

# A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights

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Volume 47, numéro 2, 2017

URI : <https://id.erudit.org/iderudit/1042928ar>

DOI : <https://doi.org/10.7202/1042928ar>

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Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)

2292-2512 (numérique)

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Citer cet article

Rousseau, G. & Côté, F. (2017). A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights. *Revue générale de droit*, 47(2), 343–431. <https://doi.org/10.7202/1042928ar>

Résumé de l'article

*Les droits fondamentaux garantis par la Charte canadienne des droits et libertés et par la Charte des droits et libertés de la personne du Québec surpassent les autres règles de droit. Ainsi, toute mesure législative qui entrerait en conflit avec leur contenu serait susceptible d'invalidation par les tribunaux canadiens. Toutefois, au nom de la souveraineté parlementaire, les deux chartes comportent un mécanisme d'exception, la « disposition dérogatoire », qui peut être invoquée par le législateur pour retirer une loi de l'examen judiciaire concernant sa conformité au droit des chartes.*

*Au-delà des considérations de fond et de forme, selon la doctrine québécoise prédominante et l'Assemblée nationale du Québec, en quelles circonstances et à quelles fins le législateur peut-il invoquer une disposition dérogatoire?*

*Une étude des principales conceptions universitaires des droits fondamentaux au Québec révèle une approche théorique distincte à l'égard des dispositions dérogatoires par comparaison avec celles répandues au Canada anglais. Cette tendance doctrinale distincte nous porte à croire qu'un législateur peut légitimement invoquer le mécanisme dérogatoire de manière préventive lorsqu'il cherche à mettre de l'avant des mesures législatives touchant les intérêts collectifs, tels que des objectifs sociaux ou des mesures liées à l'identité nationale, pour éviter qu'elles ne soient mises en péril par des intérêts privés. Cette réalité distincte se reflète également au sein de la pratique législative, en ce que le Québec a invoqué la disposition dérogatoire de la Charte canadienne 61 fois (au surplus de 45 références à la disposition dérogatoire de la Charte québécoise) comparativement à 3 fois pour le reste du Canada durant la même période, pour des considérations très majoritairement liées à des questions d'objectifs sociaux ou d'identité nationale. Cette situation pourrait s'expliquer par une conception distincte de la souveraineté parlementaire ainsi que de la dynamique de pouvoir entre le législateur élu et les juges nommés au Québec.*

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# A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights

GUILLAUME ROUSSEAU\* AND FRANÇOIS CÔTÉ\*\*

## ABSTRACT

*The fundamental human rights recognized by the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms supersede other rules of law. As such, any legislative measure conflicting with their content can be invalidated by Canadian tribunals. Yet, to ensure parliamentary sovereignty, both Charters feature an override mechanism, the “notwithstanding clause,” that can be invoked by a legislator to withdraw a given law from judicial scrutiny under charter rights.*

*Beyond formal and substantive requirements, according to Quebec prominent doctrinal trends and National Assembly, in what circumstances, and to what end, can the legislator invoke a notwithstanding clause?*

*A review of leading academic conceptions of charter rights in Quebec reveals a distinctive theoretical approach to notwithstanding mechanisms than that of leading Anglo-Canadian authorities. Quebec leading doctrinal trends, distinctly, seem to conceive that legislative overrides can be legitimately made preemptively by a legislature when dealing with matters of collective interests, such as social objectives and national identity, which, in the name of greater good, should not be fettered by private interests. This distinctive reality is also sharply reflected in legislative practice: as Quebec invoked the notwithstanding clause of the Canadian Charter 61 times (in addition to 45 references to the notwithstanding clause of the Quebec Charter) compared to 3 times in the rest of Canada over the same period, overwhelmingly for considerations of social objectives or national identity. This situation could be explained by a distinctive conception of parliamentary sovereignty and of power dynamics between elected legislature and appointed judges in Quebec.*

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**KEY-WORDS:**

*Notwithstanding clause, constitutional law, social approach, parliamentary sovereignty, collective interests, comparative approach (Quebec/Canada).*

**RÉSUMÉ**

*Les droits fondamentaux garantis par la Charte canadienne des droits et libertés et par la Charte des droits et libertés de la personne du Québec surpassent les autres règles de droit. Ainsi, toute mesure législative qui entrerait en conflit avec leur contenu serait susceptible d'invalidation par les tribunaux canadiens. Toutefois, au nom de la souveraineté parlementaire, les deux chartes comportent un mécanisme d'exception, la « disposition dérogatoire », qui peut être invoquée par le législateur pour retirer une loi de l'examen judiciaire concernant sa conformité au droit des chartes.*

*Au-delà des considérations de fond et de forme, selon la doctrine québécoise prédominante et l'Assemblée nationale du Québec, en quelles circonstances et à quelles fins le législateur peut-il invoquer une disposition dérogatoire?*

*Une étude des principales conceptions universitaires des droits fondamentaux au Québec révèle une approche théorique distincte à l'égard des dispositions dérogatoires par comparaison avec celles répandues au Canada anglais. Cette tendance doctrinale distincte nous porte à croire qu'un législateur peut légitimement invoquer le mécanisme dérogatoire de manière préventive lorsqu'il cherche à mettre de l'avant des mesures législatives touchant les intérêts collectifs, tels que des objectifs sociaux ou des mesures liées à l'identité nationale, pour éviter qu'elles ne soient mises en péril par des intérêts privés. Cette réalité distincte se reflète également au sein de la pratique législative, en ce que le Québec a invoqué la disposition dérogatoire de la Charte canadienne 61 fois (au surplus de 45 références à la disposition dérogatoire de la Charte québécoise) comparativement à 3 fois pour le reste du Canada durant la même période, pour des considérations très majoritairement liées à des questions d'objectifs sociaux ou d'identité nationale. Cette situation pourrait s'expliquer par une conception distincte de la souveraineté parlementaire ainsi que de la dynamique de pouvoir entre le législateur élu et les juges nommés au Québec.*

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**MOTS-CLÉS :**

*Disposition dérogatoire, droit constitutionnel, approche sociale, souveraineté parlementaire, intérêts collectifs, approche comparative (Québec/Canada).*

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## INTRODUCTION<sup>1</sup>

At the summit of the Canadian legal system sits the *Canadian Charter of Rights and Freedoms*<sup>2</sup> (hereafter referred to as the Canadian Charter) which guarantees a collection of human rights and civil liberties for every individual standing on Canadian soil. Pursuant to section 32 of the Canadian Charter and section 52 of the *1982 Constitution Act*, any legislative action that would purport to contravene them can be struck down as invalid by the judicial courts.<sup>3</sup>

This rule, however, is not absolute. The Canadian Charter features an overriding mechanism at its section 33 (the “notwithstanding clause”),<sup>4</sup> allowing Parliament to bypass those limitations in order to enact a legislation that cannot be challenged under charter rights.

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1. The authors would like to thank M<sup>e</sup> David Legrand and Mr Samuel Grondin for their research contributions, M<sup>e</sup> Éric Poirier, for his observations on a previous version of the present paper, and Mr Charles Harry Schiller, for his help in reviewing the English version of this paper. The authors’ thanks also extend to the Quebec Ministry of Justice for its help with the realization of this paper by generously providing a list of acts adopted by the National Assembly containing at least one reference to a notwithstanding clause, which was of great assistance in the cross-verification of our results. All quotations herein this article were translated directly from French to English by the authors, who bear the sole responsibility for any mistranslation. The authors also bear the sole responsibility for any error, flaw or omission that could be contained in the following pages.

2. *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.

3. *Ibid*, s 24.

4. Section 33 of the Canadian Charter, *supra* note 2, reads as follows:

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

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

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

Provincial charters of rights and freedoms—whose missions are also to guarantee essential human rights within provincial borders<sup>5</sup>—function in a likely manner and also contain similar notwithstanding clauses.<sup>6</sup> In Quebec, the *Charter of Human Rights and Freedoms*<sup>7</sup>

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

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

Of course, as section 1 of the Canadian Charter provides, charter rights can also be subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” allowing a legislator to limit them without necessarily having to employ a notwithstanding clause reference. However, an encroachment of charter rights that is not protected by a legislative override will be subject to judicial scrutiny, in accordance with the criteria developed in *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) [hereafter referred to as *Oakes*] and to potential invalidation if it fails, in the eyes of a court, to meet its standards. Given that the *Oakes* test contains qualitative elements, this means that any unprotected legislation can be subject to a qualitative review over which the legislator has no control. Through the notwithstanding mechanism, the legislator ensures that such a review cannot take place—with regards to sections 2 and 7 to 15 of the Canadian Charter only—thus making certain that, as long as the override reference stands, the legislation cannot be struck down in the name of a judicial review anchored in those sections.

5. Albeit with, sometimes significant, distinctions in scopes, protected rights and personal jurisdiction between the Canadian Charter, *supra* note 2, and provincial charters. For example, while the Canadian Charter only applies to acts of Parliament and provincial legislatures (s 32), the *Charter of Human Rights and Freedoms*, CQLR c C-12 [hereafter referred to as the Quebec Charter], is not so limited and applies both to State actions and private relationships.

6. Unless provided otherwise by context, the term “notwithstanding clause” throughout this paper will encompass either or both notwithstanding clauses of the Canadian Charter (*supra* note 2) and the Quebec Charter (*supra* note 5). We openly recognize that both Charters are different in nature—as the Canadian Charter is a constitutional document that cannot be changed by way of ordinary parliamentary majority like the Quebec Charter, which is, formally, a “simple” statute—yet we submit that they can both be approached at once. Since the *Ford v Quebec*, [1988] 2 SCR 712, 1988 CanLII 19 (SCC) case [hereafter referred to as *Ford*], the Supreme Court of Canada conflated the evaluation of unprotected charter rights limitation under the same *Oakes* (*supra* note 4) test, with the same potential for invalidation, for both Charters. Given that both Charters formally consider similar fundamental human rights on equal footing and given that, at least since the *Syndicat Northcrest v Amselem* (2004 SCC 47, [2004] 2 SCR 551) case, the Supreme Court of Canada has considered human rights common to both Charters under a unified scope of evaluation. Therefore, the reunion of both types of notwithstanding references in a single study is not without merit. Both the Canadian Charter (*supra* note 2) and the Quebec Charter (*supra* note 5) rights are approached in a sufficiently similar way (in matters of practical consequences) by the judicial system, which in the end will have—save for a notwithstanding clause reference—sufficiently similar practical consequences over a legislation. In addition, they are also approached similarly both by the leading doctrinal trends in Quebec and by the legislative practice of the National Assembly, both being the objects of our study. As matters of empirical research, the two Charters are therefore closely enough related in matters of real-world effects and consequences, as well as being intellectually reunited by theoretical and legislative approaches to study them both at the same time. This being said, we will make distinctions between Quebec Charter and Canadian Charter overrides when necessary. The reunion of two related objects does not necessarily mean their confusion.

7. Quebec Charter, *supra* note 5.

(hereafter referred to as the Quebec Charter) features a notwithstanding clause of its own at its section 52.<sup>8</sup>

It is notorious that the notwithstanding clause in the Canadian Charter is used more frequently in Quebec than in the rest of Canada<sup>9</sup>. In June 1982, in order to protest against the patriation, the National Assembly adopted the *Act Respecting the Constitution Act, 1982*,<sup>10</sup> which retroactively included a notwithstanding clause reference to override sections 2 and 7 to 15 of the Canadian Charter to every law already in force in Quebec. Afterwards, from 1982 to 1985, the same reference was added into each subsequent legislation adopted by the National Assembly. This legislative strategy was largely upheld as valid by the Supreme Court in the *Ford*<sup>11</sup> case, where the Court determined that tribunals had no jurisdiction to examine the merits or the appropriateness of a notwithstanding clause reference, being limited to the sole question of controlling the form and procedure by which a reference to the notwithstanding clause could be made by the legislature.

Following the *Ford* case, in which the Supreme Court also ruled that the provisions of the *Charter of the French language*<sup>12</sup> mandating exclusive use of French in commercial advertisement were unconstitutional, Quebec Liberal Government adopted the *Act to Amend the Charter of the French language*<sup>13</sup> to oppose the ruling and maintain some of the invalidated sections by invoking the notwithstanding clause. These events, which stirred much controversy in the political landscape and

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8. Section 52 of the Quebec Charter, *ibid*, reads as follows:

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

One will notice the absence of a set mechanism like the one in section 33(3) of the Canadian Charter (*supra* note 2). Legislative overrides made under the Quebec Charter (*supra* note 5) are permanent until repealed. In addition, like its federal counterpart, the Quebec Charter also provides (s 9.1(2)) that “the scope of the freedoms and rights, and limits to their exercise, may be fixed by law,” thus permitting the limitation of Quebec Charter rights through unprotected legislation as long as such a limitation also complies with the same criteria as set out in *Oakes* (*supra* note 4) (see *Ford*, *supra* note 6). However, just like for the rights protected by the Canadian Charter, unprotected pieces of legislation are subject to judicial scrutiny under the rights protected by the Quebec Charter and to potential invalidation if, in the eyes of a court, they fail to meet the qualitative requirements of this section.

9. Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 39-3 to 39-4.

10. *Act respecting the Constitution Act, 1982*, CQLR, c L-4.2.

11. *Ford v Quebec*, *supra* note 6.

12. *Charter of the French language*, CQLR, c C-11.

13. *Act to Amend the Charter of the French language*, RSQ 1988, c 54, s 10.

were highly publicized at the time, have undoubtedly contributed to the widespread knowledge that references to the notwithstanding clause, historically, happen more often in Quebec than in the other provinces.

In that respect, according to Peter Hogg, the Quebec National Assembly employed the notwithstanding clause to protect its legislation from scrutiny under the Canadian Charter no less than 12 times between 1985 and 2007 (without counting the systematic use of the notwithstanding clause from 1982 to 1985). By contrast, it happened only three times in the rest of Canada (once in Yukon, once in Saskatchewan and once in Alberta; while this never occurred at the federal level) during the same period<sup>14</sup>—each time with so little impact that we can question their significance. In Yukon, the act purposely covered by the notwithstanding clause never came into force;<sup>15</sup> in Saskatchewan, the protected act would very likely have been judged as valid and falling within the accepted scope of the Canadian Charter without any need to employ the notwithstanding clause,<sup>16</sup> and in Alberta, the protected act was *ultra vires*, as it attempted to legislate on a matter of federal jurisdiction, thus being invalid regardless of any fundamental right question.<sup>17</sup>

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14. Hogg, *supra* note 9, at 872. This figure stood in 2017 for English Canada, when this paper was submitted. Hogg's accounts on the matter are limited to the Canadian Charter, on a global "per-legislation." However, it is noteworthy to observe that—at the time of publication of this paper—Saskatchewan's Prime Minister, Brad Wall, declared his intention to invoke the notwithstanding clause of the Canadian Charter to reverse a Court of the Queen's Bench decision ruling that the Saskatchewan government may not finance non-Catholic students attendance to Catholic schools with Catholic school programs without committing an inequality in treatment on a religious basis, judging Saskatchewan measures on the matter as unconstitutional (*Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109). See Stefani Langenegger, "Sask to Use Notwithstanding Clause to Override Catholic School Ruling", CBC News (1 May 2017), online: <[www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-catholic-1.4093835](http://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-catholic-1.4093835)>. While this debate will be interesting to follow, since it has not yet become law, we cannot include it in our research. But even if Saskatchewan does invoke the notwithstanding mechanism in this instance, current events lead us to anticipate that it will do so in the name of a deliberative disagreement on individual rights, following a court decision, in a manner conform with the Anglo-Canadian approach to legislative overrides, thus, we speculate, not affecting our findings.

15. *Land Planning and Development Act*, SY 1982, c 22, s 39(1).

16. *An Act to Provide for Settlement of a Certain Labour-Management Dispute Between the Government of Saskatchewan and the Saskatchewan Government's Employees Union*, SS 1984-85-86, c 111, s 9 [*Act to Provide for Settlement*]; *SDGMR v Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90 (SCC).

17. *Marriage Amendment Act*, RSA 2000, c 3, s 5.



Quebec has also invoked the notwithstanding clause contained within its own Charter on multiple occasions—while in the rest of Canada, references to the notwithstanding clauses set out the various human rights statutes seem to have been much rarer. For example, again according to Peter Hogg, the notwithstanding clause in the *Canadian Bill of Rights* has only ever been used once at the federal level.<sup>18</sup>

In front of such distinct orders of magnitude, one can wonder why references to notwithstanding mechanisms are so much more frequent in Quebec than in the rest of Canada. Could this be because there is a different vision of, and a different moral approach to, the notwithstanding clause in Quebec when compared to the rest of Canada?

To answer that question, we will need to determine if there is a coherent and distinctive theoretical approach to the notwithstanding clause within the Quebec doctrine (I), and if there is empirical evidence of a distinctive legislative practice when it comes to invoking the notwithstanding clause in Quebec National Assembly (II). Once those two elements have been identified, we will then attempt to determine if there is a correlative link between the theoretical and practical approaches to the notwithstanding clause in Quebec, and, if applicable, qualify such correlation and draw conclusions from our findings (III).

For precision's sake, we point out straightforwardly that our analysis is solely focused on the theoretical and practical "moral legitimacy" of invoking the notwithstanding clause according to Quebec prominent doctrinal trends and legislative practice. Indeed, since the *Ford* case, the Supreme Court made it clear that the examination of the appropriateness of a legislative override of charter rights falls outside of the judicial purview. To question if a reference to the notwithstanding clause was wise, legitimate or justified in a free and democratic society thus falls outside the realm of judicial scrutiny and becomes a political question, itself anchored in theoretical conceptions and moral views on the notwithstanding clause—which will be our subject of interest here.

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18. *Canadian Bill of Rights*, SC 1960, c 44, s 2; *Public Order (Temporary Measures) Act*, SC 1970-71-72, c 2, s 20; see also Hogg, *supra* note 9 at 3-11.

## I. THEORETICAL APPROACHES TO THE NOTWITHSTANDING CLAUSE

As it seems, most part of the legal literature pertaining to notwithstanding clauses stems from English Canada, outside Quebec—notably through the work of Tsvi Kahana,<sup>19</sup> who posits at least four major theories developed by Canadian scholars regarding the use of the notwithstanding clause.<sup>20</sup> Interesting as they may be, these theories do not seem to take into account French language authorities nor Quebec practices when it comes to the notwithstanding clause. Aside from the language barrier, this situation may somewhat be explained by a low degree of academic interest towards notwithstanding clauses in Quebec and lack of a recent systematic compilation of their use. This leads us to the following question: is there a different conception of the nature, the *raison d'être*, of the notwithstanding clause that would distinguish the way it is understood in the Quebec doctrine when compared to the views of prominent Anglo-Canadian authors? In order for such a particular perspective to be observed in Quebec, it would not require a unanimous official recognition as such; it would have to be a sufficiently distinctive and coherent theoretical and moral approach to the notwithstanding clause that would have to be followed or approved by a substantial number of authors within the Quebec doctrine.<sup>21</sup>

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19. See the latter's doctorate thesis as his first great work on the matter: Tsvi Kahana, *The Partnership Model of the Canadian Notwithstanding Mechanism: Failure and Hope* (JSD Thesis, University of Toronto, Faculty of Law, 2000).

20. Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221 [Kahana 2002]. In another paper, Kahana noted six possible ways to understand the notwithstanding clause—see Tsvi Kahana, "What Makes a Good Use of the Notwithstanding Mechanism?" (2004) 23 Sup Ct L Rev 191 at 192 [Kahana 2004]. However, in this second paper, Kahana openly approaches notwithstanding mechanisms from a political science point of view. As such, while very interesting in its own right, this latter work of Kahana—which does not redefine nor contradict his previous positions—somewhat falls outside the scope of the present paper focused on purely legal theories. Therefore, unless provided otherwise, our references to Kahana's work in this paper will be focused on his 2002 theories.

21. In that perspective, we will chiefly centre our analysis of the distinctive theory within the Quebec doctrine on the works of Henri Brun and Guy Tremblay, authoritative constitutional law authors in Quebec, as well as those of several Quebec authors agreeing with them. Our research indicates us that their theory is the leading theory in Quebec—but it is not the only one. One of the main alternative theories to theirs would be that of José Woehrling. This will be more amply discussed in III.A.2, below.

To this end, we will circumvent our analysis of the Quebec doctrine and the prominent Anglo-Canadian theories<sup>22</sup> to four criteria of interest: the time of insertion of a notwithstanding clause (I.A); international law consideration (I.B); federalism and collective domestic considerations (I.C); and the material or substantive approach required to legitimately apply the notwithstanding clause (I.D).

As a last preliminary remark, we must state that the core of our attention here will be directed towards the study and characterization of Quebec academic authorities regarding the legislative override of charter rights. While we will mobilize Anglo-Canadian authorities on the same matter, we will do so for the purpose of better defining Quebec's, comparatively. As such, we make no claim as to having laid out an extensive study of Anglo-Canadian theories, as our comparative analysis can be made, with regards to leading doctrinal trends in English Canada, without need for exhaustiveness. While important, our comparative perspective is accessory to our larger thesis, which is to observe the existence of a coherent and consistent view of the notwithstanding mechanism in the Quebec doctrine, and to later compare the theoretical approach that we will have laid bare with the legislative practice of Quebec National Assembly.

## A. Timing the Use of a Notwithstanding Clause: Before or After a Constitutional Judgement?

Should the notwithstanding clause only be used after a constitutional judgement as a legislative response tool following a Supreme Court decision—or can it legitimately be used preemptively, before a

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22. With regards to Anglo-Canadian theories on notwithstanding mechanisms, we chose the works compiled by Tsvi Kahana on the subject in 2002 (*supra* note 20 at 223–24), namely the theories set out by Paul C Weiler, Brian Slattery and Lorraine Weinrib—in addition to Kahana's own theories—as our standard of reference for the Anglo-Canadian doctrinal approach. We chose Kahana's works in this perspective for two reasons. First, even dating from 2002, Kahana's work still constitutes the most recent and significant in-depth analysis of theoretical approaches to legislative overrides of charter rights in English Canada. Also, to the best of our knowledge and research, his theories are still received as authoritative and have not been significantly challenged. Rather, later authors on the subject of legislative overrides seem to chiefly write on the subject from a political science point of view. See Kahana 2004 (*supra* note 20); David Snow, "Notwithstanding the Override: Path Dependence, Section 33 and the Charter" (2008–2009) 8 U Calgary Innovations A Journal of Politics 1; Richard Albert, "Advisory Review: The Reincarnation of the Notwithstanding Clause" (2008) 45:4 *Alta L Rev* 1037; and Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination" in Grant Huscroft and Ian Brodies, eds, *Constitutionalism in the Charter Era* (Markham, Ont: LexisNexis Canada, 2004) 135.

constitutional judgement, to prevent any sort of human rights challenge to a legislation? While the moral legitimacy of a preemptive reference barring any sort of judicial review has been the subject of some discussion within the Anglo-Canadian doctrine, it seems far less controversial in Quebec.

