

SUPREME COURT OF CANADA

CITATION: English Montreal School Board *v.* Quebec (Attorney General), 2026 SCC 41

APPEALS HEARD: March 23, 24, 25 and 26, 2026
JUDGMENT RENDERED: November 27, 2026
DOCKET: 41231

BETWEEN:

English Montreal School Board,
Mubeenah Mughal and Pietro Mercuri
Appellants/Respondents on cross-appeal

and

Attorney General of Quebec,
Jean-François Roberge, in his official capacity,
and Simon Jolin-Barrette, in his official capacity
Respondents/Appellants on cross-appeal

and

Mouvement laïque québécois
and François Paradis, in his official capacity
Respondents

AND BETWEEN:

World Sikh Organization of Canada
and Amrit Kaur
Appellants/Respondents on cross-appeal

and

Attorney General of Quebec

Respondent/Appellant on cross-appeal

AND BETWEEN:

Ichrak Nourel Hak,
National Council of Canadian Muslims
and Canadian Civil Liberties Association
Appellants/Respondents on cross-appeal

and

Attorney General of Quebec,
Jean-François Roberge, in his official capacity,
and Simon Jolin-Barrette, in his official capacity
Respondents/Appellants on cross-appeal

and

Mouvement laïque québécois,
Pour les droits des femmes du Québec
and François Paradis, in his official capacity
Respondents

AND BETWEEN:

Fédération autonome de l'enseignement
Appellant/Respondent on cross-appeal

and

Attorney General of Quebec,
Jean-François Roberge, in his official capacity,
and Simon Jolin-Barrette, in his official capacity
Respondents/Appellants on cross-appeal

AND BETWEEN:

Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi
and Legal Committee of the Coalition Inclusion Québec
Appellants/Respondents on cross-appeal

and

Attorney General of Quebec
Respondent/Appellant on cross-appeal

AND BETWEEN:

Lord Reading Law Society
Appellant/Respondent on cross-appeal

and

Attorney General of Quebec
Respondent/Appellant on cross-appeal

- and -

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
World Sikh Organization of Canada,
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Quebec Community Groups Network,
Amnistie internationale Canada francophone,
Public Service Alliance of Canada,
Quebec English School Boards Association,
Christian Legal Fellowship,
Women's Legal Education and Action Fund,
Public Interest Litigation Institute,
Muslim Advisory Council of Canada,
Raoul Wallenberg Centre for Human Rights,
Trial Lawyers Association of British Columbia,
Droits collectifs Québec,
Chinese Canadian National Council for Social Justice,

Chinese and Southeast Asian Legal Clinic,
Advocates' Society,
International Commission of Jurists (Canada),
Task Force on Linguistic Policy, Andrew Caddell,
Association des avocats de la défense de Montréal-Laval-Longueuil,
Honourable Serge Joyal, P.C.,
South Asian Bar Associations (Toronto, Calgary,
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Commission nationale des parents francophones,
West Coast Legal Education and Action Fund Association,
Canadian Council of Muslim Women,
British Columbia Civil Liberties Association,
Barbra Schlifer Commemorative Clinic,
Women in Canadian Criminal Defence,
Ligue des droits et libertés,
British Columbia Humanist Association,
Canadian Secular Alliance,
Ontario Human Rights Commission,
Association des conseils scolaires des écoles publiques de l'Ontario,
National Association of Women and the Law,
Commissioner of Official Languages of Canada,
Acadian Society of New Brunswick,
Criminal Lawyers' Association (Ontario),
Egale Canada, Clinique juridique Juritrans,
Samara Centre for Democracy,
David Asper Centre for Constitutional Rights,
Federation of Ontario Law Associations,
Community Legal Assistance Society,
South Asian Legal Clinic of Ontario,
South Asian Legal Clinic of British Columbia
and South Asian Women's Community Centre
Interveners

OFFICIAL ENGLISH TRANSLATION:
Reasons of Wagner C.J. and reasons of Kasirer J.

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and O'Bonsawin JJ.

REASONS: Wagner C.J. (Côté and Rowe JJ. concurring)
(paras. 1 to 404)

REASONS: Kasirer J.
(paras. 405 to 589)

REASONS: Martin J.
(paras. 590 to 727)

JOINT REASONS: Karakatsanis and O'Bonsawin JJ.
(paras. 728 to 955)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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and

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2026 SCC 41

File No.: 41231.

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

Constitutional law — Charter of Rights — Override clause — Conditions for invocation — Effects — Declaratory judgment — Quebec legislature invoking override clauses in provincial law in order for law to apply despite certain rights and freedoms protected by Canadian and Quebec charters — Whether legislature validly invoked override clauses — If so, whether courts can rule on law's consistency with rights and freedoms it overrides — Canadian Charter of Rights and Freedoms, s. 33

— Charter of human rights and freedoms, s. 52 — Act respecting the laicity of the State, CQLR, c. L-0.3, ss. 33, 34.

Constitutional law — Charter of Rights — Rights guaranteed equally to both sexes — Provincial law imposing prohibition on wearing religious symbols and obligation to have face uncovered on certain persons representing state in exercise of their functions — Whether provincial law violates guarantee of equal rights for male and female persons — Canadian Charter of Rights and Freedoms, s. 28 — Act respecting the laicity of the State, CQLR, c. L-0.3, ss. 6, 8.

Constitutional law — Charter of Rights — Minority language educational rights — Quebec law prohibiting principals, vice principals and teachers of educational institutions from wearing religious symbols in exercise of their functions — Whether law encroaches on exclusive right of management and control held by province's English-speaking minority with respect to recruitment of school personnel — Canadian Charter of Rights and Freedoms, s. 23 — Act respecting the laicity of the State, CQLR, c. L-0.3, s. 6.

Constitutional law — Charter of Rights — Democratic rights — Right to be qualified for membership in legislative assembly — Provincial law requiring members of National Assembly of Quebec to exercise their functions with their face uncovered and prohibiting President and Vice-Presidents of National Assembly and Minister of Justice from wearing religious symbols in exercise of their functions — Whether law infringes right to be qualified for membership in legislative assembly —

Canadian Charter of Rights and Freedoms, s. 3 — Act respecting the laicity of the State, CQLR, c. L-0.3, ss. 6, 8.

Constitutional law — Division of powers — Provincial law enshrining laicity as principle of government for Quebec state — Law in question imposing prohibition on wearing religious symbols and obligation to have face uncovered on certain persons representing state in exercise of their functions — Whether law is intra vires Quebec legislature — Constitution Act, 1867, s. 92(4) — Constitution Act, 1982, s. 45 — Act respecting the laicity of the State, CQLR, c. L-0.3, ss. 6, 8.

Constitutional law — Pre-Confederation statutes — Supra-legislative status — Provincial law imposing prohibition on wearing religious symbols and obligation to have face uncovered on certain persons representing state in exercise of their functions — Validity of law challenged on basis of its inconsistency with two pre-Confederation statutes protecting, among other things, free exercise of religious profession and worship — Whether pre-Confederation statutes invoked are part of Constitution of Canada — If so, whether impugned provincial law is inconsistent with these pre-Confederation statutes and therefore of no force or effect — 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, S. Prov. C. 1851, 14 & 15 Vict., c. 175 — 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, S. Prov. L.C. 1832, 1 Will. 4, c. 57 — Act respecting the laicity of the State, CQLR, c. L-0.3, ss. 6, 8.

Constitutional law — Constitutional architecture — Provincial law imposing prohibition on wearing religious symbols and obligation to have face uncovered on certain persons representing state in exercise of their functions — Whether constitutional architecture protects right of individuals to access positions in public institutions without discrimination based on their religion — If so, whether law alters constitutional architecture and is therefore unconstitutional.

In 2019, the National Assembly of Quebec passed the *Act respecting the laicity of the State* ("Bill 21"), which affirms the lay character of the Quebec state by enshrining, *inter alia*, the principle of the separation of state and religions and that of the religious neutrality of the state. Section 6 of Bill 21 prohibits certain persons who hold public positions of authority — including the Minister of Justice, the President of the National Assembly, prosecutors, lawyers acting on behalf of the state, and principals, vice principals and teachers of educational institutions — from wearing religious symbols in the exercise of their functions. Section 8 of Bill 21 imposes an obligation to have one's face uncovered to provide or receive certain public services. This obligation applies to members of the National Assembly, among others. Bill 21 contains two override provisions, ss. 33 and 34, which provide for the application of the override clauses set out, respectively, in s. 33 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") — known as the notwithstanding clause — and s. 52 of

Quebec's *Charter of human rights and freedoms* ("*Quebec Charter*"). The purpose of these override provisions is to insulate Bill 21 from being challenged in court on the basis of ss. 2 and 7 to 15 of the *Charter* or ss. 1 to 38 of the *Quebec Charter*.

Several parties challenged the constitutionality of Bill 21 and of an exercise conducted by the Ministère de l'Éducation et de l'Enseignement supérieur, during the months preceding the enactment of Bill 21, to count the number of school personnel members wearing a religious symbol. At first instance, Bill 21 was held to be valid, subject to two exceptions. First, the trial judge concluded that s. 8 of Bill 21, which prohibits members of the National Assembly from wearing a face covering while sitting, infringes the right guaranteed by s. 3 of the *Charter* to be qualified for membership therein and he declared s. 8 to be of no force or effect. Second, he declared the provisions of Bill 21 relating to the prohibition on wearing religious symbols to be of no force or effect with respect to English-language schools on the ground that they infringe s. 23 of the *Charter*, which protects minority language educational rights.

The trial judge rejected all of the other grounds advanced by the parties opposing Bill 21. He held that Bill 21 is *intra vires*, because it falls within provincial heads of power and is not a statute within the scope of the federal criminal law power. He also ruled that the pre-Confederation statutes invoked by the parties, namely the *Rectories Act* of 1852 and the *Hart Act* of 1832, are not supra-legislative in nature and cannot serve to invalidate Bill 21, and he found that Bill 21 is contrary to neither Canada's constitutional architecture nor the rule of law. In addition, he concluded that

the legislature had validly used the override clauses in the *Charter* and the *Quebec Charter*, and he declined to render a declaratory judgment on Bill 21's consistency with ss. 2 and 7 to 15 of the *Charter*. Finally, he found that s. 28 of the *Charter* is an interpretive provision that cannot serve, on its own, to invalidate Bill 21. The Court of Appeal upheld the trial judge's conclusions, including those relating to s. 3 of the *Charter*, but overturned those based on s. 23. In all other respects, it affirmed the validity of Bill 21.

Held: The appeals and the cross-appeal should be dismissed. Bill 21 is valid and operative, apart from s. 8, which constitutes an unjustified infringement of s. 3 of the *Charter* and which is therefore, only to the extent that it applies to members of the National Assembly, of no force or effect by virtue of s. 52(1) of the *Constitution Act, 1982*.

Karakatsanis, Kasirer and O'Bonsawin JJ., dissenting in part, would have declared that ss. 6 and 8 of Bill 21 unjustifiably infringe the freedom of conscience and religion, freedom of expression and right to equality protected by ss. 2 and 15 of the *Charter* and by ss. 3 and 10 of the *Quebec Charter*, but that Bill 21 is nevertheless constitutionally valid under s. 33 of the *Charter* and s. 52 of the *Quebec Charter*.

Karakatsanis and O'Bonsawin JJ., dissenting in part, would have declared that ss. 4 para. 1, 6, 7, 8, 12 paras. 1 and 2, 13, 14 and 16 of Bill 21 unjustifiably infringe s. 23 of the *Charter* and are of no force or effect with respect to Quebec's English-language school boards, pursuant to s. 52(1) of the *Constitution Act, 1982*.

Karakatsanis, Martin and O'Bonsawin JJ., dissenting in part, would have declared that ss. 6 and 8 of Bill 21 infringe s. 28 of the *Charter* and are of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

Declaratory Judgment

Per **Wagner** C.J. and Côté and Rowe JJ.: A declaratory judgment is not available in cases where a legislative body has validly invoked the override clause in s. 33 of the *Charter* or in s. 52 of the *Quebec Charter*. Accordingly, the Court should not rule on whether Bill 21 is consistent with ss. 2(a) and (b) and 15 of the *Charter* or with ss. 1 to 38 of the *Quebec Charter*.

The courts have inherent jurisdiction to render a declaratory judgment on the constitutionality of a law. Judicial review of the constitutionality of legislation is one of the essential functions of the superior courts guaranteed by s. 96 of the *Constitution Act, 1867*. Section 52(1) of the *Constitution Act, 1982*, by instructing the courts not to give effect to laws that are inconsistent with the Constitution, serves as the foundation for the exercise of this jurisdiction. However, s. 96 of the *Constitution Act, 1867* provides no basis for recognizing a residual jurisdiction that would allow the courts to consider whether a law covered by a valid declaration made under s. 33 of the

Charter is consistent with the *Charter* provisions concerned and to declare that such a law infringes guaranteed rights.

Invoking s. 33 of the *Charter* has the effect of protecting a law from the application of the *Charter* provisions enumerated in an override declaration contained in the law. The *Charter* gives the courts neither the power nor the responsibility to verify a law's consistency with the enumerated *Charter* provisions when s. 33 has been validly invoked; rather, it confers this responsibility on legislative bodies and, ultimately, on the electorate. When s. 33 is invoked, the courts are called upon to exercise the powers conferred on them by s. 96 of the *Constitution Act, 1867* solely to ensure that the override declaration meets the applicable requirements of form and that the law does not infringe other provisions of the *Charter* or the Constitution to which s. 33 does not apply. Subject to these qualifications, s. 33 provides for no supervisory role for the courts and, considered as a whole, the *Charter* confers no power to issue a declaration of inconsistency.

Allowing the courts to rule on the question of whether rights to which an override declaration applies have hypothetically been infringed would substantially diminish the effect of s. 33 and blur the distinction between the function it performs within the *Charter* and the justification exercise provided for by s. 1 of the *Charter*. Both s. 1 and s. 33 are mechanisms devised to enable a legislative body to limit *Charter* rights, in different ways, in order to serve other public interests. The former permits the legislative body to limit rights by justifying the limit to the courts, while the latter

permits it to limit rights by justifying the limit to voters. These mechanisms are mutually exclusive. To require the state to justify a limit on a right or freedom despite the fact that s. 33 has been invoked would trivialize the function of s. 1 as the central mechanism for reviewing the constitutionality of legislation in Canadian law. When the state declines to undertake this theoretical exercise, the court's declaratory judgment loses much of its persuasive force and jurisprudential importance. Moreover, the courts generally do not rule on purely hypothetical issues, and there would be no basis for a declaratory judgment in Quebec procedural law, whether under art. 529 or under art. 142 of the *Code of Civil Procedure*.

For the same reasons as those applicable to s. 33 of the *Charter*, there is nothing that justifies the Quebec courts being able to issue declaratory judgments when the override clause in s. 52 of the *Quebec Charter* has been invoked. Nothing in the scheme of the *Quebec Charter* justifies or requires a ruling by the courts in the abstract on the validity of laws that, by virtue of s. 52 having been invoked, are exempted from the application of the provisions enumerated therein.

Per **Kasirer** J.: The legislature's invocation of the override clauses does not preclude the courts from making a declaratory judgment on a law's consistency with ss. 2 and 7 to 15 of the *Charter* and with the relevant provisions of the *Quebec Charter*. If s. 33 of the *Charter* protects a statute from the application of a *Charter* provision, it does so only for the purpose of protecting the impugned statute from a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*.

Neither of the two positions advanced provides a complete solution to the question of the consequences of invoking s. 33, the answer to which lies, in part, in the distinction to be drawn between the consistency and the validity of a statute with respect to the charters. With the adoption of a reading of s. 33 that considers the two contrary positions, it is appropriate to agree with the Attorney General of Quebec as to the validity and operability of Bill 21 and to allow the application by the parties opposing Bill 21 for a declaratory judgment bearing on its inconsistency with the charters. Regarding the scope of the declaration, it should be recognized that Bill 21 has a pressing and substantial objective. At the same time, the Attorney General of Quebec did not provide a complete justification of Bill 21's negative impact on the rights and freedoms of the parties opposing Bill 21. Consequently, despite the pressing and substantial objective of Bill 21, these infringements have not been entirely justified under s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter* by the party who bore the burden to do so.

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, did not decide whether a court can render a declaratory judgment on the consistency of a statute protected by an override provision with certain provisions of the *Charter*, nor did it decide the question of the existence of substantive constitutional limitations on the exercise of the override power. It is necessary to build upon *Ford* rather than overturn it.

A complete purposive interpretation indicates that s. 33 of the *Charter* does not have the effect of taking away the inherent jurisdiction of the superior courts to render a declaratory judgment. The text, centred on the operation of the Act at issue, the context, the overall purpose of the *Charter* and the philosophy underlying it, together with the constitutional principles of democracy, protection of minorities and parliamentary sovereignty tend towards this interpretation. A plain reading of s. 33 reveals no mention of the jurisdiction of the courts or the unavailability of a certain remedy for the litigant. The textual interpretation of s. 33, which suggests that an override provision concerns the Act and its operation rather than the jurisdiction of the courts, is aligned with the internal context of s. 33, as well as with the overall purpose of the *Charter* to provide a continuing framework for the legitimate exercise of governmental power and for the unremitting protection of individual rights and liberties. The constitutional principle of democracy underlying s. 33 militates in favour of an interpretation that allows ordinary courts, as impartial third parties, to provide such guidance on the relationship between a law and the Constitution through a declaratory judgment. The five-year expiry period set out in s. 33(3), which corresponds to the maximum duration of the House of Commons or a legislative assembly under s. 4 of the *Charter*, is clearly intended to place in the hands of the electorate the choice of whether to renew the override provision. Furthermore, the court's opinion is useful for the public, particularly where a vulnerable minority is affected by an overriding statute. The constitutional principle of parliamentary sovereignty is in no way challenged by a declaration that has no invalidating effect,

since s. 33 makes it possible to maintain the validity and operability of a law that is inconsistent with a provision of the *Charter*.

Because s. 33 does not remove the Court's inherent jurisdiction to render a declaratory judgment, there is no reason for not ruling on whether Bill 21 complies with the provisions of the charters being overridden. A declaratory judgment highlighting the inconsistency of ss. 6 and 8 of Bill 21 with the *Charter* aims to resolve a genuine problem that is in no way moot. This declaration would have undeniable practical utility for the parties opposing Bill 21 and for the electorate, even if Bill 21 is valid and operative by virtue of s. 33. The freedom of religion and conscience, the freedom of expression, as well as the right to equality continue to exist despite the invocation of s. 33 of the *Charter*. Given that Bill 21 is still in force, the question is live and perfectly justiciable. Moreover, the Attorney General of Quebec's choice to not present arguments on the existence of infringements and whether they are justified does not deprive the Court of an adversarial debate.

The trial judge's refusal to grant a declaratory remedy was tainted by an error in principle as to the effects of invoking the override clauses. Despite this error, throughout his reasons, he drew several conclusions based on the evidence adduced in light of which it is possible to declare, in the place of the Superior Court, that ss. 6 and 8 of Bill 21 infringe the fundamental freedoms of conscience and religion and of expression as well as the right to equality protected by ss. 2 and 15 of the *Charter* and by ss. 3 and 10 of the *Quebec Charter*. It is not necessary to find that there has been a

separate infringement of s. 28, which, in the circumstances, does not prevail over the notwithstanding clause, like ss. 2 and 15 with which it is connected. However, the guarantee set out in s. 28 assumes particular normative importance in this case at the s. 1 justification stage.

The characterization of the objective of Bill 21 as being pressing and substantial can be inferred from the principles of 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 that Bill 21 seeks to reconcile. However, a misreading of *Ford* led the Attorney General of Quebec to believe, wrongly, that it was not necessary to submit contrary evidence for the purpose of a possible judicial declaration. The natural effect of the Attorney General of Quebec's decision to not make arguments on *Oakes* is simple: the Court must find that the infringement of the freedom of religion and conscience, the freedom of expression and the right to equality has not been justified in a free and democratic society. Although there may exist a sufficient rational connection between the prohibition on wearing religious symbols by certain state actors and the objective of laicization of the state, the obligation to have one's face uncovered in order to receive a service is lacking a rational connection to this objective, because it imposes restrictions on members of the public and not on agents of the state. These restrictions have no connection to the religious neutrality of the state and to the separation of state and religions. It also has not been demonstrated that the prohibition on wearing a religious symbol is reasonably limited in its scope of application to satisfy the minimal impairment requirement. Because of its lack of

nuance and flexibility, Bill 21 departs from the justification advanced for the prohibition on religious symbols, that is, the appearance of neutrality and the appearance of impartiality of government employees. With respect to the guarantee of equality for male and female persons set out in s. 28 of the *Charter*, Bill 21's deleterious effect of preventing especially Muslim women from exercising their freedom of religion must be considered in balancing the salutary and deleterious effects and supports the conclusion that there is an absence of evidence of justification.

Per **Martin** J.: Superior courts retain jurisdiction to grant declaratory relief where a legislature enacts legislation in which it invokes s. 33 of the *Charter*. At a minimum, courts retain the ability to determine whether s. 33 applies to the rights at issue, and the superior courts' general jurisdiction to issue declarations continues because the *Charter* rights subject to s. 33 are not eradicated or eliminated. While courts have the jurisdiction to make declarations, they have discretion as to whether they will do so in any given case. Judicial declarations serve a notice-giving function when s. 33 is invoked. Given the conclusion that ss. 6 and 8 of Bill 21 infringe s. 28, there is no need for a separate declaration in this case as to any infringement of ss. 2(a) and (b) and 15(1) of the *Charter*. Had a breach of s. 28 not been found, a declaration would have been issued finding that these rights were violated.

Per **Karakatsanis** and **O'Bonsawin** JJ.: There is agreement with Martin and Kasirer JJ. that declaratory relief remains available when s. 33 of the *Charter* or s. 52 of the *Quebec Charter* is invoked. Superior courts always retain inherent jurisdiction

to issue declarations for *Charter* and *Quebec Charter* infringements. Courts should not be silent when faced with legislation that infringes constitutional rights and freedoms.

Courts' ability to grant constitutional declarations aligns with both s. 33's text and the purposive interpretation of the provision. Section 33's text is clear. When it is invoked, the legislation or provisions that it applies to can "operate notwithstanding" certain *Charter* rights and freedoms. Section 33 suspends the effects of ss. 2 and 7 to 15 of the *Charter*, but the rights affected by s. 33 continue to exist. A law shielded by s. 33 that is inconsistent with the *Charter*'s rights and freedoms continues to breach them until the invocation of the notwithstanding clause expires or is repealed. Section 33 does not oust the inherent jurisdiction of superior courts to review legislation for rights infringements.

Courts' ability to grant constitutional declarations when s. 33 of the *Charter* has been invoked also aligns with the notwithstanding clause's purpose to preserve a form a parliamentary sovereignty premised on democratic accountability. Section 33's temporary nature — requiring renewal every five years — reflects the expectation that its use would be subject to political scrutiny and democratic accountability. Declaratory relief vindicates those whose rights have been breached by recognizing the harms they have suffered. It also fosters democratic accountability by informing the public of the nature and extent of those harms. Section 33 is thus a tool that facilitates dialogue not only between the courts and legislatures, but between the courts, legislatures and the electorate — who are ultimately given the "final say" on

uses of s. 33 to override *Charter* rights. Courts have a crucial role to play in dialogue between the legislatures and electorate by informing both of the scope of a *Charter* right and whether and to what extent it is infringed by a statute that invokes the notwithstanding clause.

In this case, the seriousness of the alleged breaches demands a response from the Court and the exercise of its discretion to grant a declaration. Sections 6 and 8 of Bill 21 unjustifiably infringe freedom of religion, freedom of expression, and equality rights under both the *Charter* and the *Quebec Charter*. These provisions of Bill 21 would be of no force or effect, but for the invocation of s. 33 of the *Charter* and s. 52 of the *Quebec Charter*.

There can be no serious question that Bill 21 violates freedom of religion as guaranteed by s. 2(a) of the *Charter*. For many Quebecers, a religious symbol like a hijab, turban, or kippa is an essential part of their identity and their chosen connection with their faith. Their beliefs prevent them from removing their religious symbols, even at the risk of serious professional and financial consequences. For those affected, Bill 21 has life-altering effects by derailing their careers and their life aspirations. It treats visible religious minorities as less worthy of full participation in Quebec society, influences their life choices and mobility, and creates professional barriers for them by preventing qualified individuals from being hired, promoted or transferred within public sector workplaces.

There can also be no dispute that Bill 21 infringes freedom of expression under s. 2(b) of the *Charter*. Religious symbols are a means to express religious identity and to champion one's faith publicly. A person publicly displaying religious symbols conveys sincerely held religious beliefs to others, which places that conduct squarely within the scope of free expression. Bill 21 explicitly prohibits people from wearing or displaying visible religious symbols while working in certain categories of employment, thereby infringing freedom of expression under s. 2(b) of the *Charter*.

Bill 21 also infringes the right to equality under s. 15(1) of the *Charter* on the grounds of religion and sex. Bill 21 creates a distinction on its face on the basis of religion, and in its effects on the basis of sex.

Bill 21 directly discriminates on the basis of religion. By prohibiting visible religious minorities from wearing religious symbols in the public service, the law treats them differently from those who do not wear religious symbols. This distinction reinforces the historical disadvantage and exclusion experienced by visible religious minorities, which is heightened given their other intersecting identities and realities.

Bill 21 adversely discriminates on the basis of sex. Bill 21's effects are not experienced equally. They fall most heavily on Muslim women. The trial judge accepted that Bill 21 imposes unique adverse effects on Muslim women who wear head, face, or body coverings.

Bill 21's impact on Muslim women aspiring to be teachers, for example, is significant. Remarkably, on the record every job application file closed as a result of the enactment of Bill 21 belonged to a Muslim woman who wore a hijab. As a result, ss. 6 and 8 of Bill 21 prevent Muslim women from practising their religion, expressing themselves, or accessing the labour market on an equal footing with men. Bill 21 therefore violates the right to equality on the basis of sex. It discriminates against Muslim women by disproportionately affecting their professional opportunities and reinforcing negative stereotypes about them.

Despite bearing the burden of justifying infringements of rights and freedoms under s. 1 of the *Charter*, the Attorney General of Quebec chose not to address whether any breaches related to Bill 21 could be justified in a free and democratic society. There is no doubt that laicity and religious tolerance occupy an important place in Quebec's social and political fabric. However, the Court cannot engage in a proportionality exercise without the benefit of evidence and argument because to do so in the abstract risks transforming the Court from an adjudicator of the state's justification into its architect. Therefore, the breaches of freedom of religion under s. 2(a), freedom of expression under s. 2(b), and the right to equality under s. 15(1) of the *Charter* are not justified under s. 1.

Validity of Override Provisions

Per **Wagner** C.J. and Côté and Rowe JJ.: The Quebec legislature validly used the override power conferred on it by s. 33 of the *Charter* in Bill 21. Section 34

of Bill 21, whose purpose is to insulate Bill 21 from being challenged in court on the basis of ss. 2 and 7 to 15 of the *Charter*, complies with the requirements of form set out in s. 33 of the *Charter*.

Section 33 of the *Charter* allows a legislative body to temporarily override the rights protected by ss. 2 and 7 to 15 of the *Charter* through an express declaration made in validly enacted legislation. Section 33 of the *Charter* imposes only formal requirements on a legislative body, not substantive requirements: its wording requires only that a law expressly declare that it will operate notwithstanding certain provisions of the *Charter*. An override declaration can apply to one or more of ss. 2 and 7 to 15 of the *Charter*, but only to them. The validity of an override declaration does not depend on the pursuit of a pressing and substantial objective, the existence of a prior judicial decision or any substantive justification requirement. Once this declaration has been enacted, the rights and freedoms guaranteed by the provisions to which it refers do not apply to the law in question and do not produce their effects in relation to the legislative provisions so protected.

In *Ford*, the Court established, among other things, that a declaration made under s. 33 must be express, which means it must refer to the *Charter* provisions the legislative body intends to override, and that it cannot produce retroactive effects. However, nothing in the text of s. 33 prevents a legislative body from invoking this provision in an omnibus bill or from applying it to several *Charter* provisions simultaneously. Similarly, a legislative body is not required to show a link or

relationship between the law in question and the rights or freedoms it intends to override. More fundamentally, it is not for the courts to substantively review the legitimacy of the legislative policy pursued by the legislative body or the appropriateness of invoking the notwithstanding clause. *Ford* continues to have full precedential value.

The very existence of s. 1 of the *Charter* helps illuminate the distinct nature of s. 33 and shows that no justification is necessary for this provision to be validly invoked. When an infringement of a *Charter* right or freedom is established, s. 1 requires a court to determine whether the impugned measure is a reasonable limit that "can be demonstrably justified in a free and democratic society". The scope of s. 33 cannot be subordinated to s. 1. They are both distinct mechanisms that operate in parallel to enable a legislative body to limit *Charter* rights, on certain conditions, in order to serve other public interests. Only s. 1 requires it to be shown in court that the limit is justified in a free and democratic society. In contrast, s. 33 posits that the legislative process itself remains a legitimate way of maintaining a free and democratic society in Canada.

In addition, s. 52 of the *Quebec Charter*, which allows ss. 1 to 38 of that charter to be overridden, was validly invoked by the Quebec legislature in Bill 21. The exercise of the override power provided for in s. 52 of the *Quebec Charter* is not subject to a minimum requirement of justification based on the pursuit of a pressing and substantial objective. Section 52 of the *Quebec Charter*, like s. 33 of the *Charter*, serves

a purpose grounded in the principle of parliamentary sovereignty. This override mechanism therefore produces the same effects as s. 33 of the *Charter*: it makes it possible to override, by means of an express declaration, rights protected by the *Quebec Charter*.

Per **Kasirer** J.: The power of Parliament and the legislatures to override certain sections of the *Charter* is subject to inherent limits arising from the character of the Constitution in which this power is embedded. Section 33 has no supra-constitutional effect and cannot be used to amend the Constitution. It confers on Parliament and the legislatures the power to protect the validity and operability of their laws, despite an inconsistency with certain provisions of the *Charter*. *A contrario*, it does not confer on them the power to unilaterally amend these provisions, even less so the power to amend the rest of the Constitution, except where the Constitution itself authorizes it.

Any law unilaterally attempting to amend the constitutional architecture constitutes an invalid constitutional amendment and must therefore be declared null. The constitutional architecture differs from unwritten constitutional principles. The latter do not have invalidating force on their own, but help, together with the text of the Constitution, to identify the components of Canada's constitutional architecture. An overriding law must strictly respect the terms and limits set out in s. 33 of the *Charter*, failing which it would constitute a unilateral — and therefore invalid — amendment to that constitutional provision. The overriding law must not go beyond the very text of s.

33 by infringing other rights or constitutional guarantees set out elsewhere than in ss. 2 and 7 to 15 of the *Charter*. The overriding law must also respect the logic of s. 33 and the fundamentally temporary nature of the override power. An overriding law enacting a derogation of more than five years, exempting the re-enactment of the override provision from a vote by Parliament or the legislature or causing a guaranteed right to be permanently infringed to the point that it cannot regain its full force upon the expiry of the declaration would change the very terms of s. 33 and would therefore be invalid.

In the present case, Bill 21 does not have the effect of changing the constitutional architecture; it does not have the effect of radically transforming the fundamental institutions of the Canadian federation. Bill 21 also does not have the effect of changing the very terms of s. 33. The Quebec legislature used the override power under s. 33 of the *Charter* in a constitutional manner in s. 34 of Bill 21. Section 52 of the *Quebec Charter* was also validly invoked. Thus, Bill 21 is valid and operative, despite the infringements of the rights and freedoms protected by ss. 2 and 15 of the *Charter* and by ss. 3 and 10 of the *Quebec Charter* caused by ss. 6 and 8 of Bill 21.

Per **Martin** J.: While it is unnecessary to decide whether there are substantive limits on s. 33, it has not been established that there are other or additional limits on the use of the notwithstanding clause that do not arise from s. 33 itself.

Per **Karakatsanis** and **O'Bonsawin** JJ.: There is no such thing as unconstrained legislative power in Canada, and s. 33 of the *Charter* is no exception.

Section 33's scope is substantively limited in at least two ways. First, s. 33 cannot permanently extinguish *Charter* rights. Second, legislatures cannot use s. 33 in a manner incompatible with the fundamental character of Canada's free and democratic society. There is agreement with Kasirer J. that there are substantive limits on the use of s. 33.

It should be uncontroversial that s. 33's scope has limits. Section 33's use is textually confined in four obvious ways. It can only be validly invoked by an enactment passed by a legislative majority. A statute invoking s. 33 must expressly identify the *Charter* provision it temporarily operates notwithstanding. It can only shield laws from fundamental freedoms under s. 2, legal rights under ss. 7 to 14, and the right to equality under s. 15. And each s. 33 declaration expires after five years, but can be re-enacted.

Because s. 33 can only apply to ss. 2 and 7 to 15 of the *Charter*, it cannot be invoked to shield legislation from other constitutional limits. Legislatures cannot use s. 33 to enact laws outside their respective authorities under ss. 91 and 92 of the *Constitution Act, 1867*. It cannot fundamentally change the role, function, or independence of constitutionally established institutions. It cannot interfere with the separation of powers. Nor can it be used to undermine the superior courts' core jurisdiction, which is guaranteed by s. 96 of the *Constitution Act, 1867*.

Section 33's text and purpose in the context of the *Charter* as a whole further limit its scope. Its text indicates that democratic accountability constrains its

scope. Section 33 does not purport to extinguish *Charter* rights — it allows a law to temporarily operate notwithstanding the effects of one or more of them. Section 33 does not apply to democratic rights under ss. 3 to 5 of the *Charter*, signalling their special importance. And s. 33(3)'s text expressly establishes that all of its uses are temporary. To remain operative beyond five years, the declaration must be renewed by the legislature, which in turn ensures continued democratic accountability for its use. This temporal limit aligns with s. 4(1) of the *Charter*, which requires that legislative elections take place every five years.

Section 33's text informs its purpose, alongside its historical context and the purposes of the *Charter* as a whole. Its purpose is to preserve a form of legislative sovereignty premised on democratic accountability. Section 33 does not confer unfettered power, and this power cannot be exercised inconsistently with its text or its purpose. This leads to at least two substantive limits on its scope. First, s. 33 cannot permanently extinguish *Charter* rights. Permanent extinguishment of rights violates s. 33's basic textual limits by extending the breach of a right beyond s. 33's five-year sunset clause and frustrates s. 33's democratic accountability purpose because it cannot be electorally undone. Section 33 does not authorize the elimination of rights; it simply shields a law from a declaration under s. 52(1) of the *Constitution Act, 1982*, permitting it to operate and retain its legal effect despite an inconsistency with certain *Charter* rights. Because s. 33 only guarantees a law's operability, uses that permanently affect rights would exceed its textual bounds. An invocation of s. 33 that permanently extinguished a *Charter* right would offend the temporal limitation of five years explicit

in s. 33's text. This temporal limitation aligns with the *Charter* requirement that legislative elections take place every five years and ensures that any override of constitutional rights must be democratically accountable to the public. Therefore, permanently extinguishing rights would also conflict with s. 33's express exclusion of the democratic rights protected by s. 3 of the *Charter* from its scope.

Second, legislatures cannot use s. 33 in a manner incompatible with the fundamental character of Canada's free and democratic society, even when its effects are temporary. Parliamentary sovereignty cannot be used to eliminate the very democratic foundation that justifies its existence. To exceed this limit, a use of s. 33 must be irreconcilable with the constitutional order those rights and freedoms are intended to protect. Examples that illustrate the kind of state conduct that would offend Canada's character as a free and democratic society include breaches of *jus cogens* norms, such as the prohibition against genocide, and other extreme examples from Canada's past, such as racial segregation, restricting women from working, imposing additional taxes only on members of one racial group, creating residential schools for Indigenous children, or banning free press or freedom of association altogether.

The invocation of s. 33 of the *Charter* in Bill 21 is valid. It does not irreparably extinguish rights beyond its five-year limitation period, nor is it incompatible with the fundamental character of Canada's free and democratic society. While Bill 21 disproportionately affects individuals from certain religions and seriously impacts religious freedom, it is not so incompatible with freedom of religion or human

dignity as to be invalid. Further, Bill 21 does not permanently extinguish freedom of religion. Unless it is renewed by a new law, Bill 21's infringement of religious freedom will end once its five-year sunset period expires.

Section 28 of the *Charter*

Per **Wagner** C.J. and Côté and Rowe JJ.: Bill 21 is not invalid under s. 28 of the *Charter*. Section 28 does not confer a substantive right to sex equality that could be infringed by Bill 21.

Section 28 reads as follows: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 28 has an interpretive and not a normative function. It guarantees that all of the rights and freedoms protected by the *Charter* will be interpreted and applied in accordance with the principle of sex equality, but without establishing a stand-alone equality guarantee separate from s. 15. It must therefore be interpreted in relation to the rights and freedoms guaranteed by the *Charter*; it cannot be invoked independently to ground a claim where a law or state action appears to be discriminatory against women or men. Section 28 is thus infringed where rights or freedoms guaranteed by the *Charter* are not recognized or applied in the same manner for women and for men.

Section 28 produces no legal effects except when combined with other provisions. The most obvious effect of s. 28 can be seen in its interaction with the provisions that confer rights and freedoms, ss. 2 to 23 of the *Charter*: s. 28 guarantees

that the scope of these rights and freedoms is the same for male and female persons. In the case of s. 15 of the *Charter*, the effects of s. 28 are limited to precluding any interpretation of the s. 15 equality guarantee that would subordinate sex to the other grounds of discrimination in respect of which s. 15 provides protection. Section 28 also limits the scope of ss. 25 and 27 of the *Charter* by ensuring that the norm of sex equality prevails over the interests protected by these provisions. Therefore, in the case of s. 27, consideration of multiculturalism in the interpretation of the *Charter* cannot lead to a result that would undermine sex equality. Similarly, to the extent that s. 25 protects Indigenous difference from the effects of the *Charter*, it cannot do so in a manner that perpetuates discriminatory treatment based on sex.

Section 28 is not subject to the limits provided for in s. 1 of the *Charter*, because it is not a rights-conferring provision. Section 28 guarantees sex equality in the enjoyment of rights and freedoms to the extent — and only to the extent — that these rights and freedoms are themselves guaranteed by the *Charter*. It does not bar any s. 1 justification when a limitation on a right or freedom has the effect of creating a discriminatory distinction based on sex. However, s. 28 remains relevant at the s. 1 analysis stage, insofar as it speaks to what may be justified in a free and democratic society.

Section 28 does not change the manner in which s. 33 applies to ss. 2 and 7 to 15 of the *Charter*. It does not shield ss. 2 and 7 to 15 from the application of s. 33,

and it does not prevent lawmakers from having recourse to s. 33 where doing so would create a discriminatory distinction based on sex.

Per **Kasirer** J.: There is agreement with Wagner C.J. that Bill 21 is not invalid under s. 28. The guarantee of equality of rights for male and female persons set out in s. 28 of the *Charter* must be invoked in combination or in conjunction with a right or freedom protected by the *Charter*. In this case, there is no need to rule on whether s. 28 has an autonomous purpose because s. 28 is also subject to the effects of s. 33, considering its relationship with ss. 2 and 15 of the *Charter*, which cannot serve as the basis for a declaration of invalidity or inoperability. Whether its effect is substantive or interpretive, s. 28 is not a minor provision or one devoid of substance. It assumes particular normative importance at the s. 1 justification stage. When dealing with a restriction on substantive equality between women and men, the level of justification required under s. 1 must be high, as it is, for example, in the case of an infringement of s. 7 of the *Charter*. Furthermore, s. 28 can be applied when balancing collective interests and government objectives against the deleterious effects of the government action on the group concerned.

Per **Martin** J.: Sections 6 and 8 of Bill 21 infringe s. 28 of the *Charter* and are therefore of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982,* because they unequally restrict a woman's right to respect her faith, freely express herself and to be free from discrimination based on religion and sex.

The purpose of s. 28 is to protect equality between the sexes as a paramount value in the Canadian legal order. It affirms that women and men enjoy equal legal personhood with equal status and standing under Canada's Constitution. Section 28 operates as both an interpretive provision and a substantive guarantee. As an interpretive provision, it requires that ss. 2 to 23 be interpreted in a manner that each provision can be equally enjoyed by both men and women. Any conflict between one right or freedom and the guarantee of sex-based equality must be resolved in favour of the latter.

Section 28 also confers a free-standing substantive equality right that guarantees the equal benefit of all other rights in the *Charter*. In this substantive capacity, s. 28 guarantees a right to equal enjoyment of all rights and freedoms in the *Charter* by both men and women. In determining whether a law infringes the substantive right in s. 28, courts must follow a two-step analysis: (1) a court must assess whether the law limits a right protected by the *Charter*; and (2) if so, the court must go on to assess whether the deprivation of rights is inconsistent with the substantive equality between women and men. The first step simply involves applying the relevant test to assess whether a law limits a given *Charter* right. The second step determines whether the law undermines substantive equality on its face or in its effect. If both steps of this test are satisfied, then the impugned law is inconsistent with s. 28 and must be declared, to the extent of the inconsistency, to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

Since the free-standing guarantee of sex-based equality in s. 28 applies "[n]otwithstanding anything" in the *Charter* and operates as a paramount value above all else, s. 28 is outside the ambit of the limitation clause in s. 1 of the *Charter*. For the same reasons, the operability of a law that infringes s. 28 is outside the ambit of the notwithstanding clause in s. 33. Section 28 must have effect before the notwithstanding clause. Therefore, once s. 28 takes effect, the sex-equality dimension of each right is protected against the use of s. 33. Section 28 must take primacy over ss. 25 and 27 of the *Charter*.

In the instant case, at the first step of the test under s. 28, ss. 6 and 8 of Bill 21 limit the *Charter* rights to freedom of religion (s. 2(a)), freedom of expression (s. 2(b)), and the right to equality between the sexes and religions (s. 15(1)). First, to establish a limit on s. 2(a), a law must be shown to limit s. 2(a) in its purpose or in its effects. A law limits s. 2(a) on the purpose branch where it aims at compelling individuals to perform or abstain from performing harmless acts because of their religious significance. A law limits s. 2(a) in its effects where the following two criteria are met: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the law interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The purpose of s. 6 of Bill 21 is quite clearly to compel religious abstinence. Section 6 also limits s. 2(a) in its effects because it interferes with individuals' ability to act in accordance with sincerely held religious beliefs in a manner that is far more than trivial or substantial. It tells the population that individuals who closely observe their faith are

not the type of individuals who are fit to hold important positions in the province. Section 8 of Bill 21 also clearly limits s. 2(a) in its purpose because it requires certain state actors to "exercise their functions with their face uncovered" and it can only be possibly understood as directly aimed at the Muslim practice of wearing a burqa or niqab, which are the only religious symbols worn in contemporary Quebec society that cover the face.

Second, to establish a limit on s. 2(b), three criteria must be met: (1) the activity is expression or has expressive content; (2) the method or location of the expression does not remove its protection; and (3) the purpose or effect of the government action interferes with the expression. Sections 6 and 8 of Bill 21 meet these three criteria. First, the wearing of religious symbols and/or face coverings is a form of expression. Second, the method or location of the expression restricted by Bill 21 does not exclude it from *Charter* protection. Third, for the same reasons that ss. 6 and 8 limit s. 2(a), the purpose and effect of these provisions clearly interfere with an individual's ability to engage in the expressive activity protected by s. 2(b).

Finally, to establish a limit on s. 15(1), two criteria must be met, being that the impugned law: (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Sections 6 and 8 of Bill 21 meet these two criteria. They draw an undeniable distinction between Muslim women and all others. Muslim women wear religious symbols at

higher rates than men and women of other faith groups, and the requirement to have one's face uncovered can only be understood to be targeting the burqa and niqab, face coverings that are exclusively worn by Muslim women. Muslim women already face marginalization and social exclusion in Quebec, and ss. 6 and 8 perpetuate and exacerbate these existing disadvantages in a completely arbitrary manner.

At the second step of the s. 28 analysis, the limits on ss. 2(a) and (b) and 15(1) of the *Charter* are not consistent with substantive equality between men and women. Since the first step of this analysis involved a s. 15(1) claim for discrimination on the basis of sex, the explanation of why ss. 6 and 8 of Bill 21 undermine substantive equality has already been provided and does not need to be repeated.

Per **Karakatsanis** and **O'Bonsawin** JJ.: Bill 21 unjustifiably infringes s. 28 of the *Charter*, which falls outside the scope of the notwithstanding clause in s. 33 of the *Charter*. Consequently, ss. 6 and 8 of Bill 21 are declared to be of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

Section 28 is the *Charter*'s other notwithstanding clause and has both interpretive effects and substantively guarantees sex equality. It affects the interpretation of other rights and freedoms referred to in the *Charter* and the application of the justification analysis under s. 1. It also guarantees substantive sex equality: legislation cannot have unequal adverse impacts on *Charter* rights between men and women.

Section 28's text, historical context, and legislative drafting history all compel the following conclusion: s. 28's purpose is to guarantee substantive sex equality in relation to the *Charter*'s other rights and freedoms. Section 28's text is unlike any other *Charter* provision. It explicitly guarantees sex equality "notwithstanding anything in this *Charter*". And s. 28 was expressly removed from the scope of the notwithstanding clause in s. 33. When s. 33 is invoked, it cannot shield legislation that undermines substantive equality between men and women. Therefore, s. 33 is powerless to preserve the operation of such an infringement against s. 52(1) of the *Constitution Act, 1982*, where the infringement of *Charter* rights adversely impacts women more than men.

To determine whether s. 28 is engaged, a two-step analysis must be applied. First, an underlying *Charter* right or freedom must be prima facie infringed. Second, the breach of the underlying right must create a distinction on the basis of sex in a manner that is contrary to substantive sex equality by sustaining disadvantage. Because s. 28 overlaps with the sex equality provision under s. 15(1) of the *Charter*, it will generally be unnecessary to resort to s. 28 except in circumstances where the legislation is shielded by other rights-limiting provisions, including s. 33.

Section 28 overlaps with s. 15, but does not duplicate it. It is unnecessary to determine whether and to what extent the scope of s. 28 extends to sex discrimination under s. 15(1) because Bill 21 adversely affects Muslim women's religious freedom under s. 2(a) of the *Charter* more than men's.

It is not necessary to resolve the issue of whether s. 28 also applies notwithstanding s. 1 of the *Charter*. At a minimum, s. 28 supercharges s. 1 when sex equality is affected by any law or state action that the government seeks to justify. If s. 1 does not apply, the s. 28 framework should include some ability for the state to justify a law that would breach that right. Every provision of the *Charter* is founded on Canada's fundamental character as a free and democratic society, and any interpretation of their scope must accord with that foundational norm. Reasonable limitations are inherent in the concept of a constitutional democracy, because rights sometimes conflict and must be balanced against one another.

In this case, both steps of the s. 28 analysis are met. Sections 6 and 8 of Bill 21 infringe freedom of religion under s. 2(a) of the *Charter*, and this infringement is disproportionately experienced by Muslim women, because the religious symbols they wear are highly visible and include face coverings. And all the documented teachers who have been formally barred from employment under Bill 21 are Muslim women who wear hijabs. Sections 6 and 8 treat men and women differently in a manner that sustains disadvantage for Muslim women, who are unable to practice their religion, express themselves, or access the labour market on an equal footing with men. Sections 6 and 8 therefore unjustifiably infringe s. 28 and are of no force or effect.

Section 23 of the *Charter*

Per **Wagner** C.J. and Côté and Rowe JJ.: Bill 21 does not infringe s. 23 of the *Charter*. Although Bill 21 has an impact on certain decisions falling within the right

of Quebec's English-speaking minority to manage and control the aspects of education that directly affect the transmission of its language and culture, including with respect to the hiring of personnel, Bill 21 does not impede the transmission of either the English language or the cultural references of this minority in a manner that is inconsistent with the preventive, remedial and unifying objectives of s. 23.

Section 23 is in the part of the *Charter* entitled "Minority Language Educational Rights". The purpose of s. 23 of the *Charter* is to preserve Canada's two official languages, as well as the cultures they represent, and to help ensure that they flourish in provinces where they are not spoken by the majority. Achieving this purpose requires the protection of language and culture, the latter of which encompasses non-linguistic aspects like history, traditions, artistic and literary works as well as other components of cultural heritage that shape the identity of the minority language community. However, s. 23 is not intended to protect all of the cultural concerns that members of a minority may share, including political concerns. Rather, this provision is meant to protect the concerns that affect its vitality and its development as a minority language group.

The protection conferred by s. 23 has several inextricable components: the right to instruction, the right to educational facilities, the right to some degree of management and control of these facilities, and the right to an education comparable in quality to that provided to the linguistic majority. Section 23 does not, however, confer an absolute right of management and control with regard to educational facilities. The

concerns of linguistic minorities with respect to education must be reconciled with the provinces' power to legislate in this area, in order to preserve the constitutional balance between the provincial jurisdiction over education recognized in s. 93 of the *Constitution Act, 1867* and the language rights guaranteed by the *Charter*. It follows that a law or decision affecting matters that normally fall within the minority's power of management and control will not necessarily be contrary to s. 23. Rather, such a measure must be assessed in light of its tangible impact on the minority's ability to preserve and transmit its language and culture through education and to have its specific needs adequately taken into account. Only laws that affect the management and control of minority language educational facilities in a manner that interferes with the minority's linguistic and cultural concerns will infringe s. 23.

The determinative question in this case is whether the obligations contained in Bill 21 have the tangible effect of impairing the linguistic minority's ability to preserve and transmit its language and culture through education, in a manner inconsistent with the preventive, remedial and unifying objectives of s. 23. An infringement of s. 23 cannot result from the mere fact that Bill 21 frustrates the choice of English-language school boards to encourage religious diversity in their hiring policies: to equate any organizational or pedagogical value with a protected cultural component would be to transform s. 23 into a right to complete institutional autonomy. While Bill 21 limits the ability of English-language school boards to hire, retain and promote persons who wear religious symbols as teachers, principals and vice principals of schools, and while it restricts access to a number of functions for persons who wear

religious symbols, it has not been shown that this restriction interferes with a linguistic or cultural concern that is specific to the English-speaking minority and is protected by s. 23. Bill 21 therefore does not encroach on the minority's exclusive right of management and control with respect to the recruitment of personnel.

More fundamentally, it has not been shown that Bill 21 produces effects that are inconsistent with the purpose of s. 23. The analysis of this provision must take into account the potentially deleterious effects of measures on the concerns of the linguistic minority, particularly when the measures may accelerate assimilation or contribute to the erosion of the minority's culture. For example, there is no evidence from which to conclude that Bill 21 would concretely impair the ability to recruit a sufficient number of teachers from the minority. Similarly, no evidence was adduced about how Bill 21 might lead to increased linguistic assimilation or an erosion of Anglophone culture in Quebec: there is no data establishing that the alleged lack of religious representativeness among school personnel would have the effect of compromising the vitality of the minority language community, or that the application of Bill 21 would encourage members of the community to leave the province, to the point where the unifying objective of s. 23 would be undermined.

It is possible that the presence of school personnel members with diverse cultural or religious backgrounds helps some students succeed and thrive. However, there is no reason to believe that these effects apply only to students from a religious minority who attend English-language schools in Quebec and not to those enrolled in

French-language schools. With regard to the right of management and control, a law having similar effects in both types of facilities could certainly endanger the cultural specificity of the minority language community, but it has not been shown that the prohibition on wearing religious symbols affects the linguistic and cultural concerns of the English-speaking minority protected by s. 23. Bill 21 does not affect the language of instruction, educational content or the ability of English-language schools to transmit the narratives, values and interpretive frameworks that structure the linguistic minority's culture. Moreover, there is no evidentiary basis on which to find that Bill 21 would lead to an erosion of the cultural heritage of the English-speaking community in Quebec or to a process of acculturation that s. 23 is specifically designed to prevent.

Per **Kasirer** J.: There is agreement with Wagner C.J.

Martin J. does not decide this point.

Per **Karakatsanis** and **O'Bonsawin** JJ.: Bill 21 unjustifiably infringes minority language education rights under s. 23 of the *Charter*. It does so by impeding the management and control of the schools by minority language rights holders in a way that negatively affects their legitimate linguistic and cultural concerns. Several sections of Bill 21 should be read down as of no force and effect with respect to Quebec's English language school boards.

Quebec's English-speaking minority is entitled to autonomous school boards exercising the broadest powers of management and control of those aspects of

education which pertain to or have an effect upon their language and culture. The concept of a "cultural concern" may encompass a range of considerations, and linguistic and cultural concerns advanced by school boards will usually constitute legitimate concerns for the purposes of s. 23 of the *Charter*. School boards represent the linguistic and cultural concerns of a minority language community and courts must show them deference, and there is no requirement for proof of a rational link between minority language and culture to establish a cultural concern. The trial judge found that all English-language school boards in Quebec value the recognition and celebration of ethnic and religious diversity, which establishes that religious diversity, or open secularism, constitutes a legitimate cultural concern of the English-speaking minority.

Bill 21 restricts the management and control rights of Quebec's English-language school boards by limiting their authority over the recruitment and management of personnel responsible for instruction in the minority language and the facilities in which that instruction is provided. Specifically, Bill 21 prohibits English-language school boards from hiring, retaining, or promoting teachers or school administrators whose religious beliefs prevent them from removing religious symbols or face coverings. By limiting the ability of English-language school boards to maintain and promote a genuinely diverse teaching workforce, Bill 21 negatively affects the legitimate linguistic and cultural concerns of the minority language rights holder by hindering the transmission of values at the heart of the minority's culture and negatively affecting the boards' ability to foster the success and integration of students from religious minorities who wear religious symbols.

The infringement of s. 23 of the *Charter* cannot be justified under s. 1, which imposes a very stringent standard for infringements of s. 23. In the absence of submissions from the Attorney General of Quebec on this issue, Bill 21's infringements of s. 23 are not justified in a free and democratic society and certain provisions in Bill 21 should be read down as being of no force or effect with respect to Quebec's English-language school boards.

Section 3 of the *Charter*

Per **Wagner** C.J. and Côté and Rowe JJ.: Section 8 of Bill 21 infringes s. 3 of the *Charter* to the extent that s. 8 applies to members of the National Assembly of Quebec. Section 8 prevents persons elected to the National Assembly whose religious beliefs require them to wear a face covering from exercising their right to sit in the National Assembly and to participate in the legislative process. This infringes the right guaranteed by s. 3 of the *Charter* to be qualified for membership therein.

Section 3 of the *Charter* protects the right of every citizen, without exception, to stand for election to the National Assembly. The right to be qualified for membership necessarily includes the right to sit in a legislative assembly and to participate in the legislative process. Where a law has the effect of preventing a duly elected person from participating in the legislative process, the law infringes the right

to sit in a legislative assembly and thus the right to be qualified for membership therein guaranteed by s. 3.

No justification of the infringement of s. 3 is possible in this case. Determining whether s. 8 of Bill 21 can nonetheless be saved would normally require considering whether this infringement is a reasonable limit that can be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*. However, no arguments were presented on this point. Accordingly, s. 8 of Bill 21, to the extent that it applies to members of the National Assembly, is of no force or effect by virtue of s. 52(1) of the *Constitution Act, 1982*.

On the other hand, s. 6 of Bill 21, which prevents the persons exercising the functions of Minister of Justice or President or Vice-President of the National Assembly from wearing religious symbols in the exercise of their functions, does not infringe s. 3 of the *Charter*. Section 3 does not guarantee to citizens that they will be qualified to serve as a member of the executive. The function of minister is outside the legislative branch and is separate from a member's legislative mandate. Qualification for exercising the function of Minister of Justice is beyond the scope of s. 3, which is concerned solely with qualification for legislative functions and effective representation of citizens in the Assembly. Furthermore, s. 3 does not guarantee members a right to be qualified for the functions of President or Vice-President of the National Assembly: no member is less able to exercise their legislative functions, represent voters or participate in the process of democratic governance because they

cannot hold the office of President or Vice-President of the National Assembly, and no voter is deprived of the opportunity to participate, through their elected representative, in the legislative proceedings of the National Assembly.

Per **Kasirer** J.: There is agreement with Wagner C.J.

Per **Martin** J.: There is agreement with Wagner C.J. in the result that s. 8 of Bill 21 — which requires Members of the National Assembly to exercise their functions with their face uncovered — unjustifiably infringes s. 3 of the *Charter* by restricting the right to be qualified for membership in the Quebec National Assembly.

Per **Karakatsanis** and **O'Bonsawin** JJ.: There is agreement with Wagner C.J. in his result that Bill 21 unjustifiably infringes the right to seek election to the Quebec National Assembly under s. 3 of the *Charter*.

Division of Powers

Per **Wagner** C.J. and Côté and Rowe JJ.: Bill 21 is within the jurisdiction of the Quebec legislature. Its pith and substance is to enshrine laicity as a fundamental principle of government for the Quebec state and to regulate accordingly the conduct of persons who are deemed to represent the state in the exercise of their official functions. Because of its pith and substance, Bill 21 can be classified as falling within Quebec's jurisdiction to amend its constitution under s. 45 of the *Constitution Act, 1982*

and its jurisdiction to regulate provincial officers under s. 92(4) of the *Constitution Act, 1867*.

First, Bill 21 is constitutional in nature, because it bears on the operation of an organ of the government of the province: it sets out a principle of government, laicity, and it establishes a comprehensive scheme governing the conduct of persons who represent the state in the exercise and performance of their official functions. In this sense, it falls within the recognized boundaries of s. 45 of the *Constitution Act, 1982*. Second, Bill 21 regulates the conduct of government representatives: it applies primarily to provincial officers, that is, persons who hold positions in the provincial public service. The provinces' power to regulate their own public service is not in any doubt. To the extent that Bill 21 applies to persons other than provincial officers referred to in s. 92(4) of the *Constitution Act, 1867*, they are persons who undeniably fall within Quebec's heads of legislative jurisdiction, specifically its jurisdiction over education under s. 93, its jurisdiction over property and civil rights under s. 92(13), and its general and residual legislative jurisdiction over matters of a merely local or private nature under s. 92(16).

Since Bill 21 can be placed under heads of power assigned to the provincial level, it is unnecessary to consider whether it can be placed either under the federal criminal law power provided for in s. 91(27) of the *Constitution Act, 1867*, or under Parliament's power to make laws for the peace, order and good government of Canada.

A law can have a double aspect: where a law is valid for the level of government that enacted it, the fact that it has a double aspect does not affect its validity.

Per **Kasirer** J.: There is agreement with Wagner C.J.

Martin J. does not decide this point.

Karakatsanis and **O'Bonsawin** JJ. do not decide this point.

Consistency with Pre-Confederation Statutes

Per **Wagner** C.J. and Côté and Rowe JJ.: Bill 21 is not of no force or effect for being inconsistent with pre-Confederation statutes. The *Rectories Act* and the *Hart Act* are not part of the Constitution, which means that they cannot render legislation that is inconsistent with them of no force or effect.

The Court has recognized that the 1867 and 1982 Constitution Acts do not exhaustively codify all of Canada's constitutional law. But the Court has recognized the existence of constitutional components that are not expressly entrenched only when they have proved to be intrinsic to the very functioning of Canada's constitutional order and when they have been anchored to some degree in the text of the Constitution. The recognition of constitutional elements not explicitly enumerated requires more than simply historical, political or symbolic importance.

The *Rectories Act* is an ordinary pre-Confederation statute that never acquired constitutional status. It is true that it contained a provision recognizing the free exercise of religious profession and worship; however, that recognition occurred in a specific religious and political context in United Canada during the 18th and 19th centuries. This statute was not a general and abstract declaration of fundamental freedoms meant to structure the Canadian constitutional order in a lasting fashion, but rather a circumstantial legislative reform aimed at resolving a political and religious conflict that was specific to the colonial regime at the time. Further, this statute is not a federal statute that deals with a matter of national concern falling within Parliament's residual peace, order and good government power under s. 91 of the *Constitution Act, 1867*. The doctrine of federal paramountcy therefore does not apply.

Similarly, Bill 21 is not inconsistent with a constitutional principle that purportedly protects participation in public institutions by persons who profess a religion, a principle said to be expressed in the *Hart Act*. It was argued that this principle, which can be distinguished from freedom of religion, fits more broadly within the unwritten constitutional principles of democracy and protection of minorities. Unwritten constitutional principles may inform the interpretation of the written provisions of the Constitution but are not in themselves an independent basis for invalidating legislation. These principles cannot become integrated into the constitutional structure so as to invalidate legislation that is otherwise consistent with the actual text of the Constitution. While unwritten principles may guide the interpretation of the constitutional structure, they cannot, on their own, establish

constitutional norms that are not anchored in the text of the Constitution. Therefore, even if it is assumed that the principle expressed in this pre-Confederation statute is an unwritten constitutional principle or that it fits more broadly within the unwritten constitutional principles of democracy and protection of minorities, it cannot, on its own, invalidate inconsistent legislation.

Per **Kasirer** J.: There is agreement with Wagner C.J.

Per **Martin** J.: There is no error in the Court of Appeal's treatment of the *Rectories Act* or the *Hart Act*. These statutes do not have constitutional or supra-legislative status and cannot be used to invalidate the impugned provisions of Bill 21.

Per **Karakatsanis** and **O'Bonsawin** JJ.: The *Rectories Act* and the *Hart Act* do not have constitutional status and cannot invalidate provisions of Bill 21 substantially for the same reasons found by the Quebec Court of Appeal.

Consistency with Constitutional Architecture

Per **Wagner** C.J. and Côté and Rowe JJ.: Bill 21 is not inconsistent with the constitutional architecture. It is therefore not unconstitutional on this basis.

The Constitution of Canada has both written elements and unwritten elements. It is composed of a text and an internal architecture, from which certain organizing principles arise. However, the constitutional architecture itself has no

extrinsic normative content; it does not grant rights or afford protection to individuals. A principle of religious inclusivity of the public service is not part of the constitutional architecture. It follows that the constitutional architecture does not protect the right of individuals to access positions in public institutions without discrimination based on their religion.

Bill 21 does not have the effect of fundamentally altering some aspect of the constitutional architecture. First, Quebec's public service is not an institution created by the Constitution of Canada and is therefore not a component of the constitutional architecture. Second, the statutes that governed Quebec prior to Confederation do not inform the constitutional architecture: the pre-Confederation statutes invoked in this case have no supra-legislative force and are not part of the text of the Constitution. They therefore cannot serve — on their own or in association with unwritten principles — to invalidate legislation. Third, although the *Charter* entrenches protection for religious minorities and guarantees the right to equality in ss. 2 and 15, the existence of these rights and freedoms in the *Charter* is not proof that other protections for religion or other equality guarantees exist outside the text of the Constitution, in the interstices of the constitutional architecture. The mere fact that a principle enjoys constitutional protection in the *Charter* does not mean that it is necessarily a component of the constitutional architecture or that it entitles a party to challenge a law on this basis. Finally, the unwritten principles of democracy and protection of minorities have an interpretive and supplemental function, but they are

not an independent basis for invalidating legislation. In the absence of any connection to the text of the Constitution, these principles cannot be used to invalidate Bill 21.

Per **Kasirer** J.: There is agreement with Wagner C.J.

Martin J. does not decide this point.

Per **Karakatsanis** and **O'Bonsawin** JJ.: Canada's foundation as a free and democratic society is a necessary component of Canada's constitutional architecture. Section 33 cannot be invoked to undermine Canada's constitutional order by destroying the very foundations necessary in a free and democratic society. However, the architecture of the Constitution does not invalidate Bill 21.

Counting Exercise

Per **Wagner** C.J. and Côté and Rowe JJ.: The exercise conducted by the Ministère de l'Éducation et de l'Enseignement supérieur of counting the number of employees wearing religious symbols does not infringe employees' freedom of religion and right to equality protected by the *Charter*. It has not been shown how this government department's requests for information resulted in the infringement of the fundamental rights and freedoms of teachers wearing a religious symbol. No argument establishing that the counting exercise undermined teachers' right to equality or

freedom of religion has been presented, and no error has been identified in the trial judge's conclusion that the counting exercise served a legitimate purpose.

Kasirer J. does not decide this point.

Martin J. does not decide this point.

Karakatsanis and **O'Bonsawin** JJ. do not decide this point.

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APPEALS and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Savard C.J. and Morissette and Bich JJ.A.), 2024 QCCA 254, [2024] AZ-52008115, [2024] J.Q. nº 1118 (Lexis), 2024 CarswellQue 2447 (WL), setting aside in part a decision of Blanchard J., 2021 QCCS 1466, [2021] AZ-51759579, [2021] J.Q. nº 3808 (Lexis), 2021 CarswellQue 5088 (WL). Appeals and cross-appeal dismissed, Karakatsanis, Martin, Kasirer and O’Bonsawin JJ. dissenting in part.

Perri Ravon, *Mark C. Power*, *Jennifer Klinck* and *Darius Bossé*, for English Montreal School Board, Mubeenah Mughal and Pietro Mercuri.

Faiz M. Lalani, *Léon H. Moubayed*, *Aliosha Hurry* and *Guntaas Kaur Cheema*, for World Sikh Organization of Canada and Amrit Kaur.

Olga Redko, *David Grossman* and *Marie-Hélène Lyonnais*, for Ichrak Nourel Hak, National Council of Canadian Muslims and Canadian Civil Liberties Association.

Frédéric Bérard and *Aude Desmartis-Bérubé*, for Fédération autonome de l'enseignement.

Molly Krishtalka, *Alexandra Belley-McKinnon*, *Jérémy Boulanger-Bonnelly* and *Valérie Beaulieu-Pfertzel*, for Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and Legal Committee of the Coalition Inclusion Québec.

François Grondin, *Julien Boudreault*, *Amanda Afeich* and *Theodore Goloff*, for Lord Reading Law Society.

Isabelle Brunet, *Samuel Chayer*, *Fiona Émond* and *Étienne Cloutier*, for Attorney General of Quebec, Jean-François Roberge, in his official capacity, and Simon Jolin-Barrette, in his official capacity.

Luc Alarie and *Guillaume Rousseau*, for Mouvement laïque québécois.

Christian Trépanier, *Alexandre Belzile* and *Vincent Roy*, for the respondent François Paradis, in his official capacity.

Christiane Pelchat, for Pour les droits des femmes du Québec.

Guy J. Pratte, *François Joyal*, *Michelle Kellam* and *Nadia Effendi*, for the intervener Attorney General of Canada.

The Hon. Doug Downey, K.C., *David Corbett, K.C.*, *Josh Hunter* and *Maia Stevenson*, for the intervener Attorney General of Ontario.

Deborah L. Carlson, for the intervener Attorney General of Manitoba.

Trevor Bant, *Mark Witten* and *Rory Shaw*, for the intervener Attorney General of British Columbia.

Milad Alishahi, for the intervener Attorney General of Saskatchewan.

Malcolm Lavoie, K.C., and *Leah M. McDaniel*, for the intervener Attorney General of Alberta.

Ikram Farah Warsame and *Sarah Chênevert-Beaudoin*, for the intervener Canadian Human Rights Commission.

Julius H. Grey, *Geneviève Grey* and *Sasha Fortin-Ballay*, for the intervener Quebec Community Groups Network.

Sibel Ataogul, for the intervener Amnistie internationale Canada francophone.

Marie-Claude St-Amant, for the intervener Public Service Alliance of Canada.

Marion Sandilands and *Logan Stack*, for the intervener Quebec English School Boards Association.

Derek B. M. Ross, *André M. Schutten* and *Vivian W. S. Clemence*, for the intervener Christian Legal Fellowship.

Véronique Roy, *Simon Bouthillier*, *Anita Noellie Badaku-Kpalley* and *Cee Strauss*, for the intervener Women's Legal Education and Action Fund.

Lawrence David and *Jeffrey Orenstein*, for the intervener Public Interest Litigation Institute.

Adil Abdulla, *Mohsen Seddigh* and *Hassan M. Ahmad*, for the intervener Muslim Advisory Council of Canada.

Angela Marinos, for the intervener Raoul Wallenberg Centre for Human Rights.

Aubin P. Calvert and *Devin Eeg*, for the intervener Trial Lawyers Association of British Columbia.

François Côté, for the intervener Droits collectifs Québec.

Ryan W. O. Chan and *Raj Anand*, for the interveners Chinese Canadian National Council for Social Justice and Chinese and Southeast Asian Legal Clinic.

Sylvie Rodrigue, *Yael Bienenstock*, *Alexandra Hebert* and *Allyson Reid Taylor*, for the intervener Advocates' Society.

Karine Millaire, for the intervener International Commission of Jurists (Canada).

Michael N. Bergman, *Bianca R. Santangelo* and *Rachel R. Renaud*, for the interveners Task Force on Linguistic Policy and Andrew Caddell.

Written submissions only by *Philipe G. Knerr* and *Laurence Juillet*, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

The Hon. Serge Joyal, P.C., on his own behalf.

Mannu Chowdhury and *Catherine Fan*, for the interveners South Asian Bar Associations (Toronto, Calgary, British Columbia, and Edmonton), Canadian Muslim Lawyers Association, Canadian Association of Black Lawyers and Federation of Asian Canadian Lawyers (Ontario).

Steven M. Barrett and *Melanie Anderson*, for the intervener Canadian Labour Congress.

George Avraam, *Haadi Malik* and *Anton Rizor*, for the intervener Canadian Constitution Foundation.

Philip H. Horgan and *Raphael Fernandes*, for the intervener Canadian Conference of Catholic Bishops.

David Robitaille, for the intervener Migrant Justice Clinic.

Paul Slansky, for the intervener Constitutional Rights Centre Inc.

Marc-André Fabien and *Nicolas Charest*, for the intervener Hamshuchas Hadoirois International Association.

Julie Mouris, for the intervener Commission nationale des parents francophones.

Humera Jabir, *Robyn Trask*, *Gita Keshava* and *Idaresit Thompson*, for the intervener West Coast Legal Education and Action Fund Association.

Sahar Talebi and *Paul-Erik Veel*, for the intervener Canadian Council of Muslim Women.

Anna J. Lund, for the intervener British Columbia Civil Liberties Association.

Megan Stephens, *Maija Martin*, *Danielle Sandhu* and *Husna Sarwar*, for the interveners Barbra Schlifer Commemorative Clinic and Women in Canadian Criminal Defence.

Sibel Ataogul, for the intervener Ligue des droits et libertés.

Wes McMillan, for the interveners British Columbia Humanist Association and Canadian Secular Alliance.

Jagtaran Singh and *Reema Khawja*, for the intervener Ontario Human Rights Commission.

Érik Labelle Westin-Eastaugh and *Emmanuelle Champagne*, for the intervener Association des conseils scolaires des écoles publiques de l'Ontario.

Suzanne Zaccour, *Kerri Froc* and *Amanda Therrien*, for the intervener National Association of Women and the Law.

Isabelle Hardy, *Élie Ducharme* and *Alex-Ann Rousseau*, for the intervener Commissioner of Official Languages of Canada.

Dominic Caron, for the intervener Acadian Society of New Brunswick.

Michelle M. Biddulph and *Brendan Coffey*, for the intervener Criminal Lawyers' Association (Ontario).

Eric Freeman, *Ljiljana Stanic*, *Lauren Weaver* and *Bennett Jensen*, for the intervener Egale Canada.

Sajeda Hedaraly, *Steeves Bujold* and *Mariame Touré*, for the intervener Clinique juridique Juritrans.

Allan Rock, K.C., and *Warda Shazadi Meighen*, for the intervener Samara Centre for Democracy.

Mary Eberts and *Cheryl Milne*, for the intervener David Asper Centre for Constitutional Rights.

C. Katie Black and *Babacar Faye*, for the intervener Federation of Ontario Law Associations.

Jonathan Blair and *Danielle Sabelli*, for the intervener Community Legal Assistance Society.

Sujit Choudhry and *Nusra Khan*, for the interveners South Asian Legal Clinic of Ontario, South Asian Legal Clinic of British Columbia and South Asian Women's Community Centre.

English version of the reasons of Wagner C.J. and Côté and Rowe JJ. delivered by

THE CHIEF JUSTICE —

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I. Overview

[1] In these appeals, as was the case in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court is called upon to consider questions that are of great importance to Canada's constitutional order. These questions are about, in particular, the interpretation of the *Canadian Charter of Rights and Freedoms* ("*Charter*") as a coherent whole, as well as how to reconcile the existence of fundamental rights and freedoms guaranteed by the *Charter* and the override power that s. 33 of the *Charter* confers on Parliament and the provincial legislatures. In this regard, the remarks made by the Court in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, apply just as naturally in this case, which is also one that combines "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (p. 728).

[2] On June 16, 2019, the National Assembly of Quebec passed the *Act respecting the laicity of the State*, CQLR, c. L-0.3 ("Bill 21"),[1] which affirms the lay character of the Quebec state by enshrining, *inter alia*, the principle of the separation of state and religions and that of the religious neutrality of the state. Bill 21 prohibits certain persons who hold public positions of authority — such as teachers, judges and members of police forces — from wearing religious symbols in the exercise of their functions, while putting in place a grandfather clause. It also imposes an obligation to

[1] Bill 21 has been amended since the hearing of the case at first instance: provisions have been amended, repealed and added. In these reasons, I refer to the version of Bill 21 in force at the time of the hearing of the case at first instance.

have one's face uncovered to provide or receive certain public services. Bill 21 expressly invokes the override clauses set out, respectively, in s. 33 of the *Charter* (known as the notwithstanding clause) and s. 52 of Quebec's *Charter of human rights and freedoms,* CQLR, c. C-12 ("*Quebec Charter*"). This use of the override clauses is meant to insulate Bill 21 from being challenged in court on the basis of ss. 2 and 7 to 15 of the *Charter* or ss. 1 to 38 of the *Quebec Charter*.

[3] The enactment of Bill 21 sparked vigorous political, legal, sociological and philosophical debate in Quebec and Canadian society. Bill 21 raises questions about the relationship between the state and religion, particularly in light of Quebec's unique history, about the place of the expression of religious beliefs in public institutions, about the legislature's invocation of the override clauses, and about the impact of Bill 21 not only on freedom of religion and freedom of expression, but also on the right to equality. These issues have led to profound disagreements over the political and moral appropriateness of Bill 21, disagreements shaped by diverse and changing social and ideological perspectives. In addition to being legitimate, such a plurality of views is an inherent part of a free and democratic society. However, it should be remembered that this political debate is not the one before the Court. Rather, this case concerns judicial review of the validity of Bill 21 under Canadian constitutional law, and more specifically the use of the notwithstanding clause in s. 33 of the *Charter*. As the parties acknowledge, the *Charter* owes its very existence to the inclusion of s. 33.

[4] Several parties challenged the constitutionality of Bill 21. At first instance, their arguments were rejected for the most part, and Bill 21 was held to be valid, subject to certain exceptions. Blanchard J. concluded that the provision prohibiting members of the National Assembly from wearing a face covering while sitting is contrary to s. 3 of the *Charter* and declared this provision to be of no force or effect. He also declared the provisions of Bill 21 relating to the prohibition on wearing religious symbols to be of no force or effect with respect to English-language schools on the ground that they infringe s. 23 of the *Charter*. The Court of Appeal upheld the trial judge's conclusions, including those relating to s. 3, but overturned those based on s. 23.

[5] These appeals raise legal questions relating to many aspects of Canadian constitutional law, such as the constitutional architecture, the division of powers, the jurisdiction of the superior courts and the remedies they can grant, the rights and freedoms guaranteed by the *Charter*, including freedom of expression, freedom of religion, the right to equality and language rights, as well as the use of the notwithstanding clause. None of these questions has an obvious answer in this Court's jurisprudence, and indeed some have never been raised before. The Court must therefore explore the vast domain of the Canadian constitutional order to determine its relevant boundaries with care and precision and assess the soundness of the arguments put before it.

[6] It is not performing this exercise alone, however. The Court had the privilege of being assisted, in the course of these appeals, by a very large number of

parties and interveners from all across Canada, represented by nearly 150 counsel. Their diverse perspectives greatly enriched the legal debate that took place before the Court over the four days of the hearing and provided it with valuable tools for deciding questions that are as complex as they are sensitive. The Court also benefited from the contribution of the academic community, whose scholarly writings explored, clarified and refined the analysis of several of the legal questions raised in this case. The Court is grateful for this exceptional mobilization of civil society, the academic community and the provinces, which enables it to perform its task with all the necessary information and support.

[7] For the reasons that follow, I would dismiss the appeals and the cross-appeal. Bill 21 is valid and operative, except to the extent that it infringes s. 3 of the *Charter* by prohibiting members of the National Assembly from wearing a face covering.

[8] My analysis will focus first on the arguments raised to challenge Bill 21's validity that are not based on the provisions of the *Charter*. I will therefore address the grounds based on pre-Confederation statutes, the division of powers and the constitutional architecture. I conclude that Bill 21 is neither invalid nor of no force or effect by reason of pre-Confederation statutes or the constitutional architecture, and that it is within the scope of the legislative jurisdiction of the Quebec legislature.

[9] Next, I will consider the arguments based on the provisions of the *Charter*, specifically ss. 3, 23, 28 and 33. After considering them, I conclude that s. 28 does not

confer a stand-alone right which Bill 21 could infringe, and that Bill 21 does not infringe s. 23. However, s. 8 of Bill 21 does constitute an unjustified infringement of s. 3 of the *Charter* to the extent that it prohibits members of the National Assembly from wearing a face covering in the exercise of their functions.

