty Days after the same shall have been laid before the said Houses, or to assent to any such Bill or Bills in case either House of Parliament shall, within the said Thirty Days, address Her Majesty to withhold Her Assent from any such Bill or Bills; and that no such Bill shall be valid or effectual to any of the said Purposes within the said Province of Canada unless the Legislative Council and Assembly of such Province shall, in the Session in which the same shall have been passed by them, have presented to the Governor of the said Province an Address or Addresses specifying that such Bill or Bills contains Provisions for some of the Purposes herein-before specially described, and desiring that, in order to give Effect to the same, such Bill or Bills may be transmitted to England without Delay, for the Purpose of its being laid before Parliament previously to the Signification of Her Majesty's Assent thereto.

Ministre, Prêtre, Ecclésiastique, ou Prédicant, conformément aux usages d'aucun culte religieux, pour leur dite charge ou fonction; ou qui affecteront ou auront rapport en aucune manière à l'établissement ou la discipline de l'Église réunie d'Angleterre et d'Irlande, parmi les Membres d'icelle dans la dite Province; ou qui affecteront ou auront un rapport en aucune manière à la prérogative de Sa Majesté concernant la dotation des terres incultes de la Couronne dans la dite Province; tous tels Bill ou Bills seront, préalablement à aucune déclaration ou signification de l'assentiment de Sa Majesté à iceux, soumis aux deux Chambres du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande; et il ne sera pas loisible à sa Majesté de signifier son assentiment à aucuns tels Bill ou Bills jusqu'à l'expiration de trente jours après qu'ils auront été soumis aux dites Chambres, ni de donner son assentiment à aucuns tels Bill ou Bills dans le cas où l'une ou l'autre Chambre du Parlement demanderait, dans les dits trente jours, par adresse à Sa Majesté de refuser sa sanction à aucuns tels Bill ou Bills; et aucun tel Bill n'aura vigueur ni effet pour aucun des dits objets dans la dite Province du Canada, à moins que le Conseil Législatif et l'Assemblée de telle Province n'aient présenté au Gouverneur de la dite Province, pendant la Session dans laquelle il pourra avoir été passé par eux, une ou plusieurs adresses, déclarant que tels Bill ou Bills contiennent des dispositions sur quelque'un des objets spécialement précisés ci-dessus, et demandant qu'à l'effet de donner vigueur à tels Bill ou Bills, ils soient transmis en Angleterre en diligence, pour être

soumis au Parlement, préalablement
à la signification de l'assentiment de
Sa Majesté à iceux.

Nonetheless, the legislature's tone in this statute reveals the importance in the society of that time of maintaining a degree of harmony in the relationship between the colonial government and the churches that embodied the religions existing among the population.

[155] It seems appropriate to draw attention now to a few lines from s. XLII of the 1840 statute, as reproduced above — lines that correspond almost word for word to an excerpt from s. XLII of the 1791 statute. In it, the legislature makes the approval of the British Parliament a prerequisite for all colonial legislation that it describes as follows:

[...] whenever any Bill or Bills shall be passed containing any Provisions which shall in any Manner relate to or affect the Enjoyment or Exercise of any Form or Mode of Religious Worship [...].

[...] lorsqu'il aura été passé aucuns Bill ou Bills contenant aucunes dispositions qui pourront en aucune manière affecter ou avoir rapport à la jouissance ou exercice d'aucune espèce de culte religieux [...].

This brief passage foreshadowed what the legislature would focus on when it intervened once again to regulate the situation involving locally active religions.

[156] At this point, a number of details must be kept in mind in order fully grasp the context in which these legislative interventions took place. When the legislature took such a stand on this subject, to whom was it in fact addressing itself, and on what exactly was it expressing itself? According to historian Thomas Chapais, some ten years later (in 1850), when the Assembly of the Province of Canada once again considered the matter at length, [TRANSLATION] “the thorny question of the clergy reserves” had already been [TRANSLATION] “stirring opinions in the upper province” for 25 years.¹⁶² Indeed, for years, there had been a deadlock between, on the one hand, the Legislative Assembly of the Province of Canada and the progressive or reformist elements (who were generally in favour of abolishing reserves) and, on the other hand, the Legislative Council of that province and the conservative elements referred to as the “Family Compact” (who were generally against such abolition).¹⁶³ This impasse had had a lasting impact on political life

¹⁶² Thomas Chapais, *Cours d'histoire du Canada*, t. VI “1847-1851”, Montreal, Bernard Valiquette, 1944, p. 159. This refers to Upper Canada and, subsequently, to the part of the Province of Canada corresponding thereto. Alan Wilson, in *The Clergy Reserves of Upper Canada*, Historical Booklet No. 23, Ottawa, The Canadian Historical Association, 1969, mentions on p. 3 that ss. XXXV to XLII of the *Constitutional Act, 1791* “would be the cause of great conflict in Canada for over sixty years”.

¹⁶³ Thomas Chapais, *Cours d'histoire du Canada*, t. VI “1847-1851”, Montreal, Bernard Valiquette, 1944, pp. 160-161.

in Upper Canada, and later in the Province of Canada, as numerous official documents from that period attest.¹⁶⁴

[157] In addition to the question of maintaining reserves, there was also the underlying problem of the meaning to be given to the expression “Protestant Clergy / *Clergé Protestant*” as it appeared in certain provisions, including, among other relevant provisions, s. VI of the *Quebec Act*, s. XXXV of the *Constitutional Act, 1791* and s. XLII of the *Union Act, 1840*. The rights of the clergy, whether Anglican or otherwise, to the reserves intended for them depended on the answer to this question. And the colony’s demographic and economic growth was such that the controversy was now a tangible issue for stakeholders.¹⁶⁵ Indeed, the meaning of the term seems to have been the subject of lively and persistent division in Canada, despite the fact that before adopting the *Union Act, 1840*, British parliamentarians had sought and obtained the opinion of the judges of the Court of Common Pleas on this point, who had replied that the Anglican Church was not the only one covered by the expression “Protestant Clergy” in the texts voted on in London in 1774 and 1791.¹⁶⁶

¹⁶⁴ For example, Sir Francis Hincks, in *Religious Endowments in Canada: The Clergy Reserve and Rectory Questions – A Chapter of Canadian History*, London, Dalton & Lucy, 1869, p. 47, reproduced a letter from the Governor General of the Province of Canada, the Earl of Elgin and Kincardine, sent on July 19, 1850 to the Earl Grey, Secretary of State for the Colonies in London, in which he informed him of the Legislative Assembly’s desire to fundamentally transform the clergy reserve system. The Earl of Elgin and Kincardine commented as follows:

I deeply regret the revival of agitation on this subject, of which Lord Sydenham truly observed, that it had been in Upper Canada the one all-absorbing and engrossing topic of interest, and for years the principal cause of the discontent and disturbance which had arisen, and under which the province had laboured. The intervention of the Imperial Parliament in 1840 was doubtless prompted by a desire to settle on terms which should be equitable and generally satisfactory, a question which had for so many years disturbed the peace of the colony.

¹⁶⁵ In this regard, Ludovic Brunet observed as follows in *La Province du Canada : Histoire politique de 1840 à 1867*, Quebec, Laflamme & Proulx, 1908, p. 220: [TRANSLATION] “[A]s Upper Canada evolved and the population became denser, these lands [included in the clergy reserve] became more valuable, which kindled the covetousness of all the religious denominations, who claimed the designation of ‘Protestant clergy’”.

¹⁶⁶ Sir Francis Hincks, in *Religious Endowments in Canada: The Clergy Reserve and Rectory Questions – A Chapter of Canadian History*, London, Dalton & Lucy, 1869, p. 9, cited the opinion of his Chief Justice:

[...] we are all of opinion that the words “a Protestant Clergy” in the statute 31 Geo. 3, c. 31, are large enough to include, and that they do include, other clergy than those of the Church of England, and Protestant Bishops, Priests, and Deacons, who have received Episcopal ordination.

For those words, which are first to be met with in the Statute 14 Geo. 3, c. 83 [...], appear to us, both in their natural force and meaning, and still more from the context of the clauses in which they are found, to be there used to designate and intend a Clergy opposed in doctrine and discipline to the Clergy of the Church of Rome, and rather to aim at the encouragement of the Protestant Religion in opposition to the Romish Church, than to point exclusively to the Clergy of the Church of England.

[158] Finally, it should be noted that, with regard to the reserves provided for by law, the somewhat “statutory”¹⁶⁷ mechanism of banking public lands for the benefit of the “Protestant Clergy / *Clergé Protestant*” opened up the possibility for the colonial authority to “constitute and erect [...] Rectories / *constituer et ériger [des] Cures*” and to “endow / *fonder*” them with “so much or such Part of the Lands so allotted and appropriated / *autant ou telle partie des Terres ainsi concédées et appropriées*” (s. XXXVIII). Many saw this second aspect of the reserve procedure as a hindrance to the natural development of the colony, and it seems in turn to have provoked a wave of strong resentment from the affected population.¹⁶⁸

[159] Such was the climate within which the *Rectories Act* of 1852 was passed. In the report prepared by one of the experts heard in first instance, he provided the following summary of the steps that led to this transition:

[TRANSLATION]

To calm the discontent that arose among the other Christian denominations that had been excluded from the benefit of the sale of reserves permitted since 1817 [*sic*], London enacted a law in 1840 to distribute the proceeds of sale equally among all these denominations. [...] The reserves that had become multi-denominational, however, continued to divide opinions under the Union regime, such that the Parliament of the Province of Canada passed a statute on rectories in 1851 and another in 1854 to liquidate these contentious reserves.¹⁶⁹

¹⁶⁷ It was “statutory” in the sense that it involved a simple, automatically applied calculation derived from s. XXXVI *in fine* of the *Constitutional Act, 1791*: one seventh of the land made available by the Crown fell under this reserve. On p. 8 of his book (*The Clergy Reserves of Upper Canada*, Historical Booklet No. 23, Ottawa, The Canadian Historical Association, 1969), Alan Wilson sets out a table that illustrates the fragmentary effect of this policy, a policy which one might refer to as “cadastral” and which some owners or users may have resented.

¹⁶⁸ On this point, in *The Clergy Reserves of Upper Canada*, Historical Booklet No. 23, Ottawa, The Canadian Historical Association, 1969, pp. 17-18, Alan Wilson noted as follows:

The rectories symbolized the culmination of Anglican pretensions. In the process they rekindled the fires under the Clergy Reserves. The Reserves had been reviled as the symbols of a Church establishment which had arisen *de facto*; the rectories suggested that they might yet be consolidated *de jure*. In the violent public reaction to the rectories there were few historical declarations on the threat to consolidated land settlement or against the extent of the acreages sequestered. The rectories were attacked as instruments of political, social and religious inequality.

¹⁶⁹ Exhibit PGQ-7, *Rapport d'expertise de Marc Chevrier pour le PGQ (dossier Lauzon)*, p. 51. In fact, 1817 was the year the Legislative Assembly of Upper Canada passed a resolution addressed to the authorities in the metropole deploring the fact that the clergy reserves constituted an [TRANSLATION] “insurmountable obstacle” to economic development. This situation was remedied in 1827 by a statute of the British Parliament entitled *An Act to authorize the Sale of a Part of the Clergy Reserves in the Provinces of Upper and Lower Canada* (U.K.), 1827, 7 & 8 Geo. IV, c. 62.

The first of these statutes¹⁷⁰ (that of 1840) did not have the desired effect. The second (that of 1852, if we refer to the year of royal assent) is the one identified above in the title to this part of the reasons,¹⁷¹ that is, the one mainly discussed here. The third followed shortly after the second.¹⁷² The one of primary interest here is the 1852 statute. What did it consist of?

[160] Unsurprisingly, as it was then a requirement, this 1852 *Rectories Act* was enacted in accordance with the procedure prescribed by s. XLII of the *Union Act, 1840*. We know, therefore, that it was first passed by the legislature of the Province of Canada and then reserved for royal assent on August 30, 1851, that this assent was granted on May 15, 1852 and that, on June 9, 1852, the Governor of Canada proclaimed that such assent had been so granted the preceding May. It should be noted that had the statute been passed a little over two years later, this procedure would have been superfluous. Indeed, in 1854, London abolished the requirement for approval by the British Parliament as a precondition for royal assent.¹⁷³ In 1851 and 1852, however, s. XLII of the *Union Act, 1840* remained in full force.

[161] In accordance with that s. XLII, therefore, the *Rectories Act* first affirmed the equality of the religious denominations present in the province and the right of Her Majesty's subjects to profess among such denominations the religion of their choice without discrimination. It did so in terms that, save for slight variations, can be found in legislation still in force today. The legislature of the Province of Canada expressed it as follows after the first whereas of the *Rectories Act*:

[...] it is hereby declared and enacted by the authority of [the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada], That the free exercise and enjoyment of Religious Profession and Worship, without discrimination of preference, so as the same be not made an excuse for acts of licentiousness, or a

[...] il est par le présent déclaré et statué par l'autorité [de la Très-Excellente Majesté de la Reine, par et de l'avis et consentement du conseil législatif et de l'assemblée législative de la province du Canada], que le libre exercice et la jouissance de la profession et du culte religieux, sans distinction ni préférence, mais de manière à ne pas servir d'excuse à des actes d'une licence outrée, ni de

¹⁷⁰ *An Act to provide for the Sale of the Clergy Reserves in the Province of Canada, and for the Distribution of the Proceeds thereof* (U.K.), 1840, 3 & 4 Vict., c. 78.

¹⁷¹ Above, para. [109] (See also above, para. [64]).

¹⁷² *An Act to make better provision for the appropriation of Moneys arising from the Lands heretofore known as the Clergy Reserves, by rendering them available for Municipal purposes* (Can.), 1854, 18 Vict., c. 2.

¹⁷³ This resulted from s. VI of *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other Purposes* (U.K.), 1854, 17 & 18 Vict., c. 118, cited hereinabove (para. [132]).

justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

justification de pratiques incompatibles avec la paix et la sûreté de la province, sont permis par la constitution et les lois de cette province à tous les sujets de Sa Majesté en icelle.

With the exception of the reference to the original authority and a few phrases that have become obsolete over the years (such as “*licence outrée*”), this provision bears a striking resemblance to the current text of s. 1 of the *Freedom of Worship Act*¹⁷⁴ as well as that of parallel legislation in Ontario, namely the *Religious Freedom Act*.¹⁷⁵ Indeed, it can easily be traced in Ontario¹⁷⁶ and in Quebec.¹⁷⁷

[162] The 1852 statute also repealed arts. XXXVIII, XXXIX and XL of the *Constitutional Act, 1791*. Henceforth, and for this reason, Letters Patent would no longer be issued to create, fund or provide ecclesiastical staff for new Church of England parsonages or rectories.¹⁷⁸ However, as a concession to the previous sixty or so years, any such decision made prior to the new law would remain unchanged. In short, this secularization, which was a major transformation in the maintenance scheme for Protestant religions in the Province of Canada, was made possible through a major compromise: it was achieved through generous transitional measures that made it acceptable.

[163] It would be wrong, however, to believe that the British Parliament's 1852 endorsement of the *Rectories Act*, which it had received from Canada in 1851, would silence the most determined opponents of the secularization of clergy reserves.

¹⁷⁴ CQLR, c. L-2, whose s. 1 states:

1. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of Québec, are by the constitution and laws of Québec allowed to all persons living within the same.

1. La jouissance et le libre exercice du culte de toute profession religieuse, sans distinction ni préférence, mais de manière à ne pas servir d'excuse à la licence, ni à autoriser des pratiques incompatibles avec la paix et la sûreté au Québec, sont permis par la constitution et les lois du Québec à toutes les personnes qui y vivent.

¹⁷⁵ R.S.O. 1990, c. R.22.

¹⁷⁶ Starting with *An Act respecting Rectories*, R.S.O. 1877, c. 215.

¹⁷⁷ Successively, arts. 3439 to 3442 (Chapter Second, “RECTORIES”) of the Revised Statutes of the Province of Quebec, 1888; arts. 4387 to 4390 (Chapter Second, “RECTORIES”) of the Revised Statutes of the Province of Quebec, 1909; then *An Act respecting Freedom of Worship and the Maintenance of Good Order In and Near Places of Public Worship*, R.S.Q. 1925, c. 198; *An Act respecting Freedom of Worship and the Maintenance of Good Order In and Near Places of Public Worship*, R.S.Q. 1941, c. 307; the *Freedom of Worship Act*, R.S.Q. 1964, c. 301; the *Freedom of Worship Act*, R.S.Q. 1977, c. L-2; and the *Freedom of Worship Act*, CQLR, c. L-2.

¹⁷⁸ The expression “Parsonage or Rectories”, which was translated in the *Union Act, 1840* as “*Paroisses ou Rectoreries*” was henceforth translated as “*cures ou rectoreries*”.

Opponents of the measure remained intractable, as evidenced in the attitude of one of the most militant among them, the Lord Bishop of Toronto, John Strachan.¹⁷⁹ In 1853, even after the royal assent given on May 15, 1852, he sent a letter to the Duke of Newcastle, Secretary of State for the Colonies in London, peremptorily denouncing¹⁸⁰ the equating of the Church of England with the other religious denominations represented in the colony. While the tone of the colonial legislation may seem firm, this was due to the fact that the matter the statute sought to resolve was clearly still highly divisive within a certain sector of local society.

[164] It was, however, to no avail. The supporters of the clergy reserves, including Bishop Strachan himself, had to give up on the survival of the institution they had wanted to preserve at all costs. Just over two years later, on December 18, 1854, a statute of the Province of Canada that would begin the process of the final liquidation of the clergy reserves was assented to.¹⁸¹ This statute, *An Act to make better provision for the appropriation of Moneys arising from the Lands heretofore known as the Clergy Reserves, by rendering them available for Municipal purposes*, established a new regime. It, too, included transitional measures that were liberal and even advantageous for officiants from several denominations other than the Church of England.¹⁸² Pursuant to this law, the revenues still derived from clergy reserves were directed to the Receiver General for the Province of Canada, and to the “Upper Canada Municipalities Fund / *Fonds des municipalités du Haut Canada*” as well as to the “Lower Canada

¹⁷⁹ Chapais describes him as [TRANSLATION] “the famous Archdeacon Strachan [...] passionate champion of the Church of England”: Thomas Chapais, *Cours d'histoire du Canada*, t. VI “1847-1851”, Montreal, Bernard Valiquette, 1944, p. 161.

¹⁸⁰ In particular, he wrote the following:

Can religious liberty be preserved in no other way than by putting all religions on a level, as equally entitled for support from public encouragement and protection? Are the Koran, the Vedas, the book of the Mormons, and the Holy Bible, to be held equally sacred? And are the public authorities, the organs by which the nation acts, to take any of these indifferently as the rule to direct them in their public proceedings? And in a nation of Protestants, who have high and peculiar interests to preserve and transmit to posterity, are all places of power and trust, and even the Throne itself, to be open equally to the Atheist, the Infidel, the Pagan, the Mussulman, the Romanist, the Mormon and the Protestant? Is the kingdom of Satan, in whatever shape it may appear, to enjoy the same public favor as the Kingdom of God? Is a Christian Church, a Pagan temple, and a mosque, to be equally held in honor? In one word, is “the freedom of the City to be bestowed on all the gods of mankind?”

(John Strachan, *The Clergy Reserves: A Letter from the Lord Bishop of Toronto to the Duke of Newcastle, Her Majesty's Secretary for the Colonies*, Toronto, Churchman Office, 1853, pp. 26-27).

¹⁸¹ *An Act to make better provision for the appropriation of Moneys arising from the Lands heretofore known as the Clergy Reserves, by rendering them available for Municipal purposes* (Can.), 1854, 18 Vict., c. 2.

¹⁸² For example, its s. II stated that “the annual allowance heretofore payable to the Roman Catholic Church in Upper Canada, and to the British Wesleyan Methodist Church for Indian Missions, shall continue to be payable during the twenty years next after the passing of this Act, and no longer / *l'allocation annuelle jusqu'ici payable à l'église Catholique Romaine dans le Haut-Canada et à l'église Méthodiste Wesleyenne Britannique pour les Missions Sauvages, continuera à être payable durant les vingt années qui suivront la passation du présent Acte, et pas au-delà*”.

Municipalities Fund / *Fonds des municipalités du Bas Canada*". And the statute did not fail to highlight its ultimate aim. Its s. III stated the following:

III. [...] whereas it is desirable to remove all semblance of connection between Church and State, and to effect an entire and final disposition of all matters, claims and interests arising out of the Clergy Reserves by as speedy a distribution of their proceeds as may be: Be it therefore enacted [...].

III. [...] attendu qu'il est désirable de faire disparaître toute apparence d'union entre l'Eglise et l'Etat et de disposer entièrement et définitivement de toutes matières, réclamations et intérêts provenant des Réserves du Clergé par une distribution aussi prompte que possible des revenus des dites Réserves : A ces causes qu'il soit statué [...].

[165] As we saw earlier, to this day, local legislatures have remained faithful to the initial impetus given in 1852 with the *Rectories Act*.

* * * * *

[166] In light of the foregoing, can the *Rectories Act* be given the supra-legislative scope some of the *Act's* opponents claim? The answer calls for a few details. To properly examine the subject, we must first consider the genealogy, so to speak, of the statute with which we are concerned here.

[167] To begin, it should be noted that the 1852 *Rectories Act* is one of the laws contemplated in s. 129 of the *CA 1867*. And indeed, as noted above,¹⁸³ the legislatures of Quebec and Ontario would, in due course, take over from the legislature of the Province of Canada. To this day, they would perpetuate, in provincial law, the principle of equality of religions, which can be considered to have originated with the 1852 statute. As regards federal law, one must refer to the 1886 Revised Statutes of Canada to determine what happened to the *Rectories Act*. At that time, that is, in 1886, the 1852 *Rectories Act* had already been consolidated in the Province of Canada prior to Confederation, and it appeared in the 1859 Consolidated Statutes of Canada as "1859, 22 Vict., c. 74". A few years later, however, when federal legislation was revised in 1886, Appendix I of the Revised Statutes of that year, 1886, shows what happened after Confederation, and in federal law, to each of the statutes set out in the 1859 Consolidated Statutes of Canada. We see that their chapter 74, "RECTORIES", was labelled as "Provincial" — in other words, it fell under the jurisdiction of the other level of government. This means that from 1867 onwards, the provinces took over from the Province of Canada with respect to this subject matter. As for the federal Parliament, it disassociated itself from the subject matter since, under this head of jurisdiction, all new initiatives now fell to the provinces.

¹⁸³ Above, para. [161].

[168] In a sense, albeit a very limited one, in 1852, the subject matter of the *Rectories Act* fell into in a field that could potentially be the stage for a type of supra-legislative intervention. Why can we say this? Because this statute, which was adopted in 1851 by the Legislative Assembly and Legislative Council of the Province of Canada, could only take effect, even after having been duly voted on, if the British Parliament gave its assent. In other words, the local legislature was at the mercy of a potential and dominant decision to be made in London, a decision constitutionally liable to neutralize its actions. This is provided for in s. LXII of the *Union Act, 1840* and, given the procedure that was followed at the time, this is the potential fate that awaited the Canadian legislation. But in a case like this, the guardianship authority — if it can be referred to as such, that is, the authority that ultimately authorized or did not authorize royal assent to the bill — performed a function essentially political in nature. As previously pointed out,¹⁸⁴ this is in no way comparable to the function of a court vested with the power to invalidate a law because it infringes a constitutional provision that is supra-legislative in scope and has a fixed content. The analogy between the two realities is therefore highly imperfect. On the one hand, there is the supra-legislative dimension that is subject to the approval of the British Parliament — in the case of the *Rectories Act* on the pretext that it affects “the Enjoyment or Exercise of any Form or Mode of Religious Worship” (we refer here to the terms of the *Union Act, 1840*). On the other hand — and as an example — there is the supra-legislative dimension of ss. 91 and 92 of the *CA 1867* or of a provision of the *Canadian Charter*, each of which sets out an obligatory, permanent and largely apolitical framework within which Canadian legislatures can act under the Constitution. Moreover, this imperfectly supra-legislative character disappeared in phases at around the same time, to the point that it ceased to exist altogether just a few years later. Indeed, the *Rectories Act* itself repealed ss. XXXVIII, XXXIX and XL of an imperial statute, namely, the *Constitutional Act, 1791*, and, two years later, s. XLII of the *Union Act, 1840* was repealed by s. VI of another imperial statute.¹⁸⁵

[169] Admittedly, the *Rectories Act* had been adopted in accordance with the procedure, since repealed, of s. XLII, but it should not be forgotten that, in a statute enacted in 1854 by the British Parliament, the latter specified that

[...] no Act heretofore passed or to be passed by the Legislature of Canada shall be held invalid or ineffectual by reason of the same not having been laid before the said Houses, or by reason of the Legislative Council and Assembly not having presented to the Governor such Address as by the said Act of Parliament [*Union Act, 1840*] is required.¹⁸⁶

¹⁸⁴ Above, paras. [124] and [142].

¹⁸⁵ *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other Purposes* (U.K.), 1854, 17 & 18 Vict., c. 118.

¹⁸⁶ *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other Purposes* (U.K.), 1854, 17 & 18 Vict., c. 118, s. VI.

Under these conditions, what, then, is left of the alleged supra-legislative scope of the *Rectories Act*? Nothing. As noted with respect to the *Quebec Act*,¹⁸⁷ the *Rectories Act* and those that followed it were never used, on their own, to invalidate local legislation on the basis of unconstitutionality.

[170] Next, it should be noted that in its clear and explicit affirmation of a principle of freedom of worship, or religious freedom, “without discrimination or preference / *sans distinction ni préférence*”, the statute in question is in keeping with the letter and spirit of another provincial statute, one that is still in force today, namely, the *Freedom of Worship Act*.¹⁸⁸ The latter statute is a simple law, not a component of the formal or written constitution, nor is it a law that is in any way supra-legislative in scope. The reference to “the constitution [...] of Québec / *la constitution [...] du Québec*” in s. 1 of that statute must necessarily be understood to mean both the *CA 1982* and the constitution in a broader sense, namely, in the substantive (or material) sense of a legislative text adopted by a simple majority and intended to govern, among other things, relations between the state and citizens or civil society.

[171] Moreover, the *Freedom of Worship Act*, which, until proven otherwise, we can agree has no supra-legislative scope, must be reconciled with the *Act* since it co-exists with it. As a general observation, one notes that neither the *Act* nor the *Freedom of Worship Act* establishes “a preference as regards the exercise of religious profession and worship”: in fact, all religions are placed on an equal footing, both among themselves and with regard to the principle of state laicity. Coreligionists of any religious denomination whatsoever must forgo particular vestimentary forms of orthopraxy when they have specific dealings with the state or when they exercise certain functions as representatives of the state. It is, of course, debatable whether a requirement of this kind infringes rights guaranteed by s. 2 of the *Canadian Charter* and s. 3 of the *Quebec Charter*, and this, in turn, may raise questions about the scope of ss. 33 and 52 of those charters. But that is another matter altogether. Moreover, we know that, depending on the circumstances, various requirements of our positive law (and not only our criminal law) take precedence over certain components of freedom of conscience or freedom of religion.¹⁸⁹

[172] In any event, it is highly doubtful that the *Rectories Act* as it existed when it came into force in 1852 was intended to institute a system of equality of worship in the Province of Canada. Rather, it owes its existence to a difficult historical context, one that complicated interfaith relations within the colony and whose most salient aspects have already been discussed above.¹⁹⁰ As its title suggests, this statute specifically addressed

¹⁸⁷ Above, para. [143].

¹⁸⁸ It, too, uses the words “without discrimination or preference / *sans distinction ni préférence*” (s. 1).

¹⁸⁹ *Singh c. Montréal Gateway Terminals Partnership*, 2019 QCCA 1494 (application for leave to appeal to the Supreme Court dismissed, April 30, 2020, No. 38916), is but one example among many.

¹⁹⁰ Above, paras. [156] to [164].

the structural anomaly of rectories. It targeted the advantages the rectories enjoyed in the organization of the Anglican Church in Canada, and it sought to settle a dispute over the funding formula for the churches present in the colony. The dispute was resolved by replacing the rectories and ecclesiastical authorities with an endowment paid into public funds for the benefit of the municipalities that existed at the time. Subsequently, with the *Act respecting Freedom of Worship and the Maintenance of Good Order In and Near Places of Public Worship* having fairly quickly replaced the *Rectories Act*, the legislature's concerns turned to maintaining order in religious worship, as the trial judge explained in his reasons.¹⁹¹

[173] Finally, a number of observations already set out above¹⁹² regarding the progression of the principle of devolution in Canadian constitutional law and regarding the procedure for amending the Canadian Constitution are also relevant here. Given these various elements, one cannot claim that the *Rectories Act* and the laws that followed in its wake still have a supra-legislative status making it possible to invalidate the *Act* in whole or in part on constitutional grounds.

[174] We can summarize the situation in a few lines. In all likelihood, the *Rectories Act* of 1852 fell under provincial jurisdiction, which subsequently came under s. 129 of the *CA 1867*. Thus, after Confederation, its subject matter fell under Quebec's jurisdiction. It gradually metamorphosed into the *Freedom of Worship Act*, which, together with the *Quebec Charter*, is now the only remaining trace of the *Rectories Act* in the laws of Quebec. From the foregoing, one can conclude that, as is, the 1852 statute has become obsolete or has fallen into disuse. Moreover, for the reasons set out earlier, asserting that at one time the 1852 statute had a supra-legislative scope is in itself a proposition that is not only highly dubious, but actually ill-founded. In present times, the initial and intrinsic fragility of this alleged supra-legislative character comes up against an absolute impediment resulting from a number of converging factors: s. II of the 1852 statute itself, s. VI of an 1854 statute¹⁹³ and s. 52(2) of the *CA 1982* as well as its Schedule.

[175] An analogy can be drawn between what happened to the *Rectories Act* after 1867 and what had happened to the local law previously in force in the colonies recently conquered by London: both cases involved a legal transition. In the first case, s. 129 of the *CA 1867*, cited above,¹⁹⁴ established the situation. In the second case, a common law principle — the reception of English law — came into play, as clearly illustrated in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*.¹⁹⁵ This matter

¹⁹¹ See the Trial Judgment, particularly paras. 546-547.

¹⁹² See, in particular, paras. [140] and [145] to [147] above.

¹⁹³ *An Act to empower the Legislature of Canada to alter the Constitution of the Legislative Council for that Province, and for other Purposes* (U.K.), 1854, 17 & 18 Vict., c. 118.

¹⁹⁴ Above, para. [134].

¹⁹⁵ 2013 SCC 42.

involved an old English statute from 1731¹⁹⁶ that had been made applicable in the newly established colony of British Columbia by a succession of ordinances or statutes confirming the reception of English law.¹⁹⁷ A question arose as to the effect of much more recent rules of procedure — rules treated as statutory rules¹⁹⁸ — that had been adopted by the courts of British Columbia. The Supreme Court specified that it was not necessary to prove the existence of a conflict between the old rules and the new rules. Rather, the test was whether the new rules occupied the field in which, previously, the old rules had been in place. Whether or not there is an inconsistency between the current *Freedom of Worship Act* and the 1852 *Rectories Act* (or its successors), it is clear that, at this time, new laws occupy the field formerly occupied by the *Rectories Act*.

[176] It is therefore appropriate to confirm the Trial Judgment in that regard.

b. Hart Act

[177] Although it predated the *Union Act, 1840*, the *Hart Act*, like the *Rectories Act*, originally fell under s. XLII of the *Constitutional Act, 1791*. This explains the procedure followed for its adoption. We know, therefore, that it was first passed by the legislature of Lower Canada and then reserved for royal assent on March 31, 1831, that this assent was granted on April 12, 1832 and that, on June 5, 1832, when it came into force, the Governor of Canada proclaimed that such assent had been so granted two months earlier.

[178] The aim of the *Hart Act* was to eliminate from the constitutional and positive law of the time rules — sometimes old, some even dating back to the reign of Elizabeth I — that had the effect of excluding Jewish citizens from political life based on their religion, by closing the door to elected positions or public functions and offices for which the oath to the sovereign was the rule. As regards Catholics, s. VII of the *Quebec Act* had put an end to this disqualification. The same was not true of their Jewish compatriots, as demonstrated in 1808 and 1809 by Ezekiel Hart's expulsion from the Legislative Assembly of Lower Canada. Hart, who had been duly elected to the Legislative Assembly in a Trois-Rivières riding, but was of the Jewish faith, was reproached at the time of his swearing-in for not being able to take the oath of office as required by law. Historian Denis Vaugeois has recounted the murky circumstances of this case.¹⁹⁹ It may be that the issue

¹⁹⁶ *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (U.K.), 1731, 4 Geo. II, c. 26.

¹⁹⁷ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, para. 16.

¹⁹⁸ “[...] considered to have the force of statute law”, according to the original English text of the majority reasons (para. 50).

¹⁹⁹ See the biographical note in: Denis Vaugeois, “HART, Ezekiel (Ezechie)”, *Dictionary of Canadian Biography*, Vol. 7: “1836-1850”, University of Toronto Press / Université Laval, 1988, online: http://www.biographi.ca/en/bio/hart_ezekiel_7E.html. See also: Thomas Chapais, *Cours d'histoire du Canada*, t. II “1791-1814”, Montreal, Bernard Valiquette, 1944, pp. 187, 196 and 199.

of the oath was merely a pretext, motivated by the purely partisan aims of supporters of a party opposed to Hart's. Be that as it may, the result was the same: he was unable to sit in the Legislative Assembly. It was not until 1832 in Lower Canada that this anomaly was remedied by a statute that came to be known as the *Hart Act*. Remarkably, this was the first statute of its kind in the British Empire, hence the symbolic weight attached to it.

[179] Here is the text of the statute in question, as it appears in the laws of Lower Canada:

WHEREAS doubts have arisen whether persons professing the Jewish Religion are by law entitled to many of the privileges enjoyed by the other subjects of His Majesty within this Province: Be it therefore declared and enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Lower Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, intituled, "*An Act for making more effectual provision for the Government of the Province of Quebec, in North America,*" and to make further provision for the Government of the said Province of Quebec in North America." And it is hereby declared and enacted by the authority aforesaid, that all persons professing the Jewish Religion being natural born British subjects inhabiting and residing in this Province, are entitled and shall be deemed, adjudged and taken to be entitled to the full rights and privileged of the other subjects of His Majesty, his Heirs or Successors, to all intents, constructions and purposes whatsoever, and capable of taking, having or enjoying any office or place

VU qu'il s'est élevé des doutes si par la Loi les personnes qui professent le Judaïsme ont le droit à plusieurs des privilèges dont jouissent les autres sujets de Sa Majesté en cette Province; — Qu'il soit donc déclaré et statué par le Très-Excellent Majesté du Roi, par et de l'avis et consentement du Conseil Législatif et de l'Assemblée de la Province du Bas-Canada, constitués et assemblés en vertu et sous l'autorité d'un Acte passé dans le Parlement de la Grande-Bretagne, intitulé, "Acte qui rappelle certaines parties d'un Acte passé dans la quatorzième année du Règne de Sa Majesté, intitulé, "*Acte qui pourvoit plus efficacement pour Gouvernement de la Province de Québec dans l'Amérique Septentrionale,*" et qui pourvoit plus amplement pour le Gouvernement de la dite Province;" — Et il est par le présent déclaré et statué par la dite autorité, que toutes personnes professant le Judaïsme, et qui sont nées sujets Britanniques, et qui habitent et résident en cette Province, ont droit, et seront censées, considérées et regardées comme ayant droit à tous les droits et privilèges des autres sujets de Sa Majesté, Ses Héritiers et Successeurs, à toutes intentions, interprétations et fins quelconques, et sont habiles à pouvoir posséder, avoir ou jouir d'aucun office ou charge de

of trust whatsoever, within this confidence quelconque en cette
Province. Province.

[180] In paragraphs 560 to 564 of his reasons, the trial judge meticulously traced the evolution of legislation in Lower Canada and Quebec from 1832 to 1888. In it, he listed the laws that, between these two dates, absorbed and confirmed the principle first articulated in the *Hart Act*. Although the *Hart Act* was never formally repealed, it was rendered obsolete by the provisions of these laws. That said, this situation evolved in parallel with that of the other pre-Confederation statutes. There can be no doubt either that the fate, over time, of ss. XXXVIII, XXXIX and XL of the *Constitution Act, 1791*, then its s. XLII as well as s. XLII of the *Union Act, 1840*, deprived the *Hart Act* of the supra-legislative (imperial) protection afforded to it by these constitutional instruments.

[181] Lord Reading, which is challenging s. 6 of the *Act*, draws an argument from this state of affairs — namely, the continuity of the *Hart Act*. The trial judge summarized that argument and replied to it as follows:

[TRANSLATION]

[566] The legislative history of the Hart Act shows that it remained in force at the time of Confederation. According to Lord Reading, this transformed it into a “supplementary legal instrument” incorporated into the Constitution of Canada by s. 129 of the *Constitution Act, 1867*. In other words, the latter provision constitutionalized the effect of the Hart Act.

[567] Section 129 of the *Constitution Act, 1867*, however, is a transitional provision and does not confer constitutional status on the laws in force at the time of Confederation. It provides that previously enacted laws remain in force and may be amended by the federal Parliament or a provincial legislature, according to their respective spheres of jurisdiction based on the division of legislative powers established by the new constitutional act:

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union [...] shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

[568] Thus, it would be curious, to say the least, for a law passed and repealed by the provincial legislature to be incorporated into the Constitution of Canada simply by virtue of its purpose and without any express provision to that effect.

[Reference omitted]

[182] The Court agrees with this analysis. Moreover, it considers that other factors already mentioned in the discussion on the *Rectories Act* are also relevant here — including those referred to in para. [175] above. The comments made in paras. [168] and [169] above regarding the *Rectories Act* also applies to the *Hart Act*. The Court therefore concludes that the *Hart Act* cannot be used to invalidate the impugned provisions of the *Act*.

* * * * *

[183] For reasons which, while not identical, are closely related, the argument based on certain pre-Confederation statutes must therefore fail, as the trial judge rightly concluded.

C. Constitutional architecture and unwritten principles

[184] In addition to their position on the interpretation and effect of s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter*, the submissions of the parties challenging the *Act* consisted for the most part in arguing that various elements that are alleged to be an integral part of the Canadian Constitution's components prevent the enactment of such a statute by a provincial legislature. As we have just seen in regards to the pre-Confederation statutes, the very question of whether or not some of these elements are actually included in the Constitution had to be debated. It should be noted that all of the components thus invoked against the *Act* have in common the fact that they fall outside the scope of s. 33 of the *Canadian Charter*. The example of the division of legislative powers between ss. 91 and 92 of the *CA 1867* immediately springs to mind. Such an example can be described as a classic argument, one that has been elaborated time and again in a wide variety of contexts. The arguments we have just considered — those relating to pre-Confederation statutes — are much less frequently used and are far removed from what unquestionably forms the written content of the Constitution. That said, in the next part of their argument, the *Act's* opponents stand on even more uncertain ground, as they rely on concepts that we know from the outset are nowhere to be found in the text of the Constitution. Constitutional case law has recognized the relevance of these concepts and, under certain conditions, has applied them in a number of specific cases. The question is therefore whether, in light of this case law, these concepts can have an impact on the *Act's* validity.

[185] The first of these concepts is what is commonly referred to as our “constitutional architecture”. Its origins can be traced back to the ruling in *OPSEU v. Ontario (Attorney*

General).²⁰⁰ That case dealt with the constitutionality of provisions of an Ontario statute that prohibited the province's civil servants from engaging in certain political activities at the federal level (essentially, running in federal elections and campaigning accordingly, without first obtaining an unpaid leave of absence from the public service). Since the case began before the *Canadian Charter* had come into force, the Supreme Court chose not to rule on that *Charter's* effect in this case. Instead, it considered the constitutionality of the challenged statute in light of the provisions of the *CA 1867*, ruling that the statute was constitutionally valid.

[186] It was in the context of this analysis that Beetz, J., with the agreement of four of the six judges who ruled on the question,²⁰¹ made the following comments:

There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes*, at p. 133, "such institutions derive their efficacy from the free public discussion of affairs" and, in those of Abbott J. in *Switzman v. Elbling*, at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. On the whole, though, I am inclined to the view that the impugned legislation is in essence concerned with the constitution of the province and with regulating the provincial public service and affects federal and provincial elections only in an incidental way.

I should perhaps add that issues like the last will in the future ordinarily arise for consideration in relation to the political rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which, of course, gives broader protection to these rights and freedoms than is called for by the structural demands of the Constitution. However, it remains true that, quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them. The present legislation does not go so far as to infringe upon the essential structure of free Parliamentary institutions.²⁰²

The reference to the *Canadian Charter* in this passage is apt, and as regards this *Charter*, we must not lose sight of the fact that s. 33 is an integral part thereof.

²⁰⁰ [1987] 2 S.C.R. 2 ["SEFPO"].

²⁰¹ The panel was made up of seven judges, but Justice Chouinard took no part in the judgment.

²⁰² *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, p. 57.

[187] There is every indication that the idea of a “constitutional architecture” is to be understood as a notion that is merged with that of the “basic structure” of our Constitution. It is difficult to detect anything in Justice Beetz’s comments that would lead to the inference that the prohibitions of limited scope established by the *Act* in any way threaten this “basic structure” of the Constitution.

[188] One of the central arguments raised by the *Act*’s opponents, one they pleaded in concert with their general claim about constitutional architecture, is that the *Act* compromises what they describe with some verbal abandon as [TRANSLATION] “one of the pillars of our democratic and inclusive society”, namely the [TRANSLATION] “Doctrine of participation in public institutions”. They have not specified the exact origin or content of this doctrine. Moreover, despite the importance the *Act*’s opponents attributed to that doctrine — a doctrine that made its appearance in their pleadings — it does not seem to have left any explicit, or even implicit, trace whatsoever in the relevant case law. In this respect, the way in which they set out their position demonstrates, in several regards, the danger of lexical drift, which is why it is rarely advisable to depart from the text of the Constitution or from time-tested terms used in the case law to specify what the Constitution actually prescribes. Thus, to criticize the *Act*, as the parties opposed to it have done, for [TRANSLATION] “not being consistent with the constitutional architecture” creates a shift in meaning from something that could be clear to something unclear: to make oneself properly understood, it would be better to say that, in this or that respect, “the *Act* contravenes a particular provision — X or Y — of the Constitution” or “that it is inconsistent with such and such a provision as explained in the case law”, and then to demonstrate this concisely, without rhetorical embellishment.

[189] In the same vein, the *Act*’s opponents reproach the trial judge for having given s. 33 of the *Canadian Charter* a scope that it cannot have, given the unwritten, but secular, principles conveyed in the Constitution. In para. 761 of his reasons, the judge noted that s. 33 allows for the suspension of the right set out in s. 10(c) of the *Canadian Charter*. According to those opposed to the *Act*, this cannot be the case, as [TRANSLATION] “the doctrine of *habeas corpus*” dates back to the 13th century and is part of Canada’s immutable constitutional architecture. Aside from the fact that this other “doctrine” has been suspended a few times in the history of Confederation, s. 33(1) of the *Canadian Charter* could not be any more specific when it refers to “a provision included in section 2 or sections 7 to 15 of this Charter / *une disposition donnée de l’article 2 ou des articles 7 à 15 de la présente charte*”. This includes s. 10(c). Perhaps there will come a day for a debate in Canadian constitutional law on the immanence and transcendence of the right to *habeas corpus*. This is conceivable. But given the current state of the texts, the judge’s reading of s. 33 of the *Canadian Charter* in paragraph 761 of his reasons seems beyond reproach.

[190] In these matters, it is essential to always remain faithful to the text. This is clear from a very recent decision of the Supreme Court of Canada, a decision handed down after the Trial Judgment in the case at bar had been rendered. It follows that neither the judge nor the parties were able to take it into account. The case in question is *Toronto (City) v. Ontario (Attorney General)*,²⁰³ which it is appropriate to consider in greater detail by citing a few key passages. The case, which involved a certain degree of complexity, concerned the constitutionality of an Ontario statute, which, while municipal elections were underway for new terms of office on the Toronto City Council, had reduced the number of seats to be filled on that council from 47 to 25. The City challenged the constitutionality of the statute. In first instance, the judge had ruled in its favour, finding that the statute infringed the right to freedom of expression of candidates in municipal elections, as well as the right of voters to effective representation. In both cases, he concluded, there had been a violation of s. 2(b) of the *Canadian Charter*. That ruling was overturned in the Court of Appeal, with two dissenting justices who would have upheld the trial judgment. The Supreme Court's ruling, decided by a majority of five of the nine justices on the panel, is highly instructive on the issue at stake here. We will focus primarily on the point of view of the majority.

[191] The majority reasons, written by Wagner, C.J. and Brown, J., leave no doubt that, in applying the Constitution, its text must take precedence. In a dialogue with Abella, J., who wrote the minority reasons, they noted that she had referred to the "internal architecture" of the Constitution and its "basic structure", relying on two of the Court's rare decisions explicitly addressing these concepts.²⁰⁴ On this point, they responded as follows:

[52] Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision . . . is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in

²⁰³ 2021 SCC 34 [*Toronto*]. In the same vein, see also: *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, paras. 4 and 8 to 13.

²⁰⁴ These are the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2.

support of their statement; Martland and Ritchie JJ. were describing the “constitutional requirements that are derived from the federal character of Canada’s Constitution” (pp. 844-45 (emphasis added)). And this is precisely the point — while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof — particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act, 1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once “constitutional structure” is properly understood, it becomes clear that, when our colleague invokes “constitutional structure”, she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.²⁰⁵

In addition to shedding light on the intellectual approach a court must take when called upon to interpret the Constitution, these passages reiterate the primacy of a textually faithful approach, as the text must remain the point of entry for such an exercise.

[192] The starting point, therefore, must be the text, but this does not mean that the interpreter can be guided only by the text, and nothing else. Several particularly detailed paragraphs from the same reasons provide the necessary nuances by referring to a number of examples drawn from the Court’s jurisprudence. Since this judgment provides key elements for solving one facet of the appeals before us, it seems prudent, despite the length of the following excerpt, to quote it in full, retaining the details of the sources cited, which we have supplemented as necessary.²⁰⁶ Wagner, C.J. and Brown, J. continued as follows:

[54] Ultimately, what “full legal force” means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has “full legal force” within its proper ambit. Our colleague’s position — that because

²⁰⁵ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.

²⁰⁶ In addition to the sources cited in full, the passage in question also refers to the following judgments: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Québec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 [“*Imperial Tobacco*”].

unwritten constitutional principles have “full legal force”, they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: *what is the “full legal force” of unwritten constitutional principles? And in our view, because they are unwritten, their “full legal force” is realized not in supplementing the written text of our Constitution as “provisions of the Constitution” with which no law may be inconsistent and remain of “force or effect” under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not “provisions of the Constitution”. Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution’s written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.*

[55] First, they may be used in the interpretation of constitutional provisions. Indeed, that is the “full legal force” that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing “the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined” (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

[56] Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

[57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth

of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

[58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002), 27 *Queen’s L.J.* 389, at pp. 427-32). Our colleague’s approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

[59] Secondly, unwritten constitutional principles are “highly abstract” and “[u]nlike the rights enumerated in the Charter — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy . . . ha[s] no canonical formulatio[n]” (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which “promotes legal certainty and predictability” in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to “render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers” (*Imperial Tobacco*, at para. 65). Accordingly, 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” (para. 66). 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*).

[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.

[61] Our colleague says that the application of s. 33 “is not directly before us” (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33’s application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.²⁰⁷

[Underlining added]

[193] In an attempt to demonstrate that the *Act* derogates from our constitutional architecture by limiting access to public institutions, the *Act*’s opponents first invoke the “written text of the Constitution”. In this vein and on this point, they argue that their claim is grounded in the *Quebec Act*, the *Constitutional Act, 1791*, the *Hart Act* and the *Rectories Act*, all of which they submit are components of the Constitution. The matter of the supra-legislative effect of these statutes has already been disposed of in the preceding pages, and we can only reiterate here that none of these statutes (nor anything in the text of the Constitution currently in force) provides a basis for accepting the argument they have thus formulated.

[194] As for the unwritten principles, considered in their own right but still under the same theme, it seems clear in light of the ruling in *Toronto* that the notions of “constitutional architecture” and “basic constitutional structure” cannot be extended in such a way that enables the parties opposed to the *Act* to achieve the objective they seek.

[195] In addition to the notion of “constitutional architecture” discussed as of paragraph [185] above, there is also that of the “unwritten principles” of the Constitution, which the *Act*’s opponents refer to at some length in their arguments. Although the cautionary statements in *Toronto* about the primacy of the Constitution’s text are still relevant here, one can indeed ponder the impact on the *Act* of a concept such as the rule of law and, its corollary, the vagueness of statutory rules.

[196] The latter two notions overlap. The rule of law presupposes that legal rules, applied impartially and uniformly, are sufficiently predictable in their effects so that legal subjects can determine their conduct by complying with them. This presupposes that such rules are intelligible and sufficiently precise so that their applications can be predicted.

²⁰⁷ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.

[197] In this regard, the *Act's* opponents assert that the vagueness of the *Act's* provisions (in particular as regards the definition of “religious symbol” in s. 6 of the *Act*) means it is deficient in this respect and justifies that it be declared invalid as being incompatible with the unwritten principle of the rule of law.

[198] There are a vast number of legal rules whose applications are obvious in countless cases and whose meaning is generally self-evident to all (one might mention here, with regard to the notion of “religious symbol”, a crucifix, a cassock, a kippa or a kirpan, which the trial judge mentioned in para. 660 of his reasons). Elsewhere, and in other circumstances, the effect of these same rules may not be self-evident, and their applicability may legitimately give rise to disagreement and debate. To claim that a rule whose application is otherwise clear and easy to understand in most cases is rendered “vague” or “imprecise”, and therefore arbitrary and contrary to the rule of law, by the mere existence of less certain, or frankly doubtful, cases distorts the meaning of these concepts. Such a claim eliminates a distinction that is both necessary and universal in law. Indeed, one must distinguish between what happens before a rule is applied, and what happens when a rule — having appeared ambiguous at the time it is applied — is submitted to the appropriate decision-maker for a firm interpretation, in accordance with the rule of law, and thus a solution to the dispute. This eliminates the initial ambiguity. There is no doubt that the *Act*, like many other statutes, may be subjected to judicial, quasi-judicial or other interpretations. There is nothing unusual in that — nothing that would justify a declaration of unconstitutionality on account of vagueness. It simply shows that the words and passages examined here are part of a legal text that necessarily has a legal effect: they belong to a type of prose which, unlike many others, is often naturally open to interpretation because it is constantly applied to ever-changing facts.

[199] The leading case on the concepts of vagueness and ambiguity is *R. v. Nova Scotia Pharmaceutical Society*.²⁰⁸ The trial judge quoted a relevant passage from that decision in para. 671 of his reasons, a passage that it is instructive to reproduce here:

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.²⁰⁹

[200] On reading s. 6 of the *Act*, or the other excerpts thereof mentioned by the *Act's* opponents, it is impossible to argue that they do not “give sufficient guidance for legal debate”. When the time comes, such a legal debate will provide an opportunity to decide between the various arguments submitted in the instant case regarding the scope of the

²⁰⁸ [1992] 2 S.C.R. 606.

²⁰⁹ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, p. 643.

Act and to adopt a firm interpretation of the provisions in question. To criticize the *Act* for not clarifying in advance what will emerge from this process of interpretation is to expect something from it that no statute is capable of delivering. This refutes the argument based on the *Act's* vagueness.

[201] Lastly, with regard to the arguments based on alleged inconsistencies in the *Act* or between the *Act* and the *State Religious Neutrality Act*, cited above, the premise of consistency put forward by the *Act's* opponents seems just as unsuited to the practice of legal interpretation as do the notions of the rule of law and the precision of legal texts conveyed by their other claims. In all advanced systems of positive law, the courts are at the forefront of the institutions that implement and sanction legal rules. Their existence is absolutely necessary because, in law, the degree of consistency, clarity and predictability in the application of legal rules will never reach the degree of consistency, clarity and inexorability in the application of rules that characterizes some other disciplines, notably the natural sciences. In law, it is impossible to achieve the absolute clarity and coherence sought here by the parties opposed to the *Act*, and it is futile to aspire to do so.

D. Section 31 of the Canadian Charter

[202] The Fellowship, an intervenor on appeal, raised a ground that had not been broached in first instance, but which overlaps with certain other grounds asserted by others: the *Act* extends the legislative powers of the National Assembly over matters of religion beyond those powers as they existed prior to the enactment of the *Canadian Charter*, thereby contravening its s. 31. Section 31 reads as follows:

31. Nothing in this Charter extends the legislative powers of any body or authority.

31. La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.

[203] In the Fellowship's view, the law prior to the *Canadian Charter* already imposed certain constitutional limits on legislative powers over matters of religion. Indeed, it argues, as far back as colonial times, the *Quebec Act* and the *Rectories Act* enshrined the principle of legal equality for all religions. And while these statutes may have been replaced, the fundamental legal principles they codified — (i) the equality of religious denominations in the eyes of the law; (ii) the original liberty of every person to be free from forced religious profession; and (iii) the absence of a state religious doctrine — [TRANSLATION] “persist to this day”.²¹⁰ Case law, the Fellowship argues, has recognized that these principles, like that of the protection of minorities, are implicitly protected by the Constitution, and that freedom of religion has an inalienable and [TRANSLATION] “non-derogable” foundation. These constitutional protections, it further

²¹⁰ I.A. (Fellowship), para. 25.

argues, are in addition to those provided for in the *Canadian Charter*. That said, it posits that no provision thereof, not even s. 33, can be used to reduce the protection of the rights and freedoms enjoyed by Canadian citizens before 1982. In its view, s. 31 of the *Canadian Charter* effectively guarantees that [TRANSLATION] “the rights [and freedoms] that individuals enjoyed before the *Charter* remain at least in the same position, if not in an improved position, after the *Charter*”.²¹¹ It submits that pre-existing constitutional guarantees are therefore not subject to s. 33, even if they overlap with *Charter* protections that are subject to s. 33. In the case at bar, the Fellowship is of the view that the *Act* clearly encroaches on the constitutional limits to which the National Assembly would have been subject before the *Canadian Charter* was enacted. It must therefore be declared invalid.

[204] The Fellowship adds that the *Act* also contravenes s. 31 of the *Canadian Charter* in that it derogates from the principle (established before 1982) that provinces have no jurisdiction to regulate religion [TRANSLATION] “for religious purposes only”. In other words, the *Act* is unconstitutional because it encroaches on Parliament’s exclusive jurisdiction to make laws whose purpose is to regulate religious observance.

* * * * *

[205] These submissions do not withstand analysis, and in view of the Court’s conclusions as to the validity of the *Act* with regard to the division of powers and the pre-Confederation statutes, many of them can be summarily dismissed. As we saw, the *Act* comes within the heads of power of the National Assembly under ss. 92(4), (13) and (16) of the *CA 1867* and s. 45 of the *CA 1982*.²¹² Moreover, as explained above,²¹³ the pre-Confederation statutes cannot be used as a basis for invalidating the *Act* on constitutional grounds.

[206] The Fellowship argues, however, that the [TRANSLATION] “underlying and transcendent legal principles protecting freedom of religion and [found in the pre-Confederation statutes]”²¹⁴ have been constitutionalized, despite the fact these statutes were repealed or replaced, and such principles would allow the *Act* to be invalidated through s. 31 of the *Canadian Charter* and s. 52 of the *CA 1982*. The argument, while creative (and supported by some authors²¹⁵), is not convincing.

²¹¹ I.A. (Fellowship), para. 16 [underlining in original].

²¹² See, in particular: above, paras. [105] and [106].

²¹³ Above, paras. [109] to [183].

²¹⁴ I.A. (Fellowship), para. 26.

²¹⁵ André Schutten and Tabitha Ewert, “Section 31 and the Charter’s Unexplored Constraints on State Power”, (2022) 105 *S.C.L.R.* (2d) 323.