In the Anglo-Canadian doctrine, according to Paul C Weiler, the notwithstanding clause should only and exceptionally be used to correct an “error” made by the tribunals in the interpretation or application of the Canadian Charter.<sup>23</sup> Weiler’s position, as stated in the early 1980s, seems to have been followed in the Anglo-Canadian doctrine,<sup>24</sup> and was notably reaffirmed by another author, Tsvi Kahana, two decades later. According to Kahana, under the “deliberative disagreement” theory, only judiciary powers are entitled to read into the Charter. Consequently, the notwithstanding clause should only be used as a legislative response following a Supreme Court invalidation.<sup>25</sup>

However, some other Anglo-Canadian authors differ from Weiler’s and Kahana’s positions. For Brian Slattery<sup>26</sup> and for Lorraine Weinrib,<sup>27</sup> for example, the notwithstanding clause could legitimately be inserted into law prior to any judgement declaring it incompatible with the Canadian Charter.<sup>28</sup>

By contrast, the issue raises less controversy in Quebec, as there seems to be a general academic consensus to consider preemptive overrides of charter rights legitimate. This is probably due to the fact that, moments after the adoption of the Canadian Charter and before any judicial challenge, the Quebec government preemptively withdrew its entire legislative corpus from Canadian Charter scrutiny by invoking the notwithstanding clause as an act of political defiance,<sup>29</sup> which was subsequently held as legally valid by the Supreme Court.<sup>30</sup> As was stated earlier, we believe that this audacious action had a comforting

23. Paul C Weiler, “Rights and Judges in a Democracy: A New Canadian Version” (1984–1985) 18 U Mich LJ Reform 51 at 80–84.

24. Kahana 2002, *supra* note 20 at 223.

25. *Ibid* at 225.

26. Brian Slattery, “A Theory of the Charter” (1987) 25:4 Osgoode Hall LJ 701 at 739–44.

27. Lorraine Weinrib, “Learning to Live with the Override” (1990) 35 McGill LJ 542 at 557–69.

28. Although Slattery and Weinrib differ as to how and why a preemptive use of the notwithstanding clause should be made, both agree on the principle that a preemptive override can be legitimate.

29. *Act respecting the Constitution Act, 1982*, *supra* note 10.

30. *Ford*, *supra* note 6.

influence on a Quebec doctrine that was already favourable to the idea of preemptive insertion. This position is also strengthened by the fact that, as we will see shortly,<sup>31</sup> many items tied to federalism and domestic considerations upheld in the Quebec doctrine as justifications for invoking the override mechanisms demand, by their very nature, a preemptive application of it.

For Professor Henri Brun, a leading scholar at the Université Laval, the matter is simply not an issue. Since the inception of the Quebec Charter in the 1970s, he takes for granted that the legislator can perfectly well use a notwithstanding clause prior to any judicial ruling when necessary to protect collective interests—all the more so for a culturally vulnerable community such as Quebec's.<sup>32</sup>

In 1991, Jacques Gosselin argued in favour of preemptive overrides with regards to the Canadian Charter, because:

It is conceivable that a legislator, even when it believes that a contemplated legal measure is not contrary to the Charter, could consider, given the importance of the measure, that it would be preferable to preemptively protect it from judicial challenges.<sup>33</sup>

As Slattery did, Gosselin states that such *a priori* use of the notwithstanding clause would not challenge the ideals of the Charter, but rather the courts' monopoly of its interpretation.<sup>34</sup> Likewise, for Gosselin, using the notwithstanding clause after a judicial decision invalidating a law on charter grounds may also be justified in order to refute a ruling if, in the legislator's opinion, it turns out to be ill-founded.<sup>35</sup> In his view:

There needs to be some sort of alternation between the organic powers defining which interpretation of the Charter receives authority in order to concretely ensure that, within the Canadian community, and inside the distinctive society

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31. See I.C, below.

32. Henri Brun, "Le Québec peut empêcher la vente du sol québécois à des non-Québécois" (1975) 16:4 C de D 973 at 974 [Brun, "Le Québec peut empêcher la vente"].

33. Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, Que: Yvon Blais, 1991) at 234 [our translation].

34. *Ibid* at 235.

35. *Ibid* at 236.

that is Quebec, the definition of fundamental rights will not be the exclusive prerogative of jurists.<sup>36</sup>

As this short analysis indicates, there is already a first element of distinction between the Anglo-Canadian doctrine and the Quebec doctrine regarding the time of insertion for a notwithstanding clause. While the question of a preemptive use is subject to controversy in the Anglo-Canadian doctrine, it seems to be more accepted in Quebec.<sup>37</sup>

## B. International Law Considerations

Another element of discussion on the moral legitimacy of employing the notwithstanding clause resides in international law considerations. Given that fundamental human rights are intrinsically rooted in human nature beyond any national recognition, and further given that charter rights trace their roots in major international instruments such as the *Universal Declaration of Human Rights*<sup>38</sup> or the *International Covenant on Civil and Political Rights* (hereafter referred to as the International Covenant of 1966),<sup>39</sup> would it be morally acceptable to override charter rights to protect a legislation that would be at odds with international instruments?

On this question, two main standpoints emerge. On the one hand, the notwithstanding clause should simply never be used in a way that would go against internationally recognized human rights—and thus, should never be employed in a way that would be condemned by an international organization charged with their promotion. On the other hand, some consider that divergences of interpretation may arise as

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36. *Ibid* at 237 [our translation].

37. With regards to the leading trends established by Brun, Tremblay and agreeing authors in their wake. As we will see further at III.B, below, their theory face some indirect opposition, chiefly from José Woehrling (*infra* note 241). However, since Woehrling's disagreement is hypothetical in nature—and more so since the National Assembly's legislative practice on invoking the notwithstanding clause lines up with Brun and Tremblay's approach (and not with Woehrling's: his theories being hypothetical and implying modifications to the Quebec Charter, *supra* note 5, from its current state), we believe that Woehrling's dissent is of a somewhat nuanced importance in the greater scheme of things. Thus, while we could accept that some degree of disagreement exists both in the Anglo-Canadian and in the Quebec literatures, the degree of disagreement appears much lower in Quebec than in English Canada.

38. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

39. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR] [*International Covenant of 1966*].

to the scope and interpretation of those rights and that, in some circumstances, a legislative override may be legitimate even when going against international authorities, provided that the legislator remains convinced that, in good conscience, it does not infringe fundamental human rights. In this respect, it seems that while Anglo-Canadian authorities are simply silent on the question,<sup>40</sup> it is subject to some debate within the Quebec doctrine.

In 1988, Guy Tremblay and Sylvain Bellavance published an interesting paper on charter rights and their roots in the British tradition, notably addressing the override mechanisms question in light of international law considerations.<sup>41</sup> In their article, they highlighted how important it is for a sovereign State to be able to have a final say in its own rule of law, even if it leads to disagreements within the international community. Following the same principle, EU Member States must retain a large “margin of appreciation” in determining the nature and scope of human rights and their legal realization, as it is the case regarding the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter referred to as the European Convention on Human Rights).<sup>42</sup> In this perspective, the presence of a notwithstanding clause serves as a powerful mechanism to preserve parliamentary sovereignty from being captured by outside unaccountable influences. This approach has been validated by the European Court of Human Rights.<sup>43</sup>

Considering the above, Tremblay and Bellavance conclude that the notwithstanding clause of the Canadian Charter should not be abolished. In their opinion: “absolutely nothing gives ground to believe that, given the current state of affairs, a derogation made against a right entrenched in the Canadian Charter would infringe the fundamental human rights recognized by the International Covenant of 1966.”<sup>44</sup> They hold that the use of a notwithstanding clause may be wholly justified as long as it does not intrinsically violate internationally

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40. Neither Kahana nor any of the Anglo-Canadian authors he reviews (Weiler, Slattery, Weinrib) specifically address the question, leaving readers to extrapolate their respective positions.

41. Guy Tremblay & Sylvain Bellavance, “La suprématie législative et l’édiction d’une charte des droits britannique” (1988) 29:3 C de D 637.

42. *Convention for the Protection of Human Rights and Fundamental Freedom*, 4 November 1950, STE n° 5 (entered into force: 3 September 1953) [*European Convention on Human Rights*].

43. Tremblay & Bellavance, *supra* note 41 at 654.

44. *Ibid* [our translation]; *International Covenant of 1966*, *supra* note 39.

recognized human rights, while the power to determine the reach and scope of those rights remains a national matter.

In 1991, Jacques Gosselin went further and wrote that a notwithstanding mechanism in human rights laws was actually *desirable* to promote human rights. For Gosselin, some human rights bear a collective or community value, such as those encompassed by the *International Covenant on Economic, Social and Cultural Rights* (hereafter referred to as the International Covenant on Economic), and must be protected from individual claims that could also invoke human rights to nullify their effects.<sup>45</sup>

In this perspective, Marie Paré published a paper of significant interest in 1995, in which she observes that there are many differences between the notwithstanding clause contained in the Canadian Charter and the one in the International Covenant of 1966 as well as between both documents in general.<sup>46</sup> In this light, she concludes that: “The mere presence of section 33 in the Canadian Charter does not constitute a violation of Canada’s international obligations.”<sup>47</sup> Further nuancing, Paré points out that Saskatchewan once used the notwithstanding clause to quash strike action rights during a labour dispute—an action validated by the Supreme Court of Canada<sup>48</sup>—despite the fact that strike action rights are protected by the International Covenant on Economic. She also cited the example of Quebec’s prior use

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45. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*Covenant on Economic*]; see also Gosselin, *supra* note 33 at 241–46.

46. On the one hand, the notwithstanding clause of the Canadian Charter applies to human rights deemed as inviolable by the International Covenant of 1966 (*supra* note 39) such as the right to life and the protection against cruel treatments. On the other hand, section 33 of the Canadian Charter does not apply to linguistic rights, which are by that fact made untouchable under charter law, while they are not under the International Covenant of 1966. Moreover, as opposed to some international agreements such as the *European Convention on Human Rights* (*supra* note 42), the Canadian Charter does not feature any merit criteria (such as a national threat) to justify using the notwithstanding clause. Paré reminds us that the Canadian Charter and the International Covenant of 1966 are very different in nature: the first being legally binding *per se*, while the second is not, due to State sovereignty. Given that no international rule of law can force a Member State to include an international obligation within its own constitution, this principle of State sovereignty explains why the legislator has all the necessary leeway to choose what it perceives to be the most appropriate way to comply internally with its international obligations according to the International Covenant of 1966 as long as he effectively applies them. See Marie Paré, “La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international” (1995) 29 RJT 629 at 635–41.

47. *Ibid* at 640–41 [our translation].

48. See *Act to Provide for Settlement*, *supra* note 16.



of the notwithstanding clause to protect the provisions of the *Charter of the French Language* on exclusive use of the French language in commercial advertising, despite the opinion of the United Nations Human Rights Council (UNHRC) that it contravenes the International Covenant of 1966<sup>49</sup>. Immediately after these observations, she pleads in favour of the notwithstanding clause. For Paré, this latter instance was a prime example of the appropriateness of using the override mechanism against international authorities. Strongly criticizing the UNHRC ruling for its incorrect understanding of the facts and its “misconception of Canadian realities”<sup>50</sup> Paré reminds us again that, in some occasions, even international organizations may err—if not in law, at least in facts—when rendering judgement. To that effect, she echoes Henri Brun and Jean-Maurice Arbour, who also analyzed the case, and concluded that the UNHRC’s decision was lacking any “particular and thoughtful examination” of the “specific situation of the francophone population in Quebec.”<sup>51</sup>

Thus, must we understand that using the notwithstanding clause in a way “contrary” to internationally recognized human rights as *decided by international instances* is not necessarily a negation of those rights? Rather, it becomes a way to preserve the sovereign State’s power to interpret and apply those rights. It recognizes that a sovereign State should retain appreciative standing when determining the facts underlying litigious situations on its own soil. Proximity should entitle sovereign States to have a final say when disagreeing with international organizations, which may be too distant from the State’s specific situations or needs when contemplating human rights situations.

In a comparable perspective, André Binette published an article on the notwithstanding clause in 2003. In his article, Binette compares the notwithstanding clause of the Canadian Charter to those featured in some international treaties, such as the International Covenant of 1966 and the European Convention on Human Rights. According to him, the Canadian Charter is very different from these treaties, notably because it does not make the fundamentally intangible rights recognized as such by international law in internal matters. In this context, he quotes

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49. Paré, *supra* note 46 at 646.

50. *Ibid* at 651 [our translation].

51. Jean-Maurice Arbour & Henri Brun, “L’avis du Comité des droits de l’Homme concernant la loi 178. Un ukase cassant et une grande désinvolture du comité”, *Le Soleil* (27 May 1993) A-17.

Paré and reaches similar conclusions on matters of international law,<sup>52</sup> before turning to internal matters.

In the end, we find that the question of legislative overrides of charter rights with regards to international law considerations constitutes a distinctive element between the Quebec literature and its Anglo-Canadian counterpart. Even if the issue is still subject to debate, the mere fact that it is being addressed in Quebec constitutes a significant element of distinction, contrasting with Anglo-Canadian theories where there is simply no apparent stance on the question.

### C. Federalism, Identity, Social Progress and Other Collective Domestic Considerations

Another—very distinctive—element distinguishing the Anglo-Canadian and Quebec theories of the notwithstanding clause is how they approach the notwithstanding mechanism (specifically that of the Canadian Charter) when it comes to matters of collective domestic policies, in the greater political and judicial context of federalism. Once again, while this subject received little attention in the Anglo-Canadian doctrine, it has gathered considerable interest in Quebec.

For many authors in the Quebec doctrine, the notwithstanding mechanism is seen as a way to protect and promote its collective cultural distinctions in two ways. First, by allowing legislative actions to function smoothly and promote necessary legislation rooted in collective domestic interests without being disrupted by legal challenges; second, by allowing legislation destined to uphold elements of its collective identity to remain in force despite charter rights.

In the Anglo-Canadian doctrine, Weiler's and Slattery's theories<sup>53</sup> seem to set the table; the only justified reason for invoking the override mechanism would be in case of a disagreement between the legislator and the tribunals as to how better comply with charter rights. The question of actually *departing* from individual-centred charter rights to pursue other objectives in the name of federalism, collective interests or social values appears nonsensical and contrary to their very idea.

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52. André Binette, "Le pouvoir dérogatoire de l'article 33 de la *Charte canadienne des droits et libertés* et la structure de la Constitution du Canada" (2003) (special ed) R du B 107 at 125–28.

53. Weiler, *supra* note 23; Slattery, *supra* note 26.

Weinrib is one of the few Anglo-Canadian authors to consider that the notwithstanding clause could legitimately be used to promote majority values.<sup>54</sup> For Weinrib, the legislator could be morally justified in setting aside charter rights to protect a piece of legislation from constitutional scrutiny, as long as it remains convinced that it respects the spirit of the Charter.

Her perspective is not without reminding section 1 of the Canadian Charter, which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In this respect, one can construe Weinrib’s argument for the notwithstanding clause as allowing it when such justifications are present—as the spirit of the Canadian Charter would allow it in this circumstance. The notwithstanding clause thus becomes a form of preemptive protection to be used if the legislator is convinced that, in the end, the challenged legislation would pass the test of section 1. While Weinrib does not address the specific question of the preservation of local distinctiveness within a federative context, we gather from her position that such a consideration *could* probably be invoked as a valid majority value<sup>55</sup>—but the potential reach and validity of such a justification remains open to conjecture.

In the end, morally speaking, the Anglo-Canadian doctrine seems to view the override mechanism mainly as a procedural tool to prevent litigation or to promote a specific interpretation, that should only be used when the legislator is convinced that the act protected by the notwithstanding clause, justified by social policies, would still remain valid even after a constitutional challenge. It does not consider legislative overrides as a legitimate mean to actually *set aside* charter rights in the name of superior interests. As for matters of preserving local particularities in the name of federalism *despite* charter rights, the Anglo-Canadian doctrine seems to bear a silently negative stance on this perspective.

By contrast, the Quebec doctrine addresses the subject, considering it one of the core reasons for invoking the notwithstanding clause.

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54. Weinrib, *supra* note 27.

55. It is noteworthy to observe that the Supreme Court of Canada explicitly recognized that the need for preservation of Quebec social and linguistic distinctiveness is, by essence, linked to the federal union of 1867. See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 59, 1998 CanLII 793 (SCC).

Henri Brun and Guy Tremblay are amongst the first authors in Quebec that laid out the foundation of a distinctive Quebec theory of the notwithstanding clause, particularly when it comes to matters of collective interests for Quebec. In 1977, less than two years following the entry in force of the Quebec Charter, Henri Brun wrote:

The Quebec Charter, in that respect, almost exclusively sets out individual rights, and does so in an extensive manner. However, given the context of a vulnerable community, as is Quebec in economic and cultural matters, it may appear foolhardy to consider that all the individual rights deemed fundamental by the Charter are absolute. It could be wise for the State, at least on a legislative standpoint, to retain a capacity to encroach on some individual liberties, on some occasions, to ensure the survival of some collective liberties.<sup>56</sup>

Developing his thoughts, he gives the examples of the *Official Language Act*,<sup>57</sup> adopted prior to the *Charter of the French Language*, of section 39 of the *Cinema Act*<sup>58</sup> (providing that all movies not originally created in French must be dubbed or subtitled in French for Quebec), and of the *Walter*<sup>59</sup> and *Morgan*<sup>60</sup> cases. The first case upheld an Albertan statute pertaining to land ownership, which was judged valid despite encroaching on the Hutterite religious practices. The *Morgan* case, for its part, focused on a Prince Edward Island statute that also limited land ownership of non-residents and was also judged as valid. In a 1975 paper commenting on this case and similar issues in Quebec, Henri Brun emphasized on the necessity for a fragile community to be able to protect its lands from alien appropriation, even if doing so could be seen as discriminatory for non-residents. According to him: “the question of alien appropriation and ownership of land significantly illustrates the conflict between individual freedoms and collective liberties that may underlay a legal system.”<sup>61</sup> He also adds:

In Canada, and moreover in Quebec, communities are sufficiently vulnerable (especially Quebec) to create a context in

56. Henri Brun, “La Charte des droits et libertés de la personne: domaine d’application” (1977) 37:2 R du B 179 at 199 [Brun, “La Charte des droits”] [emphasis added] [our translation].

57. *Official Language Act*, SQ 1974, c 6.

58. *Cinema Act*, SQ 1983, c 37, s 194, today CQLR c C-18.1 (formerly *Act respecting the Cinema*, SQ 1975, c 14, s 1).

59. *Walter et al v Alberta (AG)*, [1969] SCR 383, 1969 CanLII 64 (SCC).

60. *Morgan v Prince Edward Island (AG)*, [1976] 2 SCR 349.

61. Brun, “Le Québec peut empêcher la vente”, *supra* note 32 at 974 [our translation].

which individual freedoms should be legally protected by employing express legislative exemptions (“notwithstanding clauses”) that would enable the federal and Quebec governments to encroach on individual freedoms in the name of collective considerations, under the sole condition that they must do so in express terms.<sup>62</sup>

Two years later, in a 1977 paper on the Quebec Charter, in which he mentioned that the Quebec notwithstanding clause appears to be “adapted to the Quebec context,” Brun’s opinion remained unchanged. While, on the one hand, he wrote that “individual rights are protected by the legislator’s duty to expressly state any intention it may have to diminish a liberty,” on the other hand he adds that “collective interests may have to prevail in the end, which is not necessarily abusive, given a context in which, in certain matters, the will of the majority requires the helping hand of the law to be carried out.”<sup>63</sup> He went on by adding that the legislator should only use the notwithstanding clause when dealing with such collective issues because, as a general matter, the power to read into charter rights should be left to tribunals.<sup>64</sup>

Thus, according to Brun, the notwithstanding clause can be legitimately employed to protect a vulnerable national community, such as Quebec’s, in order to enable it to safeguard some collective liberties regarding its language and culture, or, in today’s words, its identity. While this argument does not seem to explain Brun’s insistence on the importance of agriculture and economy at first glance, a historical perspective sheds some light on the matter; especially since Father Labelle and his regional colonization policy, and moreover since Lionel Groulx’s, regional and agricultural development gained a central role in Quebec national identity.<sup>65</sup> When Professor Brun writes about the Eastern Townships and the importance of “reconquering one’s own land” in order to avoid “an alienation of land, [which] means a pure and simple wholesome alienation of the community,”<sup>66</sup> he is anchored in this reasoning. More precisely, we can link this concern about land and economy to the works of Esdras Minville, a founding father of both

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62. *Ibid* at 975 [our translation].

63. Brun, “La Charte des droits”, *supra* note 56 at 201.

64. *Ibid* at 202.

65. For further readings on Father Labelle, see Gabriel Dussault, *Messianisme, utopie et colonisation au Québec (1850–1950)* (LLD Thesis, Université de Paris, 1975) at 272.

66. Brun, “Le Québec peut empêcher la vente”, *supra* note 32 at 974 [our translation].

Quebec economic concerns and cultural nationalism.<sup>67</sup> Within such a line of thought, Henri Brun's words on both economy and agriculture now appear as a coherent whole, encompassed within the broader concept of national identity.

Of course, one cannot reduce Henri Brun's theory of the notwithstanding clause to national identity questions, because the concept of "collective liberty" is also deeply rooted in the heart of his theory. This concept brings Brun's approach closer to democracy than to identity only. Also, since Professor Brun situates them on a "legislative level,"<sup>68</sup> collective liberties bring us closer to parliamentary sovereignty as well.

Decades later, Brun was still advocating the same views, having then been joined in his endeavour by several other Quebec scholars—notably by Professor Guy Tremblay—and later by Professor Eugénie Brouillet. Alongside them, he further developed his theories in his book *Droit constitutionnel*, a doctrinal pillar in Quebec constitutional law, last reedited in 2014 with Tremblay and Brouillet.<sup>69</sup> In their book, they submit that the presence of a notwithstanding mechanism in both the Canadian and the Quebec Charters is justified and legitimate in the name of parliamentary sovereignty. For them, the possibility of a legislative override allows: "simply put, to restore parliamentary democracy with respect to certain rights and freedoms."<sup>70</sup> Provincial legislatures (especially Quebec National Assembly) must retain a final say in some matters of local and collective interests. These matters must be protected from both the inherent standardizing influence of the Canadian federative context, as well as from the judicial power's ability to effectively block the legislature's power to carry out necessary political action. For this reason, amongst others, they approve of the conclusion of the *Ford* case to exclude merit consideration behind the use of a notwithstanding clause. On section 33 of the Canadian Charter, they also add:

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67. On Esdras Minville, see especially François-Albert Angers, "La pensée économique d'Esdras Minville" (1996) 72:4 *L'Actualité économique* 375; Dominique Foisy-Geoffroy, "Esdras Minville et l'idée de décentralisation" (Centre et périphéries, conference delivered at the 54th Congrès de l'Institut d'histoire de l'Amérique française, Montréal, 26 October 2001), online: </faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/Minville-ideeededecentralisation.html>. See also Esdras Minville, *Le nationalisme canadien-français* (Montréal: Fides (Presses des HEC) 1992).

68. Brun, "La Charte des droits", *supra* note 56.

69. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville, Que: Yvon Blais, 2014).

70. *Ibid* at 968, para XII-2.15.

For some, it may appear as an incongruity, hardly in line with the very idea of a charter. In our opinion this view is somewhat shortsighted, as one should simply not overlook the federal context underlying the Charter. In convening on their adherence to a federation, the founding provinces wanted to retain the power to decide freely on certain matters for themselves in contrast to a Canadian Charter that aims at standardizing and centralizing law in Canada.<sup>71</sup>

More importantly, they also add the following:

That which holds true for the whole country holds *a fortiori* true for Quebec. It is indeed vital for the Quebec society to have the last word on some subjects that are essential to its survival, given its specific cultural situation in North America and in Canada. The express derogation procedure allows, to some degree, to keep this power to have a final say on some subjects.<sup>72</sup>

Dating back to 2014, these words remind us of Henri Brun's 1977 paper. Formally, he no longer speaks of Quebec economic and cultural vulnerability, but rather of Quebec particular cultural situation. Yet, on the merits, the same core argument remains: the use of the notwithstanding clause is justified in order to protect Quebec identity. Additionally, since the 2014 text holds the same position on the Canadian Charter than the one found in the 1977 text on the Quebec Charter, it indicates that the same reasoning is applicable to both Charters, and was as valid then as it is today.