[10] I also conclude that Bill 21 validly invokes the override clauses in the *Charter* and the *Quebec Charter*. Section 33 of the *Charter* is not subject to any substantive condition for its invocation and does not give a court the power to rule on whether a law is inconsistent with the *Charter* provisions referred to in an override declaration contained in the law. In this regard, I decline the invitation of certain parties to call into question the foundations of the constitutional compromise underlying the *Charter*. The Court should not arrogate to itself, under the guise of constitutional interpretation or theoretical reasoning, a power that the Constitution purposely does not confer on it.

II. Background

A. *Overview of Bill 21*

[11] Bill 21, as passed by the National Assembly of Quebec on June 16, 2019, and assented to the same day, contained 36 sections and 3 schedules. Its preamble situates it within Quebec's "civil law tradition, distinct social values and . . . specific history". The preamble affirms "State laicity" and emphasizes the need for a "stricter duty of restraint regarding religious matters" for persons who exercise certain functions

in Quebec society. The preamble recognizes that the affirmation of state laicity must "ensur[e] a balance between the collective rights of the Québec nation and human rights and freedoms".

[12] Chapter I of Bill 21, which is made up of ss. 1 to 5, affirms the laicity of the state. Sections 1 and 2 specify that the Quebec state is "a lay State" and that this laicity is based on four principles: the separation of state and religions, the religious neutrality of the state, the equality of citizens, and freedom of conscience and religion. Bill 21 thus establishes a formal nexus between the Quebec state and the principle of laicity.

[13] Bill 21 promotes a particular conception of laicity. As its preamble notes, this conception draws upon Quebec's "specific history" and its relationship with religion. In examining Bill 21, I think it is relevant to briefly outline the social and political trajectory that led to the enactment of this law, in order to inform my interpretation of the principle of laicity in Quebec. The principle expressed by the law and the prohibitions it contains are grounded in Quebec's long journey toward laicity. Just like women's equality, religious diversity and the affirmation of state neutrality, the principle of laicity is an integral part of Quebec's distinct history.

[14] The origins of laicity in Quebec date back to the end of the French regime in the territory of New France. The British period that followed was marked by the relative coexistence of denominations and freedom of worship, because the British Crown chose not to make the Anglican Church the official church of its colony (R.

Moon, “Freedom of Religion in Canada — The Principled and the Pragmatic” (2023), 39 *Windsor Y.B. Access Just.* 512, at p. 513). Until the mid-20th century, however, the Catholic Church continued to have considerable institutional influence in schools, universities, hospitals and other spheres of political, social and cultural life (see J. A. Dickinson and B. Young, *A Short History of Quebec* (4th ed. 2008), at pp. 242-46).

[15] In this context of clerical dominance, the Quiet Revolution marked an important step in the laicization of Quebec (Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* (2008), by G. Bouchard and C. Taylor (“Bouchard-Taylor report”), at pp. 139-40). Under the government of Premier Jean Lesage, the welfare state took shape. The Quebec state thus assumed responsibility for social services, which until that time had largely been provided by the Catholic Church, including in the field of education. Following the recommendations of the report of the Royal Commission of Inquiry on Education in the Province of Quebec, the Lesage government established a department of education, thereby transferring control over educational institutions from the church to the state (*Parent Report: Report of the Royal Commission of Inquiry on Education in the Province of Quebec* (1963); *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 12; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 9).

[16] The rejection of the Catholic Church's patriarchal authority was accompanied by a redefinition of the role of women in Quebec society. In fact, during the 1960s, Quebec women achieved significant legal and political victories. These developments attest to the important connection between the removal of religion from the public sphere and the advancement of equality between men and women in Quebec.

[17] Quebec's journey toward laicity continued during the decades that followed the Quiet Revolution, through the gradual development of a culture of human rights in Quebec and Canada (Bouchard-Taylor report, at p. 140; *S.L.*, at para. 17). In 1960, the federal government passed the *Canadian Bill of Rights*, S.C. 1960, c. 44, and then, in 1982, it patriated the Canadian Constitution and enacted the *Charter*. Quebec was a forerunner of this movement with the enactment of the *Quebec Charter* in 1975. These constitutional and quasi-constitutional texts enshrine freedom of conscience and religion, among other things, and authorize the courts to strike down any law that favours a religion or interferes with the freedom to practise it (see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295). The secularism of the Quebec state was thus reinforced by the "institutionalization" of this culture of rights and freedoms (Bouchard-Taylor report, at p. 140).

[18] In a context of growing diversity in Quebec society, debates over accommodation and the wearing of religious symbols led to the establishment of the Consultation Commission on Accommodation Practices Related to Cultural Differences, better known as the "Bouchard-Taylor Commission". In the report it

published in 2008, the Commission laid out a conception of "open" secularism based on the neutrality of the state, respect for freedom of conscience and religion, the moral equality of persons and the separation of church and state. These principles have been incorporated in full into s. 2 of Bill 21. Among a range of recommendations it made concerning harmonization practices, the integration of immigrants and secularism, the Commission recommended that the wearing of religious symbols be prohibited for agents of the state who "strikingly exemplify State neutrality" or who "exercise a power of coercion" (Bouchard-Taylor report, at p. 151). The report identified judges, Crown prosecutors, police officers, prison guards, and the President and Vice-Presidents of the National Assembly as persons who should be subject to this prohibition (p. 271). The Commission noted, however, that the adoption of open secularism did not warrant a general rule prohibiting the wearing of religious symbols by any agent of the state (p. 149). In this regard, the Commission did not recommend prohibiting teachers, public servants, health professionals or any other agent of the state from wearing a religious symbol.

[19] The nexus between the Quebec state and laicity is reinforced in s. 3 of Bill 21, which requires "parliamentary, government and judicial institutions" to comply with the four principles of laicity set out in s. 2. These institutions are defined as including, in particular, the National Assembly and any person appointed or designated by it to an office under its authority, government departments, the public service, government bodies, municipalities, entities providing services like shared transportation, education and health care, the Court of Appeal, the Superior Court, the

Court of Québec, some administrative tribunals and the municipal courts. This nexus is also reinforced in s. 4, which requires compliance with the prohibitions set out in Bill 21 concerning religious symbols and which affirms the right of every person to have access to "lay" parliamentary, government and judicial institutions and public services.

[20] Chapters II and III establish prohibitions related to the wearing of religious symbols and the wearing of face coverings. Chapter II contains only one section, s. 6, which prohibits certain representatives of the state, listed in Sch. II of Bill 21, from wearing a religious symbol in the exercise of their functions. These persons include, in particular, the President of the National Assembly, justices of the peace, court clerks, members of commissions, boards and tribunals, public inquiry commissioners, arbitrators appointed by the Minister of Labour, the Minister of Justice, prosecutors, lawyers acting on behalf of the state, peace officers, and principals, vice principals and teachers of educational institutions. The imposition of this prohibition on teachers is a legislative choice that differs from the one proposed by the Bouchard-Taylor Commission, which did not recommend broadening the prohibition in this way.

[21] In Chapter III, ss. 7 and 8 require that the personnel of the bodies listed in Sch. I and the persons listed in Sch. III exercise their functions with their face uncovered. These provisions obligate persons who receive services from such a personnel member to do so with their face uncovered as well where this is necessary for identity verification or security reasons. The personnel members in question include members of the National Assembly, elected municipal officers, the staff of legislative

or executive offices, peace officers, physicians and dentists working in a public institution, home educational childcare providers, and school commissioners or members of the board of directors of a school service centre. This obligation may also be extended to any person who enters into a contract with or receives financial assistance from bodies listed in Sch. I, "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" (s. 10).

[22] Chapter IV contains miscellaneous provisions. Section 11 affirms the primacy of Bill 21 over any inconsistent provision of a subsequent provincial statute, unless there is a provision expressly stating otherwise. Section 12 authorizes a minister to verify compliance with the measures set out in Bill 21 and to require that a non-compliant person or body take "corrective measures". Similarly, s. 13 provides that failure by a person referred to in s. 6 or in the first paragraph of s. 8 to comply with Bill 21 may give rise to a "disciplinary measure". Section 14 specifies that no accommodation, except as provided for in Bill 21, may be granted in connection with the prohibitions set out in ss. 6 and 8. Section 15 provides that the prohibition on wearing a religious symbol is deemed to be an "integral part" of a legal services contract entered into by a lawyer or notary referred to in Sch. II. Section 16 renders null any provision of a collective agreement that is incompatible with Bill 21.

[23] Chapter V incorporates recognition of the fundamental importance of state laicity for the Quebec nation into the preamble of the *Quebec Charter* and adds state

laicity to the values and principles set out in s. 9.1 of the *Quebec Charter* for which a proper regard must be maintained in the interpretation and exercise of human rights and freedoms.

[24] Finally, Chapter VI contains transitional provisions exempting certain persons listed in Sch. II who held their current position on March 27, 2019, from the application of Bill 21 for as long as they exercise the same function within the same organization. These provisions, often described as "grandfather clauses", apply notably to teachers. Chapter VI also includes ss. 33 and 34 — the impugned override provisions — which provide for the application of the override clauses set out, respectively, in s. 33 of the *Charter* and s. 52 of the *Quebec Charter*.

[25] In short, Bill 21 is rooted in Quebec's legitimate and historical commitment to ensuring the laicity of the state in a free and democratic society.

B. *Judicial History*

[26] Many Quebecers have been significantly affected by Bill 21 because of their professional activities and their religious affiliations. Bill 21 has the effect of limiting access to employment for persons who wear a symbol or garment that shows their religious affiliation, or who wear a face covering. It is true that a number of state employees who are subject to these restrictions benefit from a grandfather clause under s. 31, but that provision impedes their career mobility and advancement and prevents persons who would like to join certain parts of the public sector from doing so. Bill

21's stigmatizing and deleterious effects on the persons so affected, most of whom are Muslim women, whether French-speaking or English-speaking, must not be underestimated.

[27] Six groups of plaintiffs — which included several teachers or aspiring teachers affected by Bill 21 — challenged the constitutionality of Bill 21:

1. Ichrak Nourel Hak, the National Council of Canadian Muslims and the Canadian Civil Liberties Association ("Ms. Hak et al."). At the time this litigation was commenced, Ms. Hak was completing her schooling to become a teacher. She is Muslim and wears the hijab.

2. Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and the Legal Committee of the Coalition Inclusion Québec ("Ms. Lauzon et al."). Ms. Lauzon is a teacher who practises Roman Catholicism and, for this reason, always wears a crucifix and a Virgin Mary medal. She believes that Bill 21 prevents her from having any career mobility. Ms. Dadouche, who has been a permanent teacher in Quebec since 2017, is a practising Muslim. Bill 21 prevents her from obtaining a transfer to the Gatineau region because of the fact that she wears the hijab. Ms. Chelbi, who has been a teacher in Quebec since 2008, wears the hijab for religious reasons and is consequently unable to find another teaching or managerial position at a school.

3. The Lord Reading Law Society ("Lord Reading Society"), an association that serves as the collective voice of Jewish jurists in Quebec.

4. The Fédération autonome de l'enseignement ("FAE"), an organization that groups together various unions representing more than 45,000 teachers, among others.

5. The English Montreal School Board, Mubeenah Mughal and Pietro Mercuri ("EMSB et al."), a school board and two parent commissioners who send their children to institutions in this board.

6. The World Sikh Organization of Canada and Amrit Kaur ("WSO et al."). Ms. Kaur is a teacher who practises Amritdhari Sikhism and wears, among other things, a turban, bracelets and a kirpan to comply with the requirements of her faith. She has worked in British Columbia since 2019 and would like to teach in Quebec, but Bill 21 prevents her from doing so.

[28] The Attorney General of Quebec and ministers Jean-François Roberge and Simon Jolin-Barrette ("AGQ"), as well as two organizations acting as interveners, the Mouvement laïque québécois ("MLQ") and Pour les droits des femmes du Québec ("PDF"), defended the law's constitutional validity. The MLQ is an organization that

advocates for the laicity of the Quebec state, while PDF is an organization that seeks to promote women's right to equality.

(1) Quebec Superior Court, 2021 QCCS 1466

[29] The Superior Court, per Justice Marc-André Blanchard, largely upheld the validity of Bill 21. However, the court struck down and declared of no force or effect certain provisions relating to the obligation imposed on members of the National Assembly to exercise their functions with their face uncovered (s. 8 para. 1, read in conjunction with para. 1 of Sch. III), as well as those that, among other things, prohibit the wearing of religious symbols by teachers and administrators of school boards, insofar as these prohibitions affect English-language institutions (ss. 4 para. 1, 6, 7, 8, 10, 12 paras. 1 and 2, 13, 14 and 16, read in conjunction with para. 7 of Sch. I, para. 10 of Sch. II and para. 4 of Sch. III). The court held that these provisions infringe the rights guaranteed by ss. 3 and 23 of the *Charter* in a manner not justified under s. 1.

[30] The judge rejected all of the grounds advanced by the parties opposing Bill 21 that were not related to the provincial and federal charters of rights and freedoms. He held that Bill 21 is *intra vires*, because it falls within provincial heads of power under s. 92(4), (13) and (16) of the *Constitution Act, 1867* and it is not a statute within the scope of the federal criminal law power under s. 91(27), although it has the features of a statute relating to order and public morality. He also ruled that the pre-Confederation statutes invoked by the parties, namely the *Quebec Act, 1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2), the *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, S. Prov. C. 1851, 14 & 15 Vict., c. 175 ("*Rectories Act*"), and the *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*, S. Prov. L.C. 1832, 1 Will. 4, c. 57 ("*Hart Act*"), are not supra-legislative in nature and cannot serve to invalidate Bill 21. Similarly, he found that Bill 21 is contrary to neither Canada's constitutional architecture nor the rule of law.

[31] The judge next addressed the grounds based on the provisions of the *Charter*.

[32] The judge concluded that the legislature had validly used the override clauses in the Canadian and Quebec charters, in keeping with the requirements of form established in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, in order to enact Bill 21 and shield it from a declaration of invalidity. The judge considered himself bound by that decision, finding that no argument justified departing from the rule of *stare decisis* in this case. Although he regarded the legislature's use of the *Charter*'s override clause as excessive because it was, in his view, overly broad relative to the intended purpose, he nevertheless held that nothing prevents the legislature from invoking it. He therefore declined to render a declaratory judgment on Bill 21's

consistency with the provisions of the *Charter*, finding that the exercise of such a power would be based on a novel interpretation of s. 33.

[33] With regard to the arguments concerning s. 28 of the *Charter*, which provides that the rights and freedoms recognized in the *Charter* are guaranteed equally to women and men, the judge found that this is an interpretive provision that cannot serve, on its own, to invalidate legislation.

[34] Turning next to the arguments on s. 3 of the *Charter*, the trial judge found that the AGQ had not discharged his burden of establishing that the National Assembly must have an unreviewable power to manage the wearing of religious symbols or garments covering the face in order to ensure its sovereignty as a deliberative legislative assembly. Similarly, the judge held that the combined effect of s. 8 and Sch. III of Bill 21 infringes s. 3 of the *Charter*, because the application of these provisions would prevent a person who covers their face from sitting in the National Assembly despite being elected. This infringement is not justified, given that the AGQ presented no evidence or arguments to establish that the infringement is a reasonable limit in a free and democratic society within the meaning of s. 1 of the *Charter*.

[35] With respect to the grounds based on s. 23 of the *Charter*, which guarantees members of the linguistic minority the right to have their children receive instruction in their first language, the judge noted that this provision also protects the linguistic minority's power of management and control over the aspects of education that pertain to its language and culture. This right of management and control is reflected in a

certain degree of autonomy in the management of human resources, including as regards the appointment of individuals to administrator positions and the recruitment of teachers and other school personnel. In this case, the judge found that Bill 21 neutralizes the minority's power of management and control in the development of its culture of diversity. In his opinion, the evidence showed that English-language school boards and their teachers or principals attach special importance to the recognition and celebration of ethnic and religious diversity and that they have developed their own conception of secularism.

[36] The judge then analyzed the justification for the infringement of s. 23 under s. 1, in the absence of any attempt by the AGQ to demonstrate such justification. The judge found that the laicization of the state is a pressing and substantial objective and that there is a rational connection between this objective and the measures provided for by Bill 21. However, he was of the view that the minimal impairment test was not met, because respect for religious neutrality does not require a total prohibition on any reference to a religious affiliation through dress. Finally, the judge found that the deleterious effects of Bill 21 are not proportional to its salutary effects.

[37] In his reasons, the trial judge also addressed the question of the count done by the Ministère de l'Éducation et de l'Enseignement supérieur of the number of school personnel members wearing a religious symbol. He held that, despite the stigmatizing effect that some religious persons may have felt, such a measure does not infringe the right to equality or freedom of religion. The counting exercise assists in carrying out

one of the state's duties, that is, knowing the makeup of the communities in which it provides services.

(2) Quebec Court of Appeal, 2024 QCCA 254

[38] On appeal, the parties essentially resumed the debate they had engaged in before the Superior Court. The AGQ, the MLQ and PDF appealed Blanchard J.'s conclusions with respect to ss. 3 and 23 of the *Charter*, while Ms. Hak et al., the FAE, Ms. Lauzon et al., the Lord Reading Society, the WSO et al. and the EMSB et al. appealed the Superior Court's other conclusions. In addition, François Paradis, the President of the National Assembly at the time Bill 21 was enacted, intervened before the Quebec Court of Appeal with respect to s. 3 of the *Charter*, as well as on a related question concerning parliamentary privilege.

[39] The Quebec Court of Appeal allowed the appeal in part and overturned the Superior Court's conclusions regarding the inconsistency of certain provisions of Bill 21 with s. 23 of the *Charter*. In all other respects, it affirmed the trial judge's conclusions.

[40] Like the trial judge, the Court of Appeal held that Bill 21 is valid under the division of powers because it falls within the heads of legislative power assigned to the provinces by s. 92(4), (13) and (16) of the *Constitution Act, 1867*. It found as well that Bill 21 is contrary to neither the architecture of the Constitution nor unwritten

constitutional principles. The Court of Appeal also rejected all the arguments relating to pre-Confederation statutes that had been raised as a basis for invalidity.

[41] With regard to the override clauses, the Court of Appeal found that the trial judge had correctly applied this Court's teachings in *Ford* — which continues to have full precedential value — when he held that the override provisions in ss. 33 and 34 of Bill 21 satisfy the conditions of validity required by s. 33 of the *Charter* and s. 52 of the *Quebec Charter*. The override power, which is grounded in the principle of parliamentary sovereignty, has the purpose and effect of allowing a legislative body to insulate a law from constitutional scrutiny by the courts in relation to the rights and freedoms that are subject to override. The use of these override clauses thus prevents the courts from granting any relief, whether monetary or declaratory. The Court of Appeal consequently found that it could not decide the question of whether Bill 21 infringes the freedoms of religion and expression guaranteed by s. 2 of the *Charter* and the right to equality guaranteed by s. 15 of the *Charter*. The Court of Appeal also held that the question of Bill 21's consistency with these provisions is moot, insofar as such a conclusion would have no practical legal consequence given the valid use of the override clauses. Indeed, Bill 21 would continue to apply even if a declaratory judgment were rendered. The Court of Appeal was also of the view that the conditions set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, that allow a court to decide a question despite its mootness were not present in this case.

[42] With regard to s. 28 of the *Charter*, the Court of Appeal upheld the interpretation proposed by the trial judge and found that this provision has only an interpretive function, capable of informing the meaning, scope and application of ss. 2 to 23 of the *Charter*. In the Court of Appeal's opinion, this provision does not enshrine any stand-alone right and is necessarily tied to the application of another *Charter* right or freedom. But when rights or freedoms guaranteed by ss. 2 and 7 to 15 are validly overridden, s. 28, being deprived of any foundation, is also deprived of any effect. In this case, s. 28 cannot defeat the application of s. 34 of Bill 21, which, in accordance with s. 33 of the *Charter*, validly overrides ss. 2 and 7 to 15 of that instrument.

[43] With regard to s. 23 of the *Charter*, the Court of Appeal was of the view that the trial judge had erred in finding that Bill 21 infringes the right guaranteed therein. It noted that while the provinces must respect the right of linguistic minorities to receive instruction in their language, they nevertheless retain some flexibility to legislate in matters of education, as long as the measures adopted do not compromise the preservation and linguistic and cultural vitality of the protected minority. In this case, the court emphasized the asymmetry between the situation of French-speaking minorities outside Quebec and that of the English-speaking minority in Quebec, which has an autonomous and well-established school network, and noted that the record showed no risk whatsoever of cultural erosion or assimilation. The restriction imposed by Bill 21 affects only hiring practices and does not concern either the use of the minority language or the content of educational programs. In finding that s. 23 cannot serve to constitutionalize hiring choices divorced from the language issue, the court

rejected what it described as [TRANSLATION] "extrapolation from well-settled rules" (para. 607) and reiterated that s. 23 protects a close, even symbiotic, relationship between the minority language and the culture it expresses. In this case, there is no relationship between the language protected by s. 23 and the "cultural" elements raised with respect to the hiring practices designed to reflect diversity.

[44] As regards the arguments concerning s. 3 of the *Charter*, the Court of Appeal found that this provision includes a person's right to hold their seat once elected. Under the provisions of Bill 21, a person whose sincere religious beliefs require them to wear a religious symbol that covers their face could not exercise the functions of a member of the National Assembly. Section 3 is therefore infringed, because it is pointless for a person who wears a religious symbol covering their face to run for election if they cannot then actually exercise the functions that result from being elected. This infringement is not justified under s. 1 of the *Charter*, given that the AGQ declined to present arguments on this point.

[45] Lastly, like the trial judge and for the same reasons, the Court of Appeal found that the exercise conducted by the Ministère de l'Éducation et de l'Enseignement supérieur of counting the number of school personnel members wearing a religious symbol does not infringe freedom of religion or the right to equality.

III. Issues

[46] These appeals require this Court to answer the following questions:

1. Is Bill 21 of no force or effect for being inconsistent with pre-Confederation statutes?

2. Is Bill 21 *intra vires* the National Assembly of Quebec?

3. Is Bill 21 inconsistent with the constitutional architecture?

4. Does Bill 21 infringe s. 28 of the *Charter*?

5. Does Bill 21 validly invoke s. 33 of the *Charter*?

6. Does s. 33 of the *Charter*, validly invoked, prevent the courts from ruling on whether Bill 21 is consistent with ss. 2 and 7 to 15 of the *Charter*?

7. Does Bill 21 validly invoke s. 52 of the *Quebec Charter*, thereby preventing the courts from ruling on whether Bill 21 is consistent with ss. 1 to 38 of the *Quebec Charter*?

8. Does Bill 21 infringe s. 3 of the *Charter*?

9. Does Bill 21 infringe s. 23 of the *Charter*?

10. Does the count done by the government of the number of school personnel members wearing religious symbols infringe the *Charter*?

IV. Analysis

A. *Bill 21 Is Not of No Force or Effect for Being Inconsistent With Pre-Confederation Statutes*

[47] Both at first instance and on appeal, some of the parties invoked three pre-Confederation statutes for the purpose of invalidating Bill 21, namely the *Quebec Act* of 1774, enacted by the British Parliament, the *Hart Act* of 1832, enacted by the legislature of Lower Canada, and the *Rectories Act* of 1852, enacted by the legislature of the Province of Canada. The courts below found that none of these statutes had a supra-legislative status that could serve to invalidate Bill 21. Before this Court, these parties have dropped their arguments concerning the *Quebec Act*. However, the WSO et al. and the Lord Reading Society maintain that the *Rectories Act* and the *Hart Act* are part of the Constitution and provide near absolute protection to freedom of religion, independently of the guarantees set out in the *Charter*.

[48] With respect, these arguments are without merit, and the Court of Appeal made no error in rejecting these grounds of appeal. Although these two statutes reflect the importance of multiculturalism in Canadian society and the historical evolution of protection for freedom of religion in our country, they are not part of our Constitution.

They have therefore never acquired supra-legislative force, which means that they cannot render legislation that is inconsistent with them of no force or effect.

(1) *Rectories Act*

[49] Enacted prior to Confederation by the legislature of the Province of Canada, the *Rectories Act* proclaimed and protected the free exercise of religious profession and worship and the equality of religions. The WSO et al. assert that this statute is a non-enumerated component of the Canadian Constitution. In support of their argument, they point out that the Court has already recognized, in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, that provisions of an ordinary statute can form part of the Constitution, and that in this case an examination of the statute clearly indicates that the religious freedom clause included in the *Rectories Act* is entrenched in the Constitution of Canada.

[50] In my view, the *Rectories Act* is an ordinary pre-Confederation statute that never acquired constitutional status. It is true that this statute contained a provision recognizing the free exercise of religious profession and worship. However, that recognition occurred in a specific historical context, characterized by the landholding and denominational arrangements put in place as a result of the *Constitutional Act, 1791* (G.B.), 31 Geo. 3, c. 31 (reproduced in R.S.C. 1985, App. II, No. 3), and by controversies surrounding the clergy reserves in the Province of Canada. It was never intended to be a general declaration structuring the Canadian constitutional order.

(a) *Constitutional Legislation Is Not Exhaustive*

[51] The WSO et al. submit that the text of the Constitution of Canada is not exhaustive and that the *Rectories Act* should be recognized as a non-enumerated component of the Constitution. The WSO et al. refer in particular to s. 52(2) of the *Constitution Act, 1982* and to certain decisions of this Court recognizing that this provision does not define the entire Constitution:

> **(2)** The Constitution of Canada includes
>
> **(a)** the *Canada Act 1982*, including this Act;
>
> **(b)** the Acts and orders referred to in the schedule; and
>
> **(c)** any amendment to any Act or order referred to in paragraph (a) or (b).

[52] According to the WSO et al., the Constitution of Canada is not an exhaustive set of formally enumerated texts, but a corpus that also includes unwritten rules and principles as well as historical provisions not expressly mentioned. The *Constitution Act, 1867* and the *Charter* neither abrogated nor subordinated pre-existing constitutional rights, which are preserved by, *inter alia*, s. 26 of the *Charter*. The guarantee of religious freedom in the *Rectories Act*, as a constitutional norm, can therefore be invoked to invalidate any inconsistent ordinary statute.

[53] Only the "Constitution of Canada", as defined in s. 52(2) of the *Constitution Act, 1982*, can render an inconsistent law of no force of effect by operation

of s. 52(1) thereof — which states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" — and, as such, serve as a basis for judicial review of the validity of Bill 21. This Court has, however, recognized on a number of occasions that the 1867 and 1982 Constitution Acts do not exhaustively codify all of Canada's constitutional law (see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 85 and 109; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 24). As this Court pointed out in *Reference re Remuneration of Judges*, our Constitution emerged from the British constitutional regime, whose fundamental rules have not been codified in a single document or in a set of documents (para. 92). It is therefore normal for our Constitution to reflect some elements of this legacy. However, the fact that s. 52(2) is not exhaustive cannot be construed as an invitation to incorporate into the Constitution any statute that is historically important or that protects a fundamental value.

[54] It should be noted that, unlike the British Constitution, the Constitution of Canada has supra-legislative status. By virtue of s. 52(1) of the *Constitution Act, 1982*, the Constitution is the supreme law of Canada. It is a statement of "the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government" (*Reference re Manitoba Language Rights*, at p. 745). It has significant consequences in this regard, in that it limits the exercise of legislative power, authorizes the courts to

strike down laws that are inconsistent with it and requires that any amendment to the Constitution be made in compliance with a strict procedure established in Part V of the *Constitution Act, 1982*. Because of the Constitution's supra-legislative status, the courts must exercise great caution before extending the scope of s. 52(2). As Lamer C.J. wrote in *Reference re Remuneration of Judges*, "[t]here are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review" (para. 93).

[55] Consequently, the Court has accorded constitutional status to elements not explicitly enumerated in the Constitution only when they were incorporated into it either by express reference or by necessary implication from the provisions or structure of the Constitution.

[56] In *New Brunswick Broadcasting Co.*, this Court recognized that the rule that the courts may not review the exercise of parliamentary privilege is part of Canadian constitutional law even though no provision of constitutional legislation expressly specifies this at the provincial level (pp. 377-78 and 384-85; see also *Alford v. Canada (Attorney General)*, 2026 SCC 14, at para. 36). That conclusion rested on several bases: the language of s. 52(2) of the *Constitution Act, 1982*, particularly the word "includes", whose use suggests that there are additional written or unwritten constitutional sources; the preamble to the *Constitution Act, 1867*, which expresses an intention to establish a constitution "similar in Principle to that of the United

Kingdom"; and consistent case law recognizing that parliamentary privilege is inherent in the creation of legislative bodies in the British tradition and in the performance of their constitutional functions (*New Brunswick Broadcasting Co.*, at pp. 375-81; see also *Alford*, at para. 36). That being said, the content of parliamentary privilege can itself be defined or redefined through legislation under either s. 18 of the *Constitution Act, 1867* at the federal level or s. 45 of the *Constitution Act, 1982* at the provincial level, and is therefore not entrenched in the Constitution of Canada as defined in s. 52(2) (*Alford*, at paras. 1-2, 42, 60-61 and 72).

[57] Similarly, in *Reference re Supreme Court Act*, this Court recognized that although the *Supreme Court Act*, R.S.C. 1985, c. S-26, was enacted as an ordinary statute and is not expressly referred to in s. 52(2) of the *Constitution Act, 1982*, the Court's essential features codified in this statute have constitutional status and can be changed only through the constitutional amendment procedure set out in Part V of the *Constitution Act, 1982* (paras. 19, 74, 76 and 97-98). That conclusion flowed from the fact that, over time, and particularly following the abolition of appeals to the Judicial Committee of the Privy Council, the Supreme Court's very existence became "central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system" (para. 85). The Court thus established itself as an integral component of Canada's constitutional architecture and of constitutional supremacy. The enactment of the *Constitution Act, 1982* not only confirmed the need for a final judicial arbiter to play the role of true "guardian of the constitution", but also expressly entrenched the essential features of the Supreme Court

by making any change relating to the Court, and particularly its composition, subject to the amending procedures set out in ss. 41(d) and 42(1)(d) of this statute (paras. 88-95). As a result, the corresponding provisions of the *Supreme Court Act* have themselves been entrenched in the Constitution of Canada by implied reference.

[58] In contrast, in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, this Court declined to accord constitutional status to certain texts despite their considerable historical and political importance, noting that the historical importance of a text is not enough to give it constitutional value where it is not sufficiently anchored in the text of the Constitution (p. 92).

[59] Considered together, these cases confirm that the recognition of constitutional elements not explicitly enumerated requires more than simply historical, political or symbolic importance. This Court has recognized the existence of constitutional components that are not expressly entrenched only when they have proved to be intrinsic to the very functioning of Canada's constitutional order and when they have been anchored to some degree in the text of the Constitution.

[60] This conclusion cannot be interpreted as an enunciation of criteria or preconditions for the recognition of new components of an "evolving" Constitution, but must rather be understood as an acknowledgment of the limited nature of the circumstances in which this Court has given effect to the non-exhaustiveness of constitutional texts. The Constitution is not an "empty vessel" — to borrow a metaphor used in *Charter* interpretation — that can be filled with any text to which one wishes

to attribute constitutional value (see *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394). In this regard, the *Rectories Act* shares no similarities with the recognized non-enumerated elements.

(b) *The Rectories Act Is Not a Non-enumerated Component of the Constitution*

[61] As I noted above, the *Rectories Act* fit into a specific religious and political context in United Canada during the 18th and 19th centuries. At that time, the Catholic Church was largely dominant in the territory of the former New France. However, it was competing in the colony with the Anglican Church, the established church of England, which itself had rivalries with various other Protestant denominations.

[62] Several of the recriminations made by the nonconformist Protestant churches concerned the privileges conferred on the Anglican Church. The *Constitutional Act, 1791* in fact provided for the creation of "clergy reserves" for the support and maintenance of the Protestant clergy. One seventh of the public lands in Upper and Lower Canada were therefore reserved for this purpose (s. 36), and residences for the Anglican clergy, called parsonages or rectories, could be established on those lands (s. 38). This allocation of lands, seen as unduly favouring the Anglican Church, quickly generated vigorous controversy among the various Protestant denominations present in the colony (expert report of Marc Chevrier for the AGQ, dated September 4, 2020, reproduced in joint schedules in the C.A., vol. 33 (at pp. 10774-886), at p. 10826; A. Wilson, *The Clergy Reserves of Upper Canada* (1969), at p. 3).

[63] It was with the aim of alleviating these tensions among denominations that the Parliament of the Province of Canada enacted a so-called [TRANSLATION] "compromise" statute, the *Rectories Act* of 1852 (expert report of Yvan Lamonde, dated July 28, 2020, reproduced in joint schedules in the C.A., vol. 32 (at pp. 10576-657), at p. 10584). This statute recognized equality of treatment for the various religious denominations and equality in the free exercise of religious profession and worship, and it prohibited the creation of new "Parsonages or Rectories" for the Anglican Church. It was followed in 1854 by a second statute on rectories that secularized the clergy reserves and disposed fully and finally of all matters, claims and interests arising from these reserves (*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*, S. Prov. C. 1854, 18 Vict., c. 2). The *Rectories Act* was incorporated into the 1859 Consolidated Statutes of United Canada (*An Act respecting Rectories*, C.S.C. 1859, c. 74). The purpose of these statutes was to end the Anglican Church's structural privileges and to make the treatment of the various Protestant denominations uniform.

[64] Following the enactment of the *Constitution Act, 1867*, the *Rectories Act* continued to be part of the law in force in the provinces formed from United Canada and became, in fact, a provincial statute applicable in Quebec and Ontario. This legal continuity resulted from s. 129 of the *Constitution Act, 1867*, which provides that pre-Confederation statutes remain in force after Confederation but may be repealed, abolished or altered by one of the two levels of government, in accordance with the

division of powers established by the Constitution. In the exercise of reviewing and classifying pre-Confederation statutes, the *Rectories Act* was classified among the statutes falling within provincial legislative jurisdiction in Appendix 1 of the 1886 Revised Statutes of Canada.

[65] In keeping with that classification, the *Rectories Act* was later incorporated into the 1877 Revised Statutes of Ontario (c. 215) and the 1888 Revised Statutes of the Province of Quebec, before being reproduced in their successive revisions. The guarantees in the *Rectories Act* relating to the free exercise of religious profession and worship therefore remained continuously in effect in Ontario and Quebec after Confederation; they survive, in substance, in the *Religious Freedom Act*, R.S.O. 1990, c. R.22, and, until very recently, they survived in the *Freedom of Worship Act*, CQLR, c. L-2 (repealed in 2026).

[66] Consideration of the context and legislative history of the *Rectories Act* confirms that the purpose of this statute was above all to resolve a denominational conflict relating to the privileges conferred on the Anglican Church and to the system of clergy reserves. Its application remained territorial and limited to United Canada. In this context, the *Rectories Act* was not a general and abstract declaration of fundamental freedoms meant to structure the Canadian constitutional order in a lasting fashion, but rather a circumstantial legislative reform aimed at resolving a political and religious conflict that was specific to the colonial regime at the time. The protections it conferred on freedom of worship must therefore be understood as [TRANSLATION] “a freedom

accorded to Christian religious denominations, which obtained an equal right to the state's protection" (expert report of Marc Chevrier, at p. 10827, citing S. Pagnuelo, *Études historiques et légales sur la liberté religieuse en Canada* (1872), at p. 229).

[67] Therefore, even though this statute enshrined freedom of worship in the Province of Canada, it cannot be equated with an absolute constitutional entrenchment of freedom of religion, nor can it serve to identify a legal norm that can limit the exercise of the legislative authority conferred on the Quebec legislature by the *Constitution Act, 1867*. In other words, contrary to what the WSO et al. assert, consideration of the *Rectories Act* and its context does not support the conclusion that it is a non-enumerated component of the Constitution.

[68] The WSO et al. cite a number of decisions that purportedly recognize the guarantee of religious freedom and equality arising from the *Rectories Act*. While these cases do in fact confirm that such protections existed in Canadian law prior to the *Charter*, they do not go so far as to recognize this statute as having constitutional status. In *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, which concerned the validity of a municipal by-law regulating the distribution of publications in the streets, four of the nine judges who heard the appeal held that the by-law was invalid because it did not fall within the jurisdiction conferred on the province by s. 92 of the *Constitution Act, 1867*, including its jurisdiction over civil rights under s. 92(13). While it is true that a few judges recognized the importance of freedom of religion in that case and that some of them referred to the *Rectories Act* as a historical source of such protection, those

references to the *Rectories Act* were made in providing context for the protection of freedoms, without the Court ruling on the constitutional status of this statute (see pp. 321, 323, 327-28, 342 and 357-62). In this regard, the opinions of Kellock and Locke JJ., the only ones explicitly suggesting a constitutional scope, remain isolated and cannot be elevated to a definitive principle (pp. 345-46 and 371). Similarly, in *Chaput v. Romain*, [1955] S.C.R. 834, which concerned a civil liability action brought against police officers for unlawful intervention at a private religious gathering, the Court strongly condemned the violation of the freedom of worship of Jehovah's Witnesses. However, the judges' reasoning was not based on the *Rectories Act*, let alone on the recognition of constitutional status for this statute (p. 840). These cases certainly confirm the long-standing nature and importance of religious freedom, but they do not support the conclusion that the *Rectories Act* has been recognized as a constitutional norm falling within s. 52 of the *Constitution Act, 1982*.

[69] Other decisions of this Court weigh, on the contrary, in favour of rejecting the position of the WSO et al. For example, in *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383, which dealt with the validity of the *Communal Property Act*, R.S.A. 1955, c. 52, a statute limiting the ability of Hutterite religious communities to acquire additional areas of land for their colonies in Alberta, the Court explicitly rejected the appellants' argument that the *Rectories Act* applied in Alberta. The Court found that this statute had been continued, by virtue of s. 129 of the *Constitution Act, 1867*, only in the original provinces, that is, Ontario and Quebec (pp. 393-94). That finding is difficult to reconcile with the argument that this statute is a constitutional rule

applicable throughout Canada. Similarly, in *Big M Drug Mart*, which concerned the constitutionality of the *Lord's Day Act*, R.S.C. 1970, c. L-13, Dickson J., writing for the Court, traced the historical evolution of freedom of religion and referred to the *Rectories Act* as an example of pre-existing protection. However, he noted that, before the enactment of the *Charter*, freedom of religion had remained subject to ordinary statutes (p. 348).

[70] In short, while certain decisions refer to the *Rectories Act* to trace the origins of protection for freedom of religion in Canada and underscore the historical importance of this statute, they do not thereby affirm its constitutional nature. Despite its historical importance in the evolution of the relationship between the state and religions in Canada, the *Rectories Act* never acquired constitutional status, and it cannot be considered a non-enumerated component of the Constitution.

(c) *Alternative Argument on the Division of Powers*

[71] In the alternative, the WSO et al. submit that the *Rectories Act* is a federal statute that deals with a matter of national concern falling within Parliament's residual peace, order and good government power under s. 91 of the *Constitution Act, 1867*. They contend that the impugned provisions of Bill 21 are therefore inoperative pursuant to the doctrine of federal paramountcy. This argument must be rejected.

[72] First of all, the argument is based on an erroneous premise relating to the legal status of the pre-Confederation statutes continued by s. 129 of the *Constitution*

Act, 1867. This section provides that the statutes in force prior to Confederation continue to apply after 1867 in the provinces where they were already in force, subject to being repealed, abolished or altered by the level of government having jurisdiction. As we have seen, these statutes did not become "federal statutes" of the Parliament of Canada at the time of Confederation. Rather, they retain their character as pre-Confederation statutes applicable locally, until such time as the level of government having jurisdiction exercises its jurisdiction with respect to them.

[73] Second, the subject matter of the *Rectories Act* clearly falls within provincial jurisdiction. This statute essentially concerns the structuring of relations between religious denominations, ecclesiastical privileges and freedom of worship in the former regions of Canada West and Canada East. Such a subject matter forms part of the provinces' jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. Indeed, the jurisprudence has long recognized that the provinces can legislate with respect to civil liberties and human rights in fields that are within their jurisdiction (*Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at pp. 234-36; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 750-51). If a province can confer legislative protections on freedom of religion, it can also alter them or limit them through valid legislation within its jurisdiction.

[74] It follows that even though the *Rectories Act* continued to apply in Quebec after 1867 by virtue of s. 129 of the *Constitution Act, 1867*, the Quebec legislature

maintained its jurisdiction to alter, at a later date, the legal scheme established by this statute.

[75] In addition, the doctrine of federal paramountcy does not apply in this case. The purpose of this doctrine is to resolve conflicts between a valid federal statute and a valid provincial statute that is incompatible with it (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at paras. 99-101). However, the *Rectories Act* is not a federal statute enacted by the Parliament of Canada. It is a pre-Confederation statute whose application remained confined to the places where it applied before 1867, that is, Ontario and Quebec (*Walter*, at pp. 393-94). As a result, it cannot be argued that a change made by Quebec to this legislative scheme would frustrate the legislative intent of the federal Parliament.

[76] Finally, the argument that the *Rectories Act* falls within federal jurisdiction because it is purportedly "of national concern" also has no merit. The national concern doctrine applies to matters that have an inherently national dimension justifying uniform action by the federal Parliament for the country as a whole (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175, at para. 163). However, the *Rectories Act* had a territorial reach extending only to Canada West and Canada East and addressed historical issues specifically associated with clergy reserves and denominational relations in those colonies. It is difficult to argue that the purpose of such a statute, of strictly local application and born of specific historical

circumstances, constitutes a matter of national concern falling within the residual power of the federal Parliament.

[77] In short, nothing in the text, purpose or legislative history of the *Rectories Act* supports recognizing it as having constitutional status or placing it under a federal head of power. It follows that this statute cannot serve as a basis for reviewing the validity of Bill 21.

(2) *Hart Act*

[78] The Lord Reading Society argues that Bill 21 is inconsistent with a constitutional principle that protects participation in public institutions by persons who profess a religion without renouncing their beliefs or forgoing the expression of them. It submits that this principle, which can be distinguished from freedom of religion *per se*, fits more broadly within the unwritten constitutional principles of democracy and protection of minorities and helps to inform Canada's constitutional architecture. According to the Lord Reading Society, the *Hart Act* of 1832 is an expression of this principle, which is now applicable to all religious communities, while also being part of a series of pre-Confederation statutes recognizing the right of religious minorities to enter the public service regardless of the expression of their beliefs, both in the United Kingdom and in the colony. This specific principle, it says, is included in the preamble to the *Constitution Act, 1867* and embedded in the country's constitutional structure.

[79] The *Hart Act* was enacted by the Parliament of Lower Canada to abolish the civil and political disabilities imposed on persons of the Jewish faith and to ensure the equality of these persons with "the other subjects of His Majesty", including in their access to public office. The purpose of this statute was to remedy a legal exclusion inherited from English law that prevented Jewish persons from acceding to public office because of the religious oaths required at the time. That exclusion applied, for example, in the Ezekiel Hart case. Despite having been properly elected, Mr. Hart was expelled from the Legislative Assembly of Lower Canada on the ground that he could not swear the oath prescribed by law "on the true faith of a Christian" (see Public Archives of Canada, *Documents Relating to the Constitutional History of Canada 1791-1818* (1914), at pp. 351 et seq.).

[80] The *Hart Act* was therefore both remedial and declaratory in nature: it recognized that persons professing the Jewish religion "are entitled . . . to the full rights and privileges of the other subjects of His Majesty" and were capable of holding any "office or place of trust whatsoever" in the province. The statute was later revised, and its content was then incorporated into other texts, including art. 18 of the *Civil Code of Lower Canada* of 1866, which proclaimed equality in the enjoyment of civil rights. The *Hart Act* was left out of the legislative revision of 1888.

[81] For reasons analogous to those set out in the previous section, I am of the view that the argument about the supra-legislative status of the principle protecting free

participation in public institutions by persons who profess a religion cannot be accepted.

[82] Even if it is assumed that the principle expressed in the *Hart Act* is an unwritten constitutional principle or that it fits more broadly within the unwritten constitutional principles of democracy and protection of minorities, such a principle cannot, on its own, invalidate inconsistent legislation. This Court has noted that unwritten constitutional principles may inform the interpretation of the written provisions of the Constitution but are not in themselves an independent basis for invalidating legislation (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at paras. 55-57). These principles cannot become integrated into the constitutional structure so as to invalidate legislation that is otherwise consistent with the actual text of the Constitution. As this Court has explained, "it is inconceivable that legislation which is repugnant to our 'basic constitutional structure' would not infringe the Constitution itself" (para. 52). In other words, while unwritten principles may guide the interpretation of the constitutional structure, they cannot, on their own, establish constitutional norms that are not anchored in the text of the Constitution.

[83] For these reasons, which are similar to those given in the section discussing the *Rectories Act*, the Lord Reading Society's argument based on the *Hart Act* should be rejected.

B. *Bill 21 Is Intra Vires the National Assembly of Quebec*

[84] Ms. Hak et al. and Ms. Lauzon et al. challenge the constitutional validity of Bill 21 on the ground that it is inconsistent with the division of powers. Ms. Hak et al. argue that the pith and substance of ss. 6 and 8 of Bill 21 is the protection of laicity as a principle of public morality and a fundamental value of Quebec society. They also assert that Bill 21 is invalid because it encroaches on the federal criminal law power. As for Ms. Lauzon et al., they support the arguments made by Ms. Hak et al. and, in the alternative, submit that Bill 21 is invalid because it encroaches on the federal power to make laws for the peace, order and good government of Canada. The AGQ rejects these arguments and defends the validity of Bill 21.

[85] As I will explain below, Bill 21 is within the jurisdiction of the Quebec legislature. Its pith and substance is to affirm the Quebec conception of laicity as a principle of government for the state and, on the basis of this principle, to impose requirements on persons who represent the state. Quebec has jurisdiction to legislate on this matter under s. 45 of the *Constitution Act, 1982*, which authorizes it to amend its constitution as regards the institutions and principles of its government (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 38-39 and 41). Quebec also has jurisdiction to enact Bill 21 under s. 92(4) of the *Constitution Act, 1867*, because Bill 21 applies primarily to "Provincial Officers", that is, persons who hold positions in the provincial public service. To the extent that Bill 21 also applies to persons who cannot be characterized as provincial officers, these persons fall within Quebec's power to legislate under other heads of jurisdiction.

(1) Characterization of Bill 21

[86] The analytical framework for determining the constitutional validity of legislation under the division of powers is well established. Courts must first characterize a law by ascertaining its pith and substance (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 481; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 25-26). Characterizing the law involves identifying its "dominant purpose", "dominant or most important characteristic", or "leading feature or true character" (*Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, [2023] 1 S.C.R. 367, at para. 23, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63, and *Morgentaler*, at pp. 481-82). Courts must then classify the law by determining whether its pith and substance brings it under one of the heads of power of the legislative authority that enacted it (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 25).

[87] To ascertain the pith and substance of a law, courts must look at its purpose and effects (*Murray-Hall*, at para. 24; *Reference re Firearms Act (Can.)*, at para. 16). To analyze the purpose, courts can rely on the text of the law, including its preamble and purpose clauses, as well as on extrinsic evidence, including parliamentary debates or evidence about the circumstances surrounding its enactment (*Murray-Hall*, at paras. 24-25; *Reference re Firearms Act (Can.)*, at para. 17; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18). To identify the effects of the

law, courts can consider both its legal effects — those arising from its provisions — and its practical effects — those arising from its application (*Murray-Hall*, at para. 25). Analyzing the actual text of the law is the focal point of the characterization exercise (*Murray-Hall*, at para. 26, quoting *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 165).

[88] Finally, in identifying the pith and substance of a law, courts must not take the heads of legislative power into account (*References re Greenhouse Gas Pollution Pricing Act*, at para. 56; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 65). The classification analysis and its result must not influence the characterization of a law or its provisions, considered together or separately.

[89] Before I characterize Bill 21, a preliminary question should be settled. Relying on *Murray-Hall*, Ms. Hak et al. argue that the Court should characterize ss. 6 and 8, the only provisions whose validity they are challenging, separately rather than characterizing Bill 21 as a whole.

[90] This argument must be rejected. Given that some of the appellants are challenging the constitutional validity of Bill 21 as a whole, it is the law as a whole that must be characterized to determine whether it is consistent with the division of powers.

[91] More fundamentally, this is not an appropriate case in which to characterize ss. 6 and 8 separately from the rest of Bill 21. In *Murray-Hall*, this Court recognized that it may be appropriate to characterize certain provisions separately from the rest of

the law where there is some doubt as to whether the impugned provisions have the same constitutional characterization as the law in which they appear (para. 30). However, where the impugned provisions are part of a broader legislative scheme and can properly be considered an integral part of that scheme, the pith and substance analysis must relate to the scheme as a whole (*ibid.*, quoting *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at p. 270).

[92] Sections 6 and 8 are of central importance in the scheme put in place by Bill 21 to give concrete expression to the laicity of the Quebec state. As explained above, these provisions prohibit certain representatives of the state from wearing religious symbols or face coverings in the exercise of their functions. While Bill 21 includes several other measures to implement laicity (see ss. 10, 11, 15 and 16), the prohibitions set out in ss. 6 and 8 are the primary mechanisms through which Bill 21 gives effect to laicity. In this sense, they form the core of a unified statute. I note that Ms. Hak et al. do not contend, and rightly so, that Bill 21 bears the hallmarks of situations in which, under the guise of enacting a coherent legislative scheme, a province has, in one or two provisions, legislated beyond its jurisdiction.

[93] More importantly, ss. 6 and 8 do not operate independently; rather, they draw their content and scope from other provisions of Bill 21. Neither of these provisions explicitly lists the persons who are subject to the prohibitions they create. Rather, s. 6 applies to the "persons listed in Schedule II", while s. 8 applies to the personnel members of a body listed in Sch. I as well as to the persons listed in Sch. III

who are considered to be such members. In addition, other provisions clarify the scope of these prohibitions. For example, s. 9 specifies that the prohibition in s. 8 does not apply to persons whose face is covered for health reasons or for other reasons related to employment. Furthermore, the prohibitions set out in ss. 6 and 8 are backed up by the possibility of disciplinary measures for non-compliance. Bill 21 provides for mechanisms to verify compliance with the prohibitions set out in ss. 6 and 8, but these mechanisms are found in ss. 12 and 13.

[94] Consequently, ss. 6 and 8 are explicitly and inextricably linked to the other provisions of Bill 21. Challenging ss. 6 and 8 amounts, in substance, to challenging Bill 21 as a whole. Characterizing ss. 6 and 8 separately would therefore be not only artificial but also impracticable, because the scope of these two provisions is defined and shaped by the rest of Bill 21.

[95] In this context, I will therefore characterize Bill 21 as a whole. As explained below, I am of the view that Bill 21 affirms the Quebec conception of laicity as a principle of government for the Quebec state and, on the basis of this principle, imposes requirements that apply to persons who represent the state in the exercise of their functions.

[96] The title of a law is a form of intrinsic evidence that is relevant in characterizing it (*Reference re Genetic Non-Discrimination Act*, at para. 35). Bill 21 is titled "*Act respecting the laicity of the State*", which indicates that it is centred on the Quebec state. This focus is confirmed by the preamble to Bill 21, which situates this

law within Quebec's "civil law tradition", "distinct social values" and "specific history". The preamble also affirms the "paramountcy of State laicity" and emphasizes the need to establish a "stricter duty of restraint regarding religious matters" for persons exercising certain functions in Quebec society. In this way, the preamble articulates a particular conception of what the principle of laicity requires. Considered together, the title and preamble reveal an intention to enshrine a particular conception of laicity — shaped by Quebec's civil law tradition, distinct social values and specific history — as a principle of government for the Quebec state.

[97] As mentioned above, Chapter I affirms the laicity of the state. Section 2 defines the principles underpinning the conception of laicity affirmed by Bill 21, and s. 3 requires that "parliamentary, government and judicial institutions" comply with these principles. The nexus between laicity and the Quebec state is also reinforced in s. 4, which requires compliance with Bill 21's two prohibitions, discussed below, and which affirms the right of all persons to lay parliamentary, government and judicial institutions and to lay public services.

[98] Most of the measures put in place by Bill 21 to implement laicity as a principle of government are found in Chapters II and III, which impose prohibitions on the wearing of religious symbols or face coverings. Chapter II consists solely of s. 6, which prohibits certain persons from wearing religious symbols in the exercise of their functions, including the President and Vice-Presidents of the National Assembly, justices of the peace, court clerks, members of commissions, boards and tribunals,

public inquiry commissioners, arbitrators appointed by the Minister of Labour, the Minister of Justice, prosecutors, lawyers acting on behalf of the state, peace officers, and principals, vice principals and teachers of educational institutions.

[99] Sections 7 and 8 require that the personnel of certain specified bodies exercise their functions with their face uncovered, and obligate persons who receive services from such a personnel member to do so with their face uncovered as well where this is necessary for identity verification or security purposes. The personnel members in question include, in particular, members of the National Assembly, elected municipal officers, the staff of legislative or executive offices, peace officers, physicians and dentists working in a public institution, home educational childcare providers, and school commissioners or members of the board of directors of a school service centre. Section 9 provides for an exception where a face covering is worn for health reasons or because of a handicap or requirements associated with the exercise of the person's functions.

[100] These provisions circumscribe the scope of Bill 21. As the Court of Appeal noted, the persons who are subject to the prohibitions set out in Bill 21, [TRANSLATION] "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" (para. 31). Furthermore, the prohibitions in Bill 21 apply neither to the conduct of individuals in their private lives nor to the public sphere in general. Rather, Bill 21 is intended to

regulate the manner in which certain persons who represent the Quebec state exercise their professional functions.

[101] Several other provisions of Bill 21 signal the intention to implement a particular conception of laicity as a principle of government. Section 10 provides that individuals and personnel members of partnerships providing services to the state or receiving funding from the state may be required to exercise their functions with their face uncovered. Section 11 gives the provisions of Bill 21 paramountcy over any inconsistent provision of any provincial law enacted subsequently. Bill 21 also incorporates the principle of laicity into the *Quebec Charter*. These provisions reflect the intention, expressed in the preamble, to affirm laicity as a fundamental principle of government for the Quebec state.

[102] The extrinsic evidence also helps shed light on the purpose of Bill 21. The same day it was tabled in the National Assembly of Quebec, the minister responsible for the bill, Simon Jolin-Barrette, explained that [TRANSLATION] "[t]he purpose of this bill is to affirm the laicity of the state and to specify the requirements that follow from it" (*Journal des débats*, vol. 45, No. 26, 1st Sess., 42nd Leg., March 28, 2019, at p. 1833). At a press conference, he situated Bill 21 in the context of Quebec's specific history, describing it as a [TRANSLATION] "historic step forward" marking a "logical extension of the Quiet Revolution and of the secularization of Quebec's school system" (*Conférence de presse de M. Simon Jolin-Barrette, leader parlementaire du gouvernement et ministre de l'Immigration, de la Diversité et de l'Inclusion*, March 28,

2019 (online)). He described Bill 21 as [TRANSLATION] "a true act of affirmation" intended to "enshrine the principle of state laicity in the laws of Quebec", specifying that the scope of the prohibitions set out in Bill 21 had been confined to "state employees in a position of authority", given that these persons are "the chief representatives of the state" and cannot be dissociated from the "role they play".

[103] This extrinsic evidence indicates that Bill 21 promotes a vision of laicity by establishing requirements relating to compliance with this principle that apply to certain persons who represent the state.

[104] Consideration of the intrinsic and extrinsic evidence concerning Bill 21 points to several conclusions about its purpose. Bill 21 affirms a particular conception of laicity, and its preamble and text demonstrate that the National Assembly's intention was to enshrine laicity as a fundamental principle of government for the Quebec state. To make this conception of the principle operational, Bill 21 establishes a scheme governing the conduct of persons who represent the state. More specifically, ss. 6 and 8 and their accompanying schedules prohibit these persons from wearing religious symbols and, in certain cases, face coverings in the exercise of their functions. It is true that the requirement imposed on members of the public to remove face coverings for security or identity verification purposes when they receive certain services does not have the same connection to the implementation of a particular conception of laicity as a principle of government that the other requirements in ss. 6 and 8 do. That being said,

this requirement does not change the essential character of Bill 21 (*Reference re Genetic Non-Discrimination Act*, at para. 29).

[105] It follows that Bill 21 is concerned with the state and with those who exercise state functions, not with the practice of religion in society generally. For this reason, the description given by Ms. Hak et al. of Bill 21's purpose — the protection of laicity as a principle of public morality and a fundamental value of Quebec society — lacks precision. The scheme established by Bill 21 is centred on the state and its functioning, not on Quebec society as a whole. The extrinsic evidence supports these conclusions.

[106] I turn now to Bill 21's legal effects. Bill 21 prevails over any other provincial law enacted subsequently, unless that law expressly provides that it applies despite the requirements of Bill 21 (s. 11). In practice, any law enacted after Bill 21 and inconsistent therewith will be inoperative to the extent of the inconsistency. Furthermore, Bill 21 creates prohibitions that apply to certain persons and to the members of certain bodies, barring them from wearing religious symbols or face coverings in the exercise of their functions. Section 12 authorizes a minister to verify compliance with the measures set out in Bill 21 and to require that a non-compliant person or body take "corrective measures". Similarly, s. 13 provides that failure to comply with s. 6 or 8 may lead to a "disciplinary measure". Section 14 specifies that no accommodation, except as provided for in Bill 21, may be granted in connection with the prohibitions set out in ss. 6 and 8. Considered as a whole, these provisions

impose prohibitions on the wearing of religious symbols or face coverings in the exercise of certain functions, such that affected persons who wear such symbols or face coverings in the exercise of their functions may be subject to disciplinary sanctions.

[107] In practical terms, Bill 21 excludes persons whose religious convictions require them to wear a religious symbol from having access to certain functions and employment. These functions include those of President or Vice-President of the National Assembly, justice of the peace, court clerk, member of various commissions, boards and tribunals, public inquiry commissioner, arbitrator appointed by the Minister of Labour, Minister of Justice, prosecutor, lawyer acting on behalf of the state, peace officer, and principal, vice principal or teacher of an educational institution. The prohibition on wearing face coverings would also have the effect of preventing persons who wear niqabs or burkas from exercising the functions of member of the National Assembly, elected municipal officer, staff member of a legislative or executive office, peace officer, physician or dentist working in a public institution, home educational childcare provider, or school commissioner or member of the board of directors of a school service centre.

[108] In short, the legal and practical effects of Bill 21 are such that persons who have certain religious convictions requiring them to wear a religious symbol or face covering cannot represent the state in the functions listed in Bill 21.

[109] In light of the foregoing analysis, I conclude that the pith and substance of Bill 21 is to affirm a particular conception of laicity as a principle of government for

the Quebec state and, on the basis of this principle, to impose requirements that apply to certain persons who represent the state in the exercise of their functions.

(2) Classification of Bill 21

[110] Having characterized Bill 21, I must now determine the class or classes of subjects into which it falls (*Desgagnés Transport*, at paras. 38-39). If Bill 21 can be placed under one or more of the heads of power assigned to the provinces, then it is *intra vires* Quebec (*Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 19; *Murray-Hall*, at para. 23).

[111] The AGQ submits that Bill 21 constitutes a valid exercise of Quebec's power to legislate on "the Appointment and Payment of Provincial Officers" under s. 92(4) of the *Constitution Act, 1867*, on "Property and Civil Rights" under s. 92(13), on "Matters of a merely local or private Nature in the Province" under s. 92(16), and on "the constitution of the province" under s. 45 of the *Constitution Act, 1982* (which replaces s. 92(1) of the *Constitution Act, 1867*).

[112] In contrast, Ms. Hak et al. submit that Bill 21 cannot be placed under any provincial head of power and stress that, when properly interpreted, Bill 21 can be classified only as a criminal law measure falling within the exclusive jurisdiction of the federal Parliament under s. 91(27). Ms. Lauzon et al. make the same arguments but also maintain in the alternative that Bill 21 can be classified under the national concern

branch of the federal Parliament's power to make laws for the peace, order and good government of Canada.

[113] As I have already explained, the pith and substance of Bill 21 is to enshrine laicity as a fundamental principle of government for the Quebec state and to regulate accordingly the conduct of persons who are deemed to represent the state in the exercise of their official functions. Because of its pith and substance, Bill 21 can be classified as falling within Quebec's jurisdiction to amend its constitution under s. 45 of the *Constitution Act, 1982* and its jurisdiction to regulate provincial officers under s. 92(4) of the *Constitution Act, 1867*.

(a) *Amendment of the Provincial Constitution*

[114] Under s. 45 of the *Constitution Act, 1982*, which corresponds to the former s. 92(1) of the *Constitution Act, 1867*, the provinces have jurisdiction to amend their constitution. The leading authority on this provision is *OPSEU*. In that case, this Court considered the constitutional validity of a law that affirmed the principle of political impartiality for members of the Ontario public service and established rules and prohibitions to give effect to that principle. Writing for the majority, Beetz J. held that the law was valid legislation under two heads of power. First, it was valid as an amendment to the provincial constitution under s. 92(1) of the *Constitution Act, 1867*, a repealed provision replaced by s. 45 of the *Constitution Act, 1982* (pp. 37-47). Second, it was valid as a law relating to provincial offices and officers under s. 92(4) (pp. 47-49).

[115] Recognizing that the contours of provincial constitutions are not rigidly defined (at pp. 37-38), Beetz J. laid out a two-step analysis for determining whether a law amends the provincial constitution. At the first step, the court must consider whether the legislation is constitutional in nature, that is, whether, by reason of its object, it "[bears] on the operation of an organ of the government of the Province" (p. 39, quoting *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, at p. 1024). For example, legislation that "implement[s] a principle of government" is legislation that bears on the operation of an organ of government and is therefore constitutional in nature (*OPSEU*, at p. 41).

[116] In my view, Bill 21, like the law at issue in *OPSEU*, can be regarded as bearing on the operation of the organs of the government of Quebec, because it sets out a principle of government. In this sense, it falls within the recognized boundaries of s. 45 of the *Constitution Act, 1982*.

[117] Bill 21 establishes laicity as a fundamental principle of government for the Quebec state. As explained above, Chapter I of Bill 21 affirms and defines the Quebec conception of laicity and makes it a cardinal principle for the Quebec state, one that must be complied with by "parliamentary, government and judicial institutions" — that is, the three branches of the Quebec government. To give effect to this principle, Bill 21 establishes a comprehensive scheme governing the conduct of persons who, in Quebec's opinion, represent the state in the exercise and performance of their official functions. The prohibitions set out in ss. 6 and 8 implement the principle of laicity in

these institutions by regulating the conduct of the persons composing them. Although the scope of Bill 21 is most certainly broad, its purpose remains centred on the persons who exercise essential functions in these three branches of government, including members of the National Assembly and their staff, certain members of the judiciary and of court staff, lawyers and peace officers, as well as members of the public service, including those who work in provincial government departments, commissions, boards and tribunals. Bill 21 is therefore legislation that is constitutional in nature.

[118] It goes without saying that defining the principles and values at the heart of the conception of the Quebec state is a matter for the provincial legislature. The provinces' power to amend their own constitution furthers a fundamental objective of the principle of federalism underlying Canada's constitutional architecture, namely that of recognizing "the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction" (*Reference re Secession of Quebec*, at para. 58). As I explained above, laicity is a principle that is deeply rooted in Quebec's history, and Bill 21 simply recognizes its importance explicitly.

[119] The second step of the *OPSEU* analysis recognizes that the provinces are part of a federal constitutional system and that amendments made to a provincial constitution may neither derogate from nor conflict with the federal Constitution, any more than they can alter or weaken the "federal principle" underlying the constitutional division of powers between the federal government and the provinces (*OPSEU*, at pp.

39-40). In the same vein, s. 45 is, by necessary implication, subject to the limits provided for elsewhere in Part V of the *Constitution Act, 1982*; a province may not avail itself of s. 45 to make an amendment that requires a different constitutional amendment procedure or that falls within the federal government's jurisdiction under ss. 41 to 44 of the *Constitution Act, 1982*.

[120] In this case, there is no such conflict. Nothing in Bill 21 is contrary to the division of powers between the federal government and the provinces or relates to a matter referred to in ss. 41 to 44 of the *Constitution Act, 1982*. It is therefore legislation that was validly enacted under s. 45, just as the law at issue in *OPSEU* was.

(b) *Provincial Offices and Provincial Officers*

[121] Like the law at issue in *OPSEU*, Bill 21 regulates the conduct of government representatives. The provinces' jurisdiction in this regard has its basis in s. 92(4) of the *Constitution Act, 1867*, which gives the provinces the power to legislate on "The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers", that is, persons who, in the exercise of their official functions, make up the organs of government and carry out state action within the province. The provinces' power to regulate their own public service is not in any doubt. Again, the provisions of Bill 21 that impose obligations and prohibitions that relate to the conduct of persons representing the state and that flow from the principle of laicity can be likened to the obligations and prohibitions imposed by the law at issue in *OPSEU*, which flowed from the principle of political neutrality. Just as those

obligations and prohibitions constituted, in *OPSEU*, a valid exercise of provincial jurisdiction under s. 92(4), the present obligations and prohibitions are also valid.

[122] Obviously, the scope of the regulatory measures provided for by Bill 21 is broader than that of the provisions considered in *OPSEU*, which prohibited Ontario civil servants from engaging in certain federal political activities. However, this wider scope does not alter the fact that, fundamentally, Bill 21 is a law whose purpose is to entrench a principle of government and to regulate the conduct of state representatives accordingly. Quebec does not, of course, have an absolute power to determine itself who is a representative of the state; it could not, for example, regulate federal employees or employees of other provinces. Furthermore, to the extent that Bill 21 applies to persons other than provincial officers referred to in s. 92(4), they are persons who undeniably fall within Quebec's heads of legislative jurisdiction. Regulating the personnel members of educational institutions that are subject to Bill 21 falls within Quebec's jurisdiction over education under s. 93 (see *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 68; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678 ("*CSFCB*"), at paras. 7 and 65); establishing rules for contracts of service falls within its jurisdiction over property and civil rights under s. 92(13), since Quebec is regulating its involvement in such contracts as a private actor (see *Reference re Genetic Non-Discrimination Act*, at para. 154, per Kasirer J., dissenting); and regulating other service providers, including in the fields of childcare, transportation and health, falls within its general and residual legislative

jurisdiction over matters of a merely local or private nature under s. 92(16) (see *Murray-Hall*, at paras. 71-72, quoting *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, at p. 792; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at pp. 132-33).

(c) *Conclusion*

[123] In summary, Bill 21 enshrines a principle of government in the province's constitution and regulates the conduct of state representatives in the exercise of their official functions in order to give effect to this principle. In this regard, it is analogous to the law at issue in *OPSEU* and, like that law, was validly enacted in the exercise of the province's power to amend its own constitution. To the extent that Bill 21's scope is broader than that of the law whose validity was upheld in *OPSEU*, this wider scope does not call the classification of Bill 21 into question and does not exceed the province's jurisdiction, because all of the persons who are subject to Bill 21 fall within the province's power to legislate under ss. 92 and 93 of the *Constitution Act, 1867*.

[124] Since Bill 21 can be placed under heads of power assigned to the provincial level, it is unnecessary to consider whether a similar law could have been enacted by the federal Parliament in the exercise of its criminal law power under s. 91(27). Indeed, it is well established that a law can have a double aspect. The provinces have, among other things, "jurisdiction to make laws in relation to several matters that touch on purposes that otherwise constitute valid criminal law purposes" (*Murray-Hall*, at para. 69). An otherwise valid provincial law does not become invalid simply because it has a moral aspect (*ibid.*). Where a law is valid for the level of government that enacted it,

the fact that it has a double aspect does not affect its validity (see *Desgagnés Transport*, at paras. 84-85; *References re Greenhouse Gas Pollution Pricing Act*, at para. 125).

[125] In addition, Ms. Hak et al. have not raised any argument relating to the doctrine of federal paramountcy or the doctrine of interjurisdictional immunity that would require this Court to determine whether Bill 21 conflicts with the purpose of a federal law or impairs a federal government activity that falls within the core of its jurisdiction (see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at paras. 43 and 66). Nor has the Attorney General of Canada contested the constitutional validity of Bill 21 by arguing that it exceeds the legislative jurisdiction of the National Assembly of Quebec. While this is not determinative, this Court has recognized that courts should be cautious about invalidating a provincial law when the Attorney General of Canada does not contest the law's validity (see *OPSEU*, at p. 19; *Murray-Hall*, at para. 82).

[126] For these reasons, it is unnecessary to consider whether, hypothetically, Bill 21 can be placed either under the federal criminal law power provided for in s. 91(27) or under Parliament's power to make laws for the peace, order and good government of Canada. Bill 21 is *intra vires* the National Assembly of Quebec.

C. *Bill 21 Is Not Inconsistent With the Constitutional Architecture*

[127] Ms. Hak et al. submit that Bill 21 is unconstitutional because it constitutes an invalid amendment to the Canadian Constitution. In their opinion, the constitutional

architecture protects the right of individuals to access positions in public institutions without discrimination based on their religion. They argue that, by effectively excluding adherents of certain religions from such positions, Bill 21 is contrary to the constitutional architecture and is therefore unconstitutional.

[128] I cannot accept that argument. Ms. Hak et al. are correct in asserting that an ordinary statute cannot change the "basic constitutional structure" embodied in the text of the Constitution (A.F., at para. 64, quoting *OPSEU*, at p. 57; see also *Reference re Senate Reform*, at paras. 26-27). However, Ms. Hak et al. have failed to establish that Bill 21 has the effect of fundamentally altering some aspect of the constitutional architecture. First of all, Quebec's public service is not an institution created by the Constitution of Canada and is therefore not a component of the constitutional architecture. Employment in the provincial public service falls wholly and exclusively within the province's legislative jurisdiction under s. 92(4) of the *Constitution Act, 1867*. In addition, the argument of Ms. Hak et al. based on the *Quebec Act*, the *Hart Act*, the *Charter* and certain unwritten principles, to the effect that a principle of "religious inclusivity of the public service" (A.F., at para. 82) is nonetheless part of the constitutional architecture, reflects a misunderstanding of the nature of this concept.

[129] The Constitution of Canada has both written elements and unwritten elements (*Toronto (City)*, at para. 49; *Reference re Remuneration of Judges*, at para. 92). It is composed of a text and an internal architecture, from which certain organizing principles arise (*Reference re Secession of Quebec*, at paras. 49-52). Interpreting the

Constitution — and thus determining the limits on the constitutional authority and powers of the various constituent branches and institutions of the state — requires consideration of these three elements: its text, its structure and its principles (*Reference re Senate Reform*, at paras. 25-26). Often these limits are explicit in the text. When they are not, and when there is an "open question of constitutional interpretation", consideration of the Constitution's unwritten elements, including its structure and the principles and values animating it, is essential to interpreting its text (*Toronto (City)*, at paras. 54-56 and 81; *Reference re Senate Reform*, at para. 26). That being said, it is important to note that the constitutional architecture is an aspect of the structural analysis of the Constitution that *describes* the institutions making up Canada's constitutional regime and the manner in which state powers are allocated and divided among the branches and organs of government (see M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at pp. 439-40). The constitutional architecture itself has no extrinsic normative content; it does not grant rights or afford protection to individuals.

[130] Ms. Hak et al. rely on three sources to argue that Bill 21 fundamentally alters the constitutional architecture. First, they invoke certain pre-Confederation statutes, including the *Quebec Act* of 1774, the *Hart Act* of 1832 and the *Rectories Act*. In their view, these statutes govern the principle of religious inclusivity and are part of the Canadian Constitution, thereby informing the constitutional architecture. Second, they note that the *Charter* enshrines freedom of religion, equality and multiculturalism

in ss. 2, 15 and 27. Considered in conjunction with the pre-Confederation statutes, these provisions constitute, according to them, the textual basis for finding that the constitutional architecture protects the right of individuals to access positions in public institutions without discrimination based on their religion. Third, they refer to the unwritten principles of democracy and protection of minorities, identified by the Court in *Reference re Secession of Quebec*. In their opinion, these principles support their position by informing the interpretation of the pre-Confederation statutes and *Charter* provisions they have invoked.

[131] However, none of these three sources can support the argument made by Ms. Hak et al. and, as a result, the argument is doomed to fail.

[132] First, the *Quebec Act* and the other pre-Confederation statutes invoked by Ms. Hak et al. are not part of the Constitution of Canada and therefore cannot serve — on their own or in association with unwritten principles — to invalidate legislation. As explained above, the statutes that governed Quebec prior to Confederation have no supra-legislative force and are not part of the text of the Constitution. These considerations, discussed above with respect to the *Hart Act* and the *Rectories Act*, also apply to the *Quebec Act*, despite the fact that it is a statute of the British Parliament and not a colonial statute. The *Quebec Act* is not an inherent and indispensable component of the Canadian Constitution (see *Reference re Remuneration of Judges*; *New Brunswick Broadcasting Co.*; *Reference re Supreme Court Act*).

[133] The *Quebec Act* is, of course, an integral part of Canada's constitutional history. It is one of a series of statutes passed by the British Parliament to govern the colony of New France (J.-Y. Morin and J. Woehrling, *Les constitutions du Canada et du Québec — du régime français à nos jours* (1994), t. 1, at p. 45). However, and as the Court of Appeal explained in detail, the *Quebec Act* [TRANSLATION] "does not belong in the courtroom to settle a controversy that is governed by entirely different modern constitutional constraints" (para. 148). The *Quebec Act* and the other pre-Confederation statutes invoked by Ms. Hak et al. do not provide the necessary textual anchor for invalidating legislation.

[134] Furthermore, the text of the *Charter* is of no assistance to Ms. Hak et al. for this purpose. To be sure, the *Charter* entrenches protection for religious minorities and guarantees the right to equality in ss. 2 and 15. However, the existence of these rights and freedoms in the *Charter* is not proof that other protections for religion or other equality guarantees exist outside the text of the Constitution, in the interstices of the constitutional architecture. In this regard, the analysis done by Ms. Hak et al. proceeds the wrong way: in construing the scope of the *Charter*, it is important to consider the structure and principles that infuse and animate the Constitution as a whole (*Reference re Senate Reform*, at para. 26). But Ms. Hak et al. are attempting to do the reverse, arguing that because the *Charter* contains protections for religion and equality, such protections must also exist within the constitutional architecture itself. In reality, the argument of Ms. Hak et al. seeks here to circumvent the internal limits of the *Charter*, particularly ss. 1 and 33, by elevating these rights to principles of the

constitutional architecture. This argument must be rejected in light of *Toronto (City)*, in which this Court expressly rejected such reasoning (paras. 60-61).

[135] Given that the text of the pre-Confederation statutes and the text of the *Charter* do not assist Ms. Hak et al. in establishing that Bill 21 fundamentally alters the architecture of the Constitution, they are left with only the unwritten principles of democracy and protection of minorities. As we explained in *Toronto (City)*, these principles have an interpretive and supplemental function, but they are not an independent basis for invalidating legislation (paras. 5 and 57; see also M. Rowe and M. Oza, "Structural Analysis and the Canadian Constitution" (2023), 101 *Can. Bar Rev.* 205, at pp. 217-20). Invoking the constitutional architecture does not transform the nature of these principles: they remain interpretive. As the Court noted in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, "in a constitutional democracy such as ours, 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 the absence of any connection to the text of the Constitution — a connection that Ms. Hak et al. have failed to establish — these principles cannot be used to invalidate Bill 21.

[136] In conclusion, as the Court of Appeal held, the argument of Ms. Hak et al. that Bill 21 is inconsistent with the constitutional architecture must be rejected. Ms. Hak et al. have not shown that equal access to public institutions is part of the "minimal requirements . . . necessary for our constitutional order to be maintained" (A.F., at

para. 49). There is no doubt that the Constitution accords importance to freedom of religion and the guarantee of equality by enshrining them as rights in the *Charter*. However, the mere fact that a principle enjoys constitutional protection in the *Charter* does not mean that it is necessarily a component of the constitutional architecture or that it entitles a party to challenge a law on this basis.

[137] I will now consider the arguments relating to the *Charter*.

D. *Methodology for Charter Interpretation*

[138] It is well established that "[t]he rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner" (*Reference re Senate Reform*, at para. 25; see also *References re Greenhouse Gas Pollution Pricing Act*, at para. 245, per Côté J., dissenting, but not on this point). For more than four decades now, this Court has consistently applied the general methodology for interpreting *Charter* rights and freedoms established in *Big M Drug Mart*, as it did again recently with mobility rights in *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, and with language rights in *Société de l'Acadie du Nouveau-Brunswick v. Canada (Prime Minister)*, 2026 SCC 22. This methodology calls for a broad, liberal and purposive interpretation of the *Charter*'s provisions based on their purpose, which is determined "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*" (*Société de l'Acadie*, at para. 45, quoting *Big M Drug Mart*, at p. 344). The *Charter*'s rights-conferring provisions are intended to "protect broad personal interests against state intervention" (*Taylor*, at para. 93; see also *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 14). It follows that the interpretive exercise essentially involves determining what interests and values are protected by the provision in question and why they are protected, having regard, in particular, to the overall purposes of the *Charter* as well as the text and history of that provision (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119; *Taylor*, at paras. 73 and 85).