[207] Contrary to the Fellowship's contention, there is no basis for concluding that these principles were constitutionalized before the advent of the *Canadian Charter*. While it is true that in some early Supreme Court decisions, judges interpreted the preamble to the CA 1867 as containing an implied bill of rights, this theory has never been formally endorsed by a majority of the Court. Indeed, it was only in minority reasons and in *obiter* that judges of the Supreme Court invoked this theory²¹⁶ so as to conclude that certain rights or freedoms, including freedom of religion, were implicitly protected by the Constitution.²¹⁷ As Brian Dickson, former Chief Justice of Canada, explained in a doctrinal text:

These cases reflect an early effort on the part of the Supreme Court to ensure that the state should not be able to violate certain basic and uniform values linked to conceptions of liberty. The theory underlying these cases was not, however, without its weaknesses and the debate surrounding the decisions contributed to a growing recognition that there was a need for a more clearly defined constitutional protection for basic rights and liberties. For those who had grown up with the British tradition of parliamentary sovereignty, in which courts are obliged to respect the will of the legislature, the line of reasoning set out in the implied *Bill of Rights* cases marked a rather novel development. [...] The implied *Bill of Rights* cases indicate that liberty was important to Canadians. But these cases are few and far between. Moreover, they have sometimes been perceived as strained in their reasoning, precisely because the constitutional discourse at the time had to be stretched to deal with issues that courts had not traditionally felt able to confront. In the end, it was impossible for the Court to develop a complete code for the protection of rights and freedoms.²¹⁸

[Underlining added]

²¹⁶ See: *Reference re Alberta Statutes – The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] S.C.R. 100, pp. 132-134 (reasons of Duff, C.J., with Davis, J. concurring); *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, pp. 329-330 (reasons of Rand, J.) and pp. 372ff (reasons of Locke, J.); *Switzman v. Elbling*, [1957] S.C.R. 285, p. 328 (reasons of Abbott, J.); *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584, pp. 599-600 (Abbott, J.). In some decisions, the theory was invoked without there being any express reference to the preamble of the CA 1867; in that regard, see: *Boucher v. The King*, [1951] S.C.R. 265, p. 288 (reasons of Rand, J.); *Chaput v. Romain*, [1955] S.C.R. 834, p. 840 (reasons of Taschereau, J.).

²¹⁷ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 673, no. VIII.71.

²¹⁸ Brian Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution", in Errol Mendes and Stéphane Beaulac (eds.), *Canadian Charter of Rights and Freedoms / Charte canadienne des droits et libertés*, 5th ed., Markham, LexisNexis, 2013, 3, pp. 5-6. See also: Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §34:7, pp. 34-12 to 34-15; Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 7th ed., Toronto, Irwin Law, 2021, p. 11.

[208] Similarly, while it is true that in the 1957 decision of this Court in *Chabot v. School Commissioners of Lamorandiere and Attorney-General for Quebec*, some of the Court's justices described freedom of religion as "natural law",²¹⁹ the Court has never adopted the position that this freedom is implicitly protected by the Constitution, thereby enjoying supra-legislative status.

[209] The Supreme Court's more recent jurisprudence does not provide any greater support for concluding that freedom of religion (or, according to the Fellowship, the principles underlying it) was constitutionalized prior to the enactment of the *Canadian Charter*. Although, in *Dupond*,²²⁰ the Supreme Court seemed to have definitively rejected the theory of an implied bill of rights, it resurfaced, in *obiter*, in some of the decisions handed down by the Court after the *Canadian Charter* was enacted.²²¹ But the recent ruling in *Toronto*,²²² referred to earlier,²²³ casts serious doubt on the proposition that this theory can be used in the way the Fellowship asserts. As already mentioned, in that judgment, Wagner, C.J. and Brown, J., writing for the majority, found that unwritten constitutional principles cannot be used as an independent basis for invalidating legislation.²²⁴ Rather, their role is limited to (i) the interpretation of constitutional provisions and (ii) the development of "structural doctrines unstated in the written Constitution [...], but necessary to the coherence of, and flowing by implication from, its architecture".²²⁵

[210] In the present case, the written text of the Constitution (the *Canadian Charter*) guarantees freedom of religion (s. 2(a)) and expressly authorizes Parliament or a legislature to set justifiable limits to that freedom (s. 1) or to derogate therefrom (s. 33). Accepting the Fellowship's submissions would be tantamount to disregarding this text, however clear it may be, and recognizing two separate freedoms of religion within our constitutional order: an unwritten one — which would be guaranteed *implicitly* by the Constitution, and with respect to which no limitations or exceptions would be permitted — and another — guaranteed *expressly* by the same Constitution, and which could be subject to certain restrictions or exceptions. In practice, this would mean that the freedom of religion guaranteed explicitly by a written provision of the Constitution would be less extensive or less "protected" than the freedom of religion guaranteed implicitly by the

²¹⁹ *Chabot v. School Commissioners of Lamorandiere and Attorney-General for Quebec* (1957), 12 D.L.R. (2d) 796, pp. 802-804 (Pratte, J.A.), 807 (Casey, J.A.), 813 (Hyde, J.A.) and 834 (Taschereau, J.A.) (C.A.).

²²⁰ *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770 ["*Dupond*"], pp. 796ff (majority reasons of Beetz, J.).

²²¹ See: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, paras. 96ff (majority reasons of Lamer, C.J.); *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, pp. 56-57 (majority reasons of Beetz, J.).

²²² *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.

²²³ Above, paras. [190]ff.

²²⁴ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, paras. 50-78. See also: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, paras. 64-67.

²²⁵ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, paras. 55-56.

same Constitution. In a sense, the freedom of religion guaranteed implicitly by the Constitution would render the freedom of religion enshrined in the *Canadian Charter* redundant. This approach would therefore undermine the delimitation of that freedom “chosen by our constitutional framers”.²²⁶ This evidently makes no sense. The recognition of unwritten constitutional principles (such as the protection of minorities) cannot be used to “dispense with the written text of the Constitution”.²²⁷

[211] In reality, the Fellowship is urging the Court to use s. 31 of the *Canadian Charter* to disregard ss. 1 and 33 of that *Charter*. Yet, it is well established that no part of the Constitution can be used to abrogate another part of the Constitution.²²⁸ Rather, the Constitution must be interpreted as a coherent whole. In fact, each part of the Constitution is linked to the others and must be “interpreted by reference to the structure of the Constitution as a whole”.²²⁹ And contrary to the Fellowship’s assertion, there is no basis for reading s. 31 of the *Canadian Charter* — an interpretative provision designed to ensure the continued division of powers following the patriation of the Constitution — as containing a limit on the override power provided for in s. 33 so as to preserve [TRANSLATION] “an inalienable and non-derogable foundation for freedom of religion”.²³⁰

[212] This ground must fail.

PART II: ARGUMENTS BASED ON FUNDAMENTAL RIGHTS

A. Use of the notwithstanding clauses

[213] As mentioned above, the trial judge dismissed the challenge to the constitutionality of ss. 33 and 34 of the *Act*, because he was of the view that the use of the notwithstanding clauses (s. 52 of the *Quebec Charter* and s. 33 of the *Canadian Charter*) was unassailable. While acknowledging that it appears [TRANSLATION] “incontestable” that the *Act* infringes fundamental rights and freedoms²³¹ and that the legislature’s use of the notwithstanding clauses seems [TRANSLATION] “both offhanded and excessive [...] in that it casts an overly wide net”,²³² the judge nonetheless felt bound by the precedent set by the Supreme Court in *Ford*.²³³ According to this ruling, he wrote, the use of the *Canadian Charter’s* notwithstanding clause (s. 33) is subject only to formal requirements. He

²²⁶ *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, para. 65.

²²⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 53.

²²⁸ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [“*Doucet-Boudreau*”], para. 42; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 [“*Harvey*”], para. 31; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, p. 390.

²²⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 50.

²³⁰ I.A. (Fellowship), para. 43.

²³¹ In the judge’s view, the *Act* infringes freedom of conscience and religion, freedom of belief and expression and the right to equality: Trial Judgment, para. 727.

²³² Trial Judgment, para. 770.

²³³ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

refused to reconsider this precedent, finding that the dispute raises no new legal issues and does not present a factual context arguing [TRANSLATION] “in favour of a new determination”²³⁴ of the issue.

[214] The parties opposed to the *Act* have invited the Court to overturn these conclusions and declare that ss. 33 and 34 of the *Act* are unconstitutional. Their grounds of appeal are centered on the following two points:

- The scope of the ruling in *Ford*; and
- The rule of *stare decisis* the trial judge applied, and its exceptions.

[215] Before considering these grounds, we begin with a look at the scope of the notwithstanding clauses.

1. **Scope of the notwithstanding clauses**

[216] For ease of reference, it is useful to once again reproduce ss. 33 and 34 of the *Act*, which are at the heart of this portion of the challenge:

33. This Act and the amendments made by it to the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies apply despite sections 1 to 38 of the Charter of human rights and freedoms (chapter C-12).

33. La présente loi ainsi que les modifications qu’elle apporte à la Loi favorisant la neutralité religieuse de l’État et visant notamment à encadrer les demandes d’accommodements pour un motif religieux dans certains organismes s’appliquent malgré les articles 1 à 38 de la Charte des droits et libertés de la personne (chapitre C-12).

34. This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

34. La présente loi ainsi que les modifications qu’elle apporte par son chapitre V ont effet indépendamment des articles 2 et 7 à 15 de la Loi constitutionnelle de 1982 (annexe B de la Loi sur le Canada, chapitre 11 du recueil des lois du Parlement du Royaume-Uni pour l’année 1982).

[217] In essence, these sections reproduce the wording of s. 52 *in fine* of the *Quebec Charter* and s. 33 of the *Canadian Charter*, respectively, which give legislatures the power to override certain provisions of those very charters.

²³⁴ Trial Judgment, para. 750.

[218] While both of these provisions are notwithstanding clauses, they are distinct: the scope of the former (s. 52 of the *Quebec Charter*) is broader than that of the latter (s. 33 of the *Canadian Charter*), whereas only the latter is enshrined in a constitutional text. We will take a closer look at these provisions, starting with s. 33 of the *Canadian Charter*, which was the crux of the parties' arguments before the Court. Indeed, s. 52 of the *Quebec Charter* was discussed very little, as everyone agreed that the outcome of this ground of appeal rests first and foremost on the scope of s. 33 of the *Canadian Charter*.

a. Section 33 of the *Canadian Charter*

[219] This provision, whose wording is, in fact, quite simple, has been the subject of much debate. It prescribes the following:

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.

(2) An 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.

(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.

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

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

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

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

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

[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”.²³⁵ 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 *CA 1982*.²³⁶

[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)).²³⁷ 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.

²³⁵ 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.

²³⁶ See below, paras. [328] and [333].

²³⁷ Some question whether an override declaration made under s. 33 can be renewed more than once: Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §39:4, pp. 39-9 and 39-10. As this is not a live issue here, there is no need to consider it. Suffice it to point out that, on numerous occasions, the Quebec legislature has renewed legislative provisions enacted under s. 33 and that this repeated use has not been contested (see, in particular, the *Act respecting the pension plan of certain teachers*, CQLR, c. R-9.1, s. 62).

[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 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.²³⁸

[References omitted; underlining added]

[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".²³⁹

[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,

²³⁸ Robert Leckey and Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts and the Electorate", (2022) 72:2 *U. Toronto L.J.* 189, p. 198. As we shall see below (para. [412]), the electorate recently pushed back the Ontario legislature under such circumstances.

²³⁹ *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139 ["*Working Families Coalition*"], para. 56, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725.

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”²⁴⁰ 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.²⁴¹

[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]

²⁴⁰ Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte*, Cowansville, Yvon Blais, 1991, p. 251.

²⁴¹ Marie Paré, “La légitimité de la clause dérogatoire de la Charte canadienne des droits et libertés en regard du droit international”, (1995) 29:3 *R.J.T.* 627, p. 653. See also: 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, pp. 110-111; Noura Karazivan and Jean-François Gaudreault-DesBiens, “Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: the Example of Quebec’s *Laïcité Act*”, (2020) 99 *S.C.L.R.* (2d), 487, p. 497; André Binette, “Le pouvoir dérogatoire de l’article 33 de la *Charte canadienne des droits et libertés* et la structure de la Constitution du Canada”, (2003) 63 *R. du B.* (numéro spécial) 63, pp. 113-117.

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”.²⁴²

[References omitted]

[230] It is also worth noting that, at the time, the override mechanism was not a new phenomenon in Canada:

[TRANSLATION]

XII-2.15 - In 1982, the notion of an express override provision was not a new or exceptional phenomenon in Canadian law. It already existed, and still exists, in the 1960 federal charter, i.e., the *Canadian Bill of Rights*, as well as in the charters of rights of Quebec, Alberta and Saskatchewan. It is therefore rather a typically Canadian institution that, in a federative context, seeks to bridge the gap between the British-style legislative supremacy, which prevailed before the charters, and the American-style judicial supremacy, which the charters established. In other words, the express override simply makes it possible, where applicable, to restore parliamentary democracy with respect to certain rights and freedoms. [...]²⁴³

[Underlining added]

[231] Moreover, although seen as the [TRANSLATION] “fruit of a compromise”, the notwithstanding clause was a source of controversy since its proposal in November 1981.²⁴⁴ That is still the case today. Nearly 42 years have passed since its enactment, and the arguments of its defenders, as well as those of its opponents, have not changed. According to the former, the provision is in keeping with Canadian federalism²⁴⁵ and merely restores parliamentary sovereignty²⁴⁶ — by ensuring that legislatures (and the electorate), rather than the courts, have the last word in certain

²⁴² Eugénie Brouillet and Félix-Antoine Michaud, “Les rapports entre les pouvoirs politique et judiciaire en droit constitutionnel canadien : dialogue ou monologue?”, in *Conférence des juristes de l’État, XIX^e Conférence des juristes de l’État : Le juriste de l’État au cœur d’un droit public en mouvement*, Cowansville, Yvon Blais, 2011, 3, p. 21.

²⁴³ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 968, no. XII-2.15.

²⁴⁴ Library of Parliament, Parliamentary Information and Research Service, *The Notwithstanding Clause of the Charter*, by Laurence Brosseau and Marc-André Roy, Legal and Social Affairs Division, May 7, 2018, p. 1; Guy Tremblay and Sylvain Bellavance, “La suprématie législative et l’édition d’une charte des droits britannique”, (1988) 29 : 3 *C. de D.* 637, p. 638.

²⁴⁵ Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte*, Cowansville, Yvon Blais, 1991, p. 249.

²⁴⁶ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed. Cowansville, Yvon Blais, 2014, p. 970, no. XII-2.20.

matters.²⁴⁷ By contrast, according to the provision's opponents, it is [TRANSLATION] "[...] an incongruity that is difficult to reconcile with the very principle of a [charter of rights and freedoms]".²⁴⁸ Since then, in addition to this divergence of opinions, there has been disagreement on the conditions for implementing s. 33 of the *Canadian Charter* and on the scope of judicial powers when a court reviews a statute containing an override provision.

[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".²⁴⁹ 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.²⁵⁰

[Underlining added]

²⁴⁷ Guillaume Rousseau, *Cahier de recherche – La disposition dérogatoire des chartes des droits : De la théorie à la pratique, de l'identité au progrès social*, Institut de recherche sur le Québec, March 2016, p. 5.

²⁴⁸ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 970, no. XII-2.20.

²⁴⁹ 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. 113.

²⁵⁰ Noura Karazivan and Jean-François Gaudreault-DesBiens, "Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: the Example of Quebec's *Laïcité Act*", (2020) 99 *S.C.L.R.* (2d) 487, pp. 500-501.

[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.²⁵¹

[Underlining added]

[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.²⁵² The role of the legislature itself in defending and promoting rights and freedoms cannot be left out of the equation.

b. Section 52 of the Quebec Charter

[235] The notwithstanding clause set out in s. 52 of the *Quebec Charter* precedes that in the *Canadian Charter* and emerged in a different historical context. Section 52, which was introduced into the *Quebec Charter* at the time it was enacted in 1975, and was amended in 1982,²⁵³ prescribes the following:

²⁵¹ Dominique Leydet, “Droits fondamentaux et démocratie représentative : prendre au sérieux le rôle des Parlements”, in J. Michel Doyon (ed.), *Droit, justice et démocratie : colloque du lieutenant-gouverneur du Québec*, Montreal, Yvon Blais, 2023, 73, pp. 74-75. In the same vein, see also: Stéphane Sérafin, Kerry Sun and Xavier Focroulle Ménard, “Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order”, (2023) 110 *S.C.L.R.* (2d) 135, particularly pp. 142-145 and 156ff.

²⁵² Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 970, no. XII-2.20.

²⁵³ When the *Quebec Charter* was enacted, on June 27, 1975, its s. 52 applied only to ss. 9 to 38. Section 52 was amended by *An Act to amend the Charter of Human Rights and Freedoms*, S.Q. 1982, c. 61, s. 16, assented to on December 18, 1982, and has remained unchanged since then.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

52. Aucune disposition d'une loi, même postérieure à la Charte, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n'énonce expressément que cette disposition s'applique malgré la Charte.

[236] This provision, also referred to as the primacy clause,²⁵⁴ is often seen as the counterpart to s. 33 of the *Canadian Charter*, although some claim that the two provisions have opposite purposes. Thus, according to authors Brun, Tremblay and Brouillet, s. 52 of the *Quebec Charter* is an exception to full parliamentary sovereignty and “constitutionalizes” certain rights and freedoms.²⁵⁵

[237] In truth, although s. 52 does not, strictly speaking, “constitutionalize”²⁵⁶ rights and freedoms, given that the *Quebec Charter* can be amended or repealed through the ordinary legislative process,²⁵⁷ the effect of s. 52 is to confer relative primacy to some of its provisions (ss. 1 to 38).²⁵⁸ Indeed, a legislative provision of another statute — whether it predates or is subsequent to the coming into force of the *Quebec Charter* — cannot be inconsistent with ss. 1 to 38 of the *Quebec Charter*, unless the provision is protected by an express override. Section 52 thereby gives the *Quebec Charter* precedence over other provincial statutes.

[238] The override power in s. 52 of the *Québec Charter*, like that of s. 33 of the *Canadian Charter*, is based on the principle of parliamentary sovereignty²⁵⁹ in that both

²⁵⁴ José Woehrling, “Les modifications à la *Charte des droits et libertés de la personne* nécessaires en cas d’accession du Québec à la souveraineté”, (1995) 26:4 *R.G.D.* 565, p. 570.

²⁵⁵ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 983, no. XII-2.58. They write:

[TRANSLATION] **XII-2.58** – The express override, as a constitutional law technique, has a completely contrary purpose in the Quebec Charter than it does in the Canadian Charter. In the latter, the purpose of s. 33 is to allow a departure from the constitutional order so as to return to parliamentary sovereignty, whereas the purpose of s. 52 of the Quebec Charter is to provide an exception to full parliamentary sovereignty so as to constitutionalize rights. [...]

²⁵⁶ The Court has used the terminology employed by Brun, Tremblay and Brouillet in the passage reproduced in the preceding footnote.

²⁵⁷ See above, para. [113].

²⁵⁸ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, para. 116. See also: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, para. 30.

²⁵⁹ François Côté and Guillaume Rousseau, “From *Ford v. Québec* to the *Act Respecting the Laicity of the State*: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause”, (2020) 94 *S.C.L.R.* 463, p. 478; Pierre Bosset, “*La Charte des droits et libertés de la personne* dans l’ordre constitutionnel québécois : évolution et perspectives”, Conférence de lancement de l’Association québécoise de droit

provisions ensure that legislatures, rather than the courts, have the final say in certain matters.²⁶⁰ Like s. 33 of the *Canadian Charter*, the use of s. 52 defeats a judicial declaration of inoperability that could otherwise be made.²⁶¹

[239] It should be added, however, that the override power conferred on the legislature by s. 52 of the *Quebec Charter* is broader in scope than that of s. 33 of the *Canadian Charter* (yet it is the latter that has been criticized by some) since s. 52 can cover all the rights set out in ss. 1 to 38 of the *Quebec Charter* — that is, fundamental rights and freedoms (ss. 1 to 9.1),²⁶² the right to equal recognition and exercise of rights and freedoms and the prohibition against discrimination (ss. 10 to 20.1),²⁶³ political rights (ss. 21-22)²⁶⁴ and judicial rights (ss. 23-38).²⁶⁵

constitutionnel, conference presented at the National Assembly building (Quebec City), June 27, 2005, p. 13.

²⁶⁰ Guillaume Rousseau, *Cahier de recherche – La disposition dérogatoire des chartes des droits : De la théorie à la pratique, de l'identité au progrès social*, Institut de recherche sur le Québec, March 2016, p. 5.

²⁶¹ See: *below*, para. [328] and [330].

²⁶² In their current version, ss. 1 to 9.1 of the *Quebec Charter* protect: the right to life, and to personal security, inviolability and freedom (s. 1); the right to assistance (s. 2); the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association (s. 3); the right to live in French (s. 3.1); the right to the safeguard of one's dignity, honour and reputation (s. 4) and the right to respect for one's private life (s. 5); the right to the peaceful enjoyment and free disposition of one's property (s. 6); the right to the inviolability of one's home (art. 7); the right to respect for one's private property (s. 8) and the right to non-disclosure of confidential information (s. 9); and protection of the exercise of rights and freedoms in keeping with a given legal framework (art. 9.1).

²⁶³ Section 10 establishes the right to equal recognition and exercise of human rights and freedoms and sets out the prohibited grounds for discrimination. Section 10.1 prohibits harassment on the basis of any of these grounds. As for ss. 11 to 18.2, they prohibit: the distribution, publication or public exhibit of a discriminatory notice, symbol or sign (s. 11); discrimination in juridical acts concerning goods or services ordinarily offered to the public (ss. 12 and 14); discriminatory clauses in a juridical act (ss. 13 and 14); discrimination in access to public transportation or a public place (s. 15); discrimination in respect of hiring or employment (s. 16); discrimination in respect of an association of employers or employees or any professional order or association of persons carrying on the same occupation (s. 17); discrimination by an employment bureau (s. 18); discrimination in an employment application form or employment interview (s. 18.1); and the dismissal, refusal to hire or penalizing of a person because of the person's conviction for a penal or criminal offence (s. 18.2). Section 19 sets out the right to equal wages for equivalent work. Finally, ss. 20 and 20.1 identify certain acts that are to be deemed non-discriminatory.

²⁶⁴ Sections 21 and 22 protect the right of petition to the National Assembly (s. 21) and the right to vote and to be a candidate in an election (s. 22).

²⁶⁵ As for ss. 23 to 38, they protect: the right to a public and impartial hearing by an independent and impartial tribunal (s. 23); the right not to be arbitrarily deprived of one's liberty or rights (s. 24); the right to be protected against unreasonable search or seizure (s. 24.1); the right to be protected against inhuman arrest or detention (s. 25); various rights related to the conditions of detention (ss. 26 and 27); the right to be promptly informed of the grounds of one's arrest or detention and of the specific offence with which one is charged (ss. 28 and 28.1); the right to contact one's next of kin and to obtain the

[240] Economic and social rights (ss. 39 to 48),²⁶⁶ by contrast, do not enjoy the legislative supremacy conferred by s. 52 of the *Quebec Charter*; a statute could limit them without invoking this provision.

[241] Finally, unlike s. 33 of the *Canadian Charter*, s. 52 of the *Quebec Charter* provides no temporal limit to the exercise of the override power. This means that the override provision, once enacted, remains in force unless the statute is amended or repealed.²⁶⁷

[242] Although many seem to forget it, it is therefore apparent that s. 52 of the *Quebec Charter* confers a broader override power on the provincial legislature than does s. 33 of the *Canadian Charter*. Nonetheless, save for the rights mentioned in both notwithstanding clauses, this power may be purely theoretical, in that provincial legislation still remains subject to constitutional review under the *Canadian Charter*. The case at bar is a good example of this.

[243] Having examined the scope of the notwithstanding clauses, we now turn to the grounds of appeal raised by the parties opposed to the *Act*.

2. Scope of the ruling in *Ford*

a. Section 33 of the *Canadian Charter*

[244] The first complaint of the parties opposed to the *Act* concerns the trial judge's reading of the ruling in *Ford*, which, according to him, is that use of the *Canadian Charter's* notwithstanding clause is subject only to formal requirements. Each of these parties assert, in their own way, that use of the override power provided for in the *Canadian Charter* is subject to substantive requirements, which, in the case at bar, have not been

assistance of a lawyer without delay in the event of arrest or detention (s. 29); the right, in the event of arrest or detention, to be brought promptly before a competent tribunal or be released (s. 30) and the right not to be deprived, without just cause, of the right to be released (s. 31); the right to have the lawfulness of one's detention reviewed, i.e., the recourse to *habeas corpus* (s. 32); the right to be tried within a reasonable time (s. 32.1); the presumption of innocence (s. 33); the right not to be compelled to testify against oneself in a trial (s. 33.1); the right to representation by a lawyer (s. 34); the right to a full and complete defence (s. 35); the right to an interpreter (s. 36); the right not to be held guilty on account of any act or omission which, at the time when it was committed, did not constitute a violation of the law (s. 37); the right to protection against double jeopardy (s. 37.1); the right to the lesser punishment when the law has been amended (s. 37.2); and the right against self-incrimination (s. 38).

²⁶⁶ These provisions cover the following rights, among others: [TRANSLATION] "child protection, free public education, the right to demand religious or moral education and to choose private education, the cultural interests of minorities, the right to information, the right of persons in need to financial assistance, the right to fair and safe conditions of employment, the equality of spouses, protection of the elderly" (José Woehrling, "Les modifications à la *Charte des droits et libertés de la personne* nécessaires en cas d'accession du Québec à la souveraineté", (1995) 26:4 *R.G.D.* 565, p. 570).

²⁶⁷ José Woehrling, "Les modifications à la *Charte des droits et libertés de la personne* nécessaires en cas d'accession du Québec à la souveraineté", (1995) 26:4 *R.G.D.* 565, p. 576.

met. Some of them also argue that the Supreme Court's statements in *Ford* regarding the interpretation of s. 33 of the *Canadian Charter* are *obiter dictum* and should not be taken to mean that the enactment of an override provision pursuant to s. 33 is exempt from judicial review (in respect of substantive requirements).

[245] The Court cannot agree with this view. The trial judge's interpretation of the requirements and effects of s. 33 of the *Canadian Charter* is consistent with the Supreme Court's teachings in *Ford*.

[246] It is important to begin with a review of what this judgment, rendered *per curiam* in 1988, decided. The Supreme Court had to determine whether ss. 58 and 69 of the *Charter of the French Language*,²⁶⁸ which required that public signs and posters and commercial advertising be solely in French and that only the French version of a firm name be used, infringed the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter*. The application of the *Canadian Charter* to the challenged legislation, however, turned initially on whether *two* override provisions enacted pursuant to s. 33 of the *Canadian Charter* were valid and applicable:

- s. 214 of the *Charter of the French Language*, which was enacted by s. 1 of *An Act respecting the Constitution Act, 1982*,²⁶⁹ omnibus legislation that provided, in particular, for the inclusion of a standard override provision in all Quebec legislation enacted before the *Canadian Charter* came into force.²⁷⁰ This provision applied to s. 69 of the *Charter of the French Language*;
- s. 52 of the *An Act to amend the Charter of the French Language*,²⁷¹ enacted in 1983, which applied only to s. 58 of the *Charter of the French Language*.

The wording of these two override provisions was identical:

This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).²⁷²

²⁶⁸ CQLR, c. C-11 (at the time, R.S.Q., c. C-11).

²⁶⁹ CQLR, c. L-4.2 (at the time, S.Q. 1982, c. 21).

²⁷⁰ The *Act respecting the Constitution Act, 1982* also provided for the inclusion of an override provision in all legislation enacted between the date of coming into force of the *Canadian Charter* and the date the former statute was assented to.

²⁷¹ S.Q. 1983, c. 56.

²⁷² As regards s. 214 of the *Charter of the French Language*, the appeal also raised the issue of the manner in which it had been enacted, given that the provision had been adopted as part of omnibus legislation (the *Act respecting the Constitution Act, 1982*) and had a retrospective effect (the omnibus legislation having come into force on June 23, 1982, while the standard override provisions enacted by s. 1 of that legislation had effect from April 17, 1982). As these are not live issues within the scope of this case, there is no need to dwell on this aspect of *Ford*, other than to point out that this exercise of the override

[247] It will already have been noted, of course, that the override provision in s. 34 of the *Act* uses precisely the same wording, while indicating that it also applies to “the amendments made / *modifications qu’elle apporte*” to the *Quebec Charter* and to the *State Religious Neutrality Act*.

[248] As the trial judge rightly pointed out,²⁷³ 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.²⁷⁴ 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*”.²⁷⁵ 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”.²⁷⁶ “There is no reason why more should be required under s. 33,” it wrote.²⁷⁷

[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.²⁷⁸

[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”.²⁷⁹

power was ruled valid, except insofar as the Quebec legislature had sought to make the derogation retroactive.

²⁷³ Trial Judgment, para. 724.

²⁷⁴ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, pp. 740-743.

²⁷⁵ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 741.

²⁷⁶ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 741.

²⁷⁷ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 741.

²⁷⁸ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 740.

²⁷⁹ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 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”.²⁸⁰ 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”.²⁸¹ 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.²⁸²

[253] Finally, and contrary to what some of the *Act*’s opponents argue, these excerpts from *Ford* cannot be considered as *obiter*, even if part of the dispute in that case had become moot because the *Act respecting the Constitution Act, 1982* had not been renewed upon the expiry of the five-year term provided for in s. 33(3) (the period that elapsed before the Supreme Court rendered judgment).²⁸³ On the contrary, given that the second override provision (s. 52 of the *Act to amend the Charter of the French Language*) was still in effect and given the importance of the issue, the Supreme Court performed an in-depth examination of the requirements attached to the use of the override authority provided for in s. 33(1). Its meticulous analysis is in no way an accessory, complementary or incidental remark, nor a comment made *in passing*. Rather, it established a general analytical framework²⁸⁴ on the subject that provides “guidance and [...] should be accepted as authoritative”.²⁸⁵

[254] In short, as the AGQ writes, *Ford* [TRANSLATION] “leaves no door open to the possibility of incorporating substantive requirements for the application [of s. 33]”.²⁸⁶ As the Supreme Court explained, the text of this provision is clear; it need simply be applied. Whether or not the courts agree with the legislature’s choice — a choice, moreover, that the legislature need not justify — is irrelevant.

²⁸⁰ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 743.

²⁸¹ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 743.

²⁸² Below, para. [269].

²⁸³ See also: below, para. [329].

²⁸⁴ To paraphrase Binnie, J. in *R. v. Henry*, 2005 SCC 76, para. 53.

²⁸⁵ *R. v. Henry*, 2005 SCC 76, para. 57. See also: *R. v. Kirkpatrick*, 2022 SCC 33, paras. 123-126 (joint concurring reasons of Côté, Brown and Rowe, JJ., Wagner, C.J. concurring).

²⁸⁶ R.A. (PGQ), para. 112.

[255] It should be noted that the Ontario Court of Appeal shares this interpretation of *Ford*. Indeed, in *Working Families Coalition*, the majority wrote:

[49] The application judge rejected the appellants' claim that s. 33 was not validly invoked, as its formal requirements were met and no other precondition to its invocation existed in law. We agree.

[50] In our view, this conclusion is entailed by the Supreme Court's decision in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. *Ford* holds that s. 33 is subject to a requirement of form only, and that no substantive justification by a legislature for invoking the notwithstanding clause is required: at pp.740-41.²⁸⁷

The dissenting judge also agreed with this interpretation of *Ford*.²⁸⁸

b. Section 52 of the Quebec Charter

[256] As mentioned earlier, the parties' submissions focused primarily, if not almost exclusively, on the interpretation of s. 33 of the *Canadian Charter*; they did not dwell on the impact of the ruling in *Ford* on the interpretation of s. 52 of the *Quebec Charter*.

[257] It is nevertheless appropriate to note briefly that, in the Court's view, the guidance in that ruling also applies to s. 52 of the *Quebec Charter*. First, this provision simply states that the overriding statute must "expressly stat[e] that it applies despite the Charter / énonce[r] expressément [qu'elle] s'applique malgré la Charte", and nothing more. Second, the basis for the override authority provided for in each of the charters is the same. Consequently, if requirements of form are sufficient to justify an override of the rights and freedoms enshrined in the Constitution, they are certainly equally sufficient to justify an override of the provisions of the *Quebec Charter*, a quasi-constitutional statute.²⁸⁹

* * * * *

[258] One must therefore conclude that the trial judge correctly applied the guidance in *Ford* when he ruled that the override provisions provided for in ss. 33 and 34 of the *Act* satisfy the requirements of form under s. 52 of the *Quebec Charter* and s. 33 of the *Canadian Charter*.

[259] We turn now to examining whether this ruling is still a binding precedent, as the judge determined.

²⁸⁷ *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725.

²⁸⁸ *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, para. 145, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725.

²⁸⁹ See also: below, para. [330].

3. Rule of *stare decisis* and exceptions

[260] The second complaint of the parties opposed to the *Act*, which is subsidiary to the first one, concerns the trial judge’s refusal to reconsider *Ford*. Several parties opposed to the *Act* submit that the case at bar raises new legal issues or that the factual context has changed dramatically since the ruling in *Ford*, thereby warranting a fresh determination of the issue.

[261] These parties base their arguments on the two exceptions to the rule of *stare decisis* (or vertical *stare decisis*), which, it bears noting, is a fundamental principle of our legal system:

[44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate” (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).²⁹⁰

[262] Moreover, “the threshold for revisiting a matter [decided by a higher court] is not an easy one to reach”.²⁹¹

[263] How does the foregoing apply to the matter at hand?

a. New legal issue

[264] The “new legal issue” criterion sets a high threshold. In constitutional matters, the criterion may include new charter-based legal questions that were not put forward or examined in the precedent submitted for reconsideration, or arguments raised as a consequence of significant developments in the law. As the Supreme Court, *per* McLachlin, C.J., wrote in *Bedford*, a lower court “can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law [...]”.²⁹²

²⁹⁰ *Carter v. Canada (Attorney General)*, 2015 SCC 5.

²⁹¹ *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 44.

²⁹² *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 42. See also: Lawrence David, *Stare Decisis, The Charter and the Rule of Law in the Supreme Court of Canada*, Toronto, LexisNexis, 2020, pp. 135-137.

i. Section 1 of the Canadian Charter

[265] Some of the *Act's* opponents submit, as a new issue, that the use of the notwithstanding clause set forth in the *Canadian Charter* must be subject to judicial review under its s. 1. In their view, reconciling ss. 1 and 33 of the *Canadian Charter* requires that [TRANSLATION] “s. 1 be applied in a manner that considers the context and the uniqueness of s. 33”.²⁹³ It is also argued that [TRANSLATION] “every application of [s. 33], since it entails a violation of fundamental rights and freedoms, must be subject to the *R. v. Oakes* test”.²⁹⁴ Although these parties did not specify it in their arguments, it is apparent that their position also applies, with the necessary modifications, to ss. 52 and 9.1 of the *Quebec Charter*.

[266] Admittedly, in *Ford*, the Supreme Court did not rule *expressly* on whether s. 33 is subject to the justification test set out in s.1 of the *Canadian Charter*. *Ford's ratio decidendi* and the Supreme Court's jurisprudence, however, preclude the assertion that this is a new legal issue warranting a reconsideration of *Ford*.

[267] In *Oakes*, the leading case on the interpretation of s. 1 of the *Canadian Charter*, a majority of the Supreme Court, in a judgment written by Dickson, C.J., established a clear difference between the justificatory criteria under s. 1 and those under s. 33:

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured.²⁹⁵

[Underlining added]

One can certainly assume that the Supreme Court had this difference in mind when it wrote its decision in *Ford* two years later.

[268] In addition, as discussed above,²⁹⁶ in *Ford*, the Supreme Court expressly ruled out any need for the legislature to justify the decision to exercise its override authority, finding that the use of s. 33 requires *nothing more* than compliance with requirements of form. Indeed, it clearly disavowed the ruling of this Court in *Alliance des professeurs de Montréal c. Procureur général du Québec*,²⁹⁷ in which Jacques, J.A., who delivered the

²⁹³ A.A. (Lauzon Group), para. 137 [reference omitted].

²⁹⁴ I.P.A. (CHRC), para. 56 [reference omitted].

²⁹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103 [“*Oakes*”], p. 135.

²⁹⁶ See above, para. [252].

²⁹⁷ [1985] C.A. 376 [“*Alliance des professeurs de Montréal*”], reversing *Alliance des professeurs de Montréal c. Procureur général du Québec*, [1985] C.S. 1272. It should be noted that in *Ford*, the parties

principal opinion, had expressed the view that the s. 33 declaration had to indicate the link or relationship between the overriding statute and the guaranteed rights or freedoms to be overridden. Without necessarily recognizing that the use of s. 33 of the *Canadian Charter* was subject to the requirements of s. 1, Jacques, J.A. had been of the opinion that one could nevertheless refer to s. 1 to interpret s. 33 and delineate the exercise of the override authority:

[TRANSLATION]

Thus, in addition to guaranteeing the rights and freedoms set out in the Charter and providing that those rights and freedoms can be subject to certain limits, [s. 1] is a statement about the nature of our society.

The use of s. 33 must therefore be in keeping with our society's rules, some of which are established by the courts, since the nature of our society is set out in a Constitution whose interpretation and application are within the purview of the judiciary.

[...]

While certain rights, such as freedom of conscience, may be absolute, no power, however, can be exercised in an absolute manner: that is the rule of law. Power can only be exercised in accordance with the law.

[...]

The exercise of the power under s. 33 must therefore be in keeping with the fundamental principles that define our society.²⁹⁸

[269] Thus, according to Jacques, J.A., the legislature was required to justify its use of the override authority set out in s. 33, at the very least by clearly specifying the rights or freedoms to be overridden. The Supreme Court, however, held that this reading of s. 33 was legally incorrect, as the legislature did not have to justify its use of the override authority:

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

challenging the validity of the disputed override provisions had relied primarily on the Court of Appeal's ruling in *Alliance des professeurs de Montréal*. For the reasons set out by the Supreme Court on pages 736-737 of its judgment, it deemed it necessary to consider the ruling of the Court of Appeal in order to adjudicate the matter before it.

²⁹⁸ *Alliance des professeurs de Montréal c. Procureur général du Québec*, [1985] C.A. 376, pp. 380-381.

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. [...] ²⁹⁹

[Underlining added]

[270] Similarly, in the recent ruling in *Ontario (Attorney General) v. G.*,³⁰⁰ the Supreme Court alluded to the legislative power to resort to s. 33 “even for purely political reasons”.³⁰¹ Such a statement cannot be reconciled with the assertion that s. 33 must be subject to the justification requirements of s. 1. We agree with the analysis of Professor Hogg and his co-author on this point:

The thesis that s. 33 is subject to s. 1 is a difficult one to sustain. It is true that s. 33 does not expressly state that s. 1 of the Charter can be overridden. However, it is implicit in s. 33 that, once a Charter provision has been overridden by an express declaration in a statute, the Charter provision has no application whatsoever to the statute, and therefore there is no need for any showing of reasonableness or justification under s. 1. This view seems to have been accepted in *Ford v. Quebec* (1988). Although the Court made no explicit reference to the s. 1 argument, the Court upheld the validity of the s. 33 override without considering its reasonableness or demonstrable justification. And the Court said that s. 33 “lays down requirements of form only”, and that there was “no warrant for importing into it grounds for substantive review”.³⁰²

[References omitted]

[271] Lastly, the position asserted by the *Act*'s opponents is incompatible with the highly different scope of s. 33 and s. 1 of the *Canadian Charter*. Section 33 gives Parliament and the provincial legislatures the power (which power, it bears reminding, can be exercised for purely political reasons) to temporarily override the application of ss. 2 and 7 to 15 of the *Canadian Charter*, whether or not there is a violation of these provisions, and whether or not such violation, if any, is justified. For its part, s. 1 allows Parliament and the provincial legislatures to *justify*, based on certain conditions, *proven violations* of the rights and freedoms guaranteed by the *Canadian Charter*. Thus, s. 33 sets out a mechanism for overriding certain rights and freedoms (ss. 2 and 7 to 15), while s. 1 “guarantees the rights and freedoms set out in it / *garantit les droits et libertés qui y sont*

²⁹⁹ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, pp. 740-741.

³⁰⁰ 2020 SCC 38.

³⁰¹ *Ontario (Attorney General) v. G.*, 2020 SCC 38, para. 137.

³⁰² Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §39:7, p. 39-13. See also: *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906 [*Hess; Nguyen*], p. 926.

énoncés”. Section 1 also provides a justificatory framework in the event of a violation, stating, as a requirement, that the guaranteed rights and freedoms are “[...] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society » (*“Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d’une société libre et démocratique”*).

[272] Applying s. 1 to s. 33 would presuppose not only a demonstrated infringement of a right or freedom (ss. 2 and 7 to 15), but also the need to “justify” that infringement. Such an interpretation would gut the override authority of all usefulness,³⁰³ in addition to giving the courts, rather than the legislature, the final say, because the former could conclude that the latter’s exercise of its override authority is unjustified and therefore unconstitutional. Yet, harking back to what the Supreme Court wrote in *Ford*, nothing in the wording of s. 33 warrants such an interpretation — an interpretation, which, in the Court’s opinion, seems driven by the refusal to accept the very existence of such an override power. Certainly, some may question the appropriateness of such a power. The answer, however, cannot be found in a reading of ss. 1 and 33 of the *Canadian Charter* that is incompatible with their wording and with the teachings of the Supreme Court.

[273] Consequently, the trial judge did not err in law when he wrote:

[TRANSLATION]

[745] It is difficult to see how Parliament — which, at the time the Charter was enacted, held the federal-provincial constitutional talks required by such a process and decided to include a notwithstanding clause allowing certain rights to be excluded from the constitutional guarantees — could be subject to a court-imposed legal obligation that derives, in part, from the substantive application of the analytical equivalent of that very provision, namely, s. 1, when the aforementioned notwithstanding clause seeks to exclude the application of those very principles from legal debate.

[274] In short, the use of s. 33 of the *Canadian Charter* is not subject to the requirements of s. 1 of that *Charter*.

[275] The same can be said for s. 52 of the *Quebec Charter* as regards its s. 9.1. This is all the more so since it is difficult, if not impossible, to imagine that s. 52 of the *Quebec Charter* could be subject to the requirements of s. 9.1, when the former provision expressly provides for the power to derogate from the latter one.

³⁰³ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 968, no. XII-2.16.

ii. **Overriding the application of both charters**

[276] Some of the *Act's* opponents also argue, as a new issue, that the *Act* is the first piece of legislation in which the Quebec legislature has simultaneously exercised the override powers provided for in both charters and, moreover, in respect of all the rights and freedoms that can be overridden. This, they submit, warrants a reconsideration of *Ford*.

[277] This argument can be rejected succinctly. Firstly, in *Ford*, the Supreme Court found that the exercise, even on a preventive basis, of the override authority in respect of all the rights and freedoms covered under s. 33 of the *Canadian Charter*, including through omnibus legislation, was valid. If, in the eyes of the Supreme Court, a “wholesale” override is valid under the *Canadian Charter* (a constitutional enactment), it must necessarily be the same for a “wholesale” override of the provisions of a “quasi-constitutional” enactment such as the *Quebec Charter*.

[278] Moreover, neither s. 33 of the *Canadian Charter* nor s. 52 of the *Quebec Charter* restricts the legislature’s ability to exercise its override authority (other than by imposing requirements of form, as previously mentioned). Apart from pointing to portions of the Trial Judgment in which the judge states that he is seriously [TRANSLATION] “concerned by the breadth of the exercise and the [legislature’s] indifference to certain rights and freedoms”,³⁰⁴ those asserting this ground have not put forth a legal argument to support the conclusion that the simultaneous use of the override powers under both charters is unconstitutional or justifies revisiting *Ford* for that reason. It is not up to the Court to fill this gap in their arguments.

[279] Consequently, there is no basis for the submission put forth by one of the parties to the effect that the simultaneous use of both notwithstanding clauses places the *Act* “outside any legal framework”.³⁰⁵ This argument, therefore, must fail.

iii. **Override of judicial rights (ss. 23-38 of the *Quebec Charter*) and legal rights (ss. 7-14 of the *Canadian Charter*)**

[280] Relying on *Crevier*³⁰⁶ in particular, one of the parties opposed to the *Act* adds that the simultaneous override of the judicial rights guaranteed by the *Quebec Charter* (ss. 23-28) and the legal rights enshrined in the *Canadian Charter* (ss. 7-14) offends the rule of law and the core competence³⁰⁷ of the Superior Court, and is thereby contrary to

³⁰⁴ Trial Judgment, para. 756.

³⁰⁵ Oral argument of Mtre Theodore Goloff (Lord Reading), November 7, 2022.

³⁰⁶ *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 [“*Crevier*”].

³⁰⁷ A.A. (Lord Reading), para. 62.

s. 96 of the *CA 1867*. It is useful to cite excerpts from its argument in order to accurately reproduce its submissions:

[60] [...] The suspension of all judicial rights provided in both *Charters*, and, as corollary, the suspension of what “la primauté du droit” includes, negates the inherent jurisdiction of the Superior Court as guardian of the Constitution. [...]

[...]

[70] The novel combined and *holus bolus* use of both notwithstanding clauses creates the perfect privative or preclusive clause that offends both the “rule of law” and the “core competence” of the Superior Court. The suspension of all judicial rights set out at s. 23 *et seq.* of the *Québec Charter*, along with those guaranteed in the *Canada Charter* results, with respect to **Bill 21**'s provisions, in the illegal erosion of the constitutional guarantees of both ss. 96 and s. 52(1) of the *Constitution Act, 1982*. While the Province may have the structural and procedural competence to neutralize the substantive rights of each *Charter* by way of their respective ss. 52 and 33, used individually, the concurrent use by the Province of both makes same *ultra vires* because of their combined effects upon the functioning of the Superior Court as guarantor of the “rule of law” and its role as a unifying judicial force. None of this was ever canvassed or decided in either *Ford* or *Devine* because the rights of the *Québec Charter* had been left intact.

[...]

[72] [...] The unconstitutional exercise of power by one or another level of government that compromises and hobbles the “core competence” and the jurisdiction of the Superior Court per s. 96 can and must be sanctioned so as to protect the supremacy of Canada's constitution itself. [...] ³⁰⁸

[Underlining and bold in the original; references omitted]

[281] Stated in other words, it is our understanding that it is therefore posited here that the *Act* is unconstitutional because it deprives individuals of their judicial rights, including the right to a “public and fair hearing by an independent and impartial tribunal” (s. 23 of the *Quebec Charter*, which right is also guaranteed under the *Canadian Charter*) and thereby precludes the Superior Court from performing its proper constitutional role of reviewing the provincial legislature's exercise of its legislative authority and ensuring that the state acts in compliance with the law and in a non-arbitrary manner.

³⁰⁸ A.A. (Lord Reading).

[282] As the AGQ correctly points out, however, such an argument [TRANSLATION] “is a means of stripping the use of s. 33 of the *Canadian Charter*” of any effect.³⁰⁹

[283] We would add that if this argument were accepted, it would essentially lead to the conclusion that the use of s. 33 of the *Canadian Charter* is contrary to s. 96 of the *CA 1867*, because, in the present case, it is not the violation of s. 23 of the *Quebec Charter* (or of the legal rights guaranteed by the *Canadian Charter*) that limits the superintending and reforming power of the superior courts, but rather the use of the override authority provided for in s. 33 of the *Canadian Charter*.³¹⁰ In practice, none of the *Act*'s provisions limits a citizen's right to go before an independent and impartial court — indeed, this case is the best example of that — such that, as the judge seems to have implied, at first sight the override of s. 23 of the *Quebec Charter* bears no connection to the *Act*.³¹¹ Rather, it is the use of the override authority provided for in the two *Charters* (ss. 33 and 34 of the *Act*) that limits the scope of judicial review (scrutiny of requirements of form, not substantive requirements). Accepting the argument on this point would in effect be tantamount to cutting down a constitutional power (s. 33 of the *Canadian Charter*) and implicitly abrogating a written provision of the Constitution. Yet, “it is a well accepted principle that one part of the Constitution cannot be used to invalidate a provision in another part”.³¹²

[284] Moreover, it cannot be said, as one of the *Act*'s opponents asserts, that the use of the *Canadian Charter*'s override authority prevents the Superior Court from exercising its core competence. It retains its jurisdiction to review the constitutionality of legislation by assessing whether the requirements of form under s. 33 have been met. That it cannot rule on the justification behind the use of such an override authority — a matter that is, in fact, political — does not offend the exercise of its constitutional role under s. 96 of the *CA 1867* because the latter “does not permit judges to use their inherent jurisdiction to enter the field of political matters”.³¹³

[285] The discussion in the preceding paragraph applies just as much to s. 52 of the *Quebec Charter*. The use of that provision, whose constitutionality, it should be noted, was not challenged, does not have the effect of preventing the Superior Court from fulfilling its constitutional role and does not impair its core jurisdiction protected by s. 96 of

³⁰⁹ R.A. (PGQ), para. 131.

³¹⁰ See below, paras. [358]ff.

³¹¹ Trial Judgment, para. 761. It seems hard to imagine that the *Act*'s override of s. 23 of the *Quebec Charter* would deprive a person of their legal rights in the event of a challenge to a disciplinary measure imposed under s. 13 of the *Act*, as the judge pointed out in para. 762 of his reasons.

³¹² *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, para. 31. See also: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, paras. 42; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, p. 390.

³¹³ *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, para. 41.

the CA 1867. The fact that the legislature chose to use the notwithstanding clauses of both charters in the *Act* changes nothing. This argument, therefore, must also fail.

iv. **Developments in international law and in the Supreme Court's jurisprudence**

[286] The FAE and Amnistie submit that the Supreme Court judgments rendered subsequent to *Ford*, including the ruling in *Baker*,³¹⁴ raise a new legal issue, namely, whether [TRANSLATION] “the international obligations assumed by Canada apply when interpreting the notwithstanding clauses”.³¹⁵ In their view, the presumption that Canadian law conforms to international law dictates that the notwithstanding clauses in the charters be interpreted in accordance with international norms, including those set out in the *International Covenant on Civil and Political Rights*³¹⁶ and the *International Covenant on Economic, Social and Cultural Rights*³¹⁷ (collectively the “International Covenants”), both of which Canada has ratified.

[287] Consequently, they argue, in order to reconcile Canada's domestic and international obligations with respect to fundamental rights and freedoms, the use of s. 33 of the *Canadian Charter* must be subject to substantive requirements (and not merely requirements of form). The FAE contends that the legislature must justify its use

³¹⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [“*Baker*”].

³¹⁵ A.A. (FAE), para. 99.

³¹⁶ *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, accession and ratification by Canada on May 19, 1976. The parties referred primarily to its art. 4, which states:

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

³¹⁷ *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, accession and ratification by Canada on May 19, 1976. The parties referred primarily to its art. 5, which states:

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

of the notwithstanding clause on the basis of a “pressing and substantial objective”,³¹⁸ while Amnistie, echoing the criteria in s. 4 of the *International Covenant on Civil and Political Rights*, claims that the legislature must prove that the derogation is not discriminatory and that there exists a “public emergency which threatens the life of the nation”. Amnistie adds that, in any event, the override of freedom of religion set out in the *Act* is prohibited by international law, thereby — and for that reason alone — making it unconstitutional.

[288] Although the Supreme Court did not discuss this point in *Ford*, that is not a reason for setting this precedent aside. In the Court’s opinion, the trial judge did not err in concluding that international law instruments [TRANSLATION] “[...] are not useful in the case at bar”.³¹⁹

[289] It is not disputed that international law provides a relevant and persuasive source for interpretation, most notably as regards the *Canadian Charter*. In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, the Supreme Court, in majority reasons, wrote:

[22] While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support or confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. [...] ³²⁰

[290] The Supreme Court continued, citing with approval the following remarks of Dickson, C.J. in his dissenting opinion in *Reference re Public Service Employee Relations Act (Alta.)*:

[30] [...]

The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter’s* provisions. [...] ³²¹

[Underlining omitted]

³¹⁸ A.A. (FAE), para. 141.

³¹⁹ Trial Judgment, para. 749.

³²⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.

³²¹ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, p. 348.

[291] Thus, although international norms are not binding on the courts, they are liable to influence judicial interpretation of Canadian and Quebec law. In a passage cited with approval in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, authors Stéphane Beaulac and Frédéric Bérard (the latter being counsel for the FAE before the Court) explain that:

[TRANSLATION]

In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.³²²

[Underlining added]

[292] The parties opposed to the *Act* are certainly correct in pointing out that international instruments ratified by Canada, including the International Covenants,³²³ give rise to a presumption of conformity,³²⁴ given their binding force. This implies that, in the context of the *Canadian Charter*, “[said] *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”.³²⁵ This presumption, however, cannot be used to overthrow clear legislative intent nor to arrive at an interpretation that is precluded by the very wording of the statute:

[33] Subsequent case law has continued to tie the presumption of conformity to the language of Canada’s international *obligations or commitments*: *Ktunaxa*, at para. 65; *Badesha*, at para. 38; *Saskatchewan Federation of Labour*, at paras. 62 and 64-65; *Divito*, at para. 22; *Health Services*, at para. 69.

[34] This Court has explained that the presumption of conformity “operates principally as an interpretive tool in assisting the courts in delineating the breadth

³²² Stéphane Beaulac and Frédéric Bérard, *Précis d’interprétation législative*, 2nd ed., Montreal, LexisNexis, 2014, pp. 410-411, para. 5, cited with approval in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 22.

³²³ See footnotes 316 and 317.

³²⁴ *R. v. Hape*, 2007 SCC 26, paras. 53-55.

³²⁵ *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, p. 349 (dissenting reasons of Dickson, C.J.), cited in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 31.

and scope of *Charter* rights”: *Kazemi*, at para. 150. But, being a presumption, it is also rebuttable and “does not overthrow clear legislative intent”: para. 60.³²⁶

[293] In the case at bar, s. 33 of the *Canadian Charter* was enacted *after* Canada’s ratification of the International Covenants. Yet the framers of the *Canadian Charter* did not deem it expedient to reproduce the substantive requirements found in the International Covenants, opting instead, as we saw, for wording that imposes only requirements of form.

[294] As Professors Chevrette, Marx and Zhou write, the override authority in s. 33 of the *Canadian Charter*, which has no true equivalent in international law, deviates from the derogation mechanisms set out in international human and fundamental rights instruments, whose scope is very different.³²⁷

[TRANSLATION]

This override power — also referred to as a notwithstanding clause — is an institution that seems to be unique to Canada and does not have a real equivalent in other Western democracies. Although certain international human rights

³²⁶ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32. See also: *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, paras. 47-48; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, para. 60 (cited by the judge at para. 748 of the Trial Judgment); *R. v. Hape*, 2007 SCC 26, para. 53. In this regard, contrary to what Amnistie contends, in order to rebut the presumption, the domestic statute need not derogate specifically by name from the international instruments in question. The legislature’s clear intent to derogate from its international obligations suffices.

³²⁷ On this subject, see, in particular: Marie Paré, “La légitimité de la clause dérogatoire de la Charte canadienne des droits et libertés en regard du droit international”, (1995) 29:3 *R.J.T.* 627, pp. 634ff. The derogation provision set out in art. 4 of the *International Covenant on Civil and Political Rights*, cited hereinabove, therefore covers different rights (1) and requires proof of a public emergency which threatens the life of the nation in question (2) and, which, moreover, must be officially proclaimed by the state (3). This provision also establishes the exceptional and temporary nature of the measure (4), which can only be taken to the extent strictly required by the exigencies of the situation (5), must not be inconsistent with other obligations under international law (6) and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (7) (see footnote 316). Article 18 of this instrument, which deals with freedom of religion and conscience, and which cannot be overridden by a derogation provision (art. 4(2)), reads as follows:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

[...]

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

[...]

instruments contain a notwithstanding clause, they restrict recourse to it only to emergency situations whereby a “public emergency [...] threatens the life of the nation” [...]. In the Canadian Charter, the override power enshrined in s. 33 does not entail such a restriction. Only s. 4 of the Charter, which fixes the maximum duration of the House of Commons and of the legislative assemblies, limits the possibility of infringing this guarantee and continuing the life of a legislative body beyond the five years provided for “[i]n time of real or apprehended war, invasion or insurrection”. Obviously, there is no real relation between the override power in the international instruments and that in the Charter. [...]³²⁸

[295] Relying on the presumption of conformity applicable to the International Covenants in order 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. The Court cannot use this presumption as a source of authority to rewrite s. 33 of the *Canadian Charter*, as the FAE and Amnistie urge it to do.