A similar view of the purpose of the notwithstanding clause in a federal context was also put forward by Jacques Gosselin. In 1991, he published a book, containing a chapter titled "A Strategy to Understand Section 33 and Judicial Scrutiny in Charter Law."<sup>73</sup> In the said chapter, he cites Henri Brun to remind us that, alongside parliamentary democracy, "collective sovereignty already concretely existed in Canada, beyond the Constitution, well before the entry into force of the Charter."<sup>74</sup> Gosselin adds that if we are to consider the majority rule

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71. *Ibid* at 970, para XII-2.20 [our translation].

72. *Ibid* at 970, para XII-2.21 [our translation].

73. Gosselin, *supra* note 33 at 225. Chapter title translated from French: "Stratégie pour une compréhension de l'article 33 et du contrôle judiciaire sous le régime de la Charte".

74. *Ibid* at 288 [our translation]. Gosselin cites Henri Brun, "La Charte canadienne des droits et libertés comme instrument de développement social" in Clare F Beckton & A Wayne Mackay,

as a central point in democracy, then section 33 of the Canadian Charter is one of its manifestations.<sup>75</sup> At the core of Gosselin's logic, two main motives seem to justify using the notwithstanding clause. The first motive concerns Canadian diversity in general and Quebec diversity in particular. For him, the founding principles of federalism entail that some degree of region-State decentralization is necessary "to better serve the interests, the specificity and the identity of the people living in these regions."<sup>76</sup> Building on Brun's arguments, he observes that the Canadian Charter, indeed, creates both a centralization and a standardization effect.<sup>77</sup> In this context, Gosselin considers that:

Section 33 can be considered as an indirect mechanism that allows the specific and distinctive characters of the federation's constitutive entities, which in its absence would risk being evacuated or relegated to a negligible quantity by the courts under Charter scrutiny, to be maintained so that Canadian diversity and the specificity of its constitutive entities—which directly participate to the democratic ideal and of which the federal principle should be the guardian—would not fall into withering.<sup>78</sup>

This would hold especially true for Quebec, as in the absence of a specific constitutional recognition of it as a distinct society, the notwithstanding clause may turn out to be the only real way for Quebec to maintain its distinct character.<sup>79</sup>

Furthermore, for Gosselin, the legislative power to override individual charter rights when greater collective concerns warrant it is also linked to a society's ability to enact social progress. Since many policies concerned with social justice and equity are tailored to grant special advantages to certain disadvantaged groups, the notwithstanding clause becomes a powerful safeguarding tool for such actions to

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eds, *Les tribunaux et la Charte*—Commission royale sur l'union économique et les perspectives de développement au Canada (Ottawa: Public Services and Procurement Canada, 1986) 1 at 6 [Brun, "La Charte canadienne"].

75. Gosselin, *supra* note 33 at 229.

76. *Ibid* at 246 [our translation].

77. *Ibid* at 247; Brun, "La Charte canadienne", *supra* note 74 at 9–12.

78. Gosselin, *supra* note 33 at 249 [our translation].

79. *Ibid*.



protect them from being invalidated in court by non-disadvantaged individuals who could technically invoke the Charter to defeat their purpose.<sup>80</sup>

Quoting Gosselin, Paré stated that the notwithstanding clause is “justified by the fact that, in the end, the definitive power to read into the Charter is in the Supreme Court’s hands. This represents a ‘danger to standardize the local specificity that federalism should uphold.’”<sup>81</sup> Finally, relying on Canada’s and Quebec’s interventions in front of the United Nations Human Rights Council on democracy and parliamentary sovereignty, as well as on Gosselin’s papers and a text written by Weinrib,<sup>82</sup> Paré adds that “section 33 must be considered as an instrument to preserve the necessary equilibrium between the decisions of two legitimate and complementary institutions.”<sup>83</sup>

In a comparable perspective, inside his article published in 2003 on the notwithstanding clause, André Binette observed two occasions where Quebec used the notwithstanding clause in a way that generated a great deal of controversy in the rest of Canada; the *Act Respecting the Constitution Act, 1982*<sup>84</sup>, which added a general reference to the notwithstanding clause to all laws already in force in Quebec, and the *Act to Amend Bill 101*<sup>85</sup>, *Charte de la langue française*, upholding the provisions of the *Charter of the French Language* on exclusive use of the French language in commercial advertisement despite its invalidation on Charter grounds by the Supreme Court.<sup>86</sup> Even more interestingly, he points out that: “all other cases involving the notwithstanding clause of the Canadian Charter, systematically accompanied by a reference to the notwithstanding clause of the Quebec Charter, generated a lot less controversy.”<sup>87</sup> Furthermore, he adds that “the use of the notwithstanding clause continues to be better accepted by the public opinion in Quebec than in the rest of Canada, judging by

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80. *Ibid* at 241–46.

81. Paré, *supra* note 46 at 653; Gosselin, *supra* note 33 at 247 [our translation].

82. Weinrib, *supra* note 27.

83. Paré, *supra* note 46 at 655 [our translation].

84. *Supra* note 10.

85. SQ 1988, c 54.

86. Binette, *supra* note 52 at 117–18; Ford, *supra* note 6.

87. *Ibid* at 119 [our translation].

the fact that Quebec is the only province in which several references to notwithstanding clauses are still in force.”<sup>88</sup>

In Binette’s opinion, the notwithstanding clause allows to set aside conservative jurisprudence to allow more progressive measures to prevail.<sup>89</sup> In that respect, his position lines up with Brun’s, who mentioned that “a charter of rights is a particularly conservative instrument” and insisted on the importance of legislative actions for social progress<sup>90</sup>. For Binette, the notwithstanding clause is clearly an important instrument for Quebec social progress to move forward despite judicial conservatism, in addition to being preferable to other alternatives in that respect such as for political powers to deliberately ignore court rulings or to appoint new judges—a matter in which Quebec has little to say, as the province has no constitutional power to nominate superior court judges.<sup>91</sup> In such a context, he explicitly rallies to Jacques Gosselin’s position, stressing out the importance to allow the respective wisdom of judiciary and parliamentary powers to alternate and balance one another.<sup>92</sup>

André Binette concludes his paper with an overview of the relationship between the notwithstanding clause and the unwritten constitutional principles revealed in *Reference re Secession of Quebec*.<sup>93</sup> To him, section 33 of the Canadian Charter is a meeting ground for federalism and democracy.<sup>94</sup> This section would also manifest both the principle of constitutionalism and of the rule of law, as it stems from the constituent power, and could be construed as protecting minority rights by creating special rights in favour of disadvantaged groups.<sup>95</sup>

In the end, it appears that the question of federalism and collective domestic issues are sharply dividing the Anglo-Canadian and the Quebec doctrines when it comes to the notwithstanding clause—generating a seemingly low degree of interest within the former while appearing paramount to the latter. Of course, every Canadian province is different, and each one faces specific issues and distinct challenges

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88. *Ibid* at 149 [our translation].

89. *Ibid* at 139.

90. Brun, “La Charte canadienne”, *supra* note 74 at 7 [our translation].

91. Binette, *supra* note 52 at 136.

92. *Ibid* at 138.

93. *Reference re Secession of Quebec*, *supra* note 55.

94. Binette, *supra* note 52 at 114.

95. *Ibid* at 146.

from one another's. The importance of preserving local and cultural differences from standardization within the federation is several orders of magnitude higher in Quebec<sup>96</sup>—being placed in a critical situation of cultural minority within Canada that does not apply to Anglo-Canadian provinces. This situation of cultural vulnerability not only demands direct cultural protection through legislative action, but also calls for Quebec to retain a higher degree of control on its social<sup>97</sup> and economic levies.<sup>98</sup>

#### D. A Material or Substantive Approach?

One final point of interest in distinguishing the Anglo-Canadian and Quebec theoretical approaches to the notwithstanding clause resides in the degree of substantive consideration that the legislator should display with regards to the rights it overrides. Should the use of the notwithstanding clause itself be subject to a merit analysis (a *substantive* approach requiring the legislator to explain and justify itself as to why and how it overrode charter rights), or does the use of a notwithstanding clause preclude in itself any form of merit analysis on its validity (a *material* approach, in which the legislator would not be obligated to justify itself to invoke the notwithstanding clause)?<sup>99</sup> In either cases, what degree of formal requirement should be followed regarding the wording and detail of a notwithstanding clause reference?

There is some distinction between Anglo-Canadian and Quebec theories in this respect. While both doctrines recognize that the Supreme Court settled the matter in law in the *Ford* case, this ruling seems rather criticized within the Anglo-Canadian doctrine—while being more accepted in Quebec. Many Anglo-Canadian scholars feel

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96. See our previous study on the matter: Guillaume Rousseau, "Théorie québécoise de la disposition dérogoire: quand la langue, l'identité ou le social prime l'individuel" in Patrick Taillon, Eugénie Brouillet & Amélie Binette, eds, *Regard québécois sur le droit constitutionnel—Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (Cowansville, Que: Yvon Blais, 2016) at 703.

97. See Binette, *supra* note 52.

98. See Brun, "La Charte canadienne", *supra* note 74.

99. Of course, we are here addressing the question from a legal and judicial standpoint—not a political one. Even when considering "ordinary" laws and regulations, outside the scope of Charter rights, while the legislator is not *required* to explain itself in great detail, failure to do so—or to do so unconvincingly—will always bear a political cost that can hurt, or potentially bring down, a legislature on the next election. Yet, outside any question of political consequences, legislators do not *have* to explain themselves as to the reason why they enacted a given law for said law to be legitimate.

that a legislative override should be subject to some degree of merit analysis and formal requirement (if not regarding its legality, at least in matters of legitimacy). By contrast, many authors in Quebec share the view that, as was decided in *Ford*, a material approach without any particularly high degree of formal requirement is enough.

For Kahana, as the override mechanism should only be used as a legislative response following a constitutional judgement, it would only be appropriate to use it after thoughtful consideration of the Supreme Court's invalidation. For him, while the detailed thoughtful considerations of the Supreme Court's ruling would not necessarily have to be featured in the text of the notwithstanding clause itself, they should appear in parliamentary debates as the clear reason behind the legislature's choice to use the override.<sup>100</sup> In this respect, Kahana's positions are somewhat aligned with those of Weiler, as for him too, the notwithstanding clause should only be used as a legislative response to a Supreme Court decision, and as such, should only be used as a detailed and reflected response by the legislature following a judicial decision.<sup>101</sup>

Slattery held a comparable opinion. According to him, the legislator must explain itself in great detail. But since, for him *a priori* uses are acceptable, the contemplated thoughtful legislative explanation needs not necessarily to follow and respond to a Supreme Court's ruling. He even advocated, prior to the *Ford* ruling, that notwithstanding clause references should themselves be subject to judicial review under section 1 of the Canadian Charter.<sup>102</sup> Weinrib shares a similar view, with additional formal requirement. For her, any notwithstanding clause reference must have its reach delimited, made explicit by specific reference to the fundamental rights it contravenes (and not only by referring to a section of the Canadian Charter), and must be interpreted narrowly.<sup>103</sup>

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100. Kahana 2002, *supra* note 20 at 248ff.

101. Although, it must be underlined, Weiler and Kahana disagree on the nature of the relationship between the Supreme Court and the legislature when it comes to legislative overrides. For Weiler, the relationship is an antagonistic one, in which the courts and the legislature are adversaries competing to have the last word when they consider that the other is erring. Kahana rather sees them as partners, mutually reinforcing each other's reflection process through a shared dialogue. See Kahana 2002, *supra* note 20.

102. Brian Slattery, "Override Clauses Under Section 33" (1983) 61:1 Can Bar Rev 391.

103. Weinrib, *supra* note 27 at 557–69.

Thus, with the exception of Weinrib's asking for formal wording and conceding that the legislature can actually legitimately want to set aside charter rights for a greater purpose, the majority of Anglo-Canadian authors perceive that a legitimate use of the notwithstanding clause, while not subject to textual formal requirements, should be submitted to a thoughtful explanation by the legislator as to why it is used, and why such an override is not in conflict with the spirit of the Charter.

Contrasting with the Anglo-Canadian theories, some authors in Quebec seem to perceive the notwithstanding clause less fearfully, more akin to considering it a political tool promoting the distinctive collective interests of a distinctive society than a dangerous double-edged sword that risks endangering civil liberties whenever it is used. As such, they conceive legislative overrides with much more political deference towards parliamentary sovereignty in collective matters and towards the legislature's choice to override charter rights when necessary, leading to a much more realist than substantive approach, with lower degrees of formal requirements.

For Tremblay and Bellavance, the legislator's ability to use the notwithstanding clause is intrinsically linked with parliamentary sovereignty. To them, this relationship traces its roots to a British idea of charter rights that recognizes this sovereignty without question. In their 1988 paper, Tremblay and Bellavance studied the United Kingdom's hesitation on the degree of formal requirement that should apply for a valid use of a legislative override of human rights.<sup>104</sup> At this time, the UK was still hesitating between a highly formalist approach, requiring the use of express terms for a valid use of the notwithstanding clause, and a less formal ("realist") approach, requiring the legislator to simply state its intention of applying a notwithstanding clause reference in an act rather than submitting its validity to a specific formulation.<sup>105</sup> Because of the significant impact charter rights have on parliamentary sovereignty, the authors conclude that "the realist approach seems better."<sup>106</sup>

It must be underlined, however, that the modern idea of charter rights is somewhat in tension with the British tradition and may be

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104. Tremblay & Bellavance, *supra* note 41.

105. *Ibid* at 650.

106. *Ibid* at 651 [our translation].

explained by the UK's intentions, at that time, to get closer to Europe—in which the European Convention on Human Rights holds a strong symbolic place.<sup>107</sup> According to Tremblay and Bellavance, the adoption of a UK Charter incorporating the elements of the Convention would allow the UK to align its human rights laws with international standards while preserving its autonomy at the same time, given the large “margin of appreciation” in its application that remains in the Member States’ hands according to the European Court of Human Rights.<sup>108</sup> This whole idea contrasts with the Canadian approach, which, while not always in line with international law, allows judiciary activism.<sup>109</sup>

Decades later, in *Droit constitutionnel*,<sup>110</sup> Tremblay, alongside authors Brun and Brouillet, still maintain that, again in the name of parliamentary sovereignty, the use of the notwithstanding clause should only be submitted to a material approach with low formal requirements. The only true criteria to take into consideration would therefore be a clear statement that the notwithstanding clause applies. As matters of merits, since the authors purport that charter rights must sometimes be set aside for the greater good, they do not plead that the legislator must prove in parliamentary debates, even when overriding the Charter, that it does so with the intention of actually complying to it. In this respect, their theories would partly meet with Weinrib's, but not entirely.<sup>111</sup>

However, this approach to the notwithstanding clause was not always unanimous in Quebec. A strong opponent of these views would be André Morel, for whom formal and procedural questions are paramount when invoking the notwithstanding clause. His approach was much more concerned with respecting the highest possible degree of formality before a legislator can set aside a fundamental right protected by a charter.<sup>112</sup>

107. *European Convention on Human Rights*, *supra* note 42.

108. Tremblay & Bellavance, *supra* note 41 at 654.

109. *Ibid* at 652–54.

110. Brun, Tremblay & Brouillet, *supra* note 69.

111. Not only because of Weinrib's highly formal requirements, but also because her position seems to gather around a utilitarian conception of the notwithstanding clause, considering it much more as a tool for good governance than as an instrument of cultural protection and social progress: *supra* note 27 at 567.

112. André Morel, “La coexistence des chartes canadienne et québécoise: problème d’interaction” (1986) 17 RDUS 49 at 65–69. However, it must be pointed that Morel's position predated the *Ford* case, in which the Supreme Court determined a lower standard than the one he proposed.

In conclusion, we believe we can legitimately gather that there is effectively a distinctive theory of the notwithstanding clause within the Quebec doctrine, that is substantially differentiated from the Anglo-Canadian approach to the override mechanism. From Henri Brun to Jacques Gosselin, Marie Paré and André Binette and through Guy Tremblay, Sylvain Bellavance and Eugénie Brouillet, there seems to be a distinctive and coherent Quebec vision of the notwithstanding clause containing several recurring elements. Even if it is neither unanimous nor single-minded, it is still a dominant vision with substantial cohesiveness—and the dissensions it faces can largely be reconciled (as we will further nuance in Section 3.2 below). Its leading principle submits that, even prior to a judicial ruling, the use of the notwithstanding clause can be justified in the name of democracy and parliamentary sovereignty. This is especially true when made in order to protect Quebec distinctive identity or to push forward social progress in a way not contrary to the human rights principles recognized by international law. This distinctive approach would also be characterized by a much deeper consideration of the override mechanism as a political tool to uphold the distinctive cultural features of Quebec against centrally driven standardization and to address specific collective domestic considerations within the Canadian federation, in accordance with founding principles of federalism, even if it means setting aside individual interests for the greater good of collective cultural survival. Finally, with regards to matters of form, this distinctive Quebec theory of the notwithstanding clause seems to favour a non-stringent approach with a great deal of deference to the legislator choice to override charter rights.

This distinctive vision would contrast with the Anglo-Canadian doctrine, which seems to view the legitimacy of the legislative override of charter rights in a much more restricted manner, mostly limited to, as Kahana puts it, a deliberative disagreement tool—the use of which should be limited to a legislative-judiciary dialogue on the best way to respect and implement the same rights they both recognize. As such, the Anglo-Canadian doctrine mainly views the legitimate application of the notwithstanding clause as a legislative response following a constitutional judgement (or, in Weinrib's and Slattery's cases, anticipating such a judgement) that must in all aspects follow the spirit of the Charter, and that should be contemplated with highly substantive and potentially formal requirements.

We believe that those conceptual distinctions on the moral legitimacy of using the notwithstanding clause may trace their roots in an ultimately different moral view of parliamentary sovereignty between Quebec and the rest of Canada.<sup>113</sup>

All this being said, it remains that, to gain convincing substance a theory must find empirical ground in the practical world, least it remains a simple idea. After demonstrating the existence of a coherent and sufficiently distinctive doctrinal approach to the notwithstanding clause in Quebec, we must now determine if this academic view actually corresponds to the legislative practice in Quebec.

## II. EMPIRICAL SURVEY OF THE PRACTICAL USE OF THE NOTWITHSTANDING CLAUSE IN QUEBEC

Would a distinctive Quebec theory of the notwithstanding clause, anchored in a distinctive vision of it as advocated within the Quebec doctrine, be consistent with the actual practice of the National Assembly and the various governments who referred to the notwithstanding clause throughout the years? Furthermore, are the reasons reported by Quebec academics to justify using the notwithstanding clause the same as those declared by the various sponsor ministers who actually used it?

To answer these questions, we investigated the actual uses of notwithstanding clauses made by the National Assembly between 1975 and 2014,<sup>114</sup> to identify the various contexts in which such references were made and the policy motives supporting them in the process.

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113. Further discussed below, III.A.2.

114. With 1975 corresponding to the year of the adoption of the Quebec Charter, containing the first notwithstanding clause to exist in the Quebec legislation, and 2014 being the latest date of our data analysis. As of September 2017 (date of final submission for publication of this paper), Bill 890, an *Act to ensure sound administration of justice in order to maintain public confidence in the justice system* (41th Leg, 1st Sess, Quebec, 2017) is currently studied by Quebec National Assembly, in reaction to the *R v Jordan*, [2016] 1 SCR 631 case. This Bill proposes to invoke the notwithstanding mechanisms of both Quebec Charter and Canadian Charter (cl 2) to set aside the Supreme Court's interpretation of section 11b) of the Canadian Charter (ordering, as general rule, stay of criminal proceedings after an 18- or 30-month period, depending on jurisdiction) to restore judicial discretion in compliance with several criteria on this question. If this bill becomes law, it would be one of the rare instances in which Quebec will have invoked a legislative override in response to a Supreme Court's ruling rather than preemptively. As matters of justification, it is however harder to qualify: having only been presented and not discussed yet—although we could theorize that it could potentially fall in the categories of either "State



We have done so by examining the relevant statutory texts and parliamentary archives. Through these archives, it is possible to uncover the reasons that were invoked by sponsor representatives, ministers or delegates—and sometimes, exceptionally, opposition spokespersons that were favourable to it and whose words were approved by the sponsor—to justify using the notwithstanding clause in a bill.<sup>115</sup>

The first time Quebec elected representatives officially commented on the notwithstanding clause was at the time of its adoption as section 52 of the Quebec Charter. The proposed section, as it then was, reads as follows: “sections 9 to 38 prevail over any provision of any subsequent act which may be inconsistent therewith, unless such act expressly states that it applies despite the Charter.”<sup>116</sup> For the Minister of Justice at the time, this was a necessity, for there are “circumstances in which the pursuit of public interest, society’s interest, lies in a derogation to principles laid out in a charter, precisely to attain desirable and legitimate social objectives.”<sup>117</sup> On another occasion, he referred to “circumstances in which society and State imperatives outweigh individual needs.” He also added that it would not be appropriate to require a special majority from future parliaments to use the notwithstanding clause, as this would go against the principles of

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imperatives” or “social progress” (on the perspective of public trust towards the justice system). All this being said, since this bill has not yet become law (and, since it originates from an opposition party, it has very little chance of becoming so), we will not consider it in our study.

115. For each law containing a notwithstanding clause reference that we will analyze, we will refer to statements made by the sponsor minister of the bill during its section-by-section study in parliamentary commission. We prioritized statements closest to the section of the bill referring to the actual adoption of the notwithstanding clause. In three cases, where a sponsor minister made very few statements of his own while approving those of the opposition, we took those opposition statements in consideration. In one case, related to small claims, in which the sponsor minister said very little about his proposition to use the notwithstanding clause during the parliamentary commission’s study of the section containing it, we referred to a declaration from the Minister of Justice made a short time prior to the adoption of the Quebec Charter. This is justified by the fact that on this specific occasion, the Minister of Justice exemplified a potential use for the notwithstanding clause as to enable the limitation of party representation by attorney in small claims matters. Finally, in some cases where neither sponsor minister nor opposition members held sufficient words regarding the use of a notwithstanding clause in a bill to look into them, we referred to the text of the bill itself as well as to general parliamentary comments.

116. Quebec Charter, *supra* note 5. This particular occasion will not count in our empirical survey, as the notwithstanding clause was not *used* but rather *created* on this instance. [Emphasis added].

117. Bill 50, *Loi concernant les droits et libertés de la personne*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 30th Leg, 3rd Sess, Vol 16, No 155 (26 June 1975) at B-5134 (Jérôme Choquette) [our translation].

“parliamentary democracy” and the legal principles of governance stemming from “England, [...] the mother of all parliaments.”<sup>118</sup>

Later on, the first time Quebec elected representatives officially commented on the notwithstanding clause of the Canadian Charter was in the wake of the *Act Respecting the Constitution Act, 1982*, of which objective was presented by the Minister of Justice as: “by a general and systematic use of the derogatory clause, often called the notwithstanding clause, we are making sure that the National Assembly can keep its legislative powers intact within certain limitations, without falling to subjection to an external legal framework.”<sup>119</sup>

Thus, the notwithstanding clause became associated with democracy and parliamentary sovereignty by both Quebec governments, the one responsible for the adoption of the Quebec Charter, and the first one to use the notwithstanding clause of the Canadian Charter.<sup>120</sup> Many after them have followed in their footsteps and will continue to do so. As for subject matters for which the notwithstanding clause was invoked throughout the years, they fall into three distinct categories: matters of State imperatives, matters related to the pursuit of social objectives, and matters related to identity issues.<sup>121</sup>

Following the general presentation of our raw results (II.A), we will categorize the various cases in which the National Assembly overrode

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118. Bill 50, *Loi concernant les droits et libertés de la personne*, 2nd reading, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 30th Leg, 2nd Sess, Vol 15, No 79 (12 November 1974) at 2731 (Jérôme Choquette) [our translation].