[139] A purposive interpretation of the rights protected by the *Charter* "must begin with, and be rooted in, the text", taking its historical, philosophical and linguistic context into account (*Toronto (City)*, at para. 14, citing *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 8-10; see also *Taylor*, at para. 84; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 54). While other considerations may be relevant, giving primacy to the text "prevents . . . overshooting" the purpose of the right (*9147-0732 Québec inc.*, at para. 10), in keeping with the teachings of *Big M Drug Mart* (p. 344). However, as this Court noted in *9147-0732 Québec inc.*, this does not mean that there should be a "textualis[t]" analysis of the Constitution (para. 12). International legal instruments, though they cannot in themselves determine the scope of *Charter* rights, are also relevant insofar as they serve to support or confirm the interpretation arrived at through the purposive approach established in *Big M Drug Mart* (*R. v. Bissonnette*, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 98; *9147-0732 Québec inc.*, at para. 28).

[140] Particular attention must be focused on the provision's role in the *Charter* as a whole and on the coherent operation of the *Charter*. As this Court pointed out in *Taylor*, the *Charter* is a system made up of several components, each of which contributes to the internal coherence of the document (para. 81, quoting *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365, and *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 80). This guidance is especially important in the context of provisions that necessarily interact with other provisions.

[141] In my view, this general methodology, though formulated in the specific context of interpreting rights-conferring provisions, can be applied to all of the *Charter*'s provisions, with the necessary adaptations. Of course, only those that guarantee a right are meant to "protect interests". Nevertheless, careful analysis of the text of a constitutional provision, having regard to its historical and philosophical origins and its function in the general scheme of our constitutional legislation, remains an appropriate approach for identifying its purpose (see, e.g., *Alford*, at paras. 47-49; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 16-17). Depending on the provision to be interpreted, it may sometimes be necessary to focus on certain aspects of this approach, but the interpretive methodology must remain decidedly purposive, regardless of the role that the provision plays within the *Charter* as a coherent whole. I will come back to these considerations as they apply to the various *Charter* provisions that this Court must consider in these appeals.

E. *Section 28 of the Charter Does Not Confer a Right That a Law Could Infringe*

[142] These appeals invite us to clarify the nature and scope of s. 28 of the *Charter*. This provision reads as follows:

> **28** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[143] The Court has addressed the scope of s. 28 of the *Charter* only rarely. Often touched on in passing, this provision has not yet been considered at length to clarify its effects and scope. It is nevertheless worth canvassing the s. 28 jurisprudence of this Court and of lower courts to draw some relevant guidance therefrom.

[144] This Court has historically given s. 28 a limited substantive scope. In *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, the Native Women's Association of Canada alleged, *inter alia*, a violation of ss. 2 and 28 of the *Charter*. The Court held that there was no violation of s. 2. In so doing, the Court implicitly recognized that a violation of s. 28 could not be found absent an infringement of a related right or freedom. The Court did, however, recognize s. 28 as having a certain substantive scope in *R. v. Hess*, [1990] 2 S.C.R. 906, affirming that the state could not rely on an accused's sex to justify an infringement of their *Charter* rights or to grant them less constitutional protection. The Court nonetheless acknowledged in that case that s. 28 does not prevent Parliament from creating an offence that, as a matter of biological fact, can only be committed by one sex (pp. 932-33). Further, in *R. v. Kapp*,

2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 94-97 (per Bastarache J., concurring), and *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at paras. 110 and 173, this Court considered the interaction between ss. 25 and 28 of the *Charter*, noting that the protection accorded to collective Indigenous rights by s. 25 is not absolute and remains limited by the equality guarantee in s. 28.

[145] Other decisions of this Court have instead used s. 28 as an "interpretive prism" (see B. Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation" (2005), 17 *C.J.W.L.* 45, at p. 52; W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I — The Interpretive Prism of Section 25" (1988), 22 *U.B.C. L. Rev.* 21, at p. 28). For instance, in *R. v. Keegstra*, [1990] 3 S.C.R. 697, the Court relied partly on this provision to point out that the *Charter* recognizes that harmful treatment of a group may undermine the dignity and right to equality of its individual members (p. 757). Section 28 has also served to inform the interpretation of the scope and limits of other *Charter* guarantees, including those found in ss. 7 and 11(d) (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 112-15, per L'Heureux-Dubé J., concurring; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 698-99, per L'Heureux-Dubé J., dissenting in part; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 669).

[146] Lower court decisions have focused mainly on the fact that s. 28 cannot be used to invalidate legislation if it is not connected to some right or freedom guaranteed by the *Charter*, as well as on the essentially interpretive value of this provision

(*Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at para. 117, aff'd 2008 BCCA 92, 76 B.C.L.R. (4th) 48; *McIvor v. Canada (Indian and Northern Affairs, Registrar)*, 2009 BCCA 153, 306 D.L.R. (4th) 193, at para. 64; *R. v. Lucas* (1986), 14 O.A.C. 124, at para. 24; *Boudreau v. Family Benefits Appeal Board (N.S.)* (1984), 66 N.S.R. (2d) 271 (S.C. (App. Div.)), at paras. 11-12).

[147] The jurisprudence therefore offers little guidance on how s. 28 should be applied in these appeals, and still less on its interaction with the override power provided for in s. 33 of the *Charter*.

[148] The EMSB et al. submit that s. 28 confers a substantive right to sex equality that is infringed by Bill 21 because of its disproportionate effects on Muslim women whose sincere beliefs require them to wear a religious symbol. They also argue that s. 28 creates a substantive condition governing the application of s. 33, in that it prevents this provision from being used in a manner that undermines sex equality. In contrast, the AGQ asserts that s. 28 is merely interpretive in scope. According to the AGQ, this provision must be connected to another right or freedom guaranteed by the *Charter* and is of no assistance when the other right or freedom is the subject of a s. 33 declaration.

[149] As I will explain, s. 28 does not confer a stand-alone right to equality. This provision shapes the interpretation of the *Charter*'s other provisions by guaranteeing equal enjoyment of these rights to women and men. It also structures the interpretation of the *Charter* by qualifying the effects of ss. 25 and 27 and informing the interpretation and application of s. 1. Lastly, as I will clarify, s. 28 does not limit the effects of s. 33

when the latter is invoked. To conclude otherwise is a perilous, artificial and unjustified academic exercise that departs from the precedents established by this Court and other Canadian courts.

(1) Text

[150] As with any provision of the *Charter*, the analysis begins from the actual text of s. 28, which is of primordial significance in identifying its purpose, scope and limits (*Toronto (City)*, at para. 65; *9147-0732 Québec inc.*, at para. 11).

[151] Section 28 provides as follows: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." This section has two distinct segments. The first, consisting of the words "[n]otwithstanding anything in this Charter", situates the statement that follows and affirms its paramount nature. The second sets out the rule that male and female persons[2] must have equal enjoyment of the rights and freedoms guaranteed by the *Charter*.

[152] The text of s. 28 indicates that this provision does not establish a general and independent norm of equality before the law for women and men, in the way that s. 15 of the *Charter* does. Rather, it guarantees that *Charter* rights and freedoms are

[2] Some parties argued before this Court that the reference to the equality of "male and female" persons in s. 28 should be interpreted broadly and purposively, taking gender diversity into consideration. Such an interpretation would lead us to recognize that the protection granted does not apply only to women and men. Because this question does not arise in this case, I will refrain from analyzing the arguments presented in this regard. However, nothing in what I say should be construed as indicating that the scope of s. 28 is limited to the male and female genders.

granted equally to male and female persons. Section 28 must therefore be interpreted in relation to the rights and freedoms guaranteed by the *Charter*; it cannot be invoked independently to ground a claim where a law or state action appears to be discriminatory against women or men. This "relational" provision prohibits any discrimination in the enjoyment of the rights and freedoms conferred by the *Charter*. Section 28 is therefore infringed where it is found that rights or freedoms guaranteed by the *Charter* are not recognized or applied in the same manner for women and for men. The word "equally" must be given, in this context, the same meaning as in the *Charter*'s other equality guarantees, that is, it must refer to substantive equality (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 22; see also *Native Women's Assn. of Canada*, at pp. 655-56). With regard to the second segment of the section, some parties argued before the Court that the use of the word "guaranteed" indicates that s. 28 has a substantive effect. However, as mentioned above, I am rather of the view that the word "guaranteed" connects s. 28 to the *Charter*'s other provisions and indicates that it cannot be invoked independently.

[153] This relational structure of s. 28 is neither unique to the *Charter* nor unknown to international instruments that protect fundamental rights and freedoms. As this Court explained in *9147-0732 Québec inc.*, "the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history" (para. 20; see also *Bissonnette*, at para. 108). International legal instruments can support and confirm the purposive *Charter* interpretation arrived at through the methodology established in *Big M Drug Mart*, but not displace it (*9147-0732 Québec inc.*, at paras. 28 and 37). The

persuasive value of these instruments depends on the "nature of the source and its relationship to our Constitution" (para. 23; see also M. Rowe and J. Mayrand-Thibert, "Keynote Speech: The *Charter* in the International Context" (2026), 20 *J.P.P.L.* 263, at p. 273). Instruments that are binding on Canada — in other words, those that Canada has ratified — trigger a presumption of conformity, although they cannot prevail over the result of a purposive interpretation of the text of the *Charter* (*9147-0732 Québec inc.*, at paras. 31-34). Instruments to which Canada is not a party can also have persuasive value, though they have less weight than binding instruments (para. 38).

[154] The core international instruments draw a distinction between, on the one hand, general stand-alone guarantees of equality before the law and, on the other, relational provisions that ensure equality in the enjoyment of specifically recognized rights. For example, the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, contains both a stand-alone guarantee of equality before the law (Article 26) and separate relational provisions imposing equality between women and men in the enjoyment of the rights guaranteed by the Covenant (Article 3), as well as a prohibition against any discrimination in the exercise of the override power (Article 4). Analogous relational provisions appear in the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, Articles 2(2) and 3 of which ensure the equal exercise of the rights enshrined in the Covenant, without constituting stand-alone equality guarantees. This distinction confirms that the coexistence of a relational equality guarantee and a general equality guarantee within a single legal instrument is neither redundant nor exceptional.

[155] The parties and certain authors have also referred to Article 14 of the *European Convention on Human Rights*, 213 U.N.T.S. 221 ("ECHR"), as a point of comparison with s. 28 of the *Charter* (A.F., EMSB et al., at para. 57; I.F., Migrant Justice Clinic, at paras. 12-16; I.F., National Association of Women and the Law, at para. 8; J. Hartery, "Equality and the Notwithstanding Clause: Considering the Nature and Application of Section 28 of the Canadian Charter" (2023), 64 *C. de D.* 683, at pp. 701-2; K. A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, Ph.D. thesis, Queen's University (2015), at pp. 416-18). Article 14 prohibits discrimination in the enjoyment of the rights and freedoms guaranteed by the ECHR. This provision, like s. 28 of the *Charter*, is relational in nature, since it cannot be invoked independently of another protected right. However, European jurisprudence also recognizes it as having relative autonomy: a violation of the substantive right invoked need not be established in order for a violation of Article 14 to be found. It is sufficient that the disputed measure is "linked" to the exercise of the guaranteed substantive right, that "the facts at issue . . . fall within the ambit" of that right or that "the facts in issue [do not] fall completely outside the ambit" of the provision protecting that right, combined with Article 14 (*Schmidt and Dahlström v. Sweden*, No. 5589/72, at § 39, February 6, 1976 (HUDOC); *Abdulaziz, Cabales and Balkandali v. United Kingdom*, No. 9214/80, at § 71, May 28, 1985 (HUDOC); *Van der Mussele v. Belgium*, No. 8919/80, at § 43, November 23, 1983 (HUDOC)). While this provision and s. 28 of the *Charter* are both relational in nature, it is important to highlight their differences. The relative autonomy that the European Court of Human Rights recognizes Article 14 as having can largely be explained by the fact that, until

more recently, there was no general guarantee of equality before the law in the conventional order (see Article 1 of *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Europ. T.S. No. 177). This interpretive dynamic differs fundamentally from that of the *Charter*, which contains a stand-alone equality guarantee in s. 15. Consequently, the scope afforded to Article 14 of the ECHR cannot be transposed to s. 28 of the *Charter* without ignoring the *Charter*'s own architecture and the distinct role played therein by ss. 15 and 28.

[156] Section 28 is under the heading "General" in the *Charter* ("*Dispositions générales*" in its French version), which groups ss. 25 to 31. This placement provides further indications of its purpose and scope. Like the other provisions in this division, s. 28 is general in scope, in that it affects all of the rights and freedoms guaranteed by the *Charter* (Hartery, at p. 696). These general sections are not rights-conferring in themselves and cannot be infringed on their own (G. J. Kennedy, "They're All Interpretative: Towards a Consistent Approach to ss 25-31 of the *Charter*" (2023), 56 *U.B.C. L. Rev.* 743, at pp. 774-76). However, they form a set of provisions that allow for coherent *Charter* interpretation and that may have substantive legal effects on the interpretation and application of the *Charter*'s other provisions.

[157] The text therefore provides certain indications of the purpose and scope of s. 28. Consideration of the context in which this provision was enacted will help clarify its purpose and limits.

(2) Historical Context of Section 28

[158] It is well established that the interpretation of a constitutional provision "must be anchored in the historical context of the provision" (*Blais*, at para. 40). In *Taylor*, this Court noted that the historical origins of a provision are an interpretive source of purpose, because they shed light on the interests and values that it is meant to protect (para. 80). As this Court recognized in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, "the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*" (p. 508). Caution should therefore be exercised when interpreting the meaning of the *Charter*'s provisions in light of the intention of those who participated in its development. Adhering too strictly to the framers' original intention risks undermining the well-settled principle that our Constitution, including the *Charter*, is a "living tree" capable of development and adjustment over time (p. 509).

[159] That being said, the history of s. 28 is a particularly relevant interpretive source in this case. As I will explain, s. 28 is a result of the mobilization of feminist organizations that carried on a targeted and persistent campaign to have it included in the *Charter*. The perspectives of those organizations are, of course, not determinative of the purpose and effect of s. 28, but like many other fruitful sources to which the courts have access in interpreting constitutional provisions, the intention of the persons who advocated for s. 28's inclusion in the *Charter* is relevant in understanding the concerns that motivated its adoption. History is therefore helpful in determining how this provision should be interpreted.

[160] The need to include a provision in the *Charter* specifically to protect women's rights originated in what some considered to be a "dismal . . . record" of protection for these rights under the *Canadian Bill of Rights* (C.A. reasons, at para. 430, quoting W. F. Pentney, "Interpreting the Charter: General Principles", in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 21, at p. 48; see also G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (1989), at p. 37). The restrictive attitude that had characterized the interpretation of s. 1(b) of the *Bill*, which guaranteed "the right of the individual to equality before the law and the protection of the law", can be seen from cases such as *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

[161] *Lavell* concerned the validity of a provision of the *Indian Act*, R.S.C. 1970, c. I-6, that deprived a woman of her Indian status if she married a man who did not have that status, while preserving the Indian status of a man who married a woman who did not have that status. This Court stated that s. 1(b) of the *Bill* protected only equality in the administration or application of the law, finding that the impugned provision did not infringe s. 1(b) because it applied in an identical manner to all women with Indian status (pp. 1366-67 and 1372). The Court adopted similar reasoning in *Bliss*, which concerned the validity of a statute that limited the accessibility of unemployment insurance for pregnant women. It held that the statute did not discriminate on the basis of sex, given that any inequality in this area "[was] not created by legislation but by nature" (p. 190). The reasoning adopted in those cases reflects the narrow and

formalistic approach that characterized the jurisprudence on equality under the *Canadian Bill of Rights* (see *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, at para. 35; M. Eberts, "Notwithstanding v. Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rights and Freedoms", in P. L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (2024), 338, at p. 345; Froc, at pp. 121 and 137; A. M. Dodek, ed., *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (2018), at p. 236).

[162] It was in this context that the inclusion of s. 28 in the *Charter* was first proposed. In 1980, the Canadian government established the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada ("Committee"), which was in charge of the patriation of the Constitution. The Committee presented the Canadian public with a draft charter of rights and freedoms for the first time (P. W. Hogg and A. Wang, "The Special Joint Committee on the Constitution of Canada, 1980-81" (2017), 81 *S.C.L.R.* (2d) 3, at p. 4). For several months, the Committee considered submissions from hundreds of people and organizations, each expressing their perspective on various aspects of an instrument for the protection of rights and freedoms (see K. J. de Jong, "Sexual Equality: Interpreting Section 28", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), 493, at p. 500; Hogg and Wang, at pp. 7-8).

[163] Numerous feminist organizations, including the National Association of Women and the Law ("NAWL"), the Canadian Advisory Council on the Status of Women and the National Action Committee on the Status of Women, participated in the Committee's work (Eberts, at p. 346). Among other submissions, these organizations raised concerns about s. 15 of the proposed *Charter* — which contained a general equality guarantee — on the basis that it was not sufficiently strong to displace the narrow approach that had characterized the interpretation of s. 1(b) of the *Canadian Bill of Rights* (Froc, at pp. 137-38; Baines, at p. 49). Certain organizations "did not believe that section 15 offered sex as much protection as it provided for claims based on race, national or ethnic origin, colour, and perhaps religion", given the fact that "sex" did not appear until after those other grounds of discrimination in the text of s. 15 (Baines, at p. 49). They were also aware of the efforts made by women activists in the United States to have the *Equal Rights Amendment* ratified and of their ultimate failure to do so. Canadian feminist organizations wanted to avoid a similar outcome in Canada (Froc, at pp. 170-71). In short, many of the submissions sought to "challenge the prevailing hierarchy that treated sex discrimination as less heinous than some other forms of discrimination" (Baines, at pp. 51-52).

[164] For these reasons, the NAWL campaigned to have a purpose statement added to the *Charter* to ensure equality for women and men in the recognition and exercise of *Charter* rights and freedoms (Eberts, at pp. 346-47; Froc, at p. 139). This association's view was that such a provision "would . . . provide an overriding statement of principle to be used in [the] interpretation" of the *Charter* (*Women's*

Human Right to Equality: A Promise Unfulfilled (1980), at p. 7; see also Eberts, at p. 347, quoting Froc, at pp. 139-41). According to Mary Eberts, this provision "was meant to make the equality of men and women a guiding principle of the Charter" (p. 347). The central objective was not to create a higher guarantee based on sex, but to prevent the continued marginalization of discrimination based on sex.

[165] At the time of those consultations, the Canadian government tabled a new draft of the *Charter*. While it contained a number of amendments, including broadening the wording of s. 15 to strengthen protection for the right to equality, it did not adopt the proposal to include a general purpose statement on equality between women and men (see de Jong, at p. 504; Eberts, at p. 347; Froc, at pp. 141-42).

[166] This new draft of the *Charter* also contained a novel provision (now s. 27) requiring that the protected rights and freedoms be interpreted so as to enhance Canada's multicultural heritage. The addition of s. 27 raised some concerns among feminist organizations, which feared that the provision would introduce practices "inimical to the safety and equality of women" into *Charter* interpretation (Eberts, at pp. 347-48; see also Froc, at p. 148; de Jong, at p. 520). After the new draft was tabled, feminist organizations joined forces to continue advocating for the addition of a purpose statement on sex equality, relying on the language of the provision initially proposed by the NAWL (Froc, at pp. 190-91 and 203; Eberts, at p. 348). In particular, several of them pushed for the use of the expression "notwithstanding anything" at the start of the provision (Froc, at pp. 203-4; Eberts, at p. 348). As Professor Kerri Froc

notes, this language was meant to address "the need to overcome the wording of section 27, which . . . created a potential conflict with section 15, thereby necessitating a separate equality guarantee to better protect all women's rights and freedoms" (p. 204).

[167] Feminist organizations also pushed for the use of the expression "male and female persons" in s. 28 (Froc, at pp. 203-4). They had raised similar arguments before the Committee, urging the need to use the word "person" uniformly throughout the *Charter* to ensure that inconsistencies in the language employed to refer to rights holders would not be exploited to the detriment of women (p. 138). As Professor Katherine de Jong notes, the use of this word in the text of s. 28 echoed *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 — the decision of the Judicial Committee of the Privy Council recognizing that the word "Persons" in s. 24 of the *Constitution Act, 1867* includes women (see de Jong, at p. 515).

[168] Thanks to those mobilization efforts, the New Democratic Party tabled a motion in April 1981 to include s. 28 in the proposed *Charter*. The motion passed unanimously in the House of Commons. A first version of s. 28 was therefore added to the next draft of the *Charter*:

> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
>
> (House of Commons, *Votes and Proceedings*, No. 187, 1st Sess., 32nd Parl., April 23, 1981, at p. 1775)

The Minister of Justice at the time was aware that this version of s. 28 reflected the desire of feminist organizations "to have absolute equality of the sexes enshrined" and thus ensured "equal status to women" (*House of Commons Debates*, vol. IX, 1st Sess., 32nd Parl., April 22, 1981, at p. 9399).

[169] These steps toward the inclusion of s. 28 were, however, interrupted later the same year. In September 1981, this Court rendered its decision in *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, finding that it would be contrary to constitutional conventions for the federal Parliament to unilaterally amend the Constitution without the consent of the provinces. In light of that decision, the federal government refocused its efforts on securing a sufficient provincial consensus for the enactment of a charter of rights and freedoms. It was in this context of negotiating and seeking a compromise that s. 33 was introduced into the *Charter* in November 1981.

[170] The addition of s. 33 initially created uncertainty about the impact it would have on s. 28, but this uncertainty was cleared up when the Prime Minister confirmed that s. 28 would be subject to it, and this confirmation was borne out in the next draft of the *Charter* (Dodek, at p. 77; Eberts, at p. 349):

> **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. [Emphasis added.]
>
> (House of Commons, *Votes and Proceedings*, No. 260, 1st Sess., 32nd Parl., November 20, 1981, at pp. 4014-15)

[171] This addition provoked strong reactions from feminist organizations, which "leaped back into action and engaged in intense lobbying" to exclude s. 28 from the application of s. 33 (Dodek, at p. 77; see also de Jong, at p. 510; Eberts, at p. 349). Their efforts were supported by several members of Parliament. The leader of the New Democratic Party stated in particular that it was necessary to "restore the original positive wording of Section 28 which ensures the paramountcy of the principle that men and women are equal" (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 20, 1981, at p. 13056). Similarly, the leader of the official opposition stated: "We intend that the rights and freedoms set forth in all the provisions of the resolution will be guaranteed equally to male and female persons" (p. 13047).

[172] On November 24, 1981, the leader of the opposition proposed an amendment to exclude s. 28 from the scope of s. 33 (House of Commons, *Votes and Proceedings*, No. 262, 1st Sess., 32nd Parl., at p. 4128). His motion passed unanimously and, following a last-minute campaign all across Canada by feminist organizations, the amendment received the support of the provincial premiers (see Froc, at pp. 215-17; C. Salvino, *The Notwithstanding Clause in the Canadian Charter of*

Rights and Freedoms (2025), at pp. 53-54). As a result, s. 28, like s. 33, was included in the *Charter* in its current form.

(3) Purpose and Effect of the Provision

[173] The text and the historical context allow us to identify the main remedial purpose of s. 28, which is to ensure equality for women and men in the enjoyment of the rights and freedoms protected by the *Charter* (see Eberts, at p. 350; D. Proulx, "L'objet des droits constitutionnels à l'égalité" (1988), 29 *C. de D.* 567, at p. 592).

[174] To this end, s. 28 shapes and structures the interpretation and application of the *Charter*'s other provisions. It does so primarily by guaranteeing equal enjoyment of the rights it confers on women and men. It also ensures that ss. 25 and 27 are applied in a manner consistent with the principle of sex equality, and it clarifies the nature of the limits that may be justified in a free and democratic society.

[175] The text and context of s. 28 inform the description of these effects. Section 28 arose out of the shared desire of a number of feminist organizations at the time to break with the narrow and formalistic approach that had characterized the jurisprudence on equality under the *Canadian Bill of Rights* (Baines, at pp. 51-52). The framers shared these concerns about the importance of women's equal enjoyment of the rights and freedoms conferred by the *Charter*, as the parliamentary debates quoted above amply demonstrate.

[176] This context also supports interpreting s. 28 as not constituting a second stand-alone guarantee of equality that is based solely on sex and is excluded, in this dimension alone, from the application of s. 33. There is no indication that the feminist organizations that campaigned for the enactment of s. 28 and participated in its drafting, or some other framer who championed their cause, sought to give discrimination based on sex a constitutional status higher than that of discrimination based on the other grounds referred to in s. 15. On the contrary, their objective was to *correct* an existing hierarchy, which relegated discrimination based on sex to a lower level, by ensuring that this form of discrimination was accorded the same weight and the same importance as discrimination based on other grounds. This remedial purpose of s. 28 is therefore part of the history of its drafting and its adoption in the *Charter*. This point clearly illustrates the weaknesses of the appellants' position on the substantive nature of s. 28.

[177] Feminist organizations themselves also assigned s. 28 an interpretive and structuring function at the time the *Charter* was enacted, as can be seen from the written and oral submissions made by a number of feminist organizations. These organizations described s. 28 as a purpose statement that was necessary for the *interpretation* of the *Charter*'s other provisions (Eberts, at p. 347; Froc, at p. 140).

[178] The historical context also shows that s. 28 guides the interpretation to be given to the *Charter*'s general provisions. As noted above, feminist organizations pushed for the addition of the expression "notwithstanding anything" partly to counter certain potential effects of s. 27 of the *Charter*, insofar as that section might give rise

to an interpretation of the *Charter* that could jeopardize women's equality. The objective of s. 28 was therefore to ensure that consideration of multiculturalism in the interpretation of the *Charter* could not lead to a result that would undermine sex equality. Similarly, the objective of s. 28 was also to ensure that the protection granted by s. 25 to Indigenous difference could not be viewed as authorizing the perpetuation of discriminatory treatment based on sex (see *Dickson*, at para. 110). Feminist organizations were also concerned about the scope of the limitation clause now set out in s. 1, emphasizing the risk that it could be used to disregard women's rights. In particular, given the fact that s. 1 allows rights to be limited where their exercise would prevent important societal goals from being achieved, these organizations doubted that "the interests of the collectivity would consistently align with recognizing the rights of women" (Froc, at p. 463).

(4) Interaction Between Section 28 and the *Charter*'s Other Provisions

[179] The legal effects arising from the interaction between s. 28 and the *Charter*'s other provisions should now be considered.

[180] Because of its remedial purpose of ensuring sex equality in the interpretation and application of *Charter* guarantees, the effects of s. 28 are relatively straightforward. Considered in isolation, s. 28 has no independent legal effects. While it contributes to the *Charter* value of sex equality, it produces no legal effects except when combined with other provisions. It is therefore in the interaction between s. 28 and the *Charter*'s other provisions that its effects can be discerned.

(a) *Section 28 and Sections 2 to 23*

[181] The most obvious effect of s. 28 can be seen in its interaction with the provisions that confer rights and freedoms, ss. 2 to 23 of the *Charter*. Section 28 guarantees that the scope of these rights and freedoms is the same for male and female persons. As the Court of Appeal noted, the effect of this provision is that each *Charter* guarantee must be read as if [TRANSLATION] "a reference to this guarantee of equality were appended" to it (para. 450). Section 28 does not alter the substantive scope of these rights and freedoms. It ensures, for example, that women and men have equal enjoyment of the freedoms of religion and expression guaranteed in s. 2, but without influencing the content of these freedoms. I will come back to this interaction in my analysis of the arguments on s. 3 of the *Charter*.

(b) *Section 28 and Section 15*

[182] In the case of s. 15 of the *Charter*, the effects of s. 28 are limited to precluding any interpretation of the equality guarantee that would subordinate sex to the other grounds of discrimination. As explained above, s. 28 provides insurance against the type of narrow interpretation of the right to equality based on sex that previously characterized the interpretation of s. 1(b) of the *Canadian Bill of Rights*. However, s. 28 has no effect on the internal limits of s. 15. For example, it cannot be invoked by men to challenge the validity of an affirmative action measure in keeping with s. 15(2). Section 28 does not redefine the s. 15 framework: it changes neither its structure nor its parameters. Rather, its role is interpretive and confirmatory in nature.

Far from transforming the substantive equality perspective that underlies s. 15, it ensures its coherence and strengthens its application by guaranteeing that sex equality is neither relativized nor marginalized in the analysis.

(c) *Section 28 and Sections 25 and 27*

[183] With regard to the interaction of s. 28 with the *Charter*'s other structural and interpretive provisions, its effects are less obvious. As I have indicated, s. 28 limits the scope of ss. 25 and 27 by ensuring that the norm of sex equality prevails over the interests protected by these provisions. Consideration of multiculturalism in the interpretation of the *Charter* therefore cannot lead to a result that would undermine sex equality. Similarly, to the extent that s. 25 protects Indigenous difference from the effects of the *Charter*, it cannot do so in a manner that perpetuates discriminatory treatment based on sex (*Dickson*, at para. 110).

(d) *Section 28 and Section 1*

[184] Certain authors and interveners have argued that s. 28 makes the norm of sex equality an absolute one that cannot be subject to s. 1 (I.F., NAWL, at para. 20; I.F., Canadian Human Rights Commission, at para. 29; I.F., Constitutional Rights Centre Inc., at para. 3; I.F., Muslim Advisory Council of Canada, at para. 11; Froc, at p. 464; G.-A. Beaudoin, in collaboration with P. Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, droits et libertés* (3rd ed. 2004), at p. 1347; de Jong,

at p. 525; A. Tremblay, “Le principe d’égalité et les clauses anti-discriminatoires” (1984), 18 *R.J.T.* 329, at p. 341).

[185] That proposition cannot be accepted. Section 28 is not, in itself, subject to the limits provided for in s. 1 of the *Charter*, because it is not a rights-conferring provision. Rather, it attaches to the rights and freedoms guaranteed by the *Charter*, which can still be limited under s. 1. In other words, s. 28 guarantees sex equality in the enjoyment of rights and freedoms to the extent — and only to the extent — that these rights and freedoms are themselves guaranteed by the *Charter*. These guarantees are never absolute; they can always be justifiably limited under s. 1. This non-absolute nature is an integral part of the scope of the protected rights, in the same way as s. 28 (see *Re Blainey and Ontario Hockey Association* (1985), 52 O.R. (2d) 225 (H.C.J.), at pp. 236-37, rev’d on other grounds (1986), 54 O.R. (2d) 513 (C.A.)). I therefore reject the idea that s. 28 would bar any s. 1 justification when a limitation on a right or freedom has the effect of creating a discriminatory distinction based on sex.

[186] However, there is no doubt that s. 28 is relevant at the s. 1 analysis stage, insofar as it speaks to what may be justified in a free and democratic society (see *Hess*, at pp. 932-33). The enshrinement of sex equality as a central *Charter* value will be particularly relevant at the final balancing stage of the *Oakes* proportionality analysis, where the legislative effects on sex equality — whether they are salutary or deleterious — will be given considerable weight in light of s. 28. In the same way that infringements of ss. 7 and 15 are generally more difficult to justify given their internal

limits, it is difficult to imagine that a limitation on a *Charter* right that creates a discriminatory distinction based on sex could be justified under s. 1. However, such a possibility cannot be ruled out.

(e) *Section 28 and Section 33*

[187] The EMSB et al. and certain interveners have also argued that s. 28 imposes a substantive condition for invoking s. 33, a condition that precludes a legislative body from having recourse to this provision where the effect of doing so would be to create a distinction based on sex in the enjoyment of one of the rights or freedoms to which s. 33 applies. In particular, the EMSB et al. rely on the fact that s. 28 was initially made subject to and then excluded from the application of s. 33.

[188] I do not accept that argument. Section 28 does not change the manner in which s. 33 applies to ss. 2 and 7 to 15 of the *Charter*. Section 28 guarantees sex equality in the enjoyment of rights and freedoms to the extent — and only to the extent — that these rights and freedoms are themselves guaranteed by the *Charter*. Like s. 1, s. 33 is an inherent and inseparable component of the *Charter* and of the constitutional compromise it embodies. Section 33 allows Parliament or a provincial legislature to override ss. 2 and 7 to 15 when the conditions for invoking it are met. Section 28 does not shield ss. 2 and 7 to 15 from the application of s. 33, and it does not prevent lawmakers from having recourse to s. 33 where doing so would create a discriminatory distinction based on sex. In short, s. 28 does not alter the structure of the *Charter*, under which no rights are absolute and certain rights can be overridden.

[189] Given that s. 28 is not listed in s. 33(1), it cannot be the subject of an override declaration under s. 33. The operation of s. 28 thus prevents any indirect override of the rights and freedoms not enumerated in s. 33(1), that is, those protected by ss. 3 to 6 and 16 to 23 of the *Charter*. For example, s. 33 could not be invoked to deprive women of their right to vote under s. 3. The concern that s. 33 might be used to indirectly override rights to which it does not expressly apply was part of the reason why s. 28 was ultimately excluded from the application of s. 33 (Hartery, at pp. 705-6; Froc, at p. 223).

[190] The argument advanced by the EMSB et al. as well as several interveners is largely based on this aspect of the drafting history — an aspect that, as I have noted, may lend itself to several interpretations of s. 28's effect. In light of the broader origins of s. 28 in the *Charter* and the purpose of this provision, I conclude that the argument of the EMSB et al. and certain interveners must be rejected. The conception they propose of the interaction between ss. 28 and 33 would mean that women could invoke s. 28 to overcome the potentially harmful effects of the invocation of s. 33 on their rights and freedoms, whereas other marginalized groups would have no way of overcoming these effects. This conception would thus create a hierarchy in the enjoyment of *Charter* rights and freedoms — a hierarchy that, it must be stressed, the feminist organizations that campaigned for the enactment of s. 28 specifically sought to avoid. The creation of such a hierarchy in the enjoyment of rights would greatly overshoot s. 28's *remedial* purpose, which is to ensure that sex equality is accorded the same importance and protection as equality based on other grounds.

[191] More fundamentally, the creation of such a hierarchy in the enjoyment of rights would undermine the *Charter*'s internal coherence. This Court has repeatedly stated that there is no hierarchy of *Charter* rights and that the courts must avoid interpreting the *Charter* in a way that privileges some rights at the expense of others (*Taylor*, at para. 81; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877; see also *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, [2023] 1 S.C.R. 709, at para. 80). The interpretation advanced by the EMSB et al. and certain interveners conflicts with this guidance by privileging women's rights over the rights of other marginalized groups. Such an interpretation is also inconsistent with the overall purposes of the *Charter*, including respect for and promotion of human dignity and equality (*Taylor*, at para. 75, citing *Big M Drug Mart*, at pp. 336-37).

[192] Some of the appellants emphasize that the aim of s. 28 at the time it was enacted was to give the right to sex equality a special place in the Constitution and to affirm the guiding principle that women and men enjoy equal protection in our free and democratic society. They also submit that the drafting history of s. 28 corroborates the conclusion that this provision confers substantive rights on women. More specifically, they argue that the decision to exclude s. 28 from the application of s. 33 indicates that it was intended to be substantive in nature.

[193] I cannot agree with that conclusion. While s. 28 does indeed provide for sex equality in the interpretation of rights and freedoms, its effect cannot be to raise

women's rights to a higher level than the rights of other marginalized groups. Nothing in the text and context of the provision suggests that the framers, or feminist organizations for that matter, desired such an outcome. As I said above, s. 28 was excluded from the application of s. 33 because of the concern that s. 33 might be used to indirectly override rights to which it does not expressly apply.

[194] With regard to the argument that the words used in s. 28 do not suggest an interpretive role, as mentioned above, I cannot agree with this argument given that the text of s. 28 clearly indicates that *Charter* rights and freedoms are *guaranteed* equally to male and female persons, which shows that they must be *interpreted* and *applied* without any distinction between women and men.

[195] Finally, as the respondents point out, the interpretation proposed by the appellants would give s. 28 a function that would largely overlap that of s. 15 of the *Charter*. The latter section already enshrines the equality of individuals without any distinction based on a number of grounds, including sex. Like the Quebec Court of Appeal, I am therefore of the view that s. 28 has an interpretive and not a normative function.

(5) Conclusion

[196] Generally speaking, the effects of s. 28 are subtle. It remains, of course, in the constitutional text as a safeguard against a possible return to the interpretation that prevailed at the time of *Bliss* and *Lavell* — a tendency this Court has explicitly rejected

on several occasions since the *Charter* was enacted (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at pp. 1242-50; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 170-71, per McIntyre J., dissenting in part, but not on this point; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 87; *Kanyinda*, at para. 35). Given how Canadian courts have interpreted the *Charter*, including its s. 15 equality guarantee, s. 28 will more often have a confirmatory character than a distinct function.

[197] Ultimately, s. 28 guarantees that all of the rights and freedoms protected by the *Charter* will be interpreted and applied in accordance with the principle of sex equality, but without establishing a stand-alone equality guarantee separate from the one in s. 15.

F. *Section 33 of the Charter Precludes Judicial Review of the Constitutionality of a Law on the Basis of Sections 2 and 7 to 15 of the Charter*

[198] Although the parties opposing Bill 21 presented several arguments to challenge Bill 21's validity, the focus of the submissions made by these parties and interveners was on the validity of the use of the override clauses in s. 33 of the *Charter* and s. 52 of the *Quebec Charter*.

[199] Section 33's presence in the *Charter* and its use clearly remain controversial. The constitutional debates surrounding its enactment, the political

reaction to recent uses of it, and the court proceedings that have been brought to challenge the exercise of the override power created by it attest to this.

[200] That being said, the debate before us concerns neither the legitimacy of the existence of such a clause in the *Charter* nor the appropriateness of its invocation by the legislature. It is not for courts to judge the wisdom or relevance of the political choices underlying its existence and use. Fundamental though they may be, these questions relate either to the constitutional compromise that led to the enactment of the *Charter* or to the democratic debate that must take place within legislative assemblies and, ultimately, in front of the electorate to justify the use of the override power. This Court does not have the power to rewrite the Constitution of Canada or to enact amendments to it.

[201] Rather, this case requires us to consider the role played by the override clause in the Canadian constitutional order, to identify the scope of and conditions for the use of this mechanism and to delineate the interaction between legislative and judicial powers when the clause is invoked.

(1) The Court's Precedent in *Ford*

[202] This Court has directly considered s. 33 of the *Charter* only once, in *Ford*, where it addressed its scope and the conditions for its invocation by a legislative body. *Ford* concerned the constitutional validity of certain provisions of the *Charter of the French language*, R.S.Q., c. C-11, requiring, among other things, that all public signs

and commercial advertising be only in French in Quebec. Several parties argued that these provisions infringed the freedom of expression guaranteed by s. 2(b) of the *Charter*. However, the validity of the provisions depended on the Quebec legislature's invocation of s. 33 of the *Charter* in the *Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21, a statute that re-enacted all Quebec statutes in force before April 17, 1982 — the date the *Charter* came into force — including the *Charter of the French language*, and provided that all of them would operate notwithstanding ss. 2 and 7 to 15 of the *Charter*. The *Act respecting the Constitution Act, 1982* also specified that the provisions of the re-enacted statutes were deemed to have effect from the date they had initially taken effect.

[203] The issues before this Court concerned, among other things, the conditions that must be met by an override declaration made under s. 33 as well as the possibility of invoking this provision in an omnibus statute with retroactive effect (*Ford*, at p. 734).

[204] With regard to the requirements of form, this Court rejected the argument that a statute invoking s. 33 must either set out the wording of the *Charter* provision it is overriding or have an apparent link or relationship with the rights or freedoms it is overriding (*Ford*, at pp. 740-42). The Court found instead that a "s. 33 declaration is 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" (*ibid.*). The

declaration at issue satisfied this requirement of form because it referred expressly to ss. 2 and 7 to 15 of the *Charter* (pp. 741-42).

[205] In a passage often relied on since, the Court stated in *Ford* that s. 33 "lays down requirements of form only" (p. 740). It added that 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" (*ibid.*). In the Court's view, requiring that there be an apparent relationship between an override provision and the affected rights or freedoms would amount to subjecting the exercise of the s. 33 power to substantive judicial review, because it would then be necessary to assess whether the legislative body had a sufficient justification for using it. However, s. 33 provides no basis for such judicial review.

[206] The Court also rejected the argument that s. 33 cannot be invoked through an omnibus statute. Invoking it in this way "did not prevent the override declaration . . . from being an express declaration within the meaning of s. 33 of the . . . *Charter*" (*Ford*, at p. 743). In the Court's opinion, the assertions that an omnibus invocation of s. 33 is an "impermissibly 'routine' exercise" or a "perversion" of the override power were about the permissible legislative policy underlying the exercise of this power rather than the question of whether the declaration met the requirement of being sufficiently express (*ibid.*). Relying on the text of s. 33, the Court noted 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" (*ibid.*).

[207] Nonetheless, the Court held that a legislative body may not give retroactive effect to a declaration made under s. 33. While acknowledging that the text of this provision is ambiguous on this point, the Court relied on the interpretive principle that legislation does not operate retroactively. It therefore found that, in the absence of language expressly allowing a retroactive invocation of s. 33, the override power cannot be exercised with retroactive effect.

[208] *Ford* was thus concerned mainly with the conditions governing the invocation of the notwithstanding clause. My analysis in this case is grounded in an interpretation of s. 33 and addresses two important sub-issues raised by the parties. The first issue relates to the validity of the Quebec legislature's invocation of the notwithstanding clause in Bill 21. It requires a closer look at the conditions surrounding the invocation of this clause. The second issue relates to the courts' jurisdiction to find and declare, even where an override declaration has been made, that a legislative provision unjustifiably infringes the rights and freedoms to which the declaration applies. These two issues require, as a first step, a purposive interpretation of s. 33 of the *Charter* in order to identify its purpose and effects.

[209] In my view, and as established by *Ford*, s. 33 imposes only formal requirements on a legislative body, not substantive requirements. Furthermore, because the purpose of s. 33 is to preserve parliamentary sovereignty, a court must confine itself to verifying that these formal requirements have been met. The provision leaves the courts with no role to play in scrutinizing alleged infringements of the rights and

freedoms enumerated in an override declaration. This interpretation is consistent with the text, the context and the purpose of s. 33: preserving a degree of parliamentary sovereignty to ensure that the legislative branch — and, by extension, the electorate — has the final say on the implementation of the rights and freedoms set out in ss. 2 and 7 to 15 of the *Charter*.

[210] I am unconvinced by the arguments of the appellants who urge us to distinguish, "supplement" or revisit *Ford*. Recognizing new grounds that would now permit the courts to undertake substantive judicial review of the use of the notwithstanding clause is not simply "supplementing" or clarifying *Ford*. On the contrary, it would be tantamount to overturning the key holdings of *Ford*, which determined that the role of the courts when s. 33 has been invoked is limited to verifying that the override declaration meets the requirements of form prescribed by s. 33.

[211] To get around the binding nature of the Court's holdings in *Ford*, the appellants invite the Court to reduce *Ford* to its disposition in the strictest sense, to the specific circumstances of the case and to a formalistic reading of the arguments presented at the time. However, that narrow conception of the scope of *Ford* ignores the precedential value of the decisions rendered by this Court as a general court of appeal for Canada (see *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 53-57; *R. v. Kirkpatrick*, 2022 SCC 33, [2022] 2 S.C.R. 480, at para. 181, per Côté, Brown and Rowe JJ., concurring) and seriously undermines the principle of *stare decisis*, which helps to "uphol[d] the institutional legitimacy of courts" by assuring the "public

. . . that judges decide cases on a principled basis, rather than simply based on their own views" (*Kirkpatrick*, at para. 188, per Côté, Brown and Rowe JJ., concurring; see also *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 64; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 260-61, per Abella and Karakatsanis JJ., concurring).

[212] I do not accept the invitation to reverse *Ford*. None of the conditions that authorize the Court to reconsider one of its precedents is met (see *Kirkpatrick*, at para. 202, per Côté, Brown and Rowe JJ., concurring, cited with approval in *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98). The FAE's argument that the [TRANSLATION] "rise of populism" across the western world and the "rollback of fundamental rights" constitute a sufficient change of circumstances to justify reversing *Ford* is unpersuasive (A.F., at para. 131). It cannot justify rereading the Constitution of Canada, calling into question the foundations of Canadian constitutionalism or reversing such a fundamental precedent of this Court when the conditions that the Court has already laid down for reversing one of its precedents are not met. Similarly, the fact that the Court did not explicitly adopt a purposive approach to interpretation in making its holdings in *Ford* cannot, in itself, be a sufficient reason to overturn those holdings. Such a proposition would amount to accepting that a precedent of this Court can be reversed as long as a later panel of the Court finds that it was "wrongly decided", which would be contrary to the principle of *stare decisis* (*Kirkpatrick*, at paras. 188 and 252-53, per Côté, Brown and Rowe JJ., concurring; see also *Sullivan*, at para. 74). The courts should depart from precedents only in exceptional circumstances, for otherwise

their credibility in the eyes of the public may be affected (*Vavilov*, at paras. 18-19 and 255-62).

[213] Nevertheless, even if the Court were to reconsider the holdings of *Ford*, I would arrive at the same result. A purposive analysis of the text of s. 33 and of the historical, political and philosophical context that prompted its inclusion in the *Charter* leads me to conclude that the purpose of this provision is to preserve parliamentary sovereignty in relation to a limited number of rights and freedoms. Section 33 is not an anomaly in our constitutional framework, nor does it conflict with the overall purposes of the *Charter*. On the contrary, it is the cornerstone of the Canadian model of constitutional protection for rights and freedoms. In this sense, s. 33 is entirely consistent with the logic of the constitutional compromise that underpinned the patriation of the Constitution in 1982. The role of the courts in this context must take into account these philosophical origins and this historic compromise.

[214] My analysis will relate mainly to s. 33 of the *Charter*, since nearly all of the parties' submissions are focused on this provision. That being said, the appellants also make arguments concerning s. 52 of the *Quebec Charter*. I will deal with s. 52 later.

(2) Text

[215] As I noted above, the methodology for interpreting *Charter* provisions is well established. They must be interpreted in a decidedly purposive manner, in light of

the character and objects of the *Charter* itself, their text, the historical origins of the concept, and their interaction with the *Charter*'s other provisions (*Big M Drug Mart*, at p. 344; *Taylor*, at para. 76).

[216] The interpretation of a *Charter* provision begins with its text, which is of primordial significance in determining its purpose, scope and limits (*Toronto (City)*, at para. 65; *9147-0732 Québec inc.*, at para. 11).

[217] Section 33 provides as follows:

> **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).

[218] Section 33(1) indicates that invoking s. 33 requires an express declaration in an Act of Parliament or of a provincial legislature (see *Ford*, at pp. 741-42). In addition, *Ford* specified that an override declaration can apply to one or more of ss. 2 and 7 to 15 of the *Charter*, but only to them. These provisions encompass fundamental freedoms, legal rights and the right to equality. An override declaration therefore cannot affect the application of any other *Charter* provision, including those relating to democratic rights, mobility rights and language rights, or, more broadly, the application of other provisions of the Constitution.

[219] Subsections (3), (4) and (5) of s. 33 are also explicit. They provide that an override declaration shall cease to have effect five years after the date it comes into force or on such earlier date as may be specified by the legislative body in question, and that the declaration may be re-enacted, subject, upon its renewal, to the same five-year limit.

[220] Much of the disagreement over s. 33 among authors and courts concerns a single subsection, subs. (2), which specifies the effect of an override declaration. Section 33(2) states that a law covered by an override declaration "shall have such operation as it would have but for the provision of this Charter referred to in the declaration" (in French, "*a l'effet qu'elle aurait sauf la disposition en cause de la charte*").

[221] In *Ford*, the Court confirmed that an override declaration operates only prospectively from the date it is enacted and cannot be applied retroactively (pp. 744-45). *Ford* also established that an override declaration can apply simultaneously to several of the *Charter* provisions enumerated in s. 33(1) (pp. 739-41).

[222] The proper interpretation of the word "operation" (in French, "*effet*") in particular has been the subject of much debate. What does s. 33(2) mean by stating that the law covered by an override declaration shall have "such operation" (in French, "*l'effet*") as it would have "but for" (in French, "*sauf*") the *Charter* provision referred to in the declaration, that is, were it not for that provision?

[223] In the opinion of certain authors and interveners, including the attorneys general of Alberta and Ontario, this conditional wording has the effect of displacing or neutralizing the *Charter* provisions referred to in the override declaration, such that, for the purposes of the law covered by the declaration, these *Charter* provisions do not exist or are temporarily stripped of their supra-legislative effect (see G. Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial

Review" (2024), 61 *Osgoode Hall L.J.* 63, at pp. 80 and 82-83; S. Sérafin, K. Sun and X. Foccroulle Ménard, "Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order" (2023), 110 *S.C.L.R.* (2d) 135, at pp. 164-65; M. St-Hilaire, X. Foccroulle Ménard and A. Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-)Rejoinder", in Biro, *The Notwithstanding Clause and the Canadian Charter*, 132, at p. 138; I.F., Attorney General of Alberta, at para. 14; I.F., Attorney General of Ontario, at para. 52).

[224] Many of the appellants and interveners take the view that an override declaration maintains the operability of legislative provisions that would otherwise be inconsistent with one of the enumerated provisions of the *Charter* and thus of no force or effect under s. 52(1) of the *Constitution Act, 1982*. There is considerable support for this position in the scholarly literature, although there is no consensus on it (see G. Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021), 71 *U.T.L.J.* 510, at pp. 524-25; R. Leckey and E. Mendelsohn, "The notwithstanding clause: Legislatures, courts, and the electorate" (2022), 72 *U.T.L.J.* 189, at pp. 195-96; cf. Sigalet, at pp. 84-86; Sérafin, Sun and Foccroulle Ménard, at p. 164).

[225] Given its political importance and the absence, to this point, of a comprehensive judicial interpretation, it is perhaps not surprising that s. 33 has attracted a wide range of commentary. Proponents of the various schools of thought rely on natural law, grammatical rules, statements made at the time the *Charter* was enacted

and more recent statements by those who participated in the constitutional negotiations, various political and legal philosophies, as well as many other sources in support of their respective interpretations. While broader considerations related to the philosophical origins of the provision or the framers' original intention may shed light on the purpose and scope of constitutional text, a court must nonetheless begin the interpretive exercise by reading the text of the provision (*Taylor*, at para. 79; *9147-0732 Québec inc.*, at para. 8; *Toronto (City)*, at para. 14).

[226] The text of s. 33(2) specifies that an override declaration under s. 33(1) has the effect of maintaining the operability of the law in question, such that the law operates as it would have in the absence of the *Charter* provisions referred to in the declaration. In other words, the effect of invoking s. 33 is that the law can apply "notwithstanding" *the existence* of the *Charter* provisions enumerated in the override declaration. The use of the words "as it would have but for the provision of this Charter referred to in the declaration" strongly suggests the notion of exemption, an interpretation supported by this Court's jurisprudence: "Section 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 . . ." (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 137 (emphasis added), per Karakatsanis J.).

[227] A comparative reading of the English and French versions of s. 33 also reinforces the conclusion that a s. 33 declaration exempts a law from the application of

the provisions enumerated in the declaration. Subsections (1) and (2) of the English version provide that legislation "shall operate notwithstanding" and "shall have such operation as it would have but for" the *Charter* provisions specified in the declaration. The word "notwithstanding" can have different meanings, but the French version helps clarify its precise meaning and its scope in this case (*Taylor*, at paras. 98-100). Section 33(1) provides that legislation applies "*indépendamment d'une disposition donnée*" in ss. 2 and 7 to 15, while s. 33(2) provides that it shall have such operation as it would have "*sauf*" the *Charter* provisions identified by the declaration, that is, were it not for those provisions.

[228] The use of these two terms is revealing. The phrase "*indépendamment de*" conveys the idea of things existing separately, while "*sauf*" expresses the idea of an exception or exclusion. The language chosen therefore suggests a dissociation between the law effecting the override and the *Charter* provisions referred to in the override declaration. In other words, the law cannot be invalidated by operation of s. 52(1) of the *Constitution Act, 1982* because of an inconsistency between the law and one of the provisions listed in the declaration, since the law is "exempt[ed]" from the application of the enumerated *Charter* rights and freedoms (*G*, at para. 137). Once s. 33 has been validly invoked, the specified *Charter* provisions cease to have effect in relation to that law. As I will explain below, this interpretation accords with the "linguistic, philosophic and historical contexts" in which s. 33 was enacted (*Toronto (City)*, at para. 14; *Big M Drug Mart*, at p. 344).

[229] The text of s. 33(2), read in the context of s. 33 as a whole and the rest of the *Constitution Act, 1982*, supports the conclusion that a law containing a s. 33(1) override declaration is operative and produces its own legal effects, despite any inconsistency between the law and the *Charter* provisions referred to in the override declaration. Those *Charter* provisions do not apply to the law; this means that the law cannot be read down or declared to be of no force or effect because of this inconsistency.

[230] In conclusion, the structure and scope of s. 33 are apparent from reading its text. This provision sets out an override mechanism that allows a legislative body to override, in a limited fashion and for a maximum of five years, certain provisions of the *Charter*. It thus preserves, within the *Charter*, a narrow form of parliamentary sovereignty and temporarily shields certain laws — which the electorate must be able to identify — from the courts' power of review.

(3) Context

(a) *Historical and Philosophical Origins of Section 33*

[231] In *Taylor*, this Court explained that the historical origins of a right "provide another interpretive source of purpose" (para. 80). In addition, while the drafting history of s. 33 does not on its own determine its interpretation, it remains relevant insofar as it gives some indication of the purpose of this provision and its role in the *Charter* (para. 82). Section 33's history shows that the notwithstanding clause, far from

being an anomaly in the *Charter*, is the cornerstone of the model of human rights protection in Canada. This provision ensures balance and complementarity between the judicial and legislative branches in the definition and implementation of fundamental rights. It is the product of a constitutional compromise between the provinces (other than Quebec) and the federal government, and it was meant to be a "counterweight" to the expansion in the scope of the judicial review power that would necessarily result from the constitutional entrenchment of rights and freedoms.

[232] The notwithstanding clause has historical origins that predate the negotiations surrounding the enactment of the *Charter*. Provisions allowing fundamental rights to be overridden were already part of Canadian public law prior to the enactment of the *Charter*. A number of federal and provincial statutes protecting human rights contained an override mechanism analogous to s. 33. For example, the *Quebec Charter*, enacted in 1975, already provided in s. 52 for a power to override guaranteed rights. The human rights legislation of Saskatchewan and Alberta also set out similar mechanisms (*The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 44; *The Alberta Bill of Rights*, S.A. 1972, c. 1, s. 2; see also E. M. Adams and E. R. J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022), 26:2 *Rev. Const. Stud.* 121, at p. 128; Salvino, at p. 27). Similarly, s. 2 of the *Canadian Bill of Rights* enacted in 1960 provided that a federal law could continue to operate "notwithstanding" the *Bill* where the law contained an express declaration to this effect. The inclusion of a clause of this kind was meant to prevent a future Parliament from amending the *Bill*, given that the *Bill* was not entrenched in the

Constitution (M. Carter, "Diefenbaker's *Bill of Rights* and the 'Counter-Majoritarian Difficulty': The Notwithstanding Clause and Fundamental Justice as Touchstones for the *Charter* Debate" (2019), 82 *Sask. L. Rev.* 121, at p. 128). In this regard, the federal Minister of Justice at the time stated that the *Bill* would be strengthened by a clause requiring any law overriding the *Bill* to expressly indicate that the law would operate notwithstanding a guaranteed right or freedom:

> . . . no parliament can bind a subsequent parliament. . . . But what our bill of rights does do is to ensure that no subsequent parliament can override the bill of rights without that fact being clearly in its mind and out in the open, as it were, so that it cannot be done inadvertently or by concealment, either from parliament or the country. [Emphasis added.]
>
> (House of Commons, Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, No. 10, 3rd Sess., 24th Parl., July 27, 1960, at p. 573; see also Carter, at p. 128; Adams and Bower, at p. 130.)

Thus, the first iterations of override clauses in Canadian law implicitly recognized the importance of democratic control in the protection of rights by requiring that any override of rights be express.

[233] In 1968, a discussion paper issued by the federal Minister of Justice proposed the enactment of a constitutional charter of rights accompanied by mechanisms to limit its application. Those override mechanisms would, however, be restricted to emergencies (L. E. Weinrib, "Of diligence and dice: Reconstituting Canada's Constitution" (1992), 42 *U.T.L.J.* 207, at pp. 209-10). That proposal limiting the use of the override power to times of emergency was included in a version of the

notwithstanding clause tabled at a ministers' conference in July 1980 (Continuing Committee of Ministers on the Constitution, Discussion Draft 830-81/027, *Rights and Freedoms within the Canadian Federation* (1980), cl. 6(3)). However, that version of the clause applied only to legal rights and was removed from subsequent drafts of the *Charter*. This aspect of s. 33's history shows that, in one form or another, the provision was always part of the discussions that led to the enactment of the *Charter*.

[234] It was Professor Paul C. Weiler who, in the late 1970s, proposed adapting the concept of a notwithstanding clause — a concept already found in federal and provincial bills of rights — to the Canadian constitutional context ("Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?" (1980), 60 *Dalhousie Rev.* 205, at pp. 231-32; see also Adams and Bower, at p. 131). In his view, such a clause would serve to reconcile, on the one hand, the British constitutional tradition of parliamentary sovereignty and, on the other, the American model of judicial review for constitutionality (Weiler, at p. 232).

[235] The British model has traditionally been described as a "political constitution", that is, a system in which the principal constitutional safeguards flow from the democratic process and political accountability, not from judicial review of legislation on the basis of a written constitution (J. A. G. Griffith, "The Political Constitution" (1979), 42 *Mod. L. Rev.* 1, at p. 16). At the heart of this tradition lies the principle of parliamentary sovereignty. Under this principle, it is Parliament that gives voice to the community's conceptions of its fundamental values, its rights and its duties.

The principle of parliamentary sovereignty is an expression and embodiment of the democratic foundation of the British constitutional regime, in which laws are enacted by the people's elected representatives, to whom the executive is politically accountable. The courts, in turn, give effect to Parliament's sovereignty by ensuring that any exercise of public power is consistent with democratically enacted laws, in keeping with the corollary principle of the rule of law (see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), ch. IV).

[236] Under this model, although the courts play an important role in interpreting and applying laws, they have no power to strike down laws enacted by Parliament. British constitutionalism instead relies on confidence in the deliberative democratic process as the primary mechanism for protecting human rights and determining their scope (see *Pickin v. British Rys. Board*, [1974] A.C. 765 (H.L.), at p. 798, per Lord Simon; *R. (Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 9; *R. (Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41). The government's political accountability to Parliament, and that of members of Parliament to the electorate, is ultimately the main mechanism of constitutional scrutiny.

[237] Canada, a parliamentary democracy "with a Constitution similar in Principle to that of the United Kingdom" (*Constitution Act, 1867*, preamble), has largely inherited this constitutional tradition. While the *Constitution Act, 1867* differs from the British Constitution in the sense that it is a written constitution establishing a federal system, it nevertheless remains closely tied to the British conception of

constitutionalism. Thus, it does not contain a charter of rights allowing the courts to strike down laws held to be inconsistent with fundamental guarantees. Until 1982, constitutional scrutiny of legislation by the courts was essentially limited to ensuring compliance with the principles of federalism. Within those limits, Parliament and the provincial legislatures had, in their respective areas of jurisdiction, the same parliamentary sovereignty as the British Parliament (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 132).

[238] For its part, the American model of constitutional scrutiny of legislation by the courts assigns the courts the role of upholding a constitutionally entrenched bill of rights (Weiler, at p. 232). Under this model, judges are called upon to adjudicate disputes between citizens and the state in order to protect certain individual interests that are considered fundamental from the potential excesses of majoritarian democracy. The American constitutional tradition can properly be characterized as a system of judicial supremacy, since the constitutionality of legislation is ultimately determined by how the courts interpret the bill of rights, without any possibility for a legislative body to give precedence to its own conception of these rights where this conception differs from the judicial interpretation (see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at pp. 177-78; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at p. 638).

[239] In the Canadian context, Professor Weiler believed that a notwithstanding clause would fit midway between these traditions, enabling Canadian courts to "boldly

articulate and protect entrenched rights" while giving Parliament and the legislatures "the final say" thanks to their power to override — explicitly and publicly — constitutional rights and freedoms (Adams and Bower, at p. 131; Weiler, at pp. 233-34). In fact, the origins of the notwithstanding clause reveal a desire to synthesize these two constitutional models to create, in a "typical[ly] Canadian" spirit of conciliation, a unique model of constitutionalism (Weiler, at p. 232).

[240] Professor Weiler's proposal proved attractive to a number of participants in the constitutional negotiations who were otherwise opposed to the adoption of a charter of rights and freedoms in Canada. The statements made by several provincial premiers during the 1979 and 1980 constitutional conferences reflect this logic. They voiced a shared concern about a model that would give the courts the final say on major issues of public policy.

[241] The Premier of Alberta argued for the inclusion of a notwithstanding clause in a potential charter of rights and freedoms (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. 215; Adams and Bower, at p. 133; T. S. Axworthy, "An Historic Canadian Compromise: Forty Years after the Patriation of the Constitution, Should We Cheer a Little?", in Biro, *The Notwithstanding Clause and the Canadian Charter*, 25, at p. 37). He later explained that "[t]he drafters of the Canadian Charter foresaw the problem created by judicial supremacy in the US, and opted to form a system of checks and

balances between the judiciary and legislators" (Hon. P. Lougheed, "Why a Notwithstanding Clause?" (1998), 6 *Points of View* 1, at p. 13). His position was that the notwithstanding clause would allow legislatures to depart from judicial interpretations with which they might reasonably disagree (Adams and Bower, at p. 139).

[242] The Attorney General of Ontario was also of the view that a notwithstanding clause would act as a "safety valve" so that legislatures could depart from judicial decisions they did not agree with (R. R. McMurtry, "The Search for a Constitutional Accord — A Personal Memoir" (1982), 8 *Queen's L.J.* 28, at p. 64). In particular, he thought that the clause would serve to correct judicial decisions that the people's elected representatives regarded as contrary to the public interest (p. 65). He had in mind certain decisions of the American Supreme Court striking down legislation designed to protect the rights of women and children in the workplace (p. 64; see *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)).

[243] Similarly, the Premier of Saskatchewan noted during the public meetings of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada that the courts are "bad places to decide broad social policies" (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 30, 1st Sess., 32nd Parl., December 19, 1980, at p. 39). In his opinion, a notwithstanding clause would

enable legislatures to promote rights that were not enumerated in a charter of rights and freedoms, including economic and social rights (Hon. A. E. Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010), 19 *Const. Forum* 1; see also Newman, at pp. 216-18).

[244] While these perspectives rest on slightly different understandings of the need for a notwithstanding clause, they show that some of the *Charter*'s framers strove to avoid the pitfalls of a highly judicialized American-style system by equipping Canadian legislatures with a mechanism that would enable them to preserve the validity of laws found by the courts to be inconsistent with rights and freedoms (Newman, at p. 218; J. Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004), 23 *S.C.L.R.* (2d) 135, at pp. 137-38). The framers of the *Charter* thus viewed the notwithstanding clause as a way of safeguarding the democratic nature of Canadian constitutionalism, in the context of an initiative whose purpose was essentially to give the judiciary the role of final arbiter on issues related to fundamental rights that until then had fallen within the jurisdiction of legislative assemblies.

[245] On November 4, 1981, in a development known as the "Kitchen Accord", several provinces reached a compromise with the federal government under which they agreed to the enactment of a charter of rights and freedoms as long as it contained a notwithstanding clause (Salvino, at pp. 49-50). Section 33's inclusion in the *Charter*

thus stems from an agreement between the federal government and several provinces that was designed to leave an important place for legislatures on matters pertaining to the entrenched rights and freedoms. Without this clause, it is unlikely that there would have been a sufficient provincial consensus on the enactment of the *Charter*.

[246] Under the Prime Minister's influence, s. 33 was included in the *Charter* accompanied by a "sunset clause" limiting the length of time an override declaration has effect to five years but allowing Parliament or a legislature to re-enact the declaration at the end of this period (Salvino, at pp. 49-50; see also Newman, at p. 219). The inclusion of this clause and the specific choice of a five-year period had the effect of strengthening the electorate's role in approving or rejecting any use of s. 33, because a general election must inevitably be held between an initial use of the clause and its potential re-enactment.

[247] Lastly, the initial version of the notwithstanding clause applied to ss. 2, 7 to 15 and 28, but s. 28 was ultimately excluded from its scope.

[248] The negotiations surrounding the enactment of s. 33 therefore reflect the serious concerns that the provinces had about shifting from a system largely based on parliamentary sovereignty to a system that would, from then on, give the courts the final say in the constitutional order. The entrenchment of the *Charter* necessarily entailed a substantial rebalancing of institutional authority between the legislative and judicial branches. This Court has acknowledged the significance of the constitutional transformation that occurred in 1982. In *Reference re Secession of Quebec*, it observed

that the adoption of the *Charter* marked a fundamental change in the Canadian constitutional order, such that, to a large extent, "the Canadian system of government was transformed . . . from a system of Parliamentary supremacy to one of constitutional supremacy" (para. 72).

[249] The *Charter* did in fact greatly expand the role of the courts in defining and protecting fundamental rights. However, the enactment of the *Charter* was never intended to displace our constitutional heritage (see *Power*, at paras. 320-21, per Rowe J., dissenting, but not on this point; *New Brunswick Broadcasting Co.*, at p. 377, per McLachlin J.). In this regard, s. 33 reflects a deliberate choice by the framers to preserve a sphere of parliamentary sovereignty within Canada's new constitutional order. While the *Charter* affirms the primacy of rights and the role of the courts in protecting them, s. 33 nevertheless permits Parliament and the provincial legislatures to assume ultimate responsibility for the application of the enumerated rights and freedoms, as long as they retain the support of the electorate. In short, the notwithstanding clause is Canada's chosen solution to the "problem of judges and rights in a democracy" (P. C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984), 18 *U. Mich. J.L. Ref.* 51, at p. 80; see also *Re B.C. Motor Vehicle Act*, at pp. 497-98, per Lamer J.; A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), at pp. 16-17).

[250] This history sheds significant light on the interpretation to be given to s. 33 and on its essential function in our constitutional regime. As I have explained, s. 33's

inclusion was not an incidental or secondary component of the constitutional compromise reached by the members of the federation in 1982. On the contrary, and this fact cannot be emphasized enough, its inclusion was a condition *sine qua non* for the provinces' agreement: the legislative history shows that, without s. 33, the *Charter* would likely not have been enacted. The courts are therefore required to give full effect to this essential component of the constitutional compromise underlying the *Charter*.

[251] In summary, the historical and philosophical origins of the notwithstanding clause reveal its role as the cornerstone of a uniquely Canadian model of constitutionalism, under which rights and freedoms are entrenched in a written constitution that the courts are responsible for upholding, but Parliament and the legislatures, and by extension the Canadian electorate, still have the final say on matters pertaining to some of these rights and freedoms. Section 33 was therefore intended to act as a "counterweight" to the expansion of judicial review by creating space for legislative action in response to judicial interpretations of rights and freedoms, while leaving it to the electorate to pass judgment on the choice made by the legislative body in question to use the notwithstanding clause (see A. M. Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007), 36 *S.C.L.R.* (2d) 309, at pp. 317-18; S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013), at p. 101).

(b) *International Context*

[252] The FAE relies on certain international instruments to support a narrow interpretation of s. 33. It is therefore relevant to look at the international instruments on which it relies, bearing in mind the methodology that applies to the consideration of international norms in *Charter* interpretation (*Bissonnette*, at para. 98; *Taylor*, at paras. 76, 79 and 82; *9147-0732 Québec inc.*, at paras. 28 and 36). As this Court has noted, international norms can provide support or confirmation for the result reached by a court by way of purposive interpretation (*9147-0732 Québec inc.*, at paras. 22 and 28).

[253] The concept of an override clause is not unknown to international instruments for the protection of fundamental rights and freedoms. The *International Covenant on Civil and Political Rights* ("ICCPR"), adopted in 1966 by the United Nations General Assembly, contains a mechanism that allows the violation of rights in certain limited circumstances. Article 4 provides as follows:

> 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.

[254] The FAE relies on Article 4 of the ICCPR as a point of comparison with s. 33 of the *Charter*, noting in particular that the former is interpreted as being [TRANSLATION] "an exceptional and temporary measure that should be taken only in a specific context through a careful analysis of the situation involved" (A.F., at para. 125 (footnote omitted)).

[255] Other international instruments contain override clauses similar to the one in Article 4 of the ICCPR (M. Paré, "La légitimité de la clause dérogatoire de la Charte canadienne des droits et libertés en regard du droit international" (1995), 29 *R.J.T.* 627, at pp. 636-37). For example, under Article 15 of the ECHR, a state may derogate from its obligations under that convention in time of war or other public emergency threatening the life of the nation, but must keep the Council of Europe informed when it exercises this right.

[256] It is true that Article 4 of the ICCPR and the final version of s. 33 of the *Charter* both allow a government to override certain enumerated rights. However, the override powers set out in these two provisions [TRANSLATION] "ha[ve] very few similarities . . . in terms of both the substantive conditions and the conditions of form to which [their] exercise is subject" (Paré, at p. 638). Article 4 can be invoked only in circumstances where there is a public emergency that threatens the very life of a nation. Clearly, a comparable limit is nowhere to be found in the text of s. 33, having been removed more than a year before the final version of s. 33 was added to the *Charter*

(see F. Chevrette and H. Marx, *Droit constitutionnel: Principes fondamentaux: Notes et jurisprudence* (2nd ed. rev. 2021), at p. 1173).

[257] There is, of course, a recognized presumption that the *Charter* is in conformity with the binding international instruments to which Canada is a party. It follows that, in the interpretation of a *Charter* provision, it must generally be presumed that the protection provided by the *Charter* is at least equivalent to that afforded by the analogous provisions of the international human rights instruments ratified by Canada (*Reference re Public Service Employee Relations Act (Alta.)*, at p. 349, per Dickson C.J., dissenting, quoted in *9147-0732 Québec inc.*, at para. 31). However, while these instruments can be helpful in interpreting the *Charter*, they cannot supersede the text and purpose of a provision of Canada's Constitution (*9147-0732 Québec inc.*, at para. 34).

[258] In this case, defining the scope of s. 33 of the *Charter* on the basis of the interpretation given to Article 4 of the ICCPR would disregard the wording of s. 33 and would therefore be contrary to this Court's teachings in *9147-0732 Québec inc.*, in which it was stated that the text of the Constitution is of "primordial" significance in its interpretation and that international law is not used on its own to define the scope of a *Charter* provision (paras. 11, 22 and 28). The scope given to Article 4 of the ICCPR cannot be transposed to s. 33 without ignoring the specific wording of the *Charter*.

[259] Comparing s. 33 with the override clauses found in certain international instruments serves to highlight the specificity of the Canadian model of protecting and constitutionalizing human rights.

(4) Purpose and Effect

[260] This analysis of the text of the provision, its philosophical origins, its drafting history, as well as international law, makes it possible to identify the fundamental purpose of s. 33. Section 33 is at the centre of a constitutional compromise aimed at reconciling judicial review of the validity of legislation in relation to rights and freedoms with preservation of the role of parliamentary institutions in determining certain matters pertaining to fundamental rights, in a manner that upholds parliamentary sovereignty as a foundational principle of Canada's constitutional heritage. Its primary purpose is to enable Parliament and the legislatures to have, in certain circumstances and for a limited time, the final say on the operability of a law despite any inconsistency with certain rights and freedoms guaranteed by the *Charter*. By authorizing the enactment of laws that operate notwithstanding ss. 2 and 7 to 15, s. 33 recognizes the possibility of a democratic disagreement with the judicial interpretation of these rights and freedoms and temporarily transfers the ultimate decision on their application to elected representatives (see D. Newman, "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities", in Biro, *The Notwithstanding Clause and the Canadian Charter*, 69, at p. 76). It has therefore

always been understood that the purpose of the notwithstanding clause is to provide "a mechanism whereby . . . the elected legislative branch of government may make important policy decisions and isolate them from review by the unelected judicial branch of government" (Library of Parliament, *The Notwithstanding Clause of the Charter*, Background Paper BP-194E, October 16, 2008, at p. 13).

[261] The opportunity for Parliament or a legislature to override constitutional rights has a dual logic behind it. First, it preserves parliamentary sovereignty in relation to the enumerated rights and freedoms by recognizing that it does not fall exclusively to the courts to define them and balance them against other public interest objectives. Second, it establishes a mechanism of democratic accountability, since the exercise of the override power is governed by formal and temporal requirements that ensure its visibility and make its use subject to the judgment of the electorate. Indeed, the temporary duration of the override coincides with the maximum length of an election cycle under s. 4 of the *Charter*, giving voters the final say on the government's decision to override certain rights and freedoms protected by the *Charter*. In this sense, s. 33 fosters a form of dynamic public deliberation on the nature and limits of certain rights and freedoms.

[262] Section 33 is an integral part of the general architecture of Canadian constitutionalism as an institutional balancing mechanism. It provides a solution to the democratic difficulty presented by judicial review by allowing elected lawmakers to respond to court decisions and, if necessary, to depart from them. Far from being an

anomaly, this provision is a central element of the Canadian model of constitutional rights protection, a hybrid model that combines the respective advantages of American-style liberal constitutionalism and British political constitutionalism in order to overcome the difficulties of each (Weiler (1980), at p. 232; Dodek (2007), at p. 319). It thus reflects the coexistence of two complementary approaches arising from these two constitutional models: one that tasks the courts with protecting rights through constitutional scrutiny, and another that recognizes a central role for parliamentary institutions in defining and implementing rights (see R. Bellamy, "A Genealogy of Political Constitutionalism in the UK, and Why Canadians Might be Interested (and What the British Might Learn from Canada)", in N. Karazivan and J. Leclair, eds., *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (2020), 539, at p. 540).

[263] Finally, the notwithstanding clause fits into the federal logic of the Canadian Constitution. By giving provincial legislatures the ability to maintain the validity of certain laws despite their inconsistency with rights and freedoms guaranteed by the *Charter*, it preserves a place for political autonomy within the federation and mitigates the unifying effects that may result from judicial interpretations of constitutional rights (J. L. Hiebert, "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" (2004), 23 *S.C.L.R.* (2d) 169, at p. 170). This structure reflects the principle of federalism, which recognizes that the historical, cultural and social realities of the federation's various components may justify different ways of achieving shared constitutional values (see *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 275, per LeBel J.). The notwithstanding clause

thus facilitates the expression of different provincial democratic choices, within the confines of the constitutional compromise of 1982.

[264] While this function is important throughout Canada, it has particular importance in Quebec. Since its enactment, the *Charter* has been perceived by some Quebecers as lacking legitimacy. This is primarily because it was enacted without the consent of the Quebec government. Moreover, in the Quebec context, s. 33 has acquired an institutional significance that extends beyond merely protecting a particular law from being challenged in court. As Rowe J. recently observed, the *Charter* is commonly seen in Quebec as having a homogenizing potential that limits Quebec's ability to pursue policies to protect its distinct national character (*Kanyinda*, at para. 167). Section 33 is the mechanism through which Quebec can preserve this room to manoeuvre when it considers that certain public policies reflect collective choices and conceptions that differ from the judicial interpretation of rights and freedoms (B. Pelletier, "The Notwithstanding Powers and Provisions: An Asset for Quebec and for Canada", in Biro, *The Notwithstanding Clause and the Canadian Charter*, 205, at p. 219). In this sense, s. 33 is, both for Quebec and for the other provinces, an essential mechanism for preserving provincial autonomy in Canada's constitutional order.

[265] Section 33 is thus meant to ensure a balance between the role of the courts and that of elected institutions on the issue of fundamental rights, by promoting democratic accountability and preserving, in the Canadian federal context, a degree of legislative autonomy. Understood in this way, the notwithstanding clause is not an

exception to Canadian constitutionalism; on the contrary, it is one of its principal manifestations. Just as s. 52(1) of the *Constitution Act, 1982* authorizes the courts to engage in constitutional scrutiny as regards legislative power, s. 33 permits Parliament and the legislatures to act as a democratic counterbalance to judicial power for a limited number of constitutional rights. As Cory and Iacobucci JJ. noted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 139, "[t]he work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it" (see also M. Bastarache, "Section 33 and the Relationship Between Legislatures and Courts" (2005), 14:3 *Const. Forum* 1, at p. 1).

[266] Thus, far from constituting a departure from the fundamental principles of the Constitution, s. 33 forms part of the system of checks and balances it establishes, reflecting the central idea of constitutionalism that no institution, not even the judiciary, should possess unlimited power (*Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 1). The courts have the general power to define and protect the rights and freedoms guaranteed by the *Charter*, but Parliament and the provincial legislatures retain the ability to depart from the judicial interpretation of some of these rights and freedoms, within the express limits laid down by the Constitution. Just as the courts act as a check on the power of Parliament and the legislatures, the power of the

courts is also checked by the possibility of s. 33 being invoked. And ultimately, the override power is itself limited through democratic control.

[267] Following this analysis, the effects of the notwithstanding clause are altogether clear. The clause allows a legislative body to temporarily override the rights protected by ss. 2 and 7 to 15 of the *Charter* through an express declaration made in validly enacted legislation. Once this declaration has been enacted, the rights and freedoms guaranteed by the provisions to which it refers do not apply to the law and do not produce their effects in relation to the legislative provisions so protected.

G. *Bill 21's Invocation of Section 33 of the Charter Is Valid*

[268] In 1982, the framers gave judges a mandate to define the contours of the rights and freedoms set out in the *Charter*. These same framers also clearly limited this mandate by including the notwithstanding clause. While seemingly contradictory, this limit on the courts' role stems from the desire of elected representatives to ensure a certain balance between two constitutional philosophies.