[296] The same conclusion applies to s. 52 of the *Quebec Charter*, although its enactment, in 1975, came shortly before Canada’s ratification of the International Covenants (1976). This provision was subsequently amended, in 1982, in order to broaden the scope of the override authority to ss. 1 to 38 (instead of ss. 9 to 38), without the legislature considering it necessary to amend its wording to set out the substantive requirements included in the International Covenants for the exercise of the override authority. One must conclude therefrom that such was not its intention.

[297] This conclusion applies *a fortiori* with respect to the non-binding international instruments invoked by the parties, which instruments are persuasive — but not determinative — interpretive tools and do not give rise to the presumption of conformity.³²⁹

[298] In short, the parties opposed to the *Act* have not demonstrated a new legal issue that would justify reconsidering *Ford*.

[299] We turn now to determining whether a change in circumstances or evidence fundamentally shifts the parameters of the debate, such that the Court can revisit the ruling in *Ford*.

³²⁸ François Chevette and Herbert Marx, *Droit constitutionnel : Principes fondamentaux – Notes et jurisprudence*, 2nd ed. revised and updated by Han-Ru Zhou, Montreal, Thémis, 2021, p. 1173.

³²⁹ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 35. See also: *R. v. Bissonnette*, 2022 SCC 23 [“*Bissonnette*”], para. 103.

b. Change in circumstances or evidence

[300] The exception to the principle of *stare decisis* based on a change in circumstances or evidence that fundamentally shifts the parameters of the debate is also limited in scope:

[31] Not only is the exception narrow — the evidence must “fundamentally shif[t] the parameters of the debate” — it is not a general invitation to reconsider binding authority on the basis of *any* type of evidence. As alluded to in *Bedford* and *Carter*, evidence of a significant evolution in the foundational legislative and social facts — “facts about society at large” — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.³³⁰

[301] A court, therefore, cannot depart from *stare decisis* on the basis of new evidence because it is in disagreement with the precedent or has a different interpretation. For a binding precedent from a higher court to be set aside based on new evidence, this new evidence must fundamentally shift “how jurists understand the legal question at issue”.³³¹

[302] The FAE submits that such an exception applies to the matter at hand. Quebec society, it argues, is facing changes in the position adopted by the political branch towards the judicial branch. More specifically, it claims, for some time there has been a propensity on the part of the legislature to oppose what [TRANSLATION] “some characterize as ‘government by the judiciary’”.³³² In its view, this oppositional stance is characterized by the Quebec legislature’s recent propensity to resort to the use of the override authority [TRANSLATION] “in a preventive and omnibus manner, without nuance or justification”³³³ so as to [TRANSLATION] “simultaneously sacrifice various minority rights provided for in the *Charters* in order to make electoral gains”.³³⁴ It argues that this [TRANSLATION] “casual and deleterious use”³³⁵ of the notwithstanding clauses, combined with the [TRANSLATION] “heightened and legalized stigmatization of the Muslim community”,³³⁶ fundamentally shifts the parameters of the debate and opens the door [TRANSLATION] “to reversing the precedent established in *Ford*”³³⁷ and to adding a substantive requirement — the demonstration of a “pressing and substantial objective” — for the use of the notwithstanding clauses.

³³⁰ *R. v. Comeau*, 2018 SCC 15.

³³¹ *R. v. Comeau*, 2018 SCC 15, para. 34.

³³² A.A. (FAE), para. 60.

³³³ A.A. (FAE), para. 64.

³³⁴ A.A. (FAE), para. 60. See also: *id.*, para. 97.

³³⁵ A.A. (FAE), para. 79.

³³⁶ A.A. (FAE), para. 97.

³³⁷ A.A. (FAE), para. 97.

[303] The FAE also refers to what it characterizes as [TRANSLATION] “the rise of populism in Quebec and elsewhere in the Western world”.³³⁸ Given that this [TRANSLATION] “new trend [...] diminishes the real scope of the rights and freedoms guaranteed by the *Charters*”,³³⁹ the FAE is of the view that it is [TRANSLATION] “the Court’s *moral duty* to be *bold* and reverse [this] precedent »³⁴⁰ (italics added).

[304] To be clear, we note immediately that this latter statement — while it unquestionably draws the reader’s attention — adds little, if anything, to the debate. The role of an appellate court is not to be *bold*. Overseeing the lawfulness of legislation and safeguarding “*Charter* protection[s]”,³⁴¹ as the FAE urges the Court to do, does not entail an exercise in bravery in which the Court must be *bold*. When the Court declares a law unconstitutional in a given case, it is not being *bold*; it is quite simply performing its constitutional role.

[305] Likewise, the Court is not being *timid* (the antonym of *bold*) in rejecting the FAE’s argument in the case at bar; it is simply applying the law. In the Court’s opinion, the FAE has not shown the existence of a “change in circumstances” or evidence that “fundamentally shifts the parameters of the debate” such that *Ford* could be revisited.

[306] As noted above, the use of the notwithstanding clauses, even in an omnibus manner and for political and preventive purposes, is not a new legal issue nor a new phenomenon. According to Professor Guillaume Rousseau, the Quebec legislature has used the override authority provided for in the *Quebec Charter* [TRANSLATION] “uninterruptedly” and preventively³⁴² since 1975.³⁴³ The same is true regarding the use of this power after the coming into force of the *Canadian Charter*.³⁴⁴ To date, such use is much rarer elsewhere in Canada:

³³⁸ A.A. (FAE), p. 24.

³³⁹ A.A. (FAE), para. 87.

³⁴⁰ A.A. (FAE), para. 87.

³⁴¹ Excerpt from *R. v. Henry*, 2005 SCC 76, para. 44, cited by the FAE in para. 86 of its argument.

³⁴² It was also used in *An Act to amend the Charter of the French Language*, S.Q. 1988, c. 54, as a response to the ruling in *Ford*.

³⁴³ Guillaume Rousseau, *Cahier de recherche – La disposition dérogatoire des chartes des droits : De la théorie à la pratique, de l’identité au progrès social*, Institut de recherche sur le Québec, March 2016, p. 12. The results of this study were updated in Guillaume Rousseau and François Côté, “A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights”, (2017) 47:2 *R.G.D.* 343, and then in François Côté and Guillaume Rousseau, “From *Ford v. Québec* to the *Act Respecting the Laicity of the State*: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause”, (2020) 94 *S.C.L.R.* 463.

³⁴⁴ François Côté and Guillaume Rousseau, “From *Ford v. Québec* to the *Act Respecting the Laicity of the State*: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause”, (2020) 94 *S.C.L.R.* 463, p. 480. See also: Noura Karazivan and Jean-François Gaudreault-DesBiens, “Rights Trivialization, Constitutional Legitimacy Deficit, and Derogation Clauses: the Example of Quebec’s *Laicity Act*”, (2020) 99 *S.C.L.R.* (2d), 487: these commentators consider the hypothesis that

While Quebec employed section 33 at least 62 times since 1982, all the other provinces combined only referred to the Canadian Charter notwithstanding mechanism 4 times during the same period [1982-2019]. The federal Parliament never used it.³⁴⁵

[307] For all that, however, this observation does not lead to the conclusion that there has been a [TRANSLATION] “[c]hange [since 1988] in the political [branch’s] stance towards the judicial branch”,³⁴⁶ as the FAE contends. Only an assessment of the justification for the legislature’s use of its override authority — which would require a substantive review of the exercise of that power, an exercise *Ford* proscribes — could lead to such a conclusion. Consequently, beyond the circular nature of this argument, it would be speculative for the Court to conclude, relying solely on the exercise of the override authority in a specific case, that such exercise is based on a change in the political branch’s stance towards the judiciary.

[308] The same is true of the FAE’s argument about the rise of populism. In order to conclude that this rise in populism, if any, represents a new trend warranting a revision of *Ford*, the Court would necessarily have to conclude that the *Act* and the political party that saw to its enactment are part of such a populist trend. Such an exercise would require a political judgment on the *Act* and on the way in which the party in power exercises its legislative functions.

[309] There is no need to go on at length regarding these two matters to conclude that this is not the Court’s role, which, we repeat, is instead limited to determining whether the legislature’s actions are consistent with the law, including the Constitution. In *Imperial Tobacco*,³⁴⁷ which dealt with the constitutionality of a British Columbia statute allowing the provincial government to sue manufacturers of tobacco products to recover the cost of tobacco-related health care, the Supreme Court, in a judgment written by Major, J., reiterated the role of the judiciary as follows:

50 The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.

the legitimacy deficit resulting from the patriation of the Constitution without Quebec’s agreement has led to a wider use of the notwithstanding clause.

³⁴⁵ François Côté and Guillaume Rousseau, “From *Ford v. Québec* to the *Act Respecting the Laicity of the State*: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause”, (2020) 94 S.C.L.R. 463, p. 479, footnote 71. See also: Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §39:2, pp. 39-3 to 39-9.

³⁴⁶ A.A. (FAE), p. 10.

³⁴⁷ *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

51 The judiciary has some part in the development of the law that its role requires it to apply. [...] But the judiciary's role in developing the law is a relatively limited one. "[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform": *Salituro*, at p. 670.

52 It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. "The wisdom and value of legislative decisions are subject only to review by the electorate": *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 59.³⁴⁸

[Underlining added]

These remarks are also relevant in the instant case.

[310] All in all, the FAE has not shown that the exception to the rule of *stare decisis* applies in the matter at hand, and its arguments must therefore fail.

4. Conclusion

[311] In summary, the Court is of the view that the trial judge rightly held that he was bound by the ruling in *Ford*, which still has precedential value. As ss. 33 and 34 of the *Act* satisfy the requirements of form set out in *Ford*, the challenge by the parties opposed to the *Act* cannot succeed in this respect.

B. Infringement of fundamental rights and declaratory or pecuniary remedies

[312] By overriding, respectively, ss. 1 to 38 of the *Quebec Charter* and ss. 2 and 7 to 15 of the *Canadian Charter*, ss. 33 and 34 of the *Act* are therefore a valid use of s. 52 of the former and s. 33 of the latter. That being so, is it necessary or appropriate to rule formally on whether the *Act* contravenes any of the provisions to which the overrides apply and, if so, to declare that it does?

³⁴⁸ *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49. The remarks of the majority in the Ontario Court of Appeal ruling in *Working Families Coalition*, when discussing s. 33 of the Canadian Charter, are to the same effect, and it is helpful to reproduce them once again: "[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" [underlining added] (*Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, para. 56, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725).

[313] The parties opposed to the *Act* ask the Court to do so, relying in particular on s. 24(1) of the *Canadian Charter*. As previously mentioned, although the trial judge's reasons intimate that, in his view, the *Act* is in some respects contrary to the principle of equality, while also restricting the freedoms of conscience, religion, belief and expression (hereinafter collectively referred to as "freedoms of religion and expression"), he nevertheless refused to make such a declaratory ruling. In particular, he explained as follows:

[TRANSLATION]

[795] The Court must be mindful of respecting the separation of powers between the legislative and judicial branches. The Court must therefore avoid using its discretionary power in the matter at hand to issue what is akin, in many respects, to a judicial opinion on a purely moot issue that, moreover, is based on hypothetical considerations. Indeed, the factual substratum is based on the premise that the legislature could decide not to invoke s. 33 of the Charter again.

[796] The Court, exercising its judicial discretion, will not rule on such a request.

[797] First, because the question posed is moot, as it seeks to circumvent the existing factual context in order to suggest a hypothetical one based on the legislature not invoking the notwithstanding clauses.

[798] Secondly, and more importantly, because while, on its face, we must give meaning to the words used in s. 33 — which speaks only of the effect of the use of the notwithstanding clause and which, therefore, would not exclude a request for a declaratory judgment — the fact remains that engaging in such a debate is an indirect way of doing something that cannot be done directly.

[799] With all due respect, although rights and freedoms are a matter of the utmost importance, we must avoid mortgaging an already busy judicial system with proceedings that do not lead to a concrete result.

[800] This is why the Court will reject this request.

[References omitted]

[314] The Court has come to the same conclusion as the trial judge, but for reasons that differ in part.

[315] When the legislature, relying on s. 33 of the *Canadian Charter*, decides to derogate from that *Charter's* ss. 2 or 7 to 15 (doing so as a preventive measure in the case at bar), not only does it protect or exempt the statute from their application, but it also thereby limits the judicial review of the statute's constitutionality. As a consequence, the courts

can no longer engage in the process of verifying whether the statute complies with the provision or provisions being overridden, and any notion of redress — including declaratory relief — is excluded. The same can be said when the legislature invokes s. 52 of the *Quebec Charter* to derogate from any of ss. 1 to 38 of that *Charter*. Why is this so? To answer this question, we will first examine the general effect of override provisions (the statute containing the override provision is exempt from the application of the provisions being overridden) and then their effect on judicial review (the statute containing the override provision is protected from judicial review of its conformity with the provisions being overridden). The following analysis will be based primarily on s. 33 of the *Canadian Charter*, but the same reasoning applies to s. 52 of the *Quebec Charter*.

[316] Subsidiarily, assuming courts can rule on whether a statute is in conformity with the constitutional provisions covered by a declaration made under s. 33 of the *Canadian Charter* or s. 52 of the *Quebec Charter*, and given the circumstances of the present matter, the doctrine of mootness requires that the Court refrain from ruling and granting any declaratory remedy whatsoever (compensatory relief being excluded in all cases).

1. **Inapplicability of ss. 2 and 7 to 15 of the *Canadian Charter* and ss. 1 to 38 of the *Quebec Charter***

[317] As we have just seen, the combination of the first two paragraphs of s. 33 of the *Canadian Charter* enables a legislature to enact a statute that operates “notwithstanding” ss. 2 or 7 to 15 of the *Canadian Charter*, i.e. “*indépendamment*” — independently — of these provisions, regardless of them, without taking them into account, such that the statute in question is protected from their application and placed outside their reach:

Section 33 enables the Parliament or Legislature to “override” s. 2 or ss. 7 to 15 of the Charter. If a statute contains an express declaration that it is to operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Charter, then by virtue of s. 33(2) the statute will operate free from the invalidating effect of the Charter provision referred to in the declaration. Through the use of this override power, the Parliament or Legislature is enabled to enact a statute that unjustifiably infringes one or more of the rights or freedoms guaranteed by s. 2 or ss. 7 to 15. If the override power did not exist (or if it were not exercised), such a statute would be valid only if it came within s. 1 of the Charter: a court would have to be persuaded, in accordance with the rules described in the previous chapter, that the statute came within “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. 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.³⁴⁹

[Reference omitted; underlining added]

[318] In short, a statute that is the subject of a declaration made under the first paragraph of s. 33 and in compliance with the requirements for the application of that section operates notwithstanding (“*indépendamment*”) ss. 2 and 7 to 15 and, therefore, notwithstanding the fact that, but for this declaration, it might have been of no force or effect by virtue of s. 52(1) of the *CA 1982*. These provisions are rendered inapplicable to the statute, which is consistent not only with the wording of s. 33 and the ordinary meaning of the words it uses, but also with its placement within the *Canadian Charter*, under the heading “APPLICATION OF CHARTER / APPLICATION DE LA CHARTE”, which shapes its field and scope. Section 33 therefore has a two-fold effect:

- the provisions of the *Canadian Charter* referred to in the override declaration are removed (temporarily³⁵⁰) from the scope of s. 52(1) of the *CA 1982*: since s. 33 of the *Canadian Charter* is itself an integral part of the Canadian Constitution, if the statute that invokes it infringes ss. 2 or 7 to 15, that statute cannot be subjected to a declaration of invalidity or, more precisely, of inoperability;
- concurrently, as a result of subsections (1) and (2) of s. 33, statutes in which that section is invoked operate fully, regardless of the rights referred to in ss. 2 or 7 to 15.

[319] In practice, this means that a statute containing a declaration made under s. 33 of the *Canadian Charter* is shielded from the application of ss. 2 or 7 to 15 — or is “protected” or “exempted” from any of these provisions, or “overrides” them. These terms, or their equivalents, are those of the Supreme Court itself, as we shall see from the judgments cited below. It should be noted that, for purposes of this discussion only and contrary to custom, the Supreme Court’s comments will be quoted in the language in which they were drafted (generally English), together with their translation, so as to demonstrate the consistency in the terms used in both languages. We should point out that, as regards the rulings in *Ford*, *Devine*³⁵¹ and the *Reference re Secession of Québec*, the Supreme Court reports do not specify the original drafting language of the judgment, but the excerpts from those judgments will also be cited in French and in English.

³⁴⁹ Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §39:1, pp. 39-2 and 39-3.

³⁵⁰ Given, of course, the time limit imposed by s. 33(3) of the *Canadian Charter* on the declaration made by Parliament or a legislature under s. 33(1).

³⁵¹ *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790 [“*Devine*”].

[320] In *Ford*, when referring to s. 52 of *An Act to amend the Charter of the French Language*, a provision found to respect s. 33 of the *Canadian Charter*, the Supreme Court wrote:

Therefore, s. 52 of *An Act to amend the Charter of the French Language* is a valid and subsisting exercise of the override authority conferred by s. 33 of the *Canadian Charter of Rights and Freedoms* that protects s. 58 of the *Charter of the French Language* from the application of s. 2(b) of the *Canadian Charter*. [...]

En conséquence, l'art. 52 de la *Loi modifiant la Charte de la langue française*, qui soustrait l'art. 58 de la *Charte de la langue française* à l'application de l'al. 2b) de la *Charte canadienne*, est un exercice valide et effectif du pouvoir de dérogation conféré par l'art. 33 de la *Charte canadienne des droits et libertés*. [...]. [...]³⁵²

[Underlining added]

[321] Slightly further on in the same judgment, when recapitulating its conclusions, the Supreme Court used the following terms:

In so far as s. 214 of the *Charter of the French Language* has ceased to have effect but s. 52 of *An Act to amend the Charter of the French Language* remains in effect, s. 58 of the *Charter of the French Language* is protected from the application of the *Canadian Charter of Rights and Freedoms* but it is inoperative as infringing the guarantee of freedom of expression in s. 3 of the *Quebec Charter of Human Rights and Freedoms* and the guarantee against discrimination based on language in s. 10 of the *Quebec Charter*. [...]

Dans la mesure où l'art. 214 de la *Charte de la langue française* a cessé d'avoir effet mais où l'art. 52 de la *Loi modifiant la Charte de la langue française* demeure en vigueur, l'art. 58 de la *Charte de la langue française* est soustrait à l'application de la *Charte canadienne des droits et libertés*, mais est inopérant parce qu'il constitue une violation de la liberté d'expression garantie par l'art. 3 de la *Charte des droits et libertés de la personne* du Québec et de la garantie contre la discrimination fondée sur la langue, énoncée à l'art. 10 de la *Charte québécoise*. [...]³⁵³

[Underlining added]

[322] The same words were used in *Devine*:

Are Any or All of ss. 52 (Formerly s. 53), 57, 58, 59, 60, and 61 of the *Charter of the French Language*

Les articles 52 (auparavant 53), 57, 58, 59, 60 et 61 de la *Charte de la langue française*, ou certains d'entre

³⁵² *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 742.

³⁵³ *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, p. 788.

Protected From the Application of ss. 2(b) and 15 of the Canadian Charter of Rights and Freedoms by a Valid and Applicable Override Provision Enacted in Conformity with s. 33 of the Canadian Charter?

For the reasons given in *Ford*, ss. 52 (formerly s. 53) and 58 of the *Charter of the French Language* are protected from the application of ss. 2(b) and 15 of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision, enacted pursuant to s. 33 of the *Canadian Charter*, in the form of s. 52 of *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56. [...]

eux, sont-ils soustraits à l'application de l'al. 2b) et de l'art. 15 de la Charte canadienne des droits et libertés par une disposition dérogatoire valide et en vigueur édictée en conformité avec l'art. 33 de la Charte canadienne?

Pour les motifs donnés dans l'arrêt *Ford*, l'art. 52 (auparavant 53) et l'art. 58 de la *Charte de la langue française* sont soustraits à l'application de l'al. 2b) et de l'art. 15 de la Charte canadienne des droits et libertés par une disposition dérogatoire valide et en vigueur adoptée en vertu de l'art. 33 de la *Charte canadienne*, c'est-à-dire l'art. 52 de la *Loi modifiant la Charte de la langue française*, L.Q. 1983, chap. 56. [...]³⁵⁴

[The underlining in the first paragraph is in the original, the second underlining was added]

[323] In *Vriend v. Alberta*,³⁵⁵ when discussing the relationship between the legislature and the courts under the *Canadian Charter*, Cory and Iacobucci, JJ., for the majority, expressed the same idea:

32 To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat

32 [VERSION FRANÇAISE] La révision judiciaire et ce dialogue sont précieux, selon moi, parce qu'ils obligent en quelque sorte les divers organes du

³⁵⁴ *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, p. 812. See also: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, pp. 948 and 966 (reasons of Dickson, C.J. and Lamer and Wilson, JJ.), where the Court had to determine whether two sections of the statute were "protected from the application of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision / soustraits à l'application de la Charte canadienne des droits et libertés par une disposition dérogatoire valide et en vigueur" (p. 948, underlining added); the Court answered that it was not, given that the override provision had not been renewed upon the expiry of the time limit set out in s. 33(3) of that *Charter*: "This means that s. 364 ceased to have effect on June 23, 1987 and that ss. 248 and 249 of the *Consumer Protection Act* are no longer protected from the application of the Canadian Charter by a valid and subsisting override provision / Cela signifie que l'art. 364 a cessé d'avoir effet le 23 juin 1987 et que les art. 248 et 249 de la Loi sur la protection du consommateur ne sont plus soustraits à l'application de la Charte canadienne par une disposition dérogatoire valide et en vigueur" (p. 966, underlining added).

³⁵⁵ [1998] 1 S.C.R. 493 ["*Vriend*"].

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.

gouvernement à se rendre mutuellement des comptes. Les tribunaux examinent le travail du législateur, et le législateur réagit aux décisions des tribunaux en adoptant d'autres textes de loi (ou même en se prévalant de l'art. 33 de la Charte pour les soustraire à la Charte). Ce dialogue et ce processus de reddition de compte entre organes du gouvernement, loin de nuire au processus démocratique, l'enrichissent.³⁵⁶

[Underlining added]

[324] In the unanimous ruling in *Reference re Secession of Quebec*,³⁵⁷ the Supreme Court stated the following:

47 [...] It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the *Canadian Charter of Rights and Freedoms*. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the *Charter*, the constraint operated as much against federal legislative powers as against

47 [...] Entre parenthèses, il faut signaler que les modifications de 1982 n'ont pas touché au partage des pouvoirs établi aux art. 91 et 92 de la *Loi constitutionnelle de 1867*, qui constitue la principale expression textuelle dans notre Constitution du principe du fédéralisme dont il a été convenu au moment de la Confédération. Toutefois, elles ont eu un effet important en ce que, malgré le refus du gouvernement du Québec de souscrire à leur adoption, le Québec est devenu lié par les termes d'une Constitution qui est différente de celle qui était en vigueur jusque-là, notamment quant aux dispositions régissant sa modification et la *Charte canadienne des droits et libertés*. Quant à cette dernière, dans la mesure où la portée des pouvoirs législatifs est limitée depuis par la *Charte*, cette limitation s'applique autant aux pouvoirs législatifs

³⁵⁶ This passage was quoted in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 65 (Iacobucci, J., writing for the Court).

³⁵⁷ [1998] 2 S.C.R. 217.

provincial legislative powers. Moreover, it is to be remembered that s. 33, the “notwithstanding clause”, gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the Charter.

fédéraux qu’aux pouvoirs législatifs provinciaux. Qui plus est, il faut rappeler que l’art. 33, la « clause de dérogation », donne au Parlement et aux législatures provinciales le pouvoir d’adopter, dans les domaines relevant de leurs compétences respectives, des lois dérogeant aux dispositions de la Charte qui concernent les libertés fondamentales (art. 2), les garanties juridiques (art. 7 à 14) et les droits à l’égalité (art. 15).

[Underlining added]

[325] In *Gosselin v. Quebec (Attorney General)*,³⁵⁸ a decision we will return to below,³⁵⁹ McLachlin, C.J., writing for the majority, stated that, pursuant to s. 33, the purpose and effect of the legislative provision had been to “withdr[a]w all Quebec laws from the *Canadian Charter* regime for five years from their inception / [VERSION FRANÇAISE] *soustraire toutes les lois québécoises à l’application de la Charte canadienne pendant une période de cinq ans à compter de leur adoption*”).³⁶⁰

[326] More recently, in *Ontario (Attorney General) v. G*,³⁶¹ Karakatsanis, J., writing for the majority, noted that “[s]ection 33 permits Parliament or a provincial legislature to temporarily exempt an Act from the application of rights and freedoms guaranteed by ss. 2 and 7 to 15 of our *Charter*, even for purely political reasons (*Charter*, ss. 32(1) and 33(1) and (2); *Quebec Association of Protestant School Boards*, at p. 86) / [VERSION FRANÇAISE] [*]l’article 33 permet au législateur fédéral ou provincial de soustraire temporairement une loi à l’application des droits et libertés garantis par les art. 2 et 7 à 15 de notre Charte, même pour des motifs purement politiques (Charte, par. 32(1) ainsi que 33(1) et (2); Québec Association of Protestant School Boards, p. 86)*”³⁶² [underlining added].

³⁵⁸ 2002 SCC 84 [“*Gosselin*”].

³⁵⁹ Below, paras. [365]ff.

³⁶⁰ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, para. 15. Such wording could already be found in *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033, p. 1047, in reasons written by Lamer, J. (as he then was) for the Court (“[ENGLISH VERSION] the validity of the exception clause adopted pursuant to s. 33 of the *Canadian Charter* to remove all Quebec legislation from the application of ss. 2 and 7 to 15 of the *Canadian Charter* / *validité de la clause dérogatoire adoptée en vertu de l’art. 33 de la Charte canadienne pour soustraire toute la législation québécoise à l’application des art. 2 et 7 à 15 de la Charte canadienne*”).

³⁶¹ 2020 SCC 38.

³⁶² *Ontario (Attorney General) v. G*, 2020 SCC 38, para. 137 (also mentioned in para. [270] above; see also para. [271]).

[327] Lastly, in *Toronto*, Wagner, C.J. and Brown, J., in their joint majority reasons, noted that s. 33 of the *Canadian Charter* “preserves a limited right of legislative override”³⁶³ (translated as “*garantit un droit de dérogation législative limité*”), so as to “permit legislation to operate ‘notwithstanding a provision included in section 2 or sections 7 to 15’ *only* / [VERSION FRANÇAISE] *permettre à des mesures législatives d’avoir effet « indépendamment d’une disposition donnée de l’article 2 ou des articles 7 à 15 » uniquement*”.³⁶⁴

[328] Thus, since the ruling in *Ford*, the Supreme Court’s jurisprudence has been clear, and the terminology it uses, in both English and French, is unambiguous: 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 *CA 1982*.³⁶⁵

[329] As noted above,³⁶⁶ the discussion of s. 33 in *Ford* is not *obiter*. Nor can we consider that the Court’s choice of words in that judgment (the expressions “protected from” and “override authority”, as well as the words “*soustraire*” and “*déroger*” or “*dérogation*”, and any derivatives of the foregoing words and expressions) was not arrived at carefully and is merely a lexical “accident” to which no weight should be given: this is clearly not the case, and *Ford*, in this respect as in others, stands as authority — as a *ratio decidendi* — one from which subsequent Supreme Court cases have never departed, whether terminologically or otherwise.

[330] The same reasoning and the same conclusion apply in respect of s. 52 *in fine* of the *Quebec Charter*, whose conditions of application, as noted above,³⁶⁷ are no more stringent than those of s. 33 of the *Canadian Charter*, and which has the same effect — i.e., that of protecting a statute containing an override declaration from the application of any of ss. 1 to 38 of said charter (or from a combination of these provisions or all of them). In that regard, the wording of s. 52 leaves no doubt.

[331] Does this mean, however, that a statute containing a declaration made under s. 33 of the *Canadian Charter* or s. 52 of the *Quebec Charter* is thereby concurrently protected from *any* judicial review, and that no remedy, even a purely declaratory one, can be granted? This is the question the Court must now answer.

³⁶³ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 60.

³⁶⁴ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 60.

³⁶⁵ In this regard, see, for example: Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §39:1, pp. 39-2 and 39-3; Robert Leckey and Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate”, (2022) 72:2 *U. Toronto L.J.* 189, particularly at pp. 190-193.

³⁶⁶ See above, paras. [245] to [255].

³⁶⁷ See above, para. [258].

2. Effect of s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter* on judicial review and on the remedies potentially flowing therefrom

[332] Certainly, the question of whether s. 33 of the *Canadian Charter* or s. 52 *in fine* of the *Quebec Charter* has been validly invoked remains subject to judicial review, as does the determination of the meaning and scope of these sections. This, in fact, is illustrated by section A of Part II of this judgment (see paras. [213] to [311] above).

[333] But can the courts rule on whether a statute complies with provisions of the *Canadian Charter* or the *Quebec Charter* that are expressly covered by an override provision enacted in accordance with s. 33 of the former or s. 52 of the latter? We know that the use of the notwithstanding clauses provided for in s. 33 or s. 52 *in fine* of these *Charters* defeats any judicial declaration of inoperability that could otherwise be made. Does this necessarily mean that courts cannot find that there has been an infringement of ss. 2 and 7 to 15 of the *Canadian Charter* or ss. 1 to 38 of the *Quebec Charter*, if such infringement exists, even if they cannot remedy it by a declaration of inoperability? Does it prevent litigants seeking such a finding from bringing the matter before a court of competent jurisdiction and obtaining a ruling thereon?

[334] As mentioned above, the parties opposed to the *Act* argue that, even when the legislature, by virtue of s. 33 of the *Canadian Charter* or s. 52 *in fine* of the *Quebec Charter*, removes a statute from the scope of ss. 2 and 7 to 15 of the *Canadian Charter* or ss. 1 to 38 of the *Quebec Charter*, the courts remain empowered to examine the statute and are required to determine whether it infringes the rights and freedoms from whose application it has been exempted. It is irrelevant that this determination cannot lead to a declaration of the statute's inoperability or that it does not prevent its application: litigants have the interest and right to know whether such an infringement exists and, therefore, to institute legal proceedings and to obtain a judicial declaration to that end. In the instant case, the parties opposed to the *Act* argue, the Superior Court therefore should have declared — and the Court should now declare — that the *Act* infringes the freedoms of religion and expression guaranteed by s. 2 of the *Canadian Charter* and by s. 3 of the *Quebec Charter*, as well as the right to equality protected by ss. 15 and 28 of the former and ss. 10 and 50.1 of the latter.

[335] From the arguments put forward in some of the briefs and at the appeal hearing, it can be deduced that this declaratory remedy would be based on s. 24(1) of the *Canadian Charter*, but also on arts. 142 and 529 *C.C.P.*, which govern declaratory actions and judicial reviews, respectively. In the case of the *Quebec Charter*, its s. 49 or, again, arts. 142 and 529 *C.C.P.* would be invoked.

[336] Moreover, according to the Lauzon Group, the AGQ should be ordered to pay \$500 in damages to each of appellants Andrea Lauzon, Hakima Dadouche and Bouchera Chelbi as redress for the infringement of their fundamental rights, which rights did not

cease to exist despite the legislature's use of the notwithstanding clauses set out in the two charters.

[337] The Court cannot accept these propositions. Here are the reasons why (in each of the sections that follow, the analysis will once again focus on the *Canadian Charter* and then be transposed to the *Quebec Charter*).

a. **No judicial review of the Act's conformity to ss. 2 or 7 to 15 of the *Canadian Charter* or ss. 1 to 38 of the *Quebec Charter* or to their respective justificatory provisions**

[338] As to whether judicial review survives the use of s. 33 of the *Canadian Charter* and permits the declaratory remedy sought here, we will first consider, as we must, the Supreme Court's jurisprudence. Although the Supreme Court has not had to answer the question as formulated in the case at bar, its comments nevertheless shed light on the issue.

[339] In majority reasons in *Hess; Nguyen*,³⁶⁸ Wilson, J. stated the following (while discussing the effects of s. 1 of the *Canadian Charter*):

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*.

[VERSION FRANÇAISE] D'ailleurs, chaque fois qu'une loi qui n'est pas soustraite au contrôle judiciaire par l'art. 33 de la *Charte* porte atteinte aux droits et libertés que celle-ci reconnaît, il est parfaitement loisible au gouvernement d'essayer de justifier la loi en vertu de l'article premier de la *Charte*.³⁶⁹

[Underlining added]

[340] The words are unequivocal: by using s. 33 of the *Canadian Charter*, the legislature insulates legislation from judicial review (*soustrait la loi au contrôle judiciaire*) — it being understood that this refers to judicial review of the statute's conformity with the provisions being overridden.

[341] The ruling in *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*³⁷⁰ is to the same effect. L'Heureux-Dubé, J. wrote:

³⁶⁸ *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906 (case dealing with ss. 7 and 15 of the *Canadian Charter*).

³⁶⁹ *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, p. 926.

³⁷⁰ [1994] 2 S.C.R. 406 [*Potash*].

[ENGLISH VERSION] Additionally, at the time the offences were committed the fourth paragraph of s. 22(e) ACAD 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.

Par ailleurs, le quatrième alinéa du par. 22e) LDCC faisait, à l'époque où les infractions ont été commises, l'objet d'une dérogation à l'art. 8 de la Charte, adoptée conformément à son art. 33. En effet, ce quatrième alinéa a été introduit dans la LDCC par la *Loi modifiant diverses dispositions législatives en matière de relations du travail*, L.Q. 1984, ch. 45, dont l'art. 35 prévoyait expressément la dérogation aux art. 2 et 7 à 15 de la *Charte*. La validité d'une telle dérogation ne fait aucun doute, puisqu'elle a été reconnue par notre Cour (*Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, aux pp. 741 et 742 (*per curiam*)). Par conséquent, même si les intimés soutiennent que le quatrième alinéa du par. 22e) viole l'art. 8 de la Charte, la Cour n'a pas à aborder cette question, étant donné la dérogation constitutionnellement valide. Cependant, la validité de ce quatrième alinéa au regard de l'art. 24.1 de la *Charte* québécoise devra être examinée.³⁷¹

[Underlining added]

[342] It should be noted that similar references are found even in minority reasons (dissenting or concurring), which tends to show unanimity in this respect.³⁷²

³⁷¹ *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406, pp. 435-436.

There are two sets of majority reasons in this judgment, the first by La Forest, J. (Lamer, C.J. and Sopinka, Cory, McLachlin and Iacobucci, JJ. concurring), the second by L'Heureux-Dubé, J. (Sopinka, Gonthier, McLachlin and Major, JJ. concurring). Although La Forest, J. disposed of the appeal in the same manner as his colleague, he wrote his own reasons, which dealt only with the second paragraph of s. 22(e) of the impugned statute, the *Act respecting Collective Agreement Decrees* (at the time: R.S.Q., c. D-2). As it appears from the above excerpt, L'Heureux-Dubé, J. also discussed the fourth paragraph of s. 22(e) of the statute in question.

³⁷² For example, in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, LeBel, J. (dissenting, with Fish, J. concurring in the dissent) pointed out that "[i]n the context of the values of the democratic society of Canada, courts were assigned the responsibility of final adjudication in the case of conflicts between public authorities and citizens, subject to the derogation or notwithstanding clause in s. 33 of the Charter / [VERSION FRANÇAISE] [*d*]ans le contexte des valeurs de la société démocratique du Canada,

[343] Finally, in *Law Society of British Columbia v. Trinity Western University*,³⁷³ Rowe, J., who wrote reasons concurring in the result, stated:

[199] The *Constitution Act, 1982* gives normative primacy to the rights and freedoms guaranteed by the *Charter*. By virtue of s. 1, any limit on these guarantees is presumptively unconstitutional. This means that rights infringements can stand *only* if the limit complies with the requirements of s. 1 (or, in some cases, if the government invokes the override provision in s. 33 of the *Charter*). These are the *only* options: the government either justifies the infringement, exempts the infringement from constitutional scrutiny, or the infringement is remedied by the court.

[199] [VERSION FRANÇAISE] La *Loi constitutionnelle de 1982* confère aux droits et libertés garantis par la *Charte* la primauté sur le plan normatif. Par l'effet de l'article premier, toute limite à ces garanties est présumée inconstitutionnelle. Cela signifie qu'une atteinte à un droit est valide *uniquement* si la limite respecte les exigences de l'article premier (ou, dans certains cas, si l'État invoque l'art. 33 de la *Charte*, la disposition autorisant les dérogations). Il s'agit là des *seules* possibilités : soit l'État justifie l'atteinte, soit il la soustrait au contrôle de sa constitutionnalité, soit le tribunal remédie à l'atteinte.

[Underlining added]

[344] The wording of the above sentences, in both languages, leaves no doubt that, in the opinion of Rowe, J., the use of s. 33 of the *Canadian Charter* exempts the impugned statute from constitutional review — i.e., judicial review of its constitutionality in light of the provisions being overridden.

[345] Twenty years earlier, Bastarache, J., writing for the majority in *Thomson Newspapers Co. v. Canada (Attorney General)*,³⁷⁴ implicitly suggested the same thing:

79 I find it necessary, at the outset of my analysis on the right to vote, to distinguish between the two *Charter* rights at issue in the present case. It is significant, for instance, that s. 3 of the

79 [VERSION FRANÇAISE] J'estime nécessaire, en commençant l'analyse du droit de vote, d'établir une distinction entre les deux droits garantis par la *Charte* qui sont en jeu

les tribunaux se sont vu confier la responsabilité de trancher les conflits entre les autorités publiques et les citoyens, sous réserve de la disposition de dérogation ou d'exemption de l'art. 33 de la Charte" (para. 184) [underlining added]. Given the general framework of LeBel, J.'s comments, it must be understood from this sentence that, in his view, the courts do not have this mission when the legislature has invoked s. 33 (i.e., they do not have to rule on a statute's conformity with the provisions of the *Canadian Charter* the legislature has overridden).

³⁷³ 2018 SCC 32.

³⁷⁴ [1998] 1 S.C.R. 877 ["*Thomson Newspapers*"].

Charter, which guarantees the citizen's right to vote, is not subject to override under s. 33 of the Charter. This means that a statutory provision which violates s. 3, and is not saved by s. 1, cannot be insulated from Charter review by Parliament or a provincial legislature. By contrast, s. 2(b) of the *Charter*, which protects free expression, is subject to override under s. 33. Even though the override power is rarely invoked, the fact that s. 3 is immune from such power clearly places it at the heart of our constitutional democracy.

dans le présent cas. Par exemple, il est significatif que l'art. 3 de la Charte, qui garantit le droit de vote des citoyens, ne puisse faire l'objet d'une dérogation fondée sur l'art. 33 de la Charte. Il s'ensuit que ni le Parlement ni les législatures provinciales ne peuvent soustraire à un examen fondé sur la *Charte* une disposition législative qui viole l'art. 3 et dont la validité n'est pas sauvegardée par l'article premier. À l'opposé, il est possible, en vertu de l'art. 33, de déroger à l'al. 2b) de la *Charte*, qui garantit la liberté d'expression. Même si ce pouvoir de dérogation est rarement invoqué, le fait que l'art. 3 soit soustrait à son application fait clairement de cette disposition un des éléments centraux de notre démocratie constitutionnelle.

[Underlining added]

[346] It follows from these remarks, *a contrario*, that the use of s. 33 allows the legislature to exempt a statute from a “review / examen” — which is necessarily a judicial review — based on the provisions of the *Canadian Charter* it has validly chosen to override.

[347] It could be argued that all of the foregoing comments (from *Hess; Nguyen to Thomson Newspapers*) are *obiter*, except in *Potash*, where they form part of the *ratio decidendi* of L'Heureux-Dubé, J.'s reasons. However, in a legal system in which judicial review has become a pillar of our constitutional democracy,³⁷⁵ the repetition and convergence of these comments are not insignificant, and our Court cannot ignore them.

[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 *CA 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, to rule otherwise would be tantamount to indirectly doing

³⁷⁵ See, for example: *R. v. Stillman*, 2019 SCC 40, para. 111 (majority reasons of Moldaver and Brown, JJ., with Wagner, C.J. and Abella and Côté, JJ. concurring).

what cannot be done directly.³⁷⁶ 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.

[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 15’³⁷⁷ 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).

[352] Do subsections (3) and (4) of s. 33 of the *Canadian Charter* (which, respectively, set a five-year limit on the declaration made under subsection (1), while also authorizing its renewal) affect this conclusion? Adams and Bower assert the following:

Indeed, the mechanics of the sunset provision only make sense if courts retain a role in assessing and identifying, but not remedying, legislation that unjustifiably infringes one of the select *Charter* rights covered by section 33. A judicial finding that a law infringes a *Charter* right without justification and would have been invalid but for the invocation of the notwithstanding clause provides crucial information for both voters and governments alike as they contemplate their democratic choices during the five-year span that the notwithstanding clause operates. By the same token, a judicial finding that the legislation did *not*, in fact, need the protective shield

³⁷⁶ Trial Judgment, para. 798 (reproduced above at para. [313]).

³⁷⁷ *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para. 60 (majority reasons of Wagner, C.J. and Brown, J.).

of the clause since the law would not have infringed the *Charter*, will allow a government to let the sun set without having to pay the ongoing political cost for a deliberate infringement of *Charter* rights. Additionally, a judicial determination and the constitutional litigation surrounding it might inspire productive legislative alternatives for the legislature to consider that would fulfill its policy objectives without unjustifiably infringing rights. Similarly, a judicial interpretation of a rights infringement that would have otherwise invalidated the legislation but for the protective shield of the notwithstanding clause will bring the constitutional stakes at play into sharper relief and to broader public attention than the legislative process alone might afford. It will, through evidence, testimony, and legal argument inject the perspectives of the individuals and groups most directly impacted by the law into the constitutional debate. This may be especially the case, and will be particularly important, where the rights infringements are experienced and endured by a vulnerable minority. As the constitutional law of the notwithstanding clause takes further shape, it will be crucial for courts to see its richer rights protecting purposes when interpreting the application of its text. Such an approach to section 33 of the *Charter* fits within Canada's balanced constitutional arrangements more seamlessly than has often been assumed.³⁷⁸

[Underlining added]

[353] This premise is based in part on that put forward by authors Leckey and Mendelsohn in an article calling on superior courts not to abdicate their constitutional review function even — and especially — when they cannot issue a declaration of inoperability as a result of s. 33 of the *Canadian Charter*.³⁷⁹

[354] In a way, this proposal echoes the comments of the Court (and more precisely those of Jacques, J.A.) in *Alliance des professeurs de Montréal*,³⁸⁰ where, for other purposes,³⁸¹ the Court evoked the rule of law and the need to inform the public of the rights of which they are potentially being deprived and to alert them thereto so they can knowingly exercise their right to civic debate and their democratic rights.

[355] Certainly, 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

³⁷⁸ Eric M. Adams and Erin R. J. Bower, “Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*”, (2022) 26:2 *Rev. Constit. Studies* 121, pp. 142-143 (this article also provides a thorough review of the political history surrounding the insertion of s. 33 in the *Canadian Charter*).

³⁷⁹ Robert Leckey and Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate”, (2022) 72:2 *U. Toronto L.J.* 189.

³⁸⁰ *Alliance des professeurs de Montréal c. Procureur général du Québec*, [1985] C.A. 376.

³⁸¹ In this case, the Court had to determine the conditions governing the legislature's use of s. 33 of the *Canadian Charter*. The Court imposed fairly stringent requirements of form, but was subsequently overruled by the Supreme Court, as noted above (para. [268]).

principles and techniques”³⁸²), which is what traditionally characterizes the “justiciability” of a debate, without regard to its political dimensions.³⁸³ In this sense, as Leckey and Mendelsohn write, “[t]he potential political impact of those questions does not efface their legal nature or render them non-justiciable”.³⁸⁴

[356] But, in the case at bar, this is not the obstacle to judicial review — rather, it arises from s. 33 itself. As Cory and Iacobucci, JJ. wrote in *Vriend*, 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*”.³⁸⁵ 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* 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*”)³⁸⁶ nor democracy, the protection of minorities or the role of superior courts in maintaining and fostering our constitutional order³⁸⁷ 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”³⁸⁸ (“*disposition d’inattaquabilité constitutionnelle*”) that

³⁸² *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, para. 70 (reasons of Brown and Rowe, JJ. concurring in the result).

³⁸³ See, for example: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, paras. 183-184 (joint dissenting reasons of Binnie and LeBel, JJ., with Fish, J. concurring); *Dostie c. Procureur général du Canada*, 2022 QCCA 1652 [“*Dostie*”], paras. 55-58 and 61, application for leave to appeal to the Supreme Court dismissed, July 27, 2023, No. 40597.

³⁸⁴ Robert Leckey and Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate”, (2022) 72:2 *U. Toronto L.J.* 189, p. 212.

³⁸⁵ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 137.

³⁸⁶ Brian Bird proposes a “thick” version of the rule of law, pursuant to which any statute that, based on odious reasons, purported to invoke s. 33 of the *Canadian Charter* in order to entirely ignore certain fundamental freedoms would be illegitimate and unlawful; this statute would no longer even truly be a law (Brian Bird, *The Notwithstanding Clause and the Rule of Law*, (2021) 101 *S.C.L.R.* (2d) 299, pp. 301 and 303-304).

³⁸⁷ Robert Leckey and Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts and the Electorate”, (2022) 72:2 *U. Toronto L.J.* 189.

³⁸⁸ The term “*inattaquabilité*” in the French expression has been borrowed from the Supreme Court, which used it on occasion to refer to what was traditionally known as a “privative clause / *clause privative*” (see, for example: *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, para. 27; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 104; *Canada*

limits the judicial review protected by s. 96 of the *CA 1867*. The power of the courts to review the exercise of the legislature's authority, a power guaranteed by s. 96 of the *CA 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.³⁸⁹ 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.

[359] The same conclusion must be drawn as regards s. 52 *in fine* of the *Quebec Charter*: a statute containing a declaration that complies with this provision is immune from judicial review of its conformity with the provisions of the *Quebec Charter* from whose application it has been exempted, and there can be no question of any remedy whatsoever, declaratory or otherwise.

b. Inapplicability of s. 24(1) of the Canadian Charter and s. 49 of the Quebec Charter as well as arts. 142 and 529 C.C.P. as a source for judicial review

[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. Nor is it permissible under arts. 142 and 529 *C.C.P.* Similarly, neither s. 49 of the *Quebec Charter* — nor, once again, arts. 142 and 529 *C.C.P.* — can impede the effect of a declaration made under s. 52 *in fine* of the *Quebec Charter*.

[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.

(*Canadian Human Rights Commission*) v. *Canada (Attorney General)*, 2011 SCC 53, paras. 16, 17, 20). It seems to have been used for the first time in the French version of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, para. 27 (reasons of McLachlin, C.J., writing for the Court), to translate a British Columbia statute containing the expression "privative clause".

³⁸⁹ See above, paras. [281] to [285].

[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*, “no part of the Constitution can abrogate or diminish another part of the Constitution”,³⁹⁰ and this is what would result if s. 24(1) were given such an autonomous — and decontextualized — effect.

[363] Moreover, the ruling in *Canada (Prime Minister) v. Khadr*³⁹¹ cannot be relied on as a basis for granting the declaratory (or pecuniary) remedy sought here by some of the parties opposed to the *Act*. In that case, which in no way involved s. 33 of the *Canadian Charter*, but rather dealt with the exercise of the executive’s common law royal prerogative in matters of foreign affairs,³⁹² the Supreme Court wrote the following:

[36] In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

[37] The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. [...] It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

³⁹⁰ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 42. See also: *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, para. 31; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, p. 390.

³⁹¹ 2010 SCC 3 [“*Khadr*”].

³⁹² *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, para. 35.

[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 *CA 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 *Khadr*, 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 *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*³⁹³ and *Gosselin*,³⁹⁴ 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.³⁹⁵

[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*”).³⁹⁶ 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”.³⁹⁷

[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

³⁹³ 2018 SCC 30 [*Ewert*].

³⁹⁴ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.

³⁹⁵ Above, para. [325]. See: *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, para. 15.

³⁹⁶ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, para. 304.

³⁹⁷ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, para. 96.

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.

[369] The same analysis, tailored to the context, applies to art. 142 and art. 529 para. 1(1) *C.C.P.* Nothing in these provisions makes it possible to disregard the double effect of a declaration made under s. 33 of the *Canadian Charter*. No more so than s. 24(1) of the *Canadian Charter* can arts. 142 and 529 *C.C.P.*, on their own, defeat the consequences of a declaration made in accordance with s. 33 of that *Charter*. The remedy provided for in art. 529(1) *C.C.P.* (the embodiment of the superior courts' judicial review power, which is enshrined in art. 34 *C.C.P.*) — by which a court would declare that a provision of a statute that infringes ss. 2 or 7 to 15 of the *Canadian Charter* is inapplicable, invalid or inoperative — is fully neutralized by the use of s. 33 of this *Charter*. As for art. 142 *C.C.P.*, which is another embodiment, but in matters of public law, of the superior courts' superintending and reforming power,³⁹⁸ it cannot, for all the reasons we have seen, supersede the effects of a declaration duly made under s. 33 of the *Canadian Charter*. The same is true where the override declaration has been made by the legislature under s. 52 *in fine* of the *Quebec Charter*. In such a case, s. 49 of the *Quebec Charter*³⁹⁹ is of no help, since it cannot be applied when the alleged violation is the infringement of a provision of that charter from whose application the impugned statute has been exempted.

³⁹⁸ On this subject, see, in particular: *Dostie c. Procureur général du Canada*, 2022 QCCA 1652, paras. 37ff, application for leave to appeal to the Supreme Court dismissed, July 27, 2023, No. 40597.

³⁹⁹ Section 49 of the *Quebec Charter* states:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

49. Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.

c. Summary

[370] In short, the reactive or preventive use of s. 33 of the *Canadian Charter* or s. 52 *in fine* of the *Quebec Charter* removes the statute from the scope of any of ss. 2 or 7 to 15 of the former or ss. 1 to 38 of the latter and also exempts it from judicial review of its conformity with the provisions in question, just as it shields it from the effects of s. 52(1) of the *CA 1982* or from the effects of the first portion of s. 52 of the *Quebec Charter* (except, of course, as regards the conditions for the valid use of s. 33 of the *Canadian Charter* or s. 52 *in fine* of the *Quebec Charter*).

[371] Consequently, in the instant case, the Court does not have to rule on whether or not the *Act* is consistent with the provisions of the charters to whose application it is not subject. It does not therefore have to review the *Act* in light of these provisions or, similarly, in light of s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*.⁴⁰⁰ More specifically, it is not empowered to rule on whether the *Act* infringes the freedoms of religion and expression or the right to equality guaranteed by these charters.

[372] It follows that if the Court cannot rule on the *Act's* compliance with the relevant provisions of either charter, it cannot grant any remedy whatsoever under s. 24(1) of the *Canadian Charter*, s. 49 of the *Quebec Charter* or arts. 142 and 529 *C.C.P.*, including a declaratory or pecuniary remedy, given that each such remedy, by its very nature, requires a prior determination that the Court cannot make.

* * * * *

[373] We will now add a few words about the pecuniary remedy sought by the Lauzon Group on behalf of Andr ea Lauzon, Hakima Dadouche and Bouchera Chelbi.

[374] This remedy would be inappropriate even if, hypothetically speaking, the Court were to consider the *Act's* compliance with the provisions of the charters from whose application it has been exempted and were to declare, again hypothetically, that the *Act*, were it not for the override provisions (ss. 33 and 34), violates s. 2 (freedom of religion or expression) or s. 15 (right to equality) of the *Canadian Charter* or the equivalent provisions of the *Quebec Charter*. Firstly, as we know, such a judicial declaration would in no way affect the applicability of the *Act* with regard to these sections of the two charters, nor would it render the *Act* of no force or effect or weaken its binding force. No pecuniary remedy can penalize the application of a statute which, notwithstanding its defects, remains valid and effective by virtue of the use of s. 33 of the *Canadian Charter* or s. 52 *in fine* of the *Quebec Charter*. Moreover, needless to say, the idea that the legislature's very use of s. 33 or s. 52 could give rise to an award of damages is just as untenable.

⁴⁰⁰ On this point, see paras. [265] to [275] above.

[375] Secondly, generally speaking, even when a statute does not contain a provision overriding fundamental rights and freedoms, a finding that it violates the *Canadian Charter*, or another constitutional provision or the *Quebec Charter*, cannot give rise to an order for damages against the Attorney General. As LeBel, J. noted in *Communauté urbaine de Montréal*:⁴⁰¹

19 In such cases, well-established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional, be it on the grounds of a violation of the separation of legislative powers within the Canadian federation or of non-compliance with the *Canadian Charter*. The case law of this Court has been consistent in this regard. The Court's position was recently outlined in the comments of Gonthier J. in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 78-79: [...].⁴⁰²

[Underlining added]

[376] In principle, therefore, pecuniary relief is not an appropriate sanction when a court rules that a statute is constitutionally invalid or of no force or effect, including with regard to the *Canadian Charter*, or that it is inconsistent with ss. 1 to 38 of the *Quebec Charter*. Although there is a narrow exception to this principle, its existence in the matter at hand has by no means been established.⁴⁰³

[377] In all cases, therefore, the pecuniary claim of the Lauzon Group and of the appellants supporting it is unfounded.

3. Subsidiary argument: doctrine of mootness

[378] Subsidiarily, and assuming that, despite ss. 33 and 34 of the *Act* and the absence of a constitutional remedy, the Court were empowered to rule on the *Act's* compliance with the provisions of the charters protecting the freedoms of religion and expression and the right to equality, it is now appropriate to examine the doctrine of mootness. In the

⁴⁰¹ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30.

⁴⁰² See also: *Canada (Attorney General) v. Hislop*, 2007 SCC 10, para. 102 (majority reasons of LeBel and Rothstein, JJ.). In the same vein, as regards policy decisions, see also, by analogy: *Nelson (City) v. Marchi*, 2021 SCC 41, paras. 39-49. In a very different context, Karakatsanis and Martin, JJ. pointed out that "although there is no question that the legislative and executive branches sometimes make core policy decisions that ultimately cause harm to private parties (Klar, at p. 650), the remedy for those decisions must be through the ballot box instead of the courts [...]" (para. 47). This comment is relevant to the case at bar, even if the issue in that case was the exercise of the judiciary's oversight power in private law liability matters.

⁴⁰³ See: *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13, paras. 78 to 82.

Court's view, the rules regarding mootness indeed justified the trial judge's refusal to include a conclusion on the subject in the disposition of his judgment.

[379] One can agree that the question of whether the *Act* unjustifiably restricts the freedoms of religion and expression, as well as the right to equality of Quebec state employees, representatives and actors, raises a moot issue in the traditional sense of the term: the answer given by a court would have no concrete legal effect, because the *Act* would still have force and effect notwithstanding any infringement of these rights. Given that a declaration of inoperability on this ground is excluded, a judgment on this point would have no useful impact on the rights alleged to have been infringed. In other words, even if we were to recognize both that an infringement exists and that it is not justified, this would change nothing regarding the *Act's* application or the legal situation of those who are and will continue to be subject to it.

[380] In *Dostie*,⁴⁰⁴ this Court recently reviewed the relevant case law and summarized the mootness doctrine (which is enshrined in Quebec law in art. 10 para. 3 *C.C.P.*⁴⁰⁵) as follows:

[TRANSLATION]

[50] **Moot issue.** The 1989 Supreme Court ruling in *Borowski* is the landmark case on this subject. Its teachings, still relevant to this day, are implicitly codified in art. 10 para. 3 *C.C.P.*, which thereby endorses an organizing principle of judicial activity. It follows that, as a general rule, and regardless of the subject matter, courts must refrain from ruling on theoretical or abstract questions or debates — i.e., questions or debates whose solution has no practical or concrete effect, which can occur, for example, when the impugned legislative or regulatory provisions have ceased to have effect or have been repealed. Exceptionally, in exercising their discretionary power, they may nevertheless rule on such a question if they can do so in an adversarial context and if judicial resources, which are scarce, can be used properly and in the interests of justice, without the courts overstepping their adjudicative role. It goes without saying that where a court has found a matter

⁴⁰⁴ *Dostie c. Procureur général du Canada*, 2022 QCCA 1652, application for leave to appeal to the Supreme Court dismissed, July 27, 2023, No. 40597.