119. *Act respecting the Constitution Act, 1982*, *supra* note 10; Bill 62, *Loi concernant la loi constitutionnelle de 1982*, 2nd reading, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 32th Leg, 3rd Sess, Vol 26, No 59 (19 May 1982) at 3616 (Marc-André Bédard) [our translation].

120. It is interesting to note that this intellectual continuity in interpreting the notwithstanding clause endured despite changes in government. For example, the notwithstanding clause of the Quebec Charter was first adopted and used under the liberal government of Robert Bourassa, and the Parti Québécois Government of René Lévesque was first to use the notwithstanding clause of the Canadian Charter. The notwithstanding mechanism will be subsequently employed by both political formations as they succeed one another at the seat of power throughout the decades with a remarkable intellectual continuity in their approach despite their sharply conflicting views on many other aspects of Quebec politics.

121. Incidentally, we can note that these matters of social objectives are not without reminding us Jacques Gosselin's social rights and André Binette's progressive measures. At this stage, however, they have not yet evolved into language, culture or identity matters, even in the eyes of Parti Québécois representatives. In his 1977 paper, Henri Brun specifically criticizes them for failing to take this dimension into consideration. See Brun, “La Charte des droits”, *supra* note 56 at 199.

charter rights by invoking the notwithstanding clause according to the justifications presented in that respect by the legislature—respectively: in the name of State imperatives (II.B); the pursuit of social objectives (II.C) or identity issues (II.D). Each of these categories will be subject to a detailed analysis.

## A. Presentation of the Raw Results

While legislative overrides of charter rights are a rare thing in English Canada, the same can certainly not be said about Quebec. Since the entry in force of the Quebec Charter in 1975, the elected representatives used its notwithstanding mechanism on more than 30 occasions,<sup>122</sup> frequently while simultaneously referring to the notwithstanding clause of the Canadian Charter (which they invoked over 60 times) as well.

The results of our investigation regarding the use of the notwithstanding clause in Quebec are clear: it has been used on numerous occasions, without interruption, from 1975 up until the present day—albeit with a slight decrease in frequency over time. If we globally consider the systematic references to the notwithstanding clause of the Canadian Charter made between 1982 and 1985 through the *Act Respecting the Constitution Act, 1982*, as a single occurrence, and individually count every other single references and renewals of a reference to the notwithstanding clause of the Canadian Charter made afterwards, we total 41 clauses adopted by the National Assembly containing at least one reference—11 of which are still in force today. Amongst those 41 laws, 9 derogated to both Charters, 23 derogated to one or several provision(s) of the Quebec Charter, and 9 derogated to one or several provision(s) of the Canadian Charter; for a total of 32 derogations to the Quebec Charter and 18 for its Canadian counterpart. Regarding the laws still in force today, five are derogating to

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122. To compile those cases, we referred to an extensive document from the Quebec Ministry of Justice titled “Lois contenant une disposition dérogatoire à la *Charte québécoise des droits et libertés de la personne* postérieure à 1975 et à la *Charte canadienne des droits et libertés*, postérieure à 1985” dated 13 September 2011. Regarding the Quebec Charter, we also referred to Brisson and Deschênes for the 1975–1989 time period (Jean-Maurice Brisson & Yves Deschênes, *Texte annoté de la Charte des droits et libertés de la personne du Québec* (Montréal: SOQUIJ, 1989) at 143–45). On the Canadian Charter, we referred to Kahana 2002, *supra* note 20 at 293–94. We also conducted a keyword-based search in legal databases such as CanLII on both Charters for the 1989–2014 time period.

both Charters and six to the Quebec Charter only.<sup>123</sup> Since several of those acts featured more than a single reference to a notwithstanding clause through their various sections, as shown in the Appendix, we can also number those individual references, to a total of 45 paragraphs referring to the notwithstanding clause of the Quebec Charter, with 12 still in force, and 61 paragraphs referring to the notwithstanding clause of the Canadian Charter, with 5 still in force—for a combined total of 106 derogations, 17 of which being still in force.<sup>124</sup>

Within those 41 acts and 106 references, we categorize 4 acts, containing a total of 4 references, in which the notwithstanding clause was invoked in the name of State imperatives; 25 acts, containing a total of 60 references, where it was used for the pursuit of social objectives; and 11 acts, with a total of 39 references, where it was employed in the name of identity issues. This gives us a total of 40 acts with 103 combined references for study purposes.<sup>125</sup>

Further detailing, we can subcategorize the results within the references made in the name of social objectives between references made to respond to situational issues (4 acts, 6 references) and those made in the pursuit of social progress (21 acts, 54 references). We can also subcategorize those made with respect to identity issues between references made with regards to individual identity considerations

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123. Five acts referring to both Charters: *Act Respecting the Pension Plan of Certain Teachers*, CQLR c R-9.1, art 62; *Act Respecting the Government and Public Employees Retirement Plan, Act Respecting the Implementation of Recommendations by the Pension Committee of Certain Pension Plans in the Public Sector and Amending Various Legislative Provisions*, CQLR c R-10, art 223.1; *Act Respecting the Teachers Pension Plan*, CQLR c R-11, art 78.1; *Act Respecting the Civil Service Superannuation Plan*, CRLQ c R-12, art 114.1; and *Act Respecting the Pension Plan of Management Personnel*, CQLR c R-12.1, art 211. Six acts referring to the Quebec Charter only: *Jurors Act*, CQLR c J-2, art 52; *Code of Civil Procedure*, CQLR c C-25.01, arts 11 and 542; *Act Respecting Trust Companies and Savings Companies*, CQLR, c S-29.01, arts 151 and 276; *Act Respecting the Régie du logement*, CQLR c R-8.1, art 73; *Tax Administration Act*, CQLR, c A-6.002, art 93.18; and *Youth Protection Act*, CQLR c P-34.1, art 82.

124. We count each initial reference as well as each of its subsequent renewal as distinct occurrences, but we consider the general reference to the notwithstanding clause made in the *Act respecting the Constitution Act, 1982*, *supra* note 10, as amounting to three occurrences, as three sections within this act are referring to the notwithstanding clause.

125. We excluded from our classification the general derogation from the Canadian Charter made in the *Act respecting the Constitution Act, 1982*, *ibid*, which contained three separate references to the override of the Canadian Charter, as it was made as an act of political protest against the patriation rather than in the pursuit of a specific legislative goal. As such, it would be difficult to classify it in any discrete category, as it could fit in any and all of them, yet in an undefined manner. We concede that this case is of great political interest and that several arguments could be made to its classification in either category, but this falls outside the scope of our research, which is focused on precise and specific legislative intentions.

(1 act, 1 reference) and those made with an objective of collective identity preservation (10 acts, 38 references). We establish those specific sub-distinctions because, beyond the subject matter in which the notwithstanding clause was invoked, we perceived a different legislative intention in using the notwithstanding clause warranting such a sub-classification. For matters of social progress and of collective identity, we perceived the legislator's intention as motivated by a sense of collective affirmation and identity preservation in a sociological and somewhat republican sense, while we noticed that when it came to matters of situational issues and individual identity, the legislator's choice to override charter rights seemed more justified by good governance considerations and pragmatism, without the prominent sense of collective popular interest we found in the previous subcategories. We did not subcategorize references to State imperatives, because they all fall in the same category of good governance with no particular collective and sociological *impetus*.

In this regard, while we chose to address our findings in our detailed analysis in orders of subject matters,<sup>126</sup> we also could have classified them according to those two orders of legislative intent when referring to the notwithstanding clause: cases where it was invoked with an intent of collective affirmation and identity preservation (that would include references made in the two subcategories "social progress" and "collective identity"—we will hereafter refer to this category as "collective interest"), and cases where a legislative override was invoked for more pragmatic purposes of good governance (that would include references made in the name of "State imperatives," "situational issues" and "individual identity"—we will hereafter refer to this category as "good governance").

These instances motivated by a "collective interest" perspective constitute the core of Quebec legislative practice in which the notwithstanding clause was invoked to override charter rights. Indeed, out of the 40 acts containing 103 notwithstanding clause references made in the last 4 decades, 91 acts (77.5%), containing 92 references (89.3%), fell in this category, while only 9 acts (22.5%), containing 11 references (10.7%) fell in the "good governance" category.

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126. One of the reason for which we privileged this classification is that, while the subject matter for which a legislative override is invoked appears at first glance and warrants an easy classification, discovering the legislative intention behind it can only appear after analyzing each reference in detail and cannot be done upstream.

This leads us to establish that there is a very strong correlation between legislative overrides of charter rights and matters of collective and sociological interest in Quebec, while using the notwithstanding clause “simply” for reasons of good governance seems to constitute a minority of cases. The following Table summarizes our finding according to those classifications.

**Table 1: Classification of Notwithstanding Clause References by Subject Matter and Legislative Intent<sup>127</sup>**

A) CLASSIFICATION BY CATEGORIES					
	State imperatives	Social objectives		Identity issues	
		Situational issues	Social progress	Individual identity	Collective identity
Acts (individual references)	4 (4)	25 (60)		11 (39)	
		4 (6)	21 (54)	1 (1)	10 (38)
Ratio	10% (3.9%)	62.5% (58.2%)		27.5% (37.9%)	
		10% (5.8%)	52.5% (52.4%)	2.5% (1%)	25% (36.9%)

B) CLASSIFICATION BY LEGISLATIVE INTENT		
	Good governance	Collective interest
Acts (individual references)	9 (11)	31 (92)
Ratio	22.5% (10.7%)	77.5% (89.3%)

With those numbers in mind, we can now turn to a detailed analysis of the Quebec legislative practice when invoking the notwithstanding clause.

### B. Notwithstanding Clause References Justified by State Imperatives

The first category of cases we will address hereon are the occasions upon which the notwithstanding clause was employed in the name of

127. An exhaustive classification of acts and individual references is provided in Appendix.

State imperatives (four acts, four references). By “State imperatives,” we here mean the imperative need for the State to properly function unimpeded as a governing entity in an executive way. State imperatives, as we will address them herein, will be distinct from policy venues and political choices, and will be more akin to the administrative machinery of the State and government in the public sector that must be able to properly function and provide services to citizens.

We identified two types of subject matters where the notwithstanding clause was used in the name of State imperatives: special back-to-work legislation (II.B.1); and retroactive implementation of laws, regulations and decisions (II.B.2).

### 1. *Special Back-to-Work Legislation*

In July 1976, the government adopted a special legislation to order striking nurses to return to work. Section 14 of the *Act Respecting Health Services in Certain Establishments* provided that “notwithstanding Chapter 6 of the 1975 statutes (the Quebec Charter): any employee encompassed by section 2 is presumed to have violated its provisions for every given day where it can be proven *prima facie* that this employee did not fulfill his or her functions during that day.”<sup>128</sup> In June 1982, a similar law that was enacted to order striking generalist practitioners to return to work contained a reference to the notwithstanding clause as well.<sup>129</sup> In February 1983, yet another similar law was adopted to end a teachers’ strike,<sup>130</sup> with its section 28 referring to the notwithstanding clause.

The first of these three acts, which was used as a drafting model for the other two, deserves special attention. Indeed, it seems to have been adopted to respond to wishes emanating from the Quebec hospitals association.<sup>131</sup> The second part of its section 14 establishes a presumption of guilt according to which if a nurse is not present at work, his or her absence is presumed to be motivated by a wilful refusal

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128. *Act Respecting Health Services in Certain Establishments*, SQ 1976, c 29, s 14.

129. *Act on the Resumption of Medical Care in Quebec*, SQ 1982, c 20, s 8.

130. *Act on the Resumption of Activities in Colleges and Public Schools*, SQ 1983, c 1.

131. Jean-Herman Guay, “Adoption d’une loi spéciale pour forcer le retour au travail des infirmières” in *Bilan du siècle* (Sherbrooke: Université de Sherbrooke), online: <[bilan.usherbrooke.ca/bilan/pages/evenements/2769.html](http://bilan.usherbrooke.ca/bilan/pages/evenements/2769.html)>.

to go back to work—if he or she is absent from work for another reason (*i.e.* sickness), he or she has the burden of proving it. Thus, section 14 of this act contravenes section 33 of the Quebec Charter recognizing the presumption of innocence. According to the Minister of Social Affairs, the reason behind this recourse to the notwithstanding clause is that without the presumption of section 14, even if 90% of the nurses were absent from work, they could all invoke a justification—and it would fall upon the public prosecutor to prove, for each individual case, that no external circumstances actually prevented the accused from coming to work. Such an immense procedural burden would effectively paralyze the system and prevent the act from functioning properly. According to him: “The reason behind this presumption is to adjust the application of a penal statute to deal with a collective phenomenon the likes of which our tribunals were not structured to face.”<sup>132</sup> For the two other acts, the ministers’ explanations follow the same direction without additional details<sup>133</sup>.

## 2. Retroactive Implementation of Laws, Regulations and Decisions

While embedded in the wider debate surrounding the *Charter of the French Language* in the late 1970s and 1980s in Quebec, we categorized one particular legislative override of charter rights made with respect to this sensitive legislation in the domain of State imperatives (rather than identity issues). This particular reference was not made to protect the *Charter of the French Language* itself, but rather to avoid a legal void following a Supreme Court invalidation.

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132. Bill 61, *Loi concernant les services de santé dans certains établissements*, Plenary Commission, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 30th Leg, 4th Sess, Vol 17, No 59 (24 July 1974) at 2007 (Claude Forget).

133. In 1982, the Minister of Social Affairs spoke of a “*prima facie* reversible presumption of participating in a concerted activity” for any general practitioner that did not dispense medical care or related activities: Bill 91, *Loi sur la reprise de la prestation de soins médicaux au Québec*, Plenary Commission, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 32th Leg, 3rd Sess, Vol 26, No 78 (21 June 1982) at 5287 (Pierre-Marc Johnson). In 1983, even if he shirks the whole act from the entire Quebec Charter, the Minister of Labour simply justifies this recourse to the notwithstanding clause by stating: “this possibility to explicitly derogate from the Charter is allowed by section 52” [our translation]. See Bill 111, *Loi assurant la reprise des services dans les collèges et les écoles du secteur public*, Plenary Commission, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 32nd Legis, 3rd Sess, Vol 26, No 107 (16 February 1983) at 7715 (Raynald Fréchette).



In December 1979, the National Assembly adopted an act to counteract the effects of the first *Blaikie* ruling.<sup>134</sup> In this ruling, the Supreme Court declared First Title, Chapter III, of the *Charter of the French Language* (titled “The Language of the Legislature and the Courts”) as unconstitutional. This act was adopted to respond to the potential consequence that the *Blaikie* verdict could have rendered any act adopted after the entry in force of the *Charter of the French Language* invalid for failing to comply with bilingualism requirements. In this perspective, four sections of the act retroactively validated laws and regulations to avoid any invalidation declaration. The act invoked the notwithstanding clause of the Quebec Charter to protect those four sections “notwithstanding section 37 of the Charter of Human Rights and Freedoms.”<sup>135</sup> According to the Minister of Justice, this was made to prevent people who were condemned for violations of those potentially invalid acts to “come back with complaints against the government.”<sup>136</sup>

### C. Notwithstanding Clause References Justified by the Pursuit of Social Objectives

Our next classification will concern cases where the notwithstanding clause was used to attain certain social objectives (25 acts, 60 references). This category encompasses cases where the notwithstanding clause was used not only to ensure the pragmatic functioning of the State *apparatus*, but also to secure that the specific policy objectives conveyed by the purported legislation covered by the clause would not be halted by judicial scrutiny under a charter of rights.

As we mentioned, this category is in itself divided in two subcategories. First, we have instances where the protected act was drafted to respond to a situational issue (II.C.1.)—that is, a discrete situation

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134. *Act Respecting Judgements Rendered by the Supreme Court of Canada on the Language of Statutes and Other Instruments of a Legislative Nature*, CQLR c J-1.1, s 6; *Quebec (AG) v Blaikie et al*, [1979] 2 SCR 1016, 1979 CanLII 21 (SCC).

135. Section 37 of the Quebec Charter, *supra* note 5, stating: “No accused person may be held guilty on account of any act or omission which, at the time when it was committed, did not constitute a violation of the law.”

136. Bill 82, *Loi concernant un jugement rendu par la Cour suprême du Canada le 13 décembre 1979 sur la langue de la législation et de la justice au Québec*, 3rd reading, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 31th Leg, 4th Sess, Vol 21, No 80 (13 December 1979) at 4536 (Marc-André Bédard) [our translation].

targeting a specific and restricted issue involving a limited category of persons or activities which, as a matter of scale, does not aim to affect the whole society or a significant part of it at once, the whole with a more technical and logistical perspective for a specific problem resolution. Second, we have instances where the protected act was drafted in order to accomplish a more general and all-encompassing social progress (II.C.2)—being cases where the protected act came with a strong policy-driven intent to steer global social changes that would target the entire Quebec society or a significant part of it, often with a perspective of attaining large-scale social justice.

### 1. *Situational Issues*

We numbered four acts, containing six references, in which the notwithstanding clause was invoked to protect legislation made to address situational issues. They concerned matters related to parole hearings (II.C.1.a), safety issues (II.C.1.b), and trust companies as well as saving companies (II.C.1.c).

#### a. *Parole Hearings*

In June 1978, the National Assembly adopted the *Act to Promote the Parole of Inmates and Amending the Act Respecting Probation and Houses of Detention*.<sup>137</sup> This act was protected by one reference to the notwithstanding clause to ensure that the legislative objective to promote inmate parole and liberation would not be fettered by charter rights claims. Its section 44 stated that “except where otherwise provided by this act, Chapter III shall have effect notwithstanding sections 23 and 34 of the Charter of Human Rights and Freedoms,” said Chapter III addressing parole hearings, while sections 23 and 34 of the Quebec Charter recognize the right to a public and impartial hearing by an independent tribunal and the right to an attorney. For the Minister of Justice, this use of the notwithstanding clause is justified by the fact that:

In matters of parole hearings, some decisions must be made swiftly to avoid unduly lengthy delays, especially regarding short sentences, for example less than 10 months, that would

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137. *Act to Promote the Parole of Inmates and Amending the Act Respecting Probation and Houses of Detention*, SQ 1978, c 22.

effectively shorten the parole duration or deprive an inmate of freedom periods.<sup>138</sup>

### b. Safety Issues

*The Act to Amend the Youth Protection Act*, adopted in June 1981, aimed at increasing child safety through, amongst other measures, its section 39,<sup>139</sup> which, as the Minister of Social Affairs stated: “demands that swift reports of certain types of situations can be made to the director of youth protection, despite section 9 of the Charter of Human Rights and Freedoms.”<sup>140</sup> The goal was to set aside professional secrecy when necessary to protect minors from impending harm. The same month, section 523 of the *Highway Safety Code* was adopted, specifying that: “notwithstanding section 9 of the Charter of Human Rights and Freedoms,” any physician or optician “must report to the Régie the name and address of any patient 16 years old or older he or she judges medically unfit to drive a motor vehicle.”<sup>141</sup> So, even when protected by doctor-patient confidentiality, medical information indicating that a patient would be a danger on the road must be revealed to avoid accidents and tragedies. The Minister of Transport explicitly stated that this derogation to professional secrecy was made for “public safety reasons.”<sup>142</sup>

### c. Trust Companies and Saving Companies

*The Act Respecting Trust Companies and Savings Companies* was adopted in December 1987. It contained three sections referring to the notwithstanding clause of the Quebec Charter (section 9, professional

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138. Bill 95, *Loi favorisant la libération conditionnelle des détenus*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 31th Leg, 3rd Sess, Vol 20, No 92 (25 May 1978) at B3502–3503 (Marc-André Bédard) [our translation].

139. *Act to Amend the Youth Protection Act*, SQ 1981 c 2, s 39.

140. Bill 10, *Loi modifiant la Loi sur la protection de la jeunesse*, study before the Commission permanente des affaires sociales, Québec, National Assembly, *Journal des débats de la Commission permanente des affaires sociales*, 32th Leg, 1st Sess, Vol 24, No 11 (4 June 1981) at B-419 (Denis Lazure).

141. *Highway Safety Code*, SQ 1981 c 7, s 523.

142. Bill 4, *Code de la sécurité routière*, study before the Commission permanente des transports, Québec, National Assembly, *Journal des débats de la Commission permanente des transports*, 31th Leg, 6th Sess, Vol 23, No 45 (5 February 1981) at B-2012 (Denis De Belleval) [our translation].

secrecy), two of which being still in force today.<sup>143</sup> All three cases were meant to impose a legal duty to report some breaches of the law despite professional secrecy. According to the Delegate Minister of Finance, the goal behind this measure was to ensure the proper respect of rules relating to the administration of public property and trust companies.<sup>144</sup>

## 2. Social Progress

The uses of the notwithstanding clause in the name of social progress constitute a much greater subject in which the National Assembly overrode charter rights. It was invoked in this perspective in 21 acts, for a total of 54 individual references (forming more than half of all the legislative overrides ever made in Quebec) in 6 orders of matters: small claims (II.C.2.a); *in camera* proceedings (II.C.2.b); affirmative action programs (II.C.2.c); temporary softening of a legislation (II.C.2.d); pension coverage (II.C.2.e), and agriculture (II.C.2.f).

### a. Small Claims

In 1971 the National Assembly adopted the *Act to promote access to justice*,<sup>145</sup> which amended the *Code of Civil Procedure* and created a small claims division within the provincial court that would function with less formal procedures and where representation by attorney is forbidden. Four years later, in 1975, the Quebec Charter was adopted. The conflict between the fundamental right to be represented by an attorney in court, set out in section 34 of the Quebec Charter,<sup>146</sup> and the small claims procedures explicitly denying this right was readily apparent. To protect the social progress of significant reach and

143. *Act Respecting Trust Companies and Savings Companies*, SQ 1987, c 95, ss 151, 276 and 385, today CLRQ c S-29.01, ss 151 and 276.

144. Bill 74, *Loi sur les sociétés de fiducies et les sociétés d'épargnes*, study before the Commission permanente du budget et de l'administration, Québec, National Assembly, *Journal des débats de la Commission permanente du budget et de l'administration*, 33th Leg, 1st Sess, Vol 29, No 77 (11 December 1987) at CBA-3367 (Pierre Fortier).

145. *Act to Promote Access to Justice*, SQ 1971, c 86.

146. While section 10b) of the Canadian Charter provides an arrested individual the right to an attorney in criminal matters following arrest and detention, section 34 of the Quebec Charter widens the notion of a right to representation by attorney to any kind of tribunal and proceedings (including civil tribunal and encompassing administrative and quasi-judicial matters) to any person (including witnesses and intervening parties). See *Archambault v Doucet*, (1993) RJQ 2389 (CS); *Droit de la famille — 1559*, (1992) RJQ 855 (CA); 1993 CanLII 3570 (QC CA).

magnitude that was the creation of the small claims procedures and court from being struck down in the name of charter rights, the National Assembly adopted the *Act to Amend the Code of Civil Procedure*<sup>147</sup> in 1977, protecting the rule against attorney representation in small claims matters by a legislative override of the Quebec Charter.