[269] Courts must look first and foremost to the precedents of this Court before they question the choice made by elected representatives, at the risk of damaging and lessening public confidence in our institutions.

[270] I note that, in such matters, it is essential for courts to follow the interpretive approach that has been recognized for many years and not to depart from

precedents unless exceptional circumstances exist. To maintain the public's confidence in its institutions, even where some citizens disagree with the result, judgments in an area as sensitive as this one should not be based on bold academic reasoning that strays from history and from social and legal realities.

[271] Some of the parties contest the validity of Bill 21's invocation of s. 33 and argue that the exercise of the override power is subject to certain substantive limits, beyond the requirements of form prescribed by its text. Ms. Lauzon et al. submit that the protection of s. 33 cannot validly extend to a law whose purpose is to take away rights and freedoms guaranteed by the *Charter*. According to them, the fact that the notwithstanding clause does not apply to s. 1 shows that the override power was designed to enable legislative bodies to keep laws that limit certain rights in force, but only to the extent that these laws pursue legitimate objectives. Parliament or a provincial legislature could not invoke s. 33 to enact a law whose very purpose is to exclude *Charter* rights. Similarly, the FAE submits that the exercise of the override power should be subject to a minimum requirement of justification based on the pursuit of a pressing and substantial objective, although without linking this requirement to the interaction between ss. 1 and 33. An intervener also asserts that s. 33 cannot be invoked pre-emptively, that is, before a court has ruled on the validity of the law in question. As for the EMSB et al., they argue that s. 28 of the *Charter* limits the exercise of the override power by preventing a legislative body from using it to override the guarantee of equality between women and men enshrined in this section.

[272] The AGQ, for his part, submits that the Quebec legislature validly exercised the override power conferred by s. 33 when it enacted Bill 21. In his opinion, *Ford* definitively settled the question of whether this provision is subject to the limits referred to by the appellants, clearly answering it in the negative.

[273] In the case before us, the Superior Court and the Court of Appeal both relied on *Ford* in concluding that the exercise of the override power is not subject to any limits other than those expressly specified by the text of s. 33. The teachings of *Ford* should therefore be carefully examined to determine their precise scope and assess their relevance to the arguments put forward by the appellants regarding the substantive conditions that, according to them, apply to the exercise of the s. 33 power. *Ford* as a whole was about the conditions governing the exercise of the s. 33 override power and, more specifically, the requirements that emerge from the text of this provision.

[274] In *Ford*, this Court recognized that there are certain limits on the exercise of the override power, but it rejected others. That case established, among other things, that a declaration made under s. 33 must be express, which means it must refer to the *Charter* provisions the legislative body intends to override, and that it cannot produce retroactive effects. However, nothing in the text of s. 33 prevents a legislative body from invoking this provision in an omnibus bill or from applying it to several *Charter* provisions simultaneously. Similarly, a legislative body is not required to show a link or relationship between the law in question and the rights or freedoms it intends to

override. More fundamentally, this Court recognized that it is not for the courts to substantively review the legitimacy of the legislative policy pursued by the legislative body or the appropriateness of invoking the notwithstanding clause. The Court's reasons are unequivocal on this point, expressly stating that the legislative policy justifying recourse to s. 33 should not be subject to judicial review (see pp. 740 and 743).

[275] That being said, the specific arguments put forward by the parties should be addressed. As I noted above, some of the parties contend (a) that a law invoking s. 33 cannot have the purpose of infringing rights and freedoms; (b) that a law invoking s. 33 must have a pressing and substantial objective in order to do so; and (c) that s. 33 cannot be invoked before a court has ruled on whether the law is consistent with the *Charter*.

[276] In my opinion, a purposive interpretation of s. 33, combined with this Court's teachings in *Ford*, provides a response to these arguments. None of the conditions referred to by the parties is sufficiently anchored in the text, purpose or historical and philosophical origins of s. 33. It is not open to the courts to place additional limits on the exercise of the override power that are entirely detached from the wording of the provision or the constitutional compromise that forms the cornerstone of the *Charter*.

[277] The argument of Ms. Lauzon et al. that the protection of s. 33 cannot validly extend to a law whose purpose is to take away rights and freedoms guaranteed by the

Charter (A.F., at para. 50) must be rejected, for two reasons. For the same reasons, the argument raised by the FAE, which proposes that any exercise of the override power be made subject to justification based on the pursuit of a pressing and substantial objective, should also be rejected.

[278] First, these restrictions are difficult to reconcile with the actual text of s. 33. The wording of this provision already sets out the express conditions that govern the exercise of the override power: the declaration must be explicit, must refer to certain specific provisions of the *Charter* and must remain limited in time. Nothing in the language of s. 33 suggests that a legislative body is required to somehow justify its use of the notwithstanding clause in order to preserve the validity of the law.

[279] Second, the interpretations proposed by Ms. Lauzon et al. and the FAE would profoundly alter the nature of the s. 33 mechanism. Requiring a legislative body to justify the use of the notwithstanding clause would, in practice, amount to making the exercise of this power subject to court approval (*Ford*, at pp. 740-41 and 743). As we have seen, s. 33 was added to the *Charter* to ensure that legislatures could give effect to their own conceptions of fundamental rights, no matter what interpretations were adopted by the courts. Consequently, the approach advocated by the appellants would greatly narrow the effective scope of s. 33 and would hardly be compatible with its purpose. The effect of the proposed limit would thus be to reintroduce, in another form, the justification requirement that s. 33 was specifically designed to eliminate.

[280] Additionally, a justification requirement would undermine the broader constitutional function that s. 33 was designed to perform. By entrusting the courts with responsibility for interpreting and applying constitutional rights that are broadly framed by law, the *Charter* inevitably requires judges to decide questions that are socially, morally and politically contentious. As I explained above, s. 33 serves as an institutional counterbalance through which democratically elected bodies may respond to judicial decisions or jurisprudential trends that they regard as mistaken or ill-advised. This mechanism allows Parliament and the legislatures to act without needing to challenge the legitimacy of the courts. In this way, s. 33 provides Parliament and the legislatures with a constitutionally legitimate means of resolving profound disagreements that are likely to arise when the meaning and scope of fundamental rights are in issue. Devising substantive requirements would diminish the utility of s. 33 as a mechanism for resolving institutional disagreements over constitutional rights. To the extent that they would give a review function back to the courts, such requirements could, in fact, produce the opposite of their intended effect.

[281] The very existence of s. 1 of the *Charter* helps illuminate the distinct nature of s. 33 and shows that no justification is necessary for this provision to be validly invoked. When an infringement of a *Charter* right or freedom is established, s. 1 requires a court to determine whether the impugned measure is a reasonable limit that "can be demonstrably justified in a free and democratic society". Section 33 does not reproduce the language of s. 1. It permits legislative assemblies to articulate their democratic conception of appropriate limits in relation to a select number of rights and

freedoms, without making this conception subject to judicial scrutiny. The scope of s. 33 cannot be subordinated to s. 1 of the *Charter*. They are both distinct mechanisms that operate in parallel to enable a legislative body to limit *Charter* rights, on certain conditions, in order to serve other public interests. Only s. 1 requires it to be shown in court that the limit is justified in a free and democratic society. In contrast, s. 33 posits, in line with the constitutional tradition that inspired it, that the legislative process itself remains a legitimate way of maintaining a free and democratic society in Canada. Section 33 is not a justificatory mechanism that is duplicative of s. 1. It performs a distinct role within the *Charter*.

[282] In short, the interpretation proposed by Ms. Lauzon et al. and the FAE is not sufficiently anchored in the text, purpose or constitutional history of s. 33.

[283] Some of the parties also attempt to infer a limit on the use of s. 33 by relying on the history of its enactment, including the function that some participants in the constitutional process intended to assign to it. According to these parties, the notwithstanding clause was a "safety valve" designed in part to allow "unforeseen situations . . . to be corrected without the need to seek constitutional amendment" (*House of Commons Debates*, November 20, 1981, at pp. 13042-43 (Hon. J. Chrétien), quoted in A.F., Ms. Lauzon et al., at para. 52). Its purpose was also to preserve certain rights not set out in the *Charter* that might come into conflict with the rights and freedoms guaranteed therein (see *House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 23, 1981, at pp. 13144-45 (H. Herbert)). On this reading, the provision

was never conceived of as a mechanism that simply allows a legislative body to override the rights of certain groups.

[284] These historical statements certainly clarify how certain actors conceived of the legitimate or desirable use of the override power, but they must be placed in the context of the broader constitutional compromise reached by the provinces and the federal government at the time the Constitution was patriated. As I explained above, the provinces' acceptance of a constitutional charter of rights and freedoms depended in part on the preservation of a form of parliamentary sovereignty. Moreover, provincial representatives expressed specific and sometimes diverging views on the intended uses of the notwithstanding clause. In the end, the conception that some participants may have had regarding the desirable exercise of a constitutional power is not determinative of its legal scope (see *Re B.C. Motor Vehicle Act*, at pp. 508-9; *Taylor*, at para. 82). Nor can this conception be used to infer conditions for the use of the notwithstanding clause that are not found in the wording of the clause, or to frustrate the function that the framers ultimately chose to give this clause.

[285] The international context does not make it possible to infer a limit on the use of s. 33 either, contrary to what some of the parties and interveners maintain. It is telling, as I noted above, that the wording of s. 33 is clearly different from that of Article 4 of the ICCPR.

[286] Nor do the text and purpose of s. 33 support the argument that there should be no ability to use the override power pre-emptively. The wording of s. 33 does not

make its invocation conditional on there being a prior judicial decision. It requires only that a law expressly declare that it will operate notwithstanding certain provisions of the *Charter*. The purpose of the override power was precisely to preserve a form — albeit a limited form — of parliamentary sovereignty so that legislative bodies could, in some cases, have the final say on the definition and exercise of the rights that are subject to s. 33. Making the exercise of the override power subject to a prior judicial decision would upset the delicate balance at the heart of our constitutional model.

[287] Contrary to what the EMSB et al. argued, s. 28 also places no limit on the override power. It does not create a stand-alone guarantee of sex equality that a legislative body could never override. As I explained above, a harmonious, purposive and contextual interpretation of these two provisions reveals that they do not interact directly with each other. They serve distinct purposes and rely on different mechanisms. Section 28 guarantees equality for women and men in the enjoyment of rights and freedoms, subject to the inherent limits on their scope, including s. 33.

[288] Some of the interveners also submitted that unwritten constitutional principles, the architecture of the Constitution and even the text of s. 33 itself — including the five-year time limit imposed on override declarations by s. 33(3) — place certain limits on the exercise of the override power. In support of their positions, they pointed to the consequences that would result from an override power entirely unencumbered by any legal constraints. The Attorney General of Canada argued in particular that the s. 33 power cannot be exercised in such a way as to cause an

irreversible impairment of *Charter* rights and freedoms, given the temporary nature of override declarations.

[289] It goes without saying that the invocation of s. 33, though it allows a law to operate notwithstanding certain *Charter* guarantees, does not make it possible to otherwise override the Constitution of Canada or to amend its provisions. Likewise, the express terms of s. 33(3) of the *Charter* specify that an override of the rights and freedoms guaranteed by the *Charter* cannot have effect for more than five years unless the override declaration is re-enacted, although s. 33 does not set any limit on the number of possible renewals of an override declaration. These are express limits on the scope of the override mechanism as defined by the language of s. 33. Section 33 of the *Charter* thus comes nowhere close to giving legislative bodies an "unlimited" legal power whose nature is incompatible with the rule of law and the basic architecture of the Canadian constitutional order (*Democracy Watch*, at para. 1). It is subject to clear limits imposed by the actual text of this provision and by the rest of the Constitution.

[290] This being the case, it would be paradoxical, to say the least, to conclude that a mechanism designed to act as a democratic counterbalance to judicial review remains itself subject to substantive judicial review. A provision intended to allow legislative institutions to substitute their judgment for that of the courts cannot reasonably be interpreted in a manner that inverts this institutional relationship in favour of the courts without neutralizing this constitutional mechanism. The Attorney General of Canada's position inviting the courts to assess the "irreversible" or

"irreparable" nature of an impairment of a right in reviewing the use of the notwithstanding clause, in addition to being a novel one in our constitutional law, ultimately comes up against the clear limit set by s. 33 of the *Charter* on the courts' constitutional jurisdiction.

[291] In the same way, the scope of s. 33 cannot be neutralized by invoking abstract principles, the constitutional architecture or the overall objective of the *Charter* as an instrument aimed at ensuring "the unremitting protection of individual rights and liberties" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). For the reasons I have already outlined above, subordinating a purposive interpretation of s. 33 to this overall objective would be a fundamental methodological error, because it would ignore the fact that, by playing a part in defining the scope of the *Charter* and by setting a limit on the constitutional jurisdiction it confers on the courts, s. 33 itself constitutes an express and essential qualification on this overall objective.

[292] Ultimately, the arguments inviting us to interpret s. 33 as preserving a supervisory role for the courts reflect, with all due respect, a profound misunderstanding of Canadian constitutionalism. They import, so to speak, the premises of American-style constitutionalism into a mechanism designed to preserve a degree of political constitutionalism within a hybrid model. As Professor Newman explains, "there is a danger of inaccuracy if [we] read the Canadian Constitution as if it adopted American-style strong-form judicial review . . . and then use those features

to purport to interpret and thus to delimit the genuinely unique provision of the notwithstanding clause" (Newman (2024), at p. 71).

[293] To impose substantive conditions not found anywhere in the text of s. 33, or to authorize the courts to continue ruling on rights that have been validly overridden, would undo the historical compromise from which the *Charter* emerged. Respecting the role of s. 33 in our constitutional order requires recognizing that the *Charter* deliberately reserves the final say on a certain number of rights and freedoms to democratically elected institutions. The Court should not arrogate to itself, under the guise of constitutional interpretation, a power that the Constitution purposely does not confer on it. To do so would be to claim the same type of unlimited power that our constitutional order based on the rule of law cannot tolerate. This Court recently observed that "the rule of law is not the rule of courts" (*Democracy Watch*, at para. 69). While it is up to the courts to interpret and enforce the Constitution, the judiciary is not a supra-constitutional branch. It is subject to the primacy of constitutional law, just like the other branches of the state, and it must respect the limit that s. 33 sets on its jurisdiction.

[294] In the end, I conclude that none of the substantive limits proposed by the appellants finds sufficient support in the text, context or purpose of s. 33. Variously formulated, these propositions all invite the courts to assess the merits of the use of the override power or the reasons underlying it. Yet this is precisely what this Court held to be incompatible with s. 33 in *Ford*. A purposive interpretation of the provision

confirms this conclusion. Section 33 confers jurisdiction to decide the merits of the use of the notwithstanding clause on legislative bodies rather than on the courts. It follows that the validity of an override declaration does not depend on the pursuit of a pressing and substantial objective, the existence of a prior judicial decision or any substantive justification requirement.

[295] In this case, the Quebec legislature validly used the override power conferred on it by s. 33 of the *Charter*. Section 34 of Bill 21 complies with the requirements of form set out in s. 33 of the *Charter*.

H. *The Valid Invocation of Section 33 of the Charter Prevents the Courts From Ruling on a Law's Hypothetical Inconsistency With Sections 2 and 7 to 15 of the Charter*

[296] Given my conclusion that the Quebec legislature validly invoked s. 33 of the *Charter*, it is appropriate to consider the alternative argument raised by several of the appellants, namely that this Court should nevertheless rule on whether Bill 21 is consistent with ss. 2(a) and (b) and 15 of the *Charter* — all of which are expressly identified in the override declaration it contains. The AGQ, for his part, argues that the override declaration in s. 34 of Bill 21 precludes any judicial review concerning whether the sections of this law comply with the provisions referred to in the override declaration. The AGQ relies on judgments of this Court in which s. 33 was discussed in passing, as well as on his own interpretation of the effect of a s. 33 declaration. He thus adopts the Quebec Court of Appeal's position that this Court's decisions contain guidance on the legal effects of s. 33, including that the invocation of this provision

insulates a law from judicial review of its constitutionality in relation to ss. 2 and 7 to 15 of the *Charter*.

[297] The Court of Appeal in the present case relied on a passage from this Court's reasons in *Ford*:

> 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*. [Emphasis added; emphasis in original deleted.]
>
> (C.A. reasons, at para. 320, quoting *Ford*, at p. 742.)

[298] The Court of Appeal gave particular weight to the use of the word "protect" in finding that, in *Ford*, this Court implicitly ousted a court's jurisdiction to render a declaratory judgment. According to the Court of Appeal, once a law is "protected" from the application of certain *Charter* provisions, its compliance with those provisions is not subject to review. The Court of Appeal relied, *inter alia*, on this Court's decisions in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, *Vriend*, *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, *G* and *Toronto (City)*, which also use the word "protect" or similar terminology in this context, to justify its decision.

[299] As I have explained, a purposive interpretation of s. 33 supports the conclusion reached in *Ford* that invoking s. 33 has the effect of "protecting" the law from the application of the enumerated *Charter* provisions. Section 33's purpose is to

preserve parliamentary sovereignty by allowing Parliament and the legislatures to enact laws "notwithstanding" certain rights guaranteed by the *Charter*, such that judicial review becomes moot as regards the consistency of these laws with the *Charter* provisions in question, at least while the override declaration remains valid. I therefore agree with the Court of Appeal.

[300] Of course, the courts have inherent jurisdiction to render a declaratory judgment on the constitutionality of a law (see *G*, at para. 85; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at p. 85). Judicial review of the constitutionality of legislation is one of the essential functions of the superior courts guaranteed by s. 96 of the *Constitution Act, 1867* (*Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291, at para. 68, citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725). Section 52(1) of the *Constitution Act, 1982*, by instructing the courts not to give effect to laws that are inconsistent with the Constitution, serves as the foundation for the exercise of this jurisdiction.

[301] That being said, s. 96 of the *Constitution Act, 1867* provides no basis for recognizing a residual jurisdiction that would allow the courts to consider whether a law covered by a valid declaration made under s. 33 of the *Charter* is consistent with the *Charter* provisions concerned and to declare that such a law infringes guaranteed rights. There is no conflict between these two constitutional provisions. Sections 33 and 96 are part of the Constitution of Canada and must be interpreted harmoniously (*New Brunswick Broadcasting Co.*, at p. 373, per McLachlin J.). Section 96 guarantees

the supervisory jurisdiction of the superior courts throughout Canada. Section 33, however, expressly defines the circumstances in which legislation may be exempted from the application of certain *Charter* guarantees and, consequently, from judicial supervision.

[302] Nor can judicial independence be invoked as a basis for disregarding this express limit on the courts' constitutional jurisdiction. To interpret s. 96 in this manner "would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance" by allowing the courts to interfere unduly in public debate (*Imperial Tobacco,* at para. 53).

[303] As I noted above, the enactment of the *Charter* significantly expanded the superior courts' jurisdiction by tasking them with overseeing legislative activity to ensure its conformity with the new constitutional rights and freedoms. However, s. 33 defines the scope of this grant of judicial jurisdiction and limits its exercise where a declaration is made under this provision. In such circumstances, the *Charter* gives the courts neither the power nor the responsibility to verify a law's consistency with the enumerated *Charter* provisions; rather, it confers this responsibility on legislative bodies and, ultimately, on the electorate.

[304] To summarize, when s. 33 is invoked, the courts are called upon to exercise the powers conferred on them by s. 96 solely to ensure that the override declaration meets the applicable requirements of form and that the law does not infringe other provisions of the *Charter* or the Constitution to which s. 33 does not apply. Subject to

these qualifications, s. 33 provides for no supervisory role for the courts and, considered as a whole, the *Charter* confers no power to issue a declaration of inconsistency.

[305] The purposive interpretation of s. 33 I have delineated above strongly supports this conclusion. Allowing the courts to rule on the question of whether rights to which an override declaration applies have hypothetically been infringed would substantially diminish the effect of s. 33 and blur the distinction between the function it performs within the *Charter* and the justification exercise provided for by s. 1. Section 33's purpose is incompatible with the proposition that the courts retain a general power to assess whether legislation is consistent with the *Charter* provisions that have been overridden.

[306] This more broadly reflects the structure of the *Charter*. As I have explained, both s. 1 and s. 33 are mechanisms devised to enable a legislative body to limit *Charter* rights, in different ways, in order to serve other public interests. The former permits the legislative body to limit rights by justifying the limit to the courts, while the latter permits it to limit rights by justifying the limit to voters. These mechanisms are mutually exclusive.

[307] The circumstances of this case illustrate one of the reasons why an interpretation of s. 33 recognizing a supervisory role for the courts beyond the requirements of form would be fundamentally unworkable. Establishing that a law is inconsistent with a *Charter* provision requires not only determining whether the law

infringes the right or freedom in question, but also considering whether the infringement can be justified in a free and democratic society. The onus is on the state to justify any infringement of a *Charter* right or freedom under s. 1 (*Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 42; see also *Reference re Remuneration of Judges*, at para. 278). However, the state may, as Quebec has done in this case, decline to justify an infringement when it has invoked s. 33, given that the absence of justification will ultimately have no effect on the validity of the law.

[308] Indeed, it seems absurd to argue that the state must justify an infringement despite the fact that it has invoked s. 33 precisely to avoid having to answer in court for its public policy choices. When the state declines to provide a justification, the court will be forced to conclude that any infringement is unjustified, even in circumstances where such a justification might well be possible. In this situation, the s. 1 constitutional mechanism loses its purpose.

[309] To require the state to justify a limit on a right or freedom despite the fact that s. 33 has been invoked would trivialize the function of s. 1 as the central mechanism for reviewing the constitutionality of legislation in Canadian law. And when the state declines to undertake this theoretical exercise, the court's declaratory judgment loses much of its persuasive force and jurisprudential importance. This possibility would also run counter to the adversarial nature of our justice system, which must be preserved in a declaratory judgment context (see M. Rowe and D. Shnier, "The Limits of the Declaratory Judgment" (2022), 67 *McGill L.J.* 295, at pp. 304 and 308-9, quoting

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 34). This shows the incompatibility between a justification under s. 1 and the invocation of s. 33 of the *Charter* and highlights the importance of respecting their respective roles as distinct mechanisms addressing different concerns.

[310] Moreover, the courts generally do not rule on purely hypothetical issues (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 832-33). The preventive function of a declaratory judgment "must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure" (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 457; see also *Borowski*, at p. 362). Consequently, a declaratory judgment will not be granted "where the dispute has yet to arise" (*Solosky*, at p. 832). When s. 33 has been invoked, the claim of rights infringement remains hypothetical because (1) the law is exempted from the application of the *Charter* right or freedom in question; (2) the s. 33 declaration may be renewed at the end of its maximum validity period of five years; and (3) the law covered by a s. 33 declaration may be repealed or amended before the expiry of the declaration's validity period. Outside the specific context of statutory reference procedures, the courts normally do not decide issues that are academic or render judgments that have no legal effect. Doing so would amount to "sanction[ing] a private reference", which this Court has always refused to do (*Borowski*, at p. 367).

[311] Furthermore, there would be no basis for such a judgment in Quebec procedural law, whether under art. 529 of the *Code of Civil Procedure*, CQLR, c. C-25.01 — which governs applications for judicial review and can ground only a declaration that a statute is "inapplicable, invalid or inoperative" — or under its art. 142 — which governs declaratory actions in Quebec law. Indeed, the question of whether a statute complies with the *Charter* provisions referred to in the override declaration it contains does not raise any "genuine problem" that plaintiffs have an "existing" legal interest in resolving (*Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 41; see also *R. in right of Newfoundland v. Commission Hydro-Électrique de Québec*, [1982] 2 S.C.R. 79, at p. 106).

[312] For these reasons, I conclude that a declaratory judgment is not available in cases where a legislative body has validly invoked s. 33.

I. *The Invocation of Section 52 of the Quebec Charter Is Valid*

[313] The parties have raised arguments about both s. 33 of the *Charter* and s. 52 of the *Quebec Charter*. Despite their similar mechanisms, these provisions must be analyzed separately, since their constitutional status and their text, context and purpose differ.

[314] The *Quebec Charter* was enacted in 1975, a few years before the *Charter*. In the wake of the postwar movement for the recognition and protection of human

rights, Quebec wished to adopt a legal instrument inspired primarily by existing international instruments, by tailoring them to Quebec's specific needs (A. Morel, "La Charte québécoise: un document unique dans l'histoire législative canadienne" (1987), 21 *R.J.T.* 1, at pp. 6-7; A.-R. Nadeau, "La *Charte des droits et libertés de la personne*: origines, enjeux et perspectives", [2006] *R. du B.* (numéro thématique) 1, at p. 5). A pioneering instrument, the *Quebec Charter* [TRANSLATION] "was undeniably a text that had no equivalent in Canadian legislative history" (Morel, at p. 9).

[315] Section 52 was included in the *Quebec Charter* in response to intense criticism over the legislature's initial proposal not to give legislative primacy to this instrument. Indeed, Quebec's Minister of Justice at the time took the view that the very broad scope of the rights recognized by the *Quebec Charter* — which included economic and social rights — was not conducive to recognizing them as absolute and binding. He ultimately adopted the compromise solution proposed by certain stakeholders, that is, recognizing the primacy of certain provisions of the *Quebec Charter* over any law enacted subsequently to it, unless there was an express override (Morel, at pp. 10-12). Section 52 was amended in 1982 to broaden its scope and recognize the primacy of the *Quebec Charter* over every Quebec law, regardless of whether the law precedes or is subsequent to this charter.

[316] Section 52 therefore serves a twofold purpose: it enshrines not only an override power but also the relative supremacy of the civil and political rights set out in ss. 1 to 38 of the *Quebec Charter* over other ordinary statutes (see H. Brun, G.

Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. XII-2.58). In this regard, the purpose of s. 52 of the *Quebec Charter* is the opposite of that of s. 33 of the *Charter*. Whereas s. 33 is intended to [TRANSLATION] "make it possible to leave the constitutional sphere to return to parliamentary sovereignty", s. 52 creates "an exception to full parliamentary sovereignty in order to constitutionalize rights" (Brun, Tremblay and Brouillet, at para. XII-2.58).

[317] The inclusion of the override power in the provision recognizing the primacy of rights allows the legislature to achieve its legislative objectives while preserving the continuity and integrity of the *Quebec Charter*. Indeed, although the *Quebec Charter* has quasi-constitutional status (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, at paras. 27-28), the fact remains that it is an ordinary statute of the National Assembly that can be amended or repealed, directly or by implication. By expressly allowing the legislature to override certain rights, the *Quebec Charter* provides a safety valve that serves to preserve parliamentary supremacy while minimizing recourse to amendments to its provisions.

[318] In addition to differing in its purpose, s. 52 of the *Quebec Charter* differs somewhat from s. 33 of the *Charter* in its wording, including with respect to its scope and its limits. Section 52 reads as follows:

> **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.

[319] As can be seen, the override declaration provided for in s. 52 has no maximum duration. This means that such a declaration remains in effect until the legislation is amended or repealed. In addition, the scope of s. 52 seems broader than that of s. 33, since s. 52 also applies to the political rights set out in ss. 21 and 22 of the *Quebec Charter*.

[320] Section 52 of the *Quebec Charter* does, however, have effects similar to those of s. 33 of the *Charter*. Like s. 33, s. 52 gives the legislature, and not the courts, the final say on the application of the rights conferred. In short, s. 52, like s. 33, serves a purpose grounded in the principle of parliamentary sovereignty. Section 52 creates an exception to full parliamentary sovereignty by giving the rights protected by the *Quebec Charter* relative primacy over other provincial laws, while allowing the legislature, rather than the courts, to have the final say on the application of certain rights. This override mechanism therefore produces the same effects as s. 33. It makes it possible to override protected rights by means of an express declaration.

[321] Just as it does for s. 33, the FAE contests the validity of Bill 21's invocation of s. 52 and argues that the exercise of the override power is subject to certain substantive limits, beyond the requirements of form. The FAE submits that the use of s. 52 is subject to a minimum requirement of justification based on the pursuit of a pressing and substantial objective. For reasons similar to those outlined above, I reject this argument. There is no basis in the text, context or purpose of this provision for

recognizing such a limit on the exercise of the s. 52 power. Section 52 was therefore validly invoked by the Quebec legislature in Bill 21.

[322] Some of the appellants nonetheless ask this Court to rule on whether Bill 21 is consistent with ss. 1 to 38 of the *Quebec Charter*. The AGQ, for his part, submits that the override declaration precludes any judicial review concerning Bill 21's compliance with the provisions of the *Quebec Charter* covered by the declaration.

[323] Unlike the *Charter*, which confers constitutional powers on the courts, subject to the limits set out in s. 33, the *Quebec Charter* is not part of the Constitution of Canada and neither confers nor limits the courts' constitutional jurisdiction. That being said, and for the same reasons given with respect to s. 33, there is nothing that justifies the Quebec courts being able to issue declaratory judgments when s. 52 has been invoked. Nothing in the scheme of the *Quebec Charter* justifies or requires a ruling by the courts in the abstract on the validity of laws that, by virtue of s. 52 having been invoked, are exempted from the application of the provisions enumerated therein.

J. *Section 8 of Bill 21 Infringes Section 3 of the Charter to the Extent That Section 8 Applies to Members of the National Assembly of Quebec*

[324] Section 3 of the *Charter* provides as follows:

> **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.

[325] Ms. Hak et al. argue that s. 8 of Bill 21 infringes s. 3 of the *Charter* by prohibiting members of the National Assembly from wearing a face covering. The Lord Reading Society shares the view of Ms. Hak et al. and further submits that s. 6 of Bill 21 infringes s. 3 by prohibiting the President and Vice-Presidents of the National Assembly, as well as the Minister of Justice, from wearing a religious symbol.

[326] These arguments were accepted in part by the courts below. The trial judge held that the requirement that members of the National Assembly exercise their functions with their face uncovered infringes the right guaranteed by s. 3 to be "qualified for membership" therein. He was of the opinion, however, that the scope of the protections conferred by s. 3 does not extend to the functions of the President or Vice-Presidents of the National Assembly, or to those of the Minister of Justice, and he therefore found no infringement of s. 3 arising from s. 6 of Bill 21. The Court of Appeal upheld those conclusions.

[327] In his cross-appeal, the AGQ challenges the conclusion of the courts below that s. 8 infringes s. 3 of the *Charter*. The AGQ submits that the courts below erred in basing their analysis on the democratic right of citizens to seek election as a member of Quebec's legislative assembly rather than on the freedom of these citizens to wear religious face coverings. According to the AGQ, this is an error because s. 33 of the *Charter* shields Bill 21 from any inconsistency with s. 2(a) of the *Charter*, which protects the right to freedom of conscience and religion. The AGQ submits that the

courts below erred in grounding a supposed infringement of s. 3 in what is, in reality, an analysis of freedom of religion.

[328] The AGQ's arguments are doomed to fail. As I will explain, s. 3 of the *Charter* protects the right of every citizen, without exception, to stand for election to the National Assembly. Any law that impedes the ability of some persons to exercise this right infringes s. 3. This section does not independently guarantee freedom of religion or equality, but it does prohibit actually or effectively depriving someone of the right to vote and to be qualified for membership in a legislative body. The scope of the democratic protections found in s. 3 is broad. They cannot be circumvented or limited in any way by invoking s. 33 of the *Charter*.

(1) Parliamentary Privilege

[329] Before turning to the analysis under s. 3 of the *Charter*, I must deal with a preliminary question relating to parliamentary privilege. In the courts below, the AGQ argued that the impugned provisions of Bill 21 were insulated from judicial review under the *Charter* as a result of parliamentary privilege. The respondent François Paradis, the President of the National Assembly at the time Bill 21 was enacted, intervened before the Court of Appeal to ask it not to rule on the question of parliamentary privilege in the absence of an adequate record and full argument from the National Assembly. The Court of Appeal granted that request, finding that it was not appropriate in the circumstances to consider that question. In the appeals before this Court, Mr. Paradis urges us to do likewise. In his cross-appeal, the AGQ is, in any

event, no longer relying on parliamentary privilege to defend the impugned provisions of Bill 21.

[330] In my view, the approach adopted by the Court of Appeal should be followed. The question of parliamentary privilege was not argued on the merits before this Court. To respect the National Assembly's position, I will therefore not consider this question any further. For the purposes of the present analysis, I will assume, without definitively deciding the matter, that parliamentary privilege does not insulate the impugned provisions from judicial review as regards their compliance with s. 3.

(2) Scope of Section 3 of the *Charter*

[331] The democratic rights enshrined in s. 3 of the *Charter* "li[e] at the heart of Canadian democracy" (*Frank*, at para. 25). The broad, untrammeled language used in s. 3 "signal[s] the special importance" of the rights it protects (*ibid.*, quoting *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11). This Court has noted that a broad and liberal interpretation of s. 3 shows that this provision protects an array of values that are fundamental to our democratic society, including "respect for the diverse interests of a broad range of citizens, fairness in political discourse, and the importance of citizen participation in political life for public faith in our laws and institutions" (*Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.*, 2025 SCC 5, at para. 8, citing *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at pp. 181-82 and 188, *Figueroa v. Canada (Attorney*

General), 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 27-30, and *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 70 and 72).

[332] The singular importance of s. 3 can also be gauged by the fact that it is not among the *Charter* provisions enumerated in s. 33(1). This means that Parliament or a legislature cannot invoke s. 33 to override the democratic rights protected by s. 3. These same rights play an integral role in the logic of s. 33 itself. As I have explained, when a legislative body chooses to exercise its power to override one or more rights or freedoms protected by the *Charter*, the final say on the appropriateness of this course of action lies with the electorate, which, through elections held at regular intervals, is able to express its opinion on the policies adopted by the government of the day. The s. 33 mechanism thus acts as an accountability tool, since it allows voters to decide whether the exercise of the override power is legitimate (see Leckey and Mendelsohn, at pp. 198-99). Therefore, democratic rights are not only of great importance in themselves, but also protect the other fundamental *Charter* rights and freedoms that are subject to override. This explains the broad scope that this Court has consistently afforded to the rights enshrined by s. 3.

[333] This Court has long recognized that the purpose of s. 3 is to guarantee the right of every citizen "to participate meaningfully in the electoral process" (*Frank*, at para. 26, citing *Figueroa*, at paras. 25-26). As the Court explained in *Frank*:

> Civic participation is fundamentally important to the health of a free and democratic society. Democracy demands that each citizen have a genuine opportunity to participate in the governance of the country through the

> electoral process. If this right were not protected adequately, ours would not be a true democracy.
>
> (para. 26, citing *Figueroa*, at para. 30.)

[334] This Court has adopted a broad interpretation of the right to vote, stressing that it encompasses more than a bare right to place a ballot in a box. The right to vote includes the "right to 'effective representation'" (*Reference re Prov. Electoral Boundaries (Sask.)*, at p. 183). In a representative democracy like ours, the right to democratic participation comprehends "the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative" (*ibid.*; see also *Working Families*, at para. 29).

[335] The scope of the right to be qualified for membership in the House of Commons or a legislative assembly must be interpreted in a similarly broad and purposive manner. The right to be qualified for membership includes not only the right to run for election but also the right to participate in the legislative process if elected (*Reference re Prov. Electoral Boundaries (Sask.)*, at p. 183, citing *Dixon v. B.C. (A.G.)*, [1989] 4 W.W.R. 393 (B.C.S.C.), at p. 413).

[336] This aspect of these appeals therefore concerns the right enshrined by s. 3 to be qualified for membership in a legislative body and the right to participate in the legislative process flowing therefrom. In *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, this Court recognized that s. 3 guarantees to citizens that

qualification is "automatic regardless of any criteria set out by statute" (para. 28). Indeed, this Court firmly rejected the idea that any limitation or restriction on the rights protected by s. 3 must first be weighed against the interests represented by the section to determine whether an infringement has occurred (paras. 29-30).

[337] In this regard, the right to be qualified for membership necessarily includes the right to sit in a legislative assembly and to participate in the legislative process. The question we must answer is therefore whether Bill 21 prevents a citizen who has been duly elected from sitting in the National Assembly or from participating in the legislative process.

(3) Application to Section 8 of Bill 21

[338] Given the broad scope of the protections conferred by s. 3 of the *Charter*, the infringement resulting from s. 8 of Bill 21 is clear. Section 8 of Bill 21 provides that members of the National Assembly must exercise their functions with their face uncovered. This requirement prevents members whose religious convictions call for the wearing of a face covering from exercising their right to sit in the National Assembly and to participate in the legislative process. Section 8 of Bill 21 thereby limits the ability of these members to exercise their democratic rights under s. 3 of the *Charter*. According to this Court's teachings in *Harvey*, such a limit is an infringement of s. 3 that needs to be justified.

[339] I do not accept the AGQ's position that such an analysis is necessarily based on freedom of religion. The analysis is not focused on the right to express one's religious convictions by covering one's face; rather, it is a matter of recognizing that, as the trial judge noted, some citizens in Quebec are prevented from exercising their democratic rights because of the prohibition set out in s. 8 of Bill 21. These citizens have a constitutional right to run for election and, once elected, to represent their constituencies by participating in the legislative process. Where a law has the effect of preventing a duly elected person from participating in the legislative process, the law infringes the right to sit in a legislative assembly and thus the right to be qualified for membership therein guaranteed by s. 3.

[340] The AGQ argues that a limit on democratic participation based on religion or a citizen's other protected characteristics does not infringe s. 3 where the legislative body has invoked s. 33 in order to exempt a law from the application of s. 2(a) or 15 of the *Charter*. In advancing this argument, the AGQ is essentially attempting to rely on the invocation of s. 33 to justify an indirect infringement of the right to be qualified for membership in the National Assembly. In my view, this argument is doomed to fail. An override declaration under s. 33 does not change the scope of s. 3 of the *Charter*, since s. 3 is not one of the *Charter* provisions enumerated in s. 33(1).

[341] To summarize, s. 8 of Bill 21 prevents persons elected to the National Assembly whose religious beliefs require them to wear a face covering from exercising

their right to sit in the National Assembly and to participate in the legislative process. This is an infringement of s. 3 of the *Charter*.

[342] Determining whether s. 8 of Bill 21 can nonetheless be saved would normally require considering whether this infringement is a reasonable limit that can be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*. However, as in the courts below, the AGQ has presented no arguments on this point. In the circumstances, and without making any further comment on the wisdom or appropriateness of such an approach, no justification of the infringement of s. 3 is possible (see *Frank*, at para. 42; see also *Reference re Remuneration of Judges*, at para. 278). This does not mean, of course, that if the AGQ had presented arguments and evidence to justify the infringement of s. 3, such a justification could not have been possible. However, the onus is on the state to justify any infringement of *Charter* rights, and the AGQ has chosen not to undertake this exercise here. Accordingly, s. 8 of Bill 21 constitutes an unjustified infringement of s. 3 of the *Charter* and, to the extent that it applies to members of the National Assembly, is of no force or effect by virtue of s. 52(1) of the *Constitution Act, 1982*.

(4) Application to Section 6 of Bill 21

[343] The Lord Reading Society argues that the scope of the protection accorded by s. 3 of the *Charter* extends to guaranteeing citizens an equal right to be qualified for the exercise of parliamentary and ministerial functions once elected. It ties this guarantee not only to the right to be qualified for membership in a legislative body but

also to the right of voters to participate effectively in the democratic process. The Lord Reading Society submits that the effect of s. 6 of Bill 21, which prevents the persons exercising the functions of Minister of Justice or President or Vice-President of the National Assembly from wearing religious symbols, is to create [TRANSLATION] "two classes of elected representatives: those who could participate fully in the political process and those who would be partially excluded from it" (A.F., at para. 79).

[344] The courts below rejected this argument. They concluded that the rights conferred by s. 3 of the *Charter* extend neither to being eligible to exercise certain functions within the executive branch nor to being qualified for functions within the National Assembly itself. As a result, s. 6 of Bill 21 does not engage the rights guaranteed by s. 3.

[345] I agree with those conclusions. Indeed, as the courts below found, s. 3 does not guarantee to citizens that they will be qualified to serve as a member of the executive. Although by constitutional convention the Minister of Justice in Quebec is generally also a member of the National Assembly, the function of minister is outside the legislative branch and is separate from a member's legislative mandate. There is no legal impediment preventing anyone from being appointed Minister of Justice, even without being a member of the National Assembly (see Brun, Tremblay and Brouillet, at para. V-2.75). Consequently, qualification for exercising the function of Minister of Justice is beyond the scope of s. 3, which is concerned solely with qualification for legislative functions and effective representation of citizens in the Assembly. To the

extent that s. 6 of Bill 21 creates an impediment to becoming Minister of Justice for some persons, it does not infringe s. 3 of the *Charter*.

[346] I am of the same view with regard to the limits that s. 6 of Bill 21 imposes on the persons who exercise the functions of President or Vice-President of the National Assembly. As I have explained, s. 3 of the *Charter* protects the right of every citizen to be qualified for membership in a legislative body and, once elected, to exercise the legislative functions required of members. This broad protection furthers one of the objectives underlying democratic rights, both for citizens who cast votes and for those who run for election: meaningful participation in the democratic process (*Frank*, at para. 26).

[347] In my opinion, s. 3 of the *Charter* does not guarantee members a right to be qualified for the functions of President or Vice-President of the National Assembly. The functions of the President and the Vice-Presidents are part of the internal operation of the Assembly as a legislative body; they do not confer special or additional legislative powers on the members who exercise them. There is no doubt that these functions are essential to the National Assembly's work; the President and Vice-Presidents perform important leadership and facilitation roles that ensure the proper functioning of the Assembly. However, no member is less able to exercise their legislative functions, represent voters or participate in the process of democratic governance because they cannot hold the office of President or Vice-President of the National Assembly. Further, no voter is deprived of the opportunity to participate,

through their elected representative, in the legislative proceedings of the National Assembly. Accordingly, these functions are not among the legislative functions that are necessary for the participation in the legislative process protected by s. 3 of the *Charter*.

[348] In conclusion, I agree with the AGQ and with the conclusion of the courts below that s. 6 of Bill 21 does not infringe s. 3 of the *Charter*.

K. *Bill 21 Does Not Infringe Section 23 of the Charter*

[349] Section 23 is in the part of the *Charter* entitled "Minority Language Educational Rights". It provides, in part, as follows:

> **Language of instruction**
>
> **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.

[350] The EMSB et al. submit that Bill 21 infringes s. 23 by prohibiting English-language school boards from recruiting teachers who wear a religious symbol. According to the EMSB et al., Bill 21 thus imposes cultural norms on the English-

speaking minority that undermine its autonomy, its culture of open secularism and its ability to support the success of its students, thereby encroaching on its exclusive right of management and control with respect to the recruitment of personnel.

[351] The Court of Appeal rejected these arguments. It found that s. 23 is intended to protect culture only in its linguistic dimension:

> [TRANSLATION] 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. . . . 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. [para. 557]

[352] I agree with the Court of Appeal's conclusion that Bill 21 does not infringe s. 23 of the *Charter*. However, I do not entirely agree with its reasoning on the scope of this provision.

[353] As I will explain, s. 23, interpreted purposively, protects the linguistic minority's language and culture — beyond its strictly linguistic dimension — without excluding minority educational facilities from provincial legislative jurisdiction. While this section gives the minority a right of management and control over the aspects of education that directly affect the transmission of its language and culture, this right must be reconciled with the province's legitimate interest in regulating education.

[354] Applied to the specific context of Quebec's English-speaking minority, these principles lead to the conclusion that although Bill 21 has an impact on certain decisions falling within the minority's right of management and control, including with respect to the hiring of personnel, it does not impede the transmission of either the English language or the cultural references of this minority in a manner that is inconsistent with the preventive, remedial and unifying objectives of s. 23.

(1) Principles for Interpreting Section 23 of the *Charter*

[355] Language rights, like all *Charter* rights, must be given a broad and liberal purposive interpretation that is focused on advancing their purpose, in a manner consistent with the preservation and development of official language communities and with the cardinal values that these rights embody (*Beaulac*, at para. 25; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 27). These rights are fundamental for linguistic minorities given that "[l]anguage is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it" (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362; see also *Ford*, at pp. 748-49). The language rights entrenched in our Constitution thus express our nation's commitment to the substantive equality of linguistic communities, which is reflected in the equality of their respective languages and cultures (see *Report of the Royal Commission on Bilingualism and Biculturalism*, Book I, *The Official Languages* (1967), at p. xxxix, para. 62). Their interpretation must, in this regard, reflect their dual dimension, both individual and collective (*Beaulac*, at para. 20; *Solski (Tutor of) v.*

Quebec (Attorney General), 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 33; *CSFCB*, at para. 17).

[356] The purpose of s. 23 of the *Charter* is to preserve Canada's two official languages, as well as the cultures they represent, and to help ensure that they flourish in provinces where they are not spoken by the majority (*Mahe*, at p. 362). Section 23 has a threefold objective that is preventive, remedial and unifying in nature (*CSFCB*, at para. 15; *Mahe*, at pp. 362-64; *Solski*, at paras. 3 and 33; *Arsenault-Cameron*, at para. 27).

[357] From a preventive standpoint, s. 23 seeks to stem the erosion of minority language communities in the face of assimilative pressures from the majority (*CSFCB*, at para. 11, quoting *Reference re Secession of Quebec*, at para. 74; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, at para. 27). Educational facilities are one of the main vehicles for transmitting the language and culture of the linguistic minority. It is from this perspective that s. 23 recognizes the right of linguistic minority parents to have their children receive instruction in their language throughout Canada (*Mahe*, at p. 362). The preventive function of s. 23 is not based solely on a future-oriented rationale of preservation, but also rests on the need to enable minority language communities to live and flourish fully in their language and culture in the present (see *Solski*, at paras. 4-5).

[358] Section 23 is also remedial in nature, because it is based on recognition of the inadequacy of the protections conferred on the language of instruction of minority language communities and because its objective is to remedy the past injustices that made the constitutional entrenchment of this provision necessary (*Mahe*, at p. 363; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 79). The report of the Royal Commission on Bilingualism and Biculturalism specifically highlighted the refusal of several provinces in the late 19th and early 20th centuries to grant French-speaking minorities access to instruction in their language (*Report of the Royal Commission on Bilingualism and Biculturalism*, Book II, *Education* (1968), at paras. 114-32; see also *CSFCB*, at para. 8).

[359] Lastly, s. 23 also has a unifying objective, insofar as it allows members of linguistic communities to settle anywhere in the country without having to give up their language or their cultural identity (*Solski*, at para. 30, quoting *House of Commons Debates*, vol. III, 1st Sess., 32nd Parl., October 6, 1980, at p. 3286 (Hon. J. Chrétien)). As such, it helps to ensure continuity in minority language instruction and to preserve family unity (*Solski*, at para. 30). Even more fundamentally, this section reflects the commitment of two of the founding language groups to building a country based on a true partnership grounded in cooperation and tolerance (see *Rose-des-vents*, at para. 25, quoting *Assn. des Parents Francophones (Colombie-Britannique) v. British Columbia* (1996), 27 B.C.L.R. (3d) 83 (S.C.), at para. 24; see also *Société de l'Acadie*, at para. 43).

[360] From this perspective, the practical scope of the obligations resulting from s. 23 must always be assessed in light of the historical, social and demographic realities in which they arise (*CSFCB*, at para. 17; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 850-51; *Arsenault-Cameron*, at para. 27; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 27). This approach requires consideration of the "official languages dynamics in each province" (*Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 26, citing *Reference re Public Schools Act (Man.)*, at p. 851, *Ford*, at pp. 777-78, and *Solski*, at para. 7). The courts thus "have the delicate task of reconciling the sometimes divergent concerns of French-speaking minority groups outside Quebec, whose language rights have been acquired at considerable expense, with the particular reality of Quebec's English-speaking minority and with how French-speaking Quebecers, who are in the majority in that province but whose language is in the minority in the country as a whole, perceive their future in Canada" (*CSFCB*, at para. 17, citing *Solski*, at para. 5).

(2) Scope of Section 23 of the *Charter*

[361] That being said, a few considerations relevant to the general scope of the protections conferred by s. 23 of the *Charter* should be discussed. As noted above, any interpretation of s. 23 must take into account the provinces' legitimate interest in legislating with respect to education. While s. 23 grants broad and generous protection to official language minority communities, it does not exclude them from provincial

legislative jurisdiction. Only laws that affect the management and control of minority language educational facilities in a manner that interferes with the minority's "linguistic and cultural concerns" will infringe s. 23 (see *Mahe*, at p. 380; *Arsenault-Cameron*, at para. 53). Therefore, to understand whether Bill 21 infringes s. 23, it is necessary to first look briefly at provincial jurisdiction over education, the linguistic and cultural significance of s. 23 and the right of management and control that it protects.

(a) *Provincial Power to Legislate With Respect to Education*

[362] As this Court has stated on several occasions, the *Charter* recognizes the importance of respect for federalism, and notably for provincial legislative jurisdiction over education, in the interpretation of language rights (*Yukon Francophone School Board*, at para. 68, quoting *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, at para. 56; *Solski*, at para. 10).

[363] Section 93 of the *Constitution Act, 1867* gives the provinces exclusive jurisdiction over education (*Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at p. 389; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 32).

[364] Section 23 of the *Charter* does not exclude this provincial power to regulate education (see *Mahe*, at p. 380). Minority educational facilities are not enclaves

excluded from provincial legislative jurisdiction, and s. 23 does not give linguistic minorities absolute autonomy over all aspects of education. On the contrary, the provinces have "a legitimate interest in the provision and regulation of minority language education" (*Solski*, at para. 10, citing *Arsenault-Cameron*, at para. 53). The provinces must therefore be given "latitude . . . broad enough" for them to legislate on "the content and the qualitative standards of educational programmes" (*Solski*, at para. 34; *Mahe*, at p. 380) and, in the same way, on the requirements relating to teachers' qualifications.

[365] In principle, provincial laws apply equally to majority language educational facilities and to those of the minority. This remains the case as long as a law does not "interfere with the linguistic and cultural concerns of the minority" (*Mahe*, at p. 380; see also *Arsenault-Cameron*, at para. 53). Understanding the extent of the "linguistic and cultural concerns of the minority" requires further consideration of the nature of the constitutional protection conferred by s. 23.

(b) *Linguistic and Cultural Dimensions of Section 23*

[366] According to the Court of Appeal, the central question with respect to s. 23 is whether this provision protects the minority's culture beyond its linguistic dimension.

[367] There is no doubt that the constitutional protection conferred by s. 23 is anchored in language. The *Charter* introduces s. 23 with the heading "Minority

Language Educational Rights" ("*Droits à l'instruction dans la langue de la minorité*"). These rights are granted to rights-holder parents partly on the basis of the first language they learned and still understand or the language in which they received their primary school instruction (s. 23(1)(a)[3] and (b)).

[368] That being said, s. 23 cannot be reduced to its linguistic dimension. A review of the history of language rights protection and of the purpose of this provision shows that it is part of a commitment to the substantive equality of the official language communities in Canada, a commitment that requires protection of the culture of the minority community, beyond language itself.

[369] The entrenchment in the *Charter* of several provisions guaranteeing language rights, including ss. 16 to 20 and 23, followed a period of growing linguistic and cultural tensions in Canada between French-speaking and English-speaking communities in the 1950s and 1960s. Fearing the emergence of a national unity crisis, Prime Minister Lester B. Pearson established the Royal Commission on Bilingualism and Biculturalism, which he tasked with examining issues related to the language and culture of English speakers and French speakers in Canada, including education. The Commission was a "major force in the eventual entrenchment of language rights in the *Charter*" (*Mahe*, at p. 362).

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[3] To date, neither the National Assembly of Quebec nor the Quebec government has given its authorization for s. 23(1)(a) to come into force. This provision therefore does not apply in Quebec pursuant to s. 59 of the *Constitution Act, 1982*.

[370] In its final report, the Commission stressed the importance of a commitment to an equal partnership between the official language communities in Canada. In this regard, the report underscored the dual dimension of linguistic equality, which is meant to preserve the language *and* culture of the two communities in order to ensure their substantive equality (Book II, at paras. 9-11). While it recognized the intrinsic connection between language and culture and the role played by the former in preserving the latter, the Commission stated that "[l]anguage and culture are not synonymous" (para. 9). Indeed, it specified that "the vitality of the language is a necessary condition for the complete preservation of a culture, but it is not at all the sole condition" (Book I, at p. xxxvii, para. 56 (emphasis added; emphasis in original deleted)).

[371] The dual linguistic and cultural dimension identified by the Commission is part of the historical and social context that led to the recognition of these educational rights. As Dickson C.J., writing for the Court, stated in the leading case of *Mahe*, s. 23 represents a "linchpin in this nation's commitment to the values of bilingualism and biculturalism" (p. 350 (emphasis added)). Canada's commitment to these two principles is a foundational element of the country, setting it apart from other countries (*Rose-des-vents*, at para. 25, citing *Assn. des Parents Francophones (Colombie-Britannique)*, at para. 24). More recently, in *CSFCB*, this Court noted that "[s]ection 23 is intended to preserve culture and language, two core elements of the notions of identity and well-being of individuals and communities" (para. 13, citing W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 89). The

conception of language rights put forward in the Commission's report is thus an integral part of our s. 23 jurisprudence (see *Mahe*, at pp. 362-63; *Reference re Public Schools Act (Man.)*, at p. 849; *Arsenault-Cameron*, at para. 30; *Doucet-Boudreau*, at para. 27; *Rose-des-vents*, at para. 26).

[372] The purpose of s. 23 is therefore not confined to the protection of the French language outside Quebec and the English language in Quebec. The provision is intended more broadly to protect official language minority communities against the erosion of their language and culture by guaranteeing educational rights to them (see *Rose-des-vents*, at para. 27; *Arsenault-Cameron*, at para. 26; *Mahe*, at p. 364; *CSFCB*, at para. 11; see also *Reference re Secession of Quebec*, at para. 74). It strives "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" (*CSFCB*, at para. 11 (emphasis added), quoting *Reference re Secession of Quebec*, at para. 74). The legitimate linguistic and cultural concerns of the minority contemplated by s. 23 must be assessed in light of these imperatives.

[373] Achieving this purpose requires the protection of language *and* culture, the latter of which encompasses non-linguistic aspects like history, traditions, artistic and literary works as well as other components of cultural heritage that shape the identity of the minority language community. These components of cultural heritage need not be exclusive to the linguistic minority or entirely distinct from those of the majority group. As the trial judge noted, [TRANSLATION] "[r]ecognition of the rights guaranteed

by section 23 of the Charter does not depend on the existence of a social divide" (para. 966). These components must, however, be part of the linguistic and cultural specificity of that minority, which gives it roots and defines it. The transmission of these components of identity plays an essential role both on a collective level, in preserving minority communities, and on an individual level, in safeguarding the dignity of their members. Students from the minority belong to a distinct cultural group, which is entitled to pass on to its members the historical and contemporary points of reference that allow them to find their place in their province and their country (Royal Commission on Bilingualism and Biculturalism, Book II, at para. 382). Therefore, as the Commission's report noted, in addition to guaranteeing the right to instruction in the minority language, language rights allow the minority to shape the educational program in its institutions in order "to stress the cultural heritage of the minority group" (para. 11). However, it is important to note that s. 23 is not intended to protect all of the cultural concerns that members of a minority may share, including political concerns. Rather, this provision is meant to protect the concerns that affect its vitality and its development as a minority language group.

[374] An interpretation of s. 23 that seeks only to protect language or the linguistic dimension of culture cannot be reconciled with the history and purpose of this provision, which is meant to embody Canada's commitment to "give effect to the equal partnership of the two official language groups in the context of education" (*CSFCB*, at para. 20, quoting *Arsenault-Cameron*, at para. 26; see also *Mahe*, at p. 364).

I therefore see little point in drawing formalistic lines between the linguistic and non-linguistic aspects of culture. Section 23 protects both.

[375] With respect, the Court of Appeal's approach, which involves separating the linguistic dimension of the minority's culture from its non-linguistic dimension and protecting only the former, is consistent with neither the purpose nor the scope of s. 23 (see paras. 557 and 614). To conclude otherwise would be to adopt an unduly narrow interpretation of s. 23, contrary to its purpose of preserving the two official languages and the cultures they represent and ensuring that minority language communities flourish (*Mahe*, at p. 362).

(c) *Right of Management and Control*

[376] This Court's jurisprudence recognizes that the protection conferred by s. 23 has several inextricable components: the right to instruction, the right to educational facilities, the right to some degree of management and control of these facilities, and the right to an education comparable in quality to that provided to the linguistic majority (see *Mahe*). The implementation of these components furthers the preventive, remedial and unifying objectives of language rights, while also being a concrete expression of the country's commitment to the substantive equality of minority communities.

[377] The right of the linguistic minority to manage and control educational facilities is a central element of the scheme of protection established by s. 23. It gives

the minority real decision-making power over the aspects of education that affect its language and culture (*Mahe*, at p. 375). This power is meant to ensure that the instruction provided actually responds to the minority's linguistic and cultural concerns in order to help its language and culture flourish.

[378] As this Court has recognized, management and control of educational facilities by the linguistic minority are necessary because many administrative and pedagogical decisions relating to education, including as regards the curriculum, the hiring of personnel and the allocation of financial resources, can affect linguistic and cultural concerns (*Mahe*, at p. 372). These powers are therefore an essential condition to ensure that the education provided in the minority language is equivalent in quality to that received by the majority and to prevent management or administrative decisions from unduly impairing the interests of the minority. This Court recognized in *Mahe* that decisions relating to management issues in education can affect the health and survival of the minority's language and culture "in subtle but important ways" (*ibid.*).

[379] Enabling the linguistic minority to exercise real decision-making power also serves a remedial objective. This power is intended to "correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns" (*Arsenault-Cameron*, at para. 45). The history of the treatment of French-speaking minority communities in fact shows that it is unrealistic to hope to achieve substantive equality in education between the official language communities without entrusting the

management and control of educational facilities to the members of the minority itself (*CSFCB*, at para. 149; M. C. Power, "Les droits linguistiques en matière d'éducation", in M. Bastarache and M. Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 657, at p. 723).

[380] The scope of the right of management and control recognized by s. 23 is not uniform, however. The implementation of this provision is governed by the sliding scale principle, under which the extent of the services offered and the degree of control granted to the linguistic minority depend on the number of rights holders who will take advantage of minority language instruction (*Mahe*, at p. 384; *Arsenault-Cameron*, at para. 32; *CSFCB*, at paras. 58-60).

[381] At the low end of this scale, s. 23 rights holders can have their children receive instruction in the language of the official language minority (*Mahe*, at p. 367). At the upper end, the linguistic minority will have separate educational facilities and sometimes even independent school boards (p. 377). In this latter case, the minority has a right to manage and control these facilities and school boards.

[382] Where this upper end is reached, the right of management and control entails real and exclusive decision-making power, exercised by the representatives of the linguistic minority, over matters relating to instruction in the minority language and to the facilities where such instruction is given. This power includes the allocation and management of funds for minority instruction and facilities, the appointment and direction of those responsible for the administration of such instruction and facilities,

the establishment of educational programs, the recruitment, hiring and assignment of teachers and other personnel, and the making of agreements on education and services for students from the minority (*Mahe*, at p. 377).

[383] That being said, s. 23 does not confer an absolute right of management and control. The concerns of linguistic minorities with respect to education must be reconciled with the provinces' power to legislate in this area, in order to preserve the constitutional balance between the provincial jurisdiction recognized by the *Constitution Act, 1867* and the language rights guaranteed by the *Charter*. As this Court recognized in *Arsenault-Cameron*, the province continues to have a legitimate interest in the content and qualitative standards of the educational programs that apply to official language communities, and it can therefore establish and impose educational programs provided that they do not interfere with the legitimate linguistic and cultural concerns of the minority (para. 53). It follows that a law or decision affecting matters that normally fall within the minority's power of management and control will not necessarily be contrary to s. 23. Rather, such a measure must be assessed in light of its tangible impact on the minority's ability to preserve and transmit its language and culture through education and to have its specific needs adequately taken into account. Thus, only a measure that, in its scope or its effects, compromises these interests in a manner not consistent with the general purpose of s. 23 will infringe this provision.

(3) Application

[384] As I have said, the analysis of the alleged infringement of s. 23 must be grounded in the particular historical, social and demographic context of Quebec's English-speaking minority. The purpose of s. 23, which is aimed at preserving the two official languages and the cultures they represent and helping to ensure that they flourish, is grounded in a context where the vulnerability of minority language communities puts them at risk of being assimilated or marginalized within a majority environment.

[385] It is important to acknowledge from the outset that, since well before the enactment of the *Charter*, Quebec's English-speaking community has had an organized network of public educational facilities that are equivalent in quality to those of the French-speaking majority (Royal Commission on Bilingualism and Biculturalism, Book II, at para. 74). It is also common ground that the English-speaking minority, through its school boards, exercises a broad power of management and control over its educational facilities, corresponding to the highest level identified in *Mahe*.

[386] The determinative question is not whether Bill 21 affects this prerogative normally exercised by minority school boards, but whether the obligations it contains have the tangible effect of impairing the linguistic minority's ability to preserve and transmit its language and culture through education, in a manner inconsistent with the preventive, remedial and unifying objectives of s. 23.

[387] It is true that Bill 21 limits the ability of English-language school boards to hire, retain and promote certain persons as teachers, principals and vice principals of

schools. It restricts access to a number of functions for persons who wear religious symbols. However, the EMSB et al. have not shown that this restriction interferes with a linguistic or cultural concern that is specific to the English-speaking minority and is protected by s. 23, in a manner inconsistent with the general purpose of this guarantee.

[388] Without disputing the fact that the French-language public education system recognizes and values cultural and religious diversity, the trial judge found that English-language school boards attach particular importance to the recognition and celebration of ethnic and religious diversity, as evidenced by their internal policies. He also accepted that the representativeness of school personnel may facilitate the integration and success of students from socio-cultural and religious minority groups. However, the judge did not conclude that religious diversity and a conception of secularism that accepts the wearing of religious symbols are, as such, elements of the culture of the English-speaking minority for the purposes of s. 23. The absence of such a conclusion is determinative in this case, despite the other findings made by the judge concerning the values promoted by English-language school boards.

[389] It should be remembered that the rights conferred by s. 23 do not belong to school boards, but to rights holders. School boards are "favoured vehicles for the concerns of official language minorities" (*CSFCB*, at para. 86). They play an essential role in the management and control of minority educational facilities (*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, at para. 63). These bodies have

expertise in assessing the special educational needs of the minority and making choices about the management measures that will best encourage the flourishing of the minority (*Mahe*, at p. 373; *Commission scolaire francophone des Territoires du Nord-Ouest*, at para. 63). They are therefore "legitimate representatives" of language rights holders when it comes to their concerns and interests (*Arsenault-Cameron*, at para. 51). However, school board policies cannot, in themselves, define what constitutes a protected cultural concern of the linguistic minority, in the absence of broader evidence establishing that the minority actually shares this concern.

[390] Evidence about the internal policies of school boards, however relevant it may be in demonstrating their institutional values, is not sufficient to establish that the promotion of religious diversity is an integral part of the culture of the English-speaking minority whose preservation s. 23 is intended to ensure. Contrary to the approach adopted by the trial judge, an infringement of s. 23 cannot result from the mere fact that Bill 21 frustrates the choice of English-language school boards to encourage religious diversity in their hiring policies. To equate any organizational or pedagogical value with a protected cultural component would be to transform s. 23 into a right to complete institutional autonomy. This provision does not extend that far.

[391] More fundamentally, it has not been shown that Bill 21 produces effects that are inconsistent with the purpose of s. 23. The analysis of this provision must take into account the potentially deleterious effects of measures on the concerns of the linguistic minority, particularly when the measures may accelerate assimilation or

contribute to the erosion of the minority's culture. Such an infringement might be established if, for example, a hiring restriction concretely impaired the ability to recruit a sufficient number of teachers from the minority, as noted by the intervener the Commission nationale des parents francophones in the context of certain minority communities that are heavily reliant on immigration (I.F., at para. 25). In this case, however, no quantitative evidence was presented regarding the number of English-speaking school personnel members who wear religious symbols and who would actually be affected by Bill 21. Nor is there any evidence from which to conclude that the application of Bill 21 would deprive school boards of such a high proportion of their teaching personnel that it would undermine students' ability to receive an education rooted in the minority's language and culture.

[392] Similarly, no evidence was adduced about how Bill 21 might lead to increased linguistic assimilation or an erosion of Anglophone culture in Quebec. There is no data establishing that the alleged lack of religious representativeness among school personnel would have the effect of compromising the vitality of the minority language community, or that the application of Bill 21 would encourage members of the community to leave the province, to the point where the unifying objective of s. 23 would be undermined. Unlike with other minority contexts raised before the Court, it has not been shown that Bill 21 would compromise, in the Quebec context, the vitality of the English-speaking minority or its ability to preserve its educational facilities. I note that the above examples merely illustrate the range of evidence capable of establishing a connection between the prohibition on wearing religious symbols and

the preservation of Quebec's English-speaking community. Claimants are not obliged to present quantitative evidence in a s. 23 claim, as long as they show by other means that the impugned law or state action infringes on the protected interests of the linguistic minority. Here, this has not been shown.

[393] As the EMSB et al. argued, it is possible that the presence of school personnel members with diverse cultural or religious backgrounds helps some students succeed and thrive. The trial judge found that prohibiting teachers from wearing religious symbols could reduce diversity among the teaching personnel and negatively affect several aspects of students' education, particularly for those from religious and cultural minorities. In their case, lack of recognition of their personal identity at school could result in an increase in the social stigma associated with their culture or religion, a decrease in motivation and engagement and, ultimately, tangible repercussions for their academic success. His findings are supported by the expert reports presented at first instance (expert report of Thomas Dee, dated March 11, 2020, reproduced in joint schedules in the C.A., vol. 30 (at pp. 9976-10009), at paras. 59, 62, 67 and 70-71; expert report of Eric Hehman, dated June 3, 2020, reproduced in joint schedules in the C.A., vol. 32 (at pp. 10545-75), at para. 21). These points are relevant in understanding Bill 21's effects on the educational paths of these students. However, there is no reason to believe that these effects apply only to students from a religious minority who attend English-language schools in Quebec and not to those enrolled in French-language schools. Bill 21 therefore does not have a disproportionate impact on the quality of the education provided by English-language schools. With regard to the right of

management and control, a law having similar effects in both types of facilities could certainly endanger the cultural specificity of the minority language community. However, as I explained above, it has not been shown in this case that the prohibition on wearing religious symbols affects the linguistic and cultural concerns of the English-speaking minority protected by s. 23.

[394] There is therefore no established connection between the trial judge's findings emphasized by the EMSB et al. and the objectives of s. 23, which is intended to preserve the minority language community as a whole. Section 23 aims to ensure the transmission of the language and cultural references of the linguistic minority, not to constitutionalize a particular model of institutional diversity. By way of illustration, as the intervener the Acadian Society of New Brunswick properly points out, a measure that prohibited the teaching of foundational events in the history of a linguistic minority, like the Great Upheaval in New Brunswick's Acadian schools, could jeopardize the transmission of cultural references central to the linguistic minority's identity and eventually result in the loss of its cultural specificity. Such a prohibition would clearly be contrary to s. 23. This is not the case for Bill 21, which does not affect the language of instruction, educational content or the ability of English-language schools to transmit the narratives, values and interpretive frameworks that structure the linguistic minority's culture. In addition, Bill 21 does not prevent English-language educational facilities from recognizing, teaching or celebrating cultural and religious diversity through educational content, school activities or the historical references passed on to students.

[395] This Court has recognized, in *Mahe*, *Rose-des-vents* and *CSFCB*, that the impact of a law or decision on the quality of students' educational experience may be sufficient to establish an infringement of s. 23 of the *Charter*. However, these pronouncements must be contextualized in light of the particular facts of each of those cases as well as the preventive, remedial and unifying objectives that underlie s. 23. In those cases, the Court had to determine whether the inequality experienced by students from the French-speaking minority was likely to affect not only their self-fulfillment, but also the flourishing of the minority language community as a whole. Decisions that made the educational experience of children from the minority less attractive than that of their majority counterparts — including because of the quality of the facilities or the travel time required to get to school — had a tangible impact on parents' choice of a language of instruction for their children. Ultimately, this worsening of the educational experience was liable to contribute to the assimilation of the linguistic minority and compromise its vitality. However, these considerations are clearly absent from the present case. While it cannot be denied that the impugned measure results in a poorer experience for students from the religious minority, this decline is unrelated to the objectives of s. 23, which is intended to ensure substantive equality between the English-speaking and French-speaking communities. The record in this case does not establish that Bill 21 affects the experience of students attending English-language and French-language educational facilities differently, so as to undermine the objectives of s. 23.

[396] Moreover, there is no evidentiary basis on which to find that Bill 21 would lead to an erosion of the cultural heritage of the English-speaking community in Quebec or to a process of acculturation that s. 23 is specifically designed to prevent. Ultimately, while Bill 21 interferes with one aspect of the power of management and control exercised by English-language school boards, it does not impair the ability of the English-speaking minority to preserve and transmit its language and culture through education.

[397] For these reasons, I conclude that Bill 21 does not infringe s. 23 of the *Charter*.

L. *The Government's Count of the Number of Employees Wearing Religious Symbols Does Not Infringe the Charter*

[398] Before this Court, the FAE has raised a ground of appeal related to the constitutionality of the surveys conducted by the Ministère de l'Éducation et de l'Enseignement supérieur in November 2018 and January 2019 to gather information on the wearing of religious symbols by teachers and on the requests for accommodation received on religious, linguistic or ethnocultural grounds. School authorities were surveyed without any notification to the main persons affected, that is, school personnel members who wore a religious symbol and were the subject of this counting exercise. The FAE submits that this count infringes employees' freedom of religion and right to equality and is discriminatory because it results in differential and arbitrary treatment

that reinforces the stigmatization experienced by persons who wear a visible religious symbol.

[399] This argument was pleaded before the courts below, both of which rejected it. The trial judge found that there was no doubt that religious minorities, and particularly some Muslim women, experienced stigmatization, fear, humiliation, stress and anxiety and felt a sense of rejection as a result of the counting exercise. However, he was of the view that the state can legitimately seek to determine the features of its social fabric, which includes state employees. This process served a legitimate purpose, because its aim was to find out how many people would be affected by the prohibition on wearing religious symbols in schools and because the process might prove helpful in providing a justification for Bill 21 under s. 1 of the *Charter*. The Court of Appeal upheld the trial judge's conclusions.

[400] The ground of appeal raised by the FAE must be rejected. The FAE has not shown how these requests for information resulted in the infringement of the fundamental rights and freedoms of teachers wearing a religious symbol. Before this Court, it has presented no argument establishing that the counting exercise undermined teachers' right to equality or freedom of religion. Nor has the FAE identified any error in the trial judge's conclusion that the counting exercise served a legitimate purpose. It has not offered any argument that would justify disturbing the trial judge's conclusions. Like the Court of Appeal, I see no basis here for intervention by this Court.

V. Conclusion and Disposition

[401] In summary, Bill 21 is not of no force or effect for being inconsistent with pre-Confederation statutes, which have no constitutional status. It constitutes a valid exercise of provincial jurisdiction. Nor is it inconsistent with the constitutional architecture.

[402] Furthermore, Bill 21 is not invalid under s. 28 of the *Charter*, which does not confer a stand-alone right that a law could infringe. Since Bill 21's invocation of s. 33 of the *Charter* is valid, this law cannot be reviewed for constitutionality on the basis of ss. 2 and 7 to 15 of the *Charter*. Similarly, the valid invocation of s. 52 of the *Quebec Charter* precludes judicial review under ss. 1 to 38 of the *Quebec Charter*. Finally, Bill 21 does not infringe s. 23 of the *Charter*.

[403] Bill 21 is therefore valid and operative, apart from s. 8 thereof, which, to the extent that it applies to members of the National Assembly of Quebec, infringes s. 3 of the *Charter*. Since the infringement has not been justified under s. 1, I would uphold the Court of Appeal's conclusions.

[404] For these reasons, I would dismiss the appeals and the cross-appeal, without costs.

English version of the reasons delivered by

KASIRER J. —

I. Overview

[405] I have had the benefit of reading the reasons of my colleagues. Like the Chief Justice, I am of the view that the *Act respecting the laicity of the State*, CQLR, c. L-0.3 ("Bill 21"),[4] is valid by operation of s. 33 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*" or "*Charter*") and s. 52 of the *Charter of human rights and freedoms*, CQLR, c. C-12 ("*Quebec Charter*"), except to the extent that it infringes the rights guaranteed by s. 3 of the *Canadian Charter*. I agree with him that Bill 21 does not infringe the rights guaranteed by s. 23 of the *Charter*. Like him, I find that Bill 21 is not invalid under s. 28 of the *Charter*, subject to some clarification as to its scope, or on one of the other grounds raised on appeal. However, with respect for the contrary views, I find that the legislature's invocation of the override clauses does not preclude the courts from ruling on a law's consistency with ss. 2 and 7 to 15 of the *Canadian Charter* and with the relevant provisions of the *Quebec Charter*.

[406] This case invites the Court to consider the scope of s. 33 of the *Canadian Charter*, particularly on whether a court can render a declaratory judgment on the constitutionality of a statute protected by an override provision. To respond to this latter question, which to date has not been raised in the jurisprudence of our Court, the appellants and the respondents invoke, in turn, "the rule of law" — a concept at the heart of the Canadian constitutional culture and at the head of the *Canadian Charter* in

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[4] Bill 21 has been amended since the hearing of the case at first instance: provisions have been amended, repealed and added. In these reasons, I refer to the version of Bill 21 in force at the time of the hearing of the case at first instance.

its preamble — but they give it a different meaning and scope. At a high level, the appellants' arguments in support of their conclusions on the merits seem to emphasize the rule of law reflecting the primacy of the legal *right* (in French, "droit *subjectif*") — that is, an absolute supremacy of individual legal rights, like the freedom of religion or conscience, which would prevail even over s. 33. On the other hand, for the respondents, s. 33 focuses on one aspect of the rule of law relating to parliamentary supremacy — the pre-eminence of "law", in the sense of an enactment — a prominent theme in scholarship addressing the sometimes fraught relationship between the rule of law and legislative authority (see, e.g., T. Bingham, *The Rule of Law* (2010), c. 12, "The Rule of Law and the Sovereignty of Parliament"). This opposition translates into two differing readings of *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, giving rise to discordant interpretations of the scope of s. 33.

[407] These two conceptions of the rule of law are both incomplete and lacking in nuance; I would adopt neither of them to explain the effects of invoking s. 33. The rule of law does not depend solely on individual legal rights or on laws duly enacted; it refers instead to the rule of "*law*" (in French, "*droit objectif*"), understood as all of the rules imposed upon members of society under positive law (see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at pp. 748-51). From this perspective, the French word "*droit*" in the idea of rule of law has a broader meaning than the English words "right" or "enactment"; it is consistent with the expansive meaning that is given to the English word "law", and includes [TRANSLATION] "the primacy of constitutional law" (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel*

(6th ed. 2014), at para. IX.4, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 258).

[408] Neither of the two positions advanced provides a complete solution to the question of the consequences of invoking s. 33, the answer to which lies, in part, in the distinction to be drawn between the consistency and the validity of a statute with respect to the charters. Both the appellants and the respondents capture one aspect of the constitutional reality, but neither of them accounts for it fully, in that both sides are at once right and wrong. By adopting a reading of s. 33 that considers their two contrary positions, I arrive at a middle-ground solution. On the one hand, I would agree with the respondent the Attorney General of Quebec ("AGQ") as to the validity and operability of Bill 21, but on the other hand, I would allow the appellants' application to render a declaratory judgment bearing on its inconsistency with the charters. The scope of the declaration should also favour a middle course. It should be recognized that Bill 21 has a pressing and substantial objective within the meaning of *R. v. Oakes*, [1986] 1 S.C.R. 103. At the same time, I acknowledge the fact that the AGQ did not provide a complete justification of Bill 21's negative impact on the rights and freedoms of the appellants, despite bearing the burden to do so. At the end of the day, the parties must therefore take a step toward one another. This will draw their conflicting conceptions of the rule of law — based, on the one hand, on an absolutism of legal rights and, on the other hand, on an overly broad scope of parliamentary sovereignty — closer together.

[409] Because *Ford* did not determine every issue concerning the interpretation of the notwithstanding clause, it is necessary, particularly to decide the question of the discretion to render a declaratory judgment, to build upon *Ford* rather than overturn it. In this sense, I agree with the Quebec Court of Appeal when it stated, at para. 338, that this Court [TRANSLATION] "has not had to answer" the question of whether a remedy by declaratory judgment survives the use of s. 33 (2024 QCCA 254). However, with respect, I am of the view that s. 33 is not a "constitutional privative clause" (in French, "*disposition d'inattaquabilité constitutionnelle*") prohibiting any judicial review, including a declaratory judgment (para. 358). If s. 33 "protects" a statute from the application of a *Charter* provision (*Ford*, at pp. 742 and 788), it does so only for the purpose of protecting the impugned statute from a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*.

[410] It has never been stated in our jurisprudence that s. 33 shields a statute from all judicial review. Such a bar would be at odds with judicial independence, a cardinal principle associated with the rule of law and rooted elsewhere in the Constitution, including in s. 96 of the *Constitution Act, 1867* (see *Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 3). Moreover, the discretion to render a declaratory judgment falls within the inherent jurisdiction of the superior courts, which is not ousted by s. 33. The declaration I propose to make aims to resolve a "genuine problem", within the meaning of the provisions of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), that deal with declaratory remedies. This problem, namely the consistency of Bill 21 with the Canadian and Quebec charters, is in no way moot. Thus,

in the circumstances, a declaratory judgment has practical utility for the appellants and for the electorate.