⁴⁰⁵ Article 10 para. 3 *C.C.P.* states:

10. [...]

The courts are not required to decide theoretical questions or to adjudicate where a judgment would not put an end to the uncertainty or the controversy, but they cannot refuse to adjudicate under the pretext that the law is silent, obscure or insufficient.

10. [...]

Ils [les tribunaux] ne sont pas tenus de se prononcer sur des questions théoriques ou dans les cas où le jugement ne pourrait mettre fin à l'incertitude ou à la controverse soulevée, mais ils ne peuvent refuser de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi.

to be moot, it cannot lightly use its power to rule on the merits of the case or to refer the case back for trial. Interpreting this discretionary exception too broadly would in fact demolish or neutralize the principle recognized in *Borowski* and, here, it would neutralize art. 10 para. 3 *C.C.P.* Thus, courts must proceed sparingly, prudently and with restraint when faced with ruling on moot issues.

[References omitted]

[381] This passage is based, among other things, on the Supreme Court ruling in *Doucet-Boudreau*, in which Iacobucci and Arbour, JJ., writing for the majority, stated:

17 The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. [...]

18 Although this appeal is moot, the considerations in *Borowski*, *supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):

- (1) the presence of an adversarial context;
- (2) the concern for judicial economy; and
- (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.⁴⁰⁶

[382] It should be noted that the doctrine of mootness applies even in the context of a declaratory action. It is often forgotten that the purpose of such an action is not to obtain a legal opinion from the courts, which do not act in an advisory capacity (except in the case of references submitted to them by governments), but to resolve a genuine problem, even if it has not yet acquired the characteristics of an immediate cause of action. The judgment ruling on this genuine problem must therefore have a tangible and practical effect on the rights of the parties. This is true not only in matters of private law, but in matters of public law as well (where declaratory actions are one of the procedural embodiments of the judicial review of legislative and governmental action⁴⁰⁷). This is

⁴⁰⁶ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62. In the same vein, see also: *New Brunswick (Minister of Health and Community services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 43 (majority reasons of Lamer, C.J.).

⁴⁰⁷ See: *Dostie c. Procureur général du Canada*, 2022 QCCA 1652, paras. 37ff, particularly para. 40, application for leave to appeal to the Supreme Court dismissed, July 40, 2023, No. 40597).

unequivocally illustrated by the Supreme Court's decision in *Daniels v. Canada (Indian Affairs and Northern Development)*:

[11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. 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.

[...]

[15] With federal and provincial governments re-fusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold account-able for an inadequate status quo. [...] The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a long-standing jurisdictional dispute [*"présenter l'utilité pratique tangible de régler un conflit de compétence de longue date"*].⁴⁰⁸

[Underlining added]

[383] In short, the mootness doctrine applies to all types of legal actions, including judicial review, even when it is exercised by means of a public law declaratory action: courts should, in principle, rule only on issues that have practical and tangible consequences for the rights of the parties. This is not the case here, however, because, even if the Court were to find that there has been an infringement of s. 2 and s. 15 of the

⁴⁰⁸ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (reasons of Abella, J., writing for the Court). In the same vein, citing *Daniels*, see: *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, para. 82 (reasons of Abella, J., writing for the Court); *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 42 (joint majority reasons of Wagner, C.J. and Abella and Karakatsanis, JJ.: "Declaratory relief is a narrow remedy, available independently of consequential relief, but granted only where it will have practical utility: *Manitoba Metis Federation Inc.*, at para. 143; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11."); and *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, para. 60 (majority reasons of Côté, J.). See also, for an older version of the same rule: *Solosky v. R.*, [1980] 1 S.C.R. 821, p. 833, majority reasons of Dickson, J. (as he then was): "Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case."

Canadian Charter (or ss. 3 and 10 of the *Quebec Charter*), that finding would have no legal effect whatsoever, as we have seen (i.e., it would have no effect on the rights of the parties to the dispute nor, in general, on the public as a whole).

[384] In the exercise of their discretionary power, however, courts may decide that it is in the interests of justice to rule despite the absence of such consequences and the theoretical nature of the question raised. How does this apply in the case at bar? Is it in the interests of justice for the Court to rule formally on the *Act's* compliance or non-compliance with the provisions of the Canadian and Quebec charters protecting the freedoms of religion and expression, as well as the right to equality, and, if it finds there is an infringement, to issue a declaratory judgment accordingly?

[385] According to the guidance in *Doucet-Boudreau*⁴⁰⁹ and *Borowski*,⁴¹⁰ to answer this question, we must consider the following three criteria: (1) the presence of an adversarial context; (2) concern for judicial economy; and (3) the need for courts to be sensitive to their role as the adjudicative branch in our political framework.

[386] At first glance, the first criterion does not seem to raise any difficulties: the issue of the *Act's* compliance with the provisions of the charters that guarantee freedom of religion or expression and the right to equality certainly lends itself, in principle, to an adversarial debate. Indeed, was there not a debate in the Superior Court? On closer examination, however, this debate appears significantly lacking.

[387] As Sopinka, J. wrote in *Borowski*, “[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”.⁴¹¹ In this last respect, however, there is a major gap in the adversarial context in the case at bar: the question of whether or not the *Act* complies with the freedoms of religion and expression or the right to equality was not addressed by the AGQ, who did not really put forward any arguments on the subject. In this regard, he explained himself by submitting, in essence: (1) that there was no need for him — nor, as a matter of fact, for any of the other parties — to discuss this question, given ss. 33 and 34 of the *Act*; and (2) that, in any case, any discussion on this subject would, for the same reason, be entirely theoretical and would really only address the appropriateness of the *Act*, a subject that falls outside the scope of judicial scrutiny. He maintained this position on appeal.⁴¹²

[388] The AGQ, who did not concede the existence of an infringement of the provisions at issue, did not attempt, even if subsidiarily, to counter the view of the parties opposed to the

⁴⁰⁹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

⁴¹⁰ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

⁴¹¹ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 358 *in fine* and p. 359.

⁴¹² See, in particular: R.A. (AGQ), paras. 289-303.

Act and argue that the *Act*, particularly ss. 6 and 8 thereof, which are at the heart of the dispute, does not infringe ss. 2 and 15 of the *Canadian Charter* or ss. 3 and 10 of the *Quebec Charter*. Nor did he undertake to demonstrate that, even assuming there were an infringement of these rights and freedoms, the *Act* is justified under s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*. Some of the exhibits he submitted are undoubtedly a step in providing such evidence, and no doubt they could have formed the basis of an argument,⁴¹³ but the former does not appear to be complete, and the second is non-existent.

[389] It was no different on appeal, where the AGQ stuck to this position, while the parties opposed to the *Act* presented the case as if it were self-evident that there was an infringement (an unjustified one at that) of ss. 2 and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter*.

[390] One might be tempted to reproach the AGQ for his attitude and have him bear the consequences of this choice, at least as regards s. 1 of the *Canadian Charter* (or s. 9.1 of the *Quebec Charter*), as was done, for example, in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*⁴¹⁴ or, more recently, in *Bissonnette*.⁴¹⁵ In the same vein, one can also refer to the following decisions: *R. v. Hilbach*,⁴¹⁶ *R. v. Hills*,⁴¹⁷ *R. v. Boudreault*,⁴¹⁸ *R. v. Malmö-Levine*; *R. v. Caine*,⁴¹⁹ *R. v. Ruzic*⁴²⁰ and *Mahe v. Alberta*.⁴²¹

[391] This case law, however, does not settle the issue in the matter at hand. First, it should be noted that in the cases cited above as examples, the question before the Supreme Court was not theoretical, and a full adversarial debate had taken place regarding the existence or non-existence of the alleged infringement, even if the parties who had the burden of proof had not attempted to justify the infringement under s. 1 of the *Canadian Charter*. There was

⁴¹³ See, for example, Exhibit PGQ-12, *Rapport d'expertise de Marthe Fatin-Rouge Stefanini et Patrick Taillon*, which [TRANSLATION] “[d]escrib[es] the arrangements in force in the European states in connection with the wearing of religious symbols and the provision and receipt of services with one’s face uncovered” and seeks to [TRANSLATION] “[c]ompare these norms and their interpretation to those set out in the *Act respecting the laicity of the State*, and then draw certain lessons from the European experience as to how to manage religious pluralism”. (p. 4).

⁴¹⁴ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 278, paras. 278-279 (majority reasons of Lamer, C.J.).

⁴¹⁵ *R. v. Bissonnette*, 2022 SCC 23, para. 121, where, Wagner, C.J., writing for the Court, pointed out the justification onus under s. 1 of the *Canadian Charter* and wrote: “In this case, since the appellants [the Crown and the AGQ] have made no arguments concerning the justification for the impugned provision, they have not discharged the onus resting on them.”

⁴¹⁶ 2023 SCC 3, para. 164 (joint dissenting reasons of Karakatsanis and Jamal, JJ.).

⁴¹⁷ 2023 SCC 2, paras. 5 and 170 (majority reasons of Martin, J.).

⁴¹⁸ 2018 SCC 58, para. 97 (majority reasons of Martin, J.).

⁴¹⁹ 2003 SCC 74, paras. 272 and 303 (dissenting reasons of Arbour, J. and Deschamps, J., respectively).

⁴²⁰ 2001 SCC 24, para. 91 (reasons LeBel, J., writing for the Court).

⁴²¹ [1990] 1 S.C.R. 342 [*Mahe*], p. 394 (reasons of Dickson, C.J., writing for the Court).

nothing of the sort here, where even the existence of an infringement was only halfway debated. Second, and more importantly, none of these cases were decided within a framework subject to s. 33 of the *Canadian Charter* and s. 52 *in fine* of the *Quebec Charter*. For that matter, there is no case law in Canada or Quebec dealing with a situation analogous to the one at issue here, where the question is whether or not, in the present context, the Court should answer a moot question — i.e., one that will have no tangible and concrete effect on the rights of the parties or persons referred to in the *Act*.⁴²²

[392] That said, in order for it to be in the interests of justice to answer a moot question, it must be possible to do so fully, following a debate that has addressed all its aspects,⁴²³ which is not the case here. In such a context, the rule of law requires more than a judgment that decides a dispute on the basis of unfinished arguments that fail to address essential issues.

[393] Nor can we choose to answer the question on the basis of a debate that was only conducted halfway (and even then), in order to sanction the AGQ's attitude, even if it might now be considered imprudent. When a similar question arises in an "ordinary" constitutional review case, outside the framework of s. 33 of the *Canadian Charter* and s. 52 *in fine* of the *Quebec Charter*, it may be appropriate to adjudicate and, where applicable, to find that these charters have been infringed by making the Attorney General bear the brunt of the consequences of his failure to present justificatory evidence and arguments.⁴²⁴ The present case, however, arises precisely in the context of s. 33 and s. 52 *in fine* — a context that cannot be disregarded in assessing the AGQ's conduct. Nor can we ignore the fact that his decision to do so was based on the state of the law as recognized in the jurisprudence of the Supreme Court of Canada.

[394] Moreover, while *Borowski* teaches that a court can agree to address a moot issue "of public importance of which a resolution is in the public interest",⁴²⁵ in particular so as to avoid "the social cost of continued uncertainty in the law",⁴²⁶ these elements cannot justify doing so in the instant case, contrary to what the parties opposed to the *Act* suggest.

⁴²² While it is true that the courts in *Ford* dealt with the question of whether s. 2 of the *Canadian Charter* (freedom of expression) had been infringed, doing so in a context where s. 33 had been invoked, in that case, the impugned legislation had not been exempted from the *Quebec Charter*, such that there was a full debate under the latter, whose s. 3 also protects freedom of expression. That is not the case here, given that the *Act* includes override provisions adopted, respectively, under s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter*.

⁴²³ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, pp. 358-359. See above, para. [387].

⁴²⁴ This, indeed, will be the outcome in the present case as regards s. 3 of the *Canadian Charter* (a provision not covered by s. 33 of that *Charter*). See below, paras. [679] to [685].

⁴²⁵ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 361 ("*une question d'importance publique qu'il est dans l'intérêt public de trancher*").

⁴²⁶ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 361.

[395] Would a judicial declaration on the question of whether the *Act* infringes the freedoms of religion and expression, as well as the right to equality, be useful to the legislature should it wish to renew the provision set out in s. 34 of the *Act* (the provision that overrides the *Canadian Charter*)?⁴²⁷ Would it shed light on the work of the National Assembly? Would it provide adequate information to the public in general and to the electorate in particular, who might then be better able to exercise their democratic responsibilities?

[396] The answer is no: the guidance provided by a court based on an incomplete adversarial debate is not useful, as it allows uncertainty in the law to continue and thus does nothing to alleviate the “social cost in leaving the matter undecided”.⁴²⁸ Indeed, what would be the value of a theoretical *stare decisis* based on a deficient debate? It would educate neither the public nor the members of the National Assembly, and would merely perpetuate the debate. The public interest cannot simply make do with a half-answer, and neither the legislature nor the electorate would be well served.

[397] Although the MLQ and PDF Québec, both of which are in favour of the *Act*, attempted to show that the *Act* does not infringe ss. 2 and 15 of the *Canadian Charter* or ss. 3 and 10 of the *Quebec Charter*, and although their arguments are not without merit, in the absence of a full adversarial debate on the subject, the Court cannot truly address those arguments. These are not conditions conducive to a judicial determination of the rights of the various parties, particularly when such a determination will not affect the applicability of the *Act*.

[398] Finally, in the present context, if the Court were to address the question of whether the fundamental rights of the persons referred to in the *Act* have been infringed and, if so, whether the infringement is justified under s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter*, it would be departing from its judicial role and overstepping “its proper law-making function”⁴²⁹ by acting in an essentially advisory manner, as if it were seized of “a private reference”,⁴³⁰ which is not appropriate.

[399] This “private reference” label is even more apparent from the argument put forward by some of the parties opposed to the *Act*: in their opinion, if the question of the infringement of ss. 2 or 15 (and 1) of the *Canadian Charter* or ss. 3 or 10 (and 9.1) of the *Quebec Charter* were decided now, the matter would be settled in the event s. 33 of the *Act* (which is based on s. 52 of the *Quebec Charter*) were repealed or the declaration contained in s. 34 (which is based on s. 33 of the *Canadian Charter*) were not renewed at the end of its five-year term. There would then be no need to reopen the judicial debate,

⁴²⁷ A bill to this effect was tabled in the National Assembly on February 8, 2024, providing for the renewal of s. 34 of the *Act* as of June 16, 2024: Bill 52, *An Act to enable the Parliament of Québec to preserve the principle of parliamentary sovereignty with respect to the Act respecting the laicity of the State*, 43rd Leg. (QC), 1st Sess., 2024.

⁴²⁸ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 362.

⁴²⁹ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, p. 362.

⁴³⁰ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, pp. 365 and 367.

which would already have been decided — this would be convenient and in keeping with the principle of judicial economy.

[400] The Court cannot accept this argument: courts do not issue hypothetical or speculative judgments, “just in case”. As the trial judge noted, they do not render [TRANSLATION] “a judicial opinion on a purely moot issue that, moreover, is based on hypothetical considerations”.⁴³¹

[401] Ultimately, the conditions that would allow the Court to rule on whether or not the *Act* complies with ss. 2 and 15 of the *Canadian Charter* or ss. 3 and 10 of the *Quebec Charter*, or with ss. 1 and 9.1 of these charters, notwithstanding the fact that the *Act*’s applicability would in no way be affected, have not been met. Acknowledging this is not an abdication of the Court’s judicial role.

[402] For these reasons, the Court, in exercising its discretionary power with respect to this matter, would in any event subsidiarily refrain from ruling on this subject.

4. Conclusion

[403] Consequently, the Court will not rule on whether the *Act* complies with ss. 2 and 15 of the *Canadian Charter* or with ss. 3 and 10 of the *Quebec Charter*. Indeed, by virtue of ss. 33 and 34 of the *Act*, which are based, respectively, on s. 52 of the *Quebec Charter* and s. 33 of the *Canadian Charter*, the *Act* is exempt from the application of the aforementioned provisions and from the judicial review of its conformity with those provisions.

[404] In any case, and subsidiarily, determining whether the *Act* infringes the freedoms of religion and expression or the right to equality is a moot issue, insofar as recognizing the existence of a violation would not entail any practical legal effects: the *Act* would continue to apply even in the event of an infringement. The conditions that allow a court to answer a moot question have not been met in the instant case, as the Court does not have the necessary elements to properly rule on the matter.

[405] The claim for declaratory relief must therefore be rejected, as must the claim for pecuniary relief, the latter being inadmissible in all cases.

5. Additional comments on the use of the notwithstanding clauses and on the role of democratic institutions

[406] Having completed this analysis of the conditions of application and the effects of the notwithstanding clauses, as well as the role of the courts in this context, a number of

⁴³¹ Trial Judgment, para. 795.

additional comments are in order, in addition to those already set out in paras. [231] to [234] above.

[407] No doubt, the fact that a legislature can exempt a statute from the application of certain provisions of the *Canadian Charter* or the *Quebec Charter* and thereby shield it from judicial review in this regard (except, of course, with respect to the very validity of the override provision in light of the requirements set out in *Ford*⁴³²) is cause for reflection, if not discomfort. Indeed, the review of legislation in light of the charters plays an important role in a free and democratic society, with the courts exercising the mission entrusted to them by the Constitution, although it bears reminding that they exercise that mission not on their own initiative, but when called upon to do so.

[408] As Deschamps, J. pointed out in 2005, 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.⁴³³

[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

⁴³² As previously mentioned, a statute will still be subject to judicial review in the event of a challenge that does not relate to the provisions being overridden, but relies, instead, on other grounds (see para. [332] above).

⁴³³ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

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 *CA 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 *CA 1982*, the Court cannot disregard it and rule on a question that no longer (at least temporarily) falls within its power of judicial review. The same is true in respect of s. 52 *in fine* of the *Quebec Charter*, which is not subject to a time limit.

[410] That being said, there is no denying that the very existence of s. 33 of the *Canadian Charter* and s. 52 *in fine* of the *Quebec Charter* has given rise to criticism (the former provision, which has constitutional status, even more so than the latter). Indeed, for many, these provisions make the charters contradictory instruments — instruments that give with one hand and take away with the other, claiming to protect rights and freedoms described as fundamental, while allowing legislatures, acting at the whim of the ideologies of the day, to capriciously override those 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 charters,⁴³⁴ and jeopardizing the freedoms and guarantees that are essential to democracy, such as freedom of opinion, expression or association, protection against arbitrary arrest and detention or cruel treatment, the presumption of innocence, or the principle of equality. The fact that, in such as context, litigants cannot turn to the courts to have their voices heard, and that the courts are consequently unable to recognize that rights and freedoms have been violated, merely adds to these concerns: left unsupervised in this manner, legislatures could lapse into an abuse of power. This is certainly a fear expressed by most of the parties opposed to the *Act*, or reflected in their arguments.

[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* and since 1975 (and then 1982) in the case of the *Quebec Charter*. Even if one were to think it politically regrettable that the framers incorporated s. 33 into the *Canadian Charter*, just as one might think that the override permitted by s. 52 of the *Quebec Charter* and its 1982 expansion are deplorable (a matter on which the Court will evidently not opine), 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* or s. 52 *in fine* of the *Quebec Charter* to be inappropriate. For example,

⁴³⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 81.

the Ontario legislature recently inserted an override provision in the *Keeping Students in Class Act, 2022*,⁴³⁵ 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.⁴³⁶ 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 or the equivalent provision of the *Quebec Charter*.⁴³⁷

[414] Finally, we cannot ignore the crucial role of the legislature itself in defending and promoting rights and freedoms, especially when the Constitution gives it the final say, as the Supreme Court recognized in *Vriend*.⁴³⁸

[415] Legislating on rights and freedoms 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. Certainly, every member of the National Assembly has an individual responsibility in this regard, regardless of the member's political allegiance. Indeed, s. 43 of the *Act respecting the National Assembly* confers on each Member “full independence for the carrying out of his duties / *une entière indépendance dans l'exercice de ses fonctions*”, which independence can be exercised in all cases, including in matters of fundamental rights and freedoms, a subject that merits a full and rigorous examination. Indeed, such an examination seems rather incompatible with the closure procedure (which curtails parliamentary debate), a procedure that was,

⁴³⁵ Which is the short title of the following statute: *An Act to resolve labour disputes involving school board employees represented by the Canadian Union of Public Employees*, S.O. 2022, c. 19. Its s. 13 reads as follows:

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

(2) This Act applies despite the *Human Rights Code*.

(3) For greater certainty, subsections (1) and (2) apply to regulations made under this Act.

⁴³⁶ *An Act to repeal the Keeping Students in Class Act, 2022*, S.O. 2022, c. 20.

⁴³⁷ As we saw earlier (see paras. [226] and [227] above, as well as footnote 348), this is what the Ontario Court of Appeal recently noted in *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, para. 56, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725.

⁴³⁸ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 137-139.

in fact, used when the *Act* was adopted. That said, the subject is entirely a matter for parliamentary discussion.

C. Sexual equality⁴³⁹

[416] Section 28 of the *Canadian Charter* states:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

[417] As for s. 50.1 of the *Quebec Charter*, it states:

50.1. The rights and freedoms set forth in this Charter are guaranteed equally to women and men.

50.1. Les droits et libertés énoncés dans la présente Charte sont garantis également aux femmes et aux hommes.

[418] Both at trial and on appeal, the parties opposed to the *Act* relied on s. 28 of the *Canadian Charter* as one of the principal arguments for their challenge. In their view, the *Act*, through its purpose and effects, infringes this provision, which cannot be overridden under s. 33 of the *Canadian Charter*, and, according to them, it is therefore of no force or effect. Section 50.1 of the *Quebec Charter* was also raised, but only in passing. The reasons that follow will therefore focus on s. 28 of the *Canadian Charter* and touch more briefly on s. 50.1 of the *Quebec Charter*.

1. Section 28 of the Canadian Charter

a. The parties' submissions

[419] It is useful to recall the arguments put forward by the parties concerning s. 28 of the *Canadian Charter*.

⁴³⁹ This portion of the judgment is devoted to an analysis of s. 28 of the *Canadian Charter* and s. 50.1 of the *Quebec Charter*. The wording of the first provision refers expressly to sexual equality, with the English version showing that the aim is to ensure equality between “male and female persons”. The wording of the second provision refers to “women and men / *aux femmes et aux hommes*”. While it is not suggested that these provisions could not be extended to non-binary individuals, for example, or that they would not be drafted differently if enacted today (for example, by referring not just to sex, but to gender or gender identity as well), this subject was not addressed in the present dispute, be it in first instance or on appeal, the case having been argued solely on the basis of distinctions between women and men.

[420] According to the parties opposed to the *Act*, s. 28 was introduced into the *Canadian Charter* in order to reinforce the principle of sexual equality by adding to s. 15 (which already specifically makes sex a prohibited ground of discrimination) a separate and standalone substantive provision ensuring the pre-eminence of that principle. This pre-eminence, they submit, is expressed in two ways: for one, s. 28 conditions the interpretation and application of all the rights and freedoms guaranteed by the *Canadian Charter*; moreover, the section itself applies “[n]otwithstanding anything in this Charter / [i]ndépendamment des autres dispositions de la présente charte”, without exception, which gives it primacy over all provisions of the *Canadian Charter*, including ss. 1 and 33. In other words, s. 28 not only states that the rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons, it provides this guarantee *independently* of the other provisions of the *Charter*, including s. 33.

[421] The parties opposed to the *Act* also submit that since s. 33 makes no mention of s. 28, this clearly shows that it cannot be used to impair the equality of women and men, as the respective drafting histories of these two provisions in fact confirm. Consequently, they argue, no federal, provincial or territorial legislation can in any way derogate from the principle of sexual equality, and s. 33 itself cannot be used in a way that is disrespectful of this principle — i.e., in a way that, through its purpose or effects, differentiates between women and men. Subsidiarily, even if a restriction on the right guaranteed by s. 28 could be justified under s. 1 of the *Canadian Charter*, that justification would have to be demonstrated according to the test set out in *Oakes*, no such demonstration having been made here.

[422] Consequently, the parties opposed to the *Act* submit, the *Act* violates s. 28 because of the discriminatory — i.e., differentiating and prejudicial — treatment they assert it imposes on women, mainly Muslim women. Indeed, they claim, Muslim women, far more than men (including Muslim men), are the individuals whose freedoms of religion and expression are the most affected, disproportionately so, by the ban on wearing religious symbols (s. 6 of the *Act*), by the obligation to provide public services with their faces uncovered (s. 8 para. 1 of the *Act*) and by all the provisions associated with the implementation of these two requirements. As the AGQ did not attempt to demonstrate that this infringement is justified under s. 1 of the *Canadian Charter*, the *Act* should therefore be declared of no force or effect in this respect.

[423] Alternatively, they also argue that, even supposing that s. 28 does not establish a standalone substantive right that is separate from the right in s. 15, as an interpretative provision it nonetheless limits the manner in which a legislature can use s. 33. Consequently, the legislature cannot use s. 33 to deprive women (or some of them), but not men, of the rights and freedoms guaranteed by ss. 2 or 7 to 15, nor can it, under s. 33, create a situation with more restrictive effects on women (or some of them) than on men, or vice versa. In this respect, they submit, the *Act* also violates s. 28, since, in their view, the override provision it contains (s. 34) deprives Muslim women of their freedoms of

religion and expression, while their male coreligionists, and indeed all men, are not affected, or are affected to a lesser extent. According to them, it has the same overly restrictive effect on the right to equality of Muslim women compared to Muslim men and men in general. In short, they posit, the legislature cannot use s. 33 in a way that, by its purposes or effects, impacts women or women of a certain group more than men, which is a defect of s. 34 of the *Act* and thereby constitutes an unconstitutional use of s. 33.

[424] For its part, the AGQ argues that s. 28 of the *Canadian Charter* is not a standalone provision and does not, on its own, guarantee a principle of equality that is in addition to, or superimposed on, the principle enshrined in s. 15, but which, unlike the latter, cannot be overridden by a declaration under s. 33. If this were the case, the principle of sexual equality — shielded in this manner under s. 33 — would be recognized as predominant, while an override would be possible in the case of race, national or ethnic origin, colour, religion, age, mental or physical disability, and other similar grounds. There is nothing, however, to suggest that the framers intended to grant sexual equality this special status and offer it greater protection than that afforded to persons who are distinguished by the other characteristics listed in s. 15(1), or by characteristics to which this provision extends by analogy. The text and context of s. 28, its location within the *Canadian Charter* — just as that of s. 33 — and the general structure and logic of the *Charter* preclude such a conclusion. Rather, he submits, s. 28 is an interpretative provision, aimed at ensuring that the rights and freedoms guaranteed by the *Canadian Charter* are defined and applied without distinguishing between women and men (subject to the general proviso of s. 1).

[425] Thus, the AGQ argues, s. 28 does not create a standalone right to sexual equality, but comes into play when determining the meaning and scope of the rights and freedoms protected by the *Canadian Charter* or when delineating their implementation. Consequently, as an interpretative tool, s. 28 cannot be applied when the rights and freedoms to which it is grafted are themselves inapplicable or deactivated by the use of s. 33 of the *Canadian Charter*. In other words, when legislation is exempted from the application of ss. 2 and 7 to 15 of the *Canadian Charter*, s. 28, an ancillary provision, is thereby deprived of its foundation and effect in that regard.

[426] PDF Québec, another party supporting the *Act*, argues that s. 28 was inserted in the *Canadian Charter* not only to counter the stunted interpretation previously given to s. 1(b) of the *Canadian Bill of Rights*,⁴⁴⁰ but also to ensure the substantive equality of

⁴⁴⁰ S.C. 1960, c. 44:

1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, [...]

1 Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe :

women and men despite the constraints that most religions (including the three great monotheistic religions of Judaism, Christianity and Islam) impose on the former, by actually or symbolically subjugating them to the latter, by forcing upon them obligations to which the latter are not subject, or by depriving them of certain privileges or a certain status. The purpose of s. 28 is also to counterbalance the potential effect of s. 27 of the *Canadian Charter*. Respect for the cultural diversity of the Canadian population, including in terms of the dealings between women and men, cannot result in a disparity of rights and freedoms between men and women. As s. 28 operates “[n]otwithstanding anything in this Charter”, it bars sexist values and cultural patterns from being imported into the *Charter*. That being so, the *Act* does not contravene s. 28, since it does not encroach on women’s freedom of religion, but rather frees those holding the positions described in Schedules I, II and III from religious obligations that are intrinsically contrary to sexual equality, thus fostering the neutrality of the state and the concern for genuine parity.

[427] The trial judge agreed with the view of the parties opposed to the *Act* regarding its prejudicial effect on women, primarily Muslim women, as compared with men, finding that it has that effect [TRANSLATION] “in the field of education only”, as he stated in paragraph 876 of his judgment (reproduced below).⁴⁴¹

[428] Conversely, the trial judge endorsed the AGQ’s view on the meaning and scope of s. 28 of the *Canadian Charter*: this provision, [TRANSLATION] “which guarantees rights equally to both sexes, is solely interpretative and cannot be used on its own to invalidate legislation”.⁴⁴² While acknowledging that the arguments of the parties opposed to the *Act* were not without merit, and that the historical and political circumstances in which s. 28 was included in the *Canadian Charter* seem to pull in the direction they proposed, the trial judge nonetheless concluded that the very words of s. 28 (the starting point of the interpretative exercise), the general structure of the *Charter* and the other provisions thereof could not, ultimately, support these claims:

[TRANSLATION]

[873] Consequently, the Court cannot conclude that s. 28 is a standalone provision that can be used to invalidate legislative provisions.

(b) the right of the individual to equality before the law and the protection of the law;
[...]

[...]
b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;
[...]

⁴⁴¹ Paragraphs 801 to 807 of the judgment, which begin the section devoted to s. 28 of the *Canadian Charter*, might lead one to believe, at first glance, that the trial judge concluded that the *Act* primarily affects Muslim women in general ([TRANSLATION] “the evidence undoubtedly reveals that the effects of Bill 21 will have a negative impact on Muslim women first and foremost”, para. 807), but he clarified his thinking in para. 876.

⁴⁴² Trial Judgment, para. 4 (reproduced above at para. [57]).

[874] As a result of the legislature’s very broad use of s. 33, there are, legally speaking, no longer any rights and freedoms covered by s. 28 of the Charter.

[875] With all due respect, insofar as the Quebec legislature decides to avail itself of the override provision provided for in s. 33 of the Charter, it thereby suspends recourse to the rights and freedoms it seeks to exclude through such use. Consequently, there are no longer any rights or freedoms to be guaranteed equally to men and women as provided for in s. 28. The fact that s. 28 is not subject to the override provision does not alter this juridical reality.

[876] In other words, even assuming that Bill 21 has effects that prevent women, and especially Muslim women — as the record shows by a preponderance of evidence, in the field of education only — from exercising their freedom of religion and violates s. 15 of the Charter, the use of the notwithstanding clause prevents any recourse to s. 28 to circumvent the effects of its application set out in ss. 33 and 34 of Bill 21.

[429] For the reasons set out in the following pages, the Court comes to the same conclusion: s. 28 of the *Canadian Charter* is an interpretative provision, one that cannot defeat s. 33, whether by conditioning its use, neutralizing its effect or excluding s. 15(1) from its scope in the case of discrimination between men and women.

b. Applicable interpretation principles

i. General comments on s. 28 of the *Canadian Charter*

[430] Nearly 42 years after it came into force, s. 28 of the *Canadian Charter* — which was intended to remedy the “dismal [...] record”⁴⁴³ of pre-1982 jurisprudence on the protection of women’s rights, including under the *Canadian Bill of Rights* — remains a provision that is seldom used (if one relies on jurisprudence that, itself, barely deals with it, other than as a side issue) and is largely under-theorized, as noted in certain texts,⁴⁴⁴ even having been described as “astonishingly underdeveloped”.⁴⁴⁵ Scholarly commentators have taken an interest in s. 28, hesitating or being divided on its nature,

⁴⁴³ William F. Pentney, “Interpreting the Charter: General Principles”, in Gérald A. Beaudoin and Edward Ratushny (eds.), *The Canadian Charter of Rights and Freedoms*, 2nd ed., Montreal, Carswell, 1989, 21, p. 48.

⁴⁴⁴ See, for example: Cee Strauss, “Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*”, (2021) 33:1 *C.J.W.L.* 84, p. 88; Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, doctoral thesis, Kingston, Queen’s University (Faculty of Law), 2015, p. 326.

⁴⁴⁵ Cee Strauss, “Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*”, (2021) 33:1 *C.J.W.L.* 84, p. 86.

meaning, scope and usefulness:⁴⁴⁶ does it lay down an overriding principle⁴⁴⁷ or a rule of interpretation?⁴⁴⁸ Does it establish a standalone substantive right, or does it bind itself to the other rights and freedoms recognized by the *Canadian Charter*? Is it or is it not subject to s. 1 of that *Charter*, or can it influence its interpretation and application? How can it be reconciled with s. 33?

[431] The context in which it was enacted does not allow one to answer these questions with confidence. Section 28 was included in the *Canadian Charter* as a result of repeated requests and proposals from women's groups,⁴⁴⁹ but it is uncertain whether their objectives coincided perfectly with the ultimate will of the framers (federal-provincial framers⁴⁵⁰), whose preparatory work and debates are not necessarily very convincing.⁴⁵¹

⁴⁴⁶ Driedger himself had the following to say about s. 28:

Section 28 is a queer provision. It provides that the rights and freedoms referred to in the Charter "are guaranteed equally to male and female persons". Whatever the word "guarantee" may mean, it is obvious that the provisions of the Charter are directed equally to male and female persons. The expressions "everyone", "every citizen", "any person", "every individual", and "any member of the public" as a mere matter of language include male and female persons. This section means and accomplishes nothing. No doubt its origin and the euphoria with which its re-insertion in the Charter was greeted are due to the constant distortion and misrepresentation of the Privy Council's decision in *Edwards v. Attorney General of Canada*, sometimes known as the "Persons" case.

[Reference omitted]

(Elmer A. Driedger, "The Canadian Charter of Rights and Freedoms", (1982) 14 *Ottawa L. Rev.* 366, p. 373).

⁴⁴⁷ Consider the following example: Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, p. 493.

⁴⁴⁸ According to the opinion expressed in the following text, among others: William F. Pentney, "Interpreting the Charter: General Principles", in Gérald A. Beaudoin and Edward Ratushny (eds.), *The Canadian Charter of Rights and Freedoms*, 2nd ed., Montreal, Carswell, 1989, 29, pp. 39-40.

⁴⁴⁹ The following texts discuss this: Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, doctoral thesis, Kingston, Queen's University (Faculty of Law), 2015, chap. 3 (pp. 103ff); Beverley Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation", (2005) 17:1 *C.J.W.L.* 45, pp. 47-52; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forwards or Two Steps Back?*, Ottawa, Canadian Advisory Council on the Status of Women, 1989, pp. 15-17; Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, pp. 499-512.

⁴⁵⁰ This must be emphasized, as the *Canadian Charter* is not a federal tool, and the work of federal parliamentary bodies alone does not reflect the framers' intention.

⁴⁵¹ We know how little weight the Supreme Court gives to the testimony heard by the Joint Committee of the Senate and House of Commons at the time and to the minutes of its meetings of that time, as well as to any ministerial speeches made there: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, pp. 507 to 509 (majority reasons of Lamer, J., as he then was). The work of the House of Commons or the Senate is no more conclusive, for similar reasons, but also because, as footnote 450 above points out, the framers here are not only federal constituents. More generally, see also: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 369 (unanimous reasons of Dickson, C.J.).

Moreover, while the Supreme Court does not deny that it may be useful to refer to the parliamentary debates surrounding the adoption of legislation, in *MediaQMI inc. v. Kamel*, 2021 SCC 23, it invites courts to be cautious in doing so.

Certainly, one general impression can be drawn: parliamentarians wanted to ensure sexual equality and remedy the weaknesses of prior law in this respect.⁴⁵² It is unlikely, however, that they envisaged all the potential legal effects of the text as finally enacted, much less the interpretative problems liable to arise.

[432] The drafting history of s. 28 is perhaps more revealing, and we will return to this later. We will say, from the outset, however, that it does not provide an answer to all the questions raised here by the parties' respective claims concerning this provision.

ii. Rules of interpretation of the *Canadian Charter*

[433] The *Canadian Charter*, a constitutional instrument, must be interpreted using a purposive approach "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*".⁴⁵³

[434] This broad and contextual approach is, however, rooted first and foremost in the text of the constitutional provision, and one must not "minimiz[e] the [text's] primordial significance [...] in undertaking purposive interpretation".⁴⁵⁴ Indeed, in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, Brown and Rowe, JJ. stated:

[8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41 ("*Vancouver Island Railway*"), "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question": p. 88. This was reiterated in *Grant*, where the Court stated that "[a]s for any constitutional provision, the starting point must be the language of the section": para. 15 (emphasis added). Recently, in *Poulin*, the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.

⁴⁵² The rulings in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 (the latter having been rendered shortly after the *Canadian Charter* was adopted) were often cited at the time as examples of this weakness. Indeed, their approach to discrimination did not survive the coming into force of the *Charter* and the new Supreme Court jurisprudence on that subject.

⁴⁵³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 344, passage cited in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 7.

⁴⁵⁴ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 4.

[9] This is so because constitutional interpretation, being the interpretation of *the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain “the most primal constraint on judicial review” and form “the outer bounds of a purposive inquiry”: B. J. Oliphant, “Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms” (2015), 65 *U.T.L.J.* 239, at p. 243. The Constitution is not “an empty vessel to be filled with whatever meaning we might wish from time to time”: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Re PSERA*”), at p. 394; Caron, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted “the primacy of the written text of the Constitution”: para. 36; see also para. 37.

[10] Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53 and 55; *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, at paras. 21 and 126; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; *Big M Drug Mart*, at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.⁴⁵⁵

[435] Finally, according to Brown and Rowe, JJ., giving precedence to the constitutional text, the interpreter’s primary tool, does not entail rigid textualism or literalism, because the analysis must “also be conducted by reference to the historical context, the larger objects of the *Charter*, and, where applicable, the meaning and purpose of associated *Charter* rights”.⁴⁵⁶

[436] In light of these principles, what is the meaning of s. 28 of the *Canadian Charter*?

c. Meaning and scope of s. 28 of the *Canadian Charter*

[437] As the analysis must begin with an examination of the text of s. 28, it is worth reproducing it once again:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

⁴⁵⁵ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.

⁴⁵⁶ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para. 13.

[438] As one can see, the provision is divided into two segments: a main proposition, syntactically speaking, and an introductory statement that refines it. The following is the main proposition: “the rights and freedoms referred to in [the *Canadian Charter*] are guaranteed equally to male and female persons / *les droits et libertés [mentionnés dans la Charte canadienne] sont garantis également aux personnes des deux sexes*”. The meaning of this proposition seems clear, at least at first glance: the framers wanted to ensure (and ensure for the benefit of every individual) that the rights and freedoms enumerated in the *Canadian Charter* are granted to and recognized in the same way for women and men, providing them both with equal protection. This means that, in accordance with this rule, the provisions of the *Charter* that recognize a right or freedom must be interpreted and applied *without* distinction between women and men. Of course, the existence of such a distinction must be gauged in light of the principle of substantive — rather than formal — equality. There may also be distinctions that help re-establish sexual equality. For its part, the introductory statement “[n]otwithstanding anything in this Charter / *[i]ndépendamment des autres dispositions de la présente charte*” establishes the supremacy of the structuring rule of interpretation laid down by the main proposition.

[439] We will now take a closer look at the various elements having led to this conclusion.

2. Section 28: text, context and jurisprudence

[440] Firstly, it should be noted that s. 28 does not set out, as such, the principle of equality of women and men, which is established in s. 15 under the aspects of equality before and under the law, equal protection of the law and equal benefit of the law,⁴⁵⁷ all without discrimination based on a list of prohibited (or analogous) grounds, including sex. Rather, s. 28 affirms that the rights and freedoms referred to in the *Canadian Charter* (“*qui y sont mentionnés*”) are “guaranteed equally / *garantis également*” to male and female persons (“*personnes des deux sexes*”), that is, without distinction between women and men. Section 28 is thus grafted onto the *other* provisions of the *Charter* that recognize rights and freedoms. As de Jong writes, s. 28 “is not a general anti-discrimination provision” and its effect is limited “to the rights and freedoms set out in the document in which the provisions are contained”,⁴⁵⁸ adding that “section 28 is limited to the rights referred to in the *Charter*”.⁴⁵⁹

⁴⁵⁷ In French: “*Egalite devant la loi, egalite de benefice et protection egale de la loi*”.

⁴⁵⁸ Katherine J. de Jong, “Sexual Equality: Interpreting Section 28” in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, p. 521.

⁴⁵⁹ Katherine J. de Jong, “Sexual Equality: Interpreting Section 28” in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, p. 528. In the same vein, see also: Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §55:43, pp. 55-117 *in fine* and 55-118.

[441] In this respect, one notes that s. 28 is closely related to art. 3 of the *International Covenant on Civil and Political Rights* and art. 3 of the *International Covenant on Economic, Social and Cultural Rights*, which also aim to ensure that women enjoy all the rights enumerated in each of these instruments on an equal footing with men:

International Covenant on Civil and Political Rights

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

International Covenant on Economic, Social and Cultural Rights

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

[442] That said, what exactly does the main proposition of s. 28 contemplate when it mentions the *rights and freedoms referred to* (“*droits et libertés [...] mentionnés*”) in the *Canadian Charter*?

[443] At first glance, the text seems to clearly point to the rights and freedoms enumerated in ss. 2 to 23 of the *Charter*. This seems evident. Indeed, with the exception of ss. 4, 5 and 18, these provisions all use either the term “freedom / *liberté*” or the term “right / *droit*”, under the headings “FUNDAMENTAL FREEDOMS / *LIBERTÉS FONDAMENTALES*” (s. 2), “DEMOCRATIC RIGHTS / *DROITS DÉMOCRATIQUES*” (s. 3), “MOBILITY RIGHTS / *LIBERTÉ DE CIRCULATION ET D’ÉTABLISSEMENT*” (s. 6), “LEGAL RIGHTS / *GARANTIES JURIDIQUES*” (ss. 7 to 14), “EQUALITY RIGHTS / *DROITS À L’ÉGALITÉ*” (s. 15), “OFFICIAL LANGUAGES OF CANADA / *LANGUES OFFICIELLES DU CANADA*” (ss. 16 to 22⁴⁶⁰) and “MINORITY LANGUAGE EDUCATIONAL RIGHTS / *DROITS À L’INSTRUCTION DANS LA LANGUE DE LA MINORITÉ*” (s. 23). Their text, which it is not useful to reproduce here, expressly recognizes and affirms each of these rights and freedoms and, where necessary, defines their nature and conditions.

[444] As for ss. 4 and 5, these provisions do not, strictly speaking, confer an individual right; rather, they protect a right that is essentially collective and is linked to the very organization of the state, a right that anyone may assert in the event of an alleged violation. They preserve Canada’s democratic system by limiting the maximum duration of the House of Commons and of the legislative assemblies, and by requiring the latter, like Parliament, to hold at least one sitting a year. Section 18 adds to the official languages

⁴⁶⁰ Sections 21 and 22 circumscribe the application of s. 16 to 20 by protecting (1) language rights existing under other provisions of the Constitution (such as s. 133 of the *CA 1867* as regards the use of French or English before the courts of Quebec) and (2) legal or customary rights with respect to any language that is not English or French.

provisions by providing that the statutes and records of Parliament and of the legislature of New Brunswick must be printed and published in English and French. It is difficult to see, *a priori*, how these three provisions could be interpreted or applied in such a way as to distinguish between women and men, but, in any event, since these are obligations owed by the state to the electorate in the case of ss. 4 and 5, and to everyone in the case of s. 18, the rule set out in s. 28 must apply to those provisions.

[445] Logically, then, the “rights and freedoms / *droits et libertés*” mentioned in s. 28 are those of ss. 2 to 23. Moreover, this is consistent with the meaning of other provisions in which the framers have used similar expressions referring to the rights and freedoms guaranteed by the *Canadian Charter*.

[446] In this regard, s. 1 states that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it / [*]la Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés*”, which certainly refers to the rights and freedoms in ss. 2 to 23 — and, indeed, it is to these rights and freedoms that s. 1 has been applied since the *Charter* came into force, such that, unless overridden in accordance with s. 33, each of these rights and freedoms is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[447] Similarly, s. 24 speaks of the remedy available to any person “whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied / *victime de violation ou de négation des droits et libertés qui lui sont garantis par la présente charte*”, which, again, refers to the protections offered by ss. 2 to 23.

[448] Sections 25 and 26 use the expression “certain rights and freedoms / *certain droits et libertés*”, which, in context, again clearly refers to one or the other of the rights and freedoms guaranteed by ss. 2 to 23. Thus, as s. 25 states, the fact that “certain rights and freedoms” — i.e., those in ss. 2 to 23 — are protected by the *Charter* must not be construed so as to abrogate or derogate from “any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” (“*aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada*”). Similarly, according to s. 26, the fact that “certain rights and freedoms” — necessarily those of ss. 2 to 23 — are protected does not wipe out any *other* rights and freedoms (“*les autres droits et libertés*”) that exist in Canada: these other rights and freedoms survive, whether they emanate from the common law, the civil law or a statute (for example, the *Quebec Charter*, which guarantees several rights not included in the *Canadian Charter*).

[449] In short, given this context, and considering the other provisions of the *Canadian Charter* that use similar language, one must conclude that when s. 28 mentions the “rights and freedoms referred to in it”, the provision is clearly referring to the rights and freedoms protected by ss. 2 to 23. It is these rights and freedoms that are “guaranteed equally to

male and female persons / *garantis également aux personnes des deux sexes*” and the provisions that recognize and protect them must be read and applied in light of the rule set out in the main proposition of s. 28.

[450] To put it briefly, the main proposition of s. 28 is intended to ensure the equality of women and men in the interpretation and application of the rights and freedoms protected by ss. 2 to 23 of the *Canadian Charter*, as if a reference to this guarantee of equality were appended to each of these provisions.⁴⁶¹ Rather than using such a drafting technique, however, the framers opted for a general provision — s. 28 — which has the same effect as if it had been incorporated into each of ss. 2 to 23. It follows that these provisions must, in principle, be interpreted without distinction between women and men, since the rights and freedoms they guarantee must be qualitatively the same and have the same content and scope, regardless of the person’s sex, in a constant effort to achieve substantive equality.

[451] In this sense, therefore, s. 28 has no standalone normative value and does not add a right distinct from those recognized by ss. 2 to 23 of the *Charter*. Instead, it conditions the interpretation — and hence the application — of these provisions. Moreover, to conclude otherwise would be to duplicate s. 15 of the *Charter*, which already enshrines, in various respects, the equality of individuals without distinction based on various grounds, including sex.

[452] The interpretative purpose of s. 28 is confirmed by its placement within the *Canadian Charter*, under the heading “GENERAL / DISPOSITIONS GÉNÉRALES”, which includes ss. 25 to 31. All of these provisions prescribe rules that serve to elucidate — or sometimes limit — the meaning and scope of ss. 2 to 23, as if the former provisions had been incorporated into the latter, and they act as interpretation guidelines. The same is true of ss. 25, 26, 27 and 29:

- **Sections 25 and 29.** Sections 25 and 29 reconcile the protection afforded to rights and freedoms under the *Canadian Charter* with that afforded to rights and freedoms under other constitutional provisions, which are themselves designed to safeguard the interests of certain groups. Section 25 affirms that the guarantees offered by the *Charter* “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples / *ne porte[nt] pas*

⁴⁶¹ Somewhat like s. 35(4) of the CA 1982. Subsection 35(1) affirms the existing Aboriginal and treaty rights of the Aboriginal peoples, and s. 35(4) specifies the following:

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

atteinte aux droits ou libertés – ancestraux, issus de traités ou autres – des peuples autochtones".⁴⁶² It is an "interpretative [provision], and is aimed at preventing contestation of Aboriginal rights based on other provisions of the *Canadian Charter*".⁴⁶³ For its part, s. 29 states that the provisions of the *Charter* do not abrogate or derogate from any rights or privileges in respect of denominational, separate or dissentient schools, thereby referring to s. 93 of the *CA 1867*.

- **Section 26.** This provision ensures that the *Charter*, through the protection it affords to certain rights and freedoms (those in ss. 2 to 23), is not interpreted as denying or excluding the *other* rights and freedoms that individuals may enjoy under the law. These *other* rights and freedoms therefore survive.

- **Section 27.** According to the express wording of this provision, the interpretation of the *Charter*, and thus of the rights and freedoms enshrined therein, must take into account the "multicultural heritage of Canadians / *patrimoine multiculturel des Canadiens*".

[453] Section 30 extends to the Yukon Territory and the Northwest Territories, as well as to their legislative authorities, the provisions of the *Canadian Charter* that refer, respectively, to "a province", "a legislature" or "a legislative assembly". This provision also has an interpretative function, tinged with a definitional essence: wherever the *Charter* uses the words "province", "legislature" or "legislative assembly", they must be understood to include the Yukon Territory, the Northwest Territories and their legislative institutions.

[454] Finally, should anyone have thought otherwise, s. 31 specifies that the *Charter* does not extend the powers of Parliament or the legislatures, such powers being defined in the *CA 1867*, and it follows that the *Charter* cannot be interpreted or applied in a way that would have this effect.⁴⁶⁴

[455] In short, all the provisions immediately surrounding s. 28 and grouped under the same heading set out, in one way or another, interpretative instructions. It is logical to conclude that this is also the case for s. 28, which confirms the meaning already conveyed by the wording of its main proposition.

⁴⁶² Section 25 echoes s. 35 of the *CA 1982*, but in addition to Aboriginal and treaty rights, also covers the "other rights" of Aboriginal peoples.

⁴⁶³ *Rice v. Agence du revenu du Québec*, 2016 QCCA 666, para. 50 (application for leave to appeal to the Supreme Court dismissed, December 22, 2016, No. 37077), citing: Peter W. Hogg, *Constitutional Law of Canada*, looseleaf ed., Vol. 1, Toronto, Carswell, 2015, pp. 28-64.

⁴⁶⁴ As regards s. 31 of the *Canadian Charter*, see paras. [202] to [212] above.

[456] This does not mean, however, that s. 28 is a minor provision or one devoid of substance: indeed, it requires those interpreting the *Canadian Charter* to take (substantive) sexual equality into account when determining the meaning and scope of ss. 2 to 23 and applying them to a given situation. Its introductory statement (“Notwithstanding anything in this Charter / *Indépendamment des autres dispositions de la présente charte*”), which is just as important, even gives this rule of interpretation an imperative character and ensures its primacy over the other interpretative rules that are set out in the *Charter* and that cannot, themselves, legitimize the introduction in the rights and freedoms guaranteed by ss. 2 to 23 of distinctions between women and men. Thus, ss. 25, 27 and 29, to name but these, cannot be used to interpret the rights and freedoms guaranteed by the *Canadian Charter* in a manner contrary to the principle of sexual equality.⁴⁶⁵ This means that recourse to these other rules, be it the protection of the rights of Aboriginal peoples (s. 25) or respect for multiculturalism (s. 27), for example, cannot justify a departure from the principle of sexual equality. Section 28 thus enshrines a fundamental value of Canadian society in ss. 2 to 23 and reinforces the guarantee of the rights and freedoms set out in the *Canadian Charter*. In other words, by virtue of s. 28, those interpreting ss. 2 to 23 must generally give these provisions a meaning and scope in keeping with the principle of substantive equality between women and men⁴⁶⁶ and cannot justify departing therefrom by invoking the other rules contained under the *Charter’s* “GENERAL / DISPOSITIONS GÉNÉRALES” heading.

[457] While we can draw these various conclusions from the text and context of s. 28, what does the case law relating to this provision have to say?

* * * * *

[458] As mentioned above,⁴⁶⁷ there is very little case law on the subject. The Supreme Court has rarely had occasion to consider s. 28, although it does seem to have given it an interpretative function (a function the British Columbia Court of Appeal also recognized in *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*⁴⁶⁸).

⁴⁶⁵ It is uncertain whether s. 26 is relevant here, insofar as it refers to rights and freedoms that are not guaranteed by the *Canadian Charter*, but exist outside it (although it is possible these rights might not be recognized equally for women and men, which would *a priori* violate s. 15 of the *Canadian Charter*). Moreover, there is little to be said about ss. 30 and 31, which are hardly likely to give rise to an unequal interpretation of the other provisions of the *Canadian Charter*.

⁴⁶⁶ From this perspective, s. 15(2), which allows affirmative action programs for women, among others, seeks to promote equality for women, and therefore does not contravene s. 28. That said, the interpretation of s. 15(2) itself could not be done in such a way as to draw undue distinctions between women and men, which could be a violation of s. 28.

⁴⁶⁷ Above, para. [430].

⁴⁶⁸ 2009 BCCA 153, para. 64, application for leave to appeal to the Supreme Court dismissed, November 5, 2009, No. 33201.

[459] It was in *Hess; Nguyen*⁴⁶⁹ (a case dealing with the interpretation of s. 7 of the *Canadian Charter*) that the Supreme Court expounded most on the matter, as evidenced by the following excerpt from the reasons of Wilson J., writing for the majority:

The appellants suggest that s. 28 of the *Charter* is relevant to these appeals. The section states that the rights and freedoms referred to in the *Charter* “are guaranteed equally to male and female persons”. In my view, this provision does not prevent the legislature from creating an offence that as a matter of biological fact can only be committed by one sex. But it does mean that it is not open to the legislature to deny an accused who is charged with such an offence rights and freedoms guaranteed to all persons under the *Charter*.

In the context of these appeals I think it clear that a male is as entitled to the protection of s. 7 as a female. It is not open to the government to suggest that a person should receive less than full *Charter* protection on account of his or her sex. Moreover, the government will not be able to justify an infringement of s. 7 under s. 1 of the *Charter* on the basis that because of an individual’s sex he or she is not entitled to the same degree of *Charter* protection as persons of the other sex or that because of his or her sex the *Charter* violation is less serious. The justification for the infringement of a *Charter* right will have to be linked to considerations other than the sex of the party that has established an infringement of his or her *Charter* right. In these appeals, for example, one could not seek to justify the infringement of s. 7 by pointing to the accused’s sex and by saying that because he is a man he is not entitled to the full protection of s. 7. It is no more open to the government to make this argument than it would be open to it to suggest that a woman procuring an abortion was not entitled to the full protection of s. 7 because she was a woman.

There will, of course, be sex-related factors that may legitimately enter into a proportionality analysis conducted under s. 1 of the *Charter*. But such factors will have to be linked to the sex of persons other than the accused, e.g. the fact that the victim can become pregnant. Such an analysis would not seek to justify the infringement of a *Charter* right on the simple basis that the accused was of a given sex. Rather, it would point to considerations independent of the accused’s sex that might be relevant to an assessment of the justification for restricting the accused’s rights.⁴⁷⁰

[Underlining in the original]

⁴⁶⁹ *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906.

⁴⁷⁰ *R. v. Hess; R. v. Nguyen*, [1990] 2 S.C.R. 906, pp. 932-933.