Months prior, in December 1976, the government also adopted the *Act to Authorize Municipalities to Collect Duties on Transfers of Immoveables*,<sup>148</sup> which directs legal proceedings to the “small claims court” and refers to the notwithstanding clause. Six other acts referring to both small claims and the notwithstanding clause were adopted afterwards, in November 1977, November 1979, December 1981, December 1983, June 2002, and February 2014,<sup>149</sup> all systematically reiterating the clause. This explains why, today still, the *Code of Civil Procedure*,<sup>150</sup> the *Act Respecting the Régie du logement*,<sup>151</sup> and the *Tax Administration Act*<sup>152</sup> contain references to the notwithstanding clause regarding the entire Quebec Charter and its section 34.

In 1976, a reference to the notwithstanding clause was introduced by the Minister of Municipal Affairs without substantial justification,<sup>153</sup> most probably because the then still recent rule prohibiting representation by counsel in front of the “small claims court” had been adopted only a few years before.<sup>154</sup> To understand the underlying motivation of this reference, one can quote the previous government’s Minister

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147. *Act to Amend the Code of Civil Procedure*, SQ 1977, c 73, s 43.

148. *Act to Authorize Municipalities to Collect Duties on Transfers of Immoveables*, SQ 1976, c 30, s 16.

149. *Act to Amend the Code of Civil Procedure*, SQ 1977, c 73, s 43; *Act to Establish the Régie du logement and to Amend the Civil Code and Other Legislation*, SQ 1979, c 48, s 73; *Act to Amend the Act to Establish the Régie du logement and to Amend the Civil Code and Other Legislation*, SQ 1981, c 32, s 4; *Act to Amend Certain Fiscal Legislation to Institute New Proceedings for Taxpayers*, SQ 1983, c 47, s 2; *Act to Reform the Code of Civil Procedure*, SQ 2002, c 7, s 148; *Act to Establish the New Code of Civil Procedure*, SQ 2014, c 1, s 542.

150. *Code of Civil Procedure*, CQLR c C-25.01, s 542.

151. *Act Respecting the Régie du logement*, CQLR c R-8.1, s 73.

152. *Tax Administration Act*, CQLR c A-6.002, s 93.18 (formerly *Act Respecting the Ministère du Revenu*, CQLR c M-31) (modified by the *Act to Amend Certain Fiscal Legislation to Institute New Proceedings for Taxpayers*, *supra* note 149).

153. Bill 47, *Loi autorisant les municipalités à percevoir un droit sur les mutations immobilières*, study before the Commission des affaires municipales, Québec, National Assembly, *Journal des débats de la Commission des affaires municipales*, 31th Leg, 1st Sess, Vol 18, No 7 (22 December 1976) at 330 (Guy Tardif).

154. *Act to Promote Access to Justice*, *supra* note 145, s 1.

of Justice who, a year and a half earlier, on the adoption of the Quebec Charter, gave this very situation as an example of the usefulness of the notwithstanding clause. He specified that through this prohibition of counsel representation, the legislator: “sought to reach the social objective of achieving justice under simple and efficient conditions, without excessive formalism.”<sup>155</sup>

This justification behind the use of the notwithstanding clause in small claims matters was reiterated afterwards. In 1977, the then new Minister of Justice stated that without it:

We risk facing proceedings involving attorney representation in such matters, and that would certainly not favour swift conflict resolution. [...] It seems that, sometimes, we must have to set aside the Charter of Human Rights and Freedoms [...] without generating injustice, on the contrary.<sup>156</sup>

Small claims matters quickly became a good example of an appropriate use of the notwithstanding clause in the National Assembly. In 1979 and 1983, the Minister of Municipal Affairs and the Minister of Revenue both justified invoking the notwithstanding clause because the act they sponsored provided for “small claims” type proceedings, in which representation by attorney is prohibited.<sup>157</sup> In 1981, the Minister of Housing wished that “there should be simple and efficient proceedings available when one of the parties fails to respect his or her obligations flowing from the lease.”<sup>158</sup> In 2002, the Minister stated

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155. *Journal des débats de la Commission permanente de la justice*, supra note 117 at B-5133 (Jérôme Choquette).

156. Bill 32, *Loi modifiant le Code de procédure civile*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 31th Leg, 2nd Sess, Vol 19, No 241 (15 November 1977) at B-7670 (Marc-André Bédard) [our translation].

157. Bill 107, *Loi instituant la Régie du logement et modifiant le Code civil et d'autres dispositions législatives*, study before the Commission permanente des affaires municipales, Québec, National Assembly, *Journal des débats de la Commission permanente des affaires municipales*, 31th Leg, 4th Sess, Vol 21, No 176 (6 September 1979) at B-8283 (Guy Tardif); Bill 52, *Loi modifiant diverses lois fiscales en vue d'instituer un nouveau recours pour les contribuables*, study before the Commission permanente du revenu, Québec, National Assembly, *Journal des débats de la Commission permanente du revenu*, 32th Leg, 4th Sess, Vol 27, No 204 (14 December 1983) at B-11180 (Alain Marcoux).

158. Bill 41, *Loi modifiant la Loi instituant la Régie du logement et modifiant le Code civil et d'autres dispositions législatives*, 2nd reading, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 32th Leg, 3rd Sess, Vol 26, No 22 (16 December 1981) at 1582 (Guy Tardif) [our translation].

that his goal was to avoid having people renounce to pursue their claims in fear of attorney costs.<sup>159</sup> In 2013, as the Minister of Justice pointed out, the goal was still to favour access to justice.<sup>160</sup>

### b. In Camera Hearings

In December 1977, the government adopted the *Youth Protection Act*<sup>161</sup> which, today still, states in its section 82 that “notwithstanding section 23 of the Charter of Human Rights and Freedoms [...], the hearings are held *in camera*.” Comparably, in June 1993, a statutory amendment was made to the *Code of Civil Procedure* (section 13, paragraph 2) to add a reference to the notwithstanding clause to protect party privacy in family matters through *in camera* hearings.<sup>162</sup> This reference, which survived the recent civil procedure recodification, is still in force today.<sup>163</sup>

In 1977, the Minister of Social Development presented this reference to the notwithstanding clause without explaining it in much detail.<sup>164</sup> We understand that through the general scope of the bill, as it then was, the goal behind this reference was to protect the privacy of children. In 1993, the Minister of Justice added that this reference was justified out of respect for “family intimacy.”<sup>165</sup> In 2014, answering an opposition intervention, the sponsor minister for the recodification

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159. Bill 54, *Loi portant réforme du Code de procédure civile*, study before the Commission des institutions, Québec, National Assembly, *Journal des débats de la Commission des institutions*, 36th Leg, 2nd Sess, Vol 34, No 74 (14 May 2002) at B-6283 (Paul Bégin).

160. Bill 28, *Loi instituant le nouveau Code de procédure civile*, study before the Commission des institutions, Québec, National Assembly, *Journal des débats de la Commission des institutions*, 40th Leg, 1st Sess, Vol 43, No 105 (5 December 2013) at CI-105/14 (Bertrand St-Arnaud).

161. *Youth Protection Act*, SQ 1977, c 20, today CQLR c P-34.1.

162. *Act to Amend the Code of Civil Procedure and the Charter of Human Rights and Freedoms*, SQ 1993, c 30, s 1.

163. Formerly: *Code of Civil Procedure*, CQLR c C-25, s 13; now: *Code of Civil Procedure*, CQLR c 25.01, s 11.

164. Bill 24, *Loi sur la protection de la jeunesse*, study before the Commission conjointe des affaires sociales et de la justice, Québec, National Assembly, *Journal des débats de la Commission conjointe des affaires sociales et de la justice*, 31th Leg, 2nd Sess, Vol 19, No 281 (9 December 1977) at B-9266 (Pierre Marois).

165. Bill 93, *Loi modifiant le Code de procédure civile et la Charte des droits et libertés de la personne*, study before the Commission permanente des institutions, Québec, National Assembly, *Journal des débats de la Commission permanente des institutions*, 34th Leg, 2nd Sess, Vol 32, No 46 (7 June 1993) at CI-1935 (Gil Rémillard) [our translation].

recognized that this reference was justified to protect the privacy of “sensitive, depressed, helpless or fragile” citizens.<sup>166</sup>

### c. Affirmative Action Programs

Three acts, respectively enacted in June 1982, December 1982 and December 1983, invoked the notwithstanding clause in matters of affirmative action programs made to benefit vulnerable persons, such as handicapped individuals.<sup>167</sup> In June 1982, the Minister of Justice stated that: “this is made to eliminate any possible doubt regarding the validity of affirmative action programs provided by the *Public Service Act*.”<sup>168</sup> In December 1982, he stated that the sections covered by recourse to the notwithstanding clause are “standardization sections considering the own provisions of the Charter regarding affirmative action programs.”<sup>169</sup> In December 1983, according to the Minister of Public Service, the notwithstanding clause was used to allow affirmative action programs to start working before the official enactment of the new Quebec Charter provisions that allowed them “without fear of injunction proceedings or other judicial claims.”<sup>170</sup>

It seems that in all three cases, the notwithstanding clause was used with the intent to protect these acts from giving ground to legal proceedings instituted pursuant to section 10 of the Quebec Charter (right to equal treatment), with the specific objective to protect vulnerable persons.

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166. Bill 28, *Loi instituant le nouveau Code de procédure civile*, study before the Commission des institutions, Québec, National Assembly, *Journal des débats de la Commission des institutions*, 40th Leg, 1st Sess, Vol 43, No 75 (9 October 2013) at CI-75/9 (Michelyne C St-Laurent and Bertrand St-Arnaud) [our translation].

167. *Act to Amend the Summary Conviction Act, the Code of Civil Procedure and Other Legislative Dispositions*, SQ 1982, c 32, s 100; *Act to Amend the Charter of Human Rights and Freedoms*, SQ 1982, c 61, s 26; *Public Service Act*, SQ 1983, c 55, s 168.

168. Bill 67, *Loi modifiant la Loi sur les poursuites sommaires, le Code de procédure civile et d'autres dispositions législatives*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 32th Leg, 3rd Sess, Vol 26, No 167 (18 June 1982) at B-7594 (Marc-André Bédard) [our translation].

169. Bill 86, *Loi modifiant la Charte des droits et libertés de la personne*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 32th Leg, 3rd Sess, Vol 26, No 232 (17 December 1982) at B-11791 (Marc-André Bédard) [our translation].

170. Bill 51, *Loi sur la fonction publique*, study before the Commission permanente de la fonction publique, Québec, National Assembly, *Journal des débats de la Commission permanente de la fonction publique*, 32th Leg, 4th Sess, Vol 27, No 223 (20 December 1983) at B-12117 (Denise Leblanc-Bantey) [our translation].



#### d. *Temporary Softening of a Legislation*

In 1978, section 112 of the *Act to Secure the Handicapped in the Exercise of their Rights*<sup>171</sup> modified section 10 of the Quebec Charter to prohibit discrimination based on handicap or the use of any means to palliate a handicap. This act also contained three sections starting with “notwithstanding rights conferred by section 10 of the Charter of Human Rights and Freedoms.”<sup>172</sup> Those three sections provided a transition period with regards to certain buildings in order to give their owners the required time to make the necessary adjustments to make them handicapped accessible, during which they would be shielded from litigation. Even if the Minister of Social Affairs did not state it explicitly when those sections were to be adopted,<sup>173</sup> we understand that, in this case, the notwithstanding clause was invoked to temporarily soften a piece of legislation, at least towards individuals for whom it created obligations, to ensure the smooth enactment of a social progress measure.

#### e. *Pension Coverage*

The *Act Respecting Pension Coverage for Certain Teachers and Amending Certain Dispositions Respecting Pension Coverage in the Public and Parapublic Sector*,<sup>174</sup> adopted in June 1986, contained four sections invoking the notwithstanding clause. In all four cases, a derogation was made to section 10 of the Quebec Charter and section 15 of the Canadian Charter (the right to equal treatment). The *Act Respecting the Pension Plan of Management Personnel*<sup>175</sup> was enacted in June 2001, with a reference to the notwithstanding clauses made in the same perspective. Every five years, those references to the notwithstanding

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171. *Act to Secure the Handicapped in the Exercise of their Rights*, SQ 1978, c 7, today CQLR c E-20.1.

172. *Ibid*, ss 70–72; these sections are now spent.

173. Bill 9, *Loi assurant l'exercice des droits des personnes handicapées*, study before the Commission permanente des affaires sociales, Québec, National Assembly, *Journal des débats de la Commission permanente des affaires sociales*, 31th Leg, 3rd Sess, Vol 20, No 135 (12 June 1978) at B-5365–5367 (Denis Lazure).

174. *Act Respecting Pension Coverage for Certain Teachers and Amending Certain Dispositions Respecting Pension Coverage in the Public and Parapublic Sector*, SQ 1986, c 44, today *Act Respecting the Pension Plan of Certain Teachers*, *supra* note 123, ss 62, 87, 97 and 105.

175. *Act Respecting the Pension Plan of Management Personnel*, SQ 2001, c 31, s 211, today *supra* note 123.

clause of the Canadian Charter are renewed.<sup>176</sup> Those five cases of double references to notwithstanding clauses are still in force today in five different acts.<sup>177</sup>

This use of the notwithstanding clause in pension plan statutes was made to protect the rights of teachers or retired teachers that were secularized former clerics who, during part of their career, did not have access to pension plans. These acts also contained cases of discrimination favouring women to allow them faster access to pension benefits—for example by lowering their minimal retirement age at 60, while their male colleagues' minimal required age for retirement is 65.

In 1986, the Parliamentary Assistant of the Minister Delegate of Administration and Public Service went on record to explain that those references were made to avoid “eventual litigation to happen.”<sup>178</sup> For the Minister Delegate of Administration and Public Service himself (as he then was), the 1991 reference to the notwithstanding clause encompassing secularized teachers who were formerly religious clerics was made “for the protection of their rights, as recognized by the National Assembly.”<sup>179</sup> In the same wake, the Minister of Justice mentioned in

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176. *Act to Amend Various Legislative Provisions Concerning Pension Plans in the Public and Para-public Sectors*, SQ 1991, c 14, ss 1, 29, 37 and 43; *Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provisions*, SQ 1996, c 10, s 5–8; *Act Respecting the Pension Plan of Management Personnel*, *supra* note 175, ss 235, 360, 378 and 392; *Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions*, SQ 2004, c 39, ss 78, 174, 196, 214 and 272; *Act to Amend Various Pension Plans in the Public Sector*, SQ 2009, c 56, ss 2, 10, 13, 17 and 23; *Act Respecting the Implementation of Recommendations by the Pension Committee of Certain Pension Plans in the Public Sector and Amending Various Legislative Provisions*, SQ 2014, c 11, ss 1, 8, 9, 10 and 15.

177. *Act Respecting the Pension Plan of Certain Teachers*, *supra* note 123, s 62; *Act Respecting the Government and Public Employees Retirement Plan*, *supra* note 123, s 223.1; *Act Respecting the Teachers Pension Plan*, *supra* note 123, s 78.1; *Act Respecting the Civil Service Superannuation Plan*, *supra* note 123, s 114.1; *Act Respecting the Pension Plan of Management Personnel*, *supra* note 123; *Act Respecting the Implementation of Recommendations by the Pension Committee of Certain Pension Plans in the Public Sector and Amending Various Legislative Provisions*, *supra* note 123, s 211.

178. Bill 55, *Loi sur le régime de retraite de certains enseignants et modifiant diverses dispositions législatives concernant les régimes de retraite des secteurs public et parapublic*, study before the Commission permanente du budget et de l'administration, Québec, National Assembly, *Journal des débats de la Commission permanente du budget et de l'administration*, 33th Leg, 1st Sess, Vol 29, No 23 (16 June 1988) at CBA-1225 (Jacques Chagnon) [our translation].

179. Bill 126, *Loi modifiant diverses dispositions législatives concernant les régimes de retraite des secteurs public et parapublic*, study before the Commission permanente du budget et de l'administration, Québec, Assemblée Nationale, *Journal des débats de la Commission permanente du budget et de l'administration*, 34th Leg, 1st Sess, Vol 31, No 69 (8 May 1991) at CBA-2975 (Daniel Johnson) [our translation].

1996 that “in doubt, we cannot take chances [...] we adopt those clauses for the general security and benefit of all.”<sup>180</sup> In 2001, the State Minister to Administration and Public Service mentioned that the goal behind invoking the notwithstanding clause was to avoid plunging pension beneficiaries in “a certain form of insecurity” because of potential litigation that could affect their pension benefits, and also because the act encompassed by the notwithstanding clause was “socially speaking, extremely justified.”<sup>181</sup> In 2004, the Government Administration Minister justified the act on the ground that it flowed from an agreement reached with a labour union following several committee recommendations and, generally speaking, that it was “easier.”<sup>182</sup> In 2009, her successor spoke of the “benefits aiming to compensate the particular work conditions that were imposed upon female teachers (which) were paid less and were obligated to resign if they were ever to marry” and the case of retired secularized teachers who were formerly religious clerics. She added that: “its renewal [of the notwithstanding clause] is necessary to preserve historically recognized benefits, [otherwise] the door to litigation would be opened in the name of the right to equal treatment.”<sup>183</sup> Finally, in 2014, the Government Administration Minister stated that “its systematic five-year renewal has never been the object of any debate.”<sup>184</sup>

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180. Bill 133, *Loi modifiant la Charte des droits et libertés de la personne et d'autres dispositions législatives*, study before the Commission des institutions, Québec, National Assembly, *Journal des débats de la Commission des institutions*, 35th Leg, 2nd Sess, Vol 35, No 21 (28 May 1996) at CI-21 (Paul Bégin) [our translation].

181. Bill 59, *Loi sur le régime de retraite du personnel d'encadrement*, study before the Commission des finances publiques, Québec, National Assembly, *Journal des débats de la Commission des finances publiques*, 36th Leg, 2nd Sess, Vol 37, No 24 (13 June 2001) (Sylvain Simard) [our translation].

182. Bill 74, *Loi modifiant la loi sur le régime de retraite des agents de la paix en services correctionnels et d'autres dispositions législatives*, study before the Commission des finances publiques, Québec, National Assembly, *Journal des débats de la Commission des finances publiques*, 37th Leg, 1st Sess, Vol 38, No 71 (8 December 2004) at CFP-71 (Monique Jérôme-Forget) [our translation].

183. Bill 70, *Loi modifiant divers régimes de retraite du secteur public*, adoption in principle, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 39th Leg, 1st Sess, Vol 41, No 74 (17 November 2009) at 4002 (Monique Gagnon-Tremblay) [our translation].

184. Bill 12, *Loi concernant la mise en œuvre de recommandations du comité de retraite de certains régimes de retraite du secteur public et modifiant diverses dispositions législatives*, study before the Commission des finances publiques, Québec, National Assembly, *Journal des débats de la Commission des finances publiques*, 41th Leg, 1st Sess, Vol 44, No 12 (5 November 2014) at CFP-12/2 (Martin Coiteux) [our translation].

### f. Agriculture

One last instance in which the notwithstanding clause was invoked to set aside charter rights in the name of social progress is agriculture. We consider this matter as social progress because agriculture, self-sufficiency and land ownership are intrinsically linked to a society's development and the survival of the people on a given territory—going well beyond the individual interests of the farmers themselves.<sup>185</sup>

The *Act to Amend the Act to Promote the Development of Agricultural Operations*<sup>186</sup> was adopted in June 1986. As it provided for agricultural subsidies created specifically to assist young farmers (aged between 18 and 40 years old) in establishing or improving agricultural operations, it was protected by reference to the notwithstanding clause of the Canadian Charter (to counter the prohibition of discrimination based on age, provided for in section 15) comprised in its own section 16 (it did not, however, mention the notwithstanding clause of the Quebec Charter).

To justify his use of the notwithstanding clause, the Minister of Agriculture stressed the importance of preventing Charter-based litigation to be instituted against the act, by a 41-year-old farmer for example, for it to function properly.<sup>187</sup> Interestingly, the Minister mentioned at the beginning and end of his interventions that the notwithstanding clause was to receive “enthusiastic” approval from the official opposition critic. The latter, a former Minister of Agriculture who led important agricultural reform programs, expanded on the subject. As he pointed out: “the absolute character of the Canadian Charter [...] fails to provide the necessary flexibility [...] for beneficial population-oriented policies to function,” “a wide use of the notwithstanding clause in agricultural laws is thus necessary for Quebec to retain its jurisdiction in the matter”; “the government’s objective, beyond party lines, is to enact a policy designed to help young farmers, and an age-based discrimination is necessary in that perspective.”<sup>188</sup>

185. Brun, “Le Québec peut empêcher la vente”, *supra* note 32.

186. *Act to Amend the Act to Promote the Development of Agricultural Operations*, SQ 1986, c 54.

187. Bill 71, *Loi modifiant la Loi favorisant la mise en valeur des exploitations agricoles*, study before the Commission permanente de l’agriculture, des pêcheries et de l’alimentation, Québec, National Assembly, *Journal des débats de la Commission permanente de l’agriculture, des pêcheries et de l’alimentation*, 33th Leg, 1st Sess, Vol 29, No 11 (12 June 1986) at CAPA-489 (Michel Pagé).

188. *Ibid* at CAPA-489, CAPA-490 (Jean Garon) [our translation].

## D. Notwithstanding Clause References Justified by Identity Issues

One last, but not least, category of notwithstanding clause references concerns cases in which the National Assembly overrode charter rights in the name of identity issues (11 acts, 39 individual references). Here, we employ the term “identity” as a reference to a scope of defining characteristics distinguishing the Quebec population as a distinctive people, a distinctive nation—literally, in the *national* sense. More specifically, the relevant identity characteristics referred to by the National Assembly when employing the notwithstanding clause were Quebec French language and Catholic heritage.<sup>189</sup>

We further divided notwithstanding clause references in the name of identity into two subcategories: with one case made to simply take into consideration the identity characteristics of given individuals (“individual identity”) (II.D.1); and the rest where the collective national identity of the Quebec majority was involved (“collective identity”) (II.D.2).

### 1. Individual Identity

On one occasion (one act, one reference), identity was invoked by the National Assembly as a justification for overriding charter rights for technical and pragmatic reasons, in a way very much like as in a situational issue, with regards to jury duties. The instance did not push forward any sense of collective identity promotion or protection but simply recognized that in some cases, an individual’s linguistic identity must be taken into consideration for the proper administration of justice.

#### a. Jurors Act

In June 1976, the government added a new wide-reaching section, still in force today, to the *Jurors Act*, referring to the notwithstanding clause of the Quebec Charter to address language issues within juries, stating that “Sections 3, 4, 6, 14, 19, 30 and 37 and Division VI of this

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189. Traditionally considered (for centuries), along with its Civil Law legal tradition, to constitute the “three pillars” that define and distinguish the Quebec majority as a distinctive people within Canada and, more largely, North America. See, especially Sylvio Normand, “Le Code civil et l’identité” in Serge Lortie, Nicolas Kasirer & Jean-Guy Belley, eds, *Du Code civil du Québec: contributions à l’histoire immédiate d’une recodification* (Montréal: Thémis, 2005) 619 at 643–46.