[411] With due respect, the trial judge's refusal to grant a declaratory remedy was tainted by an error in principle as to the effects of invoking the override clauses (2021 QCCS 1466). This error warrants appellate intervention with respect to a decision that, ordinarily, is entitled to deference. That said, his error does not prevent us from observing that, throughout his reasons, the trial judge drew several conclusions based on the evidence adduced. These conclusions indicate that, in his view, Bill 21 infringes the freedom of religion and conscience, the freedom of expression as well as the right to equality. I take note of these conclusions.

[412] Accordingly, and in light of the findings made by the judge at the end of a nearly 30-day trial, I would declare, in the place of the Superior Court, that the rights and freedoms protected by ss. 2 and 15 of the *Canadian Charter* and by ss. 3 and 10 of the *Quebec Charter* have been infringed. Thus, I would agree with the appellants who seek, in the alternative, a declaratory judgment stating that s. 6 of Bill 21, which prohibits certain representatives of the state from wearing religious symbols in the exercise of their functions, infringes the freedom of conscience and religion, the freedom of expression and the right to equality. I would also agree with their request concerning s. 8, which requires designated personnel to exercise their functions with their face uncovered. I would not find that there has been a separate infringement of the guarantee of equality set out in s. 28, which, in the circumstances, does not prevail

over the notwithstanding clause, like ss. 2 and 15 with which it is connected. Whether this guarantee of equality rights for male and female persons has a broader function, like s. 10 of the *Quebec Charter*, is a question that need not be decided by the Court in the present case. However, the guarantee set out in s. 28 assumes particular normative importance in this case at the s. 1 justification stage.

[413] Moreover, under the s. 1 analysis, I would reject the appellants' argument that the Quebec legislature is not pursuing a substantial and pressing objective by legislating on the laicity of the state. The principles set out in Bill 21 itself make it possible to establish the legitimacy of the objective pursued. However, the justification of the infringements in a free and democratic society does not depend solely on the objective of the legislation; it also depends on the appropriateness of the legislative mechanisms enacted for its implementation. In my view, a misreading of *Ford* led the AGQ to believe, wrongly, that it was not necessary to submit contrary evidence for the purpose of a possible judicial declaration. Consequently, despite the pressing and substantial objective of Bill 21, these infringements have not been entirely justified under s. 1 of the *Canadian Charter* or s. 9.1 of the *Quebec Charter* by the party who bore the burden to do so.

[414] But, in spite of these unjustified infringements, I am of the view that Bill 21 is constitutionally valid under s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter* as a result of the override provisions, ss. 33 and 34, in Bill 21. In my opinion, the conditions and limits for ensuring the operability of Bill 21 are met here.

Accordingly, I propose to make a two-part declaratory judgment: even though ss. 6 (prohibition on wearing a religious symbol) and 8 (services with one's face uncovered in certain circumstances), read together with Schs. II and III, are *inconsistent* with the Canadian and Quebec charters, I would declare Bill 21 constitutionally *operative* and *valid*.

[415] Ultimately, I would allow the appeals, but only in part, and I would dismiss, like the Chief Justice, the cross-appeal of the AGQ. Given the divided outcome of the appeals, I would dispose of them without costs.

II. Is *Ford* Determinative of the Questions at Issue?

[416] Before applying the purposive approach to interpretation to resolve the questions relating to the operation and effects of s. 33 of the *Canadian Charter*, it is important to first ensure that these questions have not already been decided by this Court in *Ford*, as certain parties suggest.

[417] This Court's case law teaches that before applying or re-examining a precedent, it is first necessary to ensure that it is indeed an authority on the questions in the case at bar. As Martin J. recently pointed out for the majority of the Court, "[c]ases are only authorities for what they 'actually decide[d]'; they are not 'statutes where every word counts as binding legal authority'" (*R. v. Kirkpatrick*, 2022 SCC 33, [2022] 2 S.C.R. 480, at para. 85, quoting R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 148). It is therefore necessary to begin by determining "what

did [*Ford*] decide" (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57) and comparing this to the questions before the Court today.

[418] In my view, and contrary to what the Fédération autonome de l'enseignement ("FAE") argues, *Ford* should not be overturned, but should instead be clarified with respect to the questions relating to s. 33 that it left answered. This clarification exercise is different from that of overturning a precedent or distinguishing a case on its facts to circumvent its application while leaving its binding nature intact. Since this Court has been asked to decide a question of law different from the one decided in *Ford*, this leading case is inapplicable to the present case: "It is not even clear that it is right to talk about distinguishing a precedent in such instances", writes Professor Neil Duxbury, "for a court considers the earlier decision irrelevant to the case at hand, and therefore, for its present purposes, not really a precedent at all" (*The Nature and Authority of Precedent* (2008), at pp. 114-15). But *Ford* nonetheless retains its binding force in its scope of application. In this way, *Ford*'s authority should be left intact for the questions of law it actually dealt with, such as whether the legislature validly invoked s. 33 (p. 734). But, today, the Court can build upon *Ford* by clarifying it with respect to questions that did not arise in the 1988 appeal.

[419] Furthermore, one might question whether it is wise to depart from a binding precedent solely because, when it was rendered, the purposive approach to interpretation had not been formally advanced. In *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, for example, the Court had to consider how to interpret s. 121 of the

Constitution Act, 1867 and, in that exercise, assess whether *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424, was still a binding precedent. Even though the Court noted that *Gold Seal* had not been decided according to this approach, that did not prevent it, having undertaken this exercise anew, from confirming the decision by clarifying it and in particular by rendering explicit the principles with which *Gold Seal* was seen to be consistent (*Comeau*, at para. 101; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 8:13; H. L. Kong, "*Comeau* and Constitutional Interpretation" (2020), 94 *S.C.L.R.* (2d) 57, at p. 77).

[420] Revisiting a precedent in order to clarify and specify its scope is a delicate but often necessary exercise. For example, in *R. v. Hussein*, 2026 SCC 2, the Court was called upon to interpret one of its leading criminal law decisions. The majority of the Court explained that, even though the analytical framework from *R. v. Corbett*, [1988] 1 S.C.R. 670 — which, like *Ford*, dates back about 40 years — "has stood the test of time", they needed to "clarif[y]" it, and even "specify" it, to ensure "that it is applied in a predictable and principled manner" (para. 5). This approach is consistent with the logic of the orderly development of the law.

[421] One of the constitutional questions decided in *Ford* concerned the inconsistency of s. 214 of the *Charter of the French language*, R.S.Q., c. C-11, and of s. 52 of the *Act to amend the Charter of the French language*, S.Q. 1983, c. 56, with s. 33(1) of the *Constitution Act, 1982* (p. 732). The respondents argued that these override

provisions were inconsistent with s. 33(1) for three reasons: first, they comprised only a simple reference to the relevant *Charter* provisions; second, they had been enacted by way of an omnibus statute; and third, they produced retroactive effects (pp. 733-45; see the explanations of G. Webber, "The Notwithstanding Clause and the Precedent in *Ford*: *le dit et le non-dit*" (2023), 32:3 *Const. Forum* 13). Ultimately, the Court rejected the first two grounds of the inconsistency, but accepted the third.

[422] The *ratio* of *Ford* is therefore as follows: a valid override provision under s. 33(1) of the *Charter* can be limited to a numeric reference to sections of the *Charter* and be adopted through an omnibus statute, but it cannot have retroactive force. Furthermore, a legislative body need not specify the link between the law it wishes to put forward and the rights it seeks to override. But none of these elements are called into question in this case. As a result, *Ford* should not be overturned, as the FAE proposes, nor should the Court's comments in that decision be applied as a sort of straitjacket, as the AGQ argues.

[423] According to the AGQ, *Ford* definitively decided that no substantive condition governs the exercise of the declaratory power under s. 33 (R.F., at paras. 151-67). But this Court was not seized of that question in *Ford* and therefore did not "decide" it, be it explicitly or implicitly (*Henry,* at para. 57). The AGQ nevertheless relies on an excerpt from the reasons regarding the rejection of the first reason for invalidity — that is, the simple reference to the relevant section numbers of the *Charter* — where the Court stated: "Section 33 lays down requirements of form only, and there

is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case" (*Ford*, at p. 740).

[424] This statement does not have the decisive scope that the AGQ seeks to attribute to it. Care must be taken not to isolate this sentence from its context, and particularly the phrase "[s]ection 33 lays down requirements of form only". At that stage of the analysis, the Court was responding to the reasons of Kaufman, Mayrand, Jacques and Vallerand JJ.A. of the Quebec Court of Appeal in *Alliance des Professeurs de Montreal v. Attorney-General of Quebec* (1985), 21 D.L.R. (4th) 354, that a valid override provision could not merely refer to section numbers of the *Charter*. According to Jacques J.A., there existed "a further requirement of form: that the s. 33 declaration must indicate the link or relationship between the Act or legislative provision in question and the guaranteed right or freedom to be overridden" (*Ford*, at p. 740). The Court's response was directed to this proposition although it rejected the characterization of the requirement "of form" accepted by Jacques J.A., and suggested that this requirement would instead open the door to a substantive review of the use of the notwithstanding clause by a legislative body:

> Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review. It appears to require that the legislature identify the provisions of the Act in question which might otherwise infringe specified guaranteed rights or freedoms. That would seem to require a *prima facie* justification of the decision to exercise the override authority rather than

> merely a certain formal expression of it. There is, however, no warrant in the terms of s. 33 for such a requirement. [Emphasis added; at pp. 740-41.]

[425] *Ford* therefore underscores that: "[this] judicial oversight, however, does not extend to reviewing the policy rationale leading to the decision to invoke the clause in the first place" (E. M. Adams, "*Ford* Focus: Constitutional Context and the Notwithstanding Clause" (2024), 32:3 *Const. Forum* 33, at p. 41 (emphasis added)). While the Court stated that s. 33 precludes judicial review of the political appropriateness of a legislative body's use of the notwithstanding clause, it did not in any way decide the analysis of an override provision with respect to the rest of the Constitution or the availability of a declaratory judgment.

[426] However, the present case does not concern the political merits of the legislature's use of the notwithstanding clause, but the constitutional limits and legal consequences that govern its exercise. The phrase "protects . . . from the application . . . of the Canadian *Charter*" in *Ford* (p. 742) does not support the conclusion that the Court definitively decided, even implicitly, the question submitted in this case, that is, whether, by declaring a law valid under s. 52(1) of the *Constitution Act, 1982*, s. 33 leaves it to the inherent jurisdiction of a superior court to declare it consistent or inconsistent with the *Charter* (see R. Leckey and E. Mendelsohn, "The notwithstanding clause: Legislatures, courts, and the electorate" (2022), 72 *U.T.L.J.* 189, at pp. 190-93).

[427] Addressing the s. 33 mechanism really for the first time in *Ford*, the Court wisely adopted a minimalist approach and answered only the constitutional questions

before it. It is in this light that the academic criticism faulting this Court for an unduly textualist and restrictive approach in that case must be placed in context (N. Karazivan, "Infirmer *Ford*" (2026), 71 *McGill L.J.* 1; H. L. Kong, "Overturning *Ford*" (2023), 32:3 *Const. Forum* 21). While it is true that the Court adopted a somewhat textualist approach and did not, in particular, measure all the relevant constitutional principles or the purpose of s. 33 (*Ford*, at p. 740), this was simply because it was dealing with specific questions regarding the conditions under which the legislature may invoke the override power, which could be resolved by examining the formal and textual requirements of s. 33(1). To answer these questions at this formative stage of *Charter* interpretation, it was therefore sufficient for the Court to adopt a "posture of maximal restraint" (C. Mathen, "Federalism and the Notwithstanding Clause" (2024), 32:3 *Const. Forum* 1, at pp. 6-7) and thus leave a full review of the purpose of and limits inherent in s. 33 for another day. In *Ford*, the Court never had the intention of definitively deciding the questions that concern us today (Webber (2023), at p. 18).

[428] With respect to the appellants' argument that the Court may render a declaratory judgment despite the invocation of s. 33, I note that the Court of Appeal correctly acknowledged that this Court's jurisprudence until now [TRANSLATION] "has not had to answer the question as formulated" (para. 338). This is manifestly sound: in *Ford*, the Court was concerned with s. 33(1) of the *Charter*, that is, the conditions of the notwithstanding clause, instead of with s. 33(2), which deals with its operation (p. 732; Leckey and Mendelsohn, at p. 191; Adams, at p. 34; Webber (2023); A.

Majekolagbe, "Is the Notwithstanding Clause an Ouster Clause?" (2025), 34:2 *Const. Forum* 41, at p. 50).

[429] Although *Ford* is this Court's leading decision that deals directly with s. 33, it did not decide the issues in dispute here, namely, first, the possibility for the Court to render a declaratory judgment despite the invocation of s. 33 and, second, the existence of substantive constitutional limitations on the exercise of the power set out in this section. *Ford*'s authority is not called into question in this case, and there is thus no need to overturn it.

[430] In conclusion, *Ford* need not be overturned, because it did not decide the questions before the Court today. It is up to us to build upon the interpretation of the conditions of s. 33 that was undertaken in that case and to articulate the effects of such a declaration. Consequently, I undertake an interpretation of s. 33 in accordance with the established purposive approach to interpretation and in light of the issues in this case (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-57; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344).

III. The Purposive Approach to Interpretation

[431] Section 33 is a provision of the *Canadian Charter* and must therefore be interpreted by means of the interpretive approach specific to this constitutional document. This interpretive approach, centred on the purpose of the provision under consideration and of the *Charter* in general, has been consistent for more than 40 years

(*Société de l'Acadie du Nouveau-Brunswick v. Canada (Prime Minister)*, 2026 SCC 22, at para. 45; see also *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, at para. 71). As the Court summarized it in *Taylor*: ". . . the interpretation of a *Charter* provision is first and foremost an exercise in ascertaining what interests that provision protects, and why it does so" (para. 85), relying on the text, the overall purposes of the *Charter*, the history of the concept, the Constitution as a whole and, where appropriate, international law and any other relevant source.

[432] The purposive approach has been applied by the Court to interpret *Charter* provisions guaranteeing specific rights and to interpret its [TRANSLATION] "structural" provisions (Karazivan, at p. 33), such as ss. 24, 25 and 32 (see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 23-25 (s. 24); *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at paras. 112-18 (s. 25); *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 25-27 (s. 32)).

[433] The fact that s. 33 seems at first glance to form a sort of exception to the overall purpose of the *Canadian Charter*, that is, the constitutional protection of rights and freedoms, in no way justifies modifying the purposive approach. As stated by the Court in *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144: "Generally speaking, the same core interpretive principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion" (para. 22 (emphasis in original); see also Hogg and Wright, § 36:25). Thus, even when interpreting s. 33, researching the specific purpose

of this provision "starts with the broad objective of the *Charter*: constitutionally enshrining fundamental rights and freedoms" (*Taylor*, at para. 77).

[434] Furthermore, it is important to note that applying the purposive approach to interpretation does not necessarily lead to the broadest or most generous result for the provision at issue (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at paras. 53-55; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17). As Professors Hogg and Wright explain, purposive interpretation sometimes reveals a restrictive purpose, in that it serves as a basis for better delineating what is actually protected by a *Charter* provision, despite a wording that would appear to indicate unlimited protection (§ 36:20). A purposive interpretation thus makes it possible "to include activity that comes within the purpose [of the provision] and exclude activity that does not" (*ibid.*). Therefore, a purposive interpretation occasionally serves to reveal inherent limits that are not immediately apparent in the text, to ensure that the true *purpose* of the provision, no more and no less, is achieved. This is one aspect of the very essence of the judicial work of a constitutional judge, who must not only give life to the Constitution over time, but also ensure that its text is not misconstrued in a way that would distort the true purpose of the provision too far in either direction.

[435] I note that in addition to the purposive approach to interpretation specific to the *Charter*, its provisions, like any constitutional provision, must be interpreted according to "[the] living tree" doctrine (*Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, at para. 33, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124

(P.C.), at p. 136; see also *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at paras. 22-23). Contrary to the exercise of interpreting a simple statute, "*Charter* interpretation is not an exercise in determining legislative intent" (*Taylor*, at para. 93). The living tree doctrine postulates that a constitution cannot be interpreted in this way, because it has an enduring purpose and must therefore be "capable of growth and expansion within its natural limits" (*Hunter*, at pp. 155-56, quoting *Edwards*, at p. 136; see also J. Boulanger-Bonnelly, "Contributions civilistes à l'interprétation des lois constitutionnelles canadiennes" (2025), 70 *McGill L.J.* 203, at p. 227; Brun, Tremblay and Brouillet, at paras. IV.60 and XII-3.17 to XII-3.19; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at para. 1007). As the author Sharpe more recently summarized, "[i]f the *Charter* is to remain relevant to the needs of a rapidly evolving society, it must be interpreted in a manner that allows for growth over the years" (p. 239). As the Court unanimously stated, this goes to "the continued relevance and, indeed, legitimacy of Canada's constituting document" (*Reference re Same-Sex Marriage*, at para. 23).

[436] This exercise does not preclude consideration of the historical circumstances that led to the drafting of the Constitution. While noting that the living tree approach is the approach enshrined in positive law, Professors Eugénie Brouillet and Alain-G. Gagnon point out that a distancing from the historical context specific to the drafting of texts can lead to an unrestrained evolution of principles, just as intransigent originalism can inhibit the natural development of constitutional law. These authors helpfully propose [TRANSLATION] "an appropriate balance" of these

considerations in constitutional interpretation (“La constitution canadienne et la métaphore de l’arbre vivant: quelques réflexions politologiques et juridiques”, in A.-G. Gagnon and P. Noreau, eds., *Constitutionnalisme, droits et diversité: Mélanges en l’honneur de José Woehrling* (2017), 79, at p. 85).

[437] The purposive approach therefore recognizes that a review of the “historical origins of the right” — and not a strictly original intention — can assist in understanding the purpose it seeks to protect, subject to the principle that “constitutional meaning is not frozen by the past” (*Taylor*, at para. 80; see also *Société de l’Acadie*, at para. 47). In short, Canadian constitutional interpretation is evolutionary, and arguments based on original intention do not have a determinative place in our constitutional law (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, citing *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 506-7). In the present case, the historical context relating to the insertion of s. 33 into the *Charter* cannot replace the “living tree”, but contributes to its implementation. Many regard s. 33 as embodying a historical “compromise”, which constitutes an element that could clarify the scope of s. 33 but that calls for caution because of the uncertainties that can arise as regards declarations of the past to which we are not, ultimately, bound (R.F., AGQ, at para. 182; see also Leckey and Mendelsohn, at p. 197, citing *Re B.C. Motor Vehicle Act*, at p. 508).

[438] This reasoning should now be applied to s. 33 of the *Canadian Charter* to resolve the questions posed to the Court by the parties.

IV. Can, and Should, the Court Render a Declaratory Judgment Despite the Use of the Notwithstanding Clause?

[439] Several appellants ask this Court, in the alternative, to issue a declaration that would have no effect on the operability of Bill 21, but would declare that ss. 4, 6 to 10, 13 to 16, 18, 19 and 21, as well as Schs. II and III, infringe certain provisions of the *Charter*, including ss. 2 and 15 (A.F., Ms. Lauzon et al., at para. 118v); A.F., Lord Reading Society, at para. 130f); A.F., FAE, at para. 171h)).

[440] The Court of Appeal gave a detailed analysis of these provisions in the part of its decision that provides an overview of Bill 21. It stated, among other things, how ss. 4, 6 to 10 and 13 to 16 prohibit the persons mentioned in Sch. II from wearing religious symbols and require the personnel referred to in Schs. I and III to exercise their functions with their face uncovered (paras. 24 and 26-44). It also explained that ss. 18, 19 and 21 amend, respectively, the preamble and s. 9.1 of the *Quebec Charter*, as well as another statute, to introduce the words "State laicity" (in French, "*laïcité de l'État*") into them (para. 46). I adopt the Court of Appeal's clear explanations on these points.

[441] The AGQ is of the view that the Court cannot render a declaratory judgment, because s. 33 of the *Charter*, when validly invoked, removes that jurisdiction from the courts. He argues, in the alternative, that this Court should refuse to exercise its discretion to render such a declaration. The Court of Appeal also divided its analysis into two parts. To start, it found that s. 33 has the effect of limiting the power of the

courts to conduct a judicial review, operating as a sort of "constitutional privative clause", that is, a provision depriving the courts of their inherent jurisdiction (paras. 315 and 317-72). It then issued the alternative opinion that, even if it had the power to render that declaratory judgment, it would refuse to exercise its judicial discretion in these circumstances given the mootness of the issues (paras. 316 and 378-402).

[442] This application for a declaratory judgment therefore raises two separate questions: first, do courts have jurisdiction to render such a declaratory judgment with no effect on the operability of Bill 21, despite the valid use of the override clauses? In the affirmative, should this Court in the circumstances exercise its jurisdiction, in the place of the trial judge?

A. *Section 33 of the Canadian Charter Does Not Have the Effect of Taking Away the Inherent Jurisdiction of the Superior Courts to Render a Declaratory Judgment*

[443] Before undertaking the interpretive exercise concerning s. 33 of the *Charter* in accordance with the methodology described above, and resolving the first question, it is important to fully understand it. The question is not whether s. 33 *creates* or *grants* the courts a power to declare that the statute at issue is inconsistent with certain provisions of the *Charter*. It is, rather, whether s. 33 has the direct or indirect effect of taking away the inherent and constitutional jurisdiction of the superior courts to make this type of declaration. As indicated by the Court of Appeal, it must therefore be determined whether [TRANSLATION] "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" or whether it merely precludes the declaration of inoperability provided for in s. 52 of the *Constitution Act, 1982* (para. 331 (emphasis in original)).

[444] The case law of this Court establishes that superior courts have, under ss. 96 to 101 of the *Constitution Act, 1867* and the principle of the "rule of law" enshrined in the very preamble of the *Canadian Charter*, inherent jurisdictions and powers that cannot be taken away from them by a legislative body, even partially (*Democracy Watch*, at paras. 39-40; *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, [2021] 2 S.C.R. 291, at paras. 41 and 66; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 37). This inherent jurisdiction includes, among other things, the power to consider the constitutional validity of statutes (*MacMillan*, at para. 36; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-28) and, more broadly, to "adjudicate the constitutional issues that come before [them]" (*R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at para. 62).

[445] The Constitution also protects the inherent and fundamental jurisdiction of the superior courts to render declaratory judgments that "merely stat[e] the law without changing anything" (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at p. 86; see also pp. 85 and 113). Rendering judgments with no legal effect is common in Canadian constitutional law. For example, through the reference process, the Court is called upon to decide constitutional questions in the abstract, giving rise to no legal consequences (see *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53).

[446] A declaratory judgment with no effect is a remedy regularly used by courts of competent jurisdiction in Canada in constitutional law, particularly for matters involving *Charter* rights (*Société de l'Acadie*, at para. 122; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 37; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 81-83) or for Indigenous law matters (*Shot Both Sides v. Canada*, 2024 SCC 12, at para. 70; *Ontario (Attorney General) v. Restoule*, 2024 SCC 27, at paras. 278-82; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at paras. 41-43).

[447] In short, the superior courts have, *prima facie*, the inherent and constitutional jurisdiction to render the kind of declaratory judgment sought by some of the appellants, and there is nothing unusual about this type of request in Canadian law. The question that has to be resolved is therefore whether s. 33 of the *Charter*, when validly invoked in a statute, has the effect of taking this inherent jurisdiction away from the superior courts. The Court of Appeal, relying largely on certain decisions of this Court, found that it does. In its view, s. 33 is a constitutional "privative clause", which has the effect of depriving the courts of their inherent jurisdiction (para. 358, fn. 388).

[448] With respect, a complete purposive interpretation of s. 33 reveals that the purpose of this section is not to take away the inherent jurisdiction of the superior courts to render a declaratory judgment. The purpose of s. 33 is, rather, to protect the validity

and operability of a statute, despite an inconsistency with certain sections of the *Charter*. It is therefore open to a person with sufficient legal interest to ask a judge to exercise their discretionary power to clarify the interaction between a statute that has an override provision, on the one hand, and certain provisions of the *Canadian Charter*, including ss. 1, 2, 7 to 15 and 33, and s. 52 of the *Constitution Act, 1982*, on the other.

[449] In accordance with the methodology described above, I will successively examine the text of s. 33, its context and the overall purpose of the *Charter*, in order to discern the specific purpose of s. 33 in light of the applicable constitutional principles. In my view, each of these interpretive considerations demonstrates that s. 33 was not intended to deprive courts of their inherent power to issue declaratory judgments that have no practical effect on the validity of the legislation under s. 52(1) of the *Constitution Act, 1982*.

(1) The Text of Section 33: The "Act" and Its "Operation"

[450] First of all, the text of s. 33 does not support the argument that it has the effect of depriving the superior courts of their inherent jurisdiction to render a declaratory judgment. Subsection 2 of s. 33 ("Operation of exception") (in French, "*Effet de la dérogation*") reads as follows: "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."

[451] A reading of the text of s. 33(2) indicates that an override provision modifies the normative "operation" (in French, "*effet*") of the "Act" (in French, "*loi*") that contains it. More specifically, the wording of s. 33(2) states that, exceptionally, the law that contains an override provision must take precedence over the constitutional provisions at issue.

[452] The use of the word "operation" ("*effet*") in s. 33(2) creates an obvious symmetry with s. 52(1) of the *Constitution Act, 1982*, which establishes that the Constitution of Canada renders "of no force or effect" (in French, "*inopérantes*") legislative provisions that are inconsistent with it. The wording of s. 33 indicates that, as an exception to s. 52, a legislative provision protected by an override provision remains operative and retains its normative force, despite an inconsistency with a constitutional provision (see Leckey and Mendelsohn, at pp. 195-96; G. Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021), 71 *U.T.L.J.* 510, at pp. 518-23). Thus, in this case, ss. 33 and 34 of Bill 21, its override provisions, preserve the normative force and operability of its provisions that are at risk of conflicting with ss. 2 and 7 to 15 of the *Canadian Charter* and with the relevant provisions of the *Quebec Charter*. It has not been disputed by any party or intervener that the override clauses, when validly invoked, have at least this effect.

[453] That being so, a plain reading of s. 33 reveals no mention of the jurisdiction of the courts or the unavailability of a certain remedy for the litigant. The text of s.

33(2) indicates that the override produces a substantive effect, that is, the normative superiority of the law over certain constitutional provisions, and not a procedural effect, that is, the prohibition of certain remedies. As noted by three attorneys general, "[t]here is nothing in the text of s. 33 that would allow this provision to be understood as a privative or restrictive clause preventing superior courts from reviewing the effect on rights and freedoms of a statute containing a s. 33 declaration" (I.F., Attorney General of Canada, at para. 55; see also I.F., Attorney General of British Columbia, at para. 37; I.F., Attorney General of Manitoba, at para. 24).

[454] Professor Majekolagbe points out that s. 33 is not on its face one of these privative clauses that, "by contrast, are framed in terms that target the judiciary, and that expressly purport to narrow judicial power" (p. 47). Certainly, the text of s. 33, which is not in any way an explicit privative clause, does not resolve the question, but it remains the starting point in the purposive interpretation exercise. The text of s. 33 in no way provides for the power of the courts to make any declaration with no effect, but simply orders the normative superiority of the statutory law over certain constitutional provisions. The notwithstanding clause is therefore not, at first glance, a privative clause, but a clause that governs the normative effects of the statute to which it applies. There is no reason why s. 33 cannot be interpreted as limiting the judicial review of the operability or effectiveness of laws, within the meaning of s. 52(1) of the *Constitution Act, 1982*, while leaving discretion to the court of competent jurisdiction to render a declaratory judgment on consistency. In a different context, as regards the economic and social rights enshrined in the *Quebec Charter*, McLachlin C.J.

recognized this possibility in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429. Writing for the majority of the Court, she noted that, while courts lack the power to invalidate a law that is inconsistent with these rights, they can still render a declaratory judgment recognizing this violation (para. 96). In my view, this reasoning can be transposed, by analogy, to the present case.

[455] In fact, a reading of the text of s. 33 suggests that the courts thus do not find themselves deprived of their power to declare a law that is inconsistent with the Constitution invalid and of no force or effect — it is, rather, that the law, by operation of s. 33, remains valid and operative despite an inconsistency with certain provisions of the Constitution. The text indicates that the effect of s. 33 of the *Charter* is therefore similar to that of s. 1 of the *Charter*: it does not restrict the jurisdiction of the courts, but serves simply to preserve the operability and validity of a law, despite an inconsistency with another provision of the *Charter*.

[456] Moreover, s. 33(3) of the *Charter* reserves, at least implicitly, an important role for the voting public by limiting the effect of the override provision to five years, being the interval between general elections (Majekolagbe, at p. 54). This role, referred to by several authors as "democratic accountability", is reinforced by the independent assessment by the courts of the constitutionality of a law that contains an override provision by means of a declaratory judgment. This makes it possible for voters to assess how the legislative assembly has used the notwithstanding clause (C. Salvino, "The Section 33 Democratic Accountability Concept: Proposing a Two-Pronged

Approach for Judicial Review" (2023), 56 *U.B.C. L. Rev*. 845, at pp. 874-76; see also Leckey and Mendelsohn, at p. 197).

[457] Finally, it is important to note that, under a purposive interpretation, the text is not determinative of the meaning and scope of a constitutional provision. It is therefore necessary to consider the context of the provision and its relationship with the overall purpose of the *Charter* and the constitutional principles it embodies.

(2) The Context of Section 33 and the Overall Purpose of the *Charter*

[458] The textual interpretation of s. 33, which suggests that an override provision concerns the *Act* and its *operation* rather than the jurisdiction of the courts, is aligned with the internal context of s. 33, as well as with the overall purpose of the *Charter*. The overall purpose of the *Charter* is to provide a "continuing framework for the legitimate exercise of governmental power and . . . for the unremitting protection of individual rights and liberties" (*Hunter,* at p. 155 (emphasis added)).

[459] The AGQ argues that, [TRANSLATION] "once s. 33 is used, ss. 2 and 7 to 15 of the *Canadian Charter* are inapplicable to *Bill 21*"; "[j]udicial review . . . is then not possible", since "there is no infringement", and "there can be no remedy without an infringement of a right protected by the *Charter*" (R.F., at paras. 201 and 205). With respect, this argument is unfounded.

[460] First, the AGQ's argument that "once s. 33 is used, ss. 2 and 7 to 15 of the *Canadian Charter* are inapplicable to *Bill 21*" is incorrect (R.F., at para. 201). We have seen above that s. 33(2) creates a textual symmetry with the language of s. 52(1) of the *Constitution Act, 1982*, which governs the consequences of an inconsistency between a law and the Constitution. This same symmetry does not exist for s. 32(1) ("Application of Charter").

[461] Section 32(1) of the *Constitution Act, 1982* provides that the *Charter* "applies" (in French, "*s'applique*") to Parliament and to the legislatures and governments. Section 33 of the *Charter* does *not* state that, when an override provision is in force, the *Charter* no longer "applies" ("*s'applique*") to the law. To that extent, s. 33 is not an exception to s. 32 of the *Charter* (Leckey and Mendelsohn, at p. 195; Webber (2021), at p. 525). The *Charter* and its provisions continue to "apply" to the law that contains an override provision. The inconsistency referred to in s. 52 of the *Constitution Act, 1982* continues to exist. However, despite this inconsistency, the law remains operative, and its normative force is preserved. In other words, it is not the full normative force of the *Charter* provisions that disappears, or even the inconsistency between the *Charter* provision and the provision of the problematic law.

[462] The AGQ's interpretation must therefore be rejected. Furthermore, his proposition that, when the override provision is in force, Bill 21 causes "no infringement" (R.F., at para. 205) is incorrect for one additional reason. It assumes a conception of rights and freedoms that is inconsistent with our constitutional order. The

rights guaranteed in ss. 2 and 7 to 15 continue to exist despite the override. There is nothing in s. 33 that makes it possible to conclude that an override provision affects the very existence of rights instead of the normative force of a "provision" in the overriding Act — a word used in s. 33 (G. B. Bordan, "Are There Constitutional Limits on the Use of the Notwithstanding Clause?", in P. L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (2024), 309, at p. 317; Leckey and Mendelsohn, at pp. 194-96; Webber (2021), at pp. 518-23). With respect, the contrary view, which maintains that fundamental rights may be abrogated by a simple legislative act, is inconsistent with the Canadian conception of rights and freedoms enshrined in the *Charter*.

[463] The interpretation of s. 33 as neutralizing the inoperability of a law in the event of an infringement, rather than as taking away the rights and freedoms in such a way that there "is no infringement" (R.F., AGQ, at para. 205), is clearly more consistent with the overall purpose of the *Charter*, which is an essential interpretive factor (*Taylor*, at paras. 77-78). This overall purpose, I reiterate, is to provide a continuing framework for the exercise of governmental power and the unremitting protection of individual rights and freedoms.

(3) The Constitutional Principles

[464] Having examined the text, the context and the purpose of the *Charter*, I now turn to the constitutional principles. These are particularly useful for understanding the purpose of a structural provision of the *Charter*, its limits and its

effects (*Power*, at paras. 27, 47-57 and 76-98; *Dickson*, at paras. 107-10). The constitutional principles of democracy, parliamentary sovereignty and the protection of minorities warrant consideration here.

[465] There is common ground that s. 33 is intimately linked to the constitutional principle of democracy and the concept of parliamentary sovereignty. The five-year expiry period set out in s. 33(3), which corresponds to the maximum duration of the House of Commons or a legislative assembly under s. 4 of the *Charter*, is clearly intended to place in the hands of the electorate the choice of whether to renew the override provision. In this sense, s. 33 recognizes "the electorate as a significant constitutional actor" (Leckey and Mendelsohn, at p. 197; see also p. 199). Yet according to the same authors, "[f]or the electorate to play the constitutional role assigned to it by subsection 33(3), however, it needs access to information about the impact of protected laws on Charter rights" (pp. 200-201).

[466] I am in agreement with the appellants and much of the academic commentary that the democratic principle, intimately linked to s. 33, militates in favour of the declaratory power of the superior courts (A.F., Ms. Lauzon et al., at paras. 77 and 92-97; A.F., Lord Reading Society, at paras. 115-16; A.F., FAE, at para. 38; E. M. Adams and E. R. J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022), 26:2 *Rev. Const. Stud.* 121, at p. 142; Majekolagbe, at p. 54; Kong (2023), at pp. 28-29; Bordan, at p. 317; Adams, at pp. 41-42). An interpretation of s. 33 that allows ordinary courts, as impartial third parties, to

provide such guidance on the relationship between a law and the Constitution through a declaratory judgment is therefore to be preferred, since it is in harmony with the democratic principle underlying s. 33.

[467] I note that the assessment of the consistency between the law and the *Charter* is not a political opinion, but that it falls, rather, within the legitimate role of the courts, as the Court of Appeal pointed out: [TRANSLATION] ". . . 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 . . ." (para. 355). It quoted authors Leckey and Mendelsohn with approval on this point, who write that the question of whether the law that contains an override provision infringes the rights and freedoms guaranteed by the *Charter* is a purely legal question; the potential political impact of the issues before us does not preclude their justiciability (see Leckey and Mendelsohn, at p. 212).

[468] Professor Adams points out, rightly, that the court's opinion is useful for the public, it being founded on a reasoning that consists in "dispassionately weighing evidence, stating facts, and applying precedent to determine and describe the potential rights infringement at stake" (pp. 34-35). This is how "judicial review . . . promotes democratic values" (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 140).

[469] This element is of particular importance where a vulnerable minority is affected by an overriding statute. As explained by the intervener the Canadian Council of Muslim Women ("CCMW"), the mechanism for review of the override provision

through an election does not adequately protect vulnerable minorities that have "limited impact through the ballot box" and for which there is a "lack of political representation" (I.F., at paras. 30-31). The declaration thus serves to "acknowledge and record the harms" and "require public accountability" (para. 31; see also I.F., Egale Canada, at paras. 16-18). Professor Adams points out that "[w]hen courts hear cases about rights, even without a direct power of remedy, they provide important institutional venues for vulnerable minorities, especially for those without much influence in the democratic politics of majority rule, to cast in written reasons a constitutional accounting of the harms a given law or policy may be exacting upon them" (p. 42; see also Leckey and Mendelsohn, at pp. 200-201).

[470] The principle of parliamentary sovereignty also does not serve as a basis for concluding that the purpose of s. 33 is to preclude any judicial review of the statute. First, it would be an exaggeration of the purpose of s. 33 to say that it aims to re-establish absolute parliamentary supremacy. This interpretation would not be in harmony with the rest of the *Charter,* and would, on the contrary, place s. 33 in contradiction with not only the purpose of the *Charter* — which conferred the protection of rights on the courts (*Vriend*, at paras. 134-35) — but also with the entire *Constitution Act, 1982*. The *Charter* did not result in us abandoning the parliamentary supremacy of the past; with the *Charter*, rather, "the Canadian system of government was transformed . . . from a system of Parliamentary supremacy to one of constitutional supremacy" (*Power*, at para. 55, quoting *Reference re Secession of Quebec*, at para. 72; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United

Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 *McGill L.J.* 207, at p. 263).

[471] Certainly, s. 33 is linked to the principle of parliamentary sovereignty in that it makes it possible to maintain the validity and operability of a law that is inconsistent with a provision of the *Charter*, but this principle is in no way challenged by a declaration that has no invalidating effect. Even systems that have real parliamentary *supremacy* accept mechanisms of judicial review leading to a declaration of incompatibility (A.F., Ms. Lauzon et al., at para. 89, citing *Human Rights Act, 1998* (U.K.), 1998, c. 42, s. 4).

[472] The Court of Appeal, attempting the difficult exercise of discerning in a few words the true purpose of s. 33, relied on *Vriend*, where this Court stated in *obiter* that s. 33 "establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts" (para. 356, quoting *Vriend*, at para. 137). I agree with the Court of Appeal as to the appropriateness of turning to that decision for guidance in resolving this dispute.

[473] What legislators and judges have in common is that, in certain contexts, their words have binding effect. Since the judge is the guardian of the Constitution, the judge's word may sometimes have the effect of invalidating in its name the legislator's word — the law. Exceptionally, s. 33 leaves "the final word . . . to the legislature" (*Vriend*, at para. 137) by ensuring that the statute survives an inconsistency with a provision of the *Canadian Charter*. Section 33, a provision of a democratic and liberal

constitution establishing a regime of constitutional supremacy in Canada, is not a "privative clause" and its purpose is not to censor the constitutional judge. On the contrary, like any other constitutional provision, s. 33 shows the judge how to judge. In this case, it indicates to the judge that the legal solution will be to maintain the validity and operability of the overriding statute, despite its potential inconsistency with ss. 2 and 7 to 15 of the *Charter*. In short, it leaves "the final word . . . to the legislature", the decisive word but, as others have observed, not the only word.

[474] If, still in its role as impartial arbiter and guardian of the Constitution, the court is seized of an application by a litigant seeking clarification as to which of their rights protected by the *Canadian Charter* is violated by an overriding statute, it may, with full judicial independence and in accordance with the criteria established by the legislation and the case law, decide this issue. As always, the courts will conduct this exercise impartially; acting within the constitutional framework, they will continue to render judgment "not in the name of the courts, but in the interests of the new social contract that was democratically chosen" (*Vriend*, at para. 135).

(4) Conclusion

[475] A complete purposive interpretation indicates that s. 33 of the *Canadian Charter* does not have the effect of taking away the inherent jurisdiction of the superior courts to render a declaratory judgment. The text, centred on the "operation" of the "Act" at issue, the context, the overall purpose of the *Charter* and the philosophy

underlying it, together with the constitutional principles of democracy, protection of minorities and parliamentary sovereignty tend towards this interpretation.

B. *The Declaratory Judgment*

(1) The Exercise of Discretion to Render a Declaratory Judgment

[476] Because s. 33 does not remove the Court's inherent jurisdiction to render a declaratory judgment, it remains to be determined whether one should be rendered in this case. With respect for the contrary position, I can identify no reason to not respond to the request of certain appellants to address the validity and operability of Bill 21.

[477] I note that, for his part, the trial judge [TRANSLATION] "exercise[d] [his] judicial discretion" to not render a declaratory judgment despite the appellants' request, stating that the question posed "is moot" and that it would be doing indirectly "something that cannot be done directly" (paras. 796-98). He specified that [TRANSLATION] "the use of section 33 sterilizes recourse to the relevant provisions of the Charter" (para. 784) and that therefore, there is no infringement. With respect to the Court of Appeal, it [TRANSLATION] "has come to the same conclusion as the trial judge, but for reasons that differ in part" (para. 314). The Court of Appeal was of the view that the invocation of s. 33 of the *Charter*, to override its provisions, has the effect of [TRANSLATION] "protect[ing] or exempt[ing] the statute from their application, but it also thereby limits the judicial review of the statute's constitutionality" (para. 315). The courts need no longer engage in the process [TRANSLATION] "of verifying whether the

statute complies with the [*Charter*] provision or provisions being overridden"; therefore, any idea of redress, including a declaratory judgment, is "excluded" (*ibid.*). In the alternative, wrote the Court of Appeal, even assuming courts can rule on this [TRANSLATION] "conformity" of a law subject to s. 33 with the *Charter*, "given the circumstances of the present matter, the doctrine of mootness requires that the [c]ourt refrain from ruling and granting any declaratory remedy whatsoever" (para. 316).

[478] I find that the AGQ erroneously relies on the doctrine of "mootness" (in French, "*question théorique*") developed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, to suggest that jurisdiction should be declined and a declaratory judgment should not be rendered even though the power exists. The trial judge (at para. 797) and the Court of Appeal (at paras. 378-402) invoked the same principle. With respect, there is nothing moot about the question that has been posed to this Court by the appellants. As we have seen, their freedom of religion and conscience, their freedom of expression and their right to equality continue to exist despite the invocation of s. 33 of the *Charter*. However, ss. 6 and 8 of Bill 21 have already caused very real infringements of their fundamental rights and freedoms; they have felt their effects for years and today seek to obtain the "narrow remedy" of a declaratory judgment (*Uashaunnuat*, at para. 42). Contrary to what the AGQ suggests, the dispute is not rendered moot because one of the remedies sought here, a declaration of invalidity and inoperability, is precluded by operation of s. 33.

[479] To use the language of *Borowski*, a "live controversy exists" in this case, and it has not "disappeared" at the time of rendering this judgment (p. 353; *Taylor*, at para. 43). If, for example, in the course of the proceedings, a legislative body had repealed the law — and the infringements had therefore come to an end — the dispute would then indeed have become moot. Given that Bill 21 is still in force, the question is live and, as noted by the Court of Appeal itself, perfectly justiciable.

[480] As I noted above, the superior courts' discretion to render a declaratory judgment derives from their inherent jurisdiction (*Kourtessis*, at pp. 85-86). This jurisdiction is inherent in the sense [TRANSLATION] "that it need not be attributed by a statutory provision" (*Québec (Sous-ministre du Revenu) v. Industrielle Alliance compagnie d'assurance sur la vie*, 2000 CanLII 30078 (Que. C.A.), at para. 19). Moreover, in Quebec, the *C.C.P.* codifies the power of the superior courts in Quebec public law, being [TRANSLATION] "declaratory of existing law, and not constitutive of this law" (*ibid.*). Article 142 *C.C.P.* makes it possible to "resolve a genuine problem" and is useful [TRANSLATION] "in public law cases involving questions of statutory or regulatory interpretation, for example, but not challenging the validity or applicability of normative instruments" (*Dostie v. Procureur général du Canada*, 2022 QCCA 1652, at para. 43) — as in the present case.

[481] As summarized by the Court of Appeal, [TRANSLATION] "the court, except where a limited exception applies, need not rule on a purely theoretical or conjectural question, that is, a question whose resolution will not settle a genuine problem (one that

is current and practical), will not provide a functional answer to a live controversy or will not have a useful impact on the rights and obligations of the parties" (*Dostie*, at para. 47). The applicable test for determining whether it is appropriate to render a declaratory judgment is therefore centred on the notion of the "genuine problem" (*C.C.P.*, art. 142; *Uashaunnuat*, at para. 41; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (7th ed. 2025), vol. 1, at paras. 1-1235 to 1-1243; D. Grenier and M. Paré, *La requête en jugement déclaratoire en droit public québécois* (2nd ed. 1999), at p. 97). This notion is not defined by the *C.C.P.*, but was examined by Pigeon J. in *Duquet v. Town of Sainte-Agathe-des-Monts*, [1977] 2 S.C.R. 1132, and by Beetz J. in *R. in right of Newfoundland v. Commission Hydro-Électrique de Québec*, [1982] 2 S.C.R. 79.

[482] In *Duquet*, the Court resolutely rejected any formalism and instead proposed a broad interpretation of the "genuine problem" test (pp. 1138-41). Pigeon J. quoted with approval comments of the commissioners who had prepared the former *Code of Civil Procedure*, CQLR, c. C-25, who noted that "the litigant may invoke the aid of justice before the actual violation of his right has taken place" and that "the declaratory judgment is not the giving of an opinion, but a decision with the force of chose jugée" (pp. 1139-40).

[483] Five years later, in *Commission Hydro-Électrique de Québec*, Beetz J. confirmed, for a unanimous Court, the generous and liberal approach adopted in the exercise of the discretion to render a declaratory judgment. Particularly relevant for our

purposes, he decided that, even though the infringement of the rights of the applicant Hydro-Québec was only a future and hypothetical infringement, the mere fact that its rights were "threatened" was sufficient (p. 106).

[484] In this case, it is difficult to see how the appellants' situation would not meet this "genuine problem" test. According to the AGQ, since s. 33 has been invoked, a judicial declaration determining that the rights guaranteed by the relevant *Charter* provisions have been infringed would be [TRANSLATION] "without effect and [thus] purely academic" (R.F., at para. 207). But, since s. 33 does not have the effect of disapplying the *Charter* provisions, as discussed above, a declaratory judgment highlighting the inconsistency of ss. 6 and 8 of Bill 21 with the *Charter* would have an impact on the appellants, even if Bill 21 is valid and operative by virtue of s. 33.

[485] In addition to the "genuine problem" test, the case law has also established that a declaratory judgment should be rendered "only where it will have practical utility" (*Uashaunnuat*, at para. 42; see also *Canada (Attorney General) (Minister of Fisheries and Oceans) v. Native Alliance of Quebec*, 2014 QCCA 1251, [2014] 4 C.N.L.R. 21, at paras. 9-10; Grenier and Paré, at pp. 85-91). In this case, the appellants have demonstrated that a declaratory judgment concerning Bill 21 and its legal relationship with the *Canadian Charter* will have undeniable practical utility for them — and no doubt for others — despite the validity of Bill 21. It would be useful not only for the appellants, but also for the Quebec electorate, which here assumes a

"constitutional role", to know whether and to what extent Bill 21 is inconsistent with the *Charter*.

[486] The primary purpose of this "practical utility" criterion is to ensure that the formulation of the questions posed to the court does [TRANSLATION] "[not] leav[e] unresolved questions of law or fact that should be decided in order to actually put an end to the controversy" (Grenier and Paré, at p. 86). However, if there is one thing the parties in this case cannot be faulted for, it is for unduly limiting the questions posed to the Court. It is certain that a declaratory judgment will make it possible to resolve any uncertainty that reasonably exists as to the validity and operability of Bill 21.

[487] Moreover, the appellants have demonstrated that the judgment would be useful for them, because it would, in itself, have a remedial effect. Indeed, they [TRANSLATION] "will individually benefit from concrete remedial effects in their interactions with the state institutions involved and their fellow citizens, not to mention that, on a symbolic, but no less important, level, they will have obtained a recognition of the violation of their rights" (A.F., Ms. Lauzon et al., at para. 107; see also I.F., Egale Canada, at paras. 16-18; I.F., CCMW, at paras. 30-31; Adams, at p. 42; Leckey and Mendelsohn, at pp. 200-201). Our case law recognizes the remedial effect that declaratory judgments can have in the rights and freedoms context (*Société de l'Acadie,* at para. 122; *Uashaunnuat*, at para. 42; *Gosselin*, at paras. 95-96; *Khadr*, at para. 46).

[488] Finally, the declaration's five-year expiry period set out in s. 33(3) in itself gives a clear effect to the declaratory judgment. In fact, a declaratory judgment, to the

extent that it concludes that Bill 21 unjustifiably infringes rights and freedoms, can also contribute to rapidly stopping the infringement as soon as this period has passed or as soon as the override provision is not enacted again. The judgment is therefore used to give full effect to the five-year period provided for in s. 33.

[489] Trial judges' discretionary decisions are, of course, generally owed deference on appeal. However, according to the standard of review applicable in this matter, an error in principle that has an impact on the judge's conclusion warrants this Court's intervention (see, e.g., *Taylor*, at para. 46; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, [2022] 3 S.C.R. 515, at para. 41).

[490] With respect, the exercise of discretion by the trial judge was tainted by an error in principle that distorted the analysis, because, as I explained above, there is nothing moot about the question, and the "genuine problem" test had to guide the judge. Sections 2 and 15 were not "sterilize[d]" by the invocation of the *Charter*, except regarding their function of invalidating Bill 21 under s. 52(1) of the *Constitution Act, 1982*. Moreover, the declaratory judgment is a partial remedy separate from the declaration of invalidity and also does not have the effect of circumventing a legislative body's use of the override power. Thus, his assessment of the question as being moot disregards the value of a declaration to inform the electorate of Bill 21's consistency with the provisions invoked, even if Bill 21 were to be declared valid by operation of ss. 33 and 52(1) in the end.

[491] I therefore propose to render a declaratory judgment in the place of the trial judge. I am aware that, in certain circumstances, the exercise of such discretion may be inappropriate in the absence of a full adversarial debate (see *Borowski*, at pp. 358-59). However, the AGQ's choice to not present arguments does not deprive us of an adversarial debate on the existence of infringements and whether they are justified. The context here is clearly adversarial, because the appellants' application for a declaration goes back to the early stages of the proceedings and, aware of that application, the AGQ has nevertheless maintained his stance to date (see AGQ's defence in response to the amended originating application for a declaratory judgment and for damages, dated July 31, 2020, reproduced in joint schedules in the C.A., vol. 3 (at pp. 583-608), at p. 589; Superior Court judgment allowing the AGQ's management notice, dated September 1, 2020, reproduced in joint schedules in the C.A., vol. 3 (at pp. 608.33-608.38), at p. 608.37). Moreover, the AGQ, as the government representative responsible for the implementation of Bill 21, qualifies as a "proper contradictor" (in French, "*adversaire valable*"), in the sense that he has a true interest to oppose the declaration sought (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 831, quoting *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, Ld.*, [1921] 2 A.C. 438, at p. 448). That he preferred not to express an opinion is his choice, but this choice does not make him an invalid adversary.

[492] In rendering a declaratory judgment in the place of the trial judge, I will not undertake an assessment on appeal of the evidence that was adduced before him. An appellate court, and even more so a court sitting at the second level of appeal, is ill-

placed and institutionally ill-equipped to carry out such an assessment, barring exceptional circumstances (see, e.g., *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, [2023] 1 S.C.R. 709, at paras. 176-78). But it is not necessary to make findings of fact in the place of the judge here. Even though, for the reasons I have discussed, the trial judge refrained from formally concluding that there was an infringement, he noted, in the clearest terms, that [TRANSLATION] "several provisions of Bill 21 violate not only some of the rights guaranteed by the Canadian and Quebec charters, thus domestic law, but also international law" (para. 727), in addition to reaching, throughout his 1,143-paragraph judgment, several conclusions that could have led to findings of infringements for the purposes of Bill 21's inconsistency with the *Charter* had it not been for his erroneous interpretation of s. 33.

(2) The Alleged Infringements of the Rights and Freedoms Guaranteed by Sections 2, 15 and 28 of the *Canadian Charter* and by Sections 3 and 10 of the *Quebec Charter*

[493] The appellants, relying on substantial evidence adduced at trial, allege that Bill 21 infringes the freedom of conscience and religion (*Canadian Charter*, s. 2(a); *Quebec Charter*, s. 3); the freedom of thought, belief, opinion and expression (*Canadian Charter*, s. 2(b); *Quebec Charter*, s. 3) and the right to equality (*Canadian Charter*, s. 15; *Quebec Charter*, s. 10). The respondent the AGQ did not make submissions on these points before the Superior Court and the Court of Appeal. Despite this Court's express invitation, he maintained this approach in this case. The

respondents the Mouvement laïque québécois ("MLQ") and Pour les droits des femmes du Québec ("PDF") made submissions opposing those of the appellants.

[494] I note that, a few weeks before the hearing began, the Court invited all parties, excluding the interveners, to provide it with additional written submissions on the question of whether Bill 21 infringes, in a manner that cannot be justified in a free and democratic society, the rights and freedoms set out in ss. 2(a) and (b) and 15(1) of the *Canadian Charter*, as well as ss. 3 and 10 of the *Quebec Charter*.

[495] Following this request, all of the appellants and the respondents the MLQ and PDF submitted supplementary factums setting out their arguments. The AGQ refused to comment on the question on the ground that this [TRANSLATION] "Court should neither analyze nor answer these questions, given the use by the Quebec legislature of override clauses found in the *Canadian Charter* and *Quebec Charter*" (additional written submissions, at para. 3). In support of this position, he cites *Ford* to reiterate his point of view that Bill 21 is "protected" from the application of ss. 2 and 7 to 15 of the *Canadian Charter* and cannot infringe the rights and freedoms guaranteed by these sections (*ibid.*, quoting *Ford*, at pp. 742 and 788).

[496] It goes without saying that it is up to the parties to establish their strategies, but the AGQ's choice is regrettable. The issue of the possibility of a declaratory judgment being rendered has been at the heart of the dispute from the very beginning; it was addressed by the Superior Court and the Court of Appeal and discussed in detail by the parties and the interveners in their factums. The AGQ states that [TRANSLATION]

"his conduct was guided by the Court's jurisprudence" (additional written submissions, at para. 19). However, his conduct was likely guided by his interpretation of s. 33, an interpretation that, as is widely acknowledged, remains strongly contested. The AGQ is ill-placed, today, to state that the Court [TRANSLATION] "would penalize" him if it answered the question of whether Bill 21 unjustifiably infringes rights and freedoms (para. 25). The AGQ's silence can therefore not preclude the Court from examining this question, which has required answers since the beginning of the dispute.

[497] As previously mentioned, on the basis of extensive and largely uncontradicted evidence, the trial judge made numerous findings, several of which concerned the inconsistency of ss. 6 and 8 of Bill 21 with certain *Charter* provisions, in particular with ss. 2 and 15, but also with ss. 23 and 28. However, as noted above, he refused to make a declaration of inconsistency by reason of his interpretation of s. 33.

[498] On the basis of the trial judge's findings and taking care not to conduct my own assessment of the evidence, I conclude that it is open to this Court to declare, in the place of the Superior Court, that ss. 6 and 8 of Bill 21 infringe the rights and freedoms protected by ss. 2 and 15 of the *Canadian Charter* and by ss. 3 and 10 of the *Quebec Charter*.

(a) *Freedom of Conscience and Religion (Section 2(a))*

[499] Section 2(a) of the *Canadian Charter* protects "the right to entertain beliefs, to declare them openly and to manifest them" while at the same time "guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs" (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 69). The freedom of conscience and religion also protects the freedom "not to believe, to manifest one's non-belief and to refuse to participate in religious observance" (para. 70, citing *Big M Drug Mart*, at pp. 346-47).

[500] In order to establish that a law infringes the right protected by s. 2(a) of the *Charter*, the claimant must prove: (1) that they hold a sincere belief that has a nexus with religion and (2) that there is a more than insignificant interference with their ability to act in accordance with that sincere belief (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56-59; *Mouvement laïque québécois*, at para. 86). The same analytical framework applies to s. 3 of the *Quebec Charter*, which protects "freedom of conscience" and "freedom of religion" in the same manner (*Mouvement laïque québécois*, at para. 68; *Amselem*, at para. 37).

[501] In this case, following a trial of about 30 days and in light of dozens of accounts, expert reports and exhibits, the trial judge concluded that Bill 21 [TRANSLATION] "more than minimally impairs the freedom to manifest or practise religious beliefs" (para. 382; see also paras. 1069 and 1096). He characterized as

[TRANSLATION] "serious and negative" the consequences of Bill 21 for individuals who wear religious symbols:

> [TRANSLATION] There is no doubt that Bill 21 has serious and negative consequences for all individuals who wear religious symbols in public. Generally speaking, first, anyone who holds employment that is subject to Bill 21 is stuck in their current position because they cannot change it without losing the benefit of the grandfather clause, unless they decide to no longer wear religious symbols in public.
>
> Second, any of these individuals who aspire to hold one of these jobs is confronted with the following dilemma: either they act on the basis of their soul and conscience, in this case, their beliefs, or they work in the profession of their choice. It can be readily appreciated that this is a cruel consequence that dehumanizes the individuals affected. [paras. 68-69]

[502] These findings by the trial judge rely on substantial evidence. I find on the basis of the judge's conclusions that ss. 6 and 8 of Bill 21 infringe the fundamental freedom of conscience and religion guaranteed by s. 2(a) of the *Canadian Charter* and s. 3 of the *Quebec Charter*.

(b) *Freedom of Thought, Belief, Opinion and Expression (Section 2(b))*

[503] Section 2(b) of the *Canadian Charter* protects the "freedom of thought, belief, opinion and expression". An infringement of this right is proven if, cumulatively, (1) the activity in issue has expressive content, (2) the location or method of expression does not conflict with the values of self-fulfillment, democratic discourse and truth finding and (3) the purpose or the effect of a government action results in an infringement of the protected right (*Irwin Toy Ltd. v. Quebec (Attorney General),*

[1989] 1 S.C.R. 927, at pp. 967-71; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at paras. 33-38). The same analytical framework applies to s. 3 of the *Quebec Charter*, which also protects the freedom of opinion and expression (*Attorney General of Quebec v. Théâtre du Trident inc.*, 2026 QCCA 529, at para. 25; *Ville de Montréal v. Astral Media Affichage*, 2019 QCCA 1609, at para. 103).

[504] In determining the meaning of a *Charter* provision and the scope of the protection provided by it, under a purposive interpretation, it is necessary to identify the "purpose" of the guarantee, "that is, the interests and values that it fundamentally protects" (*Société de l'Acadie*, at paras. 45-46; *Taylor*, at paras. 77-84). The distinct interests and values protected by s. 2(b) of the *Charter* are unquestionably infringed by Bill 21. In *Irwin Toy*, the Court identified these as being truth finding, participation in social and political decision-making and, particularly relevant to this case, "diversity in forms of individual self-fulfillment and human flourishing [that] ought to be cultivated in an essentially tolerant, indeed welcoming, environment" (p. 976).

[505] In the present case, the trial judge concluded that Bill 21 [TRANSLATION] "undoubtedly" violates the freedom of expression of Muslim women in addition to violating their freedom of religion, "because dress constitutes not only expression pure and simple, but may also constitute the manifestation of a religious belief" (para. 807). This finding was based on ample evidence, including the testimony of the principal parties concerned.

[506] On the basis of this finding by the trial judge, I find that the appellants have also discharged their burden of demonstrating an infringement of their freedom of expression protected by s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter*, because many of the items of clothing and objects that may not be worn pursuant to ss. 6 and 8 of Bill 21 contribute to this "diversity in forms of individual self-fulfillment and human flourishing" (*Irwin Toy*, at p. 976).

(c) *The Right to Equality (Section 15)*

[507] Section 15(1) of the *Canadian Charter* prohibits "discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". It "protects substantive equality by targeting both direct and indirect discrimination" against disadvantaged groups (*Kanyinda*, at para. 47). An infringement of the right protected by s. 15 is established where the law at issue creates, on its face or in its impact, a distinction based on an enumerated or analogous ground, and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (para. 48; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 27).

[508] Furthermore, according to our case law, where an infringement of freedom of religion is proven, there will also be an infringement of the right to equality if the "distinction based on religio[n] impairs the right to full and equal exercise of freedom of conscience and religion" (*Mouvement laïque québécois*, at para. 86; see also J. Woehrling, "Quelle place pour la religion dans les institutions publiques?", in J.-F.

Gaudreault-DesBiens, ed., *Le droit, la religion et le "raisonnable": Le fait religieux entre monisme étatique et pluralisme juridique* (2009), 115, at pp. 117-19, as regards the [TRANSLATION] "largely interchangeable" nature of the two protections).

[509] The counterpart of s. 15, at the provincial level, is s. 10 of the *Quebec Charter*, which recognizes the right of every person "to full and equal . . . exercise of his human rights and freedoms, without distinction, exclusion or preference based on [grounds that include] religion" (see *Mouvement laïque québécois*, at para. 63; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176, at para. 35).

[510] In this case, the trial judge noted that [TRANSLATION] "the evidence undoubtedly reveals that the effects of Bill 21 will have a negative impact on Muslim women first and foremost" (para. 807) and that "this policy of exclusion, since that is what it must be called, leads to disproportionate consequences for Muslim women" (para. 67). As an example, the judge found that at the Centre de services scolaires de Montréal, [TRANSLATION] "all of the job application files, in this case eight, closed following the entry into force of Bill 21 concern Muslim women wearing the hijab" (para. 805). He also pointed out that [TRANSLATION] "the record shows by a preponderance of evidence" that Bill 21 prevents women, and especially Muslim women in the field of education only, "from exercising their freedom of religion and violates section 15 of the Charter" (para. 876).

[511] Beyond the field of education in the public sector, the trial judge also noted that the lawyer Gregory Bordan, a Jewish person who wears religious symbols in his daily life, [TRANSLATION] "will not be permitted to provide legal services to government entities" (para. 64). He pointed out as well that Basir Naqui, [TRANSLATION] "a practising Muslim, who has a beard and wears a head covering, . . . will not be able to become a Crown prosecutor" (para. 64). These examples led the judge to conclude that [TRANSLATION] "[t]his exclusion of the mere possibility of working in the career envisaged, for which one possesses all the qualifications, represents more than a simple denial of a chance, as it sends the message that people who practise their faith do not deserve to fully participate in Quebec society" (para. 65; see also para. 1102).

[512] In short, in light of these conclusions by the trial judge, I find that ss. 6 and 8 of Bill 21 infringe the right to equality enshrined in s. 15 of the *Canadian Charter* and s. 10 of the *Quebec Charter* by imposing disadvantages related to religion, which aggravate pre-existing injustices.

(d) *The Guarantee of Equality of Rights for Male and Female Persons (Section 28)*

[513] This Court has also been asked to rule on the nature and application of s. 28 of the *Charter*, a provision that appears in the section entitled "General" (in French, "*Dispositions générales*") and that states the following:

> **28** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[514] Differing interpretations of s. 28 have been proposed by the parties and the interveners. According to the first position, advanced particularly by the EMSB et al., s. 28 is a guarantee of equality for male and female persons that "operates together with the rights it guarantees equally even in the absence of a violation of those rights" (A.F., at para. 43).

[515] According to the second position, advanced particularly by the AGQ, and adopted by the Court of Appeal, s. 28 serves only [TRANSLATION] "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" (R.F., at para. 245, quoting C.A. reasons, at para. 505).

[516] Neither of these positions fully capture the purpose and effects of s. 28 in light of its text, its context and the general scheme of the *Charter*. Despite using different terms, all agree that s. 28 guarantees equal enjoyment to both sexes of the rights and freedoms set out in the *Charter* (Sup. Ct. reasons, at paras. 836-38; C.A. reasons, at para. 450; A.F., EMSB et al., at paras. 43 and 51; R.F., AGQ, at paras. 217-18). I agree with the Court of Appeal that s. 28 does not confer [TRANSLATION] "a right distinct from those recognized by ss. 2 to 23 of the *Charter*" (para. 451).

[517] In the fundamental rights and freedoms instruments put forward by the EMSB et al., two distinct devices for protecting equality exist (see A.F., at paras. 44-57). The first device, exemplified by s. 15 of the *Canadian Charter*, protects "equality *per se*" (*Ward* (2021), at para. 35) and prohibits discrimination in the application of the law, without reference to the exercise of another constitutional right. The second device, exemplified by s. 10 of the *Quebec Charter*, instead guarantees the equal enjoyment of the other rights and freedoms set out in the same instrument (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 54, citing D. Robitaille, "Non-indépendance et autonomie de la norme d'égalité québécoise: des concepts 'fondateurs' qui méritent d'être mieux connus" (2004), 35 *R.D.U.S.* 103).

[518] Section 28 falls under the second device and must therefore [TRANSLATION] "be invoked in combination or in conjunction with a right or freedom" protected by the *Charter* (I.F., Clinique pour la justice migrante, at para. 8). Indeed, [TRANSLATION] "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" (C.A. reasons, at para. 451).

[519] This attribute of s. 28 has two consequences. Even though the EMSB et al. invite this Court to rule on whether, like s. 10 of the *Quebec Charter*, s. 28 has an autonomous purpose (A.F., at para. 54, quoting *Bombardier*, at para. 54), I do not have

to address this issue because, first, I recognize that ss. 6 and 8 of Bill 21 infringe the rights and freedoms guaranteed by ss. 2 and 15 of the *Charter*, to which s. 28 is connected in this case. Like s. 10 of the *Quebec Charter*, the guarantee of equality in s. 28 does not require a "double violation" (*Bombardier*, at para. 54). Second, considering its relationship with ss. 2 and 15 of the *Charter*, s. 28 is also subject to the effects of s. 33. Indeed, as mentioned previously, ss. 2 and 15 are protected from the application of s. 52 of the *Constitution Act, 1982* and therefore cannot serve as the basis for a declaration of invalidity or inoperability.

[520] Finally, I note that the Court of Appeal correctly recognized that s. 28 is of importance in the s. 1 analysis. It suggested that the level of justification required under s. 1 could be higher, but that the current state of the law does not, however, make it possible to reach this conclusion. It put it this way: [TRANSLATION] "Moreover . . . 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*" (para. 474). I will come back to this in my analysis concerning the justification of the infringements.

[521] For now, like the Chief Justice, I find that Bill 21 is not invalid under s. 28 of the *Canadian Charter*.

(3) Justification of the Infringements in a Free and Democratic Society

[522] In Canadian constitutional law, the fact that a law infringes one or more rights and freedoms protected by the *Canadian Charter* does not necessarily mean that it is invalid and unconstitutional. The *Charter* recognizes that the rights set out therein may be subject to "such reasonable limits . . . as can be demonstrably justified in a free and democratic society" (s. 1), as does the *Quebec Charter* in s. 9.1. This safety valve provides the various governments with the opportunity to demonstrate that the infringement resulting from their action is justified and that it nevertheless complies with the Constitution. It is a fundamental mechanism of constitutional balance, arbitrating a point of stability between the judicial branch and the legislative branch, as well as between individual freedoms and the common good.

[523] In order to demonstrate that an infringement is justified in a free and democratic society and that the law is therefore valid under the *Charter*, the person defending the measure must meet the burden established by *Oakes*. Under the first branch of the test, the objective of the law must be pressing and substantial. Under the second branch, the means chosen must be proportional to it. There are three requirements under this second branch of the test: there must be a rational connection between the means and the pressing and substantial objective; the law must be minimally impairing of the right in question; and there must be proportionality between the salutary and deleterious effects of the law (pp. 138-40; *Taylor*, at paras. 189-93). This same analytical framework applies for s. 9.1 of the *Quebec Charter*, the counterpart to s. 1 of the *Canadian Charter* (*Théâtre du Trident inc.*, at para. 55; *Procureur général du Québec v. Gallant*, 2021 QCCA 1701, at para. 181).

[524] In this case, the AGQ, despite the Court's express invitation, opted not to try to justify the infringements of fundamental rights caused by Bill 21. That was his choice to make, but it carried a risk. The appellants point out the well-known rule that the burden of demonstrating the justification of an infringement under s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter* rests on the government (additional written submissions, Ms. Hak et al., at para. 46; additional written submissions, Ms. Lauzon et al., at para. 32; additional written submissions, Lord Reading Society, at para. 37; additional written submissions, FAE, at para. 34). They rightly argue that the AGQ has not discharged this burden.

[525] I note that, in the Court of Appeal's view, this rule applies only in cases where the question before the court is not theoretical and where the infringements have been tested through the adversarial process (para. 391). With respect, I am unable to agree with this conclusion. First, as previously mentioned, the problem here is genuine and is in no way hypothetical, even if a declaration of invalidity under s. 52 of the *Constitution Act, 1982* is not available to the appellants. Second, I cannot accept the idea that the government's silence excuses it from an adversarial process.

[526] The natural effect of the AGQ's decision to not make arguments on *Oakes* is simple: the Court must find that the infringement of the freedom of religion and conscience, the freedom of expression and the right to equality has not been justified in a free and democratic society (see, e.g., *R. v. Bissonnette*, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 121; *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 91).

This Court is usually wary of conducting a full *Oakes* analysis but simply states in *obiter* the step of the *Oakes* test at which the justification would likely have failed in any event (*Bissonnette*, at para. 121 (proportional effects); *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 97 (minimal impairment); *Ruzic*, at para. 92 (minimal impairment); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 285 (minimal impairment)).

[527] That being so, three distinct elements stand out in this case and call for a more in-depth analysis of the justification of the infringements, despite the AGQ's lack of arguments to this effect. First, as noted by the trial judge (at para. 1018), although the AGQ did not advance an argument under s. 1, he adduced in support of his arguments on other issues extensive evidence in defence of Bill 21, including legislative debates, statistics and expert reports on the history and importance of laicity in Quebec (expert report of Yvan Lamonde, dated July 28, 2020, reproduced in joint schedules in the C.A., vol. 32 (at pp. 10576-10657)), the philosophy underlying Bill 21 (expert report of Marc Chevrier, dated September 4, 2020, reproduced in joint schedules in the C.A., vol. 33 (at pp. 10774-10886)), the structure of Canadian federalism (expert report of Benoît Pelletier, dated August 25, 2020, reproduced in joint schedules in the C.A., vol. 32 (at pp. 10658-10773)) and the cultural differences between Canadian and Quebec societies with respect to religion (expert report of Yannick Dufresne and Gilles Gagné, dated October 6, 2020, reproduced in joint schedules in the C.A., vol. 33 (at pp. 10899-11061.2)). Second, the respondents the MLQ and PDF, recognized as full parties before this Court, argued and made

submissions on the justification of Bill 21, also relying on considerable evidence. As noted by Professors Hogg and Wright, a party to the proceedings other than the government may meet the burden of demonstrating the justifiability of the infringement (§ 38:4). Third, even though the trial judge only undertook an analysis based on *Oakes* under s. 23, he found, among other things, that Bill 21 pursued a pressing and substantial objective and that there was a rational connection between the infringing measures and this objective (see paras. 1004-1109). The appellants argue vigorously against these findings before our Court, contending that Bill 21 does not pursue any pressing and substantial objective and that the means have no rational connection with that objective.

(a) *Pressing and Substantial Objective*

[528] Under this first branch of the *Oakes* test, great care must be taken to dissociate the objective of the law from the means it enacts to achieve that objective. This exercise is sometimes very complex to carry out, and there is a risk of "conflat[ing] the means taken by the legislature with the objective itself" (*Kanyinda*, at para. 98). However, in this case, this distinction is facilitated by the structure of Bill 21 itself, which distinguishes the objective pursued from the means undertaken to achieve it.

[529] The appellants argue before the Court that Bill 21 does not pursue a pressing and substantial objective. However, in my view, Bill 21's objective must be characterized as pressing and substantial, and this characterization can be inferred from the principles set out in Bill 21 itself, in s. 2 (see, on such an approach, *Oakes*, at p.

138; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, [2017] 1 S.C.R. 93, at para. 58). Therefore, I share the view of the trial judge, expressed in his analysis concerning the justification of the infringement of the rights set out in s. 23 and based in part on the historical evolution of the relationships between the state and religions, that Bill 21 pursues [TRANSLATION] "most certainly a pressing and substantial legislative objective in accordance with the case law" (para. 1028). I do take note, also, of the Court of Appeal's comment, in its discussion on s. 3, that the objective to legislate on [TRANSLATION] "the duty to respect the principle of state laicity" may be relevant to the s. 1 analysis (para. 683). Moreover, I also reject the alternative and incorrect characterizations of the objective of Bill 21 proposed by the respondents the MLQ and PDF.

[530] As it appears from the explanatory notes to Bill 21, *An Act respecting the laicity of the State*, 1st Sess., 42nd Leg., 2019, the preamble of Bill 21 and ss. 1 and 2, the purpose of Bill 21 is "[to affirm] State laicity" (preamble), which rests on the four principles Bill 21 seeks to reconcile: 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. Chapter 1 of Bill 21, according to its title, states that this objective of affirmation of the laicity of the state is ensured having regard to all of these principles. Overall, Bill 21 aligns with the importance of "the paramountcy of State laicity be[ing] enshrined in Québec's legal order" (preamble) on the basis of a legislative model founded on a balance between the principles identified in s. 2. That the legislature seeks to implement state laicity in accordance with principles that may

overlap and clash in a pluralistic society is, it seems to me, a legally legitimate objective. Of course, the mechanisms for attaining this objective and for striking a balance between principles that may conflict with each other are contested. But this does not preclude the finding that the pursuit of state laicity seeking to reconcile the principles identified by Bill 21 is a pressing and substantial objective.

[531] These four principles animating the legislative affirmation of the laicity of the state reflect those set out in the report by the Bouchard-Taylor Commission (Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* (2008), by G. Bouchard and C. Taylor ("Bouchard-Taylor report"), at pp. 135-36). Since the concept of laicity is fundamentally polysemic and open to divergent interpretations, the principles chosen serve as guidelines for the laicity of the state established by the legislature. It is therefore a valuable sign of the meaning the legislature intended to give to this term; these principles must guide the Court in identifying the objective of Bill 21.

[532] The affirmation of laicity as described in the second section of Bill 21, and more generally the regulation of religious matters within the state apparatus, is a pressing and substantial objective. The AGQ filed in evidence several expert opinions demonstrating that laicity has a role specific to Quebec and particular importance given the province's unique history. The Quebec legislature, under the principle of federalism enshrined by the Constitution, is entitled to implement a particular conception of state secularism specific to Quebec — the laicity of the state — which it has done to varying

degrees for decades now. The National Assembly's choice to provide Quebec with a law on the laicity of the state commands both judicial deference and respect for the distinct public policy choices that are inevitable within a pluralist federation such as ours. This Court has already recognized that "a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem" (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 43). This is an additional basis for Quebec's distinctive legislative treatment of the laicity of the state (see, by analogy, *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 (reasons of McLachlin C.J.); see also Leckey and Mendelsohn, at p. 205).

[533] That being so, there is also no reason to exaggerate the differences between Quebec's approach and other forms of secularism — or even to characterize them as inconsistent. It must be noted that each of the principles on which Quebec laicity rests pursuant to s. 2 of Bill 21 (that is, the separation of state and religions, the religious neutrality of the state, equality and freedom of conscience and religion) already occupies a fundamental place in Canadian public law (see *Canadian Charter*, ss. 2 and 15 (freedom of conscience and religion, right to equality); *Mouvement laïque québécois* (religious neutrality of the state); *Chaput v. Romain*, [1955] S.C.R. 834, at p. 840 (separation of church and state); *Big M Drug Mart* (separation of church and state and religious neutrality of the state)). Indeed, as authors have observed and as recognized by the Court of Appeal at para. 83 of its reasons, the principles set out in s. 2 of Bill 21 are fundamentally consistent with Canadian case law (P. Bosset, "Le port de signes

vestimentaires religieux dans l'appareil d'État", in S. Bernatchez, P. C. Noël and R. M. Legault-Laberge, eds., *Droit des religions: Canada — Québec* (2024), 719, at pp. 727-28; L.-P. Lampron, "L'impact de la *Loi sur la laïcité de l'État* sur les conditions de travail des agents et agentes de l'État québécois" (2020), 75 *I.R.* 153, at pp. 154-55 and 163-64).

[534] Nor is there any indication that Quebec laicity is intrinsically opposed to or at odds with the *Canadian Charter* or the Constitution. Since laicity rests, in particular, on the principle of freedom of religion (Bill 21, s. 2(4)), its implementation will generally be protected by the *Charter*, given that the state's duty of religious neutrality is a necessary consequence of the freedom of conscience and religion (*Mouvement laïque québécois*, at para. 76). In the event that the implementation of the principle of laicity has the indirect effect of restricting religious expression, the Quebec legislature — like those of other provinces — has tools enabling it to achieve this pressing and substantial objective, including the justification under s. 1 of the *Charter* and the valid use of the override power under s. 33. Indeed, it is perhaps no coincidence that the only other decision of this Court dealing with s. 33, *Ford*, also concerns the implementation of a fundamental principle for Quebec society: the protection of the French language. In fact, the Court recognized in *Ford* that a law that seeks to support the French language was "a response to a substantial and pressing need", particularly because of the vulnerability of French in Quebec and in Canada (p. 777).

[535] The identification of the pressing and substantial objective of Bill 21 also makes it possible to distinguish and reject the alternative objectives put forward by the respondents the MLQ and PDF. These distinct objectives in no way represent the objective of Bill 21 and find no basis in it; the AGQ was also careful not to make submissions on them.

