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From *Ford v. Québec* to the *Act Respecting the Laicity of the State* : A Distinctive Quebec Theory and Practice of the Notwithstanding Clause

François Côté and Guillaume Rousseau[*]

Legal theories and practices can sometimes be compared to volcanoes. Formed in the past and remaining quiet for ages, these peaceful giants in the background scenery appear dormant, taken for granted, uninteresting even, save for a few experts — until one day they erupt in the most spectacular fashion in a sudden torrent of heated activity that changes the entire landscape. In Canadian constitutional law, the notwithstanding clauses contained in the *Canadian Charter of Rights and Freedoms*[1] and in the *Charter of Human Rights and Freedoms*,[2] which allows a legislature to willingly set aside the supercedence of the fundamental Canadian Charter rights regarding a specific law or body of law[3] are such volcanoes. Formed in the mid 1970's through the early

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 33 [hereinafter the "Canadian Charter"].

[2] *Charter of Human Rights and Freedoms*, CQLR c. C-12, s. 52 [hereinafter the "Quebec Charter"].

[3] Unless provided otherwise by context, the terms "notwithstanding clause", "override" and analogous formulas throughout this article will encompass either and/or both the Canadian Charter's and the Quebec Charter's notwithstanding clauses. We openly recognize that both Charters are different in nature. Yet we submit that they can both be approached at once. Since *Ford v.*

1980's, the notwithstanding mechanism last generated significant attention in its early stages, in 1988, when the Canadian Charter's override was analyzed by the Supreme Court in the *Ford v. Québec* case[4] and when the Quebec Charter's override was invoked in the subsequent *Act to Amend Bill 101, Charte de la langue française*.[5] In the moment, these closely linked events generated a lot of political and legal discussion on the notwithstanding mechanism. Then, time went on, the focus shifted to other matters, and the notwithstanding clause faded out of the mainstream discussion for decades, seemingly quiet, asleep, until recently. Earlier this year, the Quebec Government adopted a new legislation, the *Act respecting the laicity of the State*.[6] This Act, which proposes targeted restriction to the wearing of religious garments by selected State officials during their duties, sparked a wildfire debate in the legal community, as it purports to shield itself from judicial scrutiny and potential invalidation on Charter rights grounds by invoking the notwithstanding mechanism; awakening the giant and putting it under the spotlight once again, 30 years after its last great eruption.

In these authors' opinion, this is the perfect time to address one specific issue: How were the notwithstanding mechanisms addressed — both by academic theory and in legislative practice — in the last decades in Quebec before and following the *Ford* case? Were they shunned? Were they a non-issue? Or, rather, did Quebec develop its own coherent theory and practice concerning the legitimacy[7] of referring to legislative overrides? We contend

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Quebec (Attorney General), [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.) [hereinafter "Ford"], the Supreme Court of Canada conflated the evaluation of unprotected Canadian Charter rights limitation under the same *Oakes* test (*R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.)), with the same potential for invalidation, for both Charters. The reunion of two related objects does not necessarily mean their confusion.

4 *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.). In this affair, the Quebec government did use the Canadian Charter's notwithstanding clause to partially protect the *Charter of the French Language*, CQLR, c. C-11 (hereinafter "CFL") from judicial scrutiny under the Canadian Charter, but did not invoke the Quebec Charter's override at the same time. While the Supreme Court did respect the legislature's reference to the Canadian Charter's notwithstanding clause and found itself without jurisdiction to conduct a Canadian Charter judicial scrutiny on s. 58 of the CLF, it proceeded to do so under the Quebec Charter to attain the same result: invalidating parts of the CLF pertaining to some linguistic obligations in commercial advertisement in the name of freedom of expression.

5 *Act to Amend Bill 101, Charte de la langue française*, S.Q. 1988, c. 54.

6 *Act respecting the laicity of the State*, S.Q. 2019, c. 12.