Act have effect notwithstanding the Charter of Human Rights and Freedoms.”<sup>190</sup> These sections deal with the issues of juror eligibility to non-residents and individuals not speaking French or English fluently, allowing the formation of exclusively French-speaking or English-speaking juries and, in some regions, providing that “an Indian or an Inuk, even though he does not speak French or English fluently, may serve as a juror if the accused is an Indian or an Inuk.”<sup>191</sup>

On the adoption of that reference, the opposition spokesperson and the Minister of Justice convened without debate that this reference to the notwithstanding clause was based on “discriminatory dispositions [founded on] linguistic phenomena that are translated in the act.”<sup>192</sup> Even if not specifically mentioned, section 10 of the Quebec Charter, prohibiting discrimination based on language, is the obvious section targeted by this derogation.

## 2. *Collective Identity*

Amounting to a quarter of the acts and a third of the individual references in which the National Assembly employed the notwithstanding clause (10 acts, 38 references), legislative overrides of individual charter rights in the greater name of the promotion and protection of the Quebec majority’s collective national identity are without a doubt the most politically visible cases. Driven by the intention of protecting essential sociological identity components that define the Quebec national majority as what it is, the National Assembly invoked the notwithstanding clause to set aside charter rights in this perspective in two general areas: matters relating to French language (II.D.2.a); and matters relating to religion in the education system (II.D.2.b).

### a. *French Language*

The notwithstanding clause was used to defend a law specifically designed to protect the French language in Quebec in 1988, with none other than the *Act to Amend the Charter of the French Language* (one act,

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190. *Jurors Act*, SQ 1976, c 9, s 58, today CQLR c J-2, s 52.

191. *Ibid*, s 45.

192. Bill 33, *Loi sur les jurés*, study before the Commission permanente de la justice, Québec, National Assembly, *Journal des débats de la Commission permanente de la justice*, 30th Leg, 4th Sess, Vol 17, No 109 (23 June 1976) at B-3516 (Robert Burns) [our translation].

two references). This law invoked the notwithstanding clauses of both Charters to protect its provisions pertaining to the exclusive use of French in exterior commercial advertisement<sup>193</sup> that were set aside by the Supreme Court in the *Ford*<sup>194</sup> case. Specifically, these provisions were protected by a derogation to sections 2b) and 15 of the Canadian Charter, regarding freedom of expression and right to equality, and sections 3 and 10 of the Quebec Charter, to the same effect.

To justify those derogations, the Delegate Minister of Cultural Affairs invoked “the vulnerability of French language in Quebec and in Canada,” “the cultural insecurity befalling French-speaking Quebecers,” “the need to protect a French language which distinguishes our society,” “a collective life that inevitably entails some restrictions to individual liberties,” and “a duty to protect the rights of the French-speaking majority.”<sup>195</sup> It is noteworthy to stress out that, here, the notwithstanding clause was used not only as a *legal* response to the Supreme Court’s ruling in *Ford*, but also as a *political* one. The National Assembly was well aware that the *Charter of the French Language* was in conflict with the charter rights in the Supreme Court’s opinion, and deliberately chose to make the former prevail in the name of what it considered a paramount collective interest—thus retrieving the final say in the matter from nominated Canadian judges to place it in the hands of elected Quebec officials in the name of parliamentary sovereignty. The disagreement here was not only one of interpretation, it was one of merit and involving the fundamental power of a democratic assembly to legislatively materialize the will of the people it represented.

### b. Education System

In December 1984, December 1986, December 1988, June 1989, December 1992, June 1994, June 1999, June 2000, and June 2005, 9 acts (totalling 36 references) addressing the relationship between religion and the school system were adopted, many of them modifying several other laws and all of them referring to a notwithstanding

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193. *Act to Amend the Charter of the French language, supra* note 13.

194. *Ford, supra* note 6.

195. Bill 178, *Loi modifiant la Charte de la langue française*, adoption of principle, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 33th Leg, 2nd Sess, Vol 30, No 82 (19 December 1988) at 4373–75 (Guy Rivard) [our translation].

clause.<sup>196</sup> Their goals were essentially to uphold historical rights and privileges granted to Catholics and Protestants, chiefly in matters of religious education and institutional representation within the broader school system. All these references to the notwithstanding clauses targeted the right to equality and freedom of religion.

Justifying one of those references to notwithstanding clauses, the Minister of Education stated, in 1984, that:

The *Commission des droits de la personne* [...] told us that, in its opinion, collective freedom of religion is incompatible with individual freedom of religion. [...]. If the Commission says that there is an incompatibility and if we want to maintain our collective right to allow religious education, there is only one solution out of the problem: suspend the application of the Charter.<sup>197</sup>

In 1986, in support of the government's choice to use the notwithstanding clauses, in addition to the claims made by the Bishops' Association, the Minister of Education raised their necessity in order to avoid "being dragged into endless litigation" and "rulings that could be

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196. *Act Respecting Public Elementary and Secondary Education*, SQ 1984, c 39, s 80; *Act to Again Amend the Education Act and the Act Respecting the Conseil supérieur de l'éducation and to Amend the Act Respecting the ministère de l'Éducation*, SQ 1986, c 101, ss 10–12; *Education Act*, SQ 1988, c 84, today CQLR c I-131, ss 726, 727; *Act Respecting the Conseil supérieur de l'éducation*, CQLR c C-60, ss 31 and 32; *Act Respecting the ministère de l'Éducation*, CQLR c M-15, ss 17 and 18; *Education Act for Cree, Inuit and Naskapi Native Persons*, CQLR c I-14, ss 720 and 721; *Act Respecting School Elections*, SQ 1989, c 36, today CQLR c E-2.3, ss 283 and 284; *Act Respecting Private Education*, SQ 1992, c 68, ss 175 and 176, today CQLR c E-9.1; *Act Respecting Certain Declarations of Exception in Acts Relating to Education*, SQ 1994, c 11, s 1; *Act Respecting Certain Declarations of Exception in Acts Relating to Education*, SQ 1999, c 28, ss 1 and 3; *Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters*, SQ 2000, c 24, ss 44, 61, 67 and 68; *Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field*, SQ 2005, c 20, ss 9, 11, 16 and 17. The first laws in this matter refer to the notwithstanding clause by stating that they do not infringe charter rights, rather than stating that they apply notwithstanding them. For this reason, Jean-Maurice Brisson and Yves Deschênes consider those references as rules of interpretation rather than proper references to notwithstanding clauses (*supra* note 122 at 144). We respectfully disagree and consider that these acts indeed refer to the notwithstanding clause, notably because of the Minister of Education's statement in 1984 to the effect that: "simply put, notwithstanding the Charter, there is no incompatibility" (Bill 3, *Loi sur l'enseignement primaire et secondaire public*, study before the Commission permanente de l'éducation, Québec, National Assembly, *Journal des débats de la Commission permanente de l'éducation*, 32th Leg, 5th Sess, Vol 28, No 6 (5 December 1984) at CE-370 (Yves Bérubé)). For further reading on parliamentary debates on the need to invoke the notwithstanding clause in matters of education and religion, see Québec, Conseil supérieur de l'éducation, *Pour un aménagement respectueux des libertés et des droits fondamentaux: une école pleinement ouverte à tous les élèves du Québec – Avis au ministre de l'Éducation, février 2005* (Québec: Conseil supérieur de l'éducation, 2005) at 31–39.

197. Bérubé, *supra* note 196 [our translation].



rendered according to considerations that would be neither complete nor satisfactory in our perspective.”<sup>198</sup> Moreover, and interestingly, he added the following statement: “we do want to have faith in the courts [...] but we cannot have them substitute themselves to the political power when dealing with matters of political nature.”<sup>199</sup> Replying to an allegation that those laws were discriminatory and that schools must be neutral, he responded that “this is not the view of the majority of Quebec citizens”; “the traditional relationship between schools and religion in Quebec [...] is one of positive respect, not only of religious values, but also of the main religious groups that structure our society, and of the religious, moral and spiritual values of other groups.”<sup>200</sup> In 1988, the motives invoked to justify referring to notwithstanding clauses changed a little. The same Minister mentioned, notably, the imperative to avoid litigation and added: “this is the very purpose of the notwithstanding clause, [...] to allow a positive respect of the religious and moral values of the two great religious families that shaped the soul Quebec people.”<sup>201</sup>

In April 1994, even if the Minister of Education was no longer the same, the reasons employed to justify using the notwithstanding clauses remained; to protect existing confessional establishments, to allow a coherent evolution of the system, to shield the act against costly litigation, to “allow the National Assembly to function freely ‘[...] in the exercise of its legislative powers’” and to avoid “court rulings detached from the field.”<sup>202</sup> Point of interest, while conceding that “the

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198. Bill 131, *Loi modifiant de nouveau la Loi sur l’instruction publique et la Loi sur le Conseil supérieur de l’éducation et modifiant la Loi sur le ministère de l’Éducation*, study before the Commission permanente de l’éducation, Québec, National Assembly, *Journal des débats de la Commission permanente de l’éducation*, 33th Leg, 1st Sess, Vol 29, No 32 (17 December 1986) at CE-1795 (Claude Ryan) [our translation].

199. *Ibid.*

200. *Ibid.*

201. Bill 107, *Loi sur l’instruction publique*, study before the Commission permanente de l’éducation, Québec, National Assembly, *Journal des débats de la Commission permanente de l’éducation*, 33th Leg, 2nd Sess, Vol 30, No 47 (20 December 1989) at CE-2328–CE-2330 (Claude Ryan) [our translation]. No relevant comments were made about the notwithstanding clauses during the adoption of the *Act Respecting Private Education*, *supra* note 196: Bill 141, *Loi sur l’enseignement privé*, study before the Commission permanente de l’éducation, Québec, National Assembly, *Journal des débats de la Commission permanente de l’éducation*, 34th Leg, 2nd Sess, Vol 32, No 27 (11 December 1992).

202. Bill 2, *Loi concernant certaines dispositions dérogatoires dans des lois relatives à l’éducation*, adoption in principle, Québec, National Assembly, *Journal des débats de l’Assemblée nationale*, 34th Leg, 3rd Sess, Vol 33, No 16 (28 April 1994) at 576 (Jacques Chagnon) [our translation].

act does grant Catholic and Protestant communities some historically recognized rights and privileges [...] that create inequalities of treatment," the Minister reminded that "the purpose of the notwithstanding clause is not to allow the enactment of policies that would negate those freedoms [freedom of conscience and of religion]."<sup>203</sup> He went as far as to add that: "Bill n° 2 invites the members of the National Assembly to exercise a jurisprudential judgement regarding the evolution of our school system."<sup>204</sup> In June 1999, according to the Minister of Education, the underlying objective of the reference to the notwithstanding clause was to provide two years of reflection and debate on the place of religion in the school system and to "allow for a necessary and progressive evolution to happen in harmony with Quebec history and culture."<sup>205</sup> In June 2000, for the same Minister of Education, the goal was still to achieve "balance between the necessary open-mindedness of a pluralist society, while respecting the tradition, history and culture of Quebec."<sup>206</sup> Finally, in June 2005 the Minister of Education stated that using the notwithstanding clauses was justified by a temporary but necessary need to preserve grandfathered rights.<sup>207</sup>

### III. DISCUSSION AND ANALYSIS

Comparing the previous observations on the theoretical approach to the notwithstanding clause within the Quebec doctrine with a census of its practical use by the Quebec legislator allows us to draw several questions and conclusions from our observations. Could there be a distinctive approach, both in theory and practice, to the legislative override of charter rights in Quebec that differentiates it from the Anglo-Canadian approach? And if so, what are the founding grounds

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203. *Ibid.*

204. *Ibid.*

205. Bill 43, *Loi concernant certaines dispositions dérogatoires dans les lois relatives à l'éducation*, adoption in principle, Québec, National Assembly, *Journal des débats de l'Assemblée nationale*, 36th Leg, 1st Sess, Vol 36, No 39 (2 June 1999) at 2123 (François Legault) [our translation].

206. Bill 118, *Loi modifiant diverses dispositions législatives dans le secteur de l'éducation concernant la professionnalité*, study before the Commission de l'éducation, Québec, National Assembly, *Journal des débats de la Commission de l'éducation*, 36th Leg, 1st Sess, Vol 36 No 34 (1 June 2000) at CE-34 (François Legault) [our translation].

207. Bill 95, *Loi modifiant diverses dispositions législatives de nature confessionnelle dans le domaine de l'éducation*, study before the Commission de l'éducation, Québec, National Assembly, *Journal des débats de la Commission de l'éducation*, 37th Leg, 1st Sess, Vol 38, No 62 (7 June 2005) (Jean-Marc Fournier).

of this distinctiveness? How can we attempt to explain it, and what conclusions can we draw from this survey?

We believe that there is a strong correlation between the distinctive theoretical approach to the notwithstanding clause present within the Quebec doctrine and the practical use of it made by the National Assembly, which could be explained by a different moral conception of parliamentary sovereignty in matters of collective interest, especially when considering Quebec cultural vulnerability (III.A).

This conclusion opens the door to many additional questions and further reflections on the situation—one of which we shall address: is there a way to achieve theoretical reconciliation within the Quebec doctrine to unify it under a common conception of a distinctive theory of the notwithstanding clause (III.B)? In our opinion, this question can be answered affirmatively.

## A. The Correlation Between a Distinctive Theory and a Distinctive Practice

To properly speak of a distinctive theoretical approach to the notwithstanding clause in Quebec, that would be reflected in the National Assembly's legislative practice, we must first discern in what domains theory and practice meet one another and define the correlation scope within the two (III.A.1). We contend in this perspective that the correlation scope between theory and practice lies in matters of collective interests in a national sense—that is, in considering the interest of the population not only as the sum of its individuals, but also as the distinct and greater entity it represents as the collective embodiment of a people. This perspective could be explained by a distinctive conception of parliamentary sovereignty and of the political role of the National Assembly (III.A.2).

### 1. *The Correlation Scope: Matters of Collective Interests in a National Sense*

Prior to any discussion, we must point out that while we contend that there is a *correlation* between the distinctive theory of the notwithstanding clause according to the Quebec doctrine and the legislative practice of the National Assembly in that matter, we are not saying that there is *causation* between the two. While it remains very possible that authors may be influenced by the National Assembly's debates

when drafting their theories,<sup>208</sup> and inversely, that members of the legislature may be influenced by what they read from academic authorities when debating the notwithstanding clause in chamber, we have not witnessed direct, relevant and influencing references made from one to another. Therefore, neither theory nor practice would appear as the other's point of origin. Rather, what we have here are two coexisting realities, which happen to complement one another. In our opinion, this absence of "direction" (*i.e.* the theory does not flow mainly from practical observation, and the practice does not feel obligated to go in the direction of a predefined theory) actually greatly authenticates both, forming two independent intellectual approaches to the same intellectual problem that corroborate one another. In our opinion, this strengthens the proposition that there is a genuine distinctive vision of the notwithstanding clause in Quebec, and not just a "directed" train of thought.

With that being said, according to prominent authors within the distinctive Quebec doctrine (chiefly led by the authoritative theories of the authors Henri Brun and Guy Tremblay), the notwithstanding clause can (and should) be used not only when the legislature and the courts disagree on how to better comply with the same charter rights, but also as a political tool to allow the legislature to actively *depart* from the ideology of the absolute supremacy of individual charter rights, when higher considerations than individual interests warrant it.

But what possible motives could a government legitimately have to set aside individual human rights consecrated in the highest documents of our legal order? The answer would lie in the collective interest of society: both for the sum of the individuals composing it as well as for society itself as a distinct sociological concept. One individual's human rights are neigh-absolute, but should not justify trumping the collective welfare of the society when circumstances dictate that, to achieve a given social goal, the interests and expectations of some individuals must be set aside—even in a discriminatory way—when

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208. In this perspective, André Binette did address Quebec legislative practice (*supra* note 52, at 117), but he did so chiefly from a positive standpoint, especially focused on the *Act respecting the Constitution Act, 1982* (*supra* note 10) and the *Act to Amend the Charter of the French language* (*supra* note 13), briefly addressing other instances from a general perspective. His study is more concerned with the genesis of the notwithstanding mechanism of the Canadian Charter and its relationship with constitutional law and other human rights instruments (both domestic and international). As such, we do not gather a sense of direction in his work that would stem from empirical observation of the National Assembly's practice.

the goal is not to prejudice the individual, but to enact social measures that are needed and beneficial for the majority, if not for all. In other words, legislative override of charter rights becomes necessary when the needs of the many outweigh the needs of the few. A government that would be absolutely bound to the Charter—not only in form, but also in spirit—would be powerless to act when collective equity requires special actions that can only be carried out by setting charter rights aside.

As we saw, the legislative practice of the National Assembly when dealing with the notwithstanding clause showed plenty of examples of such situations when dealing with matters of collective interests. Over the last 4 decades, 31 acts, containing 92 references to the notwithstanding clause (nearly 90% of all the legislative overrides ever made by the National Assembly) were made in that perspective. In all such instances, the National Assembly considered that the greater good was achieved in setting charter rights aside to promote social progress in the name of collective justice and equity. The figure speaks for itself.

Surely enough it can be argued that the Charters themselves take the possibility into account. Given that section 1 of the Canadian Charter and section 9.1 of the Quebec Charter provide that a rule of law may reasonably limit the reach of fundamental human rights, is there still a need to employ a legislative override to protect an act aiming to fulfill a greater collective purpose, when both Charters already consider that possibility explicitly?

Two elements appear to maintain a positive answer to this question, both in theory and practice. The first one is pragmatic (and in this sense, not so distinctive from Anglo-Canadian theories<sup>209</sup>); there are some situations that demand immediate legislative intervention, where the legislature simply cannot afford to have its legislation challenged and threatened for years during a constitutional litigation all the way to the Supreme Court. Even if, after an in-depth merit analysis, the act would in the end be held as reasonable and valid, any *prima facie* argument against it grounded in charter rights that does not seem completely outlandish at its face value<sup>210</sup> can open the door to an intricate litigation process that could, in itself, threaten its

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209. Particularly those of Slattery, *supra* note 26.

210. A feat that any reasonably skilled legal practitioner is capable of achieving.

efficiency—all the more so if, before being ultimately validated after a final verdict of the Supreme Court, it is struck by constitutional invalidation at trial or appeal level. The notwithstanding clause here appears as a preventive tool to bar this process from happening in the first place.

There is also another reason, very distinctive and held high by both theory and practice in Quebec: an acknowledgement that the Supreme Court's jurisprudence is not politically and epistemically neutral when it comes to charter rights. As some observed, the rights in the Canadian Charter were drafted, and are considered by the courts today (chiefly the Supreme Court), under the scope of individual liberalism and "Canadian Charter values."<sup>211</sup> While it is possible to construe those elements as base premises for maintaining the rule of law in Canada, it is also possible to consider them as debatable political standpoints (one can disagree on the reach and scope of liberalism as a canvas in a modern democracy; one can claim that "Canadian values" are not an accurate reflection of "Quebec values," and so on)—which therefore are not the only acceptable conception of law but rather points that should remain open to political debate. Intricately linked with democracy, the notwithstanding clause appears here as both a legal and political tool to ensure that the legislature's political power is not confiscated by the tribunals through a single-minded conception of what is good and acceptable in society. Indeed, on several occasions, ministers and members of the National Assembly reiterated that while they may have faith in courts for dealing with purely judicial matters; that faith does not blindly extend to the judicial reading of political issues when dealing with charter rights.<sup>212</sup>

This is especially visible when it comes to matters of collective identity, where both academic authorities and the legislature openly recognized that the "majority values" of the Quebec people are in the end the highest order of legislative legitimacy in a democracy. Spearheading these majority values, when it comes to legislative overrides, was the need for recognition of historically significant religious

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211. France Allard, "L'impact de la *Charte canadienne des droits et libertés* sur le droit civil: une relecture de l'arrêt *Dolphin Delivery* à l'aide d'une réflexion sur les sources du droit civil québécois" (2003) (special n°) R du B 1. Given the precedence of the Canadian Charter in the constitutional order, other authors argue that this view also spread, by way of legal hierarchy, to the Quebec Charter. See Adrian Popovici, "Le rôle de la Cour suprême en droit civil" (2000) 34 RJT 607.

212. See for example *supra* note 202 (Jacques Chagnon); *supra* note 198 (Claude Ryan).

communities in the education system that are so profoundly rooted in its history that to entirely purge them from the school system at once in the name of charter rights would be akin to slicing off part of what makes the Quebec people what it is and deny its historical pluralism in education matters.

Even more importantly, comes the paramount need to preserve and promote the vitality of the French language in Quebec, which is its most visible cultural feature, yet placed in a culturally vulnerable situation that would leave it to be swallowed and dissolved by the overwhelming economic and cultural attraction for English in North America if left unprotected in a free cultural market. References made to the notwithstanding clauses of both Charters to protect the *Charter of the French Language* are therefore consistent with Quebec theory of the notwithstanding clause.<sup>213</sup> In 1988, the sponsor minister justified its use, and the limitation of “individual freedoms” it entailed, in order to respond to the greater considerations that are “the vulnerability of French language in Quebec and in Canada” and “the cultural insecurity befalling French-speaking Quebecers.”<sup>214</sup> This approach seems to echo Henri Brun’s preoccupations. Eleven years before, he wrote that language-related legislation was a necessity for “fragile communities, as is the Quebec community in economic and cultural matters,” and that it would be imprudent “to consider that all the individual rights recognized as fundamental by the Charter are absolute,” and that the use of the notwithstanding clause must be “adapted to Quebec circumstances.”<sup>215</sup> Moreover, those references to the notwithstanding clause fit well with the fact that the distinctive Quebec theory of the notwithstanding clause sees section 33 of the Canadian Charter as a way for Quebec to preserve its autonomy, especially in spheres of human activity encompassing its distinctive character, or in other words, its identity.<sup>216</sup>

Yet, the notwithstanding clause was only used once to protect the *Charter of the French Language* from the Canadian Charter in 1988, expiring in 1993 and not renewed afterwards. Could this mean that the protection of the French language no longer sufficiently matters

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213. *Act to Amend the Charter of the French language*, *supra* note 13.

214. Rivard, *supra* note 195.

215. Brun, “La Charte des droits”, *supra* note 56 at 199–201.

216. Paré, *supra* note 46 at 653; Gosselin, *supra* note 33 at 248; Brun, Tremblay & Brouillet, *supra* note 69 at 970, para XII-2.21.

in Quebec to warrant using the notwithstanding clause? We highly doubt so, as protection of the French language is and remains a highly discussed issue in the province.<sup>217</sup> If a strong enough context would arise once again, with a Supreme Court's ruling threatening its core provisions beyond simple technicalities, or if a change of government would be to occur with an explicit mandate to expand its reach in the name of the collective interest of the majority, the political will to use the notwithstanding clause to protect the *Charter of the French Language*—even if it remains a hypothetical question for now—still has all the necessary potential to come forth.<sup>218</sup>

Turning to matters of social progress, theory and practice join once again in recognizing the need for Quebec to preserve its autonomy by retaining the necessary powers to enact social change for the greater collective welfare when necessary. The notwithstanding clause appears here as an appropriate tool to reach this objective. For example, preservation of Quebec autonomy has been invoked by the opposition spokesperson, Jean Garon, to justify referring to the notwithstanding clause of the Canadian Charter in agricultural matters when discussing the adoption of the *Act to Amend the Act to Promote the Development of Agricultural Operations*.<sup>219</sup> Surprisingly enough, the very possibility for individual rights to be affected by an agricultural legislation and that the notwithstanding clause could provide a mean to circumvent charter rights in such an instance, in order to protect the land interests

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217. Éric Poirier, *La Charte de la langue française: ce qu'il reste de la Loi 101 40 ans après son adoption* (Montréal: Septentrion, 2016). While the question of the *Charter of the French language* remains a highly politicized one in Quebec, it seems, for the last decade, to mobilize authors and academics to a higher degree than members of the government, with the former more amply discussing the opportunity for changes and expansion of the *Charter of the French language* while the latter are seemingly keeping some distance from the issue unless necessary, to avoid stirring political controversy. We believe that the reasons behind this apparent lower interest of the almost uninterrupted Liberal governments in power in Quebec since the early 2000s in touching the *Charter of the French language* are grounded in the realm of political and electoral interests rather than in legal interpretation. As such, we do not conclude that this lower degree of activity changes anything from a legal perspective.