[536] Before this Court, the MLQ suggests that Bill 21 aims to protect the rights of parents with respect to their children's education. No aspect of the preamble of Bill 21 or of its general sections (ss. 1 to 5) deals with a right of parents to control their children's education. Furthermore, this respondent submits that, according to *Mouvement laïque québécois*, the state's duty of religious neutrality inevitably implies a prohibition on wearing religious symbols, with the result that public servants who wear them cause an infringement of the freedom of expression of others (additional written submissions, at paras. 34-57). However, that decision did not in any way deal with the wearing of religious symbols by agents of the state.

[537] With respect to PDF, according to its written submissions, it is not Bill 21 that causes an infringement of the right to equality, but rather [TRANSLATION] "the wearing of the religious symbols claimed by female Muslim teachers of EMSB and the wearing of the niqab [that] constitute a violation of the right to gender equality protected by ss. 15 and 28 of the *Canadian Charter* and of the right to human dignity" (R.F., at para. 118; see also Sup. Ct. reasons, at para. 193). In substance, PDF is asking the state to act to protect women from themselves by overriding their choice. The

Bouchard-Taylor report notes that "[t]his [emancipatory] conception [of secularism] is highly problematical in pluralistic societies such as Québec" and formally rejects it (p. 137). I agree. In any event, no internal hierarchy exists between the rights and freedoms enshrined in the charters (see, e.g., for the *Canadian Charter*, *Reference re Same-Sex Marriage*, at para. 50, and, for the *Quebec Charter*, *Ward* (2021), at para. 46).

[538] In short, I share the trial judge's opinion that the objective of Bill 21, when correctly characterized, namely the affirmation of the laicity of the state resting on the principles described in its second section, is a pressing and substantial objective within the meaning of *Oakes*.

(b) *Rational Connection*

[539] The first requirement of this second branch of the *Oakes* test requires the existence of a rational connection between the pressing and substantial objective and the infringing measure at issue. This requirement is "not particularly onerous" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, at para. 143). The finding of causality between the infringing measure and the substantial objective does not have to be empirically proven, but may be based on "logic and reason", particularly when the objective is "philosophical, political and social" (*Mounted Police Association of Ontario*, at para. 144; see also *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 104).

[540] In this case, it must therefore be determined whether the measures set out in ss. 6 and 8 — the prohibition on wearing a religious symbol and the obligation to have one's face uncovered in certain circumstances — are rationally connected to the pressing and substantial objective of laicization of the state. The trial judge, analyzing this question from the angle of the justification of the infringement of the rights protected by s. 23, replied in the affirmative (paras. 1030-37). The appellants oppose this finding, arguing that the laicization of the state does not require a prohibition on wearing religious symbols by public servants.

[541] The determination of the measures necessary for the implementation of laicity depends directly on the definition given to this word. However, several forms of secularism exist (see, e.g., J. Maclure and C. Taylor, *Laïcité et liberté de conscience* (2010), at pp. 39-47; Lampron, at p. 164). Citing, in particular, the different conceptions of secularism that were debated at the time of the Bouchard-Taylor Commission in Quebec, Professor Benjamin L. Berger noted "the diverse range of political configurations that can subsist under the capacious umbrella of the term 'secularism'" ("Liberal constitutionalism and the unsettling of the secular", in R. Ahdar, ed., *Research Handbook on Law and Religion* (2018), 198, at p. 201). Therefore, under a given conception of secularism, certain measures will be clearly necessary for achieving the objective, while, viewed under another conception, the same measures appear arbitrary. However, it is not for the judiciary to define the *correct* conception of laicity or, more broadly, of secularism. In this case, the Court must instead judge Bill 21 — and consequently the conception of laicity that it encapsulates — in light of the

Charter. With respect, many of the appellants' arguments on this point must therefore be rejected, because they would lead the Court to merely substitute one assessment of the concept of laicity for another — its own for that of the legislature.

[542] Section 2 of Bill 21 indicates that the form of secularism as conceived by the Quebec legislature reflects a balance between these four guiding 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. The articulation of secularism as the harmonization of several principles that might otherwise be in tension is reflected in the Bouchard-Taylor report. Secularism "encompasses an array of principles . . . that can in practice come into conflict" (p. 136).

[543] It is therefore necessary to evaluate the measures established by Bill 21 according to these four principles. However, it must be noted that the provisions of Bill 21 appear to be trying to implement the principles of the separation of state and religions and the religious neutrality of the state to the detriment of the principles of the equality of all citizens and freedom of conscience and religion. Not only, as noted above, do ss. 6 and 8 cause serious infringements of these rights, aggravated particularly by the prohibition on any accommodation or adaptation (s. 14), but also no other provision of Bill 21 aims to protect the freedoms of conscience and religion or the right to equality of citizens.

[544] An institutional requirement may sometimes impose personal imperatives for those who are connected to that institution (see, e.g., *Société de l'Acadie*, at para.

89). Authors Michel Seymour and Jérôme Gosselin-Tapp also reflect this logic by acknowledging that even institutional laicity leads to a duty of visible religious neutrality for [TRANSLATION] "persons in positions of supreme authority" ("Entre philosophie politique et droit: le cas de la *Loi sur la laïcité de l'État* au Québec" (2020), 61 *C. de D.* 741, at p. 767). Commissioners Bouchard and Taylor, having studied the matter closely, reached a similar conclusion, approving as a compromise, in the name of symbolism and the appearance of impartiality, the prohibition on wearing religious symbols for "those employees who occupy positions that embody at the highest level the necessary neutrality of the State" (p. 151). Accordingly, recommendation G2 of the report suggests prohibiting certain "government employees" in positions of authority from wearing religious symbols, but with the notable exclusion of "teachers" and "public servants" (p. 271).

[545] I therefore note that, according to some, there may exist a sufficient rational connection between the prohibition on wearing religious symbols by certain state actors and the objective of laicization of the Quebec state. While one may or may not agree with the appropriateness of imposing this requirement for the purposes of accomplishing the objective of laicization (see, e.g., D. Weinstock, "Réflexions critiques sur le rapport Taylor-Bouchard", in Gaudreault-DesBiens, *Le droit, la religion et le "raisonnable": Le fait religieux entre monisme étatique et pluralisme juridique*, 93, at pp. 107-12), this is not the question the Court must answer. The rational connection requirement is met provided "that it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Taylor*, at para. 211, quoting

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48). In light of this low threshold, I find that s. 6 satisfies the rational connection requirement.

[546] Even so, the measure set out in para. 2 and 3 of s. 8 of Bill 21 — the obligation to have one's "face uncovered" in order "to receive a service" — is lacking a rational connection to the objective of laicization of the state, because it imposes restrictions on members of the public and not on agents of the state. As commissioners Bouchard and Taylor warned, we must "avoid confusing the **laicization** of a political system and the **secularization** of a society" (p. 135 (emphasis in original)). Moreover, the restrictions imposed on women who wear a veil that covers part of their face have no connection to "the religious neutrality of the State" and to "the separation of State and religions" and breach the principles of "the equality of all citizens" and "freedom of conscience and freedom of religion" in a direct manner (Bill 21, s. 2). This reflects a rejection of certain religious practices, rather than the state acting in a neutral manner and with separation from religious matters.

[547] In conclusion, I recognize a rational connection between the pressing and substantial objective and s. 6 of Bill 21. However, s. 8 of Bill 21 does not satisfy this requirement.

(c) *Minimal Impairment*

[548] The second requirement of the second branch of the *Oakes* test requires that the government prove that "there were no less harmful means to achieve the objective in a real and substantial manner" (*Taylor*, at para. 234). A certain degree of deference must be afforded to a legislative body, particularly "where the impugned measure seeks to strike a balance between competing and legitimate social values" (*R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 135). It is therefore necessary, in this case, to determine whether the legislature reasonably had other options available that would have enabled it to achieve its objective of the laicization of the state with less impairment to rights and freedoms.

[549] However, the AGQ has not demonstrated that Bill 21 is "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). On the contrary, it expressly prohibits any accommodation, derogation or adaptation (s. 14). The trial judge provided an example in light of the evidence, that is, that it does not limit the prohibition to moments when public servants could be in contact with the public, and could thus hypothetically apply, for example, to a teacher who is correcting test copies at home (paras. 324-25). Furthermore, the judge accepted that Bill 21 applies not only to visible religious symbols, but also to those that are not visible, such that [TRANSLATION] "a Catholic person cannot wear a cross under their clothes, just as a Jewish man cannot wear tzitzits under his shirt" (para. 321; see also para. 322).

[550] Because of this lack of nuance and flexibility, Bill 21 departs from the justification advanced for the prohibition on religious symbols, that is, "the appearance of neutrality" and "the appearance of impartiality" of government employees (Bouchard-Taylor report, at pp. 149 and 151 (emphasis added)).

[551] Finally, it has not been demonstrated by the AGQ that the prohibition on wearing a religious symbol imposed by Bill 21 is reasonably limited in its scope of application, which is defined in Sch. II ("Persons subject to the prohibition on wearing religious symbols in the exercise of their functions"). At a minimum, it would be expected that the choice of the public servants subject to s. 6 be justified by a rational principle and be connected to the pressing and substantial objective. This list of persons is not tailored so that rights are impaired no more than necessary.

[552] I therefore find that this measure does not satisfy the minimal impairment requirement, and, accordingly, the infringing nature of s. 6 of Bill 21 with respect to the fundamental freedoms and the right to equality cannot be justified in a free and democratic society.

(d) *Balancing the Salutary and Deleterious Effects*

[553] The third requirement of the second branch of the *Oakes* test aims to ensure that the deleterious effects of the measures at issue are proportionately counterbalanced by the salutary effects arising from the objective. There must thus "[be] a balance

between the benefits of the law and its negative effects" (*Kanyinda*, at para. 96, citing *Oakes*, at pp. 138-40).

[554] This final requirement of the *Oakes* test reminds us of a fundamental principle of Canadian constitutional law: rights and freedoms cannot be limited as a matter of principle if there are no real salutary effects for others as a result. This is an important limit on the legislative power, certainly, but it is a limit that is inherently democratic. To justify the harm caused to one, it is necessary, at a minimum, to ensure that it is counterbalanced by the salutary effects felt by the other, which does not seem to be the case, in light of the findings made by the judge.

[555] This is not to say that the secularization of the state, in the broad sense, has not had a number of significant salutary effects for the Quebec population as a whole for decades. As noted by the trial judge in para. 75 of his reasons, the Court is not ruling here on laicity, but on a measure undertaken in its name, that is, Bill 21 and the prohibition on wearing a religious symbol for many people.

[556] On this point, the AGQ did not adduce any evidence explaining the salutary effects of the exclusion of these people. For this additional reason, the infringements caused by s. 6 of Bill 21 are not justified.

[557] As mentioned previously, s. 28 is of importance in the s. 1 analysis and, in this case, reinforces this conclusion. The interpretation suggested by the Court of Appeal should be confirmed: ". . . 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*" (para. 474).

[558] This Court has recognized s. 25 of the *Charter* — which appears under the same heading as s. 28 — as having a measure of substantive force in addition to its interpretive scope, in that it "protects" an "interest" and has a real normative effect when it operates as a "shield" (*Dickson*, at paras. 161 and 164). Like s. 25, s. 28 expresses a collective interest; it can be applied when balancing collective interests and government objectives against the deleterious effects of the government action on the group concerned (*R. v. Hess*, [1990] 2 S.C.R. 906, at p. 932). In *Brown*, the Court considered this interest under s. 28 even though women were not the holders of the rights asserted against the state (para. 70).

[559] In this regard, it can be said that consideration of s. 28 under s. 1 indicates that s. 28 is not [TRANSLATION] "a minor provision or one devoid of substance" (C.A. reasons, at para. 456). Some have characterized this effect as substantive, others as interpretive. But this semantic debate does not shed any light on the true scope of s. 28. As the s. 1 analysis reveals, s. 28 possesses a certain normative force. It goes without saying that the manner in which this collective guarantee of equality rights is to be applied will no doubt be clarified over time.

[560] In this case, the trial judge accepted that [TRANSLATION] "Bill 21 has effects that prevent women, and especially Muslim women . . . in the field of education only

— from exercising their freedom of religion" (para. 876). This deleterious effect of Bill 21, with respect to s. 28, must be considered in the balancing and supports the conclusion that there is an absence of evidence of justification here.

C. *Conclusion on the Declaratory Judgment*

[561] For all the foregoing reasons, I find that ss. 6 and 8 of Bill 21 cause an infringement of the freedom of religion and conscience, the freedom of expression and the right to equality, as guaranteed by ss. 2 and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter*. These infringements have not been justified by the AGQ or by the other parties that attempted to meet this burden. Despite the fact that the infringing measures are part of the pursuit of a pressing and substantial objective, that is, the laicization of the Quebec state, it has not been demonstrated that there is a rational connection between the obligation to have one's face uncovered and this objective, or that the prohibition on wearing a religious symbol satisfies the requirements of minimal impairment and proportional effects within the meaning of *Oakes* and particularly in light of s. 28.

[562] That being so, the analysis of the constitutional status of Bill 21 for the purposes of the declaration cannot end here. With regard to Bill 21, an inconsistency between its ss. 6 and 8 and the *Charter* does not automatically amount to its constitutional invalidity. In fact, the AGQ invoked ss. 33 and 34, its override provisions, in defence of the validity of Bill 21, which state that Bill 21 continues to have effect notwithstanding certain provisions of the Canadian and Quebec charters.

V. Are Bill 21's Override Provisions Valid?

[563] Section 34 of Bill 21 invokes the override power set out in s. 33 of the *Canadian Charter*, and in its s. 33, the override power set out in s. 52 of the *Quebec Charter*. On their face, the inconsistencies between certain provisions of Bill 21, ss. 2 and 15 of the *Canadian Charter* and ss. 3 and 10 of the *Quebec Charter* do not have the effect of rendering Bill 21 invalid and inoperative by the effect of s. 33 of the *Canadian Charter* and s. 52 of the *Quebec Charter*.

[564] However, several appellants challenge the very validity of s. 34 of Bill 21, arguing that it does not respect an inherent and implicit limit on the use of the override power set out in s. 33 of the *Canadian Charter*. Ms. Lauzon et al. submit that an override clause cannot keep operative a law [TRANSLATION] "whose purpose is to attack guaranteed rights and freedoms" (A.F., at para. 48). The FAE is of the view that [TRANSLATION] "evidence of the pursuit of a pressing and substantial objective by a Legislative body" is a "substantive condition" of the override power (A.F., at para. 135). Finally, Ms. Hak et al. argue that a law protected by an override provision remains invalid if it is inconsistent with Canada's constitutional architecture (A.F., at paras. 50-59). The appellants that propose a substantive limit argue that certain provisions of Bill 21 should be declared invalid, despite its override provision.

[565] The AGQ relies on *Ford* to assert that the Court has already held that there is no substantive condition for the use of the override power. This argument has already been rejected above, as it was a misreading of a passage of that decision. In the

alternative, the AGQ argues that a correct purposive interpretation of s. 33 indicates that the provision is [TRANSLATION] "subject only to conditions of form" (R.F., at para. 170). He relies on the wording of the provision, arguing that it contains no explicit limit, as well as on the history of the enactment of s. 33 at the time of the patriation of the Constitution.

[566] I will divide the analysis of this question into two parts. I will first address the AGQ's argument that a purposive interpretation of s. 33 necessarily indicates that there is no possible limitation on the override power, a position that I refute. I will then dispose of the substantive limits argued by the parties, before concluding that s. 34 of Bill 21 is a valid and constitutional use of the override power.

A. *A Purposive Interpretation of Section 33 Indicates That There Are Inherent Limits on the Override Power*

[567] This Court recently unanimously pointed out that "[u]nder the rule of law, all public powers must be legal, and all legal powers have limits", because "[a]n unlimited power is, definitionally, not a legal power" (*Democracy Watch*, at para. 1). The power of Parliament and the legislatures to override certain sections of the *Canadian Charter* is also subject to such inherent limits.

[568] A purposive interpretation, as applied by this Court, makes it possible to discern the implicit criteria and conditions governing the exercise of a right, the

recognition of which serves to ensure that only the actual purpose of the provision applies, no more and no less.

[569] The identification of implicit conditions and criteria is not required only for *Charter* provisions that guarantee rights. It is equally required for provisions that grant a power. For example, the power with respect to remedies in s. 24 of the *Charter* is subject to criteria of application and substantive limits, such as "employ[ing] means that are legitimate within the framework of our constitutional democracy" (*Power*, at para. 40; see also para. 38). The same progression — from the text, to the purpose, to the determination of substantive limits — exists almost everywhere else in the Constitution.

[570] In *Alford v. Canada (Attorney General)*, 2026 SCC 14, on a purposive interpretation, this Court discerned "constraints" that did not appear in the text of s. 18 of the *Constitution Act, 1867* concerning Parliament's authority to supplement or limit its privileges (para. 72). Similarly, in *Société de l'Acadie*, this Court determined that the power of appointment of a lieutenant governor provided for in s. 58 of the *Constitution Act, 1867* is subject to implicit constraints when considered in relation to certain other constitutional provisions (para. 105).

[571] In short, I reject the AGQ's argument that a purposive interpretation of s. 33 necessarily leads to the result that there can be no parameter or substantive condition on the use of this power, which would make it an unparalleled exception in Canadian constitutional law. Instead, I share the opinion of the author Bordan when he stated: "It

would not be surprising to find that a power granted under the Constitution is subject to limitations arising from the character of the Constitution in which it is embedded" (p. 320).

B. *Bill 21 Respects the Implicit Limits of the Override Power Because It Does Not Have the Effect of Amending the Constitution*

[572] As summarized above, Ms. Lauzon et al., Ms. Hak et al. and the FAE suggest substantive conditions governing the exercise of the override power in s. 33 of the *Canadian Charter*. While I conclude that this power indeed has inherent limits, the latter only partially correspond to their propositions. In my view, these propositions of limits all flow from one and the same principle: a law that invokes s. 33 remains an ordinary law and cannot, therefore, amend the Constitution.

[573] First, I would reject the FAE's proposition that an override provision will be valid only where there is "evidence of the pursuit of a pressing and substantial objective by a Legislative body", like the first branch of the *Oakes* test (A.F., at para. 135; see also paras. 136-39). As we have seen, the purpose of s. 33 is distinct from that of s. 1 of the *Charter*. Section 1 establishes a mechanism for justifying infringements, while s. 33 establishes a mechanism for protecting the normative force of infringing provisions that cannot be justified within the meaning of *Oakes*. Simply grafting one part of the test applicable to s. 1 onto this distinct provision would not respect the distinct nature and purpose of these two provisions. In any case, as determined above, Bill 21 pursues a pressing and substantial objective.

[574] Regarding Ms. Lauzon et al., their proposition that [TRANSLATION] "an override provision cannot keep operative a law whose purpose is to attack guaranteed rights and freedoms, because such a law is fundamentally inconsistent with the very nature of the *Charter* as a rights protection instrument" (A.F., at para. 48) relies, in particular, on the fact that s. 33 does not fall under Part V of the *Constitution Act, 1982* ("Procedure for Amending Constitution of Canada") and that it cannot be used to unilaterally take away a *Charter* right without following the amendment procedure set out therein (para. 65). On this point, Ms. Lauzon et al. reflect the logic articulated by the author Bordan, who proposes to distinguish between measures that "limit" a right and those that "attac[k] the very existence of that right" (Bordan, at p. 325). He makes the following suggestion: "However, a legislative attack directed against the right itself is more akin to a back-door attempt to amend the Canadian Charter to abrogate the right than it is a limit on the right" (pp. 325-26). Ms. Hak et al. also base their argument on the fact that Bill 21 amends Canada's "constitutional architecture"; it constitutes an indirect amendment and is therefore invalid (A.F., at paras. 31-32).

[575] These propositions, despite their different foundations, are based on a common denominator with which I agree: s. 33 has no supra-constitutional effect and cannot be used to amend the Constitution. It confers on Parliament and the legislatures the power to protect the validity and operability of their laws, despite an inconsistency with certain provisions of the *Charter*. *A contrario,* it does not confer on them the power to unilaterally amend these provisions, even less so the power to amend the rest

of the Constitution, except of course where the Constitution itself authorizes it. To that extent, the appellants are correct.

[576] Indeed, a law invoking the override power of s. 33 remains a simple law. This is not so much an inherent limitation on the override power, but a recognition of what that power simply cannot achieve: it is not a constitutional loophole allowing to be done indirectly what cannot be done directly. Clearly, a law containing an override provision may, like any other law, unilaterally amend the constitution of its province in accordance with s. 45 of the *Constitution Act, 1982*. However, it cannot have the purpose or effect of amending the Canadian Constitution in a manner that is inconsistent with Part V of the *Constitution Act, 1982* (see Kong (2023), at pp. 27-28).

[577] For the purposes of these appeals, this principle has at least two consequences: despite its override provision, Bill 21 cannot amend the constitutional architecture or unilaterally amend s. 33 without thereby constituting a unilateral and invalid amendment to our Constitution. As we shall see, this is not the case.

(1) Bill 21 Does Not Have the Effect of Amending the Constitutional Architecture

[578] As argued by Ms. Hak et al., an overriding law cannot amend what this Court has characterized as Canada's "constitutional architecture", because such a transformation would instead require a constitutional amendment following the procedure set out in Part V of the *Constitution Act, 1982*. The constitutional architecture

is understood as the country's "basic constitutional structure", and it is distinguished by a consideration of the "assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another" (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26; see also *Reference re Secession of Quebec*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57).

[579] The constitutional architecture differs from unwritten constitutional principles. The latter do not have invalidating force on their own, but help, together with the text of the Constitution, to identify the components of Canada's constitutional architecture (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at paras. 49-56 and 65). Any law unilaterally attempting to amend the constitutional architecture constitutes an invalid constitutional amendment and must therefore be declared null (*Reference re Senate Reform*, at paras. 27 and 53; *OPSEU*, at p. 57). It should be noted that the "separation of powers", the proper functioning of which is ensured by one of its corollaries, judicial independence, is also part of our constitutional architecture (see *Power*, at para. 50; *R. v. Varennes*, 2025 SCC 22, at para. 79).

[580] Bill 21 does not have the effect of changing Canada's constitutional architecture. Contrary to the examples given above, it does not have the effect of radically transforming the fundamental institutions of the Canadian federation. It bears recalling that a component of the constitutional architecture must have at least some

basis in the text of the Constitution. However, Ms. Hak et al. have not demonstrated that Bill 21 contravenes a component of the constitutional architecture that has a sufficient textual foundation and the same degree of generality that characterized the components at issue in *Reference re Senate Reform* (the Senate must be appointed) and *OPSEU* (the legislative assembly must be elected). On the contrary, provincial legislatures *prima facie* have the power to legislate in order to regulate their public service and, accordingly, the persons constituting it in these matters (see *Constitution Act, 1867*, ss. 92(4), (13), (16) and 93). Much like the case of *OPSEU*, Bill 21, rather than modifying Canada's constitutional architecture, amends at most the provincial constitution of Quebec — in accordance with s. 45 of the *Constitution Act, 1982* — in that its provisions "bear on the operation of an organ of government in [Quebec] and that they impose duties on the members of a branch of government in order to implement a principle of government" (p. 41).

(2) Bill 21 Does Not Have the Effect of Amending Section 33

[581] An overriding law must strictly respect the terms and limits set out in s. 33 of the *Charter*, failing which it would constitute a unilateral — and therefore invalid — amendment to that constitutional provision.

[582] First, the law invoking the override power must respect the requirements of s. 33(1). It may derogate from only ss. 2 and 7 to 15 of the *Canadian Charter*, to the exclusion of democratic rights (ss. 3 to 5), mobility rights (s. 6), and language rights and minority language educational rights (ss. 16 to 23). The courts must duly verify

that the overriding law does not go beyond the very text of s. 33 by infringing, even indirectly, these rights, or other constitutional guarantees set out elsewhere in our Constitution. The fact that a law infringes both a right that could be subject to an override and a right that could not be subject to it cannot extend the scope of the override power, because "the scope of one *Charter* right does not circumscribe the scope of another" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 58).

[583] Second, the overriding law must also respect the logic of s. 33, as expressed by its subss. (3) to (5). A plain reading of the wording of these subsections demonstrates the fundamentally temporary nature of the override power. A declaration ceases to have effect no later than five years after it comes into force (s. 33(3)), a period that corresponds to the maximum duration of the House of Commons or a legislative assembly (*Charter*, s. 4), and the override provision can be maintained only by the enactment of a new declaration (s. 33(4)), which itself is subject to the same temporal limit (s. 33(5)). All agree that the purpose of this particular mechanism is to put the final say on the use of the override clause in the hands of the electorate and to encourage each new legislative assembly to debate the override anew (see C.A. reasons, at paras. 222 and 226; see also Leckey and Mendelsohn, at pp. 198-99; Adams and Bower, at p. 141).

[584] An overriding law whose purpose or effect would be to render this temporal limit illusory — whether by enacting a derogation of more than five years, by exempting its re-enactment from being voted on by Parliament or the legislature, or by

causing a guaranteed right to be permanently infringed to the point that it cannot regain its full force upon the expiry of the declaration — would change the very terms of s. 33, and in doing so, of the Constitution. It would therefore be invalid. If a legislative body wishes to permanently render inoperative one of the sections of the *Canadian Charter*, the appropriate avenue is a constitutional amendment according to the procedure set out in Part V of the *Constitution Act, 1982*.

[585] In this case, Bill 21 does not produce any effects going beyond subss. (3) to (5) of s. 33 and therefore does not constitute a unilateral amendment to the *Canadian Charter*. The deleterious effects of Bill 21, while serious, are neither permanent nor irremediable in the sense I have described above, and Bill 21 does not have the purpose or effect of abrogating certain *Charter* rights. If a future National Assembly were to choose not to re-enact the override provision, the infringements of the rights of Quebecers would cease; the persons affected could once again access the functions that Bill 21 excludes them from.

[586] In summary, the Quebec legislature's use of the override power in s. 33 does not change the constitutional architecture of our country and does not effect any unilateral amendment to the Constitution. I conclude that the Quebec legislature has used the override power under s. 33 of the *Canadian Charter* in a constitutional manner in s. 34 of Bill 21. Thus, Bill 21 is valid and operative, despite the infringements of the rights and freedoms protected by ss. 2 and 15 of the *Charter* caused by ss. 6 and 8 of

Bill 21. Subject to my reasons on the override power, I agree with the Chief Justice that s. 52 of the *Quebec Charter* was also validly invoked by the Quebec legislature.

VI. Conclusion

[587] I propose that this Court, in the place of the Superior Court, declare that, except with regard to the Court of Appeal's findings in respect of s. 3 of the *Canadian Charter*, Bill 21 is constitutional, valid and operative. Despite its pressing and substantial objective, ss. 6 (prohibition on wearing a religious symbol) and 8 (services with one's face uncovered in certain circumstances) of Bill 21 infringe ss. 2 and 15 of the *Canadian Charter* in a manner that cannot be justified under s. 1, with particular consideration given to s. 28 of the *Charter*. They also infringe the rights and freedoms protected by ss. 3 and 10 of the *Quebec Charter*. The other provisions contested by the appellants (ss. 4, 7, 9, 10 and 13 to 16) will not be subject to the declaration because only ss. 6 and 8 contain, in the opinion of the trial judge, the measures that infringe the rights and freedoms. Furthermore, contrary to what the appellants argue, I am of the view that the addition of no more than a simple reference to "State laicity" in other statutes, by the amending provisions (ss. 18, 19 and 21), is not inconsistent with the charters. That said, the validity and operability of Bill 21 is preserved as a result of a constitutional use of s. 33 of the *Canadian Charter*. I therefore propose a two-part declaration: a declaration of inconsistency coupled with and subject to a declaration of validity.

[588] Accordingly, I would allow the appeals in part, and I would dismiss the AGQ's cross-appeal.

[589] I take note of the trial judge's conclusion to not award legal costs given the public interest of the questions at issue and of that of the Court of Appeal to not award legal costs on appeal. While it is true that the rule is that the losing party must pay all costs, it does not readily apply to my findings, which propose a divided outcome of the appeals with respect to s. 33 of the *Charter*, an essential element of the debate. On the one hand, I would declare ss. 6 and 8 of Bill 21 inconsistent with the *Charter*, but, on the other hand, I would declare Bill 21 valid and operative. Thus, given the divided outcome of the appeals, I would award no costs in this Court.

The following are the reasons delivered by

MARTIN J. —

I. Overview

[590] Section 28 of the *Canadian Charter of Rights and Freedoms* operates as both an interpretive provision and a substantive guarantee. Section 33 has a limited scope and only applies to certain rights and freedoms, specifically ss. 2 and 7 to 15 of the *Charter*. Thus, even when validly invoked, it is clear from its face that s. 33 cannot suspend the sex equality right protected under s. 28. Substantively, s. 28 confers a free-standing right that exists "[n]otwithstanding anything in this Charter" and cannot be

rendered inoperable by s. 33 of the *Charter*. In addition to being outside the ambit of s. 33, the substantive sex equality right guaranteed under s. 28 is not subject to ss. 1 or 25 of the *Charter*.

[591] I conclude that ss. 6 and 8 of the *Act Respecting the Laicity of the State*, CQLR, c. L-0.3 ("Bill 21"),[5] infringe s. 28 of the *Charter* because they unequally restrict a woman's right to respect her faith, freely express herself and to be free from discrimination based on religion and sex.

[592] I agree with Justices Karakatsanis and O'Bonsawin, and Justice Kasirer, that superior courts retain inherent jurisdiction to grant declaratory relief where legislatures choose to insulate laws under s. 33 of the *Charter*. Courts have the discretion to determine whether or not to grant declaratory relief in a given case. The factors that will guide that decision will develop further over time and respond to the particular constitutional context of s. 33. At one level, it is unnecessary to decide whether there are substantive limits on s. 33 in this appeal as there is no finding that any such limits have been transgressed. Nevertheless, I am unconvinced that there are other or additional limits on the use of the notwithstanding clause that do not arise from s. 33 itself. I do not see a clear source from which the proposed limits derive. While the concerns raised by my colleagues should be taken seriously, I prefer to see their

[5] Bill 21 has been amended since the hearing of the case at first instance: provisions have been amended, repealed and added. In these reasons, I refer to the version of Bill 21 in force at the time of the hearing of the case at first instance.

proposed limits as operating only as factors which may bear on the decision to grant or deny declaratory relief when s. 33 is invoked.

[593] Given my conclusion on s. 28, there is no need for a separate declaration in this case to ensure that the electorate understands how ss. 6 and 8 of Bill 21 restrict religious freedom, limit freedom of expression and are discriminatory. Since I have declared ss. 6 and 8 to be of no force or effect, the reasons given for why s. 28 is breached provide a full explanation of how the impugned provisions operate.

[594] In addition, I agree with my colleagues in the result that Bill 21 unjustifiably limits s. 3 of the *Charter*. I also see no error in the Court of Appeal's treatment of the pre-Confederation statutes.

[595] In light of my conclusion on s. 28, it is unnecessary to decide whether Bill 21 infringes s. 23 of the *Charter* or whether Bill 21 may be *ultra vires* Quebec. However, in my view, Bill 21 raises serious concerns under s. 23 of the *Charter*, and the application of ss. 6 and 8 of Bill 21 to non-state actors raises federalism concerns as being *ultra vires* Quebec.

[596] I would allow the appeals in part. I find that ss. 6 and 8 of Bill 21 infringe s. 28 of the *Charter*, and are of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. I would dismiss the cross-appeal.

II. Section 28 of the *Charter*

[597] Section 28 operates as both an interpretive provision and a substantive guarantee. It reads:

> **28** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[598] In its interpretive dimension, s. 28 requires that all *Charter* rights be interpreted in a manner that can be equally enjoyed by men and women, and it demands that any conflict between sex-based equality and other rights be resolved in favour of the former. In its substantive capacity, s. 28 confers a substantive equality right that cannot be rendered inoperable by s. 33 or limited by ss. 1 or 25. This right guarantees the equal benefit of all other rights in the *Charter*. And it prohibits the state from limiting those other rights in a manner that discriminates on the basis of sex, irrespective of whether the underlying right is subject to the notwithstanding clause or whether the limit of the underlying right might be justified under s. 1. In this sense, s. 28 effectively carves out matters of sex-based discrimination from the scope of ss. 1 and 33.

[599] This conclusion flows from a purposive interpretation of s. 28, based on the interpretive sources set out in *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, at paras. 76 and 85: the character and larger objects of the *Charter*, as well as s. 28's text, context, history, analogues in international law, and drafting history. These sources indicate that the purpose of s. 28 is to protect equality between the sexes as a paramount value in the Canadian legal order.

[600] I recognize that s. 28 has not yet been interpreted in the manner that I propose. To date, s. 28 has only been used to assist in the interpretation of other provisions of the *Charter* (*R. v. Hess*, [1990] 2 S.C.R. 906, at pp. 932-33; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 698-99, per L'Heureux-Dubé J., dissenting in part, but not on this point; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 649-64; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 112 and 115; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 97, per Bastarache J., concurring in the result). But this does not mean that s. 28's scope must be *solely* interpretive. Indeed, *Charter* rights are regularly used as interpretive aids in relation to *other* rights, yet they retain their own substantive force (see, e.g., *Taylor*, at para. 81; *G. (J.)*, at paras. 112 and 115; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976; *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365).

[601] I similarly understand that, in the past, this Court has upheld laws that discriminate on the basis of sex as justified limits under s. 1 (*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 117; see also *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at paras. 42-55, per Abella J., concurring in the result; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61). However, those cases were decided only under s. 15 of the *Charter*. Section 28 was not raised by the parties or discussed by the Court. The purpose, scope and effect of s. 28 cannot be derived from cases in which it was not argued or addressed.

[602] In fact, it should come as no surprise that this case presents the first opportunity for the Court to recognize s. 28's substantive scope. Section 28 primarily comes into play, and is needed most, when the state invokes s. 33. When the notwithstanding clause is not used, s. 15(1) continues to provide robust equality protection, as sex is an enumerated ground of discrimination. So it makes good sense that this Court's prior cases touching on s. 28, which did not involve s. 33, do not exhaustively define its content. As the Court of Appeal noted, [TRANSLATION] "in none of these judgments was s. 28 presented as spearheading the argument, nor was it examined in-depth" (2024 QCCA 254, at para. 464). For this reason, s. 28 must now be interpreted from first principles.

A. *Interpretation*

(1) Character and Larger Objects of the *Charter* as a Whole

[603] The stage for any purposive interpretation must be set by recalling "the broad objective of the *Charter*" (*Taylor*, at para. 77). The *Charter* is fundamentally a rights-protecting instrument (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156). As Chief Justice Dickson said, its purpose "is to entrench certain basic rights and freedoms and immunize them from legislative encroachments" (*R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 14) in order to ensure that "Canadian society [can] be free and democratic" (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136).

[604] This goal is laudable, broad and ambitious. A free and democratic society is one defined by "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" (*Oakes*, p. 136). And, pressingly for the purposes of this appeal, "[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336). Protecting and promoting these values requires diligence as the Court must continuously be guided by them (*Oakes*, at p. 136).

[605] That is why the Court has committed itself to large, liberal, and generous interpretations of the *Charter*'s provisions (*Taylor*, at paras. 83-85; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 7; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Big M*, at p. 344; *Hunter*, at pp. 155-56). I agree with Justices Karakatsanis and O'Bonsawin (at paras. 794-95), and Justice Kasirer (at paras. 431-32), as to this well-established approach to *Charter* interpretation. With a mandate to protect the Constitution, the Court must act as a jealous guardian of individual liberty and group-based equality rights. Its interpretive methodology will often lean towards expanding and preserving their scope. Invitations to restrict those freedoms will necessarily be approached with caution and care.

(2) Text

[606] A textual analysis of s. 28 can be broken down into three steps, each revealing something unique about this special provision.

(a) *"Notwithstanding Anything in This Charter"*

[607] This strong introductory language suggests that s. 28 takes priority over all other provisions of the *Charter*. The plain meaning of these words is quite clear: the content of s. 28 continues to apply in spite of *anything* in the *Charter*. This indicates that s. 28 is paramount over any provision that may serve as an internal limit on other components of the *Charter*, including ss. 1, 25 and 33, and provisions that protect other substantive rights.

[608] It is telling that several other provisions of the *Charter* also establish priorities between competing principles, yet the language of s. 28 is the broadest and most unambiguous. These other provisions, for instance, use the alternative language of: "shall not be construed" (s. 26); "[n]othing in this Charter limits the authority" (s. 16(3)); "[n]othing in this Charter abrogates . . . any rights" (s. 29); "[n]othing in this Charter extends the legislative powers" (s. 31); "[n]otwithstanding subsection (1)" (s. 32(2)); and "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" (s. 33(1)) (K. J. de Jong, "Sexual Equality: Interpreting Section 28", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), 493, at p. 522). Each of these examples either identifies a specific effect that one component of the *Charter* may or may not have on another right or power in the Constitution or in a statute, or enumerates specific sections of the *Charter*

that may or may not trump another. Importantly s. 28 includes no such restriction: its scope is not restricted to a particular effect or to particular provisions of the *Charter*.

(b) *". . . The Rights and Freedoms Referred to in it Are Guaranteed . . ."*

[609] This phrase — and most importantly, the words "are guaranteed" ("*sont garantis*") — indicates that s. 28 has substantive effect. In the English text, there is only one other provision in the *Charter* that "guarantees" ("*garantit*") rights — that is, s. 1.[6] While the French texts of ss. 25 and 26 also include the word "*garantit*", it is s. 1 which provides that the *Charter* "*garantit*" rights and freedoms. The French versions of ss. 25 and 26 refer to the *fact* that the *Charter* guarantees certain rights and freedoms. In both English and French, the use of the word "guarante[e]" in ss. 1 and 28 has the same substantive effect. Section 1 "guarantees" ("*garantit*") the rights referred to in the *Charter* subject to reasonable limits. It is this s. 1 guarantee which gives *Charter* rights their substantive force (*Oakes*, at p. 135). One can expect the guarantee of s. 28 to have the same or similar meaning; indeed, "[t]here is no indication in the text of the *Charter*

[6] In the English text of the *Charter*, while the words "guaranteed" and "guarantee" appear elsewhere (ss. 24(1), (2), 25, 26 and 29), only s. 1 "guarantees" the rights and freedoms therein and only s. 28 provides that the rights and freedoms therein "are guaranteed". In the French text, while the words "*sont garantis*" appear in both ss. 28 and 24(1), s. 24(1) refers to anyone whose rights or freedoms "*qui lui sont garantis par la présente charte*" are infringed or denied while s. 28 provides that the rights and freedoms in the *Charter* "*sont garantis*". Section 24(2) similarly refers to evidence obtained in a manner that infringes or denies rights or freedoms "*garantis*" by the *Charter*. Also in the French text, the heading above ss. 7 to 14 uses the word "*garanties*" as a noun rather than a verb, and s. 29 contains the word "*garantis*" in reference to rights protected by the Constitution in respect of denominational, separate or dissentient schools.

that the effect of the word ‘guarantee’ differs from section to section”, and “[t]he entire scheme must stand or fall together” (de Jong, at p. 523).

[610] What, though, is s. 28 guaranteeing? The answer is that it is guaranteeing the “rights and freedoms referred to in [the *Charter*]”. But the meaning of those words is subject to two competing interpretations (B. Baines, “Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation” (2005), 17 *C.J.W.L.* 45, at p. 55).

[611] On the first interpretation, s. 28 guarantees the “rights and freedoms” as qualified or limited by s. 1 (see M. Eberts, “Sex and Equality Rights”, in Bayefsky and Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms,* 183, at pp. 215-16). This theory posits that s. 1 serves as the substantive guarantee of rights in the *Charter* and protects all rights, subject to reasonable limits. And s. 28 *adds* to the s. 1 guarantee, ensuring that the rights as protected by s. 1 are enjoyed equally by women and men.

[612] On the second interpretation, s. 28 guarantees the “rights and freedoms” in the *Charter* independently from s. 1 (see de Jong, at p. 527). Instead of restricting the scope of rights, like s. 1 does, s. 28 broadens the scope of rights to ensure that each right is extended equally to male and female persons. This reading of s. 28 suggests that there are two pathways to benefit from one’s rights. On the one hand, s. 1 creates a substantive guarantee (or a right) to all other rights, subject to reasonable limits. And

on the other hand, s. 28 creates a substantive guarantee (or a right) to the equal benefit of all other rights.

[613] In my view, the second approach is most consistent with the text of the provision. The first asserts that rights and freedoms do not exist independently of s. 1 and their scope can only be discerned by filtering them through the limitation clause. This view was rejected by this Court in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 10 (see also *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 42). Moreover, this perspective seems to neglect the introductory language in s. 28 of "notwithstanding anything", and instead reads it down to say "notwithstanding anything except section 1" (K. A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, Ph.D. thesis, Queen's University (2015), at p. 379).

[614] That said, I recognize that one might argue that the second view does not harmonize ss. 1 and 28 as well as the first. As a result, a definitive position on the relationship between ss. 1 and 28 does not arise from this portion of the text alone. Rather, what is required is a further consideration of which position best conforms to the purpose of s. 28, as determined by the other interpretive sources. But one thing is abundantly clear from this portion of the text: s. 28 is a substantive, rights-protecting guarantee.

[615] I point out that neither of these two positions supports the view proposed by the Attorney General of Quebec ("AGQ") that s. 28 cannot substantively guarantee

the rights and freedoms under ss. 2 and 7 to 15 when s. 33 is invoked because s. 33 renders them inoperable. The s. 28 guarantee is completely independent of s. 33. When read alongside s. 28's substantive guarantee, the language of "[n]otwithstanding anything in this Charter" suggests that s. 28 removes the ability of s. 33 to suspend the effect of rights on legislation in a manner that discriminates on the basis of sex. To borrow a phrase from Jacob Weinrib, s. 28 operates "[n]otwithstanding [n]otwithstanding" (*Notwithstanding Notwithstanding: On the Relationship Between ss. 33 and 28*, Lecture at Queen's University Faculty of Law, June 5, 2025 (online)).

(c) *". . . Guaranteed Equally to Male and Female Persons . . ."*

[616] These final words define the subjects of s. 28, and specify the scope of its guarantee. The subjects of s. 28 are "male and female persons". Some parties to this appeal have asked us to read these words to include persons of all genders, as opposed to just the male and female sexes (see, e.g., I.F., Women's Legal Education and Action Fund, at para. 12). But that question does not need to be addressed in this appeal, and I would leave it for another day. It is sufficient for the purposes of this appeal to acknowledge that the s. 28 claim here is based on sex ("male and female persons"), not gender.

[617] The effect of the s. 28 guarantee is described by the adverb "equally". The invocation of equality here does two things: it insists that all rights are guaranteed to male and female persons, and it requires that the scope, value, and degree of that guarantee be equally afforded to male and female persons (de Jong, at p. 519).

[618] This reference to equality should be understood as substantive equality. Substantive equality is the "governing legal paradigm" under Canadian constitutional law (B. McLachlin, "Equality: The Most Difficult Right" (2001), 14 *S.C.L.R.* (2d) 17, at p. 21). Indeed, "[i]t is here to stay. We can count on it" (*ibid.*). There is no compelling reason to invoke a different theory of equality under s. 28 (see Baines, at p. 64).

(3) Context

[619] The context surrounding s. 28 is also informative of its purpose. By "context", I refer to the structure of the *Charter*, and the meaning of surrounding language and provisions (*Taylor*, at para. 81). This context can provide clues as to the purpose of a particular provision because the *Charter* must be interpreted as a unified system (*Dubois*, at pp. 365-66). As a result, any purpose assigned to s. 28 must make sense alongside the rest of the *Charter*.

[620] I begin with an observation about s. 28's place in the *Charter* as a whole, before turning to the impact of particular *Charter* provisions on the interpretation of s. 28. The Court of Appeal interpreted s. 28 as merely ensuring that all rights in the *Charter* are provided equally, and without distinction, to both women and men. The AGQ advances the same interpretation before this Court. But, on this reading, s. 28 would accomplish nothing and would be "a cruel sham", because s. 28 is not needed to achieve this end (W. F. Pentney, "Interpreting the Charter: General Principles", in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 21, at p. 49). Even without s. 28, "it is obvious that the provisions of

the *Charter* are directed equally to male and female persons" (E. A. Driedger, "The Canadian Charter of Rights and Freedoms" (1982), 14 *Ottawa L. Rev.* 366, at p. 373). All that is left, then, on the interpretation of the Court of Appeal and the AGQ, is that s. 28 limits the scope of other interpretative provisions (e.g., ss. 25 and 27) and has some undefined effect on s. 1. If that were the case, then s. 28 would simply say "Notwithstanding sections 25 and 27" or be a caveat to s. 1. In order to make sense of s. 28's strong language and broad mandate, and to prevent it from being completely redundant of the other rights-conferring provisions, its meaning must be different.

[621] That brings me to more specific contextual claims based on individual provisions of, or language in, the *Charter*. There seem to be at least eight such contextual factors that weigh on the interpretation of s. 28.

[622] First, the Court of Appeal held that s. 28's placement in the "General" section of the *Charter* supports the conclusion that it is an interpretive provision. This reasoning infers that s. 28 is likely interpretive because it sits alongside other interpretive provisions, or because *all* provisions in the "General" section are interpretive (Pentney, at pp. 39-40; G. J. Kennedy, "They're All Interpretative: Towards a Consistent Approach to ss 25-31 of the *Charter*" (2023), 56 *U.B.C. L. Rev.* 743, at pp. 773-76).

[623] That can't be right. The term "General" says nothing about whether a provision is substantive or interpretive. It simply means that the provisions contained therein apply *generally* to several other provisions. And the "General" section contains

substantive provisions as well. For instance, while it "does not create new substantive rights or freedoms", s. 25 "is not a mere interpretive lens" and provides substantive protection to Aboriginal, treaty, and other rights from irreconcilable conflicts with other *Charter* rights (*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, at paras. 152 and 159; see also paras. 160-64; E. Macfarlane, "Not Merely Interpretative: The Supreme Court's Application of Section 25 of the *Charter of Rights and Freedoms* and its Implications for Section 28" (2024), 33:2 *Const. Forum* 17, at pp. 21-25). Granted, some provisions in this section are interpretive, but they use very clear language to that effect. For instance, s. 27 specifically directs courts that the *Charter* "shall be interpreted in a manner consistent with" Canada's multicultural heritage. Section 28, however, contains no such specific interpretation-based language.

[624] Second, and by contrast, the heading directly above s. 28 supports the notion that it is a substantive rights-conferring provision. This heading simply states: "Rights guaranteed equally to both sexes". This suggests that s. 28 is guaranteeing rights equally to men and women.

[625] Third, the Court of Appeal and the AGQ reason that a substantive interpretation of s. 28 would render s. 15 redundant, since s. 15 already protects against sex discrimination. I fail to see why that would be true. Section 28 identifies one particular type of discrimination in the scope of s. 15 in order to give it added protection (A. Tremblay, "Le principe d'égalité et les clauses anti-discriminatoires" (1984), 18 *R.J.T.* 329, at p. 341). In this sense, s. 28 *adds* to s. 15, but does not duplicate it (see

Baines, at pp. 64-65). Relatedly, s. 28 does not operate alone; it operates *through* s. 15 (and all other rights). Without s. 15, s. 28 would only equally protect rights, but it would not equally protect equality rights.

[626] Fourth, and relatedly, one might say that s. 28 cannot provide a substantive guarantee that takes priority to all else in the *Charter* because that would undermine the purpose of s. 15(2). Section 15(2) permits the state to create laws, programs and activities that actively differentiate to assist disadvantaged groups. Such affirmative action programs are sometimes seen as a form of "inequality" between men and women. So, the argument goes, if s. 28 took priority to s. 15(2) and demanded equality between men and women, then any affirmative action program that *positively* discriminated in favour of women would not be permitted. But this argument depends on a notion of equality that is foreign to Canadian law. As suggested above, s. 28 should be interpreted in alignment with substantive equality. Affirmative action programs under s. 15(2) support the "full expression" of substantive equality; they do not derogate from it (*Kapp*, at para. 37). Further, if an impugned law, program, or activity falls within the scope of s. 15(2), it is not considered discriminatory, and there is no limit on the rights conferred by s. 15(1) (para. 40).

[627] Fifth, one might claim that sex equality cannot be paramount over all other provisions in the *Charter* because this Court has previously justified sex-based infringements of s. 15 under s. 1. However, as discussed above, no party has ever

argued that s. 28 shielded sex equality from the s. 1 regime or affected it in any way. So those past judgments are not binding in respect of the interpretation of s. 28.

[628] Sixth, the AGQ argues that s. 28 cannot truly mean notwithstanding *anything*, because that would also mean s. 28 applies notwithstanding s. 32(1). Section 32(1) stipulates that the *Charter* only applies to the state. If s. 28 applied notwithstanding s. 32(1), according to the AGQ, then it would mandate sex equality in private relations. However, this argument does not withstand closer scrutiny. Section 28 simply guarantees rights equally to men and women. I fail to see how s. 32(1), which simply applies the *Charter* to the state, could produce *unequal* rights because s. 32(1) has no impact on *who* benefits from those rights.

[629] Seventh, this Court's treatment of the interaction between s. 28 and s. 25 supports the idea that s. 28 is paramount over other provisions of the *Charter*. For instance, in one of the few cases in which s. 28 was addressed, Bastarache J. stated that s. 25 is not "absolute" and is "restricted by s. 28" (*Kapp*, at para. 97, per Bastarache J., concurring). Citing that opinion, the Court in *Dickson* relied on s. 28 in finding that s. 25 "does not shelter gender-based discrimination" (para. 173). Applying this logic consistently would then suggest that s. 28 is similarly paramount over, for instance, ss. 1 and 33.

[630] Eighth, and finally, the Court of Appeal concluded that s. 28 cannot provide absolute protection to sex-based equality rights because s. 33 expressly permits derogation from those same rights (para. 502). So, on that account, s. 28 would

undermine the purpose of s. 33. With respect, reading s. 28 as limiting the application of s. 33 would not bring disharmony between the two provisions. Prohibiting the use of s. 33 in a manner that deprives one sex of their rights is no different than prohibiting the use of s. 33 to render certain specific rights inoperable (like the voting rights in s. 3, which are outside the ambit of s. 33). Both are simply limits on the scope of s. 33 anchored in the text of the *Charter*. And both preserve the state's ability to use the notwithstanding clause within the confines of its constitutional boundaries.

(4) History

[631] I move next to the history underpinning s. 28. But before I do, I want to emphasize *what* I mean when I invoke history, and *why* I am invoking it. In appealing to history, I am searching for the "broader philosophy underlying the historical development of the right" in order to understand the values, interests, and purpose that s. 28 serves (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 181). I am not simply appealing to the drafting history underlying s. 28 or the framers' intent. As this Court explained in *Taylor*, "[t]he drafting history, critically, is distinct from the historical origins of the right in question" (para. 82). Drafting history has a limited role to play in constitutional interpretation (para. 76).

[632] I am using history in this way because a constitution does not, and cannot, exhaustively define each of its provisions at the outset or cement the law in the past. Rather, a constitution sets down a collection of broad moral values, abstract principles, and majestic generalities that guide laws into the future. To the extent that the framers

envisioned particular conceptions of the provisions set down in the *Charter*, they did so *because* those conceptions aligned with the broader value enshrined by each provision.

[633] So great care must be taken when appealing to what the framers might have intended. As Justice Lamer (as he then was) explained, "the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 508). These individuals will almost always have distinct goals in their minds, which calls into question the commonality of any singular intent. As a result, drawing on the quotes of those who were involved in drafting or ratification is bound to be a frustrating exercise and, perhaps worse, may permit a court to effectively cherry-pick from an incomplete version of history the points that support a preferred conclusion. Even Justice Scalia, a committed originalist, maintained that using drafting history to interpret legal texts was inappropriate; he adopted a characterization of that approach as being akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends" (A. Scalia and B. A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at p. 377).

[634] The proper use of history helps with the interpretive inquiry by offering clues as to what values and interests underlie a particular provision. Looking to the past can shed light on why some values and interests are important, which articulation of those values and interests fit the *Charter*, and how to avoid flawed or mistaken

approaches to those values and interests. This information assists in the search for the best articulation of the value that justifies a provision and its place in the *Charter* as a whole.

[635] I make these comments knowing how utterly and completely the drafting history supports the reading I ultimately adopt. The battle that women fought to ensure s. 28 found its place in the Constitution is inspiring (see P. Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (1983)). The intention of these equality seeking women and men, and the Parliamentarians who adopted their proposals, was so clearly to enshrine an inviolable guarantee of equal rights that superseded both ss. 1 and 33 (K. A. Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015), 19 *Rev. Const. Stud.* 237, at pp. 273-76). The original understanding of s. 28 at its time of adoption was to give sex equality rights a special place in the Constitution and to make clear the now uncontroversial point that women and men are equally protected in our free and democratic society (C. Strauss, "Section 28's Potential to Guarantee Substantive Gender Equality in *Hak c Procureur général du Québec*" (2021), 33 *C.J.W.L.* 84, at pp. 93-94).

[636] With this in mind, I turn to the history itself. The philosophical origins of the concepts enshrined in s. 28 are particularly illuminating with respect to two elements of the provision. The first is s. 28's equal guarantee to "male and female

persons". The second is the fact that s. 28 exists as a standalone guarantee of sex-based equality, independent from the other provisions of the *Charter*.

(a) *Section 28's Recognition of Women's Personhood*

[637] Section 28 guarantees the rights in the *Charter* to "male and female persons". At first blush, the use of the word "persons" seems quite odd. After all, the text could have more simply said, "men and women".

[638] Importantly, the notion of personhood has a great deal of historical and jurisprudential meaning. For centuries, women were denied full legal personhood, meaning they were not granted complete status to hold the rights and bear the duties that the law provides (K. A. Lahey, "Legal 'Persons' and the Charter of Rights: Gender, Race, and Sexuality in Canada" (1998), 77 *Can. Bar Rev.* 402, at pp. 405-7). Instead, they were largely excluded from public life because, based on their sex, they were deemed unfit and incapable (M. E. Ritchie, "Alice Through the Statutes" (1975), 21 *McGill L.J.* 685, at pp. 690-94, 696 and 698). This idea extends at least as far back as Roman law, which recognized the maxim, "*[f]oeminae ab omnibus officiis civilibus vel publicis remotae sunt*" ("[w]omen are excluded from all civil and public charges or offices") (*Black's Law Dictionary* (12th ed. 2024), at p. 1966).

[639] The denial of full personhood was incorporated into the common law, and was commonplace in the 18th, 19th and 20th century United Kingdom. In turn, courts interpreted statutory grants of the right to vote to "every man" or to "every person" as

excluding women (*Chorlton v. Lings* (1868), L.R. 4 P.C. 374; *The Queen v. Crosthwaite*, [1864] 17 I.C.L.R. 463); prohibited women from sitting in Parliament or holding elected office (*Viscountess Rhonda's Claim*, [1922] 2 A.C. 339; *Beresford-Hope v. Lady Sandhurst* (1889), 23 Q.B.D. 79); and denied them all manner of employment opportunities (*Bebb v. Law Society*, [1914] 1 Ch. 286; see also *The King v. Stubbs*, (1788) 2 T.R. 395, 100 E.R. 213; *Olive v. Ingram* (1740), 7 Mod. 263, 87 E.R. 1230).

[640] Women's limited personhood was received and inherited into Canadian law. The right to vote was restricted to certain men. The ability to join the legal profession and practice law was also only extended to "persons", and as a result excluded women (M. Eberts, "Notwithstanding v. Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rights and Freedoms", in P. L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (2024), 338, at pp. 343-44). Famously, women were not permitted to become members of the Senate because that right was also only given to "persons".

[641] Eventually, the legal personhood of women was partially recognized in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, in which the Judicial Committee of the Privy Council determined that women are "persons" under s. 24 of the *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (now the *Constitution Act, 1867*), and therefore permitted to sit in the Senate. But even that was limited progress. As Beverley Baines observed, the Judicial Committee determined that

"women were 'persons' only if a contrary intention did not appear in the legislation. Thus, men always are persons, while women's personhood is hostage to legislative directive" (p. 48).

[642] This historical background sheds light on the purpose of s. 28. Section 28's recognition of the equal personhood of men and women, notwithstanding *anything* else, marks a departure from this history in the strongest possible terms. It suggests that legislatures and courts will no longer be able to deprive women of rights and freedoms that are afforded to men. And it ensures that women will never again have to endure this "major form of systemic discrimination against them, which took over 150 years of litigation and legislative reform to overcome" (Eberts (2024), at p. 343).

[643] Therefore, the philosophical origins underpinning s. 28, as well as the word "persons" it employs, powerfully suggest that s. 28 was chosen as a conscious corrective that seeks to protect women's equal entitlement to rights as a paramount legal value in Canadian society.

(b) *Section 28's Rejection of Existing Legal Theories of Equality and Standalone Protection of Sex-Based Equality*

[644] A second curious dimension of s. 28 that benefits from historical inquiry is its standalone protection of sex-based equality. Equality rights are already provided for by s. 15, alongside several enumerated and analogous grounds. Yet, s. 28 provides additional protection, over and above s. 15, and only to claims based on sex.

[645] To understand this element of s. 28, it is helpful to look to the form that equality protections took before the enactment of the *Charter*. Until 1982, the *Canadian Bill of Rights*, S.C. 1960, c. 44, housed Canada's primary equality guarantee. Section 1(b) of the *Canadian Bill of Rights* protects "the right of the individual to equality before the law and the protection of the law" and this "without discrimination by reason of race, national origin, colour, religion or sex". This provision is structurally similar to s. 15(1) by providing broad equality protection to a wide range of groups, although the two have their obvious differences.

[646] The reality was that the interpretation given to the equality rights in the *Canadian Bill of Rights* offered little protection to women. The problems with the interpretation given to s. 1(b) are often traced to this Court's formal equality approach followed 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. In *Lavell*, the Court upheld a legal provision which deprived women, but not men, of *Indian Act* status if they married a person without *Indian Act* status (*Indian Act*, R.S.C. 1970, c. I-6). The most generous interpretation of the Court's decision is that this provision was consistent with equality because the female claimants were treated the same way as other women who married men without *Indian Act* status (see P. W. Hogg, "The Canadian Bill of Rights — 'Equality Before the Law' — A.G. Can. v. Lavell" (1974), 52 *Can. Bar Rev.* 263, at p. 275). In *Bliss*, the Supreme Court upheld a provision that denied certain unemployment benefits to women who took workplace leave due to pregnancy and childbirth. This provision was found to have created no comparative sex inequality because, according

to the Court, it distinguished between pregnant and non-pregnant people, *not* between men and women (pp. 190-92).

[647] The distinct protection afforded by s. 28 — distinct from the structure of s. 1(b) of the *Canadian Bill of Rights* and distinct from the other protected classes in s. 15(1) of the *Charter* — demonstrates how s. 28 is animated by a unique value. It marks a departure from the theories of equality adopted under the *Canadian Bill of Rights*. It reflects a democratic movement and mobilization to leave those theories in the past and to establish women as full rights bearers. And it indicates that the guarantee of sex-based equality must be taken particularly seriously and be afforded robust protection.

[648] This same value emerges from an understanding of the American Fourteenth Amendment jurisprudence and constitutional history (Baines, at pp. 49-50). The Fourteenth Amendment similarly provides a right to equality, but affords different levels of protection to different grounds of discrimination. Race-based classifications, for instance, are subject to strict scrutiny and place the highest possible justificatory burden on the state (*Loving v. Virginia*, 388 U.S. 1 (1967)). Sex-based classifications, though, were not even initially recognized under the Fourteenth Amendment (*Reed v. Reed*, 404 U.S. 71 (1971)), and were eventually only covered by the more relaxed standard of intermediate scrutiny (*Craig v. Borden*, 429 U.S. 190 (1976)). For decades, equality seekers sought to enhance the scope of equality protections afforded to sex by introducing an Equal Rights Amendment in the Constitution of the United States. The

proposed Equal Rights Amendment would have established sex as a distinct ground of discrimination. These efforts never succeeded and many American women were left both disappointed and unsettled.

[649] Comparatively, s. 28 is a success story and appears to be something of Canada's Equal Rights Amendment. Its standalone nature, understood in light of this historical background, suggests that s. 28 must do something beyond what is already provided for elsewhere in the *Charter*. Section 15(1) already protects sex-based equality, but subject to both ss. 1 and 33. The singling out of sex-based equality in s. 28 for unique protection indicates that it extends beyond the reach of the limitation and notwithstanding clauses. Understood in this light, s. 28 recognizes sex-based equality as a paramount protection that cannot be abrogated in Canadian society. Again, it enshrines what is a noncontroversial statement of principle: women and men in Canada have equal rights.

(5) International Law

[650] Another indicator of purpose — international human rights law — also suggests that s. 28 has a substantive scope. This body of international law is relevant because it is an "expression of international judicial wisdom" that provides insight on what values "rights-respecting democracies" consider "essential and worthy of constitutional protection" (*Taylor*, at para. 134).

[651] Section 28 of the *Charter* finds a close analogue in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"). Article 26 of the ICCPR provides a general equality guarantee, like s. 15(1) of the *Charter*, that protects against discrimination without reference to the exercise of other rights or freedoms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Yet the ICCPR also contains a second type of equality guarantee, at Article 3, that only protects equality on the basis of sex in the exercise of other rights and freedoms. Article 3, in similar language to s. 28, states:

> 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.

[652] Importantly, Article 3 of the ICCPR provides a substantive guarantee. The United Nations Human Rights Committee has made clear that Article 3 can be violated when one sex is deprived of a separate protected right (*Revised Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2274/2013*, U.N. Doc. CCPR/C/123/D/2274/2013/Rev.1, October 22, 2018, at paras. 7.7-7.8).

[653] The ICCPR is "entitled to extra weight in the interpretive analysis" with respect to the *Charter* (*Taylor*, at para. 124). This is because Canada has ratified this binding instrument and, as a result, the *Charter* is "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*9147-0732 Québec inc.*, at para. 31 (emphasis in original), citing *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349). Moreover, the ICCPR pre-dates the *Charter* and informed its drafting, meaning that it can provide a strong indication of the values that the *Charter* seeks to protect (*9147-0732 Québec Inc.*, at paras. 41-42).

[654] The *European Convention on Human Rights*, 213 U.N.T.S. 221, is similarly instructive. Article 14 of the Convention also provides a substantive right to equal enjoyment of all other rights and freedoms recognized in the Convention:

> The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This provision was in existence with its substantive interpretation well before the enactment of the *Charter* (see, e.g., *Belgian Linguistic Case (No. 2)* (1968), 1 E.H.R.R. 252; *Müller v. Austria*, Application No. 5849/72, December 16, 1974, D.R. 1, p. 46; *W. v. Belgium*, Application No. 6745/74, May 30, 1975, D.R. 2, p. 110; *Conscientious Objectors v. Denmark*, Application No. 7565/76, March 7, 1977, D.R. 9, p. 117;

Marckx v. Belgium (1979), 2 E.H.R.R. 330; *A. v. Federal Republic of Germany*, Application No. 7742/76, July 4, 1978, D.R. 14, p. 146).

[655] These international sources strongly suggest that the purpose of s. 28 is to grant and guarantee a substantive equality right. Giving it a merely interpretive scope would put it at odds with other provisions across the world that helped form the basis for the language of s. 28 itself.

(6) Drafting History

[656] A final indicator of purpose is the drafting history of s. 28. Again, I do not intend to discern the precise views of the framers or to parse the minutes of the debates. Instead, I focus on one particular aspect of drafting history that this Court has recognized as being of unique importance (*R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 267). That is where "a specific clause . . . was proposed, considered and rejected by our elected representatives" (*ibid.*). Such a situation is distinctly important because "it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted" (*ibid.*). It is *not*, however, relevant because it describes what was directly in the minds of the framers at the time of ratification. Rather, it provides a clue about what values and interests a provision *should* protect. If the framers thought that a particular formulation of a provision was inadequate, then that formulation was seen as ill-suited to the *Charter*, and this concern should be taken seriously.

[657] The language of s. 28 was subject to a significant change after being introduced into Parliament and merits this type of analysis. One early version of s. 28 subordinated s. 28 to s. 33, such that laws could apply notwithstanding s. 28's protection. But, importantly, s. 28 was eventually removed from s. 33's scope.

[658] This draft of ss. 28 and 33 was proposed to Parliament in the "Resolution Respecting Constitution Act, 1981" of November 20, 1981, and reads as follows:

> **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. [Emphasis added.]
>
> (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 20, 1981, at pp. 13023-24)

The merits of this language were then extensively debated in Parliament over the ensuing days (pp. 13043, 13047, 13050-52 and 13055-56; *House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 23, 1981, at pp. 13121, 13123, 13129-30 and 13140-41).

[659] Parliament, with the unanimous agreement of the provincial signatories to the draft *Charter*, ultimately voted to adopt a version of these provisions without the

reference to s. 33 in s. 28, and without the reference to s. 28 in s. 33. Sections 28 and 33 were officially amended in the "Resolution Respecting Constitution Act, 1981" of November 25, 1981, and read as they do today:

> **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.
>
> (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 25, 1981, at p. 13255)

[660] Parliament's decision here has meaning: indeed, profound meaning with significant implications for the purpose and scope of s. 28 and its relationship with s. 33. It specifically indicates that s. 28's right to sex-based equality cannot be suspended by the notwithstanding clause. It re-affirms the idea expressed above that, if s. 28 was protecting a guarantee that could be rendered inoperable by s. 33 or limited by s. 1, then the language would have said so. In turn, it suggests that the inviolable nature of sex-based equality is a primary value animating s. 28, and one that is guaranteed.

[661] One might be tempted to read this history as simply suggesting that s. 33 cannot be used to eliminate the protection of s. 28 as applied to the rights in ss. 3 to 6 and 16 to 23 of the *Charter*. With respect, this approach would be contrary to the clear wording of s. 28 and drastically limit its scope. As I explained above, s. 28 is not needed

to ensure that both men and women benefit from, for example, ss. 3, 6, 16, 17 and 19 to 23. If one sex is deprived of one of these rights, then the right is limited, independent of s. 28. Constitutional provisions must have meaning. So, s. 28 must do more, and it does.

B. *The Scope of Section 28 and its Interaction With Other Charter Provisions*

[662] The purpose of s. 28 is to protect equality between the sexes as a paramount value in the Canadian legal order. This purpose best conforms to the text of s. 28, fits the structure of the *Charter* as a whole, gives life to the philosophical origins of the provision and rectifies the injustices against women that led to the constitutionalizing of sex-based equality, conforms to Canada's international obligations, and reflects the values that Parliament deemed worthy of protection. It affirms that the Constitution will not tolerate the grant of rights only to men or women. And it leaves sex-based discrimination as a relic of the past, to be discussed in the history books, but which will take no part in our future. It states a proposition which should be obvious: women and men enjoy equal legal personhood with equal status and standing under Canada's Constitution.

[663] On this understanding, s. 28 carries a number of implications for the other provisions in the *Charter*.

(1) <u>The Interaction Between Section 28 and Sections 2 to 23</u>

[664] The purpose of s. 28 demands that it bears both interpretive and substantive dimensions as applied to the other rights in the *Charter*. If it were merely interpretive, then its full purpose could readily be undermined by other provisions. Yet, as a substantive provision, s. 28 upholds its intended purpose and permits other provisions to give continued effect to their respective purposes.

[665] As an interpretive provision, s. 28 has a two-fold effect. First, it requires ss. 2 to 23 to be interpreted in a manner that each provision can be equally enjoyed by both male and female persons. But that does not mean that the scope of each right must be *formally* the same as applied to each sex. Rather, the interpretation of ss. 2 to 23 must account for the realities of what it means to be a man or a woman, and ensure substantive sex equality such that each sex can enjoy each right to the same value and degree. Second, s. 28 demands that any conflict between one right or freedom and the guarantee of sex-based equality must be resolved in favour of the latter.

[666] In its substantive capacity, s. 28 guarantees a right to both men and women's equal enjoyment of all rights and freedoms in the *Charter*. This dimension of s. 28 demands a two-step analysis: (1) a court must assess whether the law limits a right protected by the *Charter*; and (2) if so, the court must go on to assess whether the deprivation of rights is inconsistent with the substantive equality between women and men.

[667] The first step of the analysis simply involves applying the relevant test to assess whether a law limits a given *Charter* right. So, for instance, if a claimant alleges

an infringement of s. 2(b), then the court must apply the test set out in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and its progeny; or, if the claimant argues that s. 6 is infringed, then the court must apply the test outlined in *Taylor*. The analysis under this first step will necessarily vary based on the applicable jurisprudence, the impugned provision and the arguments of the parties.

[668] The second step of the analysis does not simply look at whether more individuals of one sex are deprived of a given right, numerically speaking. Rather, it focuses on substantive equality and asks whether the limit on the given right is contrary to substantive equality between male and female persons. This looks to the affected group's place in society to determine whether the law unfairly prevents them from participating on an equal footing. A law may undermine substantive equality on its face or in its effect. And a court should rely on the rich substantive equality jurisprudence in conducting this analysis to ascertain whether there is equal dignity, concern and consideration (*Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, at para. 36; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 42; *R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147, at para. 37; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at para. 25; *Kapp*, at para. 15).

[669] Where the *Charter* right allegedly breached is s. 15 and a limit of s. 15(1) due to discrimination on the basis of sex is established at the first step, the claimant will necessarily have met their burden at the second step. That is because, in order to

prove such a limit of s. 15(1), the claimant must show that the law is inconsistent with substantive equality. But where the claimant solely relies on provisions other than s. 15(1), the court will be required to conduct a complete substantive equality analysis.

[670] If both steps of this test are satisfied, then the impugned law is inconsistent with s. 28 and must be declared, to the extent of the inconsistency, to be of no force or effect under s. 52(1) of the *Constitution Act, 1982.*

(2) The Interaction Between Section 28 and Section 1

[671] An infringement of s. 28 cannot be justified under s. 1. Section 28 provides an independent guarantee of sex-based equality that attaches to each right in the *Charter*. Since this independent guarantee applies "[n]otwithstanding anything" in the *Charter*, and operates as a paramount value above all else, s. 28 is outside the ambit of the limitation clause.

(3) The Interaction Between Section 28 and Section 33

[672] For the same reasons, the operability of a law that infringes s. 28 of the *Charter* is outside the ambit of s. 33. It therefore prevents a legislature from invoking s. 33 to uphold the operability of laws that limit the rights in ss. 2 or 7 to 15 in a manner that is unequal between men and women.

[673] The Court of Appeal therefore erred in concluding that s. 28 has no effect once s. 33 is invoked. That conclusion was based on an assumption that s. 33 renders rights inapplicable to a statute; so, once s. 33 is invoked, s. 28 has nothing left to protect. But, with respect, ss. 28 and 33 necessarily operate in reverse order. Section 28 is paramount over all other provisions of the *Charter*; so, it must have effect *before* the notwithstanding clause. And once s. 28 takes its effect, the sex-equality dimension of each right is protected against the use of s. 33.

[674] To hold otherwise would be to conclude that s. 28 only operates, parasitically, when the underlying rights are full bodied and only applies after all other *Charter* provisions have taken effect. That interpretation would deprive s. 28 of its meaning. On its face, s. 28 applies notwithstanding *anything* else in the *Charter*. That language, in addition to the provision's purpose, clearly establish that s. 28 must operate even if s. 33 is invoked. Indeed, that is the precise situation when s. 28's guarantee is most needed.

[675] Even if the Court of Appeal were correct in concluding that s. 33 acts *first*, s. 28 would still have the ability to invalidate legislation. I agree with my colleagues who recognize that the targeted rights continue to exist when s. 33 is invoked; they are not extinguished. Instead, s. 33 merely limits their effects on the shielded legislation. Section 28 gives effect to those rights, which remain alive, and provides a path to their continued effect through an independent guarantee that is outside the ambit of s. 33's override and cannot be restricted by it.

(4) The Interaction Between Section 28 and Sections 25 and 27

[676] Similarly, s. 28 must take primacy over ss. 25 and 27 of the *Charter*. This Court has already recognized that s. 25's protections are "subject to the equality guarantee for 'male and female persons' under s. 28" (*Dickson*, at para. 110). And, to the extent that s. 27 may serve as a competing interpretive principle against s. 28, it must yield and give way to sex equality.

C. *Application*

[677] The appellants — the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri ("EMSB") — argue that ss. 6 and 8 of Bill 21 infringe s. 28 of the *Charter*. They claim that these provisions of Bill 21 unequally deprive women of their ss. 2(a), (b) and 15(1) rights.

[678] The respondents — the AGQ, the Mouvement laïque québécois ("MLQ"), and Pour les droits des femmes du Québec ("PDF") — argue that Bill 21 does not infringe s. 28, even if s. 28 were a substantive guarantee. They respectively say that there is insufficient evidence to conclude Bill 21 infringes any of ss. 2(a), (b) or 15(1); that Bill 21 cannot be read as limiting any of these rights because the state is under a constitutional duty of religious neutrality; and that Bill 21 actually promotes the equality of men and women because religion is inherently patriarchal and incompatible with women's equal rights.

[679] I agree with the EMSB appellants. I will explain why s. 28 commands that result by applying the two-step test articulated above. Before I do, I want to address one point made by the respondent PDF that is external to the two-step s. 28 test. That is, that Bill 21 promotes gender equality by prohibiting state actors from wearing religious symbols that oppress women or that flow from misogynistic origins.

[680] The respondent PDF claims that [TRANSLATION] "the subordinate position imposed on women by monotheistic religions has been the greatest discrimination against women for centuries" (R.F., PDF, at para. 83). And, that religious symbols — particularly those that require women to cover their bodies or faces, like the hijab and burqa — [TRANSLATION] "[are] a religious practice that brings us back to stereotyped roles for women, a practice marked by the superiority of men and the impurity of women" (para. 106). Thus, according to PDF, ousting these religious symbols from society is necessary and consistent with the equality of women.

[681] The theory put forth by PDF is not, however, the *only* theory of sex equality. Others espouse a more pluralist view, and argue that religion and women's equality can be compatible (e.g., I.F., West Coast Legal Education and Action Fund Association, at para. 16). Along these lines, the wearing of religious symbols can be understood as the subject of a woman's choice, an expression of her cultural identity, a manifestation of her belief and spirituality, and a necessary condition for her inclusion in society.

[682] Faced with different conceptions of sex equality, I opt for the one that recognizes all aspects of an individual and promotes pluralism and multiculturalism. The architecture and arc of substantive equality involves the eradication of hierarchy based on perceived or socially constructed differences. This approach to equality under s. 28 is consistent with, and indeed required by, the Canadian interpretive methodology to *Charter* rights, which is purposive, and recognizes that a large, liberal and generous interpretation is most likely to promote a provision's purpose. The purpose of equality rights is to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171). This purpose is fundamentally inclusionary, and recognizes that the state may not insist that a person make changes that would come "at unacceptable cost to personal identity" (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13). The theory proposed by the respondent PDF would have the effect of excluding many women, who are entitled to insist on both their religion and their right to sex equality. I therefore cannot accept the argument that Bill 21 furthers sex-based equality as understood under s. 28 and the *Charter* as a whole.

[683] I now turn to the application of the test under s. 28.

(1) Step 1: Whether Bill 21 Limits Sections 2(a), (b) and 15(1) of the *Charter*

[684] The first step requires assessing whether the impugned law limits a protected *Charter* right or freedom. The EMSB appellants argue that ss. 6 and 8 of Bill

21 limit the rights to freedom of religion (s. 2(a)), freedom of expression (s. 2(b)), and the right to equality between the sexes and religions (s. 15(1)).

(a) *Section 2(a)*

[685] Sections 6 and 8 of Bill 21 limit the right to freedom of religion. Section 2(a) recognizes that "[e]veryone" has the "freedom of conscience and religion". The purpose of this basic liberty is "to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759).

[686] A law can limit s. 2(a) in its purpose or its effects. On the purpose branch of the analysis, a law will limit s. 2(a) where it aims at "compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others" (*Big M*, at p. 350). On the effects branch, a law will be inconsistent with s. 2(a) where "(1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32; see also *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004]

2 S.C.R. 551, at paras. 56-59). Satisfying either branch of this analysis will suffice to establish a limit on s. 2(a).

[687] The purpose branch of the analysis does not depend on evidence to show that any particular individual was affected by the law. Rather, it looks at the constitutionality of the law on its face. As Justice Dickson (as he then was) explained, "[a] law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the [claimant] is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue" (*Big M*, at p. 314). Indeed, *Big M* rests on this logic, where the Court struck down the *Lord's Day Act*, R.S.C. 1970, c. L-13, after a corporation, without leading any evidence that its employees' religious freedoms were affected, alleged that the law breached s. 2(a) because its purpose was to compel religious observance. The logic and legacy of *Big M* withstand the test of time. A patently unconstitutional law should not be able to evade constitutional scrutiny simply because it arrives before the court without a theoretically perfect *Charter* claimant.

[688] Section 6 of Bill 21 meets both the purpose and effects branches of the analysis. The purpose of s. 6, where it applies, is quite clearly to compel religious abstinence. Section 6 provides that "[t]he persons listed in Schedule II are prohibited from wearing religious symbols in the exercise of their functions." This provision sits in a legislative scheme whose preamble declares that it aims at promoting laicity, that

it is "incumbent on the Parliament of Québec to determine" how relations between the State and religions will be governed, and that persons exercising state functions bear a "stricter duty of restraint regarding religious matters". On its face, s. 6's purpose plainly limits s. 2(a) of the *Charter*.