[460] In her dissent,⁴⁷¹ McLachlin J. (as she then was), in discussing the discriminatory nature of the legislative provision at issue, emphasized that men are no less entitled than women to the protection provided by s. 15 of the *Canadian Charter*, adding that “[t]he Court [in the ruling in *Turpin*⁴⁷²] must be taken to have had in mind s. 28 of the *Charter*, which provides that notwithstanding any other provisions, the rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons”.⁴⁷³

[461] In *Seaboyer*, both McLachlin, J. (as she then was) and L’Heureux-Dubé, J. noted the contribution of s. 28 to the interpretation of the right to a fair and full answer and defence within the meaning of ss. 7 or 11(d) of the *Canadian Charter*.⁴⁷⁴ In *R. v. Osolin*, which dealt with the right to a fair trial, including the right to cross-examine, Cory, J. pointed out that ss. 15 and 28 “should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant”⁴⁷⁵ (and therefore on the rights guaranteed by ss. 7 and 11(d)). In *Native Women’s Assn. of Canada v. Canada*,⁴⁷⁶ a case that considered the scope of s. 2(b) of the *Charter*, Sopinka, J., writing for the majority, did not accept the argument based on s. 28, although he did not rule out the idea that this provision could be used to assist in the interpretation of freedom of expression. He was of the view, however, that the issue (which focused on whether the federal government had acted in accordance with the *Canadian Charter* by directly funding certain predominantly male Aboriginal organizations, but not the appellant association, for the purposes of a constitutional consultation⁴⁷⁷) “relate[d] more closely to an equality argument under s. 15 of the *Charter*”.⁴⁷⁸

[462] In 1999, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,⁴⁷⁹ L’Heureux-Dubé, J. (with the endorsement of her colleagues Gonthier, J. and McLachlin, J. (as she then was)), commenting once again on s. 7 of the *Charter*, wrote that:

112 [...] All *Charter* rights strengthen and support each other (see, for example, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976) and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other

⁴⁷¹ Gonthier, J. concurred in the dissenting reasons of his colleague McLachlin, J.

⁴⁷² *R. v. Turpin*, [1989] 1 S.C.R. 1296 (judgment on which certain parties in *Hess; Nguyen* had relied on to argue that the provision at issue was not discriminatory).

⁴⁷³ *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906, p. 944.

⁴⁷⁴ *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577 [“*Seaboyer*”], pp. 603-604 (majority reasons of McLachlin, J. (as she then was)) and 698-699 (partially dissenting reasons of L’Heureux-Dubé, J.).

⁴⁷⁵ *R. v. Osolin*, [1993] 4 S.C.R. 595, p. 669 (concurring reasons of Cory, J., endorsed by Major, J.).

⁴⁷⁶ [1994] 3 S.C.R. 627.

⁴⁷⁷ A consultation held for the purpose of discussing the federal proposals related to the negotiations (“Canada Round”) leading up to the Charlottetown Accord (1991).

⁴⁷⁸ *Native Women’s Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, p. 664 (see also p. 657).

⁴⁷⁹ [1999] 3 S.C.R. 46.

constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.

[...]

115 [...] The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

[463] Lastly, in *R. v. Kapp*,⁴⁸⁰ Bastarache, J., in concurring reasons, mentioned s. 28, but in a way that added nothing to the debate before this Court.

[464] It should be noted that in none of these judgments was s. 28 presented as spearheading the argument, nor was it examined in-depth, even in *Hess; Nguyen*, where Wilson, J. discussed it in greater detail. Nevertheless, it is apparent from the foregoing cases that the role of the provision is that of an interpretative guideline.

* * * * *

[465] At the end of this textual, contextual and jurisprudential examination of s. 28, we must agree that this provision [TRANSLATION] “makes sexual equality sort of ubiquitous, in the sense that it must be considered when interpreting the other rights enshrined in the Charter”.⁴⁸¹ Section 28, therefore, does not appear to be a provision guaranteeing a standalone right in *addition to* the other rights enshrined in the *Charter*: rather, it is a complementary provision that binds itself to ss. 2 to 23 of the *Canadian Charter*.⁴⁸²

⁴⁸⁰ 2008 SCC 41 (see para. 97).

⁴⁸¹ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 1006, no. XII-3.33. See below, however, as regards the relationship between ss. 28 and 33 of the *Charter Canadian*.

⁴⁸² We have not discussed whether s. 28 of the *Canadian Charter* also applies to the interpretation and application of s. 24, in particular its subsection (1). *A priori*, s. 24, which is found in the *Canadian Charter* under the heading “ENFORCEMENT / RECOURS” does not seem to form part of the rights and freedoms referred to in the text of s. 28 (no more so than it would seem to be covered by s. 25 or s. 27). On the other hand, perhaps from a more generous interpretative perspective, it may be argued that, by allowing litigants to apply to a court to obtain redress for the violation of their rights (i.e., those under ss. 2 to 23), s. 24 itself confers a right. The right to a remedy under s. 24 would have to respect the principle set out in s. 28. That said, even if s. 28 did not apply, it is hard to imagine a court ordering a remedy under s. 24(1) that is contrary to the principle of equality between men and women (it being understood that this refers to substantive equality and that certain remedies may be aimed solely at women, in order, for example, to restore any equality of which they might have been deprived). It is even harder to imagine a court refusing an application based on s. 24(2) on the grounds that the litigant is a man or a woman.

[466] To speak of s. 28 as a complementary provision is not to deny or minimize its importance. The *Oxford English Dictionary* defines “complement” as “[s]omething which, when added, completes or makes up a whole; each of two parts which mutually complete each other, or supply each other’s deficiencies”.⁴⁸³ Recognizing that the principle of equality between women and men frames the interpretation of ss. 2 to 23 of the *Canadian Charter*, thereby giving s. 28 the force of an “interpretative injunction”, is an affirmation that ensures that nothing essential is missing from the rights and freedoms enshrined therein.

[467] That being so, if s. 28 can be used as an interpretative tool for purposes of ss. 2 to 23 of the *Canadian Charter*, is it liable to have a similar impact on s. 1 of the *Charter* and on the way in which this provision is to be understood and applied? The answer to this question is yes — but a qualified yes, as we will now see.

i. Sections 28 and 1 of the *Canadian Charter*

[468] Although the Court need not rule on the application of s. 28 to s. 1 of the *Canadian Charter*, as the issue is not in dispute in the case at bar, a few observations on the matter are not superfluous insofar as they confirm the interpretative purpose of s. 28 and are useful in determining how to reconcile this provision with s. 33 of the *Charter*.

[469] As we know, under certain conditions, s. 1 can justify a limit on any of the rights and freedoms enshrined in the *Canadian Charter*, including in matters of equality (i.e., when the rights protected by s. 15 are at stake).⁴⁸⁴ This general statement is no less true in matters of equality of women and men, as the rulings in *Centrale des syndicats du Québec v. Québec (Attorney General)*,⁴⁸⁵ *Québec (Attorney General) v. A*⁴⁸⁶ and *Newfoundland (Treasury Board) v. N.A.P.E.* show.⁴⁸⁷

[470] In these three cases, which did not mention s. 28 (a fact that is not insignificant), the Supreme Court concluded that legislative provisions that *prima facie* contravened s. 15(1) of the *Canadian Charter*, by making a distinction that was based on sex and was prejudicial to women, were nonetheless reasonable and justified in a free and democratic society within the meaning of s. 1. It can be inferred from these decisions that s. 28 alone cannot prevent a court applying the *Oakes* test from ruling that such a limit is reasonable

⁴⁸³ *Oxford English Dictionary*, s.v. “complement (n.),” December 2023, online: <https://doi.org/10.1093/OED/2039029650>.

⁴⁸⁴ See, for example: *Lavoie v. Canada*, 2002 SCC 23 (preferential treatment of Canadian citizens for employment in the federal Public Service); *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 (treatment of male and female prisoners); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 29 (mandatory retirement at age 65).

⁴⁸⁵ 2018 SCC 18.

⁴⁸⁶ 2013 SCC 5.

⁴⁸⁷ 2004 SCC 66.

in a free and democratic society. Thus, when a legislative provision that *a priori* violates s. 15(1) of the *Canadian Charter* is saved by the effect of s. 1, it is difficult to see how it could nonetheless be contrary to s. 28.

[471] This is not to say that s. 28 has nothing to do with s. 1 of the *Charter*. In this respect, it could be treated in the same way as *R. v. Keegstra* treated s. 27 of the *Charter*, as an element that must, “where possible”,⁴⁸⁸ be part of the analysis carried out by the courts under s. 1. As Dickson, C.J. wrote in this judgment:

This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. Section 27 has therefore been used in a number of judgments of this Court, both as an aid in interpreting the definition of Charter rights and freedoms (see, e.g., *Big M Drug Mart*, *supra*, per Dickson J., at pp. 337-38, *Edwards Books*, *supra*, per Dickson C.J., at p. 758; and *Andrews v. Law Society of British Columbia*, *supra*, per McIntyre J., at p. 171) and as an element in the s. 1 analysis (see, e.g., *Edwards Books*, per La Forest J., at p. 804, and Wilson J., at p. 809).⁴⁸⁹

[Underlining added]

[472] We can conceivably transpose these remarks to s. 28⁴⁹⁰ and say that it can be used “as an aid in interpreting the definition of *Charter* rights and freedoms [...] and as an element in the s. 1 analysis”⁴⁹¹ and that, in the latter case as in the former, it serves as an interpretative tool.

[473] In short, s. 28 is an interpretative guideline that should, “where possible”,⁴⁹² permeate the way courts apply s. 1.

[474] Moreover, given the wording of s. 28 (particularly its introductory statement), one might have thought that the level of justification required under s. 1, when dealing with a restriction on substantive equality between women and men, must be high, as it is, for example, in the case of an infringement of s. 7 of the *Canadian Charter*. Yet, this is not what emerges from the few rulings mentioned above, which, in applying s. 1, validated

⁴⁸⁸ *R. v. Keegstra*, [1990] 3 S.C.R. 697 [“*Keegstra*”], p. 757 (majority reasons of Dickson, C.J.).

⁴⁸⁹ *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 757.

⁴⁹⁰ Which, in fact, *Keegstra* mentions in passing, for other purposes: *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 757 *in fine*.

⁴⁹¹ The idea that s. 28 must be considered in the context of the analysis prescribed by s. 1 of the *Canadian Charter* was endorsed by Anderson, J.A., in *obiter*, in *R. v. Red Hot Video Ltd.* (1985), 18 C.C.C. (3d) 1 (B.C. C.A.), at p. 23 (application for leave to appeal to the Supreme Court dismissed, July 31, 1985, No. 19396). Nemetz, C.J., with whom Hinkson, J.A. concurred, did not consider s. 28.

⁴⁹² Expression borrowed from *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 757.

legislative rules limiting the sexual equality of women and men, without apparently raising the standard above the usual level.⁴⁹³

ii. **Sections 28 and 33 of the Canadian Charter**

[475] We turn now to the effects, if any, of s. 28 on s. 33 of the *Canadian Charter*, and vice versa. As we have seen,⁴⁹⁴ the parties opposed to the *Act* are of the opinion that, since s. 28 operates “[n]otwithstanding anything in this Charter / [*i*]ndépendamment des autres dispositions de la présente charte”, s. 33 is subordinate to s. 28 and cannot authorize a derogation from the principle of equality between women and men. In their view, just as the rights enshrined in ss. 2, 7, 10 or 23, to take but a few examples, cannot be interpreted in a way that makes a distinction between women and men, so s. 33 cannot be interpreted or applied in this way. According to them, s. 28 has two effects on s. 33: (1) it shields the principle of sexual equality from any derogation, even if (as is the case here) the statute in question is generally exempt from the application of s. 15, and (2) it prevents the legislature from using s. 33 in a way that, by its purpose or effect, is not itself consistent with the principle of equality between women and men.

[476] As already mentioned, the trial judge did not accept this argument, finding in favour of the AGQ on this point and concluding as follows:

[TRANSLATION]

[875] With all due respect, insofar as the Quebec legislature decides to avail itself of the override provision provided for in s. 33 of the Charter, it thereby suspends recourse to the rights and freedoms it seeks to exclude through such use. Consequently, there are no longer any rights or freedoms to be guaranteed equally to men and women as provided for in s. 28. The fact that s. 28 is not subject to the override provision does not alter this juridical reality.⁴⁹⁵

[477] The Court shares this point of view: s. 28 does not restrict s. 33, which can be used to exempt legislation from the application of s. 15 of the *Canadian Charter*, including in matters of sexual equality.

[478] The text of s. 28 hardly lends itself to any other interpretation. Can s. 33 be included in the list of rights and freedoms contemplated by s. 28 of the *Charter*— i.e., “the rights and freedoms referred to in it / *les droits et libertés qui y sont mentionnés*”? Unless

⁴⁹³ See the judgments mentioned in para. [469] above: *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18; *Québec (Attorney General) v. A*, 2013 SCC 5; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66.

⁴⁹⁴ See above, paras. [420], [421] and [423].

⁴⁹⁵ This paragraph was already reproduced above at para. [428]. It is reproduced here, again, for ease of reference.

words not found in s. 28 are read into it, it is not possible to extend the scope of its terms to s. 33, a provision which neither confers nor enshrines any right or freedom. On the contrary, it allows the legislature to derogate (albeit temporarily) from some of the rights and freedoms otherwise recognized by the *Charter*, with the effects we examined earlier. It is therefore not possible to find that the text of s. 33 contains a guarantee of a right or freedom (other than the guarantee that the conditions for use of this provision will be respected, a condition litigants can insist on). The purpose of s. 33 is to allow an override of certain rights and freedoms — i.e., those set out in s. 2 and 7 to 15 — rights and freedoms that can no longer be invoked by the persons targeted or affected by the override.

[479] The introductory statement of s. 28 does nothing to change this, since it cannot guarantee primacy to a guarantee — the equality of women and men — that is intimately tied to *Charter* provisions — ss. 2 or 7 to 15 — which, due to the use of s. 33, have been deprived of their effect.

[480] No doubt, the circumstances surrounding the introduction of ss. 28 and 33 into the *Canadian Charter* and their drafting history may give a certain air of plausibility to the hypothesis that s. 28 has supremacy over s. 33, as the trial judge noted⁴⁹⁶ and as the parties opposed to the *Act* still argue. For the reasons that follow, however, that impression dissipates upon analysis, and the argument is ultimately unconvincing.

[481] We know that s. 28, which was not part of the initial draft of the *Charter*, was added in April 1981, following a proposed amendment by the New Democratic Party, which was relaying the request of several women’s groups. The text of the proposed amendment was identical to that of the current s. 28. At the same time, we also know that, in the fall of 1981, the constitutional reform project was in jeopardy, or at least fragile: on September 28, 1981, the Supreme Court of Canada had rendered its decision in the *Reference re Resolution to Amend the Constitution*,⁴⁹⁷ after which the federal government convened a federal-provincial constitutional conference to promote the reform, including the *Canadian Charter*. These discussions bore fruit, leading to an important and decisive political compromise — the introduction of s. 33 in the *Canadian Charter*.⁴⁹⁸

[482] We find an initial answer to the question of how to combine s. 28 (which establishes the principle of equality between women and men) with s. 33 (which allows an override of certain provisions, including s. 15, a provision that prohibits sex-based discrimination) in the resolution presented to the House of Commons on November 30, 1981 (“*Resolution Respecting Constitution Act, 1981*”), which proposed the following texts:

⁴⁹⁶ Trial Judgment, para. 859.

⁴⁹⁷ [1981] 1 S.C.R. 753.

⁴⁹⁸ See above, para. [228].

28. Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

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, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

[...]

28. Indépendamment des autres dispositions de la présente charte, exception faite de l'article 33, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

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, ou de l'article 28 de cette charte dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15.

[...]

[Underlining added]

[483] That same day, Progressive Conservative Party leader Joe Clark proposed an amendment to these provisions so they would read as follows (which corresponds to their current text):

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

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.

[...]

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

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.

[...]

[484] He explained his reasons for this motion:

I want to deal with the substance of what we are proposing. The substance of our amendment guarantees that men and women will have equal access to the rights and freedoms set out in the Charter of Rights and Freedoms proposed in this resolution. Some of those rights and freedoms will already be limited by the application of Section 33. However, where they exist they will exist absolutely equally for women and for men. That is the purpose of the amendment I am introducing, seconded by my colleague, the hon. member for Kingston and the Islands. That is an amendment which I hope will commend itself to this whole House, so that this whole House can go on record as supporting the guarantee of equal treatment of male and female persons in Canada.

[...]

What that does is remove the *non obstante* clause from Section 28. It restores the guarantee of equality of male and female persons to the position enjoyed when the accord was tabled in this House of Commons by the Prime Minister of Canada after his meeting with the first ministers.⁴⁹⁹

[Underlining added]

[485] This was a vigorous plea for equality between women and men, but one that nevertheless seemed to recognize that s. 28 will only apply where the legislature has not limited certain rights and freedoms — i.e., has not overridden them. At the very least, an ambiguity not dispelled by subsequent debates hangs over the statement, as everyone seems to have understood the proposed amendment in their own way. While no one questioned the importance of the principle of equality between women and men, it does not appear that there was any awareness of the interpretative difficulty arising from the coexistence and necessary combination of ss. 15 and 28 (as regards sex-based discrimination) and s. 33 of the *Charter*.

[486] Whatever the perceptions and opinions of parliamentarians (or of the provincial premiers who participated in the November 1981 agreement, or of the members of their respective legislatures), it appears that some authors, apparently on the basis of this drafting history, have rallied around the view that s. 33 does not permit a derogation from the principle of sexual equality, and consequently, does not permit an override of s. 15(1) of the *Canadian Charter* in that regard.

[487] For instance, Brun, Tremblay and Brouillet write that, because of s. 28, [TRANSLATION] “s. 33, which provides for the possibility of expressly overriding rights,

⁴⁹⁹ House of Commons, *House of Commons Debates.*, 32nd Parl., 1st Sess., vol. 12, November 20, 1981, pp. 13049 and 13050 (J. Clark).

cannot apply to the sex-based discrimination prohibited by s. 15(1) [...]”.⁵⁰⁰ Does this mean that although s. 33 generally allows an override of s. 15, it cannot validly be used in the case of legislation imposing discriminatory treatment on women? This does indeed seem to be their view.

[488] Hogg and Wright maintain, rather laconically, that “the power of legislative override (under s. 33) applies to s. 15, but not to s. 28”.⁵⁰¹ They expressly base this assertion on the drafting history of s. 28.⁵⁰²

[489] In a particularly detailed text, Froc also concludes that s. 28 is shielded from s. 33, notably by the effect of its introductory statement: when s. 28 states that it applies “[n]otwithstanding anything in this Charter”, the word “anything” necessarily includes s. 33.⁵⁰³

[490] De Jong is of the opinion that a legislature can override any of the provisions mentioned in s. 33 and “deny their benefit to specified classes of people, but those classes cannot be gender-based. Whatever rights exist under the override must be guaranteed equally to men and women, because section 28 is not subject to the override power”.⁵⁰⁴ She adds that:

The interaction between section 28 and section 33 is most confusing when the only right overridden is the right under section 15(1) to equality without discrimination on the basis of sex. The right to equality without discrimination based on sex must be guaranteed equally to both male and female persons. What does this mean? It may mean that the section 15(1) guarantees cannot be overridden insofar as they relate to discrimination based on sex.⁵⁰⁵

[Underlining added]

⁵⁰⁰ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 1006, no. XII-3.33.

⁵⁰¹ Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §55:43, p. 55-118.

⁵⁰² Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, 5th ed. Suppl., Vol. 2, Toronto, Thomson Reuters, 2007 (loose leaf ed., revision no. 1, July 2023), §55:43, p. 55-118, footnote 5.

⁵⁰³ Kerri Anne Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, doctoral thesis, Kingston, Queen’s University (Faculty of Law), 2015, chap. 1 and 3, as well as pp. 380-381.

⁵⁰⁴ Katherine J. de Jong, “Sexual Equality: Interpreting Section 28” in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493 p. 525 (see generally pp. 525-526).

⁵⁰⁵ Katherine J. de Jong, “Sexual Equality: Interpreting Section 28” in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, p. 527.

[491] She gives the example of a (fictional) statute containing a provision like this one, which *prima facie* infringes ss. 8 and 9 of the *Canadian Charter*.

The police have the power to detain and search all members of the female sex who, unaccompanied by a member of the male sex, are present on a public sidewalk, street, or thoroughfare between 12 a.m. and 5. a.m.⁵⁰⁶

[492] In de Jong's view, even if the legislature, acting in accordance with s. 33, were to include a provision in its statute overriding ss. 8 and 9, such override would be neutralized by s. 28:

In the above example, only females are subject to the unreasonable searches and arbitrary detentions. This clearly infringes the rights contained in sections 8 and 9 *as guaranteed by section 28*. Under section 24(1) "anyone whose rights... as guaranteed by this Charter have been infringed... may apply to a court... to obtain such remedy as the court considers just and appropriate..." Individuals can therefore challenge a law even when it is enacted under the override provision, if the principle contained in section 28 is violated. In such cases, the override cannot preclude judicial review.

The result should be the same *whether or not* the courts find this law to be in violation of section 15(1). [...] Section 28 can still apply with the same results as were described above, regardless of whether the guarantees in section 15(1) have been violated. The point is that no matter what standard of equality the court wants to use under section 15, when *another* right guaranteed by the *Charter* is implicated, the court has no choice but to apply the prohibition standard of section 28.⁵⁰⁷

[493] In response, however, it could be argued that if the hypothetical statute did in fact include an override provision in accordance with s. 33, there would no longer any "rights contained in sections 8 and 9 as guaranteed by section 28". More precisely, these rights, as guaranteed by s. 28, would be of no effect. All the rights and freedoms referred to in ss. 2 to 23 of the *Canadian Charter* are subject to the guarantee of equality prescribed by s. 28, which attaches to and forms an integral part of each of them. When, however, through the use of s. 33, some of these provisions (ss. 8 and 9 in the example given by

⁵⁰⁶ Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, p. 525.

⁵⁰⁷ Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Anne F. Bayefsky and Mary Eberts (eds.), *Equality rights and the Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1985, 493, pp. 525-526.

de Jong) are neutralized, the rights and freedoms in question are also neutralized, including the guarantee of equality inherent therein.

[494] The jurisprudence on the issue of whether s. 33 allows legislatures to override s. 28 (or s. 15(1), in the case of sex-based inequality) is meagre and consists mainly of two judgments: the 1984 ruling of the Nova Scotia Supreme Court, Appeal Division, in *Re Boudreau and Lynch*,⁵⁰⁸ and the 2004 decision of the Quebec Superior Court in *Syndicat de la fonction publique du Québec inc. c. Procureur général du Québec*.⁵⁰⁹

[495] *Boudreau* concerned a legislative provision that made a distinction between men and women and limited the right to government financial assistance solely to fathers with disabilities, whereas all mothers, with or without a disability, were entitled to such assistance. As s. 15 of the *Canadian Charter* had not yet come into force, the appellant had relied on s. 28 to allege the discriminatory nature of the impugned provision. In rejecting the appellant's argument, Hart J., writing for the Court, stated the following incidentally:

In my opinion Mr. Justice Burchell and Chief Justice Glube were correct in their interpretation of the Charter, and it is therefore unnecessary to consider these other issues at the present time. Section 28 of the Charter was not intended to eliminate the probationary period of three years during which Parliament and the provincial legislatures could determine their course of action under the new Constitution. It was simply intended to prevent any continuation of sexual discrimination by affirmative legislative action once the full Charter had come into force. By doing so the legislators have treated sexual discrimination as the most odious form of discrimination and taken away from legislative bodies the right to perpetrate it in the future. Other types of discrimination may without reasons being given be carried on under the legislative override provisions of s. 33.

As authority for this conclusion I would suggest that s. 28 is a general provision of the legislation whereas s. 32(2) specifically deals with the postponement of the coming into effect of s. 15. The provisions of this specific provision of the Charter must govern and it is only after the three-year period expires in April of 1985, that restriction of s. 28 will apply to render unconstitutional the type of sexual discrimination contemplated by s. 15 of the Charter.⁵¹⁰

[Underlining added]

[496] With all due respect, the underlined portion above, which is more of an assertion than a demonstration, is very brief and is *obiter*, since the legislature had not had recourse

⁵⁰⁸ (1984), 16 D.L.R. (4th) 610 (N.S. C.A.) [*Boudreau*].

⁵⁰⁹ [2004] R.J.Q. 524 (Sup. Ct.) [*Syndicat de la fonction publique du Québec*].

⁵¹⁰ *Re Boudreau and Lynch*, (1984), 16 D.L.R. (4th) 610, p. 615.

to s. 33 of the *Canadian Charter* in that case. It would appear that this *obiter* should be understood to mean that, because of s. 28, s. 33 could not be used to override s. 15(1) of the *Charter* and thereby save a legislative provision that discriminates on the basis of sex. Consequently, a legislature could override the right to equality in the case of a distinction based on ethnic origin, colour or disability, to mention but these, but not in the case of a sex-based distinction. This statement — to which we will return later — may be surprising to some (all the more so given that, in the same breath, Hart, J.A. recognized that s. 28 could not be invoked or have effect before s. 15 came into force, which clearly shows that s. 28 has no standalone effect and does not guarantee a right to equality as such).

[497] In *Syndicat de la fonction publique du Québec inc.*,⁵¹¹ the Superior Court, in a judgment rendered by Justice Carole Julien, also examined s. 28. At issue in this case was whether Chapter IX of the *Pay Equity Act*⁵¹² was invalid because it violated (among other things) s. 15 of the *Canadian Charter*. The plaintiffs had argued that Chapter IX established a scheme that discriminated against women covered by pay equity programs established or completed by employers prior to the coming into force of the *Pay Equity Act* on November 21, 1996. In this context, the judge considered the meaning and effect of s. 28 of the *Canadian Charter*. After examining the provision itself, the circumstances in which it was inserted in the *Charter*, the doctrine and the above-mentioned ruling in *Boudreau*, the judge concluded that [TRANSLATION] “the prevailing opinion favours the primacy of s. 28 over s. 33” (para. 1429), adding that:

[TRANSLATION]

[1430] This aspect is interesting. If it is true that the legislature cannot set aside the principle of the right to equality between the sexes by means of a statute in which it has expressly invoked s. 33, it is even truer that it cannot do so indirectly and implicitly through a statute’s effect. This will particularly be the case where the statute’s purpose is expressly the opposite — i.e., the implementation of the right to sexual equality.

[Underlining added]

[498] Here, too, however, this conclusion is *obiter*, as the legislature had not invoked s. 33 (nor had it invoked s. 15⁵¹³). The rest of the analysis examining the impugned legislative provisions’ validity is essentially based on s. 15, although the judge pointed out that, in light of s. 28, [TRANSLATION] “[t]he Court must be particularly strict when assessing

⁵¹¹ *Syndicat de la fonction publique du Québec inc. c. Procureur général du Québec*, [2004] R.J.Q. 524 (Sup. Ct.).

⁵¹² S.Q. 1996, c. 43, now CQLR, c. E-12.001.

⁵¹³ *Syndicat de la fonction publique du Québec inc. c. Procureur général du Québec*, [2004] R.J.Q. 524 (Sup. Ct.), paras. 1381 and 1397.

the validity of a statute which, by its effects, impairs sexual equality”⁵¹⁴ (a statement which, it should be pointed out, is entirely consistent with the notion that s. 28 sets out a rule of interpretation).

[499] Not everyone, however, agrees that s. 28 takes precedence over s. 33, or that a legislature cannot use the latter to shield legislation that discriminates on the basis of sex from ss. 2 and 7 to 15 of the *Canadian Charter* (in particular s. 15(1)) and from the judicial review that would otherwise ensue. Such primacy, in fact, raises a major logical difficulty, which we have already alluded to, and which the AGQ is invoking in this case. If a legislature, relying on s. 33(1) of the *Charter*, exempts a statute from ss. 2 or 7 to 15, such that the statute applies “but for / *sauf*” these provisions — that is, without them, as if they did not exist, in accordance with s. 33(2) — then to what does s. 28, which would otherwise govern the application of these provisions, attach? Here is how Strauss describes the problem:

Yet it can be argued that, if section 28 guarantees “the rights and freedoms referred to in [the *Charter*],” there can be equal exercise of those rights as between genders only to the extent that they are capable of being exercised. If section 2 and sections 7-15 are overridden by legislation, do the rights and freedoms contained therein continue to exist for the purposes of section 28’s application? If not, then it may be the case that section 28 no longer has any rights or freedoms to guarantee. As a result, section 28 is subordinated to section 33(1), despite the clear efforts made during its drafting to prevent section 33(1)’s primacy. This argument was considered and articulated by William Pentney, but he did not take a position on the issue himself. However, he did state that there does not appear to be any allowance in section 33(1) for limits on its application. It is the position adopted by the trial judge in *Hak* QCCS and the reason why the section 28 argument failed in that case.⁵¹⁵

[References omitted]

[500] Strauss does not stop there, and suggests the following solution to what she calls a “vexing logical problem”:

[...] Section 33(1) may not be amenable to the limitation of its application, but section 28 is even less so. Both provisions use the same word – “notwithstanding” – but it is only section 28 that states: “Notwithstanding *anything in this Charter*.” This leads to the primacy of section 28 over section 33(1).

⁵¹⁴ *Syndicat de la fonction publique du Québec inc. c. Procureur général du Québec*, [2004] R.J.Q. 524 (Sup. Ct.), para. 1532.

⁵¹⁵ Cee Strauss, “Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*”, (2021) 33:1 *C.J.W.L.* 84, p. 106.

[...]

In order to address the logical difficulties with how the two intersect, I would suggest the following: section 33(1) can be invoked to limit the rights and freedoms in section 2 and in sections 7-15. The application of section 28, however, operates to retroactively neutralize section 33(1)'s application to section 2 and sections 7-15 to the extent that the impugned government action, or the methods and concepts employed in the analysis, has a disproportionately gendered effect.⁵¹⁶

[Reference omitted]

[501] As for William Pentney, he formulates the problem in the following terms, without, however, proposing a firm answer:

A more difficult issue is the relationship between section 28 and sections 1 and 33. The opening phrase of section 28 states that it applies “notwithstanding anything in this Charter”. Several authors have referred to these words in support of the argument that section 28 cannot be subject to limitations pursuant to section 1, or overridden pursuant to section 33. The legislative history of section 28 supports this analysis in respect of section 33, because during the course of the political negotiations that preceded its enactment, a specific reference to section 33 that would have subjected section 28 to the “notwithstanding” clause was inserted and later withdrawn after a storm of protest. This history, combined with the fact that section 33 authorizes a temporary abrogation or denial of Charter guarantees rather than a mere limitation or qualification on their enjoyment, lends credence to the view that section 28 is not superseded by section 33.

An opposing argument could be advanced, based on the idea that the reference in section 28 to “the rights and freedoms guaranteed by the Charter” indicates that these rights are to be enjoyed equally only to the extent that they are capable of enjoyment from time to time. Certain of these rights (sections 2 and 7 to 15) are subject to legislative override and are therefore “guaranteed” in a permanently precarious fashion, and that is what section 28 refers to. On this view, section 28 would be subject so section 33, despite the attempt during its drafting to overcome that possibility. The opening phrase would thus be important only with reference to section 1.

What would the practical effect be if section 28 is made subject to section 33? Since section 28 is only an interpretive provision, section 33 could not be invoked to suspend its operation directly. Instead, section 33 would be utilized to override

⁵¹⁶ Cee Strauss, “Section 28’s Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*”, (2021) 33:1 *C.J.W.L.* 84, pp. 106 and 107.

another Charter provision (e.g., section 15), and section 28 would then have no role to play as an interpretive tool in respect of the right as overridden in the particular circumstances. If section 28 is not subject to section 33, presumably it could be applied to aid in the interpretation of the right or freedom, but in order for this to be meaningful it would have to suspend or prevent the override in respect of gender equality. The text of section 33 appears to admit of no such limitation, but as the arguments examined earlier indicate, the matter is not yet settled.⁵¹⁷

[References omitted; underlining added]

[502] In the Court's view, the logical argument must prevail and cannot lead to the conclusion that s. 28 limits s. 33 and prevents its use to override the "sexual equality" component of ss. 2 or 7 to 15. Indeed, one cannot acknowledge that s. 33 allows an override of ss. 2 and 7 to 15 and, at the same time, assert that s. 28 neutralizes such override when it has the effect of establishing a distinction between women and men, or when it has a disproportionately prejudicial effect on women (in relation to men) or on men (in relation to women). This would perpetuate, rather than solve, the "vexing logical problem" mentioned by Strauss. In any event, such a conclusion is incompatible with the wording of s. 33, which unreservedly allows for an override.

[503] Moreover, such a conclusion would create inconsistency between the effect to be given to s. 28 when s. 33 is at issue, and the effect to be given to it when applying s. 1. As we saw earlier, even when an apparent violation of the principle of equality enshrined in s. 15(1) of the *Charter* is based on sex, it can be validated by a demonstration under s. 1.⁵¹⁸ Section 28 must undoubtedly be considered in the course of this demonstration, as it is a general principle of interpretation, but it cannot constitute an obstacle to recognizing the validity of a limit to equality between women and men when such limit satisfies the conditions of s. 1 of the *Charter*, as developed in the case law. Section 33 allows for an even more drastic measure than s. 1 — that is, an override that can be declared and implemented without any particular justification and subject only to fairly light formal requirements. Accepting that s. 28 can, in the case of equality between women and men, supersede an override made under s. 33, whereas it cannot prevent the justification of a limit under s. 1, creates an insoluble contradiction. Moreover, it is not in keeping with the letter or spirit of ss. 28 and 33, nor, generally, with the architecture of the *Charter* to assert that s. 28 takes precedence over s. 33, whether by depriving the legislature of the possibility of overriding the principle of sexual equality, or by neutralizing any such override.

⁵¹⁷ William F. Pentney, "Interpreting the Charter: General Principles", in Gérald A. Beaudoin and Edward Ratushny (eds.), *The Canadian Charter of Rights and Freedoms*, 2nd ed., Montreal, Carswell, 1989, 21, pp. 49-50.

⁵¹⁸ See the judgments mentioned in para. [469] above: *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18; *Québec (Attorney General) v. A*, 2013 SCC 5; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66.

[504] Lastly, the manner in which the parties opposed to the *Act* propose reading s. 28 has the effect of granting primacy and superior value to the principle of equality between women and men — thus, s. 33 would in no way allow a discriminatory override of ss. 2 and 7 to 15, or allow a statute that treats women and men differently to be excluded from the application of these provisions, but would not prevent s. 33 from having such an effect where other prohibited grounds of discrimination are involved, namely, race, ethnic or national origin, colour, or physical or mental disability (or other similar grounds). Yet there is nothing in the *Canadian Charter* itself nor in its text, context or history to justify such a reading, not even s. 28.

iii. Summary

[505] In short, and in conclusion, s. 28 serves an interpretative purpose and is one of the elements that must be considered when courts examine the meaning, scope and application of ss. 2 to 23. Section 28 is thus implicitly incorporated into each of ss. 2 to 23, as if it were a paragraph or subsection added to each of them. Consequently, insofar as s. 33 expressly allows legislatures to override ss. 2 and 7 to 15, it also allows them to override the effect of s. 28. Indeed, s. 33(1) contains no limit in that regard. In other words, once the rights guaranteed under ss. 2 and 7 to 15 of the *Canadian Charter* are no longer so guaranteed by reason of an override made under s. 33, s. 28, having been stripped of a foundation, cannot substitute for them in respect of sexual equality.

[506] In the instant case, therefore, s. 28 cannot stand in the way of the full application of s. 34 of the *Act*, a provision which, in accordance with s. 33 of the *Canadian Charter*, validly overrides ss. 2 and 7 to 15, as discussed above.

3. Section 50.1 of the Quebec Charter

[507] Section 50.1 of the *Quebec Charter*, whose text was reproduced above,⁵¹⁹ also provides that rights and freedoms are guaranteed equally to women and men. What effect, if any, does this provision have on s. 52 *in fine* of the *Quebec Charter* (the counterpart to s. 33 of the *Canadian Charter*) and on s. 33 of the *Act* (which overrides ss. 1 to 38 of the *Quebec Charter*)?

[508] Section 50.1 is found in Chapter V (“SPECIAL AND INTERPRETATIVE PROVISIONS / DISPOSITIONS SPÉCIALES ET INTERPRÉTATIVES”) of Part I (“HUMAN RIGHTS AND FREEDOMS / LES DROITS ET LIBERTÉS DE LA PERSONNE”) of the *Québec Charter*, in which it was inserted in 2008.⁵²⁰ As its placement in Chapter V indicates, s. 50.1, like s. 28 of the

⁵¹⁹ See above, para. [417].

⁵²⁰ Section 50.1 was added to the *Quebec Charter* by *An Act to amend the Charter of human rights and freedoms*, S.Q. 2008, c. 15, s. 2. At the same time, the preamble to the *Quebec Charter* was amended to add the following recital: “Whereas respect for the dignity of human beings, equality of women and men, and recognition of their rights and freedoms constitute the foundation of justice, liberty and

Canadian Charter, has an interpretative purpose. Indeed, it sits between two provisions, ss. 50 and 51, which clearly (and textually) have this function:

50. The Charter shall not be so interpreted as to suppress or limit the enjoyment or exercise of any human right or freedom not enumerated herein.

50. La Charte doit être interprétée de manière à ne pas supprimer ou restreindre la jouissance ou l'exercice d'un droit ou d'une liberté de la personne qui n'y est pas inscrit.

Moreover, the Charter shall not be so interpreted as to suppress or limit the enjoyment or exercise of any right intended to protect the French language conferred by the Charter of the French language (chapter C-11).

Elle doit également être interprétée de manière à ne pas supprimer ou restreindre la jouissance ou l'exercice d'un droit visant à protéger la langue française conféré par la Charte de la langue française (chapitre C-11).

51. The Charter shall not be so interpreted as to extend, limit or amend the scope of a provision of law except to the extent provided in section 52.

51. La Charte ne doit pas être interprétée de manière à augmenter, restreindre ou modifier la portée d'une disposition de la loi, sauf dans la mesure prévue par l'article 52.

[509] Similarly, ss. 53 to 55 lay down interpretative guidelines: any doubt in the interpretation of a statute must be resolved in keeping with the *Quebec Charter* (s. 53), which is binding on the State (s. 54) and affects all matters that come under the legislative authority of Quebec (s. 55). Section 56, which concludes this portion of the *Quebec Charter*, sets out a number of definitions to guide the interpretation of various sections and help determine their meaning and scope.

[510] In short, everything points to the fact that, in this portion of the *Quebec Charter*, which also includes “special” provisions — s. 49 (remedies), s. 49.1 (remedies in pay equity matters) and s. 52 (supremacy of ss. 1 to 38 and notwithstanding clause) — s. 50.1 is part of the interpretative provisions. By stating that “[t]he rights and freedoms set forth in this Charter are guaranteed equally to women and men / *[I]es droits et libertés énoncés dans la présente Charte sont garantis également aux femmes et aux hommes*”, it sets out a rule that is binding on those interpreting the provisions enshrining these rights and freedoms.

[511] And what are these guaranteed rights and freedoms?

peace; / *Considérant que le respect de la dignité de l'être humain, l'égalité entre les femmes et les hommes et la reconnaissance des droits et libertés dont ils sont titulaires constituent le fondement de la justice, de la liberté et de la paix;*” (*id.*, s. 1).

[512] They are the rights and freedoms found in Part I of the *Quebec Charter*, which is entitled “HUMAN RIGHTS AND FREEDOMS / *LES DROITS ET LIBERTÉS DE LA PERSONNE*” — namely, ss. 1 to 48, which, respectively, set out and protect fundamental freedoms and rights (ss. 1 to 9.1), the right to equal recognition and exercise of rights and freedoms (ss. 10 to 20.1), political rights (ss. 21 and 22), judicial rights (ss. 23 to 38), and economic and social rights (ss. 39 to 48). The other interpretative provisions of Part I (ss. 50, 51, 53-56) cannot be applied without taking into account sexual equality, which is the predominant interpretative rule (although it is hard to see how they could infringe gender equality).

[513] As for ss. 49 (remedies) and 49.1 (which refers pay equity remedies⁵²¹ to the *Pay Equity Act*⁵²²), whatever their nature, they cannot jeopardize the interpretative principle of s. 50.1.⁵²³

[514] Lastly, the relationship between s. 50.1 and s. 52 *in fine* of the *Quebec Charter* is the same as that between ss. 28 and 33 of the *Canadian Charter*: s. 50.1 does not limit s. 52 *in fine*, nor does it create any exceptions thereto or neutralize it with respect to the establishment of sex-based distinctions. We will not repeat the reasoning set out earlier regarding s. 28, which can be transposed to s. 50.1 and leads to a similar conclusion, namely:

- because of its interpretative purpose, s. 50.1 has the same effect as if it were incorporated into each of ss. 1 to 48 of the *Quebec Charter*;
- as soon as the legislature shields a statute or legislative provision from any of ss. 1 to 38 of the *Quebec Charter*, the rights and freedoms so overridden are no longer effective and no longer offer protection to persons who would otherwise avail themselves thereof; and
- when s. 50.1 is thus deprived of its substratum, it no longer applies, at least as long as the override provision is in force, and cannot prevent a distinction based, whether directly or indirectly, on sex.

⁵²¹ Pay equity between women and men is a right protected by s. 19 of the *Quebec Charter*.

⁵²² CQLR, c. E-12.001.

⁵²³ Unless, perhaps, one wants to argue that s. 49.1 is discriminatory in that it reserves a different treatment for people who are subject to pay inequity within the meaning of s. 19 of the *Quebec Charter*, a statement that seems doubtful.

D. Constitutionally protected language rights

1. Section 23 of the *Canadian Charter*

[515] On this issue, the dispute centers on s. 23 of the *Canadian Charter*, and it may be helpful to reproduce that provision in its entirety before discussing the trial judge's examination thereof and the arguments of the parties in reliance thereon.

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

23. (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

One need only read the text of s. 23 of the *Canadian Charter* once for one observation to immediately become apparent: because of the very specificity of its wording, this section clearly stands out from almost all provisions in the *Canadian Charter* that set out fundamental rights.

[516] Moreover, we know that s. 23(1)(a) is inapplicable in Quebec.⁵²⁴

2. Conclusions in the Trial Judgment

[517] We begin with the heart of the matter — that is, the trial judge's opinion of the impact of s. 23 on the *Act*, as evidenced in his conclusions.

[518] According to his analysis, several provisions of the *Act* must be declared inoperative with respect to holders of language rights guaranteed under s. 23 of the *Canadian Charter*. For ease of reference, it is useful to quote part of his conclusions, which have already been reproduced in full at the beginning of these reasons.⁵²⁵ The following excerpt shows how the judge ruled specifically on the matter by focussing on the provisions he considered to be flawed:

In file 500-17-109983-190 (The English Montreal School Board file)

[1137] **GRANTS** the application in part;

⁵²⁴ Section 59 of the *CA 1982* provides that s. 23(1)(a) of the *Canadian Charter* will come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada, only where authorized by the legislative assembly or government of Quebec. No such proclamation has been made under that section. Consequently, s. 23(1)(a) never came into force in Quebec.

⁵²⁵ Above, para. [1].

[1138] **DECLARES** that the first paragraph of s. 4, ss. 6, 7, 8, 10, the first and second paragraphs of s. 12, ss. 13, 14 and 16, read in conjunction with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, infringe s. 23 of the *Canadian Charter of Rights and Freedoms*;

[1139] **DECLARES** that these infringements are not justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms*;

[1140] **DECLARES** that the first paragraph of s. 4, ss. 6, 7, 8, 10, the first and second paragraphs of s. 12, ss. 13, 14 and 16, read in conjunction with paragraph 7 of Schedule I, paragraph 10 of Schedule II and paragraph 4 of Schedule III of the *Act respecting the laicity of the State*, CQLR c. L-0.3, are of no force or effect pursuant to s. 52 of the *Canadian Charter of Rights and Freedoms* as regards any person, whether natural or legal, entitled to the guarantees under s. 23 of said Charter;

[519] Aside from the part of the judgment on s. 3 of the *Canadian Charter* in file 500-17-108353-197, the portion of the judgment dealing with s. 23 of the *Canadian Charter* is the only one in which the judge found in favour of the parties who had taken a stand against the *Act*. It prompted the following reactions. In their appeals, the AGQ, PDF Québec and the MLQ challenged the three preceding declarations. The QCGN filed an incidental appeal. The QESBA sought and obtained leave to intervene as a friend of the court in the appeals of the AGQ, PDF Québec and the MLQ. The EMSB, for its part, defended the judgment's conclusions in that regard. Other parties were impleaded in the appeal, but did not participate in oral submissions before the Court.

3. Brief review of the reasons in first instance

[520] The trial judge began by considering the scope of s. 23. First, he accepted the EMSB's position to the effect that s. 23 of the *Canadian Charter* must be interpreted broadly and liberally. He emphasized the vital role of education in preserving and fostering linguistic minorities. This gives rise to the right of minorities to exercise a measure of management and control over public education facilities and their educational programs. Such right includes the exclusive authority to make decisions in respect of all matters pertaining to the instruction provided in the language of the minority and to the facilities providing that instruction.

[521] This extends to decisions on the recruitment and assignment of teachers. In the trial judge's view, such authority is vital if the language and culture of the linguistic minority is to flourish. He found that s. 23 is designed to preserve these two elements — language and culture. And in the case at bar, one component of this culture stems from the [TRANSLATION] "specific importance English school boards and their teachers or principals

place on recognizing and celebrating ethnic and religious diversity” — at least those are the words the judge used in paragraph 983 of his reasons to summarize what, in his opinion, was uncontradicted evidence presented at trial. And, in the judge’s view, the restrictions the *Act* establishes regarding the recruitment of personnel impair this power of management and control over the minority’s educational facilities.

[522] By focusing his analysis in this way, the trial judge dismissed, from the outset, the AGQ’s main argument regarding s. 23. Indeed, the AGQ had submitted that [TRANSLATION] “the culture s. 23 strives to promote is intrinsically linked to the language of the minority, and nothing more”.⁵²⁶

[523] Relying on an expert opinion, the judge continued his analysis, noting that the absence of diversity among teachers, and in particular the absence of a visual marker of a certain ethnic or religious identity, will have harmful effects because diversity in the educational setting contributes positively and in various ways to the students’ development. This line of reasoning led him to the conclusions set out in the three declarations reproduced above,⁵²⁷ which, as previously mentioned, are set out in paragraphs 1138, 1139 and 1140 of the Trial Judgment.

[524] As, in the trial judge’s view, an infringement had been demonstrated, he next considered whether the infringement of the rights guaranteed by s. 23 was a reasonable limit within the meaning of s. 1 of the *Canadian Charter*. Examining this issue was not without its risks since, as previously mentioned, at trial the AGQ did not present any evidence whatsoever on this point, nor did he submit any arguments pertaining to this provision of the *Canadian Charter*. The judge’s reasons addressing s. 1 are, however, very thorough and systematic in their examination of the criteria that emerged in *Oakes*,⁵²⁸ especially since, as he observed, the rights arising under s. 23 are shielded from the s. 33 notwithstanding clause.

[525] For the judge, it was clear from the outset, that in adopting the *Act*, the legislature was tackling a pressing and substantial objective. He found, however, that the deleterious effects of the infringement were disproportionate to its salutary effects, such that the measure could not be shown to be justified under s. 1 of the *Canadian Charter*.

[526] This finding regarding s. 1 of the *Canadian Charter*, together with the earlier finding that the *Act* violates s. 23 of that *Charter*, provided the basis for the declaratory conclusions reproduced above that had the effect of rendering several provisions of the *Act* of no force or effect.

⁵²⁶ Trial Judgment, para. 960.

⁵²⁷ Above, para. [518].

⁵²⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 138-140.

4. Framework under s. 23 of the *Canadian Charter*

[527] Should the Court confirm that the provisions of the *Act* referred to in the declarations in question are inconsistent with s. 23 of the *Canadian Charter*? Before considering this question, it is worth briefly recalling the parties' arguments on this subject, both for and against the *Act*. In order to answer the foregoing question, we will then look at the principles of interpretation that have been developed in connection with s. 23 and consider the relevant case law.

a. The parties' submissions

[528] On both sides of the debate, the parties essentially reiterated their arguments in first instance.

[529] Two of the parties defending the *Act* presented lengthy arguments on s. 23 of the *Canadian Charter*.

[530] The AGQ reiterated that s. 23 does not confer standalone protection on the *culture* (as opposed to the *language*) of Quebec's English linguistic minority. Such protection — one independent of any language-related considerations — does not exist. When interpreting s. 23, it is important to bear in mind the context in which it was enacted. Its purpose was, and remains, to create a general right to instruction in the language of the official linguistic minority. Thus, belonging to such a minority is a condition *sine qua non* for s. 23 to produce its effects. Belonging to any one of the cultural communities that make up this minority is irrelevant. The right to minority language education (and, more specifically, the right to minority language educational services that are equivalent in quality to those offered in the majority language) is the vehicle through which the cultural characteristics of the linguistic minority can flourish.

[531] In this case, however, the proceedings initiated by the *Act's* opponents are not based on a lack of resources provided for English language educational services. Nothing in the *Act* deprives s. 23 rights holders of access to minority language educational facilities, nor does anything prevent them from controlling and managing such facilities. Moreover, there is no doubt that the educational facilities of Quebec's English language minority are equivalent in quality to those of the French language majority. The trial judge's interpretation of s. 23 is entirely new — it is unprecedented. In relying on Supreme Court jurisprudence to support this interpretation, the judge failed to distinguish, where he should have, the factual context of the decisions thus relied on from the entirely different context of the case at hand. With the sole exception of the *Reference re Manitoba Language Rights*,⁵²⁹ all the Supreme Court decisions cited by the judge deal with proceedings by French-speaking communities outside Quebec for basic needs in respect

⁵²⁹ [1985] 1 S.C.R. 721.

of educational services, such as the existence of schools, school transportation, funding to meet these needs, or eligibility for minority language instruction.

[532] With only one exception, which is not relevant here,⁵³⁰ the Supreme Court has never invalidated a legislative provision based solely on the minority language group's management and control power. Consequently, the AGQ submits that the trial judge erred in failing to distinguish between what may fall under the minority's management and control power and what s. 23 protects from state intervention. According to the AGQ, the judge was not required to determine whether this power of management and control is also understood in Quebec as a right of English school boards to make decisions relating to the strictly cultural or religious dimensions of their activities. Rather, what he had to determine is whether the *Act* hinders or interferes with those of their prerogatives that genuinely benefit from the protection of s. 23. By subsuming a cultural (and, more specifically, religious) aspect under the rights conferred by this provision, however, the judge introduced a denominational element into s. 23, despite Quebec having exempted itself from s. 93 of the *CA 1867*. Moreover, such elements are protected by s. 2(a) of the *Canadian Charter*, which the *Act* expressly overrides.

[533] The AGQ further argues that s. 23 protects a language and the culture intrinsically linked thereto — its purpose is not to attribute rights to cultural or denominational sub-groups belonging to the linguistic minority. From this perspective, the evidence adduced at trial to demonstrate that English school boards attach particular importance to the recognition and celebration of diversity was simply irrelevant. Section 23 does not guarantee a purported right of parents of children in the English-speaking minority [TRANSLATION] “to staff in their educational facilities who wear religious symbols in the exercise of their functions”. There is an obvious parallel here with the decision in *Greater Montreal Protestant School Board v. Quebec (Attorney General)*,⁵³¹ according to which the rights of a denominational minority constitutionally protected under s. 93 of the *CA 1867* do not extend in educational matters to a Protestant philosophy founded on pluralism; similarly, the rights of a linguistic minority constitutionally protected under s. 23 of the *Canadian Charter* do not extend to a cultural aspiration involving the wearing of religious symbols.

[534] The MLQ argues that the trial judge's interpretation of s. 23 contravenes the principle of religious neutrality of the state embodied in *Saguenay*⁵³² and incorporated in s. 2(a) of the *Canadian Charter*. It is also at odds with the *Basic school regulation for preschool, elementary and secondary education* which came into force in 2008 and imposes a duty of circumspection on teachers in religious matters. In 1989, in the above-mentioned decision in *Greater Montreal Protestant School Board*, the Supreme

⁵³⁰ The reference here is to *Mahe v. Alberta*, [1990] 1 S.C.R. 342, discussed below.

⁵³¹ [1989] 1 S.C.R. 377.

⁵³² *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

Court had recognized Quebec's right to impose a compulsory uniform pedagogical system in public schools. The *Act* simply rounds out the existing system, by specifying what constitutes the duty of circumspection in religious matters.

[535] Contrary to the PGQ and the MLQ, the EMSB, the QESBA and the QCGN agree with the Trial Judgment's reasoning and outcome regarding the application of s. 23 of the *Canadian Charter*.

[536] The EMSB shares the trial judge's interpretation: the *Act* prevents representatives of Quebec's English-speaking minority from exercising their right to manage and control its school network, more specifically in that it does not allow them to make decisions based on the minority's cultural and religious needs and concerns. The only live issue in the instant case is the scope of the right to management and control in that regard, as the EMSB does not deny that the right of parents from the English-speaking minority to have their children educated in facilities that are equivalent in quality to those attended by children from the French-speaking majority is currently being respected. That said, the AGQ's submissions disregard this right of management and control, or present an unduly restrictive reading thereof.

[537] In the EMSB's view, the AGQ is wrong in excluding culture from the scope of this right, because culture is a component of s. 23. Case law on this section emphasizes the importance of ensuring the preservation and development of minority linguistic communities. And watching over the situation of such a community necessarily involves concern for two elements that are central to its identity and well-being: its culture and language. According to the case law, s. 23 must actively foster the cultures of linguistic minorities and prevent their erosion. The Supreme Court's emphasis on preserving minority culture contradicts the AGQ's position that s. 23 protects culture only when the minority language is affected by the challenged measure.

[538] This understanding of the issues at stake under s. 23 is corroborated by the work of the Royal Commission on Bilingualism and Biculturalism — the Laurendeau-Dunton Commission. While, admittedly, the Commission recommended that the right to minority language instruction should be dissociated from any denominational considerations in minority schools, this is of no real relevance here, according to the EMSB, because the culture in respect of which it is invoking s. 23 has no real religious connotations: it involves an attitude and an approach to diversity, not an adherence to the precepts of a religion.

[539] Furthermore, the EMSB posits, it is important to bear in mind the difference between s. 93 of the *CA 1867* and s. 23 of the *Canadian Charter*. At the time s. 93 was enacted, language and religion remained closely linked. Over time, the regime thus put into place proved insufficient to effectively protect official linguistic minorities, particularly the French-speaking minority outside Quebec, a circumstance of which the framers of s. 23 were fully aware. It is therefore paradoxical that the AGQ is proposing a narrow

interpretation of s. 23. That interpretation minimizes the importance of culture by making it a mere attribute of language, an accessory devoid of autonomy and entirely dependent on the minority language. The EMSB points out that, in 1997, when ss. 93(1) to (4) of the *CA 1867* were made inapplicable to Quebec, there was a consensus that, given s. 23 of the *Canadian Charter*, this amendment would in no way diminish the rights of the English-speaking minority in Quebec.

[540] The QESBA in turn submits that the trial judge's large and liberal interpretation of s. 23, as the case law requires, was correct. The rights guaranteed by this section, including the right of minority representatives to manage and control educational facilities, are a manifestation of the now well-accepted constitutional principle of the protection of minorities. The aim is to prevent the assimilation of official linguistic minorities, foster their development and, where appropriate, redress any historical injustices they may have suffered.

[541] The QESBA therefore agrees with the EMSB when the latter insists on the importance of culture among the elements s. 23 seeks to protect. It adds that, according to *Mahe*,⁵³³ any matter relating to a subject that falls under the exclusive control of minority representatives must be presumed to be a matter in respect of the language and culture of the minority. This means that any legislation that pertains to any of these matters must be presumed to affect the linguistic and cultural concerns of the minority. Applying such a presumption gives robust protection to the linguistic and cultural concerns of the minority, while allowing the state to legislate in matters of education where it has the power to do so.

[542] Like the EMSB and the QESBA, the QCGN considers that, as regards the interpretation and application of s. 23 of the *Canadian Charter*, the Court has no reason to intervene in order to overturn the Trial Judgment.

b. Applicable interpretation principles

[543] One can summarize the now well-established manner for interpreting s. 23 as follows. The interpretation requires a teleological approach focusing on the purpose of the right being protected.⁵³⁴ The provision is at once preventive, remedial and unifying.⁵³⁵

⁵³³ *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

⁵³⁴ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 ["CSFCB"], para. 4; *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47 ["Nguyen"], para. 26; Michel Doucet, Michel Bastarache and Martin Rioux, "Les droits linguistiques : fondements et interprétation", in Michel Bastarache and Michel Doucet (eds.), *Les droits linguistiques au Canada*, 3rd ed., Cowansville, Yvon Blais, 2013, 1, p. 74.

⁵³⁵ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 ["CSFTNO"], paras. 1 and 79; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 15.