218. The subject is still advanced and discussed from time to time amongst opposition parties in Quebec. For example, the second opposition party at the National Assembly during the 39th legislature, the Coalition Avenir Québec, seemed open to use the notwithstanding clause to protect the French language in 2012: "Que propose la CAQ?"; *Radio-Canada* (24 January 2012), online: <[ici.radio-canada.ca/nouvelle/547241/caq-actions-valeurs](http://ici.radio-canada.ca/nouvelle/547241/caq-actions-valeurs)>. The question was also raised during the Parti Québécois' (first opposition party at the National Assembly 41st legislature) 2016 leadership race: Vicky Fragasso-Marquis, "PQ: un débat animé, mais respectueux", *Huffington Post* (25 September 2016), online: <[quebec.huffingtonpost.ca/2016/09/25/story\\_n\\_12186558.html](http://quebec.huffingtonpost.ca/2016/09/25/story_n_12186558.html)>.

219. *Supra* note 188 (Jean Garon).



of a fragile community such as Quebec, was seemingly foreseen by Henri Brun almost 10 years prior.<sup>220</sup>

As for other matters related to social progress, we can more generally state that all the notwithstanding clause references made in their wake aimed to achieve collective and community-related objectives, such as those set out in the International Covenant on Economic<sup>221</sup> (*i.e.* progressive policies or protective measures for the benefit of vulnerable groups), the whole in accordance with the works of Gosselin, Paré and Binette.<sup>222</sup>

Globally speaking, these practical observations line up with a distinctive Quebec theory of the notwithstanding clause first developed by Henri Brun and Guy Tremblay, for whom the notwithstanding clause allows “simply put, to restore parliamentary democracy with respect to certain rights and freedoms.”<sup>223</sup> Their theory supports preemptively referring to the notwithstanding clause in the name of parliamentary sovereignty and democracy, reasons that were invoked by Minister Jérôme Choquette when adopting section 52 of the Quebec Charter.<sup>224</sup> Also, contrary to Paul C Weiler’s and Brian Slattery’s theories,<sup>225</sup> Brun and Tremblay’s theory does not advocate that a legislator should only refer to a notwithstanding clause with the intent of better complying to charter rights, merely when differing from the opinion of judicial tribunals in their interpretation. In this sense, this distinctive theory of

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220. Brun, “Le Québec peut empêcher la vente”, *supra* note 32 at 974–75. Although the *Act to Amend the Act to Promote the Development of Agricultural Operations*, *supra* note 186, was adopted with the intent of helping a new generation of farmers to develop the land, Brun’s concerns were rather about the issue of farm land sale to non-residents—as was the object of the *Act Respecting the Acquisition of Farm Land by Non-Residents* (SQ 1979, c 65, today CQLR c A-4.1, adopted without reference to the notwithstanding clause). Nevertheless, in both instances, the question was the same: to set aside the right to equal treatment for agricultural policy reasons.

221. *Covenant on Economic*, *supra* note 45.

222. Gosselin, *supra* note 33 at 241–42; Paré, *supra* note 46 at 645–46; Binette, *supra* note 52 at 139, 146.

223. Brun, Tremblay & Brouillet, *supra* note 69 at 968, para XII-2.15.

224. *Supra* note 118 (Jérôme Choquette).

225. Weiler, *supra* note 23; Slattery, *supra* note 26. It must be noted that in two instances, the National Assembly seems to have enacted a reference to the notwithstanding clause in a way consistent with Weiler’s and Slattery’s theories. In the *Act Respecting Public Elementary and Secondary Education* (*supra* note 196), and the *Act to Again Amend the Education Act and the Act Respecting the Conseil supérieur de l’éducation and to Amend the Act Respecting the ministère de l’Éducation* (*supra* note 196), references were made to the notwithstanding clause by the wording “does not prejudice the right to.” One must also consider the words of Jacques Chagnon, for whom “Bill no 2 invites the Members of the National Assembly to exercise a jurisprudential judgement regarding the evolution of our school system”: *supra* note 202 (Jacques Chagnon).

the notwithstanding clause would appear closer to Lorraine Weinrib's theory.<sup>226</sup> However, Weinrib's theory is highly formal, demanding detailed references to the specific fundamental rights that a notwithstanding clause intends to derogate from—and it does not take into consideration the kind of “majority values” that could justify referring to a notwithstanding clause. In comparison, the leading Quebec theory, less formal, justifies referring to the notwithstanding clause in order to protect national identity or social progress. The uses of the notwithstanding clause made in Quebec legislative practice seem to confirm this.

To summarize, we conclude that the scope of the correlation existing between the distinctive theory of the notwithstanding clause led by Brun and Tremblay within the Quebec doctrine and the empirical practice of the National Assembly is situated in matters of collective interests in a national sense, comprising the fields of social progress and collective identity issues.

On the other hand, legislative overrides motivated by good governance objectives (matters of State imperatives, situational social objective issues and individual identity considerations), in which the legislature did not justify using the notwithstanding clause in the name of the collective interest of society, would not fall within the scope of the correlation existing between the distinctive theoretical approach and the empirical practice. Being of a much more utilitarian design and not enacted under the idea of protecting the National Assembly's ability to reflect the political will and collective interest of the Quebec people as a nation, these instances of legislative override do not correlate very well with the core premises of the distinctive Quebec theory of the notwithstanding clause we identified in the Quebec doctrine. However, given their much smaller proportion (10.7%), when compared to the uses of the notwithstanding clause made in the name of collective interest in a manner consistent with the distinctive theory (89.3%),<sup>227</sup> we can view them, statistically, as outlying data. These results, while allowing the possibility that the legislative practice *may*, on rare occasions, distance itself from the distinctive theory, do not, in our opinion, invalidate the correlation scope laid out as a general rule.

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226. Weinrib, *supra* note 27.

227. For identity matters, it is noteworthy to observe that in his 1977 paper, Henri Brun dismissed the legislative override in the *Juror's Act*—the sole “individual identity” issue—as an improper reference to the notwithstanding clause. Brun, “La Charte des droits”, *supra* note 56 at 202.

## 2. A Possible Explanation in a Different Conception of Parliamentary Sovereignty and the Political Role of the National Assembly

Given that every provincial legislature, as well as the Federal Parliament, obviously recognize the concepts of democracy and parliamentary sovereignty, one is left to ponder; if the distinctive theory and practice of the notwithstanding clause in Quebec is supported by democracy and parliamentary sovereignty, how is it truly distinctive when compared to Anglo-Canadian provinces or the federal level?

The answer, we hypothesize, could lie in a different political approach to parliamentary sovereignty in Quebec regarding its National Assembly, viewed not only as a governing power, but also as the embodiment and protector of the cultural will and soul of a nation in a precarious position of cultural vulnerability.

For many Quebec academics, the notion of parliamentary sovereignty seems to be conceptualized more as a paramount collective power that is essential for social survival and progress in a culturally and demographically vulnerable society. However, in the culturally secure English Canada, it presents itself more like an administrative attribute of the governing power that is linked to its ability to enact and apply policy decisions within the State for good governance purposes. For example, on the one hand, Peter Hogg describes parliamentary sovereignty as a necessary policy-making power that must be subject to discretionary judicial review to ensure that it remains within what judges consider to be reasonable limits when it comes to charter rights.<sup>228</sup> On the other hand, Brun, Tremblay and Brouillet, who, as we may remind the reader, are leading Quebec authors in matters of constitutional law, adjoin parliamentary sovereignty to the “true holder” of State sovereignty that is the people, and view, in this perspective, the notwithstanding clause as an essential tool to maintain Parliament’s powers.<sup>229</sup> Also a point of interest, Hogg characterizes the “unifying” aspect of the Canadian Charter as one anchored in the objective of setting a standard for a single policy conception of individual human rights<sup>230</sup>; one that is not concerned with any recognition or promotion of a collective national culture—neither at the federal level, nor at the

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228. Hogg, *supra* note 9 at 12-7.

229. Brun, Tremblay & Brouillet, *supra* note 69 at 656, 659–60.

230. *Supra* note 9 at 36-4.

provincial one.<sup>231</sup> This perspective is highly criticized by Brouillet, who disapproves of the Canadian Charter not only failing to protect (or even consider) Quebec as a people, but also for restricting the National Assembly's power to defend the culture and interests of the people of Quebec in a collective sense.<sup>232</sup>

One can construe from this distinction between academic views that the Quebec conception of parliamentary sovereignty is coloured by a sense of cultural survival commanding the highest degree of deference towards a legislature that is not only a ruling body, but also the institutional representation of "the people." Such a sense does not appear so present in English Canada, where parliamentary sovereignty still seems to be understood as warranting *some* degree of deference when evaluated by the courts in the name of democracy, yet a much lower one. Since, in English Canada, the very existence of the nation in a sociological sense is not put in a vulnerable position by demanding greater political protection, tribunals are justified to scrutinize the legislature's actions much more deeply in order to protect the more relevant consideration that form individual rights.<sup>233</sup>

This conception of the paramountcy of parliamentary sovereignty in considering the National Assembly as the legal embodiment of the Quebec people and the guardian of its collective rights and interests, in a historical and identity perspective, is also reflected in the National Assembly's distinctive legislative practice, which differentiates it from the other legislative bodies in Canada.

First off, it is interesting to take a look at the various organic laws that are responsible for the creation and organization of the various legislative assemblies in Canada, both at the provincial and federal levels.<sup>234</sup> While all these laws provide the internal rules and regulations

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231. With the exception of Aboriginal people (Canadian Charter: ss 35, 35.1).

232. See Eugénie Brouillet, *La négation de la nation: l'identité culturelle québécoise et le fédéralisme canadien* (Montréal: Septentrion, 2005).

233. Of course, our observations on this point are incidental and far from exhaustive. An in-depth comparative study of the academic conceptions of the notion of parliamentary sovereignty as a legal concept in Quebec and in English Canada would be extremely interesting in that perspective.

234. Alberta: *Legislative Assembly Act*, RSA 2000, c L-9; British-Columbia: *Constitution Act*, RSBC 1996, c 66; Manitoba: *The Legislative Assembly Act*, CCSM c L110; New Brunswick: *Legislative Assembly Act*, SNB 2014, c 116; Newfoundland and Labrador: *House of Assembly Act*, RSNL 1990, c H-10; Northwest Territories: *Legislative Assembly and Executive Council Act*, SNWT 1999, c 22; Nova Scotia: *House of Assembly Act*, RSNS 1989 (1992 Supp) c 1; Nunavut: *Legislative Assembly and Executive Council Act*, SNU 2002, c 5; Ontario: *Legislative Assembly Act*, RSO 1990, c L.10; Prince

pertaining to legislative powers and codes of conduct for chamber affairs and deliberations, it is noteworthy to observe that only Quebec *Act Respecting the National Assembly* contains a preamble, and one written in a strongly significant tone:

WHEREAS the people of Québec have a deep attachment to democratic principles of government;

WHEREAS the National Assembly is, through the elected representatives who compose it, the supreme and legitimate organ by which those principles are expressed and applied;

WHEREAS it behooves this Assembly, as the guardian of the historical and inalienable rights and powers of the people of Québec, to defend it against any attempt to despoil it of its rights and powers or to derogate from them;

WHEREAS it is befitting, therefore, that the perdurance, the sovereignty and the independence of the National Assembly be affirmed, and that its proceedings be protected against all interference;

Those words, absent from every other provincial or federal parliament legislature's organic act, express an obvious political statement: more than just a governing power, the National Assembly is the guardian of the collective history, identity and destiny of the people of Quebec. This conveys a particular moral approach to the concept of parliamentary sovereignty—becoming not only a necessary power of governance, but also a necessity for the legislature to ensure the continual survival of the nation.

In this perspective, the very name “National Assembly” for the Quebec legislature is also quite revealing. While every other provincial legislative chamber in Canada is designated either “Legislative Assembly” or “House of Assembly,” Quebec legislature took the name “National Assembly” in 1968,<sup>235</sup> with all the collective political significance this term conveys.

Another extremely revealing piece of legislation in this matter would be the *Act Respecting the Exercise of the Fundamental Rights and*

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Edward Island: *Legislative Assembly Act*, RSPEI 1998, c L-7; Quebec: *Act Respecting the National Assembly*, CQLR c A-23.1; Saskatchewan: *Legislative Assembly and Executive Council Act*, SS 2007, c L-11.3; Yukon: *Legislative Assembly Act*, RSY 2002, c 137; Federal Parliament: *Parliament of Canada Act*, RSC 1985, c P-1.

235. *Act Respecting the Legislative Council*, SQ 1968, c 9, s 1.

*Prerogatives of the Québec People and the Québec State*,<sup>236</sup> adopted in 2001 in response to the federal *Clarity Act*<sup>237</sup> and to the Supreme Court decision in *Reference re Secession of Quebec*.<sup>238</sup> It, too, presents a very revealing preamble, affirming amongst other things that:

WHEREAS the Québec people, in the majority French-speaking, possesses specific characteristics and a deep-rooted historical continuity in a territory over which it exercises its rights through a modern national State, having a government, a national assembly and impartial and independent courts of justice;

WHEREAS the constitutional foundation of the Québec State has been enriched over the years by the passage of fundamental laws and the creation of democratic institutions specific to Québec;

[..];

WHEREAS Québec is firmly committed to respecting human rights and freedoms;

[..];

WHEREAS the National Assembly is composed of Members elected by universal suffrage by the Québec people and derives its legitimacy from the Québec people in that it is the only legislative body exclusively representing the Québec people;

WHEREAS it is incumbent upon the National Assembly, as the guardian of the historical and inalienable rights and powers of the Québec people, to defend the Québec people against any attempt to despoil it of those rights or powers or to undermine them;

WHEREAS the National Assembly has never adhered to the Constitution Act, 1982, which was enacted despite its opposition;

[..];

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236. *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, CQLR c E-20.2.

237. *Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26.

238. *Reference re Secession of Quebec*, *supra* note 55.

WHEREAS it is necessary to reaffirm the fundamental principle that the Québec people is free to take charge of its own destiny, determine its political status and pursue its economic, social and cultural development;

[...];

WHEREAS it is necessary to reaffirm the collective attainments of the Québec people, the responsibilities of the Québec State and the rights and prerogatives of the National Assembly with respect to all matters affecting the future of the Québec people.

Finally, the wording of the Charters themselves is also quite revealing when it comes to describing what “reasonable limits” can be set on fundamental rights—taking, or not, collective considerations into account. Section 1 of the Canadian Charter reads:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 9.1 of the Quebec Charter, for its part, reads:

In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Both Charters refer to freedom and democracy as potential grounds for restricting charter rights, but only the Quebec Charter makes an explicit reference to the “general well-being of the citizens of Quebec”—introducing collective elements to balance individual liberties. It is also noteworthy to point out that the first paragraph of section 9.1 of the Quebec Charter actually compels Quebec citizens to exercise their charter rights with proper regard to the collective welfare of society, whereas the Canadian Charter appears to only grant individual rights that are not textually limited by such consideration.

Of course, the previous examples are far from exhaustive.<sup>239</sup> Yet, they indicate a distinctive conception of parliamentary sovereignty in

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239. We could also consider that, sometimes in a very visible manner, epistemic conflicts arise between Quebec legislature and the Supreme Court of Canada as to the nature and scope of human rights, and to what constitutes a reasonable and proportional restriction to them (the

Quebec when it comes to charter rights; one that is not only concerned with the rights and well-being of individuals, but also with the collective welfare of the Quebec people as a greater whole than the sum of its individuals. This, in our opinion, would play an explanatory role in the correlation scope between the Quebec doctrine and the National Assembly's legislative practice when it comes to matters of collective interest.

## B. Possible Theoretical Reconciliation within the Quebec Doctrine

As we stated at the beginning of this paper, the distinctive Quebec theory of the notwithstanding clause, while spearheaded by leading authors such as Henri Brun and Guy Tremblay, is not unanimously shared within the Quebec doctrine. Some—very respected—authors present a different theoretical approach to the moral legitimacy of using the notwithstanding clause. A question then arises: can we accommodate the distinctive Quebec theory of the notwithstanding clause led by Henri Brun and Guy Tremblay with other Quebec theories on the legislative override of charter rights?

Aside from André Morel,<sup>240</sup> whose theories on the notwithstanding mechanism predate the *Ford* case, there seems to be a relative consensus regarding the manner to employ, textually, a notwithstanding clause within an act. There also seems to be a relative consensus in Quebec on the idea that individual charter rights can legitimately be limited in the name of the greater collective interest of the people.

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*Charter of the French language*, *supra* note 12, debate being a prime example of this). In this perspective, employing the notwithstanding clause finds a possible epistemic justification: as what could be considered a reasonable limitation of Charter rights in one epistemic system (*i.e.* one highly considering the notion collective rights) could be deemed unacceptable in another one (where there is no or less notion of collective rights and only or more individual rights). Flexibility and compromise may simply be impossible when one system, with its own set of base values and premises, is scrutinized under the scope of another one with different base values and premises. The notwithstanding clause there becomes an instrument of protection of epistemic distinctiveness—quintessential in a pluralist federation like Canada (*supra* note 55). For further reading on epistemic conflicts in the construction of human rights between the Quebec legal tradition and the Anglo-Canadian legal tradition, see our previous study in: François Côté, "De l'intégrité du droit privé québécois de tradition civiliste au sein du cadre constitutionnel canadien—Constat d'un conflit épistémologique au travers des droits fondamentaux" in Patrick Taillon, Eugénie Brouillet & Amélie Binette, eds, *Un regard québécois sur le droit constitutionnel—Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (Cowansville, Que: Yvon Blais, 2016) at 743.

240. Morel, *supra* note 112.



While Brun and Tremblay plead for a liberal use of the notwithstanding mechanism when necessary to protect the identity and culture of the majority as well as to enact progressive legislation aimed at achieving social progress, some authors, although not apparently in conflict against Brun and Tremblay on the idea of overriding charter rights for those reasons, would like to see some limits and safeguards put in place. In this perspective, Brun and Tremblay's theories do face indirect resistance in two sensitive areas within the Quebec doctrine: the idea that a special legislative majority should be required to employ an override, and the scope of fundamental rights that can be limited by a notwithstanding clause.

The alternative to Brun and Tremblay's theory in that perspective would be led by Professor José Woehrling. In 1995, a few months prior to the second referendum, he published a paper in which he discussed what he considered would be necessary modifications that the Quebec Charter should receive if it were to become a constitutional document in an independent Quebec.<sup>241</sup> Regarding the notwithstanding mechanism, Woehrling pleads that it should only be used in response to a court invalidation of a law ruled as contrary to the Charter. He also advocates that its use should require a qualified majority of two third of the members of the National Assembly, or a popular referendum—as would modifications to the Quebec Charter itself.

Woehrling's concerns stem from the fact that, in its current state, the Quebec Charter is, technically, a "simple" statute that could entirely be repelled with the whim of a majority government, unlike the Canadian Charter which is "locked" and can only be modified through special consensus. In the Canadian Charter, the notwithstanding mechanism serves as an appropriate tool to recognize parliamentary sovereignty—especially at the provincial level—because more often than not, a single disagreeing provincial government (such as Quebec) inside the federation simply cannot modify the Canadian Charter itself

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241. José Woehrling, "Les modifications à la *Charte des droits et libertés de la personne* nécessaires en cas d'accession du Québec à la souveraineté" (1995) 26:4 RGD 531. A noteworthy consideration: Woehrling states from the beginning that a constitutional Quebec Charter should expunge references to private law considerations. For him, the legal framework encompassing human rights in private law matters should not be placed in a constitutional document, but rather figure in a distinctive law of quasi-constitutional status that can be more easily amended by the legislature to respond to social needs—see 571ff. We shall keep in mind that, although Woehrling presents his observations as what he considers necessary modifications to "upgrade" the Quebec Charter into a fully-fledged constitutional document, his positions and critics towards it remain the same towards a provincial Quebec Charter.

to better fit its social needs. In an independent Quebec functioning as a unitary State, the context would be so different that the notwithstanding mechanism would no longer be necessary as such. For Woehrling, the override mechanism would effectively become redundant—except for one purpose: to oppose court decisions (in the sense that, while harder to employ, it would still be easier to use and more efficient than to affect a constitutional modification).<sup>242</sup> This is why he considers that, like Kahana and Weiler, the Quebec Charter should only be used *a posteriori*.

Woehrling also criticizes the fact that, contrary to the Canadian Charter, which only allows *some* of its fundamental rights and freedoms to be targeted by an override, *all* of the human rights in the Quebec Charter can be overridden. According to him, “intangible” human rights are of such fundamental importance and recognized as such by international covenants, that they should only be limited by “reasonable rules of law,” as already foreseen by section 1 of the Canadian Charter and section 9 of the Quebec Charter, and never be exempted from judicial scrutiny.<sup>243</sup> How such views can be reconciled?<sup>244</sup>

If reconciliation seems difficult on the possible conflict regarding intangible rights,<sup>245</sup> it is not when it comes to the two other elements of conflict: time of insertion and qualified majority. At first glance, Brun and Tremblay’s theory appears irreconcilable with Woehrling’s. Indeed, the legislator’s ability to override charter rights *a priori* with no formal limitation is essential to Brun and Tremblay’s theory. Sure, the legislator may have its powers limited by a charter and subject to judicial review as a general rule, but there must be an outlet to allow the National Assembly to make a full and unencumbered use of its powers in times

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242. *Ibid* at 577.

243. *Ibid* at 578ff [our translation].

244. We must underline here that, while we attempt to reconcile Brun and Tremblay’s theories with Woehrling’s propositions for the sake of large-scale theoretical consensus, we do not believe such an exercise to be necessary for Brun and Tremblay’s distinctive theory to remain logical. Brun and Tremblay’s approach to the notwithstanding clause is concerned with actual charter rights as they concretely exist as matter of applied positive law and, as we’ve seen, already correlates with the National Assembly’s legislative practice. This approach would not ultimately be prejudiced from failing to meet Woehrling’s views on a different hypothetical model of charter rights.

245. This being said, Woehrling does not extensively detail what human rights are “intangible” nor how to characterize them as such. Again, given the conjectural nature of Woehrling’s model, such a conflict would remain in the realm of hypothesis.

of need when collective interest warrants it. Forcing it to wait for a court judgement or to reach a special majority, as Woehrling advocates, defeats that purpose.

However, we suspect that there exists a third option that may actually satisfy both parties: the way of the unwritten constitutional convention.<sup>246</sup> While not legally fettering parliamentary sovereignty, an unwritten constitutional convention would impose a moral duty on the National Assembly of non-coercing yet highly political nature which would become akin to the rule of law through parliamentary custom. Such a parliamentary custom could be to require that the National Assembly must deploy all necessary efforts to try to reach a qualified majority and that it must thoroughly consider judicial precedents regarding the rights it wishes to override before going forward and adopting a notwithstanding clause reference.

We believe that this would be an optimal solution: while preserving the National Assembly's legislative power, the political consequences of ignoring a constitutional convention would be so great and cause so much outcry that it would entail the most extreme sanction for any government: to be expelled from power by way of a democratic vote at the next election. While not a legal or judicial safeguard, it would be a political one, just as effective. With the sanction being a change in government, the newly elected government could then easily repeal an unconventional use of the notwithstanding clause made by its predecessor. Also, it would guarantee that the ultimate legislative power to enact social changes would remain in the hands of the people's elected representatives and not be confiscated by the judiciary.