[689] The trial judge's findings of fact also clearly show that s. 6 limits s. 2(a) in its effects. The first step of the effects-based branch of the analysis — that the claimant sincerely believes in a belief or practice that has a nexus with religion — is met because s. 6 applies to religious symbols "worn in connection with a religious conviction or belief" or "reasonably considered as referring to a religious affiliation". This is also reflected in the record. Take just a few examples. For Ms. Ichrak Nourel Hak — an aspiring teacher — the hijab [TRANSLATION] "reflects her own religious convictions, is part of both her identity and her spirituality and, in her view, helps her combat stereotypes about Muslim women" (2021 QCCS 1466, at para. 6). For Ms. Amrit Kaur, a Sikh teacher who immigrated from England, the turban allows her to refrain from cutting her hair — a practice which [TRANSLATION] "reflects an acceptance of the divine" and "her commitment to a life of spirituality and discipline" (paras. 10-11). And for Ms. Andréa Lauzon, a graduate student with dreams of being a teacher, the chain around her neck bearing a Virgin Mary and crucifix [TRANSLATION] "allow[s] her to remember God's presence on a daily basis, to implore divine approval and to identify herself as a Catholic, particularly so she can receive the last rites in the event of an emergency" (para. 16).

[690] Section 6 of Bill 21 interferes with these individuals' ability to act in accordance with these sincerely held religious beliefs in a manner that is far more than trivial or insubstantial. It effectively gives them an ultimatum: abandon your career aspirations in Quebec or abandon your faith. Faced with that ultimatum, Ms. Kaur chose the former and moved to British Columbia, away from her family, so that she could pursue a career as a teacher. So too did Ms. Hakima Dadouche, a teacher whose decision to wear her hijab has prevented her request for a transfer to Gatineau so that she could be closer to her family, and eliminated her prospects of career advancement. The same goes for Mr. Gregory Bordan, a Jewish man who wears a kippah and tzizits, who can no longer accept mandates to represent the provincial government as a lawyer. Similarly, Mr. Basir Naqvi, a Muslim man and recent law graduate who wears a head covering, can no longer become a prosecutor in Quebec. Ms. Imane Melab, a Muslim woman and law student who wears a hijab, had hopes of providing legal services within the provincial public service and can no longer pursue those goals without compromising her religious beliefs. These are only some of the stories of those impacted by s. 6 of Bill 21 (see Sup. Ct. reasons, at para. 64).

[691] Section 6 also has a broader chilling effect on religious activity, and therefore interferes with individuals' ability to exercise their religion in a second way. By prohibiting many state actors from wearing religious symbols, s. 6 sends the message that [TRANSLATION] "in order to feel accepted as . . . full-fledged citizen[s], [they] must adopt the appearance of the majority" (Sup. Ct. reasons, at para. 8). It suggests that an individual who wears religious symbols will be judged based on

[TRANSLATION] "[their] appearance rather than [their] ability and personal qualities and that people like [them] are not wanted to be able to work in the public sector in Quebec" (para. 13). A person affected by this law feels treated [TRANSLATION] "like . . . a second-class citizen simply because of [their] religious dress practices and beliefs" (para. 20). Section 6 tells the population that individuals who closely observe their faith are not the type of individuals who are fit to hold important positions in the province. If they want to hold those positions, they too must abandon their faith at work.

[692] Section 8 also clearly limits s. 2(a) on the purpose-branch of the analysis. This provision requires certain state actors to "exercise their functions with their face uncovered". It can only be possibly understood, in a law promoting laicity, as directly aimed at the Muslim practice of wearing a burqa or niqab. The burqa and niqab are the only religious symbols worn in contemporary Quebec society, according to the expert evidence, that cover the face (expert report from Solange Lefebvre, dated March 13, 2020, reproduced in joint schedules in the C.A., vol 31 (at pp. 10083-94), at p. 10096). A law whose purpose is to ban a distinct practice associated with a particular religion cannot possibly conform to s. 2(a). Section 8 therefore is an obvious limit on the right to freedom of religion.

[693] The respondents AGQ, MLQ and PDF argue that ss. 6 and 8 cannot be inconsistent with s. 2(a) of the *Charter* because the state is under a duty of religious neutrality. MLQ and PDF point to this Court's decision in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paras. 64, 72, 74 and 119, where

we concluded that a mayor did not have a right to recite a prayer while acting in his official capacity under s. 3 of the *Charter of human rights and freedoms*, CQLR, c. C-12. They argue that, by analogy, s. 2(a) cannot protect the right of state officials to wear religious symbols.

[694] With respect, the analogy does not hold. The state's duty of neutrality is satisfied when it "neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever" (*Saguenay*, at para. 132, quoting *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 32). This duty is breached where the state "is professing, adopting or favouring one belief to the exclusion of all others" (*Saguenay*, at para. 83). In *Saguenay*, the actions of the mayor breached this duty because they *imposed* the religion of Catholicism on others, and subjected them to his personal religious practices (paras. 114 and 159). By contrast, the mere wearing of a religious symbol involves no such imposition. Each person remains equally entitled to wear their own symbol or none at all. And, witnessing another person wearing a religious symbol cannot be deemed "comp[ulsion] to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs" (para. 69). Indeed, the Bouchard-Taylor Commission similarly concluded that the goal of state neutrality does not warrant "a general rule that would prohibit agents of the State from wearing religious signs" (Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* (2008), by G. Bouchard and C. Taylor, at p. 149). I agree. Therefore, I

do not accept the argument that Bill 21 is consistent with s. 2(a) on the basis that it conforms to the state's duty of neutrality. Legislative provisions like ss. 6 and 8 of Bill 21, which mandate that the "public" be protected from the religion of others, are not state neutrality: they amount to state-imposed secularism.

(b) *Section 2(b)*

[695] There is no question that ss. 6 and 8 of Bill 21 similarly limit freedom of expression as protected by s. 2(b). A law limits s. 2(b) where: (1) the activity is expression or has expressive content; (2) the method or location of the expression does not remove its protection; and (3) the purpose or effect of the government action in issue interferes with the expression (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 38; see also *Irwin Toy*, at pp. 967, 969 and 971). Sections 6 and 8 of Bill 21 easily meet these three steps.

[696] First, the targeted activity — the wearing of religious symbols and/or face coverings — is a form of expression. An activity is expressive where it conveys, or attempts to convey, meaning (*Irwin Toy*, at pp. 968-69). A religious symbol almost definitionally conveys meaning; by virtue of wearing it, the individual does an act that is meaningful to oneself, while simultaneously conveying one's religious affiliation, identity, and culture to others.

[697] Second, the method or location of the expression does not exclude it from *Charter* protection. This may happen where the method or location conflicts with the

values protected by s. 2(b), including "self-fulfilment, democratic discourse and truth finding" (*Canadian Broadcasting Corp.*, at para. 37; see also *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 72). I see no possible reason why the method or location of expression restricted by Bill 21 would undermine any of these values.

[698] Third, the purpose and effect of ss. 6 and 8 of Bill 21 clearly interfere with an individual's ability to engage in this expressive activity. The reasons as to why ss. 6 and 8 limit s. 2(a) of the *Charter* apply equally to s. 2(b).

(c) *Section 15(1)*

[699] Sections 6 and 8 of Bill 21 also profoundly limit the right to equality under s. 15(1) of the *Charter*.

[700] The two-step test to establish an infringement of s. 15(1) is well-known. The claimant must show that the impugned law or state action: (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Kanyinda*, at para. 48; *Fraser*, at para. 27).

[701] The impugned law, Bill 21, discriminates both on the basis of religion and sex. It is clear from the above that the law draws a facial distinction on the basis of religious identity and produces immense disadvantage as a result. Since I have already

described the law's impact on religious liberty, which applies with the same force in respect of s. 15, in this section, I focus my reasons on the enumerated ground of sex.

(i) Sections 6 and 8 of Bill 21 Draw a Distinction Based on Sex

[702] Sections 6 and 8 of Bill 21 draw an undeniable distinction between Muslim women and all others. This was clearly recognized by the trial judge, who plainly stated:

> [TRANSLATION] The Court highlights that the evidence undoubtedly reveals that the effects of Bill 21 will have a negative impact on Muslim women first and foremost. First, by violating their freedom of religion and second, by doing the same to their freedom of expression because dress constitutes not only expression pure and simple, but may also constitute the manifestation of a religious belief. [Emphasis added; para. 807.]
>
> (See also para. 805.)

[703] The mere fact that the effects of Bill 21 are primarily felt by Muslim women, as opposed to all women, cannot "defeat a claim of discrimination" (*Quebec v. A*, at para. 354, per Abella J., dissenting, but not on this point). Rather, "[t]his Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated" (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 76; see also *Fraser*, at para. 75). Indeed, there is no universal woman or universal man. Each comes with their own experiences, aspirations and characteristics, whether individual or group based. In regards to equality rights, the

law acknowledges complex identities, and takes rights claimants as they are and based on all that they are. Intersecting group memberships may increase claimants' vulnerability. It also tends to augment and amplify discriminatory effects, and may alter the nature, scope and degree of the discrimination suffered (see *Kanyinda*, at para. 40).

[704] Section 6 of Bill 21 draws a distinction in its effects. The trial judge found, for example, that at the Centre des services scolaires de Montréal, all those who have been denied employment under Bill 21 are Muslim women (Sup. Ct. reasons, at paras. 805 and 811; pre-trial examination of Louis Bellerose, dated August 25, 2020, reproduced in joint schedules in the C.A., vol. 24 (at pp. 7713-94), at pp. 7740-41, 7743-47 and 7788). In the documented cases, Muslim women are overwhelmingly the ones who have been denied employment or been forced to remove their religious symbols under s. 6. This is because, in Canada, Muslim women wear religious symbols at higher rates than both men and women of other faith groups. The trial judge recognized that, according to a 2011 census, there were approximately 243,000 Muslim persons living in Quebec (para. 806), and one can expect that the population has significantly grown since then. Expert evidence adduced at trial shows that, in 2016, about 54 percent of Muslim women in Quebec wore the hijab, 2 percent wore the chador, and less than 1 percent wore the niqab (expert report of Solange Lefebvre, at pp. 10091-94). This means that there are thousands of Muslim women in Quebec who wear the hijab, chador or niqab, many of whom are certainly affected by Bill 21. As the trial judge said, [TRANSLATION] "there is no doubt that the principle of prohibiting

the wearing of a religious symbol stems from the wearing of such symbols by women of the Muslim faith" (para. 803).

[705] The effects of s. 6 of Bill 21 on Muslim women are made abundantly clear when considering the teaching and education profession. Individuals working in the education sector constitute 78 percent of all persons covered by Bill 21. The education sector in Quebec is predominantly female, with 88 percent of primary school teachers and 61 percent of secondary school teachers being women (Sup. Ct. reasons, at para. 802). Muslim women in this sector are particularly vulnerable to Bill 21. I set out a number of examples of Muslim female teachers who were affected by Bill 21 above, some of whom even needed to leave the province. The trial judge's findings of fact are even more pointed and telling: every job applicant whose file was closed as a result of Bill 21 at the Centre de services scolaires de Montréal is a Muslim woman (para. 805).

[706] Section 8 of Bill 21 plainly draws a distinction. This provision requires many individuals who occupy various government roles, and persons who receive services from those individuals, to do so "with their face uncovered". The requirement to have one's face uncovered can only be understood to be targeting the burqa and niqab, which are exclusively worn by Muslim women. Importantly, s. 8 of Bill 21 applies to a number of persons that are not subject to s. 6, including Members of the National Assembly, physicians, dentists, midwives, and many others. The reach of s. 8 also extends to persons who present themselves to receive public services. So, s. 8

targets Muslim women *specifically*, in an already discriminatory regime, and deprives them of the ability both to hold various jobs and receive various government benefits.

(ii) Sections 6 and 8 of Bill 21 Perpetuate the Disadvantage Experienced by Muslim Women

[707] There is no doubt that ss. 6 and 8 of Bill 21 perpetuate the disadvantage experienced by Muslim women living in Quebec.

[708] Muslim women already face marginalization and social exclusion in Quebec society. The expert evidence before the trial judge established that the hijab is considered the most "disturbing" religious symbol in Quebec, and that Muslim people are the most stigmatized religious or cultural group in that province (expert report of Paul Eid, dated March 31, 2020, reproduced in the joint schedules in the C.A., vol. 31 (at pp. 10195-10290) ("Eid Report"), at pp. 10201-2, 10217-18 and 10220-22). Indeed, the trial judge found as a fact that Bill 21 *itself* stems from [TRANSLATION] "social discourse" around the religious symbols worn by Muslim women and "a desire to make this reality disappear" (paras. 803-4). The expert evidence also showed that it is an unfortunate reality that the religious symbols worn by Muslim women are directly tied to the discrimination and hate crimes that they experience in Quebec (Eid Report, at pp. 10233-34).

[709] This exists in addition to the historic exclusion of *women* from the workforce, which has been recognized by this Court time and time again (*Fraser*, at

paras. 98-106; *Centrale des syndicats du Québec*, at para. 34; see also *Alliance du personnel professionnel et technique de la santé et des services sociaux*, at paras. 6-16). Women have consistently been deprived of equal pay, opportunity, and promotion as opposed to men. Progress has been made, but the same problems nevertheless persist.

[710] Sections 6 and 8 perpetuate and exacerbate these existing disadvantages in a completely arbitrary manner. They further marginalize Muslim women in Quebec society and treat them as "other", even though their faith has no bearing whatsoever on their capacity to do their job. As expressed by many of the claimants and witnesses at trial, Bill 21 makes them feel like "second-class citizen[s]" (Sup. Ct. reasons, at para. 20), makes them fear an increase in hateful rhetoric (para. 23), and makes them believe that "in order to feel accepted as . . . full-fledged citizen[s], [they] must adopt the appearance of the majority" (para. 8). In doing so, Bill 21 further excludes women from the workforce, especially from positions of authority. As a result, ss. 6 and 8 have a profound discriminatory effect on women.

[711] I have no hesitation in concluding that ss. 6 and 8 of Bill 21 limit s. 15(1) of the *Charter*.

(2) <u>Step 2: Whether the Limits on Sections 2(a), (b) and 15(1) Are Inconsistent With Substantive Equality</u>

[712] The limits on ss. 2(a), (b) and 15(1) caused by ss. 6 and 8 of Bill 21 are not consistent with the substantive equality between men and women. Since the first step of this analysis involved a s. 15(1) claim for discrimination on the basis of sex, I have already explained why ss. 6 and 8 of Bill 21 undermine substantive equality. I need not repeat that analysis here.

[713] To conclude, Bill 21 limits ss. 2(a), (b) and 15(1) of the *Charter* and these deprivations are inconsistent with substantive equality. Since a limit to s. 15(1) due to discrimination on the basis of sex was established at the first step, the impugned provisions are necessarily inconsistent with substantive equality. Sections 6 and 8 of Bill 21 infringe s. 28 of the *Charter* because they unequally restrict a women's right to respect her faith, freely express herself and to be free from discrimination based on religion and sex. They are of no force or effect under s. 52(1) of the *Constitution Act, 1982*.

III. Other Issues

[714] While s. 28 is sufficient to dispose of this appeal, it is necessary to briefly address some of the important constitutional issues raised by the parties and argued fully before us.

A. *Section 33 of the Charter and Declaratory Judgments*

[715] I agree with Justices Karakatsanis and O'Bonsawin, and Justice Kasirer, that superior courts retain jurisdiction to grant declaratory relief where a legislature enacts legislation in which it invokes s. 33 of the *Charter* (reasons of Karakatsanis and O'Bonsawin JJ., at paras. 749-51; reasons of Kasirer J., at paras. 443-71 and 475). When s. 33 is validly invoked, it allows legislatures to pass legislation which operates notwithstanding certain *Charter* rights for a maximum period of five years. But s. 33 does not and cannot oust the jurisdiction of a superior court to review state action. At a minimum, courts retain the ability to determine whether s. 33 applies to the rights at issue. In addition, the superior courts' general jurisdiction to issue declarations continues because the *Charter* rights subject to s. 33 are not eradicated or eliminated. Courts, as guardians of the Constitution, retain their plenary power to pronounce on rights violations (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at p. 86, per La Forest J., and at pp. 113-14, per Sopinka J.; *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 56). I write to emphasize the notice-giving function served by judicial declarations when s. 33 is invoked and to suggest some factors that could bear on whether to exercise the discretion to grant declaratory relief in such cases.

[716] Judicial declarations have a crucial role to play in a democratic system. Declaratory relief serves democratic accountability by informing the public of the true impact of laws invoking s. 33 of the *Charter*, including the nature and extent of any limit of a *Charter* right. In exercising their right to vote, the electorate should have the benefit of information about the consequences of laws on their rights and freedoms. In fact, s. 3 of the *Charter* guarantees the right "to vote in an informed way" and to be

"reasonably informed of all the possible choices" (*Ontario (Attorney General) v. Working Families Coalition (Canada) Inc.*, 2025 SCC 5, at para. 31, quoting *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47). True democracy requires access to information from "sources independent of the government" (*Working Families Coalition*, quoting *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 146).

[717] At some level, the very invocation of s. 33 communicates to the public that the legislature understands it is limiting *Charter* rights. Rather than defending any limitations under s. 1 as demonstrably justified in a free and democratic society, it chooses instead to declare that its legislation operates notwithstanding ss. 2 or 7 to 15 of the *Charter*. Even where Parliament or a legislature has publicly acknowledged which rights or freedoms are being violated, declaratory relief serves democratic accountability. Without the information that flows from declaratory remedies, the electorate may not understand the scope of the rights being limited or the extent of the limits, and they may accordingly be unable to hold their government to account. Declaratory judgments continue to serve significant notice-giving functions in this context by clarifying the impact of state action, helping to inform public debate, and stimulating dialogue between the legislative and judicial branches.

[718] While courts have the jurisdiction to make declarations, they have discretion as to whether they will do so in any given case. The exercise of this discretion must be done judiciously. *Shot Both Sides v. Canada*, 2024 SCC 12, at paras. 67-68,

sets out criteria on the discretion to grant declaratory relief. Where s. 33 is invoked, the exercise of this discretion may be shaped by other factors, including the separation of powers between the legislature and the judiciary, the notice-giving function of any declaratory judgement, the social good of having a well-informed public and the political accountability which underpins s. 33. It is the wider notice giving function of any declaratory judgement that will likely be at the forefront of a court's decision whether to exercise its discretion to issue a declaration.

[719] Section 33 of the *Charter* is clearly subject to limits which flow from the text of the provision. Section 33 requires that Parliament or a provincial legislature enact legislation containing an express declaration that it operates notwithstanding specified provisions of the *Charter*. Section 33 only applies to certain rights and freedoms, namely those in ss. 2 and 7 to 15 of the *Charter*. A declaration made under s. 33 expires after five years, unless it is re-enacted under s. 33(4). *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, makes clear that s. 33 cannot have retrospective effect and that Parliament or the legislature must expressly indicate that it is invoking the notwithstanding clause and set out which rights it is overriding (pp. 741 and 743-45). These are significant limits.

[720] My colleagues say that there are additional substantive limits on s. 33 that transcend the text of the *Charter* itself. Respectfully, I disagree. While it is unnecessary to decide whether there are substantive limits on s. 33 in this appeal as there is no finding that any such limits have been transgressed, I am unconvinced that there are

other or additional limits on the use of the notwithstanding clause that do not arise from s. 33 itself. I do not see a clear source from which the proposed limits derive. While the concerns raised by my colleagues should be taken seriously, I prefer to see their proposed limits as operating only as factors which may bear on the decision to grant or deny declaratory relief when s. 33 is invoked. For example, where s. 33 is invoked to irreparably or permanently impair *Charter* rights, this factor may weigh in favour of granting declaratory relief. The same is true where an invocation of s. 33 is incompatible with Canada's fundamental character as a free and democratic society or purports to amend the Constitution. These factors will likely bolster the need for the democratic accountability declaratory relief provides in this context. How these factors apply in considering whether or not to grant a declaration will be determined in appropriate cases.

[721] Given my conclusion on s. 28, there is no need for a separate declaration to ensure that the electorate understands how the impugned provisions restrict religious freedom, limit freedom of expression and are discriminatory. Since I have invalidated ss. 6 and 8 of Bill 21, the reasons given for why s. 28 is breached provide a full explanation of how the impugned provisions operate. Had I not found a breach of s. 28, I would have issued a declaration finding that the rights discussed above were violated in this case.

B. *Section 3 of the Charter*

[722] I agree with the Chief Justice in the result that s. 8 of Bill 21 — which requires Members of the National Assembly to exercise their functions with their face uncovered — unjustifiably infringes s. 3 of the *Charter* by restricting the right to be qualified for membership in the Quebec National Assembly.

C. *Pre-Confederation Statutes*

[723] I see no error in the Court of Appeal's treatment of the pre-Confederation statutes, namely the *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*, S. Prov. C. 1851, 14 & 15 Vict., c. 175, and the *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*, S. Prov. L.C. 1832, 1 Will. 4, c. 57. These statutes do not have constitutional or supra-legislative status and cannot be used to invalidate the impugned provisions of Bill 21.

D. *Section 23 of the Charter*

[724] I agree that the impugned provisions raise constitutional concerns under s. 23 of the *Charter* as potentially violating the right to minority language education. Given my conclusion on s. 28 of the *Charter*, it is unnecessary to decide this point.

E. *Division of Powers*

[725] Similarly, although my conclusion on s. 28 means it is unnecessary to decide the division of powers issue, the application of ss. 6 and 8 of Bill 21 to non-state actors raises federalism concerns, as being *ultra vires* Quebec. Unlike the rest of Bill 21, ss. 6 and 8 have effects that do not bear "on the operation of an organ of the government of the province" and therefore cannot fall under s. 45 of the *Constitution Act, 1982* (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 39). For example, s. 6 applies to private-practice lawyers or notaries "under a legal services contract entered into with a minister" (cl. 8 of Sch. II) and to "principals, vice principals and teachers" in the public education system (cl. 10 of Sch. II) and s. 8's scope includes *anyone* who seeks a government service.

IV. Disposition

[726] For these reasons, I would allow the appeals in part and dismiss the cross-appeal. I find and declare the following:

(a) Sections 6 and 8 of the *Act Respecting the Laicity of the State* infringe s. 28 of the *Charter*, and are of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

(b) Section 8 unjustifiably limits the right under s. 3 of the *Charter* to be qualified for membership in the Quebec National Assembly.

[727] Each party should bear their own costs.

The following are the reasons delivered by

KARAKATSANIS AND O'BONSAWIN JJ. —

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I. Overview

[728] There can be no dispute that ss. 6 and 8 of the legislation before us, *An Act Respecting the Laicity of the State*, S.Q. 2019, c. 12 (the Act, formerly Bill 21), infringe the fundamental rights and freedoms of many Quebecers.

[729] Contrary to freedom of religion, freedom of expression, and the right to equality, the Act forbids people who wear religious symbols from working in most of Quebec's public sector. Muslim women cannot work as teachers, be promoted, or transfer to other schools unless they do not wear hijabs. Jewish men cannot serve as lawyers for government clients unless they take off their kippas. And Sikhs cannot work in the public sector unless they forgo their turbans. Sections 6 and 8 of the Act put devout Quebecers in a terrible dilemma: betray their religious convictions or be excluded from avenues of public service and employment.

[730] Quebec argues that this law pursues its vision of a society premised on laicity. Quebec's unique history has fostered a conception of "open secularism" that continues to inform its approach to society, education, and governance. But Quebec does not attempt to defend any of the rights infringements in this law as demonstrably justifiable in a free and democratic society, under s. 1 of the *Canadian Charter of Rights*

and Freedoms. Instead, it seeks to oust the jurisdiction of the courts to review the law entirely, by invoking s. 33 of the *Charter* — the "notwithstanding clause".

[731] Section 33 empowers legislatures to pass laws that temporarily operate notwithstanding ss. 2 and 7 to 15 of the *Charter* in exceptional circumstances. It was never designed to function as a routine legislative tool, but rather as a mechanism of last resort — to be employed sparingly, when governments considered it necessary. The issues on appeal transcend this Act: it marks the first occasion that this Court will purposively interpret s. 33 and determine its scope and limits.

[732] Section 33 is not an unbridled grant of power for legislatures to override constitutional rights and freedoms. Absolute power does not exist in Canada. "An unlimited power is, definitionally, not a legal power" (*Democracy Watch v. Canada (Attorney General)*, 2026 SCC 28, at para. 1, per Wagner C.J.). Our Constitution constrains all exercises of public authority, and s. 33 is no exception.

[733] A purposive interpretation of s. 33 reveals that it grants a wide power — but not a limitless one. Parliamentary sovereignty has never been absolute in our federal state. Since at least 1867, Canadian courts have been arbiters of permissible legislative actions. But our constitutional tradition also recognizes that elected representatives can and should have the final word in many instances as to what the law should be. With s. 33, the legislatures, as the people's elected representatives, retain much of that final word, with a power to enact legislation notwithstanding that it infringes certain rights and freedoms.

[734] The legitimacy of the power to legislate notwithstanding defined rights and freedoms therefore rests on a link between parliamentary sovereignty and democratic accountability (see generally *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 97). Invocations of s. 33 that threaten that link would therefore undermine the very democratic foundations upon which parliamentary sovereignty rests.

[735] Further, the text of s. 33 does not purport to let legislatures limit, redefine, or eliminate rights and freedoms — only to enact laws that temporarily operate notwithstanding them. Embedded within the provision's text, structure, and historical context are democratic accountability measures that ensure the public is notified and has an opportunity to evaluate the legislature's use of the clause through the ballot box. From this, two conclusions follow.

[736] First, declaratory relief remains available when legislatures invoke s. 33. Courts have discretion to issue declarations that laws unjustifiably infringe *Charter* rights and freedoms, and would be of no force or effect but for the invocation of s. 33. Such declarations both vindicate affected individuals and promote democratic accountability by informing citizens how their representatives have chosen to temporarily override rights and freedoms. Interpreting s. 33 as the Court of Appeal did — precluding judicial review of legislation invoking s. 33 — undermines its five-year sunset clause aimed at ensuring that the electorate can exercise their democratic rights and express an informed opinion as to the use of s. 33 at the ballot box.

[737] Second, there are at least two substantive limits on the scope of s. 33. As we shall elaborate, s. 33 cannot be used to irreparably impair *Charter* rights and freedoms beyond the text's prescribed five-year sunset clause. Section 33 also cannot be used to authorize laws that are incompatible with the fundamental character of Canada as a free and democratic country. Beyond these two substantive limits, we note that the repeated invocation of s. 33 may itself contravene both limits. Routine uses of s. 33 could transform effects which are initially reversible into irreversible ones, effectively permanently extinguishing a right or being incompatible with the fundamental character of Canada's free and democratic society.

[738] Given these principles, this Court should not be silent when asked by claimants to acknowledge that the Act infringes their rights and freedoms. Democratic accountability in Quebec will benefit from informed public discourse. A declaration from this Court — based on undisputed findings of fact by the trial judge of the Quebec Superior Court — will assist the public in assessing the consequences of this invocation of s. 33. Accordingly, we would declare that ss. 6 and 8 of the Act unjustifiably infringe the *Charter*'s guarantee of freedom of religion, freedom of expression, and the right to equality. They would be of no force or effect but for the invocation of s. 33.

[739] We further conclude that s. 33 allows the Act to operate notwithstanding the breaches of ss. 2(a), 2(b), and 15(1). Because of its targeted scope, the Act does not irreparably extinguish rights, nor is it fundamentally incompatible with Canada's free

and democratic character. The invocation of s. 33 in the Act is valid, and so the law would remain constitutional, unless and until the sunset period expires.

[740] By its express terms, however, s. 33 does not protect the legislation from the effects of ss. 3, 23, and 28 of the *Charter*. We agree with the Chief Justice in his result that the Act unjustifiably infringes the right to seek election to the Quebec National Assembly under s. 3 of the *Charter*. We also conclude that the Act violates the right to minority language education under s. 23 and thus, relevant provisions would not apply to Quebec's English school boards. Finally, we would strike ss. 6 and 8 because they infringe the *Charter*'s guarantee of sex equality under s. 28.

[741] Section 23 protects the right to minority language instruction. The trial judge made clear findings of fact that the Act limits the authority of minority language school boards over the recruitment, assignment, and direction of personnel. He also found that the Act negatively affects the legitimate linguistic and cultural concerns of Quebec's English-speaking minority by impeding teaching staff from transmitting important elements of its culture, including multiculturalism and religious diversity. We find no palpable and overriding errors in the trial judge's findings. We agree with the trial judge that the Act unjustifiably infringes s. 23 by impeding the management and control of the schools in a way that negatively affects the legitimate linguistic and cultural concerns of the minority language rights holders and should not apply to Quebec's English-language school boards.

[742] Section 28 is the *Charter*'s other notwithstanding clause. As a provision fiercely fought for by women's groups, s. 28 states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Originally placed within the scope of the notwithstanding clause, all nine provinces that signed onto the *Charter* and Parliament unanimously agreed to remove it from s. 33. Section 28 is an express commitment not to undo Canada's decades-long efforts towards substantive sex equality. It is the unmistakable guarantee that women's constitutional equality is non-derogable.

[743] Section 28's decisive text and compelling legislative drafting history and context compel a purposive interpretation recognizing that it has both interpretive effects and substantively guarantees sex equality. It affects the interpretation of other "rights and freedoms referred to in [the *Charter*]", and the application of the justification analysis under s. 1. It also "guarantee[s]" substantive sex equality: legislation cannot have unequal adverse impacts on the *Charter* rights and freedoms of male and female persons. And it provides that guarantee notwithstanding *anything* in the *Charter*, including s. 33 — so s. 33 cannot shield legislation that infringes s. 28 by affecting *Charter* rights in a manner that undermines substantive equality between men and women. The Act does just that, because it relies on s. 33 to authorize a law that unequally and adversely impacts women's religious freedom under s. 2(a). We would conclude that ss. 6 and 8 of the Act violate s. 28 of the *Charter* and are accordingly of no force or effect.

[744] In addition to our conclusions on ss. 3, 23, 28, and 33 of the *Charter*, we also find that the *Rectories Act* and the *Hart Act* do not have constitutional status and cannot invalidate provisions of the Act for the same reasons found by the Quebec Court of Appeal (2024 QCCA 254, at paras. 150-83).

II. Declaratory Relief: The Act Unjustifiably Infringes Sections 2(a), 2(b), and 15(1) of the *Charter*

[745] The Act creates a barrier between many Quebecers' deeply held religious beliefs and their aspirations to serve their community as public servants. Section 6 of the Act prohibits public sector workers from wearing religious symbols at work. Visible religious minorities cannot be hired for Quebec public service positions and those who were already working for the state before the Act came into force are permitted to continue to exercise their functions pursuant to Chapter VI, but they cannot be promoted or transfer positions. Section 8 of the Act requires state workers to have their faces uncovered when exercising their functions. It also requires any individual receiving a state service to have "their face uncovered where doing so is necessary to allow their identity to be verified or for security reasons". For those affected, these sections of the Act mean lost employment opportunities, deferred ambitions, and the pain of knowing that full participation in public life is conditional on abandoning parts of their identities.

[746] The Act's effects cannot be understood in the abstract. They are measured in the lives of those whose aspirations, careers, and sense of belonging have been

altered by the law. At the heart of this case are people who seek to contribute to the communities they call home, yet find themselves excluded from public service because of how they practice their faith. A young Muslim woman overcame her disability to become a teacher, only to be barred from employment for wearing a hijab.[7] A Jewish lawyer in Montreal can no longer take on cases related to provincial government work because he wears a kippa.[8] A recent law school graduate cannot pursue his goal of giving back to Quebec by serving as a prosecutor because he wears a kufi in accordance with his Muslim faith.[9] A Sikh woman "feel[s] . . . like a second-class citizen" because she cannot return to work as a teacher in the province she considers home, so long as she wears a turban.[10] And an engineer and math teacher feels trapped [TRANSLATION] "in an open-air prison", unable to request a job transfer to be closer to her only living family member in Canada because she wears a hijab.[11]

[747] Common to these experiences is a conviction that religious symbols are not a garment or object that can be abandoned — they are an integral part of one's identity.[12] As the trial judge observed, the Act is [TRANSLATION] "dehumaniz[ing]" because it forces people to choose between following their religious beliefs or their livelihood and participating in their chosen profession (2021 QCCS 1466, at para. 69).

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[7] Affidavit of Ichrak Nourel Hak, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.9-494.13).
[8] Affidavit of Gregory Bordan, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.19-494.22), at p. 494.19.
[9] Affidavit of Basir Naqvi, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.6-494.8), at p. 494.6.
[10] Affidavit of Amrit Kaur, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.52-494.55), at p. 494.54.
[11] Affidavit of Hakima Dadouche, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.56-494.59), at p. 494.57.
[12] Affidavit of Ichrak Nourel Hak, at p. 494.11; affidavit of Gregory Bordan, at pp. 494.19-494.22.

That affects their dignity and sense of belonging, and makes visible religious minorities feel "expressly excluded" from Quebec society.[13] The Act may also reinforce negative stereotypes: some visible religious minorities have reported increased verbal and physical abuse since its enactment.[14]

[748] The experiences of visible religious minorities that lie at the heart of this case lead us to the inexorable conclusion that ss. 6 and 8 of the Act violate freedom of religion under s. 2(a), freedom of expression under s. 2(b), and the right to equality under s. 15(1) of the *Charter*. Quebec has chosen not to justify any of those infringements under s. 1.

[749] We agree with Justice Martin and Justice Kasirer that declaratory relief remains available when s. 33 of the *Charter* or s. 52 of the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 (*Quebec Charter*), is invoked (reasons of Martin J., at para. 715; reasons of Kasirer J., at para. 474). *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, did not consider, nor did it address, the availability of declarations when these override provisions are invoked. For both s. 33 of the *Charter* and s. 52 of the *Quebec Charter*, the availability of declaratory relief for legislation invoking these provisions is a necessary consequence of the separation of powers and the inherent jurisdiction of the judiciary to determine the legal effect of legislation and to provide a remedy where it is practically useful. Superior courts always retain inherent jurisdiction

[13] Affidavit of Basir Naqvi, at p. 494.7; see also affidavit of Carolyn Gehr, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.14-494.48), at p. 494.15.

[14] See, e.g., affidavit of Fatima Ahmad, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.26-494.29), at p. 494.27.

to issue declarations for *Charter* and *Quebec Charter* infringements (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at p. 85, per La Forest J., and at pp. 113-14, per Sopinka J.).

[750] The availability of declaratory relief also aligns with our purposive analysis of s. 33 of the *Charter*. Section 33's text is clear. When it is invoked, the legislation or provisions that it applies to can "operate notwithstanding" or, in French, "*a effet indépendamment*" the rights or freedoms it identifies (s. 33(1)). And s. 33(2) directs that the invoking act "shall have such operation as it would have but for [the *Charter* provision that it applies to]" or, in French, "*a l'effet qu'elle aurait sauf la disposition [de la Charte à laquelle elle s'applique]*". Section 33 suspends *the effects* of ss. 2 and 7 to 15 on laws shielded by s. 33; it does not oust the inherent jurisdiction of superior courts to review the legislation for rights infringements, but for s. 33's invocation (see generally G. Webber, "Notwithstanding rights, review, or remedy? On the notwithstanding clause and the operation of legislation" (2021), 71 *U.T.L.J.* 510, at pp. 511-12 and 515-18; R. Leckey and E. Mendelsohn, "The notwithstanding clause: Legislatures, courts, and the electorate" (2022), 72 *U.T.L.J.* 189, at pp. 191-96).

[751] As we discuss below, s. 33's purpose is to preserve a form of parliamentary sovereignty *premised on* democratic accountability. Declaratory relief vindicates those whose rights have been breached by recognizing the harms they have suffered. It also fosters democratic accountability by informing the public of the nature and extent of those harms. Section 33 is thus a tool that facilitates dialogue not only between the courts and legislatures, but between the courts, legislatures *and the electorate* — who

are ultimately given the "final say" on uses of s. 33 to override *Charter* rights. Courts have a crucial role to play in dialogue between the legislatures and electorate by informing both of the scope of a *Charter* right and whether and to what extent it is infringed by a statute that invokes the notwithstanding clause. Declaratory relief is therefore practically useful in this context (*Shot Both Sides v. Canada*, 2024 SCC 12, at para. 68).

[752] To issue a declaration in Quebec, the *Code of Civil Procedure*, CQLR, c. C-25.01, requires that there is a "genuine problem", among other requirements (art. 142; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 41; see also *R. in right of Newfoundland v. Commission Hydro-Électrique de Québec*, [1982] 2 S.C.R. 79, at p. 106). This "genuine problem" requirement is clearly met. A declaration recognizes the impact on the claimant's rights and enriches the electorate's ability to hold lawmakers democratically accountable for s. 33 uses. Section 33's impact on rights is not theoretical because the rights affected by s. 33 continue to exist, and a law inconsistent with the interests they protect continues to breach them. Accordingly, and although a discretionary decision is generally entitled to deference, the trial judge's decision not to grant a declaratory relief rests on a flawed interpretation of s. 33 (see *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, [2022] 3 S.C.R. 515, at para. 41).

[753] We, thus, would exercise our discretion to grant declaratory relief in this case. The seriousness of the alleged breaches demands a response from this Court. After a 33-day trial, the trial judge made sufficient findings to conclude that ss. 6 and 8 of the Act unjustifiably infringe ss. 2(a), 2(b), and 15(1) of the *Charter*, based on extensive evidence about the law's effects on visible religious minorities (paras. 67, 802-7 and 1102). The trial judge's findings support the conclusion that, but for the temporary invocation of the notwithstanding clause, ss. 6 and 8 of the Act would be of no force or effect. Although the focus of our declaration analysis is on the *Charter*, for similar reasons, we would find that ss. 6 and 8 of the Act unjustifiably infringe ss. 3 and 10 of the *Quebec Charter*.

A. *The Act Infringes Freedom of Religion*

[754] There can be no serious question that the Act violates freedom of religion as guaranteed by s. 2(a): everyone has the fundamental freedom "of conscience and religion". Section 2(a) protects "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336). To establish a s. 2(a) breach, a claimant must show that they have a sincerely held religious belief or practice, and that state conduct non-trivially interferes with their ability to act in accordance with that belief (*Ktunaxa Nation v. British Columbia (Forests, Lands*

and Natural Resource Operations), 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68). Both aspects of that test are satisfied here.

[755] The trial judge's findings establish that the claimants have a sincerely held religious belief that they must wear religious symbols in their daily life, including while working. For many people, a religious symbol like a hijab, turban, or kippa is an essential part of their identity and their chosen connection with their faith (see generally *El-Alloul v. Attorney General of Quebec*, 2018 QCCA 1611, at para. 91).[15] To Ms. Hak, for example, her hijab [TRANSLATION] "is not simply a piece of clothing"; instead, "it is part of [her] identity".[16] For Mr. Bordan, wearing a kippa to cover his head "is a continuous reminder . . . that [he] ha[s] a particular duty to behave ethically . . . [as] a religious duty".[17] And for Ms. Kaur, a Sikh affiant, [TRANSLATION] "the wearing of a turban reflects her commitment to a life of spirituality and discipline while also reflecting the fact that she has the same duty of responsibility as a man, and that, in this sense, it therefore represents a symbol of equality".[18] Their sincerely held beliefs prevent them from removing their religious symbols, even at the risk of serious professional and financial consequences.[19]

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[15] See expert report of Georges-Auguste Legault, dated March 9, 2020, reproduced in joint schedules in the C.A., vol. 30 (at pp. 9710-79), at pp. 9745-52 (for a table that summarizes all of the religious symbols referred to in affidavits before the trial judge); see also Sup. Ct. reasons, at paras. 19 and 22.
[16] Affidavit of Ichrak Nourel Hak, at p. 494.11; see also Sup. Ct. reasons, at para. 6.
[17] Affidavit of Gregory Bordan, at p. 494.20.
[18] Sup. Ct. reasons, at para. 10.
[19] Affidavit of Ichrak Nourel Hak, at p. 494.11; affidavit of Carolyn Gehr, at p. 494.15; affidavit of Gregory Bordan, at p. 494.21; affidavit of M. G. and exhibit, reproduced in joint schedules in the C.A. vol. 3 (at pp. 494.195-494.201), at p. 494.197.

[756] The trial judge's findings also establish that the Act's interference with the ability to act in accordance with sincerely held beliefs is more than trivial. The Act creates professional barriers for qualified individuals in the public sector solely because they wear religious symbols (paras. 65 and 68-69). For those affected, the Act has life-altering effects. It derails their careers and their life aspirations. For example, after almost 40 years as a lawyer, Mr. Bordan can no longer take on provincial government work.[20] Similarly, Ms. Hak, Ms. Ahmad, and Ms. Hariri, among others, cannot apply to be teachers in Quebec, despite having just finished their studies.[21] Many Muslim women have had to disclose that they wear religious symbols in job applications or have participated in a job interview only to be told they are ineligible because they wear a hijab.[22] Preventing individuals from being hired, promoted, or transferred in their workplaces are all non-trivial interferences with sincerely held religious beliefs that result in a s. 2(a) breach.

[757] Beyond employment, the Act non-trivially influences life choices and mobility. Despite Quebec being her "home", Ms. Kaur accepted a teaching position in British Columbia because the Act barred her as a Sikh woman from employment.[23]

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[20] Affidavit of Gregory Bordan, at pp. 494.20-494.21; see also Sup. Ct. reasons, at para. 64.

[21] Affidavit of Ichrak Nourel Hak, at p. 494.11; affidavit of Fatima Ahmad, at p. 494.26; affidavit of E. E., reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.75-494.77), at p. 494.76; affidavit of Ghadir Hariri, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.78-494.81), at p. 494.78; see also Sup. Ct. reasons, at paras. 13 and 64-65.

[22] Affidavit of S. H. and exhibits, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.143-494.150), at pp. 494.144 and 494.149-494.150; affidavit of S. E.-M., reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.182-494.185), at pp. 494.183-494.184; affidavit of S. B. R., reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.188-494.194), at pp. 494.189-494.190; affidavit of R. M., reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.164-494.171), at p. 494.166; affidavit of Nafeesa Salar and exhibits, reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.216-494.230), at p. 494.218.

[23] Affidavit of Amrit Kaur, at p. 494.55.

Moreover, the Act blocks Ms. Dadouche from seeking a transfer from her teaching position in Montréal to Gatineau to be closer with her only other family member in Canada.[24] As the trial judge found, [TRANSLATION] "anyone who holds employment that is subject to Bill 21 is stuck in their current position because they cannot change it without losing the benefit of the grandfather clause, unless they decide to no longer wear religious symbols in public" (para. 68).

[758] The Act also has insidious effects on freedom of religion. By treating visible religious minorities as less worthy of full participation in Quebec society, the law sends a message of exclusion — making them feel "discriminated against and like . . . second-class citizen[s]" and [TRANSLATION] "undesirable[s] in Quebec".[25] For Ms. Kaur, as an example, the Act [TRANSLATION] "tells her that she is being judged on her appearance rather than her ability and personal qualities and that people like her are not wanted to be able to work in the public sector in Quebec as teachers" (Sup. Ct. reasons, at para. 13). The Act has led Mr. Bordan, a Jewish lawyer in Montréal, to "painfully come to the realization" that his children and grandchildren should no longer live in Quebec because "[they] could not aspire to be teachers or make certain other career choices merely because of [their Jewish] religious practice".[26]

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[24] Affidavit of Hakima Dadouche, at p. 494.57; affidavit of N. P., reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.1-494.5), at p. 494.14; affidavit of Carolyn Gehr, at p. 494.15; see also Sup. Ct. reasons, at paras. 19, 23 and 64-65.

[25] Affidavit of Amrit Kaur, at p. 494.54; affidavit of Imane Melab, reproduced in joint schedules in the C.A., vol. 2 (at pp. 494.23-494.25), at p. 494.24.

[26] Affidavit of Gregory Bordan, at p. 494.22.

[759] Each of these experiences represents a non-trivial interference with a person's ability to act in accordance with their sincerely held beliefs. The Act's professional and psychological impacts are profound and far-reaching. It affects people's ability to make a living and to pursue their professional dreams. It also affects their basic sense of belonging in Canadian and Quebec society.

[760] The Mouvement laïque québécois argues that the Act does not infringe freedom of religion, because s. 2(a) protects state neutrality, and the Act pursues the same goal. We disagree. State neutrality under s. 2(a) "requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief" (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 72). That ensures a "neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally" (para. 74). But prohibiting religious symbols from being worn by employees in public service accomplishes neither aim, because allowing individual religious expression does not interfere with the freedom of religion of those who access those services. And permitting workers to wear religious symbols does not mean that the state is "profess[ing], adopt[ing] or favour[ing] one belief to the exclusion of all others" (para. 88).

[761] As the trial judge found, the very intent of the law is to restrict the wearing of religious symbols and to achieve the Act's overarching goal of laicity (paras. 54-64).

Both the purpose and effect of the Act is to limit the right to freedom of religion of visible religious minorities in Quebec. It violates s. 2(a) of the *Charter*.

B. *The Act Infringes Freedom of Expression*

[762] As with religious freedom, the Act's violation of free expression is evident on its face. Any state interference with an activity that "conveys or attempts to convey a meaning" infringes s. 2(b), provided the activity's method or location does not bring it outside the scope of the right (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, [2021] 2 S.C.R. 845, at paras. 14-15).

[763] Wearing a visible symbol of faith in public or at work is a non-violent form of expression protected by s. 2(b). For many, religious symbols are a means to express religious identity. Publicly displaying them conveys sincerely held religious beliefs to others, which places that conduct squarely within the scope of free expression. Take Ms. Chelbi, for example, [TRANSLATION] "she considers the wearing of a headscarf an integral part of her beliefs and . . . this garment is an expression of the control she exercises over her life, her body and what she decides to show others" (Sup. Ct. reasons, at para. 22). Ms. Dadouche's experience is similar. For 31 years, she has worn the hijab whenever she leaves her home in order to [TRANSLATION] "stay connected to her faith" (para. 19). For her, that expression constitutes [TRANSLATION] "an act that is inseparable from her religious practices" (para. 19).

[764] For others, religious symbols offer a means to champion their faith publicly. Ms. Gehr and Mr. Bordan, for example, both explained that their decisions to wear a religious head covering were motivated, in part, by a desire to make their Jewish faith visible in light of the centuries of discrimination experienced by their people.[27] Mr. Naqvi, on the other hand, wears a Muslim skullcap, known as a topi or kufi, in part to publicly identify himself as a Muslim in an expressive act of solidarity with Muslim women who are often more visible because some of them wear a hijab.[28]

[765] The Act explicitly prohibits people from wearing or displaying visible religious symbols while working in certain categories of employment. Nothing about the method or location of that religious expression places it outside the scope of s. 2(b)'s protection (see generally *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60-81). There can thus be no dispute that the Act violates the right to freedom of expression under s. 2(b) of the *Charter*.

C. *The Act Infringes the Right to Equality*

[766] The Act also infringes the right to equality under s. 15(1) of the *Charter*. That right protects against discriminatory state action and guards against differential treatment that perpetuates a disadvantage. It applies to laws that directly or indirectly discriminate against protected groups (*Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, at para. 37; *R. v. Sharma*, 2022 SCC 39, [2022] 3 S.C.R. 147, at para. 29; *Fraser*

[27] Affidavit of Carolyn Gehr, at p. 494.15; affidavit of Gregory Bordan, at p. 494.21.
[28] Affidavit of Basir Naqvi, at p. 494.7.

v. Canada (Attorney General), 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 30). To prove an infringement of s. 15(1), a claimant must show that the challenged law: (1) creates or contributes to a distinction based on a protected ground, either on its face or in its impact; and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage (*Kanyinda*, at para. 48; *Sharma*, at para. 28; *Fraser*, at para. 27).

[767] Based on the trial judge's findings, we conclude that the Act creates a distinction on its face on the basis of religion, and in its effects on the basis of sex. Both of these distinctions perpetuate disadvantage, thus infringing the right to equality.

(1) The Act Directly Discriminates on the Basis of Religion

[768] On its face, the Act draws a direct distinction based on religion. By prohibiting visible religious minorities from wearing religious symbols in the public service, the law treats them differently. Those who do not wear religious symbols — whether because they are non-religious or because their faith does not require them to — remain free to access and retain their jobs without changing their conduct. By contrast, those who wear a hijab, niqab, kippa, turban, or other religious symbol must choose between their faith and their professional aspirations.

[769] As we have explained, that distinction reinforces the historical disadvantage and exclusion experienced by visible religious minorities. In denying affected individuals the equal benefit of public employment opportunities on the basis

of religion, the Act perpetuates that disadvantage in a manner that is discriminatory within the meaning of s. 15(1) of the *Charter*. That disadvantage is heightened given their other "intersecting identities and realities" (*Kanyinda*, at para. 40).

(2) The Act Adversely Discriminates on the Basis of Sex

(a) *The Act Creates a Sex-Based Distinction*

[770] The Act's effects are not experienced equally. They fall most heavily on Muslim women. Due to their intersecting identities, the Act imposes unique adverse effects on Muslim women that men in the province do not experience.

[771] Most Muslim women in Quebec wear head or face coverings. A 2016 study highlights that 54 percent of Muslim women wear the hijab (a headscarf), and less than 1 percent of them wear the niqab (a covering of some of the face and other parts of one's body).[29] Wearing these garments is an expression of religious identity. Their meaning and significance can vary considerably across individuals, communities, and cultures. They are shaped by the beliefs and experiences of those who wear them.[30]

[772] The trial judge accepted that the Act disproportionately affects Muslim women who wear head, face, or body coverings (paras. 67 and 807). The law excludes

[29] See expert report of Solange Lefebvre, dated March 13, 2020, reproduced in joint schedules in the C.A., vol. 31 (at pp. 10083-94), at pp. 10093-94.

[30] See expert report of Georges-Auguste Legault Expert Report, dated March 9, 2020, reproduced in joint schedules in the C.A., vol. 30 (at pp. 9710-79), at p. 9713; see also T. F. Ruby, "Listening to the voices of the hijab" (2006), 29 *Women's Stud. Int. Forum* 54.

them from pursuing or holding certain public-sector positions. And by requiring them to choose between adherence to their religious convictions and access to certain forms of public employment, there is no question that the law imposes a burden that falls disproportionately on them.

[773] The Act's impact on Muslim women aspiring to be teachers, for example, is significant. Because women make up a substantially larger share of the teaching workforce, the ban structurally impacts them more than men (Sup. Ct. reasons, at para. 802). Women represent 88 percent of the teaching staff at the primary and preschool levels and 61 percent at the secondary level (para. 802). The record is replete with evidence from Muslim women who were required to indicate that they wear religious symbols in their job applications or interviews.[31] One teacher arrived at an interview, only to be told the interview could not begin because her hijab made her ineligible for the role.[32] Others were offered teaching positions based on their training and merit, only to have their offers revoked.[33] Remarkably, at the Centre de services scolaire de Montréal, *every* job application file closed as a result of the enactment of the Act belonged to a Muslim woman who wore a hijab (para. 805).

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[31] Affidavit of S. H. and exhibits, at pp. 494.144 and 494.149-494.150; S. E-M. affidavit, at pp. 494.183-494.184; affidavit of Mariam Najdi and exhibits, reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.202-494.215), at pp. 494.203 and 494.211.

[32] Affidavit of S. E.-M., at pp. 494.183-494.184.

[33] Affidavit of S. B. R. and exhibits, at pp. 494.189-494.190; affidavit of R. M. and exhibits, reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.164-494.171), at p. 494.166; affidavit of Nafeesa Salar and exhibits, at pp. 494.217-494.218; affidavit of M. B., reproduced in joint schedules in the C.A., vol. 3 (at pp. 494.238-494.243), at pp. 494.240-494.242; affidavit of Mariam Najdi, at pp. 494.203-494.204.

[774] This evidence allowed the trial judge to find that, as a result of the Act, Muslim women are unable to practice their religion, express themselves, or access the labour market on an equal footing with men (paras. 67 and 802-7).

[775] These conclusions establish that the Act creates a sex-based distinction in its effects within the meaning of stage one of the s. 15(1) test.

(b) *The Distinction Reinforces, Perpetuates, and Exacerbates the Disadvantage Already Experienced by Muslim Women in Canada*

[776] The Act also reinforces and perpetuates the disadvantages that Muslim women have historically faced. Evidence before the trial judge emphasized that Muslim people are the religious group most frequently targeted by negative attitudes in Quebec.[34]

[777] Muslim women who wear religious head, face, or body coverings experience this exclusion differently. Muslim women are often stereotyped as passive, oppressed, or lacking agency because of their religious beliefs and practices.[35] These stereotypes can reduce Muslim women to simplistic assumptions about their faith and identity, overlooking the diversity of their experiences, beliefs, and choices.[36] These

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[34] Supplementary expert report of Paul Eid, dated October 30, 2020, reproduced in joint schedules in the C.A., vol. 34 (at pp. 11349-80), at pp. 11351-54 and 11367-68.

[35] Affidavit of Ichrak Nourel Hak, at p. 494.10; expert report of Paul Eid, dated March 31, 2020, reproduced in joint schedules in the C.A., vol. 31 (at pp. 10195-10290), at p. 10222.

[36] See generally N. Khattab et al., "Muslim women in the Canadian labor market: Between ethnic exclusion and religious discrimination" (2019), 61 *Res. Soc. Stratif. Mobil.* 52; expert report of Paul Eid, at p. 10202.

stereotypes have been found to play a significant role in shaping the life chances and employment opportunities of Muslim women across the country.[37]

[778] Several Muslim women testified that they choose to wear religious symbols to counter these stereotypes. By wearing a hijab in public and connecting with non-Muslim Canadians, they seek to reduce misconceptions about their own agency and perceived threat to Canadian society.[38] They also reported repeated and increasing verbal and physical abuse after the Act passed.[39]

[779] The Act exacerbates those disadvantages. It perpetuates existing social and economic disadvantage by preventing Muslim women who wear religious symbols from participating equally in public life. To use the trial judge's findings on teaching as an example, *all* of the documented teachers who have been formally barred from employment under the Act are Muslim women who wear hijabs (para. 805). The trial judge also found that [TRANSLATION] "[n]ot only do these individuals feel ostracized and partially excluded from Quebec's public service, but also some see their dream becoming unattainable while others find themselves stuck in their position without the possibility of advancement or mobility" (para. 1102). He went on to find that the Act makes it impossible for Muslim women to be hired, promoted, or transferred. He

[37] See generally E. Laxer, J. G. Reitz and J. Stallone, "Challenging the legitimacy of exclusion: Muslim women and social boundaries in different headscarf policy contexts" (2023), 46 *Ethn. Racial Stud.* 987.
[38] Affidavit of Ichrak Nourel Hak, at p. 494.10; affidavit of Ghadir Hariri, at p. 494.79.
[39] Affidavit of Fatima Ahmad, at p. 494.27.

described this as a [TRANSLATION] "cruel consequence that dehumanizes the individuals affected" (para. 69).

[780] We are satisfied that both steps of the s. 15(1) test are met. The Act violates the right to equality. It discriminates against Muslim women by disproportionately affecting their professional opportunities and reinforcing negative stereotypes about them.

D. *The Rights Infringements Are Not Justified Under Section 1*

[781] The state bears the burden of justifying any infringements of rights or freedoms under s. 1 of the *Charter*. This Court does not carry that burden on the state's behalf when it declines to argue this point (*R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 91; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 97; *R. v. Bissonnette*, 2022 SCC 23, [2022] 1 S.C.R. 597, at para. 121; *R. v. Hills*, 2023 SCC 2, [2023] 1 S.C.R. 6, at para. 170; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 278-79). The Court cannot engage in a proportionality exercise without the benefit of evidence and argument.

[782] Yet, in this case, the Attorney General of Quebec (AGQ) chose not to address whether any breaches related to the Act could be justified in a free and democratic society, despite the Court's request, in writing, for additional submissions on ss. 2(a), 2(b), and 15(1) of the *Charter* and ss. 3 and 10 of the *Quebec Charter*. We

thus conclude that the Act's breaches of ss. 2(a), 2(b), and 15(1) of the *Charter* are not justified under s. 1 and that the ss. 3 and 10 breaches of the *Quebec Charter* are not justified under s. 9.1.

[783] There is no doubt, however, that laicity occupies an important place in Quebec's social and political fabric. Quebec's unique history has fostered an understanding of "open secularism" that continues to inform its public policy choices. At the same time, Quebec also has a long history of religious tolerance. As early as 1774, Quebec society was legally committed to peaceful coexistence among different religious communities (*Quebec Act, 1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2); see also Y. Lamonde, *The Social History of Ideas in Quebec, 1760-1896* (2013), at pp. 4 and 11; R. Moon, "Freedom of Religion in Canada — The Principled and the Pragmatic" (2023), 39 *Windsor Y.B. Access Just.* 512; *Saguenay*, at paras. 73-76). Religious tolerance as a foundational Quebec value also informs the meaning of laicity in the province.

[784] But any assessment of the Act's constitutionality must balance laicity-related objectives with the serious rights infringements at stake. Even the Bouchard-Taylor report — recognized as the origin of the concept of "open secularism" that underlies the Act — recommended that teachers, doctors, and lawyers be permitted to wear religious symbols (Consultation Commission on Accommodation Practices Related to Cultural Differences, *Building the Future: A Time for Reconciliation* (2008), by G. Bouchard and C. Taylor, at p. 271). It proposed prohibiting religious symbols

only for certain representatives of the State: judges, Crown prosecutors, police officers, prison guards, and the president and vice-presidents of the National Assembly.[40] The Act goes further. A full s. 1 analysis would require scrutiny and a deeper interrogation of its proportionality, which cannot be done here in the absence of submissions by the AGQ. Without government submissions, any s. 1 analysis would necessarily be abstract and speculative, requiring the Court to "fill in the blanks in the absence of" the factual and justificatory foundation that the AGQ, despite bearing the burden, chose not to provide (I.F., Quebec English School Boards Association, at para. 31). This analysis in the abstract risks transforming the Court from an adjudicator of the state's justification into its architect. That is not the role this Court plays in our constitutional democracy.

III. Section 33 Does Not Create Unlimited Legislative Power

[785] The "rule of law requires . . . that 'the exercise of all public power must find its ultimate source in [law]'" (*Democracy Watch*, at para. 1, quoting *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 10). Canadian courts have always had authority to review legislation for legality. There is no such thing as unconstrained legislative power in Canada. Because our Constitution has always limited all exercises of legal authority, parliamentary sovereignty has never been absolute in this country (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1915), at pp. 165-68). Limits distinguish bare power from legitimate legal authority. The rule of law necessarily imposes limits on all legal power.

[40] Bouchard and Taylor, at pp. 140 and 271.

As this unanimous Court recently explained, "[a]n unlimited power is, definitionally, not a legal power" (*Democracy Watch*, at para. 1).

[786] That is why no constitutional provision has unlimited scope, and s. 33 is no exception. During the negotiations leading to the patriation of the Constitution in 1982, the notwithstanding clause emerged as a political compromise intended to be invoked only in rare circumstances where elected legislatures believed that temporarily suspending certain *Charter* rights was necessary (see P. H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3rd ed. 2004), at p. 121; L. E. Weinrib, "The Canadian Charter's Transformative Aspirations" (2003), 19 *S.C.L.R.* (2d) 17, at pp. 24-25). Its temporary nature — requiring renewal every five years — reflects the expectation that its use would be subject to political scrutiny and democratic accountability. The notwithstanding clause was not designed to function as a routine legislative tool to override fundamental rights, but rather as a safeguard of last resort, to be employed sparingly when governments considered it necessary (see E. M. Adams and E. R. J. Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*" (2022), 26:2 *Rev. Const. Stud.* 121, at p. 139).

[787] This Court has already confirmed that s. 33's scope is not unlimited. In *Ford*, the Court relied on the longstanding presumption against legal retroactivity to conclude that s. 33 can only apply prospectively — a limit that s. 33's text does not expressly compel (p. 744). *Ford* interpreted s. 33 as limited by the broader legal principles embedded in the constitutional order to which it belongs.

[788] Section 33's scope is also textually confined to ss. 2 and 7 to 15 of the *Charter*. It cannot be invoked to shield legislation from other constitutional limits. Legislatures cannot use s. 33 to enact laws outside their respective authorities under ss. 91 and 92 of the *Constitution Act, 1867*. They cannot fundamentally change the role, function, or independence of constitutionally established institutions without recourse to the applicable amending procedure under Part V of the *Constitution Act, 1982* (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at paras. 21, 53, 78, 86 and 97; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at paras. 19, 90-91 and 94-95). And they cannot interfere with the separation of powers, "the foundational architecture of our constitutional order" (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 50).

[789] Nor can they use s. 33 to undermine the superior courts' core jurisdiction, which is guaranteed by s. 96 of the *Constitution Act, 1867* (*Democracy Watch*, at para. 41). This core jurisdiction protects the judicial independence of the superior courts (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 84), the public's right to have their disputes resolved by those courts (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 35-36), and those courts' power to ensure their orders are enforced and their process respected (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 37). Section 96 also guarantees the superior courts' authority to protect the judicial process from fundamentally unfair practices and other abuses (*R. v. Varennes*, 2025 SCC 22, at para. 62; see also *Crevier v. Attorney*

General of Quebec, [1981] 2 S.C.R. 220, at pp. 234 and 236-37). While Parliament may be free to override accused persons' *Charter* rights under s. 33, it therefore cannot enact legislation that would eliminate a baseline core of criminal process.

[790] It should thus be uncontroversial that s. 33's scope has limits. It is governed by the external legal constraints that bear on all state action under Canadian law. And as we explain below, s. 33 is also governed by other formal and substantive limits that emerge from a purposive interpretation of the provision itself.

A. *Stare Decisis and Ford*

[791] Quebec argues that *Ford* already determined that there are no substantive limits on s. 33's scope. It is true that *Ford* says s. 33 "lays down requirements of form only", and adds that "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" (p. 740). But *Ford* was not about the outer bounds of s. 33's substantive scope. The claimants in *Ford* argued that s. 33 requires legislatures to specify the rights or freedoms they intend to override instead of merely referencing the relevant section numbers, that it cannot be enacted through an omnibus bill, and that it cannot be applied retroactively (pp. 734 and 737-38). The Court's reasons must be read in light of the issues presented.

[792] To the extent that *Ford* did address s. 33's substantive scope, we would overrule it. This Court may depart from precedent where "there are compelling reasons

to do so", including "if the precedent was inconsistent with a binding authority" (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44; *Power*, at para. 98). By the time *Ford* was decided, the Court's purposive approach to constitutional interpretation was already well-established (see, e.g., *Hunter*, at pp. 156-57; *Big M*, at p. 344; *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 499-500). Yet *Ford*'s analysis of s. 33 was purely textual, and did not even extend to an examination of the text of s. 33(3) and (5). It failed to interpret s. 33's text in its "linguistic, philosophic and historical contexts", despite *Hunter*'s instruction that the *Charter* is a "purposive document" that requires a "broad, purposive analysis, which interprets specific provisions . . . in the light of its larger objects" (*Big M*, at p. 344; *Hunter*, at p. 156). That interpretive approach has endured and become further entrenched (see, e.g., *Taylor v. Newfoundland and Labrador*, 2026 SCC 5, at paras. 83-85).

[793] This Court can also depart from *stare decisis* when a constitutional precedent rests "on a formalistic method of interpretation that has since been consistently eschewed" (*John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6, at para. 34). *Ford* is such a case. If it can be read to foreclose the possibility of further inquiry into s. 33's substantive limits, we would overrule it.

B. *A Purposive Interpretation of Section 33*

[794] This case marks the Court's first purposive interpretation of s. 33. Like Justice Martin and Justice Kasirer, we affirm that the Court's most recent articulation of the proper approach to *Charter* interpretation is set out in *Taylor* (reasons of Martin J., at paras. 603-5; reasons of Kasirer J., at paras. 431-33). We reject any attempt to revise that approach, which has prevailed since *Big M* and *Hunter* (*Taylor*, at paras. 71-73). Purposive interpretation involves determining "*what* interests [a *Charter*] provision . . . protects, and *why* it protects them" (para. 73 (emphasis in original)).

[795] This approach applies to *all Charter provisions*. There is no jurisprudential basis to assert that certain *Charter* provisions require "necessary adaptations" to this Court's long-established approach to purposive interpretation or assert that only so-called "rights-conferring" provisions can protect interests (reasons of Wagner C.J., at para. 141). Indeed, in *Oakes*, this Court considered the text of s. 1 in light of its functions, purpose, and the interests it was meant to protect (pp. 135-38). More recently, this Court in *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, interpreted the Aboriginal non-abrogation clause under s. 25 by relying on accepted methods of *Charter* interpretation — without reference to a different approach (paras. 112-13). Finally, in *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144, this Court held that exceptions to *Charter* rights should be interpreted in the same fashion as rights themselves (para. 22).

[796] When conducting a purposive interpretation for any given *Charter* provision, a range of interpretive sources must be considered in that inquiry: the

character and larger objects of the *Charter*; the provision's language; the historical origins of the concept enshrined; other related provisions; international and comparative constitutional law; and the provision's drafting history (*Taylor*, at para. 76, citing *Big M*, at p. 344). The court must "rigorously revie[w]" the range of interpretive sources to "interpret the text of the provision to provide the most generous protection it can support to safeguard its interests" (para. 85).

[797] The *Charter* "protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326). The *Charter* and its provisions must be "interpreted in a way that maintains its underlying values and its internal coherence" (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 80). It is an integrated system in which "[e]very component contributes to the meaning as a whole, and the whole gives meaning to its parts" (*Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365, quoting P. A. Côté, *The Interpretation of Legislation in Canada* (1984), at p. 236). A purposive analysis must achieve that harmony without overshooting a provision's actual purpose, but instead by "plac[ing] [it] in its proper linguistic, philosophic and historical contexts" (*Big M*, at p. 344).

[798] As we explain, s. 33's purpose is to preserve a form of legislative sovereignty *premised on* democratic accountability. It achieves that purpose by allowing laws to temporarily operate notwithstanding their breach of certain *Charter*

rights or freedoms. But the legislative sovereignty s. 33 protects is inextricably linked to the risk of political consequences from the public at the ballot box. The legal and political source of parliamentary sovereignty is based on the legislature's role as the people's representative. Its legitimacy rests entirely on its democratic foundation. The intertwined concepts of parliamentary sovereignty and democratic accountability lie at the heart of s. 33.

(1) The Purposes of the *Charter* as a Whole

[799] Like any provision of the *Charter*, s. 33 takes its context from the *Charter*'s overall purposes (*Taylor*, at para. 79). The *Charter*'s "most essential purpose . . . 'is to entrench certain basic rights and freedoms . . .'" (para. 77, quoting *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 14). In doing so, it protects minorities, whose rights are often inadequately protected by majoritarian democracy (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 74). From Confederation in 1867 to the *Charter*'s entrenchment in 1982, minority groups were subject to discriminatory laws governing voting, education, immigration, and other areas of public life. Although the federal and provincial governments had undergone a "rights revolution" beginning in the 1960s by creating private sector human rights codes, there was an evident gap in minority rights protections from violations by the government (J. W. St. G. Walker, "Decoding the Rights Revolution: Lessons from the Canadian Experience", in D. Goutor and S. Heathorn, eds., *Taking Liberties: A History of Human Rights in Canada* (2013)). The *Charter* filled a gap in Canadian constitutional law that left minorities without legal

recourse when they were the target of discriminatory state legislation. The *Charter*'s entrenchment corrected this gap and created constitutional safeguards against "the tyranny of the majority" (*Big M*, at p. 337).

[800] A purposive interpretation of s. 33 must take place against this backdrop. It must be consistent with the *Charter*'s role as a set of protections fundamental to Canada's free and democratic society. The Constitution is a "seamless web", and s. 33 is a constitutive part of it, "strengthening its patterns of respect for democracy, difference and individual dignity" (L. E. Weinrib, "Learning to Live With The Override" (1990), 35 *McGill L.J.* 541, at p. 571). Section 33 provides a role for the legislature, the executive, and the judiciary in protecting Canadians' basic rights and freedoms.

(2) The Text of Section 33

[801] The text "is a key indicator of the interests [a provision] protects and why it does so" (*Taylor*, at para. 79).

[802] Section 33 reads:

> **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).

[803] Section 33's text limits its scope in four obvious ways. First, s. 33 can only be validly invoked by an enactment passed by a legislative majority. Second, a statute invoking s. 33 must expressly identify the *Charter* provision it temporarily operates notwithstanding. Third, s. 33 can only shield laws from fundamental freedoms under s. 2, legal rights under ss. 7 to 14, and the right to equality under s. 15. Fourth, each s. 33 declaration expires after five years, but can be re-enacted.

[804] Beyond these explicit limits, s. 33's text also indicates that democratic accountability constrains its scope. Section 33 does not purport to extinguish *Charter* rights — it allows a law to temporarily operate notwithstanding the effects of one or more of them. Section 33(1) authorizes legislatures to expressly declare that an "Act or a provision thereof shall <u>operate</u> notwithstanding a provision included in section 2 or sections 7 to 15 of th[e] Charter". Similarly, s. 33(2) provides that a law shielded by the clause "shall have such <u>operation</u> as it would have but for the provision of th[e] Charter".

[805] Section 33's repeated emphasis on a law's "operation" is significant. It preserves the legal force and effect of the legislation to which the notwithstanding clause applies, while leaving intact the *Charter* rights that the legislation is permitted to override. In other words, s. 33 suspends the legal consequences that would otherwise flow from a *Charter* breach; it does not eliminate the underlying rights themselves.

[806] The French text of s. 33 makes this even clearer. Section 33(1) permits a legislature to declare that an Act or any of its provisions "*a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte*". And s. 33(2) explains that shielded legislation "*a l'effet qu'elle aurait sauf la disposition en cause de la charte*". Both subsections emphasize the law's legal force and practical operation. The French text, like the English, preserves the effect of the legislation notwithstanding the *Charter* provision at issue, without suggesting that the *Charter* right itself is displaced or extinguished.

[807] Section 33's restricted scope also reflects its close connection to democratic accountability. Section 33 does not apply to democratic, mobility, minority language education rights, or the right to sex equality under s. 28. This Court has repeatedly explained that the exclusion of the right to vote from s. 33 signals its "special importance" and shows that it is "fundamental to our system of democracy" (*Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 11; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 60).

[808] Finally, s. 33(3)'s text expressly clarifies that all of its uses are temporary. Its sunset clause provides that a s. 33 declaration "shall cease to have effect five years after it comes into force". By its express terms, s. 33 thus creates only a time-limited override of *Charter* protections. To remain operative beyond five years, the declaration must be renewed by the legislature, which in turn ensures continued democratic accountability for its use. This temporal limit aligns with s. 4(1) of the *Charter*, which requires that legislative elections take place every five years.

[809] Read alongside s. 33's inapplicability to democratic rights, this limit on s. 33's scope sends a clear message: *any override of constitutional rights must be democratically accountable to the public*. The requirement that a legislature expressly declare its reliance on s. 33 serves the same purpose. By publicly identifying the *Charter* rights at issue, the express declaration requirement promotes transparency, facilitates public debate, and enables voters to assess the legislature's decision at the next election.

[810] Section 33 therefore gives legislatures the broad authority to enact laws that operate, for a limited period, notwithstanding certain *Charter* rights. But the scope of the parliamentary sovereignty it creates is not unlimited. Section 33 does not eliminate constitutional rights, but temporarily overrides them. And reliance on s. 33 is conditioned on democratic accountability at the next election, so that an informed electorate can accept or reject the legislature's choice to limit those rights.

(3) Section 33's Historical Context

[811] Although some members of this Court had recognized the existence of an implied bill of rights in Canada's constitutional architecture before the promulgation of the *Charter*, prior to 1982 Canada did not have a written instrument constitutionally protecting individual rights against state action (see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 133-35, per Duff C.J., and at pp. 145-46, per Cannon J.; *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 327-28, per Abbott J., concurring; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). At various points between confederation in 1867 and constitutional patriation in 1982, rights violations went without redress: Indigenous people, visible racial minorities, women, and people with some disabilities were barred from voting; Black children were sent to segregated schools; Indigenous children were forced to attend residential schools; Japanese Canadians were sent to internment camps; and Chinese immigrants were subjected to a $50 "head tax" (C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (1999), at p. 27; D. Clément, *Human Rights in Canada: A History* (2016), at pp. 35-37 and 55-56; *Reference to the Validity of Orders in Council in relation to Persons of Japanese Race*, [1946] S.C.R. 248, aff'd [1947] 1 D.L.R. 577 (P.C.); *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.), at p. 624).

[812] The *Charter*'s adoption marked a decisive change in Canadian legal and political culture — and in our society more broadly. Entrenching individual rights gave vulnerable people, especially members of minority groups, legal recourse when they were the target of harmful or discriminatory state action. It shifted the judiciary's role

into a "guardian of the constitution" with an unprecedented remedial authority to invalidate legislation that infringes rights (*Hunter*, at p. 155).

[813] The notwithstanding clause's inclusion in the *Charter* was the product of a political compromise to achieve the patriation of Canada's Constitution. Section 33 took centre stage after the federal government restarted federal-provincial constitutional negotiations after this Court determined that it could not unilaterally seek the patriation of the Constitution (*Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753). During these restarted constitutional negotiations between the federal and provincial governments, then-Premier of Alberta Peter Lougheed suggested modelling a provision after the statutory override clause in the *Alberta Bill of Rights*. To many provincial premiers, s. 33 addressed their concern that entrenching individual rights under the *Charter* would fetter their legislative sovereignty. Other provincial officials saw it as necessary to preserve their sovereignty "to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy" (G. W. J. Mercier, *Federal-Provincial Conference of First Ministers on the Constitution* (afternoon session of November 2, 1981), at p. 115).

[814] It also responded to counter-majoritarian concerns about the increased remedial authority the *Charter* gave unelected judges to remedy rights-infringing state action (see generally A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed. 1986), at pp. 16-17; C. P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed. 2001), at

pp. 169-81; P. J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987), 21 *U.B.C. L. Rev.* 87, at pp. 87-90). To those concerned with the expanded judicial role under the *Charter*, s. 33 was considered "fully consistent with the . . . need to balance the protection of rights with the existence of [democratic] institutions which have served [Canadians] . . . for so many centuries" (A. Blakeney, *Federal-Provincial Conference of First Ministers on the Constitution*, at p. 125). Section 33's proponents focused on the judiciary's lack of democratic accountability, and sought to give democratically accountable lawmakers the final say on rights instead.

[815] Some legislators were also concerned that the courts' expanded role would leave them powerless to temper unduly narrow interpretations of rights — a problem that had plagued judicial interpretation of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (R. McMurtry, "The Search for a Constitutional Accord — A Personal Memoir" (1982), 8 *Queen's L.J.* 28, at pp. 64-65; P. H. Russell, "Standing Up for Notwithstanding" (1991), 29 *Alta. L. Rev.* 293, at pp. 297-98). Section 33 could thus serve as a "safety valve" if courts interpreted *Charter* rights too restrictively (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 20, 1981, at p. 13043).

[816] The concept of an override clause was not completely novel. The *Canadian Bill of Rights* and multiple provincial human rights regimes included similar clauses. The *Charter*'s version, however, diverged from its statutory antecedents. Unlike the statutory versions, s. 33 would be temporally limited, restricted to a subset of rights,

and infused with democratic accountability mechanisms. These restrictions were an inextricable part of the compromise that led to s. 33's inclusion in the *Charter*. Democratic accountability was embedded in s. 33 from its inception.

[817] The close relationship between s. 33 and democracy was identified from its adoption. When he introduced s. 33 to the Canadian public for the first time, then Minister of Justice Jean Chrétien emphasized its democratic safeguards, which were designed to limit its use and allow the public to hold legislatures accountable for invoking it. He stated that it would be "politically very difficult for a government to [use s. 33] without very good reason" and observed that the sunset clause imposed further limits by "allowing public debate on the desirability of continuing the deliberations further" (*House of Commons Debates*, November 20, 1981, at pp. 13042-43).

[818] The political compromise that led to s. 33's inclusion in the *Charter* shows that it cannot be understood as preserving an unlimited form of legislative sovereignty. Instead, its scope was purposefully limited through multiple mechanisms premised on democratic accountability.

(4) Section 33's Purpose Is to Preserve a Form of Parliamentary Sovereignty Premised on Democratic Accountability

[819] Section 33 thus preserves a form of legislative sovereignty *premised on* democratic accountability.

[820] Section 33's relationship with legislative sovereignty is obvious. It protects a legislature's "final say" or "last word" on certain rights in exceptional circumstances (*House of Commons Debates*, November 20, 1981, at pp. 13041-42 (J. Chrétien); Library of Parliament, *The Notwithstanding Clause of the Charter*, Background Paper 2018-17-E, May 7, 2018, at p. 4). It gives legislatures a democratic participatory mechanism in the project of rights-protection, and allows them to "interpret and weigh different rights, principles and values" (I.F., Attorney General of Ontario, at para. 55; see also D. Newman, "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities", in P. L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (2024), 69). For example, in some instances s. 33 has been used to "*affirm* rights protections and minority interests", including for example to compensate women for historical wage inequities through pension benefits and to provide subsidies for young farmers (I.F., Attorney General of Alberta, at para. 95 (emphasis in original); see, e.g., *An Act respecting the Pension plan of Certain Teachers and amending various legislation respecting the pension plans of the public and parapublic sectors*, S.Q. 1986, c. 44; *An Act to amend the Act to promote the development of agriculture operations*, S.Q. 1986, c. 54). Thus, far from permitting untrammeled legislative authority over constitutional rights, s. 33 permits legislatures to participate in "ongoing public deliberation between courts, legislatures, and the public on the nature of rights and their reasonable and justified limits" (Adams and Bower, at p. 139).