A court must be sensitive to the context in which s. 23 was enacted.⁵³⁶ The interpretation must be generous and expansive⁵³⁷ and consistent with the preservation and promotion of both official language communities in Canada,⁵³⁸ while being faithful to the text of the provision.⁵³⁹

[544] With regard to the purpose of the right being protected, the following clarifications are useful. Given that s. 23 is both preventive and remedial in nature, it “is intended not only to prevent the erosion of official language communities, but also to redress past injustices and promote the development of those communities”.⁵⁴⁰ Its purpose is “to ensure the sustainability of the country’s linguistic communities” while also making it possible for them “to develop in their own language and culture”.⁵⁴¹ Several years before the British Columbia case from which the three preceding quotations were taken, Dickson, C.J., when considering s. 23 in the key case of *Mahe*, had also stated the following about the relationship between language and culture: “any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language”.⁵⁴² In addition, as mentioned in the previous paragraph, the provision “also has a unifying purpose in that it accommodates mobility by enabling citizens to move anywhere in the country without fearing that they will have to abandon their language and culture”.⁵⁴³

c. Genesis of the rights guaranteed in s. 23 of the *Canadian Charter*

i. Origin

[545] It is safe to say that, in a sense, s. 93 of the *CA 1867* is the precursor to s. 23 of the *Canadian Charter*. It should be noted from the outset, however, that s. 93, as drafted, reflects the reality that existed at the time it came into force, when [TRANSLATION] “religious

⁵³⁶ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [“*Solski*”], para. 5, where the Court wrote: “Our country’s social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights. Language rights cannot be analysed in the abstract, without regard for the historical context of the recognition thereof or for the concerns that the manner in which they are currently applied is meant to address.”

⁵³⁷ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, paras. 23-24.

⁵³⁸ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 20.

⁵³⁹ *Caron v. Alberta*, 2015 SCC 56, paras. 36-37. See also: *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, paras. 8 and 139.

⁵⁴⁰ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 15. See also: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 79.

⁵⁴¹ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 157. See also: *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 7.

⁵⁴² *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 362.

⁵⁴³ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 15.

instruction and instruction in the minority language went hand in hand”.⁵⁴⁴ Moreover, in those days, religion took precedence over language.

[546] This is reflected in the fact that, in this original framework, it was still constitutionally possible to prohibit instruction in the language of a linguistic minority, as the case law on *Regulation 17* of the Ontario Department of Education demonstrates.⁵⁴⁵ In finding, as the Ontario courts did, that this regulatory text was *intra vires*, the Privy Council thus confirmed that s. 93 of the *CA 1867* did not protect French-language education in Ontario.

[547] Various other legislative or regulatory measures elsewhere in Canada had effects comparable to the Ontario regulation. The erosion of French as a minority language outside Quebec followed,⁵⁴⁶ as did the decline of many French language communities.⁵⁴⁷ This situation, which changed with the enactment of s. 23 of the *Canadian Charter*,⁵⁴⁸ generated obvious tensions. This led to the creation, in 1963, of the Laurendeau-Dunton Commission, whose reports were published between 1967 and 1970. One of them, published in 1968, deals with education and minority language instruction. Over time, this latter issue would take on a crucial importance, with the teaching of a minority language becoming a more pressing concern than religious instruction.

[548] This is why, a few years later, the framers of the *Charter* felt it necessary to address the issue explicitly in their text. There is no doubt that they sought “to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority”.⁵⁴⁹ But, more specifically, they wanted to correct the previous situation that the case law of the early 20th century had consolidated, a situation that still existed at the end of the 1970s. The Supreme Court pointed this out in *Solski*:

⁵⁴⁴ Michel Bastarache, “Le rôle des tribunaux dans la mise en œuvre des droits linguistiques au Canada”, (2010) 40:1 *R.G.D.* 221, p. 221. This observation, however, should be supplemented and qualified by the fact that in Ontario, for example, Anglo-Irish Catholics in the school population long enjoyed the benefits of s. 93. See also: Jean-François Gaudreault-DesBiens and Danielle Pinard, “Les minorités en droit public canadien”, (2003-04) 34 *R.D.U.S.* 197, pp. 211-212.

⁵⁴⁵ *Mackell v. Ottawa Separate School Trustees* (1915), 24 D.L.R. 475, see, in particular, pp. 489-492 (reasons of Garrow, J.A.) (Ont. C.A.), aff’d. in *Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell* (1916), [1917] A.C. 62, pp. 70-72 (P.C.).

⁵⁴⁶ Author Nicolas M. Rouleau describes this evolution in “Section 23 of the Charter: Minority-Language Education Rights”, (2008) 39 *S.C.L.R.* (2d) 261, pp. 268-270.

⁵⁴⁷ Vanessa Gruben, “Language Rights in Canada: A Theoretical Approach”, (2008) 39 *S.C.L.R.* (2d) 91, p. 112.

⁵⁴⁸ Thus, in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [“CSFY”], paras. 70-73, Abella, J., writing for a unanimous Court, described an evolution that could stabilize, if not reverse, the situation that existed before s. 23 came into force.

⁵⁴⁹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 74.

21 The minority language education rights entrenched in s. 23 are national in scope and remedial in nature. At the time the section was adopted, the framers were aware of the various regimes governing the Anglophone and Francophone linguistic minorities throughout Canada and perceived these regimes as inadequate. Section 23 was intended to provide a uniform solution to remedy these inadequacies. [...]⁵⁵⁰

ii. Scope

[549] In general and abstract terms, the Supreme Court jurisprudence teaches that s. 23 is an essential component in Canada's constitutional protection of the official languages. As such, the provision is "of prime importance".⁵⁵¹ This is because of the "vital role of education in preserving and encouraging linguistic and cultural vitality"⁵⁵² among minority language communities, which "are essential for Canada to flourish as a bilingual country".⁵⁵³

[550] There is something distinctive about s. 23: it is a unique legal guarantee, specific to Canada,⁵⁵⁴ which has a collective scope but also confers individual rights⁵⁵⁵ and imposes positive obligations on the state.⁵⁵⁶ As the Supreme Court noted almost 20 years ago:

23 [...] Section 23 is clearly meant to protect and preserve both official languages and the cultures they embrace throughout Canada; its application will of necessity affect the future of minority language communities. Section 23 rights are in that sense collective rights. The conditions for their application reflect this. [...] Nevertheless, these rights are not primarily described as collective rights, even though they presuppose that a language community is present to benefit from their

⁵⁵⁰ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14. In this sense, Wagner, C.J. mentioned that one of the purposes of s. 23 was that of "changing the status quo": *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 3.

⁵⁵¹ *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 CSC 15, para. 28.

⁵⁵² *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350.

⁵⁵³ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 2.

⁵⁵⁴ *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 ["Rose-des-vents"], para. 25; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 ["Quebec Association of Protestant School Boards"], p. 79. See also: *Procureur général du Québec c. Quebec English School Board Association*, 2020 QCCA 1171, para. 18.

⁵⁵⁵ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 3; *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, para. 23; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 23; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 28.

⁵⁵⁶ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 2.

exercise. A close attention to the formulation of s. 23 reveals individual rights in favour of persons belonging to specific categories of rights holders.⁵⁵⁷

Author Mark C. Power, commenting on this aspect of things, added the following:

[TRANSLATION]

[...] section 23 does not fit into the traditional categories developed by jurists versed in human rights for classifying fundamental rights. Its purpose makes it a social and collective right while its constitutional status, obvious justiciability, and scope make it an individual and civil right as well. [...]

[...]

These considerations mesh and produce an original and even unprecedented constitutional guarantee, one that is, as the Supreme Court itself pointed out, genuinely Canadian.⁵⁵⁸

[References omitted]

[551] If we now move away from general and abstract considerations to the wording of s. 23, we first observe, as already noted above,⁵⁵⁹ the specificity of the provision. The scope of minority language rights in education is therefore subject to a variety of specific conditions:⁵⁶⁰ these conditions may thus require that parents holding such rights have received primary instruction in Canada in a minority language, that they reside in a province where this language remains that of the linguistic minority, and that they exercise the rights referred to in s. 23 for the benefit of their children where the number of children to be educated in the minority language is sufficient to warrant and dictate the various measures to be taken for the application of the rights in question. There is obviously room for judicial interpretation in the case of expressions such as “where the number of those children so warrants”, but the fact remains that the very words of the provision express several unambiguous preconditions likely to prove highly restrictive for anyone wishing to claim the rights guaranteed by s. 23.

[552] Since *Mahe*, it is well established that s. 23 sets out a “sliding scale” of requirements / “*exigence ‘variable’*”⁵⁶¹ — the current French terminology having adopted

⁵⁵⁷ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

⁵⁵⁸ Marc C. Power, “Les droits linguistiques en matière d’éducation”, in Michel Bastarache and Michel Doucet (eds.), *Les droits linguistiques au Canada*, 3rd ed., Cowansville, Yvon Blais, 2013, 657, pp. 675-676.

⁵⁵⁹ Above, para. [515].

⁵⁶⁰ For the reason already mentioned (see footnote 524 above) the following description does not take s. 23(1)(a) into account.

⁵⁶¹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 366.

the notion of scale as well, “*échelle variable*” — which provides a basis for a “range of educational services”.⁵⁶² These services are intended to give full effect to the right of certain citizens of Canada to, in the precise words of s. 23(3), “have their children receive primary and secondary school instruction in the language of the [...] linguistic minority population / *faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité*”. The low end of the sliding scale corresponds to this right only to instruction (s. 23(3)(a)). The high end also includes the right to “minority language educational facilities / *établissements d’enseignement de la minorité*” (s. 23(3)(b)), which translates into an “upper level of management and control” over these facilities and the instruction provided there.⁵⁶³ Referring to these elements in 2020, the Supreme Court made the following observations:

[24] [...] at the low end, s. 23 rights holders are entitled to have their children receive instruction in the language of the official language minority, but the extent to which the minority exercises control over the provision of instruction rises with the number of children of rights holders. At the low end of the scale, the minority is entitled only to instruction in its language. In the middle, it might have control over one or more classrooms in a school of the majority or over one part of a school it shares with the majority. It might also have control over the hiring of teaching staff and over certain expenditures. At the high end, the minority has control over separate educational facilities, that is, over a homogeneous school. The number of children of rights holders might also entitle the minority to the management and control of a separate school board. In short, once the minimum threshold of s. 23(3)(a) is crossed, the sliding scale applies to determine the level of services that corresponds to the extent to which the minority will have control over the provision of educational services.⁵⁶⁴

In the case at bar, no one disputes that the number of English-speaking children in Quebec places them at the high end of the scale.

[553] The scope of s. 23 must also be assessed in light of qualitative considerations. Once again, the Supreme Court clarified this aspect through its case law, establishing that linguistic minorities have the right to “an educational experience that is substantively equivalent to that of the majority”.⁵⁶⁵ An educational experience is not “substantively

⁵⁶² *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 24.

⁵⁶³ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 24; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 370. See also: *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 29.

⁵⁶⁴ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13.

⁵⁶⁵ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, paras. 26 and 104ff; *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, paras. 3 and 35; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 [“*Arsenault-Cameron*”], para. 31; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 378.

equivalent” when reasonable s. 23 rights-holder parents are deterred from exercising their language rights because the minority language school offers services that are meaningfully inferior to those offered by the majority language school.⁵⁶⁶ To assess the quality of instruction offered to the minority, courts must “engage in a process of comparing the minority language school with majority language schools that represent realistic alternatives”.⁵⁶⁷

[554] We indicated a few lines earlier that it is undisputed among the parties that the number of English-speaking children in Quebec places their situation at the top of the scale identified in *Mahe* and *CSFCB*.⁵⁶⁸ It is also undisputed that the quality of the educational experience offered to English-speaking children in Quebec is “substantively equivalent” to that enjoyed by French-speaking children. One thing follows from this observation: the balance of the analysis must focus on the “right of management and control”, which the Supreme Court has linked to s. 23(3)(b). It is therefore necessary to turn to this notion in order to draw the most recent guidance from the case law on the scope of this notion and that of s. 23.

[555] The ruling in *Mahe* was unanimous. It recognized that an appreciable measure of management and control is of vital importance to ensure that the language and culture of the linguistic minority flourish⁵⁶⁹ and is therefore indispensable to the purpose of s. 23.⁵⁷⁰ This is so because “a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns”.⁵⁷¹ The Court recognized that decisions relating to these issues can have an impact, “in subtle but important ways”,⁵⁷² on the health and survival of the minority language and culture. Moreover, the historical context in which s. 23 was enacted clearly shows that linguistic minorities “cannot always rely upon the majority to take account of all of their linguistic and cultural concerns”.⁵⁷³ It follows that, under s. 23(3)(b), minority language groups must have exclusive control “over those aspects of education which pertain to or have an effect upon their language and culture”.⁵⁷⁴ It is instructive here to quote Dickson, C.J.’s observations, where he summarized his thinking:

In my view, the measure of management and control required by s. 23 of the *Charter* may, depending on the number of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum

⁵⁶⁶ *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 35.

⁵⁶⁷ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 26.

⁵⁶⁸ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13.

⁵⁶⁹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 372.

⁵⁷⁰ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, pp. 371-373.

⁵⁷¹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 372.

⁵⁷² *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 372.

⁵⁷³ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 372.

⁵⁷⁴ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 375.

level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:

- (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
- (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e. the number of minority language students for whom the board is responsible;
- (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
 - (a) expenditures of funds provided for such instruction and facilities;
 - (b) appointment and direction of those responsible for the administration of such instruction and facilities;
 - (c) establishment of programs of instruction;
 - (d) recruitment and assignment of teachers and other personnel; and
 - (e) making of agreements for education and services for minority language pupils.⁵⁷⁵

This passage was reproduced as is in the conclusion immediately preceding the operative part of the Supreme Court's judgment. Regulation 490/82, which was also the subject of the appellants' challenge,⁵⁷⁶ was declared inconsistent with s. 23. The passage clearly illustrates the "sliding scale" that must characterize the judicial interpretation of s. 23. The structuring impact of this ruling on the school system was bound to be considerable.⁵⁷⁷

⁵⁷⁵ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 377.

⁵⁷⁶ The appellants wanted 100% of their children's instruction to be in French, while this regulation required approximately 20% of the instruction to be in English: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 393.

⁵⁷⁷ In commentary written after the decision, one author, who was also the lawyer who had been retained to represent the Attorney General of Saskatchewan before the Supreme Court in *Mahe*, thus wrote: "[...] *Mahe* must also be seen as a remarkable example of judicial activism. It clearly illustrates the willingness of the Supreme Court to tailor its legal reasoning in order to advance constitutional policy objectives": Robert G. Richards, "*Mahe v. Alberta*: Management and Control of Minority Language Education", (1991) 36:1 *McGill L.J.* 216, p. 217.

[556] It should be noted, however, that the management and control powers accorded to s. 23 parents, or their representatives, does not in principle exclude “provincial regulation”.⁵⁷⁸ Indeed, under the terms of s. 93 of the *CA 1867*, the power to legislate in matters of education belongs exclusively to the provincial legislatures. Moreover, there is no doubt that the provinces have “an interest both in the content and the qualitative standards of educational programmes” on their territory.⁵⁷⁹ The legislative measures they enact and the minority language education regimes they put in place must, however, be consistent with the requirements of s. 23 of the *Canadian Charter*.⁵⁸⁰ Consequently, each province may impose educational programs in minority language educational facilities (just as in those of the majority), insofar as such programs do not interfere with the linguistic and cultural concerns of the minority.⁵⁸¹ It follows that the “pedagogical requirements established to address the needs of the majority language students cannot be used [by the government] to trump cultural and linguistic concerns appropriate for the minority language students”.⁵⁸²

5. Analysis and decision

a. Current state of s. 23 case law

[557] Section 23 establishes a regime in matters of primary and secondary education for protecting Canada’s two official languages where these languages are in the minority. It represents “a linchpin in [Canada]’s commitment to the values of bilingualism and biculturalism”.⁵⁸³ If s. 23 aims to preserve and promote minority English-speaking and French-speaking cultures, it can only be through the medium of language itself, and under the conditions laid down in this provision. In other words, s. 23 protects the linguistic dimension of culture, but not all cultural manifestations of the linguistic minority. It would therefore be wrong to see it as a constitutional guarantee of the survival and advancement of English culture and French culture, where any such culture is in the minority, when those cultures are considered as such and in isolation. In a situation where the conditions for the application of s. 23 are met and where the government in question fully complies with its obligations under this provision, the local decline of the culture associated with a minority language, regrettable as such decline may be, could nevertheless occur despite the guarantees in s. 23. This, in and of itself, would not give rise to any redress under the *Canadian Charter*.

⁵⁷⁸ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 380.

⁵⁷⁹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 380.

⁵⁸⁰ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 10. Since s. 23(1)(a) does not apply in Quebec, this factor distinguishes the Quebec legislature from other provincial legislatures.

⁵⁸¹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 380.

⁵⁸² *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 38.

⁵⁸³ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350.

[558] In *Solski*, the Supreme Court noted that “[t]he current wording of s. 23 undoubtedly reflects the difficulties encountered in the discussions and negotiations that led up to the patriation of the Canadian Constitution in 1982”.⁵⁸⁴ The ruling in *Quebec Association of Protestant School Boards* had already explained that, as formulated, s. 23 was intended to reform a certain archetype of provincial legislation considered unduly unfavourable to minority languages.⁵⁸⁵ This was one aspect of things, wrote the Supreme Court, that was blindingly obvious (“*saute aux yeux*”).⁵⁸⁶ The meticulous wording of the provision — because that, indeed, is what we are concerned with here — can be explained in part by historical data and considerations of this kind.

[559] One must therefore reconcile the wording of s. 23 with the need to give it a broad, liberal and purposive interpretation, one that is focused on the purpose of the right being protected and respectful of the “preventive, remedial and unifying” nature of the provision.⁵⁸⁷ These aims, of course, are not mutually exclusive — they converge and complement each other. In properly carrying out this interpretation exercise, one can look to the Supreme Court’s jurisprudence, taking into account both the reasons given by its judges and what, in fact, has truly been achieved by the Court’s rulings under s. 23 since it came into force.

[560] There is nothing inaccurate in what the trial judge said at paras. 939 to 952 of his reasons, when he recounted the evolution of the Supreme Court’s jurisprudence on s. 23. The judge then outlined the parties’ arguments on the meanings to be drawn from this case law, and it is clear that he did not miss anything in what they submitted. This led him, in para. 975 of his reasons, to quote an excerpt from the Laurendeau-Dunton Commission’s report, in which the latter provided a definition of the term “culture”. The judge went on to say:

[TRANSLATION]

[976] One need not go on a length to understand that language and culture are two different concepts — the latter certainly encompasses the former, while language contributes to the partial formulation of what encompasses the cultural characteristics of a particular group.

[977] In *Mahe*, the Supreme Court explained:

⁵⁸⁴ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, para. 9.

⁵⁸⁵ *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, pp. 79-80.

⁵⁸⁶ *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, p. 79.

⁵⁸⁷ See: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, paras. 1 and 79; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 15.

[...] Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. [...]

[978] In today's context, there is no doubt that religion is part of a community's cultural identity. For example, no one could reasonably argue that, at least until the mid-1960s, the Catholic religion did not play a significant role in defining one of the cultural traits of Quebec's French-speaking population, just as Protestantism generally did for the English-speaking community.⁵⁸⁸

[561] The first question to be answered here is whether, relying on the Supreme Court's jurisprudence on s. 23, the trial judge was right to extend the notion of culture as he did in his reasons. Based on this premise, he concluded that the *Act* interfered with a cultural perspective specific to English-language public educational institutions, namely the promotion and celebration of religious diversity. It was this reading of the case law that led him, in para. 1140 of his judgment, to declare several provisions of the *Act* of no force or effect. He came to this conclusion, because, in his view, those provisions violate the rights of [TRANSLATION] "any person, whether natural or legal, entitled to the guarantees under s. 23 [of the *Canadian Charter*]". To provide an informed answer to this first question, it is necessary to review all the relevant case law, scrutinizing it not only on the law as stated therein, but on its facts as well.

[562] Before examining and commenting on this case law, however, it should be noted that nothing in the *Act* in any way pertains to the language of instruction, minority or otherwise, in primary and secondary schools. Admittedly, parties such as the EMSB are affected by the *Act*, even though they are legally entitled to enjoy the rights guaranteed by s. 23, as the judge confirmed in para. 953 of his reasons with respect to this school board specifically. The fact remains, however, that, in Quebec, none of the rights holders expressly referred to in s. 23 (i.e., Canadian citizens who are parents of school-aged children and meet the conditions of s. 23(1)(b) and ss. 23(2) and (3)) is deprived of a right recognized by this provision. The EMSB was able to develop its central argument by relying on the provision's interpretation, as enriched by a process of jurisprudential accretion. Indeed, it admitted it openly at the start of its oral argument, its lawyer stating: "This is a management and control case, nothing else." It is therefore useful to begin our review of the jurisprudence with the ruling in *Mahe*,⁵⁸⁹ which gave rise to the idea of control and management.

⁵⁸⁸ The excerpt reproduced by the judge is taken from *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 372.

⁵⁸⁹ *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

[563] In a sense, this significant ruling, whose conclusion was foreshadowed by the long excerpt thereof cited above,⁵⁹⁰ is the founding judgment for the s. 23 jurisprudence. The case involved a dispute between the government of Alberta and French-speaking parents in the Edmonton area who qualified as rights holders under s. 23. It is this ruling in which the Supreme Court first presented the “sliding scale” concept,⁵⁹¹ formulating a series of judge-made guidelines required for the harmonious implementation of ss. 23(3)(a) and (b) of the *Canadian Charter*. The unanimous ruling, penned by Dickson, C.J., has been authoritative for over 33 years.

[564] It is worth recalling that, at the time, according to data noted by the Supreme Court,⁵⁹² there were some 2,948 French-speaking rights holders in the City of Edmonton, and they were the parents of approximately 4,127 children, of whom 3,750 were of school age. In addition, there was a French-language school attended by 242 students from kindergarten to grade 6, and an immersion program in grades 7 and 8 attended by another 73 students. This is the context in which Mr. Mahe and the other appellants had made their initial request. The Chief Justice described it as follows:

[...] they forwarded a proposal to the Minister of Education of Alberta for a new French-language public elementary school in Edmonton, which would have the following features: (1) it would instruct Francophone children exclusively in the French language and in a totally “French” environment; (2) it would be administered by a Committee of Parents under the structure of an autonomous French School Board; and (3) it would have a programme reflecting the French linguistic culture.⁵⁹³

Having received a refusal from the Department of Education, which informed them that it was a policy of the province not to create any French school districts, the appellants turned to the courts. They were partly successful in first instance and before the Alberta Court of Appeal, before taking their challenge to the Supreme Court.

[565] The notion of “control and management” enshrined by the Supreme Court in *Mahe* had already appeared in case law prior to this decision,⁵⁹⁴ but it had never been associated with the numerous attributes the Supreme Court gave it here.⁵⁹⁵ There is no doubt that *Mahe* did much to grant Alberta’s French-speaking minority autonomy over

⁵⁹⁰ Above, para. [555].

⁵⁹¹ As previously stated, this now seems to be the established expression in both English and French, with Supreme Court decisions, including *Mahe*, having also used the expressions “*exigence variable*” and “*critère variable*” in French.

⁵⁹² *Mahe v. Alberta*, [1990] 1 S.C.R. 342, pp. 386-387.

⁵⁹³ *Mahe v. Alberta*, [1990] 1 S.C.R. 342, pp. 351-352.

⁵⁹⁴ In particular, in an Ontario Court of Appeal judgment, *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491.

⁵⁹⁵ Dickson, C.J. devoted pp. 369-380 of the judgment in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, to that notion.

French-language education. It should be noted, however, that in 1990, the year the ruling in *Mahe* was rendered, thus long before denominational school boards were abolished in Quebec and replaced by linguistic school boards, publicly funded English-language educational institutions in Quebec already had much greater autonomy than what is depicted in *Mahe* as the situation then existing in Alberta. In fact, this had been the case for many years, even well before s. 23 came into force.

[566] In the wake of *Mahe*, the Supreme Court rendered a number of other judgments dealing with s. 23. While some are of no real relevance here because the provision in question plays only a secondary role or is addressed from an angle that does not pertain to the current dispute,⁵⁹⁶ others have illustrated or consolidated the concepts developed in *Mahe*, and it is to these rulings we will now return in greater detail.

[567] The opinion filed in response to the *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7),⁵⁹⁷ followed a Manitoba Court of Appeal decision rendered prior to *Mahe*. This explains why the Manitoba justices were not unanimous on the existence of a power of management and control arising under s. 23(3). Nonetheless, the Supreme Court agreed that the *Reference* was a logical next step to *Mahe*, which set out the “general contours of the approach” to be followed when the interpretation of s. 23 is at issue; the Court now had the opportunity to “specify more precisely the content of [the] rights”⁵⁹⁸ conferred by s. 23.

[568] Lamer, C.J., writing for the Court, reiterated “the recognition that minority schools play a valuable role as cultural centres as well as educational institutions”.⁵⁹⁹ He revisited the link between the individual points on the sliding scale and the various rights resulting therefrom: if the number of minority language students is very low, no minority language instruction program is required, but a higher number may justify setting up the kind of educational facility described in s. 23, while at the high end of the scale, the number of children requires the establishment of a minority language school board.⁶⁰⁰ Whether or not the number of students is sufficient remains a question of context.

[569] The Chief Justice further recalled that the rights provided by s. 23

are granted to minority language parents individually. Their entitlement is not subject to the will of the minority group to which they belong, be it that of a majority of that group, but only to the “numbers warrant” condition.⁶⁰¹

⁵⁹⁶ For example, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 or *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15.

⁵⁹⁷ [1993] 1 S.C.R. 839 [“*Reference re Manitoba Public Schools*”].

⁵⁹⁸ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, p. 849.

⁵⁹⁹ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, p. 855.

⁶⁰⁰ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, pp. 857-858.

⁶⁰¹ *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, p. 862.

[570] Lastly, the Court emphasized the importance of allowing the government sufficient discretion in choosing the means for complying with s. 23 — in *Mahe*, Dickson, C.J. had written, in this regard, that the government “should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met”.⁶⁰²

[571] While the *Reference re Manitoba Public Schools* did provide some clarification on the scope of the ruling in *Mahe*, ultimately, its main contribution was to extend to Manitoba’s French-speaking minority the benefit that had been conferred by *Mahe* on Alberta’s French-speaking minority three years earlier.

[572] The ruling in *Arsenault-Cameron*⁶⁰³ provides what is perhaps an even more striking illustration of the concrete scope of s. 23 in a given situation. As the anticipated number of students met the applicable criterion, the relevant French language school board had made an offer to French-speaking parents, for the following school year, of instruction in French as a first language from grades 1 to 6 in location S, where a French school would be opened for this purpose. The Minister of Education recognized that the number of students warranted the provision of such instruction out of public funds, but he did not approve the school board’s offer, believing instead that transportation to location A and the French school already established there was a more advantageous solution. The parents’ application for a declaratory judgment confirming their right to French-language instruction in location S was granted, but the decision was overturned on appeal, leading to the appeal before the Supreme Court.

[573] From the outset, Major and Bastarache, JJ., who jointly wrote the unanimous reasons of a nine-judge panel of the Court, identified the main issue to be decided. It differed somewhat from the issues formulated by the parties. The Court determined that it had to decide whether the right of management and control exercised by the French language school board with regard to the location of a school should prevail over the Minister’s discretion to approve or reject the board’s decision.⁶⁰⁴ The Court answered this question in the affirmative.

[574] In addition to useful comments on the remedial nature of s. 23 of the *Canadian Charter*, on the notion of equality between linguistic communities that underlies this provision, and on the expression “numbers warrant” it contains, the Court dealt at some length with the question of school transportation.⁶⁰⁵ It reproached the Minister for having failed to consider the age of the students concerned and for having assessed travel time using a provincial standard that disregarded the context. The judgment of the Prince Edward Island Supreme Court, Appeal Division, shows that the time spent travelling on

⁶⁰² *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 393.

⁶⁰³ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1.

⁶⁰⁴ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 6.

⁶⁰⁵ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, particularly paras. 49-51.

the buses from location S to location A and back was very long, about two hours.⁶⁰⁶ The parents had several reasons for refusing this solution: such long daily travel times prevented the children, many of them very young, from participating in extracurricular activities, and created difficulties for parents in meeting with teachers or picking up a child for an appointment or due to an emergency or illness. As noted in the Supreme Court's reasons: "The decision of the Minister fostered an environment in which many of the s. 23 children were discouraged from attending the minority language school because of the long travel times."⁶⁰⁷ This factor would have an impact on the assimilation of the minority language children, whereas, for the reasons explained by Major and Bastarache, JJ., the issue of school transportation had no cultural impact on majority language children. We can see that it is important to personalize or contextualize the analysis, without limiting it to the notion of formal equality, which would liken the desirable result for the minority to what satisfies the linguistic majority. Indeed, the case law speaks of "substantive" rather than "formal" equality.⁶⁰⁸

[575] *Solski*,⁶⁰⁹ a unanimous decision rendered by a seven-member panel of the Supreme Court, is another relevant judgment. It is not so much the facts of that case, which are fairly far removed from what is at issue here, as the Court's reasoning that is of interest here.

[576] *Solski* deals with the interaction between s. 23 of the *Canadian Charter* and certain provisions of the *Charter of the French Language*. Since December 31, 1977, the first paragraph of s. 72 of that charter stipulated that "[i]nstruction in the kindergarten classes and in the elementary and secondary schools shall be in French, except where this chapter allows otherwise / [l]'enseignement se donne en français dans les classes maternelles, dans les écoles primaires et secondaires, sous réserve des exceptions prévues au présent chapitre".⁶¹⁰ The 2005 dispute concerned a now-repealed version of s. 73 of the *Charter of the French Language*, which, in 2002, had established the criterion of "major part of the [...] instruction / la majeure partie de l'enseignement" for managing exceptions to the rule set out in the first paragraph of s. 72. The first paragraph of the version of s. 73 in force at the time provided as follows:

⁶⁰⁶ The following was set out in para. 26 of this judgment, rendered in the matter of *Arsenault-Cameron v. Prince Edward Island* (1998), 160 D.L.R. (4th) 89 (P.E.I. C.A.): "For the students from the [location S] area registered at L'École Évangéline [in location A] in grades one to six for the 1995 school year the average time between their departure from home and arrival at school was 57 minutes."

⁶⁰⁷ *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 50.

⁶⁰⁸ See: *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 3.

⁶⁰⁹ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

⁶¹⁰ In 2022, the words "this division" ("à la présente section") replaced the words "this chapter" ("au présent chapitre").

73. The following children, at the request of one of their parents, may receive instruction in English:

(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

73. Peuvent recevoir l'enseignement en anglais, à la demande de l'un de leurs parents :

1° les enfants dont le père ou la mère est citoyen canadien et a reçu un enseignement primaire en anglais au Canada, pourvu que cet enseignement constitue la majeure partie de l'enseignement primaire reçu au Canada;

[577] It appears from the ruling in *Solski* that the Ministère de l'Éducation and the Administrative Tribunal of Québec were interpreting the notion of “major part of the [...] instruction” in a way that emphasized a quantitative analysis: for example, as regards subsection (1) above, they had looked at how many years or months the parent in question had been enrolled elsewhere in Canada in an English-language school. This is the element the appellant in the Supreme Court, Ms. Casimir, who had been authorized to be substituted for Mr. Solski, was challenging. Without calling into question the constitutional validity of s. 73, the Supreme Court intervened to replace the quantitative analysis with a qualitative one, which, in its view, was more in line with s. 23. It noted:

35 The pertinent question, then, is whether the “major part” requirement is consistent with the purpose of s. 23(2) and capable of ensuring that the children meant to be protected will actually be admitted to minority language schools. In our view, the “major part” requirement as interpreted by the ATQ is underinclusive; it does not achieve the purpose of s. 23(2) and, therefore, cannot be said to complete it or to act as a valid substitute for it. Thus, the “major part” requirement cannot be saved unless it is interpreted such that the word “major” is given a qualitative rather than a quantitative meaning.

[...]

37 The strict mathematical approach lacks flexibility and may even exclude a child from education vital to maintaining his or her connection with the minority community and culture. [...] ⁶¹¹

[578] To explain the approach required by s. 23 for assessing the “major part of the [...] instruction”, the Supreme Court went on to specify the factors to be considered: (i) how much time was spent in each program? (ii) at what stage of education was the choice of language of instruction made? (iii) what programs are or were available? and (iv) do

⁶¹¹ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

learning disabilities or other difficulties exist?⁶¹² But there is more to *Solski*, as the Supreme Court pushed the analysis further, illustrating how the assessment will truly respect the purpose of s. 23, which is “to ensure the sustainability of the country’s linguistic communities” while also making it possible for them “to develop in their own language and culture”.⁶¹³

[579] In carrying out this analysis, one should even be sensitive to the specifically socio-cultural dimensions of belonging to a minority language group. The Court gave a few examples:

44 [...] When considering the situation in a province other than Quebec, one must remember that a child could have been sent to a majority language school by assimilated parents who then, in the latter stages of the child’s educational experience, have changed their minds and sent the child to a minority language school in order to help the child reintegrate the minority language community and adopt its culture. It may be that the choice to enrol the child in a minority language education program, even though the program may have been available throughout the child’s educational experience, did not become a viable choice until the child’s assimilated parents decided to help their child reforge a connection with the minority language community and culture. [...]⁶¹⁴

[580] Further on, when considering the case of a child who had been enrolled in a French immersion program outside Quebec, and who, upon returning to Quebec, was denied access to English school pursuant to administrative and ATQ decisions, the Supreme Court added the following nuances when examining this situation:

50 [...] This fails to recognize significant differences between immersion programs and minority language programs. Outside Quebec, immersion programs are designed to provide second language training to children attending schools designed for those adopting the language of the majority. Immersion programs occur in a majority setting where the majority language is spoken in the corridors and during extra-curricular activities. Immersion programs are run in majority schools that are a part of the majority school system. As a result, immersion programs lack the cultural element that is vital to minority language education, as discussed in *Mahe*. [...]⁶¹⁵

⁶¹² *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, paras. 39-45.

⁶¹³ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 157.

⁶¹⁴ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

⁶¹⁵ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

[581] In *Nguyen*,⁶¹⁶ the Supreme Court revisited its *Solski* analysis and elaborated on the concept of “genuine educational pathway”, once again stressing the importance of considering the socio-cultural dimensions of decisions made by s. 23 rights holders regarding their children’s schooling. This ruling resulted in a new amendment to s. 73 of the *Charter of the French Language*, introduced by *An Act following upon the court decisions on the language of instruction*.⁶¹⁷ There is no need to further discuss this judgment.

[582] The next relevant decision to be rendered was *Rose-des-vents*.⁶¹⁸ That ruling, the first of a second generation of judgments,⁶¹⁹ raised a new issue. Indeed, *Mahe* and the *Reference re Manitoba Public Schools* were programmatic decisions — they established a general and abstract framework for ensuring the implementation of s. 23 and set out how it should be used. *Arseneault-Cameron* provided an opportunity for a debate on what might be described as the final preparations for giving effect to the ruling in *Mahe*: should one opt for a standalone, homogenous French-language school, and build it where it does not yet exist, or should one be content with a school transportation plan to a school that already has satisfactory characteristics, but is in a different, distant location? And who should make this decision? The *Rose-des-vents* decision came once the initial implementation phase had been completed, when a standalone, homogeneous French-language school already existed and had been managed for over ten years by a French school board, at which point the adequacy of the services provided was questioned: were they equivalent to those offered in majority-language schools, which is what s. 23 rights holders are entitled to?

[583] The school’s parents’ association thought not, and initiated proceedings against the Ministry of Education and the relevant French-language school board, seeking a declaratory judgment evidencing the situation. The trial judge agreed with the parents’ association in principle, while having split the proceedings into two phases. For technical reasons, including the fact that the trial judge had ordered that certain defence allegations be struck, the Court of Appeal reversed the judgment and referred the case back to the Supreme Court of British Columbia.

[584] From a normative standpoint, the Supreme Court of Canada took the opportunity to clarify a number of points, including an important one, which related to the nature of

⁶¹⁶ *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47.

⁶¹⁷ S.Q. 2010, c. 23.

⁶¹⁸ *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21. In the judgments rendered by the British Columbia courts, the school is identified by the name Rose-des-Vents.

⁶¹⁹ This explains the remark made by Karakatsanis, J. in the opening lines of the reasons she wrote on behalf of the Court: she spoke of a “new generation of issues for minority language education rights”: *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 1.

this majority-minority comparison. The comparative exercise must be contextual and holistic, accounting for the physical facilities as well as the quality of instruction, educational outcomes, extracurricular activities, and travel times by school transport or other means. As Karakatsanis, J. wrote: “Such an approach is similar to the way parents make decisions regarding their children’s education.”⁶²⁰

[585] As we saw earlier,⁶²¹ however, we are dealing with a process of jurisprudential or judicially created accretion, such that in order to fully grasp the meaning of the case, it is important not to lose sight of its particular circumstances. It is those circumstances that informed the Supreme Court’s decision and from which one can discern the judgment’s contribution to the principles for interpreting s. 23. What were these circumstances?⁶²²

[586] The educational outcomes of the students at the Rose-des-vents school were satisfactory overall, but the trial judge refused to focus on this aspect alone by simply comparing it with the state of academic results in English schools.⁶²³ And indeed, the picture was less encouraging when viewed from several other angles. At the time, the school shared its premises with a French high school, and Rose-des-vents could be described as a small, overcrowded elementary school. Its capacity, according to accepted measures (either operating or nominal capacity), was 199 to 215 students. It had 344 students. Both the school board and the Ministry agreed that this was the case — and, indeed, since 2008, the Ministry had considered the construction of a new French-language school to be a “high priority”. Yet, in 2015, none of this had been done. This state of affairs was compounded by several other revealing facts: the premises in general were cramped; the school’s library was “very small”; there was no available flexible space in the school; several classrooms had no windows, and only three met the minimum size recommended by the Ministry or the school board; the washrooms were inadequate; and, according to what was said at the school, the configuration of the premises and the lack of storage space had contributed to the spread of vermin (lice, to be more precise) among the student population. The playground was also cramped. A comparison with English-language schools confirmed that there was no substantive equality between Rose-des-vents and these schools. This inequality was also felt in terms of transportation to school, which was much more restrictive for students of the

⁶²⁰ *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 39.

⁶²¹ Above, para. [562].

⁶²² See: *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, paras. 5-13.

⁶²³ *L’Association des parents de l’école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614, paras. 134-135.

Rose-des-vents school. These observations are certainly sobering⁶²⁴ and such situations often take a long time to correct.⁶²⁵

[587] The Supreme Court of Canada reversed the decision of the Court of Appeal, reinstated the judgment of the Supreme Court of British Columbia, endorsed its conclusions of law and of fact,⁶²⁶ and approved of the way in which the judge had managed the proceedings — he had ruled, in an interlocutory judgment handed down a few months before the trial, that it was necessary to “avoid the risks of assimilation caused by delay” on the part of the school authorities.⁶²⁷

[588] Barely three weeks after the decision in *Rose-des-vents* was filed, the Supreme Court once again ruled on s. 23 in *CSFY*.⁶²⁸ The case concerned the requirements for admission to École Émilie-Tremblay, the only French-language school in the Yukon, which was administered by the appellant school board (the “Board”).

[589] Most of the decision deals with an issue unrelated to the debate here, namely, whether the trial judge’s conduct gave rise to a reasonable apprehension of bias on the part of the Yukon’s Attorney General. Like the Yukon Court of Appeal, the Supreme Court answered this question in the affirmative. The case was therefore sent back to be tried again in first instance.

[590] That said, a question of law arose in the Supreme Court that is of interest for our present purposes — whether the Board could unilaterally decide which students were

⁶²⁴ Some may be tempted to allude to *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483. The analogy, however, would be highly imperfect. Here, it was the members of the linguistic minority who wanted homogeneous, standalone schools separate from those of the majority. Nothing had been imposed on them by the majority, except perhaps a certain shortage of resources for achieving their objectives, without this necessarily having been deliberate.

⁶²⁵ The Supreme Court of Canada decision in this case dates back to April 24, 2015. On September 26, 2016, the Supreme Court of British Columbia rendered a judgment in which it noted the following: “The school facility presently housing École Élémentaire Rose-des-Vents does not allow the CSF to offer a global educational experience that is equivalent to that in comparator elementary schools.”: *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2016 BCSC 1764, para. 6834 j).

⁶²⁶ Karakatsanis, J. was careful to point out, however, that it could not be said that “the judge’s [declaratory judgment] constitutes a complete finding of a *Charter* violation”. This was so because, in the next phase of the proceedings, the possibility of a justification under s. 1 of the *Canadian Charter* remained to be explored: *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 61.

⁶²⁷ See: *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 14, a factor the trial judge had mentioned in his reasons: *L’Association des parents de l’école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89, para. 68, and *L’Association des parents de l’école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2012 BCSC 1614, para. 7.

⁶²⁸ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

eligible for admission to École Émilie-Tremblay. A few details about the background to the case are helpful in understanding what was at issue. The dispute arose out of proceedings initiated by the Board against the Yukon government, which it claimed was failing to meet its obligations in providing French-language instruction. Since 1996, the year the Board had been created, a regulation adopted under a Yukon statute defined the term “eligible student”, prescribing who qualified to attend a French school. Suffice it to say that this definition used almost exactly the same terminology as s. 23. That being said, from the time of the Board’s creation, it had, with the knowledge of the provincial authorities, admitted students to École Émilie-Tremblay who were not the children of s. 23 rights holders. At the start of the trial on the Board’s application, the government informed the Board that it now intended to fully enforce the aforementioned regulation. Abella, J., who wrote the unanimous reasons of the seven-judge panel, presented the issue as follows:

[66] The issue, therefore, is whether s. 23 grants the Board the unilateral power to admit students other than those who are “eligible” according to the *Regulation*. This raises questions about the allocation of constitutional powers.⁶²⁹

[591] As we know, education falls under provincial jurisdiction. In 2013, the Supreme Court had noted that, “while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces”.⁶³⁰ On this subject, in her reasons for judgment in *CSFY*, Abella, J. added that “[f]ederalism remains a notable feature in matters of minority language rights”.⁶³¹ Continuing her analysis, she pointed out that a province can validly delegate to a minority language school board the power of determining admission criteria for those she referred to as “children of non-rights holders”. She noted that this had indeed occurred in various parts of the country, which she illustrated with references to some provincial legislation.

[592] However, this was not the situation here, which led to the conclusion that the question identified above at para. [590] and taken from para. 66 of *CSFY* had to be answered in the negative:

[74] In this case, [...] the Yukon has not delegated the function of setting admission criteria for children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the *Regulation*. This does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon’s

⁶²⁹ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

⁶³⁰ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, para. 56.

⁶³¹ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, para. 68.

approach to admissions prevents the realization of s. 23's purpose: see *Mahe*, at pp. 362-65. But that is a different issue from whether the Board has, in the absence of delegation from the Yukon, the unilateral right to decide to admit children other than those who are covered by s. 23 or the *Regulation*.⁶³²

[593] The foregoing shows that the wording of s. 23 retains its importance. It seems plausible that allowing the children of s. 23 non-rights holders to be added to the number of children of s. 23 rights holders enrolled in a minority language school could only support and strengthen the promotion of the minority language and culture. Although this latter objective is undeniably a purpose of s. 23, it does not override the meaning of s. 23 where that meaning is not open to interpretation.

[594] The ruling in *CSFY* also highlights the fact that s. 23 rights may be adapted differently in different parts of the country. This was clearly the case here since, unlike some minority language schools elsewhere in the country, and even after the *CSFY* ruling, *École Émilie-Tremblay* in the Yukon could not benefit from the enrolment of a greater number of students than those explicitly and restrictively referred to in s. 23. Indeed, in the *Reference re Manitoba Public Schools*, Lamer, C.J. had previously written:

[...] the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.⁶³³

[595] Let us consider the foregoing. The reality of the linguistic dynamics and the respective drawing powers of the languages and cultures associated with the country's two official languages demonstrate the need to tailor the interpretation of s. 23. Consider, as one example, the problem of "bridging schools", which the Supreme Court of Canada addressed in *Nguyen*.⁶³⁴ At the time, this was a tangible problem in Quebec. Yet no one has ever heard of, let alone observed, the existence of the same problem with the same degree of seriousness, albeit in reverse — i.e., in the form of bridging schools for entry into homogeneous French schools — in Canadian provinces other than Quebec. In Canada, French and English have different drawing powers, as do the cultures closely associated with them. It is permissible to take this into account.

⁶³² *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

⁶³³ *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, p. 851. See also: *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 85.

⁶³⁴ *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47, particularly para. 7.

[596] Some may see the recent ruling in *CSFTNO*⁶³⁵ as a partial shift in the Supreme Court’s conclusions in *CSFY*. Nevertheless, this ruling appears to have no impact on the *CSFY* ruling insofar as the latter is relevant for purposes of the current debate.

[597] *CSFTNO* dealt with children whose parents were all clearly non-rights holders under s. 23.⁶³⁶ Even though these parents had no rights under this provision, they wanted to enroll their children in a minority French-language school in the Northwest Territories. The local French-language school board had given its consent, unlike the minister responsible for the school network, who had denied their wishes in administrative decisions falling within her purview. The school board consequently applied for judicial review to have these decisions set aside.

[598] It is therefore apparent that this ruling dealt specifically with the right of the parents in question to enroll their children as students in a minority language school. No such initiative is at issue in the case at bar. Moreover, it appears that *CSFTNO* did not involve the constitutional challenge of a statute or a regulation adopted under a statute; instead, the parties had contested the legality of discretionary administrative decisions limiting access to French schools. Indeed, the Supreme Court focused on the conditions for exercising such a power in situations in which the values of the *Canadian Charter* come into play.⁶³⁷ It concluded its analysis with what it referred to as “important clarifications”.⁶³⁸ although it ruled in favor of the appellant school board, the Court noted that the decisions in *Solski*⁶³⁹ and *Nguyen*⁶⁴⁰ remained fully applicable, and that, as regards the model endorsing freedom of choice of the language of instruction, it still had no place in a case such as the one before it. In short, there is nothing in this judgment to support the EMSB’s arguments on the effects of s. 23.

[599] One last decision also merits close examination: *CSFCB*.⁶⁴¹ In 2020, the appellant board (the “Board”), the only one of its kind in British Columbia, administered 37 schools across the province. In its originating proceedings, it sought the correction of alleged violations of s. 23, some of which involved various aspects of the funding of the services provided by the Board, and others which concerned requests for the approval of new schools or improvements to existing schools. The Board, which was dissatisfied with the

⁶³⁵ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

⁶³⁶ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, paras. 63 and 84.

⁶³⁷ The Court also mentioned the following relevant judgments, among others: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Doré v. Barreau du Québec*, 2012 SCC 12.

⁶³⁸ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para. 103.

⁶³⁹ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14.

⁶⁴⁰ *Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47.

⁶⁴¹ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13.

result at trial, where it had won its case in part, appealed. The Court of Appeal dismissed its appeal and allowed the province's cross appeal, in which it had challenged the trial judge's award of damages to the Board. In the Supreme Court, Wagner, C.J. wrote the majority reasons. That majority, comprised of seven judges, allowed the Board's appeal in part. Brown and Rowe, JJ. dissented in part.

[600] *CSFCB* was an opportunity for the Supreme Court to completely update the analytical framework established in *Mahe*. After noting that the trial and appellate judgments contained an exhaustive and rigorous analysis of various issues, Wagner, C.J. nevertheless added, from the outset, that these jurisdictions had "adopted an inordinately narrow interpretation of s. 23".⁶⁴² *CSFCB*, therefore, offered precise and highly illuminating guidance as to the lessons to be drawn from *Mahe*, without, however, calling into question the main elements of the analytical framework set out in that judgment. At paras. 90 to 93 of the majority reasons, Wagner, C.J. summarized the approach, before applying it to the facts that the trial had brought to light. In these reasons, we will not comment on all of the Supreme Court's clarifications, as numerous elements of the *CSFCB* analysis dealt with considerations entirely unrelated to what is at issue in the appeals currently before this Court. It is helpful, however, to mention the aspects that are most salient for our purposes, those that may be relevant here.

[601] The structure set up by *Mahe* was left intact, but the elements to be weighed in assessing each of its components were developed and clarified. At the high end of the sliding scale in British Columbia were the so-called "homogeneous"⁶⁴³ French-language schools. These are entirely separate facilities, managed and controlled by the linguistic minority. A homogeneous minority school is always warranted where French language minority children are present in sufficient numbers to match the enrolment of English language majority children that justifies the creation of a homogeneous English-language school for them in the same region. The enumeration process must take long-term demographic projections into account. To ensure the process is fair, it may have to be done on a provincial rather than a local basis. If there are X number of homogeneous majority language schools with an enrolment comparable to that of the minority, this gives rise to the presumption that, proportionally speaking, X number of homogeneous minority language schools would also be appropriate, it being understood that "comparable" does not mean "identical". The province may, however, rebut this presumption with proof on a balance of probabilities that refutes all or part of the basis for the presumption. As one moves away from the high end of the scale towards the lower end, the focus shifts to the range of school services provided to the minority, and the central question becomes whether the services offered to the minority are equivalent to those offered to the majority. In this regard, formal equivalence and proportional equivalence give way to the genuine

⁶⁴² *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 3.

⁶⁴³ As opposed to "heterogeneous" schools, which include those that have English and French classes under the same roof.

criterion, that of substantive equivalence. Substantive equivalence must be determined in accordance with the approach set out in *Rose-des-vents*, always bearing in mind the likelihood of assimilation and cultural erosion.

[602] The foregoing must be understood in light of the actual (i.e., de facto) impact of the Court's judgment. The complexity of the assessment process required by the analytical framework established by the Court is strikingly apparent in the disposition of the majority in *CSFCB*.⁶⁴⁴ The same could already be said of the disposition in the trial judgment,⁶⁴⁵ a judgment that was rendered before the Supreme Court had provided the clarifications it did in *CSFCB*. The trial judge had concluded that the French-speaking communities of Squamish, Sechelt (catchment area of Ecole du Pacifique), Penticton (catchment area of Ecole Entre-lacs) and West Vancouver⁶⁴⁶ were entitled to homogeneous schools. As we saw earlier, the majority of the Supreme Court found that this interpretation of *Mahe* was "inordinately narrow". It therefore added several homogeneous schools (for Abbotsford, the Central Fraser Valley, Burnaby, Chilliwack, Northeast Vancouver, East Victoria, North Victoria, West Victoria and Whistler⁶⁴⁷). The attendance capacity of these homogeneous schools, which stood at 900 students after the trial judgment, was increased by 967 places to 1867 students. The disposition in the *CSFCB* ruling, which took the form of a series of declaratory conclusions, also contained four judgments that covered four separate regions and were all worded in the same way, such as the following one for the Kelowna area:

[183] [...]

- (e) Children of rights holders in the Kelowna area are entitled to an educational experience that is substantively equivalent to the experience at nearby majority language schools.⁶⁴⁸

b. Effect of s. 23 in the case at bar

[603] If we summarize the guidelines provided in the foregoing cases, we first note that, of all the various remedial measures considered mandatory by the courts in the

⁶⁴⁴ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, paras. 182 to 187.

⁶⁴⁵ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2016 BCSC 1764, paras. 6834 to 6837, after a 238-day trial held between December 2013 and February 2016.

⁶⁴⁶ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2016 BCSC 1764, paras. 6834 (b), (e), (g) and (i). Paragraphs 6834 (b), (e) and (g) correspond, respectively, to paras. 183 (k), (j) and (i) in *CSFCB*.

⁶⁴⁷ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, paras. 183 (a), (b), (c), (d), (l), (m), (n), (o) and (p).

⁶⁴⁸ *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13. See also: *id.*, paras. 183 (f), (g), and (h).

enforcement of s. 23, every one of them without exception attaches to the core characteristics of minority language rights in an educational context. In particular, such measures pertain to:

- i. the physical, pedagogical and administrative conditions under which minority language instruction is offered (the right to minority language instruction, the right to separate classes where such instruction is offered, the right to proportional representation of the minority on the linguistic majority's school councils and school boards, the right to "homogenous" minority language schools, the right to separate school councils and school boards to administer one or more homogenous schools, the right to manage these facilities and to exercise exclusive control over them);
- ii. the arrangements for school-related support activities (such as transportation to and from school, or extracurricular sporting and cultural activities); and
- iii. the potentially deterrent effects on right holders of certain measures taken under s. 23, measures that might hasten the assimilation or cultural erosion of the linguistic minority due to the impact of various pedagogical choices (a limited number of hours of minority language instruction, or the teaching of that language in immersion classes where it is taught as a second language rather than as a first language in a minority language school).

[604] For linguistic and cultural minorities in Canada, whether anglophone or francophone, s. 23 serves as a bulwark against their own decline. The desire to avoid assimilation caused by the delays often associated with government inaction in this field is therefore an important aspect frequently taken into account by the courts. This particular factor, however, is entirely absent in the case now before this Court.

[605] When interpreting and applying s. 23, the first concern must be the rights of the persons contemplated by the provision (rights holders), followed by a consideration of the impact that an infringement of these rights may have on the situation of other beneficiaries of the regime, such as the primary and secondary school students and the "educational facilities", as s. 23 refers to them, intended to provide instruction to those students. The *Canadian Charter*, after all, introduces s. 23 with the title "MINORITY LANGUAGE EDUCATIONAL RIGHTS / DROITS À L'INSTRUCTION DANS LA LANGUE DE LA MINORITÉ". No such rights holder, however, is prejudicially affected here. Nothing in the *Act* has any impact whatsoever on the use of the English language in schools. Nor does anything curtail its unrestricted use in a schooling context, whether it be by students, in the offices of the linguistic minority's school boards, or in the schools where members of the linguistic minority perform their professional duties as teachers, pedagogical support personnel, school administrators or otherwise. Rather, what is at stake here is a restriction on recruitment practices, which in no way pertains to linguistic considerations.

[606] Furthermore, none of the cases analysed in the preceding pages approximates in any way the situation on which the trial judge had to rule. It goes without saying that the principles the Supreme Court infers from s. 23 must be interpreted in a flexible manner. That said, the words set out in provisions of the Constitution may impose clear restrictions on its scope, as was pointed out earlier. Interpreting the case law dealing with the *Canadian Charter* also requires that due regard be paid to existing constraints. Here too, context matters, and it is necessary to take fully into account the circumstances that informed developments in the case law. Precedent depends on this factor — a precedent is much more than mere words one can quote out of context, as it comes with its surrounding context. And this context assists the interpreter in understanding the meaning and intent of the words in which, on a case-by-case basis, jurisprudence expresses itself.

[607] If accepted in its current form, the argument of the parties opposed to the *Act* would artificially constitutionalize a practice, one that emerged only recently, at that, and has absolutely nothing to do with the English language as it is taught and used by Quebec's linguistic minority in the primary and secondary schools. The justification so offered amounts at best to an extrapolation from well-settled rules: it is premised on the alleged possibility for educational facilities governed by s. 23 to protect and promote the distinct "culture" which is said to prevail in the English schooling system, a culture that, it is claimed, fosters diversity and, in particular, religious diversity.

[608] "Culture", understood as an ethnological or sociological concept, takes many different forms, and the concept certainly extends well beyond the notion of "language of the minority". It can stretch in many directions and apply to all sorts of concepts that have little or nothing to do with language as such. For example, one speaks of general, ancient or modern culture, political, legal, Indigenous, religious, literary, musical or gastronomic culture, or Mediterranean or Asian culture. These various heterogeneous or homogenous entities may evolve and prosper without being tied to and dependent upon one language only, be it the language of the minority or the majority. Moreover, such entities often coexist in parallel in many languages, which they all transcend. In that sense, one thing cannot be doubted — language and culture are not merged into one and the same thing.