Therefore, it appears that the theoretical conflict between Brun and Tremblay and Woehrling can be reconciled for the most part. First and foremost, the way of the constitutional convention would seem to satisfy both parties' concerns regarding the democratic threshold required to invoke legislative overrides and their time of insertion. Conflict may remain on the question of legislative overrides touching "intangible" rights, but the lack of a precise definition of this notion by

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246. Unwritten constitutional conventions are, as their name suggests, unwritten political rules and parliamentary customs that, while not legally binding, are considered morally binding and systematically followed in parliament. Their violation, while not subject to judicial remedy, warrants political outcry of the greatest order of magnitude. See *Reference re Secession of Quebec*, *supra* note 55 at 247ff and *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 774ff, 1981 CanLII 25 (SCC). See also Hogg, *supra* note 9, at 1-21ff and Brun, Tremblay & Brouillet, *supra* note 69 at 41ff.

Woehrling renders this question hard to define; there may be a conflict, or there very well may not be, depending on the definition.<sup>247</sup> Yet, in any event, since Woehrling's approach is hypothetical and not theoretical, we cannot construe it to an academic opposition to Brun and Tremblay's theories regarding the notwithstanding clause *as it is*.

## CONCLUSION

In the end, of the 41 acts containing a notwithstanding clause reference that ever came into force in Quebec (18 referring to the Canadian Charter and 32 to the Quebec Charter<sup>248</sup>), over 75% of them (31/41) were enacted with the objective of pursuing social progress, or promoting and protecting elements of the collective national identity of the Quebec people. These matters of collective interests are even more dominating the National Assembly's legislative practice when one looks upon distinct and individual notwithstanding clause references, where they justified over 86% of them (92/106) in a proportion of 76% (34/45) with regards to the Quebec Charter and 95% (58/61) with regards to the Canadian Charter.

We cannot conclude otherwise: without a doubt, there is a strong legislative practice in Quebec to chiefly invoke the notwithstanding clause in order to enact legislation made in the collective interest of the Quebec people. The contrast with Anglo-Canadian provinces, where the notwithstanding clause of the Canadian Charter was invoked only three times in almost four decades, is manifest. This allows us to affirm that there indeed is not only a strong, but also a distinctive legislative practice inside the Quebec National Assembly's when it comes to legislative overrides of charter rights.

Such a distinctive practice lines up with a distinctive theoretical conception of the nature and conditions for a legitimate use of a notwithstanding clause present in the Quebec academic doctrine. Both the legislator and the academics seemingly share a common view that,

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247. As such, we cannot even begin to discuss a possible solution to an unidentified problem that could even be non-existent.

248. This combined sum of 60 legislative references to either Charter out of 41 acts referring to the notwithstanding mechanism is explained by an overlap from dual references, as some acts invoke both Charters at once. The reader will also keep in mind that while our results consider the *Act respecting the Constitution Act, 1982*, *supra* note 10, as a quantifiable act, we do not count it as generating quantifiable individual references. See *supra* note 127. Refer to the Appendix for details.

when dealing with matters of social progress and national identity, it is entirely legitimate for the National Assembly to claim the sovereignty of its parliamentary powers by placing its actions out of the reach and invalidation powers of judicial courts in the name of the greater collective good. This indicates a strong correlation between the motives actually employed in practice by the Quebec legislator when referring to notwithstanding clauses and the foundations of the leading Quebec theory of the notwithstanding clause on the legitimate motives that can be employed behind such a reference, even if the theory seems to insist more on national identity while the practice seems more concerned with social progress (but then again, one could submit that social progress is linked to a certain degree with a community's national identity, especially in Quebec).<sup>249</sup>

We saw that both theory and practice recognize that a legislative override can be made *a priori*, before any judicial ruling; that it is a quintessential tool to protect Quebec vulnerable cultural identity inside the Canadian and North-American contexts as well as the legislature's ability to push forward necessary measures of social progress it needs to enact to keep Quebec dynamic society in touch with its own specific reality; and that, in the name of a distinctive conception of parliamentary sovereignty, its use should remain subject to a simple material approach with low formal requirements. Also, while there is some degree of dissension within the Quebec doctrine towards the distinctive theory of the notwithstanding clause as advocated by Professors Henri Brun and Guy Tremblay, it is not an irreconcilable one, as the gap can be bridged through a convention. We therefore believe that we can truly speak of a distinctive theory and practice of the notwithstanding clause in Quebec, in which collective interests can sometimes outweigh individual rights.

In only one aspect can we witness a lower degree of adequate equation between the distinctive Quebec theory of the notwithstanding clause and the corresponding legislative practice: when it comes to matters of international law. However, this lower degree of adequacy does not stem from disagreement, but simply because the subject never came up in the National Assembly's debates on notwithstanding clauses. Tremblay, Bellavance and Paré all suggest that a derogation

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249. According to the historian and sociologist Gérard Bouchard, there is a link between Quebec national identity and values such as solidarity and compassion: Gérard Bouchard, *La nation québécoise au futur et au passé* (Montréal: VLB 1999) at 104.

to the Canadian Charter can be legitimate if it does not infringe human rights as recognized by international law.<sup>250</sup> Yet, none of the sponsor ministers that referred to the notwithstanding clause ever referred to international law. There is no contradiction, but rather a practical void in the legislator's intention on that question. Is this to say that the idea of a distinctive Quebec theory of the notwithstanding clause cannot stand on this aspect? Not necessarily, as theories have larger fields of application than those concretely reached by practice—the theory being in this respect larger than the practice.<sup>251</sup> Although it would be comforting if theory could fully reflect practice and if policy-makers could refer to international law when dealing with the notwithstanding clause, it is not necessary. Likewise, it would also be beneficial for the theory to further evolve through its contact with practice, especially regarding the somewhat widespread one of invoking a reference to the notwithstanding clause in the name of legal certainty. In all events, what matters at least as much—if not more—than matters of adequacy between theory and practice is the reception and persuasiveness of the theory amongst the scientific community, the legal community and, in this case, the larger political community.

In our opinion, simply saying that using the notwithstanding clause can be justified if made in the name of national identity or social progress might remain incomplete. *In theory*, this could lead to potential violations of human rights.<sup>252</sup> This is why the theory we gather from the sum of the previously cited authors, providing both for protection of national identity or enactment of social progress while respecting international human rights law, seems preferable to us.

This gives rise to the following question: what would happen if a policy based on national identity or social progress based and protected by reference to a notwithstanding clause was to come in conflict with international law? For policies justified in the name of social progress, as they most frequently intersect with the International Covenant on Economic, the question seems somewhat moot. However, when

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250. Tremblay & Bellavance, *supra* note 41 at 655; Paré, *supra* note 46 at 640–41.

251. We ground our reasoning here in Christian Atias, *Théories contre arbitraire. Éléments pour une théorie des théories juridiques* (Paris: PUF, 1987) at 123–37.

252. We emphasize here on the words “in theory.” As Tsvi Kahana observed, there has never been a single instance in history where a derogation to the Canadian Charter could be qualified as tyrannical. See Kahana 2002, *supra* note 20 at 169. See also Tsvi Kahana, “Legalism, Anxiety and Legislative Constitutionalism” (2005–2006) 31 *Queen's LJ* 536. In our opinion, the same observation applies to the Quebec Charter.

dealing with matters of national identity, the question becomes less theoretical, as was shown when the *Act to Amend the Charter of the French Language* was brought in front of the United Nations Human Rights Council.<sup>253</sup> In such cases, considering Marie Paré's or Henri Brun and Jean-Maurice Arbour's works, invoking the notwithstanding clause could still remain justified—not to set aside fundamental human rights themselves, but rather to disagree with an interpretation of them rendered by an international instance, that the legislature finds unconvincing or maladjusted to Quebec social reality.<sup>254</sup> Here, gathering some inspiration from Tsvi Kahana's "deliberative disagreement" theory, we could submit that the legislator would still have the necessary legitimacy to invoke the notwithstanding clause even to protect an act declared by an international instance as contravening human rights, if it takes the underlying motives supporting that decision into due consideration and responds to them legislatively<sup>255</sup> ... just as it can do in response to a Supreme Court decision.

All this being said, the demonstration we submitted regarding the existence of a distinctive theoretical understanding and legislative practice in Quebec in respect to notwithstanding clauses must be concluded with three important caveats.

First, as matters of intellectual *locus*, our analysis sits in the realms of legal theories and empirical legislative practice—not political science or philosophy. Many arguments can be (and are) made for or against the use of legislative overrides in those disciplines, but are not the subject of our research. What we demonstrated above was that, in matters of legal science, there exists indeed a distinctive theoretical and practical approach regarding legislative overrides in Quebec. How to incorporate our conclusions in other scientific fields of study falls outside of our purview.

Second, while personal opinions may vary on the validity of the leading Quebec theories of the notwithstanding clause or the soundness of Quebec legislative practice in themselves, we contend that this would not affect the validity of our findings. Even if, in someone's eyes, leading Quebec authors were wrong and the last 40 years of legislative practice were ill-founded, the academic writings, parliamentary

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253. See I.B, above. See also Paré, *supra* note 46 at 646.

254. *Ibid* at 651; Arbour & Brun, *supra* note 51.

255. Kahana 2002, *supra* note 20.

debates and adopted pieces of legislation referring to the notwithstanding clause in Quebec do exist as a matter of observable evidence.<sup>256</sup> The demonstration of their existence, whatever one's opinion about their wisdom or opportunity could be, proves that there effectively is a distinctive theoretical and practical *approach* to the notwithstanding clause in Quebec as an empirical matter. Our research does not affirm that the Quebec theory and practice regarding the notwithstanding clause *are valid because they exist*. Rather, we submit that a distinctive theory and practice regarding the notwithstanding clause simply *exists* in Quebec, and *that* submission—the core subject of our research—is validated through empirical evidence. Is it “right” or is it “wrong?” That is not the question; it *is*. Our thesis here is not to confront Quebec and English Canada on legislative overrides to determine who understands best the matter, to discuss which view is “correct” and which one is not—this, in our opinion, would dangerously borderline on value judgement—our purpose is to prove that different *approaches* exist.<sup>257</sup>

Lastly, we must reiterate that our findings do not negate the possibility of academic dissent. The academic theories led by Brun and Tremblay on legislative overrides in Quebec, while leading, are not *unanimous*. And this is precisely why this paper is titled “A Distinctive Quebec Theory and Practice of the Notwithstanding Clause”, and not “The Distinctive Quebec Theory and Practice of the Notwithstanding Clause”: while we contend there is an observable trend, we acknowledge minority disagreement.

Some may still criticize the theory and the legislative practice of the notwithstanding clause in Quebec exposed in this paper and prefer Anglo-Canadian theories and practices, but they must admit that the prominent doctrine in Quebec and the National Assembly contradicts

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256. To illustrate, even if the *story* narrated in 1984 by George Orwell is a work of fiction that cannot be empirically measured, the *book* itself, in the sense that it has been published and had a measurable impact in literature and various fields of humanities and social sciences, does exist in the empirical world and can be studied as such. Whatever one's perspective on the *content* of the book as accurate or outlandish, a purely subjective matter outside the realm of validity, the *book* itself can be objectively observed and lead to valid observations.

257. In this respect, comparative study of constitutional law perspectives and intellectual approaches has long been a legitimate and common field of study within Quebec literature (see for a recent example: Taillon, Brouillet & Binette, globally, *supra* note 96). Comparison does not necessarily equate confrontation—and as matters of philosophical and political approach, denying the right to compare to establish distinctiveness between one object and the other can lead to outright negation of the distinctive object. See Brouillet, *supra* note 232.



them. Besides, they must admit that, logically, those who believe that the opinion of this doctrine and the practice of this assembly have a normative force are justified in considering that a frequent use of the notwithstanding clause in Quebec may be appropriate, especially to promote social progress or protect national identity.

And in the end, one thing remains certain. In the name of national democracy and parliamentary sovereignty, the final say in many crucial matters resides in the hands of the highest source of power: the people and its elected representatives ... which are precisely the objective that the notwithstanding clause—and the Quebec theory and practice of it that we exposed—aims to achieve.

## APPENDIX

### Acts Referring to or Having in the Past Referred to the Notwithstanding Clause

(classified in chronological order from the date of entry in force)

#### TABLE LEGEND

Column [A]: Title of the act (a “still in force” mention indicates that the reference to the notwithstanding clause in the act is still in force at the present day)

Column [B]: Number of paragraphs within this act referring to the notwithstanding clause of the Quebec Charter (references to the specific sections of the Quebec Charter covered by the derogation)

Column [C]: Number of paragraphs within this act referring to the notwithstanding clause of the Canadian Charter (references to the specific sections of the Canadian Charter covered by the derogation)

Column [D]: Number of paragraphs referring to either notwithstanding clauses justified by State imperatives

Column [E]: Number of paragraphs referring to either notwithstanding clauses justified by social objectives

- Sub-column [E1]: References made regarding situational issues
- Sub-column [E2]: References made in the perspective of social progress

Column [F]: Number of paragraphs referring to either notwithstanding clauses justified by identity issues

- Sub-column [F1]: References made to individual identity considerations
- Sub-column [F2]: References made to collective identity considerations

For columns [D], [E] and [F], greyed-out sub-columns [E2] and [F2] represent cases where the notwithstanding clause was invoked in the name of collective interest. Column [D] and sub-columns [E1] and [F1], left in white background, represent cases where the notwithstanding clause was invoked for good governance purposes.

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1] Situ- ational issues	[E2] Social pro- gress	[F1] Indivi- dual identity	[F2] Collec- tive identity
1) <i>Jurors Act</i> , SQ 1976, c 9, s 58; today CQLR c J-2 <b>{still in force}</b>	1 (global)	0	0	0	0	1	0
2) <i>Act Respecting Health Services in Certain Establish- ments</i> SQ 1976, c 29	1 (global)	0	1	0	0	0	0
3) <i>Act to Authorize Municipalities to Collect Duties on Transfers of Immoveables</i> , SQ 1976, c 30	1 (global)	0	0	0	1	0	0
4) <i>Act to Amend the Code of Civil Procedure</i> , SQ 1977, c 73	1 (global)	0	0	0	1	0	0
5) <i>Youth Protection Act</i> , SQ 1977, c 20; today CQLR c P-34.1 <b>{still in force}</b>	1 (s 23)	0	0	0	1	0	0
6) <i>Act to Promote the Parole of Inmates and Amending the Act Respecting Proba- tion and Houses of Detention</i> , SQ 1978, c 22	1 (ss 23 and 34)	0	0	1	0	0	0
7) <i>Act to Secure the Handicapped in the Exercise of their Rights</i> , SQ 1978, c 7; today CQLR c E-20.1	3 (s 10)	0	0	0	3	0	0

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State imperatives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1]	[E2]	[F1]	[F2]
				Situational issues	Social progress	Individual identity	Collective identity
8) <i>Act to Establish the Régie du logement and to Amend the Civil Code and Other Legislation</i> , SQ 1979, c 48; today <i>Act Respecting the Régie du logement</i> , CQLR c R-8.1 {still in force}	1 (global)	0	0	0	1	0	0
9) <i>Act Respecting Judgements Rendered by the Supreme Court of Canada on the Language of Statutes and Other Instruments of a Legislative Nature</i> , CQLR c J-1.1	1 (s 37)	0	1	0	0	0	0
10) <i>Act to Amend the Youth Protection Act</i> , SQ 1981, c 2	1 (s 9)	0	0	1	0	0	0
11) <i>Highway Safety Code</i> , SQ 1981, c 7	1 (s 9)	0	0	1	0	0	0
12) <i>Act to Amend the Act to Establish the Régie du logement and to Amend the Civil Code and Other Legislation</i> , SQ 1981, c 32	1 (global)	0	0	0	1	0	0
13) <i>Act Respecting the Constitution Act</i> , 1982, SQ 1982, c 21; today CQLR c L-4.2	0	3 (ss 2 and 7-15)	0	0	0	0	0

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1]	[E2]	[F1]	[F2]
				Situa- tional issues	Social pro- gress	Indivi- dual identity	Collec- tive identity
14) <i>Act on the Resumption of Medical Care in Quebec</i> , SQ 1982, c 20	1 (s 33)	0	1	0	0	0	0
15) <i>Act to Amend the Summary Conviction Act, the Code of Civil Procedure and Other Legislative Dispositions</i> , SQ 1982, c 32	1 (global)	0	0	0	1	0	0
16) <i>Act to Amend the Charter of Human Rights and Freedoms</i> , SQ 1982, c 61	1 (global)	0	0	0	1	0	0
17) <i>Act on the Resumption of Activities in Colleges and Public Schools</i> , SQ 1983, c 1	1 (global)	0	1	0	0	0	0
18) <i>Act to Amend Certain Fiscal Legislation to Institute New Proceedings for Taxpayers</i> , SQ 1983, c 47; today <i>Tax Administration Act</i> , CQLR c A-6.002 <b>{still in force}</b>	1 (s 34)	0	0	0	1	0	0
19) <i>Public Service Act</i> , SQ 1983, c 55	1 (global)	0	0	0	1	0	0
20) <i>Act Respecting Public Elementary and Secondary Education</i> , SQ 1984, c 39	1 (ss 3 and 10)	0	0	0	0	0	1

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1]	[E2]	[F1]	[F2]
				Situa- tional issues	Social pro- gress	Indivi- dual identity	Collec- tive identity
21) <i>Act Respecting Pension Coverage for Certain Teachers and Amending Certain Dispositions Respecting Pension Coverage in the Public and Parapublic Sector</i> , SQ 1986, c 44; today being: <i>Act Respecting the Pension Plan of Certain Teachers</i> , CQLR c R-9.1 <b>{still in force};</b> <i>Act Respecting the Government and Public Employees Retirement Plan</i> , CQLR c R-10 <b>{still in force};</b> <i>Act Respecting the Teachers Pension Plan</i> , CQLR, c R-11 <b>{still in force};</b> and <i>Act Respecting the Civil Service Superannuation Plan</i> , CQLR c R-12 <b>{still in force}</b>	4 (s 10)	4 (s 15)	0	0	8	0	0
22) <i>Act to Amend the Act to Promote the Development of Agricultural Operations</i> , SQ 1985, c 54	0	1 (s 15)	0	0	1	0	0

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1]	[E2]	[F1]	[F2]
				Situa- tional issues	Social pro- gress	Indivi- dual identity	Collec- tive identity
23) <i>Act to Again Amend the Education Act and the Act Respecting the Conseil supérieur de l'éducation and to Amend the Act Respecting the ministère de l'Éducation</i> , SQ 1986, c 101	3 (ss 3 and 10)	3 (ss 2a and 15)	0	0	0	0	0
24) <i>Act Respecting Trust Companies and Savings Companies</i> , SQ 1987, c 95; today CQLR c S-29.01 <b>{still in force}</b>	3 (s 9)	0	0	3	0	0	0
25) <i>Act to Amend Bill 101, Charte de la langue française</i> , SQ 1988, c 54	1 (ss 3 and 10)	1 (ss 2b and 15)	0	0	0	0	2
26) <i>Education Act</i> , SQ 1988, c 84; today CQLR, c I-131	4 (ss 3 and 10)	4 (ss 2a and 15)	0	0	0	0	8
27) <i>Act Respecting School Elections</i> , SQ 1989, c 36, today CQLR c E-2.3	1 (ss 3 and 10)	1 (ss 2a and 15)	0	0	0	0	2
28) <i>Act to Amend Various Legislative Provisions Concerning Pension Plans in the Public and Parapublic Sectors</i> , SQ 1991, c 14	0	4 (s 15)	0	0	4	0	0

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1]	[E2]	[F1]	[F2]
				Situa- tional issues	Social pro- gress	Indivi- dual identity	Collec- tive identity
29) <i>Act Respecting Private Education</i> , SQ 1992 c 68, today CQLR c E-9.1	1 (ss 3 and 10)	1 (ss 2a and 15)	0	0	0	0	2
30) <i>Act to Amend the Code of Civil Procedure and the Charter of Human Rights and Freedoms</i> , SQ 1993, c 30	1 (s 23)	0	0	0	1	0	0
31) <i>Act Respecting Certain Declarations of Exception in Acts Relating to Education</i> , SQ 1994, c 11	0	5 (ss 2a and 15)	0	0	0	0	5
32) <i>Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provisions</i> , SQ 1996, c 10	0	4 (s 15)	0	0	4	0	0
33) <i>Act Respecting Certain Declarations of Exception in Acts Relating to Education</i> , SQ 1999, c 28	0	4 (ss 2a and 15)	0	0	0	0	4
34) <i>Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters</i> , SQ 2000, c 24	1 (ss 3 and 10)	3 (ss 2a and 15)	0	0	0	0	4



[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State impe- ratives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1] Situ- ational issues	[E2] Social pro- gress	[F1] Indivi- dual identity	[F2] Collec- tive identity
35) <i>Act Respecting the Pension Plan of Management Personnel</i> , SQ 2001, c 31; today CQLR c R-12.1 <b>{still in force}</b>	1 (s 10)	5 (s 15)	0	0	6	0	0
36) <i>Act to Reform the Code of Civil Procedure</i> , SQ 2002, c 7	1 (global)	0	0	0	1	0	0
37) <i>Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions</i> , SQ 2004, c 39	0	5 (s 15)	0	0	5	0	0
38) <i>Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field</i> , SQ 2005, c 20	1 (ss 3 and 10)	3 (ss 2a and 15)	0	0	0	0	4
39) <i>Act to Amend Various Pension Plans in the Public Sector</i> , SQ 2009, c 56	0	5 (s 15)	0	0	5	0	0
40) <i>Act to establish the New Code of Civil Procedure</i> , SQ 2014, c 1; today <i>Code of Civil Procedure</i> , CQLR c C-25.01 <b>{still in force}</b>	2 (s 23)	0	0	0	2	0	0

[A] Title of the act	[B] # QC Charter references	[C] # CAN Charter references	[D] # State imper- atives references	[E] # Social objectives references		[F] # Identity issues references	
				[E1] Situ- ational issues	[E2] Social prog- ress	[F1] Indivi- dual identity	[F2] Collec- tive identity
41) <i>Act Respecting the Implementation of Recommendations by the Pension Committee of Certain Pension Plans in the Public Sector and Amending Various Legislative Provisions</i> , SQ 2014, c 11	0	5 (s 15)	0	0	5	0	0
<b>TOTAL</b>							
<b>41 acts (106 paras)</b>	<b>32 acts (45 paras)</b>	<b>18 acts (61 paras)</b>	<b>4 acts (4 paras)</b>	<b>25 acts (60 paras)</b>		<b>11 acts (39 paras)</b>	
				<b>4 acts (6 paras)</b>	<b>21 acts (54 paras)</b>	<b>1 act (1 para)</b>	<b>10 acts (38 paras)</b>
<b>References to the notwithstanding clause made for good governance purposes<sup>A</sup></b>			<b>9 acts (11 paras)</b>				
<b>References to the notwithstanding clause made in the name of collective interest<sup>B</sup></b>			<b>31 acts (92 paras)</b>				

Table endnotes:

A: Being the sum of references made to the notwithstanding clause in the name of State imperatives [D], social objectives dealing with situational issues [E1] and identity issues dealing with individual identity consideration [F1].

B: Being the sum of references made to the notwithstanding clause in the name of social objectives dealing with matters of social progress [E2] and identity issues dealing with matters of collective identity [F2].