[821] At the same time, the notwithstanding clause has a "special relationship with democracy" (C. Salvino, *The Notwithstanding Clause in the Canadian Charter of Rights and Freedoms* (2025), at p. 64). The form of legislative sovereignty s. 33 preserves is premised on its democratic accountability. Section 33's legislative and electoral safeguards generate democratic accountability constraints intertwined with the legislative sovereignty it preserves. Legislative safeguards include the legislative invocation requirement and the express declaration requirement. Electoral safeguards also constrain s. 33's application and scope: it cannot be applied to democratic rights, and it expires every five years, which aligns with s. 4(1) of the *Charter*'s guarantee of periodic elections.

[822] Section 33's democratic accountability safeguards preserve not only citizen's ability to vote in periodic elections but also encourages public deliberation on notwithstanding clause uses. The legislative requirements, in particular, act as a "red flag" that communicates the legislature's intent to invoke s. 33 to the public (*House of Commons Debates*, November 20, 1981, at p. 13043; see also p. 13042). The invocation of s. 33 thus promotes public deliberation and may influence future elections. Fundamentally, it is "[t]he right of the people to discuss and debate ideas [that] forms the very foundation of democracy" (*Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 12, per McLachlin C.J. and Major J., dissenting in part, citing *Reference re Alberta Statutes*, at pp. 145-46). And "government rest[s] ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur*

v. City of Quebec, [1953] 2 S.C.R. 299, at p. 330). The democratic accountability mechanisms embedded in s. 33 facilitate public deliberation on its invocation.

[823] Together, these safeguards require legislatures to accept full responsibility for the political consequences of invoking s. 33. But legislative sovereignty and democratic accountability are not competing interests in this context: legislative sovereignty cannot exist without its democratic foundation. It derives its legitimacy from democratic accountability to the public. Together, they form dual aspects of s. 33's primary purpose.

C. *Section 33's Limited Scope*

[824] No authority is absolute, and s. 33 does not confer unfettered power. No constitutionally conferred power may be exercised inconsistently with its purpose (*Alford v. Canada (Attorney General)*, 2026 SCC 14, at para. 56). Section 33's purpose is to protect a form of parliamentary sovereignty premised on democratic accountability, and that purpose limits s. 33's scope in at least two ways. First, s. 33 cannot permanently extinguish *Charter* rights. Second, legislatures cannot use s. 33 in a manner incompatible with the fundamental character of Canada's free and democratic society. We agree with Justice Kasirer that s. 33 has substantive limits and each of these two conclusions also reflects the general principle that s. 33 cannot be used to amend the Constitution without recourse to Part V of the *Constitution Act, 1982* (paras. 571 and 574-76). Legislation that permanently altered or extinguished a *Charter* right at the end of s. 33's temporal scope would functionally amend that right. And because

Canada's commitment to its character as a free and democratic society is "the very purpose for which the *Charter* was originally entrenched in the Constitution", governments are not free to depart from it (*Oakes*, at p. 136).

(1) Section 33 Cannot Permanently Extinguish *Charter* Rights

[825] The Attorney General of Canada argues that s. 33 cannot be used in a manner that produces permanent effects (I.F., at para. 4). We agree. Section 33 cannot shield laws that permanently extinguish constitutional rights beyond its prescribed five-year limit.

[826] Permanent extinguishment would conflict with almost every aspect of s. 33. First, s. 33 does not eliminate rights or authorize their elimination. Through s. 33, legislatures retain the authority to pass laws that temporarily operate notwithstanding certain *Charter* rights. Those rights continue to exist, and a law inconsistent with the interests they protect continues to breach them. Section 33 simply shields such a law from a declaration under s. 52(1) of the *Constitution Act, 1982*, permitting it to operate and retain its legal effect despite that inconsistency. But if s. 33 could be used to permanently extinguish a right, it would outstrip its own mechanism of action. Instead of affecting a law's operation, it would affect a right's existence. Because s. 33 only guarantees a law's operability, uses that permanently affect rights would exceed its textual bounds. To use an analogy from the Attorney General of Canada, the rights and freedoms that s. 33 can apply to are like "a lightbulb [that] should shine as brightly as it did before being temporarily turned off" (I.F., at para. 3).

[827] Second, s. 33 ceases to have any effect after five years, and the permanent extinguishment of a right would also offend that temporal limitation. After five years, the rights to which a s. 33 declaration applies must re-emerge as active constraints on state decision-making. Section 33 can, of course, be invoked again before or after the expiry of those five years — but each declaration requires the legislature to pass new legislation to re-enact it. Parliamentary sovereignty does not permit a legislature to "bind a future legislature in its exercise of authority" (*Sanis Health Inc. v. British Columbia*, 2024 SCC 40, at para. 97). An invocation of s. 33 that permanently extinguished a right would prevent the future legislature from making a meaningful decision about whether to re-enact a s. 33 declaration, allow the s. 33 declaration to expire, or to repeal the legislation. If s. 33 could permanently extinguish rights, they could not re-emerge as active constraints, and that would violate the five-year limitation explicit in s. 33's text.

[828] Finally, permanently extinguishing rights would also conflict with s. 33's express exclusion of democratic rights from its scope and with its embedded democratic accountability mechanisms. Any override of rights must be ultimately democratically accountable to the public. But democratic accountability would be meaningless if the electorate could not effectively end an earlier decision to invoke s. 33. The elevation of the electorate as the ultimate check on invocations of s. 33 was a deliberate part of its design. Respecting that design means the electorate must retain a real choice to accept or reject the legislature's decision to invoke s. 33. That choice would be illusory if the right to which s. 33 applied was permanently impaired. If the

public rejects the legislature's decision to use s. 33 by electing a new government, democratic accountability is only meaningful if that new government can repeal the invocation of s. 33 and end its effects on those rights.

[829] Thus s. 33 cannot be used to permanently extinguish rights. Permanent extinguishment of rights frustrates democratic accountability because it cannot be electorally undone, and violates s. 33's basic textual limits by extending the breach of a right beyond s. 33's five-year sunset clause.

[830] A law permanently impairs or extinguishes a right if it causes a breach of the right that persists beyond s. 33's five-year sunset period. That does not bar s. 33 from having lasting negative personal effects on individuals. A law insulated by s. 33 may have life-altering consequences on someone's employment, family life, economic status, and liberty. But s. 33 cannot irreparably affect the person's *rights or freedoms*. The analysis focuses on whether the *effects on the right* are reversible upon the s. 33 declaration's repeal or expiry. If the affected right can be fully exercised once the s. 33 declaration has expired, then the notwithstanding clause's invocation will be consistent with this limit.

[831] Some examples illustrate the contours of this limit on s. 33's scope. Section 33 could not be used to shield a law authorizing involuntary reproductive sterilization (see, e.g., the past Canadian examples of *The Sexual Sterilization Act*, R.S.A. 1970, c. 341, and the *Sexual Sterilization Act*, R.S.B.C. 1960, c. 353). Someone subject to such a law could never regain their right to reproductive autonomy. But s. 33

could, by way of further illustration, be used to shield a law authorizing an unconstitutional jail sentence. Even if the effects of imprisonment on an individual persisted beyond five years, their right against cruel and unusual punishment would re-emerge as a constraint on legislative decision-making, preventing them from being subject to such a punishment absent an additional invocation of s. 33.

(2) Section 33 Uses Cannot Be Incompatible With the Fundamental Character of Canada's Free and Democratic Society

[832] Section 33 also cannot preserve the operation of a law that is incompatible with the fundamental character of Canada as a free and democratic society — even when its effects are temporary. Parliamentary sovereignty cannot be used to eliminate the very democratic foundation that justifies its existence. This is reflected in s. 1 of the *Charter*, which guarantees rights and freedoms "subject only to such reasonable limits . . . as can be demonstrably justified in a free and democratic society". Section 1's guarantee of a free and democratic society is the "very purpose for which the *Charter* was originally entrenched in the Constitution", and "the genesis of the rights and freedoms guaranteed by the *Charter*" (*Oakes*, at p. 136). The *Charter*'s commitment to Canada as a free and democratic society constrains s. 33's scope.

[833] But the roots of Canada's free and democratic character run deeper than the *Charter* itself. "Behind the written word" of the Constitution, as the Court unanimously explained in the *Secession Reference*, "is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional

principles" (para. 49). These unwritten principles "are the vital unstated assumptions upon which the text is based" (para. 49). They have "full legal force" and "may give rise to substantive legal obligations" when they are used "in the interpretation of constitutional provisions" (*Toronto (City)*, at paras. 49 and 55, quoting *Secession Reference*, at para. 54; see also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at paras. 89, 92 and 109; *Trial Lawyers*, at paras. 29-30; *Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145).

[834] Canada's foundation as a "free and democratic society" is also a necessary component of Canada's constitutional architecture. *Toronto (City)* confirms that unwritten constitutional principles "may be used in the interpretation of constitutional provisions" (para. 55); and "to develop structural doctrines unstated in the written Constitution . . . but necessary to the coherence of, and flowing by implication from, its architecture" (para. 56). Here, the principle of democracy informs the interpretation of s. 33's scope in combination with its text and context. Section 33 cannot be invoked to undermine Canada's constitutional order by destroying the very foundations necessary in a free and democratic society.

[835] The principle of democracy is "a fundamental value in our constitutional law and political culture" that "has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day" (*Secession Reference*, at paras. 61-62). Democracy is a "baseline" assumption under which the framers of our Constitution and our elected representatives "have always

operated" (para. 62). "There is no doubt . . . 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" (*OPSEU*, at p. 57). Yet it is not expressly enumerated in the text of the *Constitution Act, 1867*. That would have "appeared redundant, even silly", because our democracy is embedded more deeply than constitutional text (*Secession Reference*, at para. 62).

[836] Democracy means that sovereignty rests with the people, who then delegate that authority to their elected representatives. "[L]awmakers act as the citizens' proxies. . . . [T]he obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens" (*Sauvé*, at para. 31). The consent of the governed is a necessary condition for legitimate state authority in our constitutional tradition (*Secession Reference*, at paras. 66-67).

[837] Democratic accountability is therefore inherent in the parliamentary sovereignty s. 33 preserves. Parliamentary sovereignty is a means to the end of preserving popular sovereignty and the consent of the governed. Without democracy, parliamentary sovereignty descends into autocracy. And because the principle of democracy does not owe its existence to any of the rights the *Charter* protects, it cannot be eroded by a provision in the *Charter* that allows laws to operate notwithstanding some of those rights.

[838] But Canada's "principle of democracy . . . is richer" than "simple majority rule" (*Secession Reference*, at para. 76). It requires government that serves and protects

all. Section 33's democratic accountability purpose is not confined to a narrow conception of democracy that only contemplates periodic elections and majority rule. By definition, minorities have limited impact at the ballot box either because they cannot vote or they are numerically disadvantaged when they do (I.F., Canadian Council of Muslim Women, at para. 29; I.F., David Asper Centre for Constitutional Rights, at paras. 31-34; I.F., Egale Canada, at para. 17).

[839] The principle of democracy "is not simply concerned with the process of government" (*Secession Reference*, at para. 64). It is "fundamentally connected to substantive goals, most importantly, the promotion of self-government" (para. 64). Self-government puts the "free" in "free and democratic society", contemplating not only an occasional opportunity to put a ballot in a box, but "government by the free public opinion of an open society" (*Switzman*, at p. 306 (emphasis added)). It insists on a rule of law whose legitimacy rests not only on popular support, but also "on an appeal to moral values, many of which are imbedded in our constitutional structure" (*Secession Reference*, at para. 67).

[840] Democratic accountability, in our political tradition, means accountability to a free and self-governing public — or, in s. 1's compendious terms, a "free and democratic society". Because Canada's commitment to maintaining a free and democratic society is a bedrock principle that underlies our constitutional order, no single part of that constitutional order can be used to repudiate it. Section 33 is no exception. It can only take away what some sections of the *Charter* provide, and even

then only temporarily. But the *Charter* does not provide our society's free and democratic character: it takes that character as a baseline, as our Constitution always has, and further protects the values that have flourished under its auspices.

[841] Canada's "concept of democracy" is thus also founded on respect for the individual human dignity and freedom of all peoples (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 140; see also *Oakes*, at p. 136; *Big M*, at p. 336). The "protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity" (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 21). And as Chief Justice Dickson held in *Big M*, "[f]reedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person" (p. 336).

[842] The conception of democracy that encompasses the principles of human dignity and freedom captures the true essence of what it means for Canada to be a free and democratic society for all. Democracy "has its own internal morality, based on the dignity and equality of all human beings" (A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 19, at p. 39).

[843] For these reasons, s. 33 cannot be used to shield laws that are incompatible with Canada's fundamental character as a free and democratic society. Most unjustified *Charter* breaches will not meet this high bar. Something more is required. To exceed this limit, a use of s. 33 must be irreconcilable with the constitutional order those rights and freedoms are intended to protect. It is unnecessary to identify this limit's full contours here, but future courts may find guidance in Chief Justice Dickson's account

of the values and principles "essential to" a free and democratic society: ". . . respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" (*Oakes*, at p. 136). This Court described these values as "inherent in the notion of democracy" (*Secession Reference*, at para. 64).

[844] Some examples help illustrate the kind of state conduct that would offend our character as a free and democratic society. Breaches of *jus cogens* norms are one obvious example. Within international law, norms known as *jus cogens* ("compelling law") or "peremptory norm[s]" have been "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force January 27, 1980), Article 53). This Court has recognized their incorporation within Canadian law (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, at paras. 83-94). They include prohibitions against genocide, crimes against humanity, slavery, forced labour, and "cruel, inhuman and degrading treatment" such as torture (paras. 100-103).

[845] A law that authorized genocide, for example, would be incompatible with the free and democratic character that underlies our constitutional order. *Jus cogens* represent the most fundamental human rights norms from which no government may

derogate. If "self-government" in a "free" and "open" society means anything (*Secession Reference*, at para. 64; *Switzman*, at p. 306), it must reject mass targeting a civilian population, using people as property, or inflicting torture — even if s. 33 is used to suspend the effects of ss. 2 and 7 to 15 of the *Charter*.

[846] A law that introduced sweeping differential treatment on the basis of race or gender — to use extreme examples from Canada's past — would also violate this limit. A society that reintroduced racial segregation, restricted women from working, imposed additional taxes only on members of one racial group, or created residential schools for Indigenous children would not be free and democratic. Nor would a society that banned free press or freedom of association altogether (see generally Backhouse (1999), at p. 27; *Quong-Wing v. The King* (1914), 49 S.C.R. 440; *An Act to Prevent the Employment of Female Labour in Certain Capacities*, S.S. 1912, c. 17 (Saskatchewan); the "Chinese head tax" in the *Chinese Immigration Act, 1885*, S.C. 1885, c. 71, s. 4; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015); Bill 9, *The Accurate News and Information Act*, 3rd Sess., 8th Parl., 1937, in *Reference re Alberta Statutes*; *Act Respecting Communistic Propaganda*, R.S.Q. 1941, c. 52, in *Switzman*).

[847] Many of these historical examples affect large segments of Canadian society. But this limit on the invocation of s. 33 is not confined to legislation that affects a large portion of the population. Enslaving or torturing a small group of people is no

less incompatible with Canada's status as a free and democratic society. The analysis is qualitative in nature.

[848] As we discuss below, the Act is not incompatible with the fundamental character of Canada's free and democratic society. We would leave it to future courts to determine the full contours of s. 33's scope. But we add this. The repeated invocation of s. 33 across a broad range of rights or the repeated renewal of s. 33 over an extended period of time might well violate both limits we have articulated here. Repeated invocations could amount to permanently extinguishing a right or freedom — or they could be incompatible with the fundamental character of Canada's free and democratic society. Routine uses of s. 33 could transform effects which are initially reversible into irreversible ones, effectively permanently impairing or repudiating constitutional rights, or risk eroding the constitutional foundations of Canada's free and democratic society.

D. *The Act's Invocation of Section 33 Is Valid and Not Contrary to Any Substantive Limits on Section 33*

[849] The Act's invocation of s. 33 does not irreparably extinguish rights beyond its prescribed five-year limitation period. Nor is it incompatible with the fundamental character of Canada's free and democratic society.

[850] The Act's purpose is to assert Quebec's laicity. It aims to balance "the collective rights of the Québec nation and human rights and freedoms", while

promoting the government's vision of "equality of women and men" (preamble). Laicity as a legislative purpose has particular importance in Quebec, where the Quiet Revolution sought to create a society founded on state secularism. The Act's overarching aim to separate religion and the state is a legitimate objective in a free and democratic society.

[851] The Act seeks to accomplish its purpose by prohibiting some state representatives from wearing religious symbols. It has had considerable negative effects on some of them. People trained as teachers cannot work because of their religious expression. Young people are altering their career plans to avoid being barred from several categories of employment. And lawyers who wear religious symbols cannot work on provincial government files. These effects send a message of exclusion to visible religious minorities in Quebec — and the Act does not distribute that message evenly. It disproportionately affects individuals from certain religions, with Muslim women by far the most affected.

[852] There is no doubt that the right to practice and express one's religious beliefs is part of Canada's free and democratic character. Like our commitment to democratic self-governance, religious freedom pre-dates Canada's confederation as a country. It stems from the traditions central to post-Reformation Europe. Long before Confederation, statutes like the *Quebec Act, 1774* and the *Hart Act* protected freedom of religion. The denominational school protections entrenched in s. 93 of the *Constitution Act, 1867* offer another example of religious freedom's deep roots. They

were a constitutional compromise by Canada's representatives to gain the support of the provinces in the creation of the Canadian federation, who were concerned with the interests of their Catholic and Protestant constituents. Their reflection of Quebec's long-history of religious tolerance remain relevant even if s. 93(1) to 93(4) no longer apply to Quebec (*Constitutional Act, 1867*, s. 93A; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 68, fn. 2).

[853] During the 1960s "rights revolution", religion was a universally protected ground of discrimination in the individual rights protections federal and provincial governments enacted into law (D. Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (2008), at p. 3). And the *jus cogens* prohibition against genocide protects "national, ethnical, racial or religious group[s]" from "acts committed with intent to destroy [them] in whole or in part" (*Convention on the Prevention and Punishment of the Crime of Genocide*, Can. T.S. 1949 No. 27, Article II). These examples further highlight religious freedom's central place among the principles that make Canadian society free and democratic. As Canada has evolved as a country, becoming more diverse and with a plurality of different religions, our commitment to freedom of religion has only further crystallized.

[854] But the Act is not so incompatible with freedom of religion or expression as to be invalid, because it only applies to some state employees or contractors and only while they are working in those jobs. That is significantly less of a departure from our

society's commitment to freedom of religion than a law that would generally prohibit wearing religious symbols in public. By forcing people to choose between their religion and their employment, the Act seriously impacts religious freedom. But the scope of s. 33's constitutionally permitted uses is broad. The Act's confinement to the delivery of certain state services means it does not restrict freedom of religion to the point of incompatibility with the free and democratic character of Canadian society. Similarly, the impact of the Act on human dignity, while significant, does not rise to such an extreme level to fall outside of s. 33's scope.

[855] Nor does the Act permanently extinguish freedom of religion. The breach of religious freedom that flows from restricting religious symbols in some workplaces can be evaluated and reversed by a future legislature. Unless it is renewed by a new law, the Act's infringement of religious freedom will end once its five-year sunset period expires. Those currently prohibited from wearing religious symbols at work will be entitled to do so after that period, as they were before the Act was enacted. Those excluded from certain employment will become eligible for it when the s. 33 declaration expires. The Act's encroachment on religious freedom is indisputably serious, but it is not permanent.

[856] Despite the central importance of freedom of religion as a value in Canada, the Act's limited and targeted scope means that its infringements of freedom of religion and expression do not surpass either limit on s. 33.

IV. The Act Infringes Minority Language Education Rights Under Section 23 of the *Charter*

[857] By promoting and transmitting language and culture, education plays a key role in the survival and flourishing of official language minority communities in Canada, that is, of the English-speaking community in Quebec and of French-speaking communities outside Quebec. In this case, s. 23 of the *Charter* protects the right to minority language instruction, which includes a linguistic minority's right to manage and control its educational facilities.

[858] We generally agree with the Chief Justice on the principles of interpretation applicable to s. 23 and with its purposes, although we will provide some clarification about its scope (see paras. 349-77). In short, laws that impede the management and control of minority schools in a way that negatively affects the legitimate "linguistic and cultural concerns of the minority" infringe s. 23 (*Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 53; see also *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 380). Further, we agree that the Court of Appeal erred in holding that s. 23 does not grant protection to the culture of the minority beyond its linguistic dimension (reasons of Wagner C.J., at paras. 352 and 366-75).

[859] We differ, however, on whether the Act infringes s. 23 of the *Charter*. The arguments against finding a s. 23 infringement focus primarily on the sufficiency of the evidence presented by the minority language school board. Absent a palpable and overriding error, this Court is bound by the findings of fact made by the trial judge

(*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). Since the trial judge's reasons disclose no such error, the application of the principles referred to here must lead to the same conclusion as the one he reached: the Act infringes s. 23 in a manner that cannot be justified under s. 1.

A. *Applicable Principles*

[860] We begin with the legal principles applicable to s. 23.

(1) The Particular Context of the English Linguistic Minority in Quebec

[861] It is well established that the s. 23 analysis must consider the historical, social, and demographic context specific to Quebec's English linguistic minority (*Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at paras. 21 and 34). Various minority communities across Canada may not all face the same challenges with respect to their linguistic rights. The particularities of each community can be relevant when evaluating the approaches taken by the provinces to implement the rights and entitlements protected by s. 23, as well as when a justification under s. 1 of the *Charter* becomes necessary (*Solski*, at para. 21).

[862] This case, however, requires balancing the considerations specific to Quebec's English-speaking minority with the uniform interpretation of s. 23 across the country (*Solski*, at para. 21; see also M. C. Power, "Les droits linguistiques en matière d'éducation", in M. Bastarache and M. Doucet, eds., *Les droits linguistiques au*

Canada (3rd ed. 2013), 657, at pp. 674-77). Section 23's national application requires that the rights that it protects be interpreted in a uniform manner from province to province (*Solski*, at para. 21). With the exception of s. 23(1)(a) of the *Charter*, which is currently not in force in Quebec, where numbers warrant, s. 23 guarantees all official language minorities the same education rights, regardless of where they live in Canada. When s. 23 was adopted, Parliament and the provinces both "knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned", including the legislation enacted in Quebec that restricted access to instruction in English (*Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 79).

[863] This balancing requires courts interpreting s. 23 to bear in mind the "responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community" (*Solski*, at para. 5). Accordingly, in the analysis that follows, we remain mindful that, in any case applying s. 23 to cases involving Quebec's English-speaking minority, courts must consider the potential repercussions for French-speaking minority communities outside Quebec. They must resist the temptation to adopt a narrower interpretation of s. 23 for Quebec's English-speaking minority, without consideration of the potentially adverse consequences for the rights of French-speaking minority communities elsewhere in Canada. As Justice Bastarache wrote for the majority in *R. v. Beaulac*, [1999] 1 S.C.R. 768, "[l]anguage rights must <u>in all cases</u> be interpreted purposively, in a manner consistent with the

preservation and development of official language communities in Canada" (para. 25 (emphasis in original)).

(2) The Scope of the Right to Management and Control

[864] The Court of Appeal correctly held that the analysis of s. 23 in this case must focus on the right to management and control (para. 554; see also para. 562). Understanding the origins of that right is useful to better understand its scope. Since the enactment of s. 23, there has been ongoing debate about the exclusive nature of the right to management and control. If [TRANSLATION] "interference with educational matters by majority representatives was commonplace in the past", one of the central purposes of s. 23 was precisely to grant linguistic minorities a right of management and control over their resources, including in situations where the numbers did not warrant the creation of an independent school board (Power, at p. 722; see *Mahe*, at pp. 379-80). Against this backdrop of majority control within mixed school boards, the Ontario Court of Appeal observed in 1984 that "minority language education rights should not be left to the unfettered and undirected discretion of local school boards no matter how competent and well-meaning they may be" (*Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491, at p. 522).

[865] It was based on this concern about majority interference that this Court first elaborated the minority's right to management and control in *Mahe*. In *Mahe*, this Court unanimously held that, even where the number of minority-language students does not justify the creation of an independent school board, minority representatives sitting on

a mixed school board, where the numbers warrant that degree of control, must nonetheless enjoy "a measure of control" over several matters, including the recruitment and assignment of personnel (pp. 372-73 and 377). *Mahe* also recognized the importance of provincial regulation in educational matters (p. 380). The province's interest in educational content and service quality was reaffirmed in *Arsenault-Cameron* (para. 53). At the same time, however, the Court emphasized that "[t]he pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students" (para. 38). The balance remains a delicate one.

B. *The Meaning of Cultural Concern and the Role of School Boards*

(1) Cultural Concerns in the Jurisprudence

[866] There can be no dispute that s. 23 protects the linguistic and cultural concerns of linguistic minorities. Indeed, the definition and limits of what constitutes a "cultural concern" for the linguistic minority, one that would attract the protection of s. 23, lie at the heart of this case. Although the decisions of this Court do not provide an authoritative definition of that concept, they nonetheless offer useful guidance.

[867] In *Arsenault-Cameron*, this Court explained that, where an independent school board exists, "it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective" (para. 43). An independent school board that is free to make the types of

decisions identified in *Mahe*, including those relating to staff recruitment and assignment, thus represents the highest degree of management and control available to a linguistic minority (pp. 373-77). This right is grounded in [TRANSLATION] "the obvious expertise of minority representatives in all aspects of education that affect language and culture" (Power, at p. 731). In *Arsenault-Cameron*, the Court unambiguously stated that minority language school boards are "legitimate representatives" of minority language rights holders (para. 51).

[868] The Court's decision in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678 (*CSFCB*), confirmed a number of principles emerging from *Mahe*. Writing for the majority, Chief Justice Wagner stated that s. 23 "is intended to preserve culture and language" (para. 13). He further explained that, at least in administrative and financial matters, minority-language school boards possess specialized expertise warranting deference from governments and courts alike, and that they are "favoured vehicles for the concerns of official language minorities" (para. 86). The central role of school boards in articulating these needs and concerns was reaffirmed three years later in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 (*CSFTNO*). Writing for a unanimous Court, Justice Côté accepted that the school board occupies a privileged position in representing the interests and expressing the needs of rights holders, namely the parents of students (paras. 63 and 98).

(2) Analytical Framework for Establishing a Cultural Concern

[869] The concept of a "cultural concern" may encompass a broad range of considerations. At present, this Court's jurisprudence imposes no limitation on what may constitute such a concern. The Court of Appeal introduced a limitation by requiring proof of a [TRANSLATION] "rational link" between minority language and culture (para. 610). However, this amounts to creating a limitation that appears nowhere in the text of the provision or in the jurisprudence interpreting it. Moreover, the Court of Appeal's definition of "cultural concern" suggests that a legitimate cultural concern must be historical, thus overlooking the fact that cultures evolve over time, as illustrated by the effect of the Quiet Revolution on Quebec's majority culture (see paras. 51 and 607; cf. Sup. Ct. reasons, at para. 978).

[870] On the contrary, given this Court's jurisprudence extolling the expertise of school boards in representing the interests of the linguistic minority, it follows that the linguistic and cultural concerns advanced by school boards will usually constitute legitimate cultural concerns of minority rights holders attracting the protection of s. 23 (*CSFCB*, at para. 86; see also *CSFTNO*, at paras. 63 and 98; *Arsenault-Cameron*, at paras. 43 and 51; *Mahe*, at p. 373; Power, at p. 731).

[871] However, the school boards' assertions regarding the cultural concerns of the minority rights holders must be assessed in light of all the evidence. The decisions of school boards [TRANSLATION] "are not insulated from potential challenges and may be contested by rights holders" (Power, at p. 730). Legitimate concerns advanced by

school boards reflecting those of the minority rights holders at large could be countered by evidence showing that the concern identified by a particular school board is not legitimate because it is not shared by rights holders. This evidence might include expert evidence, testimony from a competent witness, or an agreement between a school board and a federation or association of parents identifying different cultural concerns. The sufficiency and credibility of that evidence would be for the trial judge to decide.

C. *The Act Infringes the Right to Control and Management Under Section 23*

[872] We conclude that the Act infringes s. 23 because it unduly restricts the management and control powers of English-language school boards. This restriction negatively affects a legitimate cultural concern of that linguistic minority, as identified by the English Montreal School Board, Mubeenah Mughal, and Pietro Mercuri (EMSB). The EMSB's concern, in turn, reflects the concerns of the English linguistic minority whose interests it represents.

(1) The Act Restricts the Management and Control Powers of English-Language School Boards

[873] The Act restricts the management and control rights of Quebec's English-language school boards by limiting their authority over the recruitment and assignment of personnel, as well as the appointment and direction of those responsible for administering instruction in the minority language and the facilities in which that instruction is provided.

[874] It is uncontroversial that Quebec's English-speaking minority, because of its large student population, occupies the higher end of the sliding scale of entitlements for a linguistic minority. As a result, this minority is entitled to autonomous school boards exercising the broadest powers of management and control over "those aspects of education which pertain to or have an effect upon their language and culture" (*Arsenault-Cameron*, at para. 46, citing *Mahe*, at p. 375; see also *Mahe*, at p. 377).

[875] It is equally clear that the Act limits the decision-making authority of English-language school boards over the recruitment and assignment of personnel, as well as the appointment and direction of those responsible for administering instruction. The Act prohibits English-language school boards from hiring, retaining, or promoting teachers or school administrators whose religious beliefs prevent them from removing the religious symbols they wear. The same applies to any school employee whose face is covered for religious reasons. As the trial judge concluded, the Act negates the existing hiring, retention, and promotion policies of English-language school boards (para. 991).

(2) The Act Negatively Affects the Legitimate Cultural Concerns of Quebec's English-Speaking Minority

[876] Where it is established that a law limits the right to management and control, the next step is to determine whether that limit negatively affects the legitimate linguistic and cultural concerns of the minority language community (*Arsenault-Cameron*, at para. 53). Section 23 is only infringed where both steps are

satisfied. Like the trial judge, we conclude that the restrictions imposed by the Act negatively affect the legitimate cultural concerns of the linguistic minority because they impede teaching staff from transmitting important elements of the minority's culture, including multiculturalism and religious diversity. The trial judge's unchallenged factual findings support that conclusion.

(a) *Cultural Diversity Constitutes a Legitimate Cultural Concern of the English-Speaking Minority*

[877] The trial judge found that all English-language school boards in Quebec value the recognition and celebration of racial and religious diversity, as evidenced by their internal policies relating to multicultural education (paras. 983-88). He also concluded that the briefs submitted by English-language school boards to the Committee on Institutions during its study of the Act prior to its promulgation, together with the minutes of meetings held before this Committee's study started, demonstrate unanimous institutional opposition to a prohibition on the wearing of religious symbols by teachers (para. 992).

[878] In the trial judge's view, that unanimous institutional position was sufficient to conclude that religious diversity, or a conception of open secularism, constitutes a legitimate cultural concern of the English-speaking minority. These school boards are "favoured vehicles" for representing the linguistic and cultural concerns of the minority language community, and courts must thus show them deference (*CSFCB*, at para. 86; see also *Arsenault-Cameron*, at para. 43). We see no

palpable and overriding error in the trial judge's conclusion, and no evidence challenging the legitimacy of the cultural concern was adduced.

[879] A claimant need not produce direct evidence that a cultural concern advanced by a minority-language school board is shared by all rights holders or by the minority community as a whole. This Court's jurisprudence has never established such a requirement. As it did here, a trial court may conclude that the evidence advanced by the school board is sufficient to establish their cultural concern and, by extension, that of the linguistic minority for the purposes of s. 23. Requiring more would impose an unduly onerous evidentiary burden, contrary to the broad and liberal interpretation applicable to language rights protected by s. 23 (*Beaulac*, at para. 25; see also Power, at pp. 676-77).

[880] Courts must also be careful not to "equat[e] any organizational or pedagogical value with a protected cultural component" so as to avoid transforming s. 23 into "a right to complete institutional autonomy" (reasons of Wagner C.J., at para. 390). That is not what we propose. Rather, we adopt an approach that is anchored in the evidentiary record. In this case, the evidence satisfied the trial judge that values associated with multiculturalism and religious diversity constitute the cultural concerns not only of the minority-language school boards, but also of the linguistic minority itself. It was then incumbent on the opposing parties to establish otherwise.

[881] As discussed above, provinces retain authority to regulate education for linguistic minorities, and s. 23 does not prevent them from intervening in minority-

language instruction, including in organizational and pedagogical matters. Rather, as with all *Charter* rights and freedoms, the rights protected by s. 23 serve "to constrain governmental action inconsistent with those rights and freedoms" (*Hunter*, at p. 156). The intervener Commission nationale des parents francophones argues that government intervention restricting the autonomy of school boards is therefore constitutionally valid, but only insofar as it does not negatively affect the legitimate linguistic and cultural concerns of the minority (I.F., at paras. 24-26). In our view, this is correct. Furthermore, this Court has held in the past that the provinces retain, under s. 1 of the *Charter*, the power to pursue important objectives even where they are incompatible with the minority's legitimate linguistic and cultural concerns (*CSFCB*, at paras. 143-46). However, the AGQ has put forward no argument or evidence to justify the Act.

[882] In addition to the evidence advanced by the English-language school boards, the social and historical context of the Act reinforces the conclusion that religious diversity constitutes a legitimate cultural concern of the English-speaking minority. As the intervener Association des conseils scolaires des écoles publiques de l'Ontario observed, the Act is embedded in a deeply cultural framework (I.F., at para. 37). According to its preamble, the Act is based on the proposition that "the Québec nation has its own characteristics, one of which is its . . . distinct social values and a specific history that have led it to develop a particular attachment to State laicity". This legislative context establishes a clear link between religious expression, or the absence thereof in the public sphere, and the identity of Quebec's cultural majority. We

therefore find that the vision of religious diversity advanced by representatives of the English-speaking minority similarly forms an important component of that minority's culture and identity.

(b) *The Act Negatively Affects the Legitimate Cultural Concern of the English-Speaking Minority*

[883] The Act negatively affects the English-speaking minority's legitimate cultural concern regarding religious diversity in schools. Several of the trial judge's factual findings, based on expert evidence regarding the cultural impact of prohibiting religious symbols in schools, support this conclusion (see paras. 989, 994-1002 and 1081). For example, the trial judge accepted expert testimony explaining how prohibiting school employees from wearing religious symbols conveys the message that certain minorities do not deserve to be integrated into their community (paras. 65, 994-96 and 1002). According to this evidence, the prohibition directly contradicts the cultural value of religious diversity embraced by the English-speaking minority in Quebec. The Act therefore affects the culture of English-language schools in a manner inconsistent with the minority's cultural commitment to religious diversity.

[884] The trial judge also accepted expert conclusions that prohibiting religious symbols in schools marginalizes minority students and may thus have a detrimental effect on their educational outcomes (paras. 995-96 and 1001). More specifically, he found that prohibiting teachers from wearing religious symbols risks creating stigma that negatively affects the engagement, motivation, and success of students from

minority backgrounds (para. 995). He further noted that religious diversity contributes to improved academic achievement and to the social and emotional development of marginalized students (para. 1001). Accordingly, the Act negatively affects the ability of English-language school boards to foster the success and integration of students from religious minorities who wear religious symbols (para. 997). These detrimental effects run counter to one of the fundamental purposes of s. 23: promoting the vitality and flourishing of the linguistic community as a whole in the educational setting (*CSFTNO*, at paras. 4 and 80).

[885] As the Chief Justice aptly observed in *CSFCB*, a school is "a setting for socialization where students can converse with one another and develop their potential in their own language and, in using it, familiarize themselves with their culture" (para. 1). It was in that spirit that the right to receive instruction in one of Canada's official languages was elevated to constitutional status. For Quebec's English-speaking minority, the Act undermines that spirit by impeding students' exposure to certain dimensions of their culture at school. Indeed, the trial judge found that, within the English-language school system, [TRANSLATION] "the diversity of cultural and religious backgrounds contributes to the development of educational programs aimed at enhancing intercultural education and . . . the meaningful participation of people representing these different backgrounds is an asset, not only for students, but also for the teaching staff" (para. 989). Thus, by limiting the ability of English-language school boards to maintain and promote a genuinely diverse teaching workforce, the Act hinders the transmission of cultural values at the heart of the minority's culture. In light

of the evidence accepted at trial, the Act affects this cultural concern in a manner incompatible with the purposes of s. 23.

[886] It is suggested that the EMSB must establish that the Act risks accelerating assimilation or erodes minority culture (reasons of Wagner C.J., at paras. 391-92). According to that reasoning, the EMSB has failed to discharge its burden because the Act produces the same detrimental effects on students from religious minorities enrolled in French-language schools in Quebec (paras. 387-88 and 393). Indeed, the evidence shows that the Act does not detrimentally affect only students from minority backgrounds. It affects other students as well. However, once a law restricts management and control in a manner that negatively affects the minority's legitimate linguistic and cultural concerns, there is no need to demonstrate a risk of assimilation or cultural erosion. Nor is it necessary to establish that the difficulties experienced by the minority are unique to it and not equally shared by the majority. Accordingly, it is irrelevant whether the Act poses a risk of assimilation or whether it produces the same detrimental effects on students enrolled in French-language schools in Quebec.

[887] First, requiring claimants to prove that a law risks accelerating assimilation or contributes to the erosion of minority culture is inconsistent with the preventive purpose of s. 23 (see *Mahe*, at pp. 362-64; *Solski*, at para. 3; *Arsenault-Cameron*, at para. 27; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 26). It is beyond dispute that s. 23 slows "the erosion of minority language communities in the face of assimilative pressures from the majority"

(reasons of Wagner C.J., at para. 357). That objective would be undermined if proof of actual or imminent assimilation or cultural erosion were required to establish a violation of s. 23.

[888] Some may rely on the collective nature of s. 23 to justify such a requirement (reasons of Wagner C.J., at para. 373). However, invoking the collective dimension of s. 23 only to narrow its scope is inconsistent with the principles governing the interpretation of language rights articulated in *Beaulac*, which require a broad and purposive interpretation of minority language rights (para. 25; see also *Société de l'Acadie du Nouveau-Brunswick v. Canada (Prime Minister)*, 2026 SCC 22, at paras. 49-50). Certainly, s. 23 has a collective dimension in that it protects not only individual rights holders but also minority language communities by affording them a special status in pursuit of substantive equality (*Quebec (Education, Recreation and Sports) v. Nguyen*, 2009 SCC 47, [2009] 3 S.C.R. 208, at para. 25; *Mahe*, at p. 369; *Solski*, at para. 20). However, "these rights are not primarily described as collective rights . . . A close attention to the formulation of s. 23 reveals individual rights . . ." (*Solski*, at para. 23 (emphasis added); see also para. 33). Requiring proof that a law accelerates assimilation or contributes to cultural erosion would unduly restrict the scope of s. 23 for individual rights holders.

[889] Second, whether the Act produces the same detrimental effects on students from religious minorities enrolled in French-language schools in Quebec is irrelevant in this case because the issue is not whether the quality of education provided to

English-speaking students is substantively equivalent to that available to French-speaking students. The right to minority-language instruction protected by s. 23 has four components: (1) the right to instruction; (2) the right to educational facilities; (3) the right to management and control; (4) and the right to education of a quality equivalent to that provided to the majority (Power, at p. 714). The right to management and control at issue in this case is distinct from the right to education of substantively equivalent quality (*Mahe*, at pp. 378 and 393-94; see also *Arsenault-Cameron*, at paras. 60-62; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at pp. 865-66). While a comparative analysis of the educational experience of the majority and minority is necessary in determining whether the right to education of equivalent quality has been infringed, no such analysis is required here.

D. *The Infringement of Section 23 Cannot Be Justified Under Section 1*

[890] Before this Court and the courts below, the AGQ declined to make submissions on whether any infringement of s. 23 could be justified under s. 1. Although the trial judge proceeded with a s. 1 analysis in the absence of submissions, we decline to do so here for the same reasons we set out in our analysis of the Act's *Charter* infringements of ss. 2(a), 2(b), and 15(1) but for its invocation of s. 33. However, we add this. Any infringement of s. 23 must be justified "on the basis of a very stringent standard" (*CSFCB*, at para. 151). And in our view, in the absence of submissions from the AGQ on this issue, and given the heightened justification

standard, we do not find that the Act's infringements of s. 23 are justified in a free and democratic society.

E. *The Appropriate Remedy Is a Tailored Remedy of Reading Down*

[891] Although it is not necessary to do so given our conclusion under s. 28, we would declare certain provisions of the Act of no force or effect under s. 23 with respect to Quebec's English-language school boards. After finding an unjustified s. 23 infringement, the trial judge declared several provisions of the Act of no force or effect for [TRANSLATION] "any person or entity capable of enjoying the rights conferred by section 23 of the Charter" (para. 1111). The EMSB, however, asks this Court to declare those provisions entirely of no force or effect or, in the alternative, of no force or effect only with respect to Quebec's English-language school boards (A.F., at para. 120). However, we would not read down the Act for any person or entity enjoying s. 23 rights. Instead, we would declare the Act of no force or effect only insofar as those provisions apply to Quebec's English-language school boards.

[892] Reading down the Act in this manner is a tailored remedy designed to cure a specific constitutional defect (*G*, at para. 112; see also paras. 114 and 116). This approach also ensures that courts respect the separation of powers and the legislature's domain when crafting tailored remedies (para. 114). Given that English-language school boards are the "legitimate representatives" of s. 23 rights holders in Quebec (*Arsenault-Cameron*, at para. 51), and that the s. 23 violation at issue concerns their governance rights specifically, it is appropriate to limit the declaration of inoperability

to the Act's application to those boards rather than to all persons or entities capable of invoking s. 23.

V. The Act Infringes the Right to Sex Equality Under Section 28 of the *Charter*

[893] The *Charter*'s right to sex equality under s. 28 reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[894] Sometimes called Canada's *other* notwithstanding clause, women's groups fought hard for s. 28 (M. Eberts, "Notwithstanding v. Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rights and Freedoms", in Biro, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*, 338). Section 28's inclusion in the *Charter* and exclusion from s. 33 was only secured through their efforts "at each drafting stage" of the *Charter* (M. McPhedran, "Creating Trialogue: Women's Constitutional Activism in Canada" (2006), 25:3-4 *Can. Woman Stud.* 6, at p. 6). They created a coalition to advocate in committee rooms, to the media, at conferences, in protests, and behind closed doors with politicians. When s. 28 was initially subjected to s. 33, women's groups fought even harder to remove it from the notwithstanding clause's scope. Their intense cross-country campaign achieved s. 28's removal from s. 33 with the unanimous consent of Parliament and all nine signatory provincial Premiers.

[895] As with s. 33, this Court has never interpreted s. 28's full contours. Litigants seeking sex equality before this Court have based their claims on s. 15(1). But s. 15(1)'s sex equality protections are unavailable in this case because of the valid invocation of s. 33.

[896] Section 28, however, is not subject to override by s. 33. The deliberate and unanimous democratic decision to remove s. 28 from being subject to s. 33 "signal[s] the special importance" of the *Charter*'s guarantee of sex equality (*Sauvé*, at para. 11). As we shall explain, s. 28's sweeping text, combined with its historical context and its drafting history, shows that it is not merely an interpretive provision. Section 28 has both interpretive effects and substantive rights protections.

[897] First, s. 28 has interpretive effects. It affects the interpretation of other "rights and freedoms referred to in [the *Charter*]", and the application of the *Oakes* test under s. 1.

[898] Section 28 also guarantees substantive sex equality. Legislation cannot have unequal adverse impacts on the *Charter* rights and freedoms of male and female persons. When s. 33 is invoked, it cannot shield legislation that infringes s. 28 by affecting those rights in a manner that undermines substantive sex equality. As we will discuss, s. 28 must be examined in this case because Quebec relies on s. 33 to shield a law that has unequal adverse impacts on women and men's religious freedom under s. 2(a).

A. *Section 28's Purposive Interpretation*

[899] This case requires the Court to interpret the full scope of s. 28 for the first time. The AGQ, the Mouvement laïque québécois, Pour les droits des femmes du Québec, and the Attorneys General of Alberta and Ontario argue that s. 28 is solely an interpretive provision. The EMSB, alongside several interveners, argue that s. 28 is both an interpretive provision and an independent substantive guarantee of sex equality. Drawing on the *Charter* interpretation principles outlined above, we conclude that s. 28 has both interpretive and substantive effects.

[900] Thus far, courts have engaged only minimally with s. 28 because s. 15(1) has been interpreted and applied to protect substantive sex equality (see, e.g., *R. v. Hess*, [1990] 2 S.C.R. 906, at pp. 932-33; *Kapp*, at para. 97, per Bastarache J., concurring). Most recently, Justices Kasirer and Jamal stated that s. 28 could apply to the Aboriginal non-abrogation clause to "ensure that a right protected under s. 25 does not shelter gender-based discrimination" (*Dickson*, at para. 173).

[901] The Act unequally and adversely impacts the religious freedom of Muslim women. As a result, it unjustifiably infringes s. 28, a provision not subject to s. 33, rendering ss. 6 and 8 of no force or effect.

(1) The Text of Section 28

[902] Section 28 reads:

> **28** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[903] Section 28's text is unlike any other *Charter* provision. First, s. 28 applies "[n]otwithstanding anything in this Charter". This definitive language elevates s. 28's status. Outside of s. 33, no other *Charter* provision uses the term "notwithstanding" to define its relationship with the rest of the document. And not even s. 33 purports to apply notwithstanding *anything* else in the *Charter*. The text clearly states that s. 28's guarantee of sex equality operates irrespective of all other *Charter* provisions, including but not limited to s. 33.

[904] Second, s. 28 does not use language that connotes an interpretive role like "construed" (ss. 25 and 26), "interpreted" (s. 27), or "deemed to include" (s. 30). The term "guarantee[s]" supports the conclusion that s. 28 is not merely an interpretive clause. Rather, it is a standalone right in relation to the other "rights and freedoms". It is an express guarantee of the equal enjoyment of rights and freedoms regardless of one's sex.

[905] Third, s. 28 uses the term "persons", textually linking it to "the history of Canadian women's long struggle for equality", most notably the recognition of women's legal personhood in the "Persons" case (Eberts, at pp. 339, 343-45 and 350; see also *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.)).

[906] Fourth, s. 28 uses equality-based language to guarantee the other *Charter* rights "equally" to male and female persons.[41] Although they are distinct provisions, the sex equality protections embedded in s. 28 are informed by this Court's equality jurisprudence under s. 15(1), especially its recognition of substantive equality as an "animating norm" (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; most recently aff'd in *Kanyinda*, at para. 36).

[907] Fifth, just as this Court has long held that the exclusion of the right to vote from s. 33 signals its "special importance", the same is true of s. 28 (*Sauvé*, at para. 11; see also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 28; *Taylor*, at para. 107). Its express exclusion from s. 33's scope shows that it is not merely an interpretive provision.

[908] Finally, s. 28's placement under the "[g]eneral" heading has limited interpretive relevance. The term "[g]eneral" does not limit the content or scope of provisions within it. And no jurisprudential authority suggests that provisions under the "[g]eneral" heading cannot have substantive content. To the contrary, this Court has already indicated that s. 28 has substantive rights-protecting effects by acknowledging

[41] Some interveners have argued that s. 28 should be interpreted to encompass gender equality. We do not have to address this question because it does not arise on the facts of this case. However, nothing in these reasons should be interpreted as restricting s. 28 to only male and female persons (I.F., Women's Legal Education and Action Fund, at para. 14; I.F., West Coast Legal Education and Action Fund Association, at paras. 14-15).

that s. 25 is "subject to the equality guarantee for 'male and female persons' under s. 28 of the *Charter*" (*Dickson*, at para. 110, per Kasirer and Jamal JJ.; see also para. 173).

[909] Taken together, the text of s. 28 is clear. Section 28 is a constitutional provision that "guarantee[s]" sex equality in relation to other "rights and freedoms referred to in [the *Charter*]". It also expressly operates "[n]otwithstanding anything in this Charter", including s. 33. Its historical context further illuminates the interests it protects.

(2) Canada's Historical Context of Sex Equality Prior to the *Charter*

[910] This Court has always considered historical context as a relevant consideration in constitutional interpretation, most recently in *Taylor* (paras. 76, 85, 105, 112 and 184). The context of s. 28 is essential to giving it "a large and liberal interpretation" to ensure that, as a "living tree", it is not "cut down . . . by a narrow and technical construction" (*Edwards*, at p. 136).

[911] Section 28's "guarantee" of sex equality in Canada can only be understood against the backdrop that much of Canadian history has been a story of sex inequality, legitimized and perpetuated in law. This history helps explain why the *Charter* contains a strongly-worded sex equality guarantee in s. 28 that is not subject to legislative override.

[912] Canada was founded as a democracy — but an imperfect democracy that gave women, among others, no popular sovereignty at all. Section 41 of the *Constitution Act, 1867* guaranteed a right to vote only to certain "Male British Subject[s]". It took almost half a century of suffragette activism for the first provinces to extend the franchise to women.

[913] Without the right to vote or run for office, women's perspectives were ignored or overwritten in Canadian law. It is therefore no surprise that Canadian law developed for decades with distinctively patriarchal features. The common law transferred the property of married women to their husbands, denied them recognition for their labour in divorce proceedings, did not recognize intimate partner violence as a compensable harm, and systematically favoured fathers in custody disputes (C. B. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988), 6 *Law & Hist. Rev.* 211, at p. 211; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Ahluwalia v. Ahluwalia*, 2026 SCC 16, at paras. 20 and 111-12; *King v. Low*, [1985] 1 S.C.R. 87, at p. 93). Statutes prohibited married women from suing their husbands in tort (see, e.g., *The Married Women's Property Act*, R.S.O. 1970, c. 262, s. 7; see also *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256). And in cases involving sexual violence, our criminal law viewed predominantly female complainants as inherently unworthy of belief and marital rape was legal until 1983 (*R. v. Kruk*, 2024 SCC 7, at paras. 31-35; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 676-77, per L'Heureux-Dubé J., dissenting in part, but not on this point).

[914] Today, Quebec is in many ways a pioneer in sex equality (see, e.g., *Kanyinda*, at para. 3; Conseil du statut de la femme, *L'égalité entre les femmes et les hommes: regard sur 50 ans d'évolution au Québec* (2024)). This is especially remarkable given that women were denied the right to vote or stand for office in provincial elections in Quebec until 1940 (*An Act granting to women the right to vote and to be eligible as candidates*, S.Q. 1940, c. 7). Under the first *Civil Code of Lower Canada* (*1866)*, a wife owed "obedience to her husband" (*art. 174*). Many acts performed by a married woman without her husband's consent were legally a nullity (see *Péloquin v. Cardinal* (1893), 3 R.J.Q. 10; *Civil Code of Lower Canada*, art. 183). These patriarchal laws were repealed during a law reform movement during the 1960s and 1970s, the era of the Quiet Revolution (F. S. Freedman, "The Juridical Capacity of the Married Woman in Quebec: In relation to partnership of acquests and recent amendments to the Civil Code" (1975), 21 *McGill L.J.* 518, at pp. 520-21).

[915] Over time, the law has moved slowly towards sex equality, through legislative intervention and judicial innovation. But Canadian courts have not always been staunch defenders of sex equality. In the "Persons" case, this Court ruled that women were *not* "qualified Persons" eligible for appointment to the Senate (*Reference re Meaning of the word "Persons" in s. 24 of the B.N.A. Act*, [1928] S.C.R. 276). It was only a further appeal to the Judicial Committee of the Privy Council that corrected this unjust misinterpretation of the law (*Edwards*).

[916] This Court's treatment of the equality guarantee in the *Canadian Bill of Rights* is also important context for understanding the purpose of s. 28 in the *Charter*. The *Canadian Bill of Rights* "recognized and declared" a series of rights "without discrimination by reason of . . . sex" (s. 1). This Court held that this guarantee was not an "egalitarian concept", however, but an attempt to freeze the law of equality as it existed when the *Canadian Bill of Rights* was adopted in 1960 (*Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, at p. 1365). This meant that the right was only to sex equality in the enforcement of laws, and not to the substance of laws themselves (pp. 1364-67). Infamously, this Court also unanimously held that denying benefits to pregnant women or those who had recently given birth did not violate the right against sex discrimination because "[a]ny inequality between the sexes in this area is not created by legislation but by nature" (*Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 190). The disappointment of the *Canadian Bill of Rights* for women helps inform why the *Charter* contains a standalone guarantee of sex equality in such unequivocal and stark language.

[917] Canadian history therefore features a particularly long arc, bending slowly towards substantive equality between men and women. Section 28 represents both a solemn commitment not to undo progress towards legal equality, and an unmistakable direction to all branches of state: in the *Charter* era, women's equality is non-negotiable and non-derogable.

(3) Section 28's Legislative History

[918] Section 28 has a unique drafting history — especially in relation to the notwithstanding clause. Section 28 was fought for by women who were largely excluded from the development of the *Charter* as a whole and all but completely excluded from the final negotiations that led to the addition of s. 33 (A. M. Dodek, ed., *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (2018), at p. 33; K. A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, Ph.D. thesis, Queen's University (2015), at p. 129, fn. 120; T. S. Axworthy, "An Historic Canadian Compromise: Forty Years after the Patriation of the Constitution, Should We Cheer a Little?", in Biro, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*, 25, at pp. 38-41).

[919] In undertaking a purposive interpretation, it is appropriate to consider instances where elected representatives publicly considered and rejected proposed *Charter* language. Courts should generally avoid interpreting *Charter* provisions in a way that would achieve the same result as contemplated by the rejected wording (*R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 267). And s. 28's legislative history sends a clear message that s. 28 is a substantive guarantee of rights to which s. 33 does not apply, not just an interpretive guideline.

[920] Section 28 was added to the draft *Charter* in its current form after women's groups led a months-long advocacy campaign, both publicly and through private negotiations. After intense discussions and lobbying efforts, advocates celebrated

securing Canada's version of an "Equal Rights Amendment", designed to ensure that sex equality would not be left behind in Canada's new constitutional era (McPhedran, at p. 9).

[921] When constitutional negotiations restarted after this Court's decision in *Reference re Resolution to amend the Constitution*, the federal government and the nine signatory provinces agreed to change the *Charter* draft once again to add s. 33, initially applying to ss. 2, 7 to 15, and 28 of the *Charter*. Similarly, a proposed amendment intended to clarify s. 28's scope stated that it would apply "[n]otwithstanding anything in this Charter except section 33" (House of Commons, *Votes and Proceedings*, No. 260, 1st Sess., 32nd Parl., November 20, 1981, at p. 4014).

[922] Once the addition of the notwithstanding clause to the *Charter* was publicly announced, women's groups regarded s. 33's application to s. 28 as "treacherous" and a "surtax . . . on their hard-won constitutional rights" (M. McPhedran, J. Erola and L. Braul, "'28 — Helluva Lot to Lose in 27 days': The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation", in L. Harder and S. Patten, eds., *Patriation and Its Consequences: Constitution Making in Canada* (2015), 203, at p. 207). Women's groups mobilized to amend s. 33 of the *Charter* before it was passed. But to remove s. 28 from the scope of the notwithstanding clause, they needed the consent of Parliament and all nine provinces that signed the initial constitutional agreement.

[923] In their cross-country advocacy to amend s. 33, women's groups made it clear that they did not regard s. 28 as merely interpretive. They asserted in a nationally circulated memorandum that s. 28 would provide substantive rights protections to women, arguing that the "weakening of clause 28 [through s. 33] means that Canadian laws do not have to apply equally to women and men" (National Action Committee on the Status of Women, *The Constitution in Crisis: Equality Disappears Step by Step!!!* (November 1981), at p. 1).

[924] This understanding — that the "free-standing section 28" encompassed substantive sex equality protections — was also shared by many federal and provincial representatives (R. Romanow, J. Whyte and H. Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (2007), at p. 213). In their account of patriation, three prominent members of Saskatchewan's constitutional negotiating delegation, Roy Romanow, John Whyte, and Howard Leeson, wrote that the "removal of the application of section 33 to section 28 . . . [i]n effect . . . meant that sexual equality in section 15 could not be overridden" (p. 213). Similarly, Saskatchewan Premier Allan Blakeney, the final Premier to agree to removing s. 28 from the scope of s. 33, did so reluctantly. He believed that s. 28 had substantive force and worried that courts might interpret it broadly enough to invalidate affirmative action programs for women (p. 213).

[925] Ultimately, the women's groups were once again successful, and Parliament and all nine provincial premiers that signed the *Charter* unanimously agreed

to remove s. 28 from the scope of the notwithstanding clause (*House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 24, 1981, at p. 13200; *House of Commons Debates*, vol. XII, 1st Sess., 32nd Parl., November 23, 1981, at p. 13140).

[926] Section 28's drafting history is irreconcilable with it being a purely interpretive provision. If s. 28 were purely interpretive, and so could not affect s. 33's operation, there would have been no need to include it within s. 33's scope in the first place. This distinguishes s. 28 from other *Charter* provisions that this Court has deemed purely interpretive. For example, the *Charter*'s multicultural heritage clause under s. 27 was never placed within the scope of s. 33 because it was never regarded as having substantive rights protections that could be temporarily suspended by the notwithstanding clause (see *Big M*, at pp. 302-3).

[927] The subsequent proposed amendments to both ss. 28 and 33 would similarly be difficult to reconcile with that interpretation: there would have been no rights-protecting s. 28 effect for s. 33 to suspend. While not determinative in the purposive interpretation, s. 28's drafting history strongly suggests its purpose is substantive, not merely interpretive.

(4) Section 28's Purpose Is to Guarantee Substantive Sex Equality in Relation to Other *Charter* Rights

[928] Section 28's guarantee of sex equality is not an afterthought. It was a central component of the fundamental compromise that led to the *Charter*'s patriation.

It was a commitment to safeguard women's equal status as constitutional rights-bearers and to renounce the historical denial of their status as "persons". For women, the guarantee that s. 33 could not be used to deny their hard-fought rights and freedoms was a necessary condition of the constitutional bargain. To relegate s. 28 to a hollow interpretive provision, powerless when s. 33 is invoked, is to ignore that reality — and to abandon the Court's approach to interpreting other provisions that are specifically excluded from s. 33. The interest s. 28 protects is substantive sex equality.

[929] Section 28's text, historical context, and drafting history all compel the following conclusion: s. 28's purpose is to guarantee substantive sex equality in relation to the *Charter*'s other rights and freedoms. Purposive interpretation requires courts to be generous rather than legalistic, and to secure the full benefit of a provision's protection without "overshoot[ing]" its purpose (*Big M*, at p. 344). For s. 28, a generous purposive interpretation can only be achieved by recognizing the full protections it encompasses when s. 33 is invoked in a manner that adversely affects women's *Charter* rights. Recognition of substantive rights protections under s. 28 does not create an impermissible hierarchy of rights. Insofar as there is a hierarchy of rights in the *Charter*, it is created by s. 33's application to some but not all rights and freedoms. This Court has consistently recognized substantive rights protections within provisions falling outside of s. 33's scope, such as the right to vote (s. 3), the right to mobility (s. 6), and minority language education rights (s. 23). Section 28 is no different.

[930] Thus, s. 28 affects the interpretation, application, and availability of other *Charter* rights and freedoms — even and especially when s. 33 is invoked. It recognizes our history of sex discrimination and the historic disadvantage of women in Canadian society. It guarantees that no invocation of s. 33 can ever again relegate women to second-class status in the post-*Charter* era. Section 28 is thus its own safety valve to the notwithstanding clause for women. Section 33 can broadly override ss. 2 and 7 to 15 of the *Charter*, but it can never do so in a manner that would disadvantage women as equal participants and rights-bearers in Canadian society.

B. *Section 28's Interpretive Effects*

[931] Section 28 affects the interpretation of other rights and freedoms. Section 28 requires courts to interpret these provisions in a manner that ensures that everyone, regardless of sex, has equal enjoyment of their guaranteed rights and freedoms.

[932] At a minimum, s. 28 informs the interpretation of s. 1 when other *Charter* rights and freedoms are *prima facie* violated. In effect, s. 28 *supercharges* s. 1 when sex equality is affected by any law or state action that the government seeks to justify. Section 28 elevates substantive sex equality to a special status on both sides of the overall proportionality analysis of a rights-infringing measure's deleterious and salutary effects. Undermining sex equality or disproportionately affecting women is an especially serious deleterious effect. By contrast, legislation that positively affects sex equality or addresses women's historical disadvantage will feature prominently as a

salutary effect. That approach ensures that substantive sex equality considerations remain paramount when evaluating if a rights infringement is demonstrably justified.

C. *Section 28 and Section 33*

[933] Section 28 of the *Charter* has substantive protections for sex equality when other rights-limiting provisions are used. It guarantees sex equality in relation to other rights and freedoms, regardless of whether s. 33 is invoked. As an independent right, s. 28 guarantees that legislation will not have unequal adverse impacts on other *Charter* rights and freedoms as between male and female persons.

[934] Section 28 was expressly removed from s. 33's scope. When s. 33 is invoked, it cannot operate notwithstanding s. 28, and as a result, it cannot shield legislation that adversely impacts *Charter* rights and freedoms in a manner that undermines substantive equality between men and women. If legislation that invokes s. 33 results in unjustified infringements of other rights, such as freedom of religion, s. 33 preserves its operation against s. 52(1) of the *Constitution Act, 1982*. But it is powerless to do so where the infringement of that right adversely impacts women more than men. Section 28 takes precedence.

[935] That is possible because, as we explained above, s. 33 does not eliminate rights. They continue to exist, even if s. 33's valid use means they cannot render the legislation of no force or effect. Because those rights continue to exist, they remain available for s. 28 to guarantee their equal application to men and women.

[936] As we explain below, that is fatal to ss. 6 and 8 of the Act.

D. *Section 28 and Section 15*

[937] Section 28 differs from the sex equality provision under s. 15(1) which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on . . . sex". Section 28 overlaps with s. 15, but does not duplicate it. Section 15(1) is an expansive discrimination provision that applies to nine enumerated grounds and at least five other analogous grounds. By contrast, s. 28 only applies to sex equality, and does so only in combination with the *Charter*'s other rights and freedoms. Section 28 was also expressly excluded from s. 33's scope, even though it applies to s. 15. While the precise overlap between ss. 28 and 15(1) remains to be determined, both sections protect the substantive equality interests of women.

[938] We leave it to another day to determine whether and to what extent the scope of s. 28 extends to sex discrimination under s. 15(1). It is unnecessary to do so here because the Act adversely affects Muslim women's religious freedom more than men's.

E. *The Section 28 Framework*

[939] Section 28 guarantees sex equality in relation to other *Charter* rights. But because it connects with other rights, recourse to s. 28 is rarely necessary. When other

rights and freedoms are available, it will generally suffice to determine the constitutionality of legislation based on their breach. It will therefore be unnecessary to resort to s. 28 except in circumstances where the legislation is shielded by other rights-limiting provisions, such as ss. 25 or 33 of the *Charter*.

[940] We turn now to the test to determine whether s. 28 is engaged. We draw on the equality test in our s. 15(1) jurisprudence. Because both provisions protect the same value — equality between the sexes — the rich concept of substantive equality developed under s. 15(1) should also inform s. 28. Section 28, like s. 15(1), is infused by the Court's longstanding commitment to substantive equality. And it requires not only that the legislation that s. 33 shields impact men and women differently, but that the breach affects their rights in a manner that sustains disadvantage.

[941] Section 28 requires a two-step analysis. First, an underlying *Charter* right or freedom must be *prima facie* infringed. Second, the breach of the underlying right or freedom must impact men and women differently in a manner that creates substantive sex inequality.

[942] Section 28 "guarantee[s]" the *Charter*'s "rights and freedoms . . . equally to male and female persons". Because it connects with other rights to guarantee them, s. 28 is available only when the underlying rights in the *Charter* are *prima facie* infringed.

[943] Once this threshold requirement is established, the second step of the analysis shifts to focus on whether *the breach* of the underlying right or freedom impacts men and women differently in a manner that creates substantive sex inequality. This second step is infused by this Court's rich jurisprudence on substantive equality (see, e.g., *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164, per McIntyre J.; *Withler*, at para. 2; most recently aff'd in *Kanyinda*, at para. 7). Substantive sex equality recognizes that identical treatment of men and women, without regard to their unique circumstances may still produce inequality. The *breach* of the underlying right must (1) affect men and women differently, effectively creating a distinction on the basis of sex; and (2) this breach must also affect men and women differently in a manner that is contrary to substantive sex equality by sustaining disadvantage.

[944] We end with this observation: our *prima facie Charter* rights infringement analysis and this Court's rich jurisprudence on substantive equality are premised on the state's opportunity to demonstrate that a rights breach is justified (see *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 153; *Kanyinda*, at para. 65). Proportionality is a foundational consideration for all *Charter* rights and freedoms. Because the *Charter* is structured so that once a claimant establishes an infringement of their right, the burden shifts to the state to justify it (see, e.g., *Oakes*, at pp. 136-37; *Hunter*, at p. 169; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 60, per La Forest J., dissenting).

[945] Some argue that s. 28 attaches to other rights and freedoms to render them "notwithstanding" not only s. 33 of the *Charter*, but also s. 1 (see, e.g., I.F., Muslim Advisory Council of Canada, at para. 14; I.F., National Association of Women and the Law, at para. 10). Section 28's text provides that it applies "[n]otwithstanding anything in this Charter", which appears to include s. 1. And s. 28's historical context suggests that a key rationale underlying its language was to ensure that courts did not lightly uphold sex inequality under s. 1.

[946] We prefer not to resolve this issue here. It is unnecessary to do so, as we will explain, and the parties and interveners did not argue the point in detail. But if s. 1 does not apply, we suggest that the s. 28 framework should include some ability for the state to justify a law that would breach the right. That is because rights do not exist in isolation. They are embedded in communities of persons whose entitlements sometimes conflict, and must be balanced against one another. Both governments and courts must have some way of resolving those conflicts without allowing one right to overwhelm another, and without defining rights so narrowly as to avoid conflict altogether.

[947] Reasonable limitations are inherent in the concept of a constitutional democracy. As we have already explained, s. 33 is not an exception to the general rule that no constitutional provision is unlimited. Neither is s. 28. Every provision of the *Charter* is founded on Canada's fundamental character as a free and democratic society, and any interpretation of their scope must accord with that foundational norm.

But, that said, there is no doubt that an "essential" aspect of Canada's free and democratic society is a commitment to substantive sex equality — which is why s. 28 elevates its status within the *Charter* (*Oakes*, at p. 136; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 756; *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 23; *Andrews*, at p. 195; see also M. Campbell, *Hanging in the Balance: The Function of Justification in Achieving Women's Equality* (2025), at pp. 6, 32 and 179-81).

[948] Thus, even if *Oakes* does not apply directly to s. 28, some justificatory framework likely does. But because Quebec made no attempt to justify any of the breaches at issue — which is its burden — it is unnecessary to decide that question here. We therefore leave open whether and how potential breaches of s. 28 can be justified.

F. *Application: The Act Breaches Section 28 of the Charter and Would be of No Force or Effect*

[949] The first threshold step of the s. 28 infringement analysis is met. We have determined that ss. 6 and 8 of the Act infringe freedom of religion under s. 2(a) of the *Charter* and would be of no force or effect but for its valid enactment of s. 33.

[950] The second step of the s. 28 analysis is also met. The Act's breach of s. 2(a) is not experienced equally by men and women. Rather, the effects are primarily and disproportionately experienced by Muslim women. Within the category of

religious minorities, Muslim women are affected more by the Act's breach of s. 2(a) because the religious symbols they wear are highly visible, and include face-coverings. Of the religious symbols in evidence, only Muslim women wear face-coverings. And by targeting teachers, among other professions, the Act uniquely affects a profession that women occupy at a higher rate than men (Sup. Ct. reasons, at para. 802).

[951] Not only does the Act's breach of s. 2(a) treat men and women differently, but it does so in a manner that is contrary to substantive sex equality. The evidence is clear: the Act sustains disadvantage for Muslim women. The trial judge found that, because of the Act, Muslim women are unable to practice their religion, express themselves or access the labour market on an equal footing with men (paras. 67 and 802-7). And all the documented teachers who have been formally barred from employment under the Act are Muslim women who wear hijabs (para. 805).

[952] In light of these findings, the Act infringes s. 28. And the invocation of s. 33 does not shelter the Act from s. 28. The constitutional compromise that led to s. 33's inclusion in the *Charter* came with the added compromise that it could not be employed to unequally adversely affect the rights and freedoms guaranteed to men and women. Quebec chose not to discharge its onus to provide any justifications within Canada's free and democratic society for the Act. And thus, ss. 6 and 8 of the Act unjustifiably infringe s. 28 and would be of no force or effect.

VI. Conclusion

[953] Superior courts have inherent jurisdictions to grant declaratory relief, even when s. 33 is invoked. We would do so in this case.

[954] We declare that ss. 6 and 8 of the Act unjustifiably infringe ss. 2(a), 2(b), and 15(1) of the *Charter*, but are temporarily shielded by the valid invocation of s. 33. They also infringe ss. 3 and 10 of the *Quebec Charter* but for its invocation of its override provision under s. 52.

[955] But the Act also unjustifiably infringes ss. 3, 23, and 28, which fall outside the scope of s. 33. Consequently, we would read down ss. 4 (first paragraph), 6, 7, 8, 12 (first and second paragraphs), 13, 14, and 16 of the Act to be of no force and effect with respect to Quebec's English school boards. More broadly, we declare ss. 6 and 8 of the Act to be of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

Appeals and cross-appeal dismissed without costs, KARAKATSANIS, MARTIN, KASIRER *and* O'BONSAWIN JJ. *dissenting in part.*

Solicitors for English Montreal School Board, Mubeenah Mughal and Pietro Mercuri: Juristes Power Law, Montréal.

Solicitors for World Sikh Organization of Canada and Amrit Kaur: Davies Ward Phillips & Vineberg, Montréal; World Sikh Organization of Canada, Ottawa.

Solicitors for Ichrak Nourel Hak, National Council of Canadian Muslims and Canadian Civil Liberties Association: IMK, Montréal.

Solicitors for Fédération autonome de l'enseignement: Gattuso Bouchard Mazzone, Montréal.

Solicitors for Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi and Legal Committee of the Coalition Inclusion Québec: Alexeev Avocats, Montréal; Davies Ward Phillips & Vineberg, Montréal; McGill University's Faculty of Law, Montréal.

Solicitors for Lord Reading Law Society: Borden Ladner Gervais, Montréal; Bergman & Associates, Montréal.

Solicitors for Attorney General of Quebec, Jean-François Roberge, in his official capacity, and Simon Jolin-Barrette, in his official capacity: Bernard, Roy (Justice-Québec), Montréal; Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitors for Mouvement laïque québécois: Alarie Legault, Montréal.

Solicitors for the respondent François Paradis, in his official capacity: Fasken Martineau DuMoulin, Québec; Assemblée nationale du Québec, Québec.

Solicitors for Pour les droits des femmes du Québec: Christiane Pelchat, Longueuil.

Solicitors for the intervener Attorney General of Canada: Borden Ladner Gervais, Ottawa; Department of Justice Canada, Montréal.

Solicitor for the intervener Attorney General of Ontario: Attorney General of Ontario — Constitutional Law Branch, Toronto.

Solicitor for the intervener Attorney General of Manitoba: Attorney General of Manitoba — Constitutional Law Section, Winnipeg.

Solicitor for the intervener Attorney General of British Columbia: Ministry of Attorney General — Legal Services Branch, Vancouver.

Solicitors for the intervener Attorney General of Saskatchewan: MLT Aikins, Regina.

Solicitor for the intervener Attorney General of Alberta: Alberta Justice — Constitutional and Aboriginal Law, Edmonton.

Solicitor for the intervener Canadian Human Rights Commission: Canadian Human Rights Commission — Legal Services Branch, Ottawa.

Solicitors for the intervener Quebec Community Groups Network: Grey Casgrain, Westmount.

Solicitors for the intervener Amnistie internationale Canada francophone: Melançon Marceau Grenier Cohen, Montréal.

Solicitors for the intervener Public Service Alliance of Canada: Melançon Marceau Grenier Cohen, Montréal.

Solicitors for the intervener Quebec English School Boards Association: Conway Baxter Wilson, Ottawa.

Solicitor for the intervener Christian Legal Fellowship: Christian Legal Fellowship, London.

Solicitors for the intervener Women's Legal Education and Action Fund: McCarthy Tétrault, Montréal; Women's Legal Education and Action Fund, Toronto.

Solicitor for the intervener Public Interest Litigation Institute: Consumer Law Group, Montréal.

Solicitors for the intervener Muslim Advisory Council of Canada: Sotos, Toronto; Osgoode Hall Law School, York University, Toronto.

Solicitor for the intervener Raoul Wallenberg Centre for Human Rights: Raoul Wallenberg Centre for Human Rights, Montréal.

Solicitors for the intervener Trial Lawyers Association of British Columbia: Hunter Litigation Chambers, Vancouver.

Solicitor for the intervener Droits collectifs Québec: Droits collectifs Québec, Sherbrooke.

Solicitors for the interveners Chinese Canadian National Council for Social Justice and Chinese and Southeast Asian Legal Clinic: Forbes Chochla Leon, Toronto; Raj Anand Professional Corporation, Dunrobin, Ont.

Solicitors for the intervener Advocates' Society: Société d'avocats Torys, Montréal.

Solicitor for the intervener International Commission of Jurists (Canada): Université de Montréal — Faculté de droit, Montréal.

Solicitors for the interveners Task Force on Linguistic Policy and Andrew Caddell: Bergman & Associates, Montréal.

Solicitors for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil: Shadley Knerr, Montréal; Battista Turcot Israel, Montréal.

Solicitor for the intervener Honourable Serge Joyal, P.C.: Hon. Serge Joyal, P.C., Montréal.

Solicitors for the intervener South Asian Bar Associations (Toronto, Calgary, British Columbia, and Edmonton), Canadian Muslim Lawyers Association, Canadian Association of Black Lawyers and Federation of Asian Canadian Lawyers (Ontario): Mannu Chowdhury Barrister and Solicitor, Toronto; Ursel Phillips Fellows Hopkinson, Toronto.

Solicitors for the intervener Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener Canadian Constitution Foundation: Baker & McKenzie, Toronto.

Solicitors for the intervener Canadian Conference of Catholic Bishops: Philip Horgan Law Office, Toronto.

Solicitor for the intervener Migrant Justice Clinic: University of Ottawa — Faculty of Law, Ottawa.

Solicitor for the intervener Constitutional Rights Centre Inc.: Slansky Law Professional Corp., Toronto.

Solicitors for the intervener Hamshuchas Hadoirois International Association: Fasken Martineau DuMoulin, Montréal.

Solicitors for the intervener Commission nationale des parents francophones: Conway Baxter Wilson, Ottawa.

Solicitors for the intervener West Coast Legal Education and Action Fund Association: Ethos Law Group, Vancouver.

Solicitors for the intervener Canadian Council of Muslim Women: Lenczner Slaght, Toronto.

Solicitors for the intervener British Columbia Civil Liberties Association: Nanda & Company, Edmonton.

Solicitors for the interveners Barbra Schlifer Commemorative Clinic and Women in Canadian Criminal Defence: Megan Stephens Law, Toronto; Martin Barristers, Toronto; Goldblatt Partners, Toronto.

Solicitors for the intervener Ligue des droits et libertés: Melançon Marceau Grenier Cohen, Montréal.

Solicitors for the interveners British Columbia Humanist Association and Canadian Secular Alliance: Allen/McMillan Litigation Counsel, Vancouver.

Solicitor for the intervener Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitors for the intervener Association des conseils scolaires des écoles publiques de l'Ontario: Université de Moncton, Moncton; Gowling WLG (Canada), Ottawa.

Solicitor for the intervener National Association of Women and the Law: National Association of Women and the Law, Ottawa; University of New Brunswick — Faculty of Law, Fredericton.

Solicitor for the intervener Commissioner of Official Languages of Canada: Legal Services Branch, Office of the Commissioner of Official Languages of Canada, Gatineau.

Solicitors for the intervener Acadian Society of New Brunswick: Pink Larkin, Fredericton.

Solicitors for the intervener Criminal Lawyers' Association (Ontario): Greenspan Humphrey Makepeace, Toronto; Brauti Thorning, Toronto.

Solicitors for the intervener Egale Canada: Egale Canada, Toronto; McCarthy Tétrault, Toronto.

Solicitors for the intervener Clinique juridique Juritrans: McCarthy Tétrault, Montréal.

Solicitors for the intervener Samara Centre for Democracy: Landings, Toronto.

Solicitor for the intervener David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitors for the intervener Federation of Ontario Law Associations: Black & Associates, Ottawa.

Solicitor for the intervener Community Legal Assistance Society: Community Legal Assistance Society, Vancouver.

Solicitors for the interveners South Asian Legal Clinic of Ontario, South Asian Legal Clinic of British Columbia and South Asian Women's Community Centre: Circle Barristers, Toronto; Kapoor Barristers, Toronto.