KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 23**

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

BETWEEN:

UR PRIDE CENTRE FOR SEXUALITY AND GENDER DIVERSITY

APPLICANT

- and -

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

RESPONDENTS

- and -

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

INTERVENORS

- and -

REGINA CIVIC AWARENESS AND ACTION NETWORK & OUR DUTY CANADA GROUP

PROPOSED INTERVENORS

Counsel:

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

JUDGMENT
February 16, 2024

MEGAW J.

INTRODUCTION

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

fundamentally changed since the commencement of the original proceedings which culminated in the court's judgment of September 28, 2023 (*UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Education)*, 2023 SKKB 204 [*Judgment*]). As a result of the change, the applicant, UR Pride Centre for Sexuality and Gender Diversity [UR Pride] seeks to amend its pleading to advance an allegation pursuant to s. 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. UR Pride further seeks to amend the facts pled and the remedies sought to accord with the reality that new legislation has been introduced replacing the Policy (Use of Preferred First Name and Pronouns by Students [Policy]) and which invokes the Notwithstanding Clause contained at s. 33(1) of the *Charter*.

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

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

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

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

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

[6] My reasons follow.

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUES

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

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

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

3. Should leave be granted to amend the pleadings?

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

pleadings?

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

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

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

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

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

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

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

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

6. Should the court decide the issue of mootness?

7. Costs

DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Should leave be granted to amend the pleadings?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

amendments as follows:

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

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

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

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

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

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

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

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

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

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

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

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

Actions started by originating application

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

...

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

...

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

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

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

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

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

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

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

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

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

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

...

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Babstock at para 90.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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