[609] More specifically, however, what is valued here, according to this argument, is a culture of openness, of diversity, and of the Canadian heritage of multiculturalism and pluralism, particularly as regards religion. With respect to multiculturalism and cultural diversity, it is true that s. 27 of the *Canadian Charter* explicitly makes room in the Constitution for "the multicultural heritage of Canadians / *patrimoine multiculturel des Canadiens*". But s. 27 must be read and reconciled with s. 23, which does not refer to cultural minorities other than the English linguistic minority and the French linguistic minority, such minorities being the sole rights holders under this provision. As for pluralism, an open conception thereof, which also has its place here, suggests that there are distinctions to be drawn between different aspects of diversity. Along these lines, one

might observe that it is difficult to associate the values of pluralism or tolerance with certain extreme forms of orthopraxy (some of which come under s. 8 of the *Act*). What some regard as immutable dogmas resulting from a divine revelation may, in the eyes of others who enjoy the same freedom of thought and freedom of conscience, amount to an aggregate of exogenous beliefs based on superstition if not on sectarianism. Many societal divisions may also arise in a number of other ways, for example, for reasons of ideological intransigence, fundamentalism or the pursuit of a distinct identity. The page, it seems, has not yet been turned on this kind of friction, made possible by diversity and, in a sense, born of it. And it may not be desirable to entirely turn this page, especially if these divisions and frictions are the necessary price to pay for the establishment of a more diverse society. But these considerations are far removed from the issue of language, and, plainly, s. 23 of the *Canadian Charter* does not address any of them.

[610] This is not to say that no rational link can exist between the language of a linguistic minority contemplated by s. 23 and, in the full sense of the word, the culture of this minority, suffused as it is with its language and supported by it.

[611] Provincial governments fairly frequently change the pedagogical regime or the content of programs offered within the school system. No one disputes that, as a general proposition, they have the authority to do so. They sometimes even specify the precise content of courses that teachers are required to give. At times, these actions elicit reservations and may even meet with strong and hostile reactions from users of the school system, as clearly evidenced in *S.L. v. Commission scolaire des Chênes*⁶⁴⁹ and *Loyola High School v. Quebec (Attorney General)*⁶⁵⁰ with respect to a field other than language teaching.

[612] It is not difficult to imagine a Department of Education taking steps to determine what will be taught as part of existing programs and taking an initiative, perhaps ill-advised, which could have a direct, perceptible and prejudicial impact in a school setting on the quality and growth of a minority language. For example, where English is the language of the minority, such could be the case with a curriculum reform advocating or, even more so, imposing the exclusive use of local literature in the teaching of English, thereby excluding several well-known English international authors. A policy of this sort would undoubtedly cause harm to the language of the minority and to the culture associated with that language. It would give rise to government action whose effect — whether deliberate or not — would manifestly weaken them, reduce them to the level of a language and a culture regional in scope, all of which would detrimentally affect their ascendancy and reach.

⁶⁴⁹ 2012 SCC 7.

⁶⁵⁰ 2015 SCC 12.

[613] With a modified scenario, a parallel and equally damaging result becomes apparent with French as the language of the minority and with a different array of famous names from international French literature. The fact remains that this kind of government action, detrimental as it would be to the dissemination and the flourishing of a language, and thus to the culture that is inseparable from it, might well, if it were challenged, as it probably would, amount to an infringement of the right to control and manage the minority language educational facilities. And it certainly would not suffice to answer that, in any event, where possible, francophone students will have the opportunity to study the great French authors in their English translations when being taught English. Here again, however, what is at stake is the close, even interwoven, relationship between a minority language protected by s. 23 and the culture it disseminates where the use of this language is widespread enough.

[614] Such is not the case here. Instead, the argument of the parties opposed to the *Act* attempts to take elements that are unrelated to language, sharing no characteristics with it, and glue them together around the notion of “culture”. At best, according to this argument, such elements are entirely peripheral to the notion of culture, and even this remains to be shown. Under this guise, applications have been presented to the Court which, in light of the relevant jurisprudence, have nothing in common with claims that, in the last 35- or 40 years, were successfully argued under s. 23 of the *Canadian Charter*. In other words, the Trial Judgment gives s. 23 a scope it does not have. In so doing, it erroneously concludes that the *Act* infringes this provision of the *Canadian Charter*. It therefore follows that the Court must reverse the Trial Judgment on that point.

[615] In light of this result, it is not necessary to further consider the effect of s. 1 of the *Canadian Charter*, nor is it necessary to address the parties’ arguments on the remedial orders made by the trial judge.

E. Right to be qualified for membership in a legislative assembly

[616] The challenge under this heading involves the democratic rights enshrined in s. 3 of the *Canadian Charter*, which section, it bears repeating, does not fall within the purview of s. 33 (the notwithstanding clause) and which reads:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

[617] The provisions of the *Act* at issue here are s. 6, read in conjunction with paras. 1 and 6 of Schedule II, and s. 8, para. 1, read in conjunction with para. 1 of Schedule III.

The excerpts from these provisions most relevant to the resolution of this ground of appeal read as follows (for ease of reference, some of them are reproduced here again):

6. The persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions. [...]

6. Le port d'un signe religieux est interdit dans l'exercice de leurs fonctions aux personnes énumérées à l'annexe II. [...]

SCHEDULE II

ANNEXE II

[...]

[...]

PERSONS SUBJECT TO THE PROHIBITION ON WEARING RELIGIOUS SYMBOLS IN THE EXERCISE OF THEIR FUNCTIONS

PERSONNES VISÉES PAR L'INTERDICTION DE PORTER UN SIGNE RELIGIEUX DANS L'EXERCICE DE LEURS FONCTIONS

(1) the President and Vice-Presidents of the National Assembly;

1° le président et les vice-présidents de l'Assemblée nationale;

[...]

[...]

(6) the Minister of Justice and Attorney General [...]

6° le ministre de la Justice et procureur général [...]

8. Personnel members of a body must exercise their functions with their face uncovered. [...]

8. Un membre du personnel d'un organisme doit exercer ses fonctions à visage découvert. [...]

SCHEDULE III

ANNEXE III

[...]

[...]

PERSONS CONSIDERED TO BE PERSONNEL MEMBERS OF A BODY FOR THE PURPOSES OF MEASURES RELATING TO SERVICES WITH FACE UNCOVERED

PERSONNES ASSIMILÉES À UN MEMBRE DU PERSONNEL D'UN ORGANISME POUR L'APPLICATION DES MESURES RELATIVES AUX SERVICES À VISAGE DÉCOUVERT

(1) Members of the National Assembly; [...]

1° un député de l'Assemblée nationale; [...]

[618] The trial judge refused to accept that the impugned provisions escape scrutiny under the *Canadian Charter* as being rules which constitute the exercise of a parliamentary privilege. He further held that the combined effect of the first paragraph of s. 8 and of paragraph 1 of Schedule III of the *Act* infringes the right to be qualified for membership in a legislative assembly, as guaranteed by s. 3 of the *Canadian Charter*. He found, however, that s. 6 and paragraphs 1 and 6 of Schedule II do not limit that right in any way. The AGQ appeals the first two findings, whereas Lord Reading appeals the third.

[619] The AGQ argues, notably, that the first paragraph of Schedule III of the *Act*,⁶⁵¹ which, in effect, subjects members of the National Assembly (hereinafter sometimes referred to as “MNAs”) to the obligation set forth in the first paragraph of s. 8 to exercise their functions with their face uncovered,⁶⁵² is not contrary to s. 3 of the *Canadian Charter* and that the trial judge erred in holding otherwise, adding that the judge should furthermore have declined to rule on that constitutional issue and on the issue relating to parliamentary privilege in the absence of a factual context in support thereof.

[620] For its part, Lord Reading submits that the judge erred in refusing to find that s. 6 of the *Act*, read in conjunction with paragraphs 1 and 6 of Schedule II, violates s. 3 of the *Canadian Charter* because those provisions operate to prohibit the President and Vice-presidents of the National Assembly, as well as the Minister of Justice and Attorney General (hereinafter collectively referred to as the “Affected Members of the Legislature”) from wearing religious symbols in the exercise of their functions.

[621] Added to the issues raised by the AGQ and Lord Reading is the President’s intervention on appeal. The latter asks the Court to set aside that portion of the Trial Judgment concerning parliamentary privileges and to refrain from ruling on that issue on appeal by reason of the “factual vacuum” surrounding it. Subsidiarily, should the Court decide to rule on the issue, he submits that s. 6, read together with paragraph 1 of Schedule II of the *Act*, and s. 8, read together with paragraph 1 of Schedule III, are immune from judicial review as a matter of parliamentary privilege over the management of the National Assembly’s internal affairs.

⁶⁵¹ As previously discussed, s. 7 of the *Act* limits the application of s. 8 to “a member of the personnel of a body listed in Schedule I or a person listed in Schedule III who is considered to be such a member / un membre du personnel d’un organisme énuméré à l’annexe I ainsi qu’une personne mentionnée à l’annexe III qui est assimilée à un tel membre”.

⁶⁵² It is worth noting that under s. 9 of the *Act*, this obligation does not apply “to persons whose face is covered for health reasons or because of a handicap or of requirements tied to their functions or to the performance of certain tasks / à une personne dont le visage est couvert en raison d’un motif de santé, d’un handicap ou des exigences propres à ses fonctions ou à l’exécution de certaines tâches”. Because this exception is not relevant to the analysis of this ground of appeal, there is no need to discuss it further.

[622] Before turning to the parties' submissions, we briefly summarize the trial judge's reasons.

1. Brief review of the reasons in first instance

[623] As indicated above, the trial judge found that the first paragraph of Schedule III of the *Act*, which, in effect, subjects MNAs to the obligation, set forth in the first paragraph of s. 8, to exercise their functions with their face uncovered, infringes the right to be qualified for membership in a legislative assembly, as guaranteed by s. 3 of the *Canadian Charter*.

[624] To make that finding, the judge rejected outright the AGQ's claim that [TRANSLATION] "the right to sit [in the National Assembly] should not be confused with the right to be a candidate in an election".⁶⁵³ He also dismissed the AGQ's claims relating to parliamentary privilege. He noted that the prohibition provided in the *Act* [TRANSLATION] "is of a different nature than the rules regarding discipline or those establishing guidelines concerning parliamentary debates or business".⁶⁵⁴ The judge went on to note that the AGQ [TRANSLATION] "had not demonstrated that the National Assembly requires unreviewable authority over the management of the wearing of religious symbols or clothing [covering] the face in order to maintain its sovereignty as a deliberative legislative assembly".⁶⁵⁵

[625] The trial judge concluded that the AGQ had also not discharged his onus to justify that infringement under s.1 of the *Canadian Charter*. Consequently, under s. 52 of the *CA 1982*, he declared the first paragraph of Schedule III, read in conjunction with s. 8 para. 1 of the *Act*, to be of no force or effect.⁶⁵⁶

[626] With regard to s. 6 and to the first and sixth paragraphs of Schedule II of the *Act*, the judge found that occupying the functions of the Affected Members of the Legislature is in the nature of a certain privilege and not of a right, such that, for these persons, the prohibition against wearing religious symbols does not, strictly speaking, fall within the purview of s. 3 of the *Canadian Charter*.⁶⁵⁷ He therefore refused to issue the declaration of invalidity sought with respect to those provisions.

⁶⁵³ Trial Judgment, para. 886.

⁶⁵⁴ Trial Judgment, para. 888.

⁶⁵⁵ Trial Judgment, para. 908.

⁶⁵⁶ Trial Judgment, paras. 921 and 1129-1131.

⁶⁵⁷ Trial Judgment, para. 891.

2. Analysis

[627] Before the Court, the parties' submissions can be summarized in the following three questions:

- Should the Court rule on whether the impugned provisions of the *Act* are immune from scrutiny under the *Canadian Charter* because they constitute the exercise of a privilege of the National Assembly and, if so, did the trial judge err on that issue?
- Did the trial judge err in finding that the first paragraph of Schedule III of the *Act*, read in conjunction with s. 8, infringes the right to be qualified for membership in a legislative assembly, as guaranteed by s. 3 of the *Canadian Charter*, and that this infringement cannot be justified under s. 1 of said *Charter*?
- Did the trial judge err in refusing to find that paragraphs 1 and 6 of Schedule II relating to the Affected Members of the Legislature, read in conjunction with s. 6 of the *Act*, infringe s. 3 of the *Canadian Charter*?

[628] Each of these questions merits attention.

a. Parliamentary privilege

[629] The AGQ and the President criticize the judge for having ruled on the issue of parliamentary privilege, arguing that he [TRANSLATION] "should have favoured a cautious approach on that constitutional issue," especially since his finding rests on a [TRANSLATION] "purely theoretical factual underpinning".⁶⁵⁸ The AGQ adds that he had not [TRANSLATION] "sought to rely on parliamentary privilege as a defence".⁶⁵⁹ As for the President, he notes that because he did not take part in the trial proceedings [TRANSLATION] "the trial judge was deprived of helpful guidance on the matter of privileges, more specifically as to the workings of the [National] Assembly".⁶⁶⁰ Subsidiarily, the President urges the Court to find that the judge conflated the determination that a court must make as to the *existence* of parliamentary privilege with that of its *exercise*, the latter being within the exclusive purview of the legislative assembly and not reviewable by the courts.

[630] How should the matter be resolved?

[631] In *Vaid*,⁶⁶¹ the leading case on parliamentary privilege in Canada, Binnie, J., writing for a unanimous Court, stated "a number of propositions that are now accepted both by

⁶⁵⁸ Intervenor's A. (President), para. 8.

⁶⁵⁹ A.A. (AGQ), para. 52.

⁶⁶⁰ Intervenor's A. (President), para. 8.

⁶⁶¹ *Canada (House of Commons) v. Vaid*, 2005 SCC 30 ["*Vaid*"].

the courts and by the parliamentary experts”.⁶⁶² A brief review of some of these is in order to highlight the role and importance of parliamentary privilege in our constitutional framework.

[632] The definition of parliamentary privilege, which is uncontroversial, can be summarized as follows:

29 [...]

2. Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions [...].⁶⁶³

[633] Parliamentary privilege aims to ensure respect for the constitutional separation of powers of the executive, legislative and judicial branches and, on that basis, enjoys constitutional status.⁶⁶⁴ It ensures that the legislature [TRANSLATION] “has the autonomy required to ‘perform [its] constitutional function,’ i.e., its legislative, deliberative and governmental control functions”.⁶⁶⁵ Here is how Karakatsanis, J., writing for the majority in *Chagnon*, summarized those principles:

[1] Legislative bodies in Canada have inherent parliamentary privileges which flow from their nature and function in a Westminster model of parliamentary democracy. By shielding some areas of legislative activity from external review, parliamentary privilege helps preserve the separation of powers. [...].

[...]

⁶⁶² *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 29. See also: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [“*Chagnon*”].

⁶⁶³ *Canada (House of Commons) v. Vaid*, 2005 SCC 30.

⁶⁶⁴ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, pp. 375-378 and 384 (majority reasons of McLachlin, J. (as she then was)). Beyond the privileges entrenched in the Constitution, the federal Parliament’s power to legislate parliamentary privileges is grounded on the combined effect of s. 18 of the *CA 1867* (as amended in 1875 by the *Parliament of Canada Act, 1875*) and s. 4 of the *Parliament of Canada Act, R.S.C. 1985, c. P-1: Canada (House of Commons) v. Vaid*, 2005 SCC 30, paras. 33 and 35-36. The power of provincial legislatures to define their privileges is not as clear, however. Many appear to recognize that such a power, which originally flowed from s. 92(1) of the *CA 1867*, now rests, since the repeal of that latter subsection, on s. 45 of the *CA 1982: Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCS 39, paras. 60-62 (concurring reasons of Rowe, J.); Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, pp. 325-326, no. V-1.219; Warren J. Newman, “Parliamentary Privilege, the Canadian Constitution and the Courts”, (2008) 39:3 *Ottawa L. Rev.* 573, pp. 580-581.

⁶⁶⁵ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 326, no. V-1.219, citing: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 41.

[23] [...] It is an inherent and necessary component of the Westminster model of parliamentary democracy. As in the U.K., the inherent privileges of Canadian legislative bodies are a means to preserve their independence and promote the workings of representative democracy. It is meant to enable the legislative branch and its members to proceed fearlessly and without interference in discharging their constitutional role, that is, enacting legislation and acting as a check on executive power (*New Brunswick Broadcasting*, at p. 354; *Vaid*, at paras. 21 and 41). It guarantees “an independent space for the citizens’ representatives to carry out their parliamentary functions; the freedom to debate and decide what laws should govern, and the unfettered ability to hold the executive branch of the State to account” (S. R. Chaplin, “*House of Commons v. Vaid: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament*” (2009), 2 *J.P.P.L.* 153, at p. 154).⁶⁶⁶

[Underlining added]

[634] The onus is on the party claiming immunity deriving from a parliamentary privilege to establish the existence thereof. To that end, it must show that the claimed privilege is “necessary”⁶⁶⁷ (within the meaning recognized by the case law⁶⁶⁸) to the proper functioning of the legislative body and to the exercise of the legislative function. However, to ensure respect for the separation of powers, the courts’ role is limited to ruling on the existence and scope of parliamentary privilege; only the legislature can determine the occasion and manner of its exercise:

29 [...]

9. Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a

⁶⁶⁶ *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39.

⁶⁶⁷ *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, para. 32; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paras. 29(5) and (8). It should be noted that, at the federal level, there is no need for inquiry into necessity where the existence and scope of a privilege at Westminster or at our own Parliament is authoritatively established (either by British or Canadian precedent): *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paras. 37 and 39-40; *Canada (Board of Internal Economy) v. Boulterice*, 2019 FCA 33, para. 54, application for leave to appeal to the Supreme Court dismissed, July 18, 2019, No. 38586. However, “given its rationale, the necessity of a privilege must be assessed in the contemporary context. Even if a certain area has historically been considered subject to parliamentary privilege, it may only continue to be so if it remains necessary to the independent functioning of our legislative bodies today”: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, para. 31.

⁶⁶⁸ *Canada (House of Commons) v. Vaid*, 2005 SCC 30, para. 29(4): “The idea of necessity is [...] linked to the autonomy required by legislative assemblies and their members to do their job.” See also: *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, paras. 29-30.

particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: “Each specific instance of the exercise of a privilege need not be shown to be necessary” (*New Brunswick Broadcasting*, at p. 343 (emphasis added)).⁶⁶⁹

[635] Such insulation from judicial review that privilege provides is a key component of our constitutional structure and extends “even [to] *Charter* compliance”.⁶⁷⁰ The *Canadian Charter* and parliamentary privilege enjoy the same constitutional weight and status. Thus, where there is an inconsistency between the privilege and the *Canadian Charter*, one must seek to reconcile the two. In *Chagnon*, the majority, in reasons written by Karakatsanis, J., cited with approval what McLachlin, J., then writing for the minority, had noted a few years earlier in *Harvey*.⁶⁷¹

[28] Where the privilege that is claimed could undermine the *Charter* rights of people who are not members of the legislative assembly, a purposive approach helps to reconcile parliamentary privilege with the *Charter*. Neither the *Charter* nor parliamentary privilege “prevails over the other” (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 69). They “enjo[y] the same constitutional weight and status” (*Vaid*, at para. 34 (emphasis deleted)). Accordingly, when conflicts between the *Charter* and parliamentary privilege arise, “the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them” (*Harvey*, at para. 69). No doubt it will sometimes be challenging to reconcile these two constitutional imperatives [...]. In *Harvey*, McLachlin J. sought to reconcile them by adopting a narrower interpretation of s. 3 of the *Charter* so it was consistent with parliamentary privilege, and limiting the scope of the privilege at issue in light of the *Charter* (paras. 70 and 74). A purposive approach to parliamentary privilege recognizes the *Charter* implications of parliamentary privilege. It strives to reconcile privilege and the *Charter* by ensuring that the privilege is only as broad as is necessary for the proper functioning of our constitutional democracy.⁶⁷²

[Underlining added]

[636] The few preceding paragraphs are undoubtedly a very incomplete summary of the case law on parliamentary privilege. They do, however, provide an indication of its

⁶⁶⁹ *Canada (House of Commons) v. Vaid*, 2005 SCC 30.

⁶⁷⁰ *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, para. 24.

⁶⁷¹ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

⁶⁷² *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39.

constitutional status and highlight the fact that, like the *Canadian Charter*, it is “[a] constitutional principl[e] of fundamental importance”.⁶⁷³

[637] In this context, one might question the way in which the AGQ addressed this constitutional concept at trial. Indeed, we note that it was only during oral arguments, and therefore after the parties had presented their evidence, that the AGQ raised the issue of parliamentary privilege for the first time, and in a rather ambiguous way.

[638] In his amended outline of argument, dated December 8, 2020, the AGQ explained that he was advancing this constitutional concept to enlighten the trial judge following questions posed during the Hak Group’s submissions. He wrote:

[TRANSLATION]

437.1 That being said, without expressing a definitive position, the AGQ submits a few possible tentative answers to the questions posed by the court regarding s. 3 of the Canadian Charter and its application with respect to paragraph 1 of Schedule II of the Act (President and Vice President of the National Assembly, with regard to the restrictive [*sic*] relating to the wearing of a religious symbol), as well as to paragraph 1 of Schedule III (MNAs, with regard to the requirement of having their face uncovered in the exercise of their functions). A number of questions were also posed regarding a portion of paragraph 6 of Schedule II.

Paragraph 1 of Schedule II and paragraph 1 of Schedule III

437.2 Should the court chose to raise the issue of the right to be qualified for membership, the issue of parliamentary privilege will inevitably arise in relation to paragraph 1 of Schedule II of the Act, as well as in relation to paragraph 1 of Schedule III.⁶⁷⁴

[Underlining added]

[639] Yet we see that the [TRANSLATION] “issue of the right to be qualified for membership” was not a fresh issue raised by the judge since, at least as far as s. 8 para. 1 and paragraph 1 of Schedule III of the *Act* were concerned, it was at the heart of the Hak Group’s submissions at trial and, *ipso facto*, of the AGQ’s defense as to the scope of s. 3 of the *Canadian Charter*.⁶⁷⁵

⁶⁷³ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, para. 56 (reasons of McLachlin, J. (as she then was)).

⁶⁷⁴ AGQ’s amended outline of argument, December 8, 2020.

⁶⁷⁵ AGQ’s defence, July 31, 2020, No. 500-17-108353-197, paras. 209-213.

[640] But, in any event, the AGQ added that he was not [TRANSLATION] “expressing a definitive position”⁶⁷⁶ on the issue of parliamentary privilege, while urging the trial judge to exercise caution on that issue because, among other things, the President was not a party to the proceedings:

[TRANSLATION]

437.3 The issues as to the doctrine of parliamentary privileges are complex and raise fundamental questions about, among other things, the balance between the legislative and judicial branches. [...]

437.4 As Binnie, J. noted in [*Vaid*], at paragraph 20 “[i]t is a wise principle that the courts and Parliament strive to respect each other’s role in the conduct of public affairs. [...] The courts, for their part, are careful not to interfere with the workings of Parliament. [...]”. In his view, “[p]arliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected”. [...]

437.5 This is therefore the type of proceeding in which it would be highly imprudent to rule without giving the National Assembly a full and complete opportunity to argue its case.⁶⁷⁷

[Underlining added]

[641] Despite that cautionary note, which, in principle, also applied to him, the AGQ went on to argue, in his written submissions, but still [TRANSLATION] “without expressing a definitive position”, that paragraph 1 of Schedule II, in conjunction with s. 6 of the *Act*, and paragraph 1 of Schedule III, in conjunction with s. 8 para. 1, [TRANSLATION] “*likely concern two firmly established categories of privileges*, i.e., that of the National Assembly’s control over its debates or proceedings, and its disciplinary authority over its members”⁶⁷⁸ (italics added). His oral submissions were to the same effect.⁶⁷⁹

[642] In short, if we are to summarize, we understand that the AGQ cautioned the trial judge against the risk of ruling on the existence of a privilege of the National Assembly in the absence of the President, while at the same time arguing the limited protection granted by s. 3 of the *Canadian Charter* and contending in the same breath, but [TRANSLATION] “without expressing a definitive position” on that point, that the impugned provisions go to the valid exercise of two categories of parliamentary privilege.

⁶⁷⁶ AGQ’s amended outline of argument, December 8, 2020, paras. 437.1 and 437.6.

⁶⁷⁷ AGQ’s amended outline of argument, December 8, 2020.

⁶⁷⁸ AGQ’s amended outline of argument, December 8, 2020, para. 437.6.

⁶⁷⁹ Mtre Cantin’s submissions, December 9, 2020, pp. 24-26 and 29-30.

[643] In such a context, the Court certainly cannot fault the trial judge for having considered — with care we might add — the issue of parliamentary privilege. In light of the *real ambiguity* stemming from the AGQ’s submissions on that issue, the judge could reasonably have understood that the AGQ was relying on parliamentary privilege as a [TRANSLATION] “ground of defence”,⁶⁸⁰ despite the caveats and cautions he expressed.

[644] The situation on appeal is different, however, notably in light of the AGQ’s clarifications and the President’s intervention. Considering the circumstances *before it*, the Court deems it inappropriate to rule on the existence (or non-existence) of a parliamentary privilege. Here are the reasons.

[645] First, as discussed above, parliamentary privilege is a “constitutional principle [...] of fundamental importance,” which should not be relied upon — nor, consequently, determined — lightly. The party relying on the immunity conferred by parliamentary privilege has the onus of establishing its existence. Before the Court, however, no party has claimed the existence of such an immunity. The President, as an intervenor, criticizes the judge for having ruled on the matter, considering that he was not a party to the proceeding and considering the “factual vacuum” in which the issue was addressed. The AGQ adopts the same position, while expressly indicating that he did not [TRANSLATION] “seek to rely on parliamentary privilege as a defence,”⁶⁸¹ be it at trial or on appeal. While the issue may have created confusion at trial, it now has the merit of being clear.

[646] We also note that, without discussing the concept of “parliamentary privilege”, the AGQ nevertheless urges the Court to define the scope of s. 3 of the *Canadian Charter* so as to exclude therefrom protection aimed at [TRANSLATION] “that which goes to the performance of an MNA’s duties once elected” or relating to “the internal affairs of a legislative assembly”.⁶⁸² We will return to this point below, but in the Court’s view, this is clearly insufficient to bring it to consider the constitutional issue of whether the impugned provisions of the *Act* in this regard satisfy the necessity test and escape scrutiny under the *Canadian Charter* as rules falling within the exercise of a parliamentary privilege.

[647] Second, the record is quite deficient as to the factual background relevant to the determination of whether a parliamentary privilege exists. This is clearly due to the issue

⁶⁸⁰ A.A. (AGQ), para. 52.

⁶⁸¹ A.A. (AGQ), para. 52.

⁶⁸² A.A. (AGQ), para. 64. We add that, in its submissions before the Court, the AGQ does not in any way discuss parliamentary privilege (its existence and scope) other than to criticize the judge for having ruled on that issue.

having been raised at trial only after the parties had presented their evidence, that is, during oral arguments.⁶⁸³

[648] Finally, the question of parliamentary privilege does not by itself resolve the debate surrounding the impugned provisions of the *Act* (paras. 1 and 6 of Schedule II (s. 6) and para. 1 of Schedule III (s. 8)). Indeed, their scope extends beyond the functions exercised during parliamentary proceedings, and therefore beyond matters that may be protected by a parliamentary privilege. The Affected Members of the Legislature and the other MNAs are subject to those provisions “in the exercise of their functions / *dans l’exercice de leurs fonctions*”⁶⁸⁴ — i.e., all of their functions, not only the legislative functions exercised as members of a legislative assembly. Indeed, the functions of the Affected Members of the Legislature and of the other MNAs are not limited to their participation in parliamentary proceedings, which generally span a period of 10 to 18 weeks a year, including ordinary hours of meeting and extended hours of meeting, depending on the times of the year.⁶⁸⁵ Although those proceedings form an essential part of the work of any elected official, MNAs also act as intermediaries between their constituents and the public administration, or as representatives of the Quebec State in various activities outside the National Assembly, whether in the province, in Canada or abroad.

[649] In this regard, the following should also be noted. Initially, in his written submissions, the President had asked the Court, should it decide to rule on the issue of parliamentary privileges, to determine that the provisions of the *Act* [TRANSLATION] “that involve members of the [National] Assembly fall within the exercise of a recognized constitutional parliamentary privilege, and that, consequently, they cannot be subject to review by the courts”.⁶⁸⁶ At the hearing before the Court, however, he amended the conclusion sought to limit its scope so as to include only parliamentary proceedings protected by parliamentary privilege. Accordingly, he now asks the Court, should it rule on this issue, to find that:

[TRANSLATION]

[Section 6 and]⁶⁸⁷ [s]ection 8 of Bill 21 confor[m] to the Constitution to the extent that [they] relat[e] to the constitutional functions that a legislative assembly and its

⁶⁸³ At the hearing of his application to intervene on appeal, the President indicated that he would be able to make his submissions in light of the record as it stood, without submitting fresh evidence before the Court.

⁶⁸⁴ Section 6. Similarly, s. 8 para. 1 provides for the obligation “[to] exercise their functions with their face uncovered / *[d’]exercer ses fonctions à visage découvert*”.

⁶⁸⁵ Such a period can vary according to election periods.

⁶⁸⁶ Intervenor’s A. (President), para. 61 [reference omitted].

⁶⁸⁷ It was at the hearing before the Court that the President added the reference to s. 6 of the *Act* to the conclusion sought.

members exercise in the course of parliamentary proceedings, i.e., to the extent that [they] relat[e] to matters protected by parliamentary privilege.⁶⁸⁸

[650] This means that even if the Court were to rule that ss. 6 and 8 (in connection with para. 1 of each of Schedules II and III) are immune from review under the *Canadian Charter* as rules constituting the exercise of parliamentary privileges (at least as regards the functions exercised by MNAs and by the Affected Members of the Legislature in the course of parliamentary proceedings), the issue of the constitutional validity of those provisions would remain open with respect to the other functions of MNAs and of the Affected Members of the Legislature.

[651] Given the foregoing, the issues that the Court is called upon to determine are thus framed by the position adopted by the parties. In this respect, the present case is not unlike *Harvey*, where only the Attorney General of Canada, as an intervenor, had raised the issue of parliamentary privilege before the Supreme Court. La Forest, J., writing for the majority, noted the following in this regard:

20 [...] the issue [of parliamentary privileges] was not seriously argued before us. In fact it was willingly conceded that it was appropriate to judge the provisions of s. 119(c) in light of the *Charter*. Given that the parties to the present appeal have chosen not to ground their argument on the basis that expulsion and disqualification are privileges of the Legislative Assembly, and given that there were no submissions by any party on the point, it is not necessary to decide that issue here. I will therefore proceed on the basis that the provisions of s. 119(c) are subject to the *Charter*.⁶⁸⁹

[652] The Court finds itself obliged to adopt the same approach here, given the way in which that aspect of the dispute was submitted by the AGQ. The Court does not intend to go beyond the issues of the case as raised by the parties. Consequently, it will not rule on whether a parliamentary privilege exists nor on whether the privilege (if any) can be reconciled with s. 3 of the *Canadian Charter*.⁶⁹⁰ That being said, if the National Assembly believes it has a parliamentary privilege allowing it to require its members to participate in parliamentary proceedings with their face uncovered, or without religious symbols as regards the Affected Members of the Legislature or, on the contrary, allowing it to exempt them from any restriction in that regard, it can take the required steps to have the existence of such parliamentary privilege recognized.

⁶⁸⁸ President's outline of oral argument, November 8, 2022, p. 2.

⁶⁸⁹ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

⁶⁹⁰ Above, para. [635].

b. Section 8 and paragraph 1 of Schedule III of the Act

[653] The parties' submissions under this heading are based on three lines of argument, which we will examine in order: (1) the sufficiency of the factual basis for adjudicating the constitutional issue; (2) the scope of s. 3 of the *Canadian Charter* and its application, if any, to paragraph 1 of Schedule III (s. 8) of the *Act*; and (3) s. 1 of the *Canadian Charter*.

i. Sufficiency of the factual basis

[654] The AGQ (supported on this point by the President) faults the trial judge for having ruled on the constitutional issue of the validity of the impugned provisions of the *Act* under s. 3 of the *Canadian Charter* despite the fact that, in the AGQ's view, the challenge [TRANSLATION] "rested upon a non-existent factual substratum".⁶⁹¹ He submits that the scenario advanced by the parties opposed to the *Act* is [TRANSLATION] "purely theoretical and hypothetical".⁶⁹²

[655] The judge succinctly dismissed that argument:

[TRANSLATION]

[916] Respectfully, in the Court's view, those principles do not apply here. Indeed, it remains possible to constitutionally attack a legislative provision through logic and common sense to the extent that a factual background will add nothing necessary to the legal debate. This is the case here.

[656] The Court finds no error in that determination.

[657] The AGQ is correct in arguing that this aspect of the debate is not grounded on a concrete case (no more so, in fact, than the debate on s. 6 of the *Act*). Indeed, there is no evidence that anyone has been prevented from being a candidate in a provincial election because of their obligation to exercise their functions as an MNA with their face uncovered. In this regard, the debate can certainly be characterized as theoretical.⁶⁹³ Such a finding, however, does not mean that the factual basis was insufficient to allow the trial judge to rule.

[658] The AGQ is also right to say that, in principle, a constitutional issue should not be decided in a factual vacuum. A unanimous Supreme Court expressed this unambiguously in *Mackay v. Manitoba*:

⁶⁹¹ Trial Judgment, para. 915.

⁶⁹² A.A. (AGQ), para. 47.

⁶⁹³ It should be noted that, in the present case, the AGQ is not arguing the doctrine of mootness developed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. [...] In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. [...]

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. [...] *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.⁶⁹⁴

[Underlining added]

[659] In the case at bar, however, one cannot conclude that there is a factual vacuum, as the AGQ suggests.

[660] The existence of a factual basis is a question of context and does not necessarily require an actual breach of the claimant's constitutional rights. It is enough that the record be sufficiently complete so that the court can make a determination. In *R. v. Mills*, the majority of the Supreme Court wrote the following on this subject:

36 The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice, as s. 52 of the *Constitution Act, 1982*, declares a law to be of no force or effect to the extent that it is inconsistent with the Constitution.

37 However, accepting that the respondent may challenge the general constitutionality of the impugned legislation does not answer the question of whether the respondent must first apply for, and be denied, the production of third party records before bringing a constitutional challenge. The question to answer is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised. As Sopinka J. stated for the Court in *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 955, when discussing the general rule that constitutional challenges should be disposed of at the end of a case: "An apparently meritorious *Charter* challenge of the law under which the accused is charged which is not

⁶⁹⁴ *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, pp. 361-362. See also: *R. v. Downes*, 2023 SCC 6, para. 58; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, pp. 1099-1100.

dependent on facts to be elicited during the trial may come within this exception to the general rule” (emphasis added).⁶⁹⁵

[661] Here, the evidence includes the required elements to rule on the scope of s. 3 of the *Canadian Charter* and on any violation thereof. That evidence shows that some Muslim women wear the niqab in Quebec (although not in significant numbers⁶⁹⁶), one of whom filed an affidavit explaining her choice and the difficulties arising from the obligation to uncover her face in her workplace.⁶⁹⁷ Whether such an individual has or has not in fact stood for election will in no way change the debate surrounding s. 3 of the *Canadian Charter*; it will remain the same.

[662] Moreover, other than asserting that a court could be called upon to decide a [TRANSLATION] “genuine dispute” dealing with the issue and thus benefit from the [TRANSLATION] “concrete factual setting necessary to shed sufficient light on the constitutional issues raised”,⁶⁹⁸ the AGQ has not in any way specified what those other facts are that a [TRANSLATION] “concrete” case would add to the debate and in what way it would do so.

[663] In short, the judge had sufficient evidence before him to determine the constitutional issue related to s. 3 of the *Canadian Charter*, a provision that, as we will explain, has “special importance”⁶⁹⁹ and “lies at the heart of Canadian democracy”.⁷⁰⁰

ii. **Requirement that MNAs have their face uncovered and s. 3 of the Canadian Charter**

[664] The AGQ claims that the trial judge gave s. 3 of the *Canadian Charter* [TRANSLATION] “a scope that extends beyond the guarantee it provides, i.e., that of ensuring that every citizen has the right to be qualified for membership in a legislative assembly.”⁷⁰¹ It adds that, on a proper reading, the combined effect of s. 8 and of paragraph 1 of Schedule III of the *Act* does not infringe that right in any way because, for one thing, it in no way prevents anyone from being a candidate in legislative elections and, for another thing, it merely defines the rules applicable to members of the National Assembly (that argument again being similar here to the concept of parliamentary privilege, which the AGQ claims not to be relying upon). In other words, according to the

⁶⁹⁵ *R. v. Mills*, [1999] 3 S.C.R. 668.

⁶⁹⁶ Exhibit EMSB-28-16, Expert Report from Solange Lefebvre, para. 28, pp. 10-11.

⁶⁹⁷ Affidavit of Fatima Ahmad, June 13, 2019. In it, she referred to her teaching activities.

⁶⁹⁸ A.A. (AGQ), para. 46.

⁶⁹⁹ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [“*Sauvé*”], para. 11 (reasons of McLachlin, C.J., writing for the majority).

⁷⁰⁰ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, para. 1.

⁷⁰¹ A.A. (AGQ), para. 61.

AGQ, s. 3 of the *Canadian Charter* does not protect the functions exercised by someone after their election as a member of the National Assembly.

[665] In the Court's view, the AGQ's proposed reading of s. 3 of the *Canadian Charter* does not reflect the state of the law. The protection afforded by that provision [TRANSLATION] "includes the right to hold one's seat once elected",⁷⁰² such that disqualification from sitting in the National Assembly stemming from the application of s. 8 and of para. 1 of Schedule III of the *Act* infringes that right.

Interpretation of s. 3 of the Canadian Charter

[666] We begin by noting that, while the case law relating to s. 3 of the *Canadian Charter* deals mainly (but not exclusively) with its first part, which protects the right to vote, the principles it laid down are in our view just as relevant to the analysis of its second component, i.e., the right to be qualified for membership in a legislative assembly.

[667] It is not in dispute that the rights protected by the *Canadian Charter* must be given a broad and liberal interpretation.⁷⁰³ Indeed, in *Sauvé*, McLachlin, C.J., writing for the majority, insisted on the special importance of such an interpretation in the case of the right to vote protected by s. 3:

11 [...] A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33's notwithstanding clause. I conclude that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue.⁷⁰⁴

[668] Section 3 of the *Canadian Charter* should be understood with reference to the right of each citizen "to participate meaningfully in the electoral process"⁷⁰⁵ (that is, not only to vote, but to run for office as well) and in light of its importance in our democratic society. As Iacobucci, J., for the majority, wrote in *Figueroa v. Canada (Attorney General)*:

26 [...] On its very face, [...] the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a

⁷⁰² Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 289, no. V-1.87.

⁷⁰³ See, in particular: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 147; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 23; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, p. 156.

⁷⁰⁴ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68.

⁷⁰⁵ *Frank v. Canada (Attorney General)*, 2019 SCC 1 ["Frank"], para. 26.

manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.

[...]

29 It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.⁷⁰⁶

[Underlining added]

[669] Wagner C.J., for the majority, echoed that statement a few years later, in *Frank*:

[25] The right of every citizen to vote lies at the heart of Canadian democracy (*Sauvé #2*, at para. 1; *Opitz*, at para. 10). In *Sauvé #2*, a seminal decision on the right to vote, this Court reviewed the nature and purpose of s. 3 at length before striking down legislation which prevented inmates serving sentences of two years or more from voting in federal elections. McLachlin C.J., writing for the majority, stressed the critical importance of a broad and purposive interpretation of the right to vote. She stated that the framers of the *Charter* had “signaled the special importance of this right not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33’s notwithstanding clause” (para. 11). As a result, any intrusions on this core democratic right are to be reviewed on the basis of a stringent justification standard (para. 14).⁷⁰⁷

[Underlining added]

⁷⁰⁶ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37.

⁷⁰⁷ *Frank v. Canada (Attorney General)*, 2019 SCC 1.

[670] As to the importance of s. 3 in our democracy, the Chief Justice added:

[27] Therefore, a broad interpretation of s. 3 enhances the quality of our democracy and strengthens the values on which our free and democratic state is premised (*Figueroa*, at para. 27). As a corollary, an overly narrow interpretation of the right to vote would diminish the quality of democracy in our system of government. As this Court observed in *Sauvé #2*, a government that restricted the franchise to a select group would effectively weaken the legitimacy of the country's democratic system and undermine its own claim to power (para. 34).⁷⁰⁸

[671] That reading of s. 3, with respect to the right to vote, applies equally to the right to be qualified for membership in the House of Commons or a legislative assembly, as evidenced in *Harvey*.⁷⁰⁹ The impugned provision in that case,⁷¹⁰ one that had been enacted by the New Brunswick legislature, restricted both a person's right to be elected to the provincial legislative assembly and their right to sit in that assembly on being convicted of a corrupt or illegal election offence. The majority⁷¹¹ of the Supreme Court, *per La Forest, J.*, concluded that the provision infringed s. 3 of the *Canadian Charter*.⁷¹² Its reasons were twofold. First, despite the lack of clarity of the English text, which uses the word "qualified", it applied the more precise statement in the French version ("éligible") to conclude that "the right to be a candidate and to sit as a member of Parliament or a

⁷⁰⁸ *Frank v. Canada (Attorney General)*, 2019 SCC 1. See also: *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, para. 59, application for leave to appeal to the Supreme Court granted, November 9, 2023, No. 40725.

⁷⁰⁹ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

⁷¹⁰ Section 119(c) of the *Elections Act*, R.S.N.B. 1973, c. E-3:

119. Any person who is convicted of having committed any offence that is a corrupt or illegal practice shall, during the five years next after the date of his being convicted, in addition to any other punishment by this or any other Act prescribed, be disqualified from and be incapable of [...]

(c) being elected to or sitting in the Legislative Assembly and, if at such date he has been elected to the Legislative Assembly, his seat shall be vacated from the time of such conviction.

119. Quiconque est déclaré coupable d'une infraction constituant une manœuvre frauduleuse ou un acte illicite est, pendant les cinq années qui suivent la date de sa déclaration de culpabilité, en plus de toute autre peine imposée par la présente loi ou par toute autre loi, privé du droit et incapable [...]

c) d'être élu ou de siéger à l'Assemblée législative et, s'il est déjà élu à cette date à l'Assemblée législative, son siège devient vacant à la date d'une telle déclaration de culpabilité.

⁷¹¹ It should be noted that in that case, the minority (L'Heureux-Dubé and McLachlin, JJ.) addressed the issue from the perspective of parliamentary privilege and concluded that the rules respecting disqualification from holding office as an MLA provided in s. 119(c) fell within that privilege and were hence immune from judicial review.

⁷¹² It concluded, however, that the provision was saved under s. 1 of the *Canadian Charter*.

legislative assembly should be read in a broad manner"⁷¹³ (*italics added*). It then concluded that s. 3 of the *Canadian Charter* contains no inherent limitations, such that any restriction to that right must be grounded instead in s. 1:

30 In interpreting the right to vote under s. 3 this Court, and Canadian courts in general, have taken the approach that the justification for limitations on the right must be grounded in s. 1 of the *Charter*. As I have earlier noted, I do not believe the wording in the second part of s. 3 justifies taking a different approach to the right to stand for election and become a member of Parliament or a legislative assembly. This is in accord with this Court's well established approach of reading *Charter* rights broadly and putting the burden of justifying limitations upon the state. [...]

[...]

Similarly in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 74, the Court again stated that a broad interpretation of the right in question, followed by a balancing of the relevant conflicting values under s. 1, is analytically preferable since it allows for the most comprehensive and contextual judicial review under the *Charter*. I can see no reason why a similar approach should not be adopted with respect to the rights guaranteed by s. 3. In this way the societal interests represented by the infringing provision, s. 119(c), can be weighed against the s. 3 interests using the well developed analytical framework found in *Oakes*, *supra*.⁷¹⁴

[Underlining added]

[672] La Forest, J. further indicated that certain disqualifications can stem from the Constitution itself, without actually being a restriction on s. 3, since a part of the Constitution cannot be used to invalidate another part. In that regard, he referred to s. 39 of the *CA 1867*, which prohibits a Senator from being elected to, sitting, or voting in the House of Commons, as well as to the legislative provisions that disqualify judges in the same way (by reason of the separation of powers). We would add that this same logic applies with respect to a duly established parliamentary privilege,⁷¹⁵ a doctrine that is not relied upon here, as we saw earlier.

[673] In *Frank*, the majority of the Supreme Court took the same approach:

[42] [...] With respect to the s. 3 right to vote in particular, any balancing of interests must be addressed in the context of the s. 1 justification framework, as

⁷¹³ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, para. 28.

⁷¹⁴ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

⁷¹⁵ Above, para. [635].

opposed to operating as an internal limit on the right (*Harvey*, at paras. 29-30; *Sauvé #2*, at para. 11).⁷¹⁶

[674] The AGQ is therefore wrong in claiming that s. 3 of the *Canadian Charter* only protects the right of Canadian citizens to be a candidate in legislative elections. The protection conferred by that section extends beyond the mere right to stand for election; it includes the right to “sit as a member of Parliament or a legislative assembly”⁷¹⁷ once elected and is subject to no internal limit.

Application to s. 8 para. 1 and to paragraph 1 of Schedule III of the Act

[675] In the case at bar, the Court must conclude that s. 8 para. 1, in conjunction with paragraph 1 of Schedule III of the *Act*, infringes s. 3 of the *Canadian Charter*.

[676] Indeed, the combination of those provisions requires any person elected following a provincial legislative election to exercise their functions as an MNA with their face uncovered (save for any of the reasons set forth in s. 9 of the *Act*⁷¹⁸). Therefore, by the combined effect of those provisions, a person whose sincere religious beliefs compel them to wear a religious symbol that covers their face (such as a burqa or a niqab) could not exercise the functions of a member of the National Assembly. That requirement constitutes a limit, a restriction that is imposed on persons wishing to seek the votes of their fellow citizens. While it does not interfere with the possibility of standing for office in a provincial election,⁷¹⁹ it interferes with the right to exercise the functions of a member of the National Assembly once elected. Persons who wear a religious symbol that covers their face (that is, in the current sociological context, the few Muslim women who wear a niqab or burqa out of religious conviction) are thus denied the right to “participate meaningfully in the electoral process”, because standing for election is useless if, given the obligation to remove their face covering, they cannot subsequently concretely exercise the functions arising from being elected.

[677] The fact that this limit relates to the wearing of a religious symbol (such as a niqab or burqa) in no way disturbs the analysis under s. 3 of the *Canadian Charter* because, as noted above, according to the Supreme Court, s. 3 contains no inherent limits or restrictions (other than constitutional limits such as s. 39 of the *CA 1867*, or the legislative provisions that disqualify judges from being elected to Parliament or to a legislative assembly). It is rather at the stage of the analysis under s. 1 of the *Canadian Charter* that the issues raised by such a restriction should be examined.

⁷¹⁶ *Frank v. Canada (Attorney General)*, 2019 SCC 1.

⁷¹⁷ *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, para. 28.

⁷¹⁸ See: above, note 652.

⁷¹⁹ Section 235 of the *Election Act*, CQLR, c. E-3.3, which lists the electors not qualified to be elected to the National Assembly, contains no restriction regarding the requirement to have one’s face uncovered.

[678] That being the case, in the Court's view, the trial judge did not err when he wrote:

[TRANSLATION]

[919] Clearly, if an elected person wearing clothing that covers the face cannot sit in the National Assembly, it logically follows that the fact they can nevertheless remain qualified to stand for office in a provincial election in Quebec amounts, in reality, to the acknowledgement of a situation that is as absurd as it is untenable with regard to s. 3 of the Charter. Indeed, there is no doubt that the logical consequence of the prohibition effectively negates in itself the purpose that s. 3 of the Charter is intended to achieve.

iii. **Section 1 of the Canadian Charter**

[679] The next question is whether this infringement of s. 3 of the *Canadian Charter* is justified under s. 1 of that *Charter*.

[680] Our analysis of that issue will be brief. The AGQ's choice not to adduce any evidence or make any submissions to discharge his burden under that provision is critically important here. Although there may be cases where certain elements of the analysis are "obvious or self-evident",⁷²⁰ or can be based on "logic and reason"⁷²¹ or judicial notice,⁷²² such is not the case here.

[681] Considering the importance of s. 3 of the *Canadian Charter* for our democracy and the values on which it is based, s. 3 requires "that a stringent standard of justification be applied when the government seeks to justify a limit on [that section]".⁷²³ Courts must examine the government's proffered justification carefully and rigorously rather than adopting a deferential attitude.⁷²⁴

[682] As far as the right to vote is concerned, the requirement of having one's face uncovered to do so is not a new notion in Quebec: s. 335.2 para. 2(3) and s. 337 para. 2 of the *Election Act* already provide that an elector must show his face,⁷²⁵ and this has

⁷²⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, p. 138.

⁷²¹ *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, para. 58.

⁷²² *Droit de la famille – 191850*, 2019 QCCA 1484, para. 246, application for leave to appeal to the Supreme Court dismissed, April 30, 2020, No. 38912.

⁷²³ *Frank v. Canada (Attorney General)*, 2019 SCC 1, para. 43. See also: *Figuroa v. Canada (Attorney General)*, 2003 SCC 37, para. 60; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, para. 14.

⁷²⁴ *Frank v. Canada (Attorney General)*, 2019 SCC 1, para. 43.

⁷²⁵ Provisions have in fact been made for people who are unable to show their face when identifying themselves "for reasons of physical health that are considered valid by the Chief Electoral Officer / pour des raisons de santé physique qui apparaissent valables au directeur général des élections" (*Election Act*, CQLR, c. E-3.3., s. 335.2 para. 3).

been so since 2007.⁷²⁶ According to the legislative debates, that requirement arose from the desire to ascertain the identity of persons coming to vote, to preserve the integrity of the vote and to avoid fraudulent election practices or actions meant to ridicule the electoral system.⁷²⁷ Indeed, the decision to cover one's face to exercise one's right to vote may clearly arise from sincere religious beliefs for some people, but it may also be an act of protest for others or a means for committing electoral fraud.

[683] It is conceivable that such objectives, to which should be added the duty to respect the principle of state laicity,⁷²⁸ may also be relevant when analyzing the requirement that MNAs exercise their functions with their face uncovered when sitting in the National Assembly, notably when a vote is held or when they address the Assembly. The requirement that parliamentarians vote with their face uncovered exists, for example, in the United Kingdom,⁷²⁹ while in the Hemicycle in France, it is prohibited to wear [TRANSLATION] "any visible religious symbol" associated with [TRANSLATION] "the expression of any opinion"⁷³⁰ (which greatly exceeds the scope of the impugned provisions of the *Act*).

[684] Here, however, the AGQ did not see fit to argue the issue nor did he attempt to justify the infringement of s. 3 under s. 1 of the *Canadian Charter*. One can only wonder about the seriousness of such an approach. In a situation such as this — where the AGQ has not sought to establish that the infringement is justified — McLachlin, C.J.'s comments in *Sauvé* with respect to the right to vote, comments that are also applicable to the right to be qualified for membership in a legislature, are apposite:

⁷²⁶ Cf. *An Act to amend various electoral legislation with regard to the identification of electors*, S.Q. 2007, c. 29, ss. 5 and 6, amending ss. 335.2 and 337 of the *Election Act* (amendment in force as of December 4, 2007: *An Act to amend various electoral legislation with regard to the identification of electors*, s. 7).

⁷²⁷ National Assembly, *Journal des débats*, 38th Leg., 1st Sess., vol. 40, no. 39, November 14, 2007, pp. 2035-2038 (B. Pelletier); National Assembly, Standing Committee on Institutions, *Journal des débats*, 38th Leg., 1st Sess., vol. 40, no. 18, November 27, 2007, pp. 1, 5 and 7 (B. Pelletier); National Assembly, *Journal des débats*, 38th Leg., 1st Sess., vol. 40, no. 47, November 30, 2007, pp. 2373-2374 (B. Pelletier); National Assembly, *Journal des débats*, 38th Leg., 1st Sess., vol. 40, no. 48, December 4, 2007, p. 2394 (B. Pelletier).

⁷²⁸ It appears from the parliamentary debates relating to the *Act* that the obligation to exercise one's functions with one's face uncovered is primarily tied to the principle of state laicity: National Assembly, Standing Committee on Institutions, *Journal des débats*, 42nd Leg., 1st Sess., vol. 45, no. 44, June 4, 2019, pp. 1-2 (S. Jolin-Barrette); National Assembly, Standing Committee on Institutions, *Journal des débats*, 42nd Leg., 1st Sess., vol. 45, no. 46, June 6, 2019, p. 9 (S. Jolin-Barrette); National Assembly, Standing Committee on Institutions, *Journal des débats*, 42nd Leg., 1st Sess., vol. 45, no. 47, June 7, 2019, p. 7 (S. Jolin-Barrette); National Assembly, Standing Committee on Institutions, *Journal des débats*, 42nd Leg., 1st Sess., vol. 45, no. 52, June 13, 2019, pp. 29-30, 42, 53 and 74 (S. Jolin-Barrette).

⁷²⁹ U.K., H.C. Deb., September 12, 2013, vol. 567, col. 1170 (Mr. Speaker).

⁷³⁰ France, Assemblée nationale, *Instruction générale du Bureau de l'Assemblée nationale*, art. 9.

34 [...] A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens [and] jeopardizes its claim to representative democracy [...].⁷³¹

[685] In short, on the facts of this case and considering that the AGQ has not adduced any evidence whatsoever nor made any submissions to justify the infringement of s. 3 of the *Canadian Charter*, the Court cannot undertake a s. 1 analysis on its own motion. Consequently, the Court finds that the infringement of s. 3 of the *Canadian Charter* is not justified.⁷³² The trial judge, therefore, did not err by declaring that s. 8 para. 1 of the *Act*, as it applies to the persons referred to in the first paragraph of Schedule III of said statute, is of no force or effect under s. 52 of the *CA 1982*.

iv. Additional observation

[686] Before turning to a discussion of s. 6 and paragraphs 1 and 6 of Schedule II of the *Act*, one final point should be made.

[687] By means of s. 33 of the *Act*, the legislature has overridden s. 22 of the *Quebec Charter*,⁷³³ which essentially protects the same democratic rights as those contemplated in s. 3 of the *Canadian Charter*. Such override is of no effect, however, since the legislature cannot override s. 3 of the *Canadian Charter* given its constitutional status.

c. Section 6 and paragraphs 1 and 6 of Schedule II of the Act

[688] Lord Reading⁷³⁴ claims that the trial judge erred in finding that paragraphs 1 and 6 of Schedule II, read in conjunction with s. 6 of the *Act* (prohibition on the wearing of

⁷³¹ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68. See also: *Frank v. Canada (Attorney General)*, 2019 SCC 1, para. 27 (cited hereinabove, para. [670]).

⁷³² See, by analogy: *R. v. Hills*, 2023 SCC 2, para. 170; *R. v. Boudreault*, 2018 SCC 58, para. 97; *R. v. Ruzic*, 2001 SCC 24, paras. 91-92; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, paras. 278-279; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 394; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033, pp. 1045-1046; *Denis c. R.*, 2018 QCCA 1033, para. 102, motion for an extension of time to appeal and application for leave to appeal to the Supreme Court dismissed, September 3, 2020, No. 39181.

⁷³³ Section 22 of the *Quebec Charter* reads:

22. Every person legally capable and qualified has the right to be a candidate and to vote at an election.

22. Toute personne légalement habilitée et qualifiée a droit de se porter candidat lors d'une élection et a droit d'y voter.

⁷³⁴ In first instance, this aspect of the debate was raised by the Hak Group. It was only at the oral argument stage that the Hak Group amended its proceedings to ask the court to declare that paras. 1 and 6 of Schedule II, read in conjunction with s. 6 of the *Act*, infringed s. 3 of the *Canadian Charter*. Before that amendment, the Hak Group's challenge under s. 3 of the *Canadian Charter* concerned only s. 8 of the

religious symbols), do not infringe s. 3 of the *Canadian Charter*. In its view, those provisions in fact create two “distinct classes of elected MNA’s”,⁷³⁵ those who can be considered to occupy the positions of Affected Members of the Legislature, and those who cannot because they wear a religious symbol. But such a distinction, it goes on to say, infringes the right of everyone to fully play a meaningful role in the electoral process (s. 3 of the *Canadian Charter*), besides being contrary to the state’s duty of religious neutrality by discouraging people “[from] participat[ing] freely in public life regardless of their beliefs”.⁷³⁶

[689] In the Court’s view, the judge did not err in dismissing that argument. The protection afforded by s. 3 of the *Canadian Charter* does not have the scope that Lord Reading seeks to give it.

[690] Pursuant to s. 19 of the *Act respecting the National Assembly*,⁷³⁷ the role of President or that of Vice-President of the National Assembly is entrusted to a person elected by the members of that Assembly. As for the choice of Minister of Justice, it is made by the Prime Minister* by virtue of constitutional conventions,⁷³⁸ whereas the Minister of Justice’s appointment to the Conseil exécutif is the responsibility of the Lieutenant Governor (s. 4 of the *Executive Power Act*⁷³⁹). Moreover, the Minister of Justice is *ex officio* Attorney General of Quebec (s. 2 of the *Act respecting the Ministère de la Justice*⁷⁴⁰).

Act. We further note that, on appeal, the Hak Group has not challenged the judge’s finding on s. 6 of the *Act*. In first instance, Lord Reading was an intervenor.

⁷³⁵ A.A. (Lord Reading), para. 51.

⁷³⁶ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 75.

⁷³⁷ That provision reads:

19. At the beginning of its first sitting after a general election, the National Assembly shall elect a President and, subsequently, a first, a second and a third Vice-President from among its Members.

The first Vice-President and the second Vice-President shall be elected from among the Members forming the Government and the third Vice-President from among the Members forming the Official Opposition.

19. L’Assemblée nationale doit, dès le début de sa première séance après une élection générale, élire, parmi les députés, un président et, par la suite, un premier, un deuxième et un troisième vice-présidents.

Les deux premiers vice-présidents sont élus parmi les députés du parti gouvernemental et le troisième parmi ceux du parti de l’opposition officielle.

* TRANSLATOR’S NOTE: More often referred to as “Premier” in common parlance.

⁷³⁸ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 377, no. V-2.48.

⁷³⁹ CQLR, c. E-18. This provision, in fact, reflects s. 63 of the *CA 1867*.

⁷⁴⁰ CQLR, c. M-19.

[691] As we have just seen, the purpose of s. 3 of the *Canadian Charter* is to confer on every citizen “not only the right [...] to have and to vote for an elected representative in Parliament or a legislative assembly, but also [...] the right [...] to play a meaningful role in the electoral process”.⁷⁴¹ Its central element is therefore based on “the right of each citizen to participate in the electoral process”⁷⁴² and, to this end, it protects the right of every citizen to be a candidate in an election of members of Parliament or of a legislative assembly and to sit as a member thereof after being duly elected. In *Figueroa*, the majority of the Supreme Court, *per* Iacobucci, J., provided the following criteria for finding that s. 3 has been infringed:

51 [...] It is not enough to offend s. 3 that the legislation differentiates between one citizen and another, or one political party or another. It also is necessary that the differential treatment have an adverse impact upon the applicant’s right to play a meaningful role in the electoral process.⁷⁴³

[Underlining added]

[692] The rights guaranteed under art. 3 are thus “participatory in nature”⁷⁴⁴ — more specifically, they are rights to participate in the electoral process.

[693] Although that provision must be given a generous interpretation, it does not allow the Court to go beyond its wording and the intent of its drafters. That being said, nothing leads us to find that the right to be a candidate in an election and to sit as an MNA includes the right to be appointed to the Conseil exécutif (upon the Prime Minister’s recommendation) or to be elected to the presidency or to the vice-presidency of the National Assembly by its members. This appointment and this “election” are not the result of citizens exercising their right to vote, but of decisions made by third parties (the Prime Minister and all the MNAs). They arise in an entirely different context, subsequent to the exercise of the democratic rights protected by s. 3 and separate from the electoral process. This appointment and this “election” are based on entirely different considerations, some of which are essentially political in nature (regional diversity, sex, etc.). The Court is not satisfied that the framers’ intention was to extend the protection of s. 3 to the appointment of federal cabinet members or provincial executive council members, or to the process of electing the president or vice-presidents of the legislative assemblies.

[694] Admittedly, some may be astounded by the principle implemented by paragraphs 1 and 6 of Schedule II (read in conjunction with s. 6 of the *Act*), which provisions aim, by legislative means, to exclude democratically elected MNAs from ministerial or

⁷⁴¹ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, para. 25.

⁷⁴² *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, para. 26.

⁷⁴³ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37.

⁷⁴⁴ *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, para. 26.

parliamentary functions on the basis of personal characteristics (in this case, the wearing of religious symbols). What would one do if — to give another example on a broader scale — a statute excluded all male MNAs from ministerial or parliamentary functions? This, too, might be astounding. Such astonishment would be all the more so, given that these examples are based on characteristics that are otherwise protected by the charters (religion, sex).

[695] Nonetheless, whether one considers the *Act* or the foregoing fictitious example, the fact that ss. 2 and 15 of the *Canadian Charter* are excluded through the use of the notwithstanding clause does not justify extending the scope of s. 3 beyond the right to stand for election — that is, in the present case, to the right to be appointed to a ministerial position or to be chosen by the other MNAs as the president or one of the vice-presidents of the National Assembly (even assuming that such processes are subject to the charters, which is far from clear).

[696] Lastly, we note that, in the matter at hand, Lord Reading has failed to demonstrate, with evidence, that the legislative exclusions in paragraphs 1 and 6 of Schedule II have an adverse effect on a citizen's right to stand as a candidate in a provincial election and thus to "play a meaningful role in the electoral process".

[697] Similarly, the Court must also reject the argument based on the state's duty of neutrality, which Lord Reading seeks to import into s. 3 of the *Canadian Charter* on the basis of the freedoms of conscience and religion that underly that duty,⁷⁴⁵ such freedoms being protected under s. 2 of that *Charter*. The use of the notwithstanding clause is an absolute impediment to such an argument.

[698] In short, the trial judge did not err in finding that paragraphs 1 and 6 of Schedule II, read in conjunction with s. 6 of the *Act*, do not infringe s. 3 of the *Canadian Charter*.

F. Enumerations

[699] In order to obtain a clearer picture of the situation on the ground regarding the wearing of religious symbols, in November 2018 (i.e., before the *Act* was adopted) the Ministère de l'Éducation sent school boards (as they were then constituted) a survey designed to determine, on an anonymous basis, how many of their employees wore a religious symbol, as well as the number and nature of accommodation requests they had received on religious, linguistic or ethnocultural grounds. The survey, it should be noted, was addressed to school administrations (not all of which responded) and not to their staff members, who were not formally notified of the survey. This was followed in January 2019 by targeted calls from deputy ministers in the Ministère de l'Éducation to certain school boards on the same subject.

⁷⁴⁵ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 71.

[700] One of the parties opposed to the *Act*, the FAE, contends that these steps, which, in its view, were not carried out with any benevolent intent, infringe the freedom of religion and expression and are discriminatory and contrary to the charters. It asks that they be declared unconstitutional and that all data derived therefrom be destroyed.

[701] While the trial judge found that these enumerations may have generated a feeling of stigmatization among members of minority religious communities — and mainly among Muslim women wishing to wear the hijab (a finding, it should be noted, that the evidence does not support, save through the existence of a response in hindsight fed by their conviction that the *Act* is unlawful) — the trial judge nevertheless dismissed the FAE's application in that regard. He wrote:

[TRANSLATION]

[256] That said, it appears necessary that this process have a legitimate purpose. For example, can people with disabilities legitimately complain that an attempt is being made to find out how many of them there are in the state apparatus, in order to possibly see how the state can put in place measures to ensure that they are treated without discrimination? The Court does not think so.

[257] The same applies to people wearing religious symbols. On its face, inquiring into their numbers can certainly serve a legitimate state purpose. In some cases, it may be necessary to uncover the real intentions of the state, which may be hiding them under false pretenses.

[258] That said, insofar as the state is contemplating restricting freedom of religion or conscience, whether directly or indirectly, it may appear legitimate for the state to understand, in a concrete and tangible way, the actual number of people who would be targeted by the contemplated rules. Such a process could prove useful in the context of a legal challenge based on the charters, particularly in the analysis of the pressing and substantial objective under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

[259] Moreover, the evidence does not support the finding that, in conducting this enumeration, the state acted in a roundabout manner, for example, by knowingly acting or intending to act in a discriminatory manner against certain individuals.

[260] Of course, one can easily understand and share the concern and even dismay of Muslim women, who say they feel both targeted and ostracized by this measure. However, this consequence is not sufficient to establish that the state is acting improperly towards them or any other person.

[261] The enumeration is part of the state's duty to know the makeup of the communities in which it provides services. This is a legitimate objective.

[262] The Court cannot find that the state is committing a fault or doing something reprehensible by acting as it is. The evidence does not establish this.

[702] The trial judge also dismissed the argument based on s. 18.1 of the *Quebec Charter*.

[TRANSLATION]

[263] Finally, the Court cannot agree, as the FAE argues, that the enumeration violated s. 18.1 of the Quebec Charter, since the latter deals only with employment applications or interviews, whereas the impugned request concerns the number of persons who actually wore visible religious symbols in the schools.

[703] In the Court's view, those findings and the reasoning that led to them are beyond reproach. The FAE's argument regarding the enumerations should therefore be dismissed, as should its application aimed at purging the data collected, which data was not in any event individualized or identifying information.

IV. CONCLUSION

FOR THESE REASONS, THE COURT:

[704] **ALLOWS** in part the appeal of the Attorney General of Quebec *et al.* (500-09-029550-217) and **ALLOWS** the appeals of Pour les droits des femmes du Québec-PDF Québec (500-09-029549-219) and the Mouvement laïque québécois (500-09-029539-210), solely in the file in first instance 500-17-109983-190 (English Montreal School Board *et al.* file);

[705] **REVERSES** in part the judgment at first instance for the sole purpose of replacing the disposition in file 500-17-109983-190 (English Montreal School Board *et al.* file), which is found in paragraphs 1137 to 1141 of that judgment, with the following:

In file 500-17-109983-190 (English Montreal School Board *et al.* file):

[1137] **DISMISSES** the application for judicial review and for a declaratory judgment of the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri; and the interventions in support of this application;

[1138] Without legal costs.

[706] **DISMISSES** the other appeals, incidental appeals and interventions;

[707] **WITHOUT LEGAL COSTS** on appeal.

MANON SAVARD, C.J.Q.

YVES-MARIE MORISSETTE, J.A.

MARIE-FRANCE BICH, J.A.

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Mtre Véronique Roy
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Hearing dates: November 7, 8, 9, 10 and 16, 2022

APPENDIX: AN ACT RESPECTING THE LAICITY OF THE STATE

An Act respecting the Laicity of the State, CQLR c. L-0.3

AS the Québec nation has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity;

AS the Québec State stands on constitutional foundations that have been enriched over the years by the passage of a number of fundamental laws;

AS, in accordance with the principle of parliamentary sovereignty, it is incumbent on the Parliament of Québec to determine the principles according to which and manner in which relations between the State and religions are to be governed in Québec;

AS it is important that the paramountcy of State laicity be enshrined in Québec's legal order;

AS the Québec nation attaches importance to the equality of women and men;

AS a stricter duty of restraint regarding religious matters should be established for persons exercising certain functions, resulting in their being prohibited from wearing religious symbols in the exercise of their functions;

Loi sur la laïcité de l'État, RLRQ c. L-0.3

CONSIDÉRANT que la nation québécoise a des caractéristiques propres, dont sa tradition civiliste, des valeurs sociales distinctes et un parcours historique spécifique l'ayant amenée à développer un attachement particulier à la laïcité de l'État;

CONSIDÉRANT que l'État du Québec est fondé sur des assises constitutionnelles enrichies au cours des ans par l'adoption de plusieurs lois fondamentales;

CONSIDÉRANT qu'en vertu du principe de la souveraineté parlementaire, il revient au Parlement du Québec de déterminer selon quels principes et de quelle manière les rapports entre l'État et les religions doivent être organisés au Québec;

CONSIDÉRANT qu'il est important de consacrer le caractère prépondérant de la laïcité de l'État dans l'ordre juridique québécois;

CONSIDÉRANT l'importance que la nation québécoise accorde à l'égalité entre les femmes et les hommes;

CONSIDÉRANT qu'il y a lieu d'établir un devoir de réserve plus strict en matière religieuse à l'égard des personnes exerçant certaines fonctions, se traduisant par l'interdiction pour ces personnes de porter un signe religieux dans l'exercice de leurs fonctions;

AS State laicity contributes to the fulfilment of the magistrature's duty of impartiality;

AS State laicity should be affirmed in a manner that ensures a balance between the collective rights of the Québec nation and human rights and freedoms;

THE PARLIAMENT OF QUÉBEC
ENACTS AS FOLLOWS:

CHAPTER I

AFFIRMATION OF THE LAICITY OF THE STATE

1. The State of Québec is a lay State.
2. The laicity of the State is based on the following principles:
 - (1) the separation of State and religions;
 - (2) the religious neutrality of the State;
 - (3) the equality of all citizens; and
 - (4) freedom of conscience and freedom of religion.
3. State laicity requires parliamentary, government and judicial institutions to comply with all the principles listed in section 2, in fact and in appearance, in pursuing their missions.

For the purposes of this chapter,

- (1) "parliamentary institutions" means the National Assembly and the persons appointed or designated by it to an office under its authority;

CONSIDÉRANT que la laïcité de l'État favorise le respect du devoir d'impartialité de la magistrature;

CONSIDÉRANT qu'il y a lieu d'affirmer la laïcité de l'État en assurant un équilibre entre les droits collectifs de la nation québécoise et les droits et libertés de la personne;

LE PARLEMENT DU QUÉBEC
DÉCRÈTE CE QUI SUIT :

CHAPITRE I

AFFIRMATION DE LA LAÏCITÉ DE L'ÉTAT

1. L'État du Québec est laïque.
2. La laïcité de l'État repose sur les principes suivants :
 - 1° la séparation de l'État et des religions;
 - 2° la neutralité religieuse de l'État;
 - 3° l'égalité de tous les citoyens et citoyennes;
 - 4° la liberté de conscience et la liberté de religion.

3. La laïcité de l'État exige que, dans le cadre de leur mission, les institutions parlementaires, gouvernementales et judiciaires respectent l'ensemble des principes énoncés à l'article 2, en fait et en apparence.

Pour l'application du présent chapitre, on entend par :

- 1° «institutions parlementaires» : l'Assemblée nationale, de même que les personnes nommées ou désignées par celle-ci pour exercer une fonction qui en relève;

(2) “government institutions” means the bodies listed in paragraphs 1 to 10 of Schedule I;

(3) “judicial institutions” means the Court of Appeal, the Superior Court, the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and the municipal courts.

4. In addition to the requirement under section 3, State laicity requires compliance with the prohibition on wearing religious symbols under Chapter II of this Act, and with the duty of religious neutrality under Chapter II of the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies (chapter R-26.2.01), by the persons subject to that prohibition or that duty.

State laicity also requires that all persons have the right to lay parliamentary, government and judicial institutions, and to lay public services, to the extent provided for in this Act and in the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies.

5. It is incumbent on the Conseil de la magistrature, with respect to judges of the Court of Québec, the Human Rights Tribunal, the Professions Tribunal and the municipal courts, as well as presiding justices of the peace, to establish rules translating the requirements of State laicity and to ensure their implementation.

2° «institutions gouvernementales» : les organismes énumérés aux paragraphes 1° à 10° de l’annexe I;

3° «institutions judiciaires» : la Cour d’appel, la Cour supérieure, la Cour du Québec, le Tribunal des droits de la personne, le Tribunal des professions et les cours municipales.

4. En plus de l’exigence prévue à l’article 3, la laïcité de l’État exige le respect de l’interdiction de porter un signe religieux prévue au chapitre II de la présente loi et du devoir de neutralité religieuse prévu au chapitre II de la Loi favorisant le respect de la neutralité religieuse de l’État et visant notamment à encadrer les demandes d’accommodements pour un motif religieux dans certains organismes (chapitre R-26.2.01), et ce, par les personnes assujetties à cette interdiction ou à ce devoir.

La laïcité de l’État exige également que toute personne ait droit à des institutions parlementaires, gouvernementales et judiciaires laïques ainsi qu’à des services publics laïques, et ce, dans la mesure prévue par la présente loi et par la Loi favorisant le respect de la neutralité religieuse de l’État et visant notamment à encadrer les demandes d’accommodements pour un motif religieux dans certains organismes.

5. Il appartient au Conseil de la magistrature, à l’égard des juges de la Cour du Québec, du Tribunal des droits de la personne, du Tribunal des professions et des cours municipales ainsi qu’à l’égard des juges de paix magistrats, d’établir des règles traduisant les exigences de la laïcité de l’État et d’assurer leur mise en oeuvre.

Despite subparagraph 3 of the second paragraph of section 3, the requirement to comply with the principles set out in section 2 applies to judges only to the extent provided for in this section.

CHAPTER II

PROHIBITION ON WEARING RELIGIOUS SYMBOLS

6. The persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions.

A religious symbol, within the meaning of this section, is any object, including clothing, a symbol, jewellery, an adornment, an accessory or headwear, that

(1) is worn in connection with a religious conviction or belief; or

(2) is reasonably considered as referring to a religious affiliation.

CHAPTER III

SERVICES WITH FACE UNCOVERED

7. For the purposes of this chapter, “personnel member of a body” means a member of the personnel of a body listed in Schedule I or a person listed in Schedule III who is considered to be such a member.

8. Personnel members of a body must exercise their functions with their face uncovered.

Similarly, persons who present themselves to receive a service from a

Malgré le paragraphe 3° du deuxième alinéa de l’article 3, l’exigence de respecter les principes énoncés à l’article 2 ne s’applique aux juges que dans la mesure prévue au présent article.

CHAPITRE II

INTERDICTION DE PORTER UN SIGNE RELIGIEUX

6. Le port d’un signe religieux est interdit dans l’exercice de leurs fonctions aux personnes énumérées à l’annexe II.

Au sens du présent article, est un signe religieux tout objet, notamment un vêtement, un symbole, un bijou, une parure, un accessoire ou un couvre-chef, qui est :

1° soit porté en lien avec une conviction ou une croyance religieuse;

2° soit raisonnablement considéré comme référant à une appartenance religieuse.

CHAPITRE III

SERVICES À VISAGE DÉCOUVERT

7. Pour l’application du présent chapitre, on entend par « membre du personnel d’un organisme » un membre du personnel d’un organisme énuméré à l’annexe I ainsi qu’une personne mentionnée à l’annexe III qui est assimilée à un tel membre.

8. Un membre du personnel d’un organisme doit exercer ses fonctions à visage découvert.

De même, une personne qui se présente pour recevoir un service par

personnel member of a body must have their face uncovered where doing so is necessary to allow their identity to be verified or for security reasons. Persons who fail to comply with that obligation may not receive the service requested, where applicable.

For the purposes of the second paragraph, persons are deemed to be presenting themselves to receive a service when they are interacting or communicating with a personnel member of a body in the exercise of the personnel member's functions.

9. Section 8 does not apply to persons whose face is covered for health reasons or because of a handicap or of requirements tied to their functions or to the performance of certain tasks.

10. A body listed in Schedule I may require, from any persons or partnerships with whom or which it enters into a contract, or to whom or which it grants financial assistance, that members of their personnel exercise their functions with their face uncovered, if the contract or the granting of financial assistance is for the provision of services that are inherent in the body's mission or if the services are performed in its personnel's place of work. The same applies to a parliamentary institution referred to in subparagraph 1 of the second paragraph of section 3.

CHAPTER IV

MISCELLANEOUS PROVISIONS

11. The provisions of this Act prevail over any contrary provisions of any subsequent Act, unless such an Act

un membre du personnel d'un organisme doit avoir le visage découvert lorsque cela est nécessaire pour permettre la vérification de son identité ou pour des motifs de sécurité. La personne qui ne respecte pas cette obligation ne peut recevoir le service qu'elle demande, le cas échéant.

Pour l'application du deuxième alinéa, une personne est réputée se présenter pour recevoir un service lorsqu'elle interagit ou communique avec un membre du personnel d'un organisme dans l'exercice de ses fonctions.

9. L'article 8 ne s'applique pas à une personne dont le visage est couvert en raison d'un motif de santé, d'un handicap ou des exigences propres à ses fonctions ou à l'exécution de certaines tâches.

10. Un organisme énuméré à l'annexe I peut exiger, de toute personne ou société avec laquelle il conclut un contrat ou à laquelle il octroie une aide financière, que des membres de son personnel exercent leurs fonctions à visage découvert, lorsque ce contrat ou l'octroi de cette aide financière a pour objet la prestation de services inhérents à la mission de l'organisme ou lorsque les services sont exécutés sur les lieux de travail du personnel de cet organisme. Il en est de même pour une institution parlementaire visée au paragraphe 1^o du deuxième alinéa de l'article 3.

CHAPITRE IV

DISPOSITIONS DIVERSES

11. Les dispositions de la présente loi prévalent sur celles de toute loi postérieure qui leur seraient contraires, à moins que cette dernière

expressly states that it applies despite this Act.

loi n'énonce expressément s'appliquer malgré la présente loi.

The provisions of sections 1 to 3 do not prevail over any contrary provisions of any previous Act.

Les dispositions des articles 1 à 3 ne prévalent pas sur celles de toute loi antérieure qui leur sont contraires.

12. A minister may, jointly with the minister responsible for the administration of this Act, verify compliance with the measures set out in this Act within a body listed in Schedule I or with a person referred to in paragraph 11 of Schedule III that is under his or her responsibility or jurisdiction. A minister may also designate, in writing, a person to conduct such verification. At the request of the minister concerned or the designated person, the body or the person being verified must send or otherwise make available to the minister or designated person all documents and information the minister or designated person considers necessary to conduct the verification.

12. Un ministre peut, de concert avec le ministre responsable de l'application de la présente loi, vérifier l'application des mesures prévues par la présente loi dans un organisme énuméré à l'annexe I ou auprès d'une personne visée au paragraphe 11° de l'annexe III qui relève de sa responsabilité ou qui est du domaine de sa compétence. Il peut également désigner par écrit une personne qui sera chargée de cette vérification. L'organisme ou la personne qui est visé par la vérification doit, sur demande du ministre concerné ou de la personne chargée de la vérification, lui transmettre ou autrement mettre à sa disposition tout document ou renseignement jugé nécessaire pour procéder à la vérification.

The minister concerned may, in writing and within the time he or she specifies, require the body or the person to take corrective measures, conduct any appropriate follow-up and comply with any other measure, including oversight and support measures.

Le ministre concerné peut, par écrit et dans les délais qu'il indique, requérir que l'organisme ou que la personne apporte des mesures correctrices, effectue les suivis adéquats et se soumette à toute autre mesure, dont des mesures de surveillance et d'accompagnement.

For the purposes of this section, the following bodies and persons, among others, are under the jurisdiction of the following ministers:

Pour l'application du présent article, sont notamment du domaine de la compétence des ministres énumérés ci-après les organismes et personnes suivants :

(1) the bodies listed in paragraph 5 of Schedule I: the Minister of Municipal Affairs, Regions and Land Occupancy;

1° les organismes énumérés au paragraphe 5° de l'annexe I : le ministre des Affaires municipales, des Régions et de l'Occupation du territoire;

(2) the bodies listed in paragraph 6 of Schedule I: the Minister of Transport;

2° les organismes énumérés au paragraphe 6° de cette annexe : le ministre des Transports;

(3) the bodies listed in paragraphs 7 and 12 of Schedule I: the Minister of Education, Recreation and Sports or, as applicable, the Minister of Higher Education, Research, Science and Technology, according to their respective responsibilities;

3° les organismes énumérés aux paragraphes 7° et 12° de cette annexe : le ministre de l'Éducation, du Loisir et du Sport ou, selon le cas, le ministre de l'Enseignement supérieur, de la Recherche, de la Science et de la Technologie, selon leurs responsabilités respectives;

(4) the bodies listed in paragraphs 8 and 13 of Schedule I: the Minister of Health and Social Services; and

4° les organismes énumérés aux paragraphes 8° et 13° de cette annexe : le ministre de la Santé et des Services sociaux;

(5) the bodies listed in paragraph 11 of Schedule I and the person referred to in paragraph 11 of Schedule III: the Minister of Families, Seniors and the Status of Women.

5° les organismes énumérés au paragraphe 11° de l'annexe I et la personne visée au paragraphe 11° de l'annexe III : le ministre de la Famille, des Aînés et de la Condition féminine.

This section does not apply to the parliamentary institutions and judicial institutions referred to in subparagraph 1 or 3 of the second paragraph of section 3.

Le présent article ne s'applique pas aux institutions parlementaires et aux institutions judiciaires visées à l'un ou l'autre des paragraphes 1° ou 3° du deuxième alinéa de l'article 3.

13. It is incumbent on the person exercising the highest administrative authority, where applicable, over the persons referred to in section 6 or the first paragraph of section 8 to take the necessary measures to ensure compliance with the measures set out in those provisions. That function may be delegated to a person within the same organization.

13. Il appartient à la personne qui exerce la plus haute autorité administrative, le cas échéant, sur les personnes visées à l'article 6 ou au premier alinéa de l'article 8 de prendre les moyens nécessaires pour assurer le respect des mesures qui y sont prévues. Cette fonction peut être déléguée à une personne au sein de son organisation.

The persons referred to in section 6 or the first paragraph of section 8 are, in the event of failure to comply with the measures set out in those provisions, subject to a disciplinary measure or, if applicable, to any other measure resulting from the enforcement of the

La personne visée à l'article 6 ou au premier alinéa de l'article 8 s'expose, en cas de manquement aux mesures qui y sont prévues, à une mesure disciplinaire ou, le cas échéant, à toute autre mesure découlant de

rules governing the exercise of their functions.

14. No accommodation or other derogation or adaptation, except those provided for in this Act, may be granted in connection with the provisions concerning the prohibition on wearing religious symbols or concerning the obligations relating to services with one's face uncovered.

15. Where the prohibition on wearing religious symbols applies to a lawyer or notary referred to in paragraph 8 of Schedule II, the obligation is deemed to be an integral part of the legal services contract under which the lawyer or notary acts.

16. A provision of a collective agreement, group agreement or any other contract concerning conditions of employment that is incompatible with the provisions of this Act is absolutely null.

17. Sections 1 to 3 must not be interpreted as requiring an institution referred to in section 3 to remove or alter an immovable, or movable property adorning an immovable. However, an institution may, on its own initiative, remove or alter an immovable or such movable property.

Nor must those sections be interpreted as affecting toponymy, or the name of or name used by an institution referred to in section 3.

l'application des règles régissant l'exercice de ses fonctions.

14. Aucun accommodement ou autre dérogation ou adaptation, à l'exception de ceux prévus par la présente loi, ne peut être accordé en ce qui a trait aux dispositions portant sur l'interdiction de porter un signe religieux ou sur les obligations relatives aux services à visage découvert.

15. Lorsque l'interdiction de porter un signe religieux s'applique à un avocat ou à un notaire visé au paragraphe 8° de l'annexe II, cette obligation est réputée faire partie intégrante du contrat de services juridiques en vertu duquel il agit.

16. Une disposition d'une convention collective, d'une entente collective ou de tout autre contrat relatif à des conditions de travail qui est incompatible avec les dispositions de la présente loi est nulle de nullité absolue.

17. Les articles 1 à 3 ne peuvent être interprétés comme ayant pour effet d'exiger d'une institution visée à l'article 3 qu'elle retire ou modifie un immeuble ou un bien meuble qui orne un immeuble. Toutefois, une institution peut, de sa propre initiative, retirer ou modifier un immeuble ou un tel bien meuble.

Ces articles ne peuvent non plus être interprétés comme ayant un effet sur la toponymie, sur la dénomination d'une institution visée à l'article 3 ou sur une dénomination que celle-ci emploie.

CHAPTER V

AMENDING PROVISIONS

CHARTER OF HUMAN RIGHTS AND FREEDOMS

18. The Charter of human rights and freedoms (chapter C-12) is amended by inserting the following paragraph after the third paragraph of the preamble:

“Whereas the Québec nation considers State laicity to be of fundamental importance;”

19. Section 9.1 of the Charter is amended by inserting “State laicity,” after “democratic values,” in the first paragraph.

ACT TO FOSTER ADHERENCE TO STATE RELIGIOUS NEUTRALITY AND, IN PARTICULAR, TO PROVIDE A FRAMEWORK FOR REQUESTS FOR ACCOMMODATIONS ON RELIGIOUS GROUNDS IN CERTAIN BODIES

20. The preamble to the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies (chapter R-26.2.01) is repealed

21. Section 1 of the Act is amended

(1) by replacing the first paragraph by the following paragraph:

“This Act imposes, to the extent it provides for, a duty of religious neutrality on personnel members of

CHAPITRE V

DISPOSITIONS MODIFICATIVES

CHARTRE DES DROITS ET LIBERTÉS DE LA PERSONNE

18. La Charte des droits et libertés de la personne (chapitre C-12) est modifiée par l’insertion, après le troisième alinéa du préambule, de l’alinéa suivant :

« Considérant l’importance fondamentale que la nation québécoise accorde à la laïcité de l’État; »

19. L’article 9.1 de cette charte est modifié par l’insertion, dans le premier alinéa et après « valeurs démocratiques, », de « de la laïcité de l’État, »

LOI FAVORISANT LE RESPECT DE LA NEUTRALITÉ RELIGIEUSE DE L’ÉTAT ET VISANT NOTAMMENT À ENCADRER LES DEMANDES D’ACCOMMODEMENTS POUR UN MOTIF RELIGIEUX DANS CERTAINS ORGANISMES

20. Le préambule de la Loi favorisant le respect de la neutralité religieuse de l’État et visant notamment à encadrer les demandes d’accommodements pour un motif religieux dans certains organismes (chapitre R-26.2.01) est abrogé.

21. L’article 1 de cette loi est modifié :

1° par le remplacement du premier alinéa par le suivant :

« La présente loi impose, dans la mesure qui y est prévue, un devoir de neutralité religieuse dans l’exercice de

public bodies in the exercise of their functions, in accordance with the requirements of State laicity.”;

leurs fonctions aux membres du personnel des organismes publics, conformément aux exigences de la laïcité de l’État. »;

(2) by striking out the second paragraph.

2° par la suppression du deuxième alinéa.

22. Section 2 of the Act is amended, in the first paragraph,

22. L’article 2 de cette loi est modifié, dans le premier alinéa :

(1) by inserting “, as well as bodies whose capital forms part of the domain of the State” at the end of subparagraph 2;

1° par l’insertion, à la fin du paragraphe 2°, de « , de même que les organismes dont le fonds social fait partie du domaine de l’État »;

(2) by inserting “and regional” after “municipal” in subparagraph 5;

2° par l’insertion, dans le paragraphe 5° et après « municipaux », de « et régionaux »;

(3) by inserting “, the Commission scolaire du Littoral established by the Act respecting the Commission scolaire du Littoral (1966-1967, chapter 125)” after “Education Act (chapter I-13.3)” in subparagraph 7;

3° par l’insertion, dans le paragraphe 7° et après « Loi sur l’instruction publique (chapitre I-13.3) », de « , la Commission scolaire du Littoral constituée par la Loi sur la Commission scolaire du Littoral (1966-1967, chapitre 125) »;

(4) by striking out “or any of its committees” in subparagraph 9

4° par la suppression, dans le paragraphe 9°, de « ou l’une de ses commissions ».

23. Section 7 of the Act is amended

23. L’article 7 de cette loi est modifié :

(1) by replacing “any person or partnership with whom it has entered” by “any persons or partnerships with whom or which it enters”;

1° par le remplacement, dans le texte anglais, de « any person or partnership with whom it has entered » par « any persons or partnerships with whom or which it enters »;

(2) by replacing “service contract or subsidy agreement” by “contract, or to whom or which it grants financial assistance,”;

2° par le remplacement de « de service ou une entente de subvention » par « ou à laquelle il octroie une aide financière »;

(3) by replacing “or agreement relates to” by “or the granting of financial assistance is for”;

(4) by replacing “that are performed in its personnel’s place of work” by “if the services are performed in its personnel’s place of work”.

24. Section 9 of the Act and Division II of Chapter III of the Act, comprising section 10, are repealed.

25. Section 12 of the Act is amended by replacing the second paragraph by the following paragraph:

“The guidelines must be made public using the means the Minister considers appropriate.”

26. Division IV of Chapter III of the Act, comprising section 15, is repealed.

27. Section 16 of the Act is repealed.

28. Section 17 of the Act is amended by replacing the last sentence of the first paragraph by the following sentences: “That person may delegate the function to a person within his or her organization. In addition, that person must designate an accommodation officer within the personnel.”

29. The Act is amended by inserting the following section after section 17:

“**17.1.** No accommodation or other derogation or adaptation, except those provided for in this Act, may be granted in connection with the provisions of this Act that concern

3° par le remplacement de « ou cette entente » par « ou l’octroi de cette aide financière »;

4° par le remplacement de « cet organisme ou exécutés sur les lieux de travail de son personnel » par « l’organisme ou lorsque les services sont exécutés sur les lieux de travail du personnel de cet organisme ».

24. L’article 9 de cette loi et la section II du chapitre III de cette loi, comprenant l’article 10, sont abrogés.

25. L’article 12 de cette loi est modifié par le remplacement du deuxième alinéa par le suivant :

« Ces lignes directrices sont rendues publiques par les moyens que le ministre estime appropriés. ».

26. La section IV du chapitre III de cette loi, comprenant l’article 15, est abrogée.

27. L’article 16 de cette loi est abrogé.

28. L’article 17 de cette loi est modifié par le remplacement de la dernière phrase du premier alinéa par les suivantes: « Elle peut déléguer cette fonction à une personne au sein de son organisation. En outre, elle doit désigner, au sein de son personnel, un répondant en matière d’accommodement. ».

29. Cette loi est modifiée par l’insertion, après l’article 17, du suivant :

« **17.1.** Aucun accommodement ou autre dérogation ou adaptation, à l’exception de ceux prévus par la présente loi, ne peut être accordé en ce qui a trait aux dispositions prévues

fulfillment of the duty of religious neutrality.”

30. Section 19 of the Act is replaced by the following section:

“**19.** The minister designated by the Government is responsible for the administration of this Act.”

CHAPTER VI

TRANSITIONAL AND FINAL PROVISIONS

31. Section 6 does not apply

(1) to persons referred to in any of paragraphs 2, 3, 7 and 9 of Schedule II on 27 March 2019, for as long as they exercise the same function within the same organization;

(2) to persons referred to in paragraph 4 or 5 of Schedule II on 27 March 2019, until the end of their mandate;

(3) to persons, except the Minister of Justice and Attorney General, referred to in paragraph 6 of Schedule II on 27 March 2019, for as long as they exercise the same function and are under the authority of the same organization;

(4) to persons referred to in paragraph 8 of Schedule II acting in accordance with a legal services contract entered into before 16 June 2019, unless the contract is renewed after that date;

(5) to persons referred to in paragraph 10 of Schedule II on 27 March 2019, for as long as they exercise the same function within the same school board.

par celle-ci portant sur le respect du devoir de neutralité religieuse. ».

30. L'article 19 de cette loi est remplacé par le suivant :

« **19.** Le ministre désigné par le gouvernement est responsable de l'application de la présente loi. ».

CHAPITRE VI

DISPOSITIONS TRANSITOIRES ET FINALES

31. L'article 6 ne s'applique pas :

1° à une personne visée à l'un ou l'autre des paragraphes 2°, 3°, 7° et 9° de l'annexe II le 27 mars 2019, et ce, tant qu'elle exerce la même fonction au sein de la même organisation;

2° à une personne visée à l'un ou l'autre des paragraphes 4° et 5° de l'annexe II le 27 mars 2019, et ce, jusqu'à la fin de leur mandat;

3° à une personne, à l'exception du ministre de la Justice et procureur général, visée au paragraphe 6° de l'annexe II le 27 mars 2019, et ce, tant qu'elle exerce la même fonction et qu'elle relève de la même organisation;

4° à une personne visée au paragraphe 8° de l'annexe II qui agit conformément à un contrat de services juridiques conclu avant le 16 juin 2019, sauf si ce contrat est renouvelé après cette date;

5° à une personne visée au paragraphe 10° de l'annexe II le 27 mars 2019, et ce, tant qu'elle exerce la même fonction au sein de la même commission scolaire.

32. Until the Government makes an order designating a minister responsible for the administration of this Act and the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies (chapter R-26.2.01), the Minister of Immigration, Diversity and Inclusiveness is responsible for their administration.

33. This Act and the amendments made by it to the Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies apply despite sections 1 to 38 of the Charter of human rights and freedoms (chapter C-12).

34. This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

35. The minister designated by the Government is responsible for the administration of this Act.

36. This Act comes into force on 16 June 2019.

SCHEDULE I

(Sections 3, 7 and 10)

BODIES

(1) government departments;

32. Jusqu'à ce que le gouvernement prenne un décret désignant le ministre responsable de l'application de la présente loi et de la Loi favorisant le respect de la neutralité religieuse de l'État et visant notamment à encadrer les demandes d'accommodements pour un motif religieux dans certains organismes (chapitre R-26.2.01), le ministre de l'Immigration, de la Diversité et de l'Inclusion est responsable de l'application de ces lois.

33. La présente loi ainsi que les modifications qu'elle apporte à la Loi favorisant la neutralité religieuse de l'État et visant notamment à encadrer les demandes d'accommodements pour un motif religieux dans certains organismes s'appliquent malgré les articles 1 à 38 de la Charte des droits et libertés de la personne (chapitre C-12).

34. La présente loi ainsi que les modifications qu'elle apporte par son chapitre V ont effet indépendamment des articles 2 et 7 à 15 de la Loi constitutionnelle de 1982 (annexe B de la Loi sur le Canada, chapitre 11 du recueil des lois du Parlement du Royaume-Uni pour l'année 1982).

35. Le ministre désigné par le gouvernement est responsable de l'application de la présente loi.

36. La présente loi entre en vigueur le 16 juin 2019.

ANNEXE I

(Articles 3, 7 et 10)

ORGANISMES

1° les ministères du gouvernement;

(2) budget-funded bodies, bodies other than budget-funded bodies and government enterprises listed in Schedules 1 to 3 to the Financial Administration Act (chapter A-6.001), including the persons listed in those schedules, as well as bodies whose capital forms part of the domain of the State;

(3) bodies and persons whose personnel is appointed in accordance with the Public Service Act (chapter F-3.1.1);

(4) government agencies listed in Schedule C to the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors (chapter R-8.2), including the persons listed in that schedule;

(5) municipalities, metropolitan communities, intermunicipal boards and municipal and regional housing bureaus, except municipalities governed by the Cree Villages and the Naskapi Village Act (chapter V-5.1) or the Act respecting Northern villages and the Kativik Regional Government (chapter V-6.1);

(6) public transit authorities, the Autorité régionale de transport métropolitain and any other operator of a shared transportation system;

(7) school service centres established under the Education Act (chapter I-13.3), the Centre de services scolaire du Littoral established by the Act respecting the Centre de services scolaire du Littoral (1966-1967, chapter 125), the Comité de gestion de la taxe scolaire de l'île de Montréal,

2° les organismes budgétaires, les organismes autres que budgétaires et les entreprises du gouvernement énumérés aux annexes 1 à 3 de la Loi sur l'administration financière (chapitre A-6.001), y compris les personnes qui y sont énumérées, de même que les organismes dont le fonds social fait partie du domaine de l'État;

3° les organismes et les personnes dont le personnel est nommé suivant la Loi sur la fonction publique (chapitre F-3.1.1);

4° les organismes gouvernementaux énumérés à l'annexe C de la Loi sur le régime de négociation des conventions collectives dans les secteurs public et parapublic (chapitre R-8.2), y compris les personnes qui y sont énumérées;

5° les municipalités, les communautés métropolitaines, les régies intermunicipales et les offices municipaux et régionaux d'habitation, à l'exception des municipalités régies par la Loi sur les villages cris et le village naskapi (chapitre V-5.1) ou par la Loi sur les villages nordiques et l'Administration régionale Kativik (chapitre V-6.1);

6° les sociétés de transport en commun, l'Autorité régionale de transport métropolitain ou tout autre exploitant d'un système de transport collectif;

7° les commissions scolaires instituées en vertu de la Loi sur l'instruction publique (chapitre I-13.3), la Commission scolaire du Littoral constituée par la Loi sur la Commission scolaire du Littoral (1966-1967, chapitre 125), le Comité de gestion de la taxe scolaire de l'île

general and vocational colleges established under the General and Vocational Colleges Act (chapter C-29), and university-level educational institutions listed in paragraphs 1 to 11 of section 1 of the Act respecting educational institutions at the university level (chapter E-14.1);

(8) public institutions governed by the Act respecting health services and social services (chapter S-4.2), except public institutions referred to in Parts IV.1 and IV.3 of that Act, joint procurement groups referred to in section 435.1 of that Act, and health communication centres referred to in the Act respecting pre-hospital emergency services (chapter S-6.2);

(9) bodies the majority of whose members are appointed by the National Assembly;

(10) inquiry commissions established under the Act respecting public inquiry commissions (chapter C-37);

(11) childcare centres, home educational childcare coordinating offices and subsidized day care centres governed by the Educational Childcare Act (chapter S-4.1.1);

(12) institutions accredited for the purposes of subsidies under the Act respecting private education (chapter E-9.1), and institutions whose instructional program is the subject of an international agreement within the meaning of the Act

de Montréal, les collèges d'enseignement général et professionnel institués en vertu de la Loi sur les collèges d'enseignement général et professionnel (chapitre C-29) ainsi que les établissements d'enseignement de niveau universitaire énumérés aux paragraphes 1° à 11° de l'article 1 de la Loi sur les établissements d'enseignement de niveau universitaire (chapitre E-14.1);

8° les établissements publics visés par la Loi sur les services de santé et les services sociaux (chapitre S-4.2), à l'exception des établissements publics visés aux parties IV.1 et IV.3 de cette loi, les groupes d'approvisionnement en commun visés à l'article 435.1 de cette même loi et les centres de communication santé visés par la Loi sur les services préhospitaliers d'urgence (chapitre S-6.2);

9° les organismes dont l'Assemblée nationale nomme la majorité des membres;

10° les commissions d'enquête constituées en vertu de la Loi sur les commissions d'enquête (chapitre C-37);

11° les centres de la petite enfance, les bureaux coordonnateurs de la garde en milieu familial et les garderies subventionnées visés par la Loi sur les services de garde éducatifs à l'enfance (chapitre S-4.1.1);

12° les établissements agréés aux fins de subventions en vertu de la Loi sur l'enseignement privé (chapitre E-9.1) et les institutions dont le régime d'enseignement est l'objet d'une entente internationale au sens

respecting the Ministère des Relations internationales (chapter M-25.1.1); and

(13) private institutions under agreement, intermediary resources and family-type resources governed by the Act respecting health services and social services.

SCHEDULE II

(Sections 6, 15 and 31)

PERSONS SUBJECT TO THE PROHIBITION ON WEARING RELIGIOUS SYMBOLS IN THE EXERCISE OF THEIR FUNCTIONS

(1) the President and Vice-Presidents of the National Assembly;

(2) administrative justices of the peace referred to in section 158 of the Courts of Justice Act (chapter T-16), special clerks, clerks, deputy clerks, sheriffs and deputy sheriffs referred to in sections 4 to 5 of that Act, clerks and deputy clerks referred to in section 57 of the Act respecting municipal courts (chapter C-72.01), and bankruptcy registrars;

(3) members or commissioners, as applicable, who exercise their functions within the Commission d'accès à l'information, the Commission de la fonction publique, the Commission de protection du territoire agricole du Québec, the Commission des transports du Québec, the Commission municipale du Québec, the Commission québécoise des libérations conditionnelles, the Régie de l'énergie, the Régie des alcools, des courses et des jeux, the Régie des

de la Loi sur le ministère des Relations internationales (chapitre M-25.1.1);

13° les établissements privés conventionnés, les ressources intermédiaires et les ressources de type familial visés par la Loi sur les services de santé et les services sociaux.

ANNEXE II

(Articles 6, 15 et 31)

PERSONNES VISÉES PAR L'INTERDICTION DE PORTER UN SIGNE RELIGIEUX DANS L'EXERCICE DE LEURS FONCTIONS

1° le président et les vice-présidents de l'Assemblée nationale;

2° un juge de paix fonctionnaire visé à l'article 158 de la Loi sur les tribunaux judiciaires (chapitre T-16), un greffier spécial, un greffier, un greffier adjoint, un shérif et un shérif adjoint visés aux articles 4 à 5 de cette loi, un greffier et un greffier adjoint visés à l'article 57 de la Loi sur les cours municipales (chapitre C-72.01), ainsi qu'un registraire des faillites;

3° un membre, un commissaire ou un régisseur, selon le cas, exerçant ses fonctions au sein du Comité de déontologie policière, de la Commission d'accès à l'information, de la Commission de la fonction publique, de la Commission de protection du territoire agricole du Québec, de la Commission des transports du Québec, de la Commission municipale du Québec, de la Commission québécoise des libérations conditionnelles, de la Régie de l'énergie, de la Régie des

marchés agricoles et alimentaires du Québec, the Régie du bâtiment du Québec, the Tribunal administratif de déontologie policière, the Administrative Housing Tribunal, the Financial Markets Administrative Tribunal, the Administrative Tribunal of Québec or the Administrative Labour Tribunal, as well as disciplinary council chairs who exercise their functions within the Bureau des présidents des conseils de discipline;

(4) commissioners appointed by the Government under the Act respecting public inquiry commissions (chapter C-37), and lawyers or notaries acting for such a commission;

(5) arbitrators appointed by the Minister of Labour whose name appears on a list drawn up by that minister in accordance with the Labour Code (chapter C-27);

(6) the Minister of Justice and Attorney General, the Director of Criminal and Penal Prosecutions, and persons who exercise the function of lawyer, notary or criminal and penal prosecuting attorney, including legal managers who supervise the work of those persons or of other legal managers, and who are under the authority of a government department, the Director of Criminal and Penal Prosecutions, the National Assembly, a person appointed or designated by the National Assembly to an office under its authority, a body referred to in paragraph 3, the Autorité des marchés financiers, the Autorité des marchés publics, the Commission des droits de la personne et des droits de la jeunesse, Revenu Québec or a body or person whose personnel is appointed in accordance with the

alcools, des courses et des jeux, de la Régie des marchés agricoles et alimentaires du Québec, de la Régie du bâtiment du Québec, de la Régie du logement, du Tribunal administratif des marchés financiers, du Tribunal administratif du Québec ou du Tribunal administratif du travail, ainsi qu'un président de conseil de discipline exerçant ses fonctions au sein du Bureau des présidents des conseils de discipline;

4° un commissaire nommé par le gouvernement en vertu de la Loi sur les commissions d'enquête (chapitre C-37), ainsi qu'un avocat ou un notaire agissant pour une telle commission;

5° un arbitre nommé par le ministre du Travail dont le nom apparaît sur une liste dressée par ce dernier conformément au Code du travail (chapitre C-27);

6° le ministre de la Justice et procureur général, le directeur des poursuites criminelles et pénales, ainsi qu'une personne qui exerce la fonction d'avocat, de notaire ou de procureur aux poursuites criminelles et pénales, y compris un cadre juridique qui supervise le travail de ces personnes ou celui d'autres cadres juridiques, et qui relève d'un ministère, du directeur des poursuites criminelles et pénales, de l'Assemblée nationale, d'une personne nommée ou désignée par l'Assemblée nationale pour exercer une fonction qui en relève, d'un organisme visé au paragraphe 3°, de l'Autorité des marchés financiers, de l'Autorité des marchés publics, de la Commission des droits de la personne et des droits de la jeunesse, de Revenu Québec ou d'un organisme ou d'une personne

Public Service Act (chapter F-3.1.1), except the Centre d'acquisitions gouvernementales, the Conseil de gestion de l'assurance parentale, the Institut de la statistique du Québec, La Financière agricole du Québec, the Société d'habitation du Québec and Transition énergétique Québec;

dont le personnel est nommé suivant la Loi sur la fonction publique (chapitre F-3.1.1), à l'exception du Centre de services partagés du Québec, du Conseil de gestion de l'assurance parentale, de l'Institut de la statistique du Québec, de La Financière agricole du Québec, de la Société d'habitation du Québec et de Transition énergétique Québec;

(7) persons who exercise the function of lawyer and are employed by a prosecutor referred to in paragraph 2 or 3 of article 9 of the Code of Penal Procedure (chapter C-25.1), unless the prosecutor is referred to in paragraph 6, when those persons are acting in criminal or penal matters for a prosecutor before the courts or with third persons;

7° une personne qui exerce la fonction d'avocat à l'emploi d'un poursuivant visé à l'un ou l'autre des paragraphes 2° et 3° de l'article 9 du Code de procédure pénale (chapitre C-25.1), sauf si ce poursuivant est visé au paragraphe 6°, lorsque cette personne agit en matière criminelle ou pénale pour un poursuivant devant un tribunal ou auprès de tiers;

(8) lawyers or notaries acting before the courts or with third persons in accordance with a legal services contract entered into with a minister, the Director of Criminal and Penal Prosecutions, the National Assembly, a person appointed or designated by the National Assembly to exercise a function under its authority, a body referred to in paragraph 3, the Autorité des marchés financiers, the Autorité des marchés publics, the Commission des droits de la personne et des droits de la jeunesse, Revenu Québec, a body or person whose personnel is appointed in accordance with the Public Service Act, except the Centre d'acquisitions gouvernementales, the Conseil de gestion de l'assurance parentale, the Institut de la statistique du Québec, La Financière agricole du Québec, the Société d'habitation du Québec and Transition énergétique Québec, or lawyers acting in criminal or penal matters before the courts or with third persons in accordance with

8° un avocat ou un notaire lorsqu'il agit devant un tribunal ou auprès de tiers conformément à un contrat de services juridiques conclu avec un ministre, le directeur des poursuites criminelles et pénales, l'Assemblée nationale, une personne nommée ou désignée par l'Assemblée nationale pour exercer une fonction qui en relève, un organisme visé au paragraphe 3°, l'Autorité des marchés financiers, l'Autorité des marchés publics, la Commission des droits de la personne et des droits de la jeunesse, Revenu Québec, un organisme ou une personne dont le personnel est nommé suivant la Loi sur la fonction publique, à l'exception du Centre de services partagés du Québec, du Conseil de gestion de l'assurance parentale, de l'Institut de la statistique du Québec, de La Financière agricole du Québec, de la Société d'habitation du Québec et de Transition énergétique Québec, de même qu'un avocat lorsqu'il agit en

a legal services contract entered into with a prosecutor referred to in paragraph 7;

(9) peace officers who exercise their functions mainly in Québec; and

(10) principals, vice principals and teachers of educational institutions under the jurisdiction of a school service centre established under the Education Act (chapter I-13.3) or of the Centre de services scolaire du Littoral established by the Act respecting the Centre de services scolaire du Littoral (1966-1967, chapter 125).

SCHEDULE III

(Section 7)

PERSONS CONSIDERED TO BE PERSONNEL MEMBERS OF A BODY FOR THE PURPOSES OF MEASURES RELATING TO SERVICES WITH FACE UNCOVERED

(1) Members of the National Assembly;

(2) elected municipal officers, except those of municipalities governed by the Cree Villages and the Naskapi Village Act (chapter V-5.1) or by the Act respecting Northern villages and the Kativik Regional Government (chapter V-6.1);

(3) office staff within the meaning of Division II.2 of the Executive Power Act (chapter E-18), office staff and Members' staff within the meaning of Division III.1 of Chapter IV of the Act respecting the National Assembly (chapter A-23.1), and office staff

matière criminelle ou pénale devant un tribunal ou auprès de tiers conformément à un contrat de services juridiques conclu avec un poursuivant visé au paragraphe 7°;

9° un agent de la paix exerçant ses fonctions principalement au Québec;

10° un directeur, un directeur adjoint ainsi qu'un enseignant d'un établissement d'enseignement sous la compétence d'une commission scolaire instituée en vertu de la Loi sur l'instruction publique (chapitre I-13.3) ou de la Commission scolaire du Littoral constituée par la Loi sur la Commission scolaire du Littoral (1966-1967, chapitre 125).

ANNEXE III

(Article 7)

PERSONNES ASSIMILÉES À UN MEMBRE DU PERSONNEL D'UN ORGANISME POUR L'APPLICATION DES MESURES RELATIVES AUX SERVICES À VISAGE DÉCOUVERT

1° un député de l'Assemblée nationale;

2° un élu municipal, à l'exception de celui d'une municipalité régie par la Loi sur les villages cris et le village naskapi (chapitre V-5.1) ou par la Loi sur les villages nordiques et l'Administration régionale Kativik (chapitre V-6.1);

3° un membre du personnel d'un cabinet au sens de la section II.2 de la Loi sur l'exécutif (chapitre E-18), un membre du personnel d'un cabinet ou d'un député au sens de la section III.1 du chapitre IV de la Loi sur l'Assemblée nationale

referred to in section 114.4 of the Cities and Towns Act (chapter C-19);

(4) members of the board of directors of a school service centre established under the Education Act (chapter I-13.3) and the manager and assistant manager appointed under section 4 of the Act respecting the Centre de services scolaire du Littoral (1966-1967, chapter 125);

(5) National Assembly personnel members and Lieutenant-Governor staff members;

(6) persons appointed or designated by the National Assembly to an office under its authority and the personnel directed by them;

(7) commissioners appointed by the Government under the Act respecting public inquiry commissions (chapter C-37) and the personnel directed by them;

(8) persons appointed by the government or by a minister to exercise an adjudicative function within the administrative branch, including arbitrators whose name appears on a list drawn up by the Minister of Labour in accordance with the Labour Code (chapter C-27);

(9) peace officers who exercise their functions mainly in Québec;

(10) physicians, dentists and midwives, when those persons are practising in a centre operated by a public institution referred to in paragraph 8 of Schedule I;

(11) persons recognized as subsidized home educational

(chapitre A-23.1) de même qu'un membre du personnel d'un cabinet visé à l'article 114.4 de la Loi sur les cités et villes (chapitre C-19);

4° un commissaire d'une commission scolaire instituée en vertu de la Loi sur l'instruction publique (chapitre I-13.3), ainsi que l'administrateur et l'administrateur adjoint nommés en vertu de l'article 4 de la Loi sur la Commission scolaire du Littoral (1966-1967, chapitre 125);

5° un membre du personnel de l'Assemblée nationale ou du lieutenant-gouverneur;

6° une personne nommée ou désignée par l'Assemblée nationale pour exercer une fonction qui en relève et le personnel qu'elle dirige;

7° un commissaire nommé par le gouvernement en vertu de la Loi sur les commissions d'enquête (chapitre C-37) et le personnel qu'il dirige;

8° une personne nommée par le gouvernement ou par un ministre pour exercer une fonction juridictionnelle relevant de l'ordre administratif, y compris un arbitre dont le nom apparaît sur une liste dressée par le ministre du Travail conformément au Code du travail (chapitre C-27);

9° un agent de la paix exerçant ses fonctions principalement au Québec;

10° un médecin, un dentiste ou une sage-femme lorsque cette personne exerce sa profession dans un centre exploité par un établissement public visé au paragraphe 8° de l'annexe I;

11° une personne reconnue à titre de responsable d'un service de garde en

childcare providers under the Educational Childcare Act (chapter S-4.1.1) and the persons directed by them;

(12) directors or members of a body referred to in any of paragraphs 1 to 9 of Schedule I who receive remuneration from the body other than the reimbursement of their expenses, except persons who are elected;

(13) any other persons appointed or designated by the National Assembly, the Government or a minister, when those persons are exercising functions assigned to them by the National Assembly, the law, the Government or the minister.

milieu familial subventionné en vertu de la Loi sur les services de garde éducatifs à l'enfance (chapitre S-4.1.1) et les personnes qu'elle dirige;

12° un administrateur ou un membre d'un organisme énuméré à l'un ou l'autre des paragraphes 1° à 9° de l'annexe I qui reçoit de celui-ci une rémunération autre que le remboursement de ses dépenses, à l'exception d'une personne élue;

13° toute autre personne nommée ou désignée par l'Assemblée nationale, par le gouvernement ou par un ministre, lorsqu'elle exerce des fonctions qui lui sont attribuées par l'Assemblée nationale, par la loi, par le gouvernement ou par le ministre.