7 To put it out at the start: we will not be analyzing the *legality*, in a formal sense, of invoking the override. Rather, we will hereafter focus on the *legitimacy* of employing the override in Quebec – addressing the theory and practice of how and when the legislature *should* refer to the notwithstanding mechanism to protect a piece of legislation against the Charters, rather than if it *could* (that last question being here considered a given).

that the answer lies in the latter possibility — which may shed some light as to how Quebec's academics and elected officials have been considering, construing and using the legislative override (over 100 times) since the last 30 years that could explain the present.[8]

In 1988, in *Ford*, the Supreme Court stated that:

> The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter*. (…) There is no reason why more should be required under s. 33.[9]

Then the Court concluded that section 58 of the *Charter of the French Language,*[10] which stated that "commercial advertising shall be solely in the official language", infringed "the freedom of expression guaranteed by s. 3 of the Quebec *Charter*". It also concluded that section 69 of the CFL, under which "only the French version of a firm name may be used in Quebec", infringed "the guaranteed freedom of expression under both s. 2(*b*) of the Canadian *Charter* and s. 3 of the Quebec *Charter*".[11]

Following that ruling, the Quebec National Assembly adopted the *Act to Amend Bill 101, Charte de la langue française*, which made slight modifications to sections 58 and 69 of the CFL, reinstated their core rules and referred to the notwithstanding clause of both Charters to counteract the Supreme Court's decision. These references to section 33 of the *Canadian Charter of Rights and Freedoms*[12] and section 52 of the *Charter of Human Rights and Freedoms*[13] generated a great deal of controversy in the rest of Canada and, to some extent, in Quebec. Since then, *Ford v. Quebec* and the following *Act to Amend Bill 101* are regarded as a highly influential landmark caselaw and legislative reaction.

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[8] Numbers and empirical analysis at Part II, below. In this article, we will only focus on the specifically Quebec theoretical and practical approach to the notwithstanding mechanism – which are distinct from the mainstream theoretical approach and (quasi-absence of) practical use in English Canada. For a detailed comparison between the two models, see our previous study (Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 (2) R.G.D. 343).

[9] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at para. 33 (S.C.C.).

[10] *Charter of the French Language*, CQLR, c. C-11.

[11] *Ford v. Quebec (Attorney General),* [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at para. 60 (S.C.C.).

[12] *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.*

[13] *Charter of Human Rights and Freedoms*, CQLR, c. C-12.

But 30 years later, how relevant do they remain? Are they coherent with the leading theoretical approaches to notwithstanding mechanisms discussed within Quebec's academic authorities? Are they an accurate representation of its "raison d'être" and of the actual use of notwithstanding clauses references made by the National Assembly from 1976 to 2019?

To discuss this, we will analyze the theoretical approach to the notwithstanding clause adopted by Québec's leading academic authorities, its "raison d'être" and survey the empirical legislative practice of using the notwithstanding clause made by the National Assembly (from 1976 to 2019).

I. A Theoretical Approach to the Notwithstanding Clause adopted by Québec's Leading Academic Authorities

Henri Brun and Guy Tremblay are amongst the first scholarly authors in Quebec who laid out the building elements of a Quebec theory of the notwithstanding clause. For this reason, we will first look into Brun and Tremblay's contributions before considering other Quebec authors sharing their views.[14]

1. Professors Brun and Tremblay: The Genesis of a Quebec Theory of the Notwithstanding Clause

In 1977, less than two years following the Quebec Charter's entry into force, Henri Brun, one of Quebec's most influential constitutionalists,

[14] Of course, there are some Quebec authors who do not share Brun and Tremblay's point of view on the matter, but we will not address them in detail in this article. André Morel, for example, considers notwithstanding clauses as a formal and procedural question first and foremost rather than associating them with identity policies, social questions or international law considerations. His approach is much more concerned with respecting the highest possible degree of formality before a legislator can set aside a fundamental right protected by a Charter. It must however be noted that his position predated the *Ford* case, in which the Supreme Court determined a lower standard than the one proposed by Morel regarding formal considerations required to employ a notwithstanding clause. André Morel, "La coexistence des chartes canadienne et québécoise: problème d'interaction" (1986) 17 R.D.U.S. 49 at 65-69. Our contention in this article is to submit that there exists *a* distinct Quebec academic theory of the notwithstanding mechanism, not that its is the *only* one or the *official* one. For a detailed comparison with English Canada's leading authors on the matter, further detailing the distinctiveness of Quebec's approach, see Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 (2) R.G.D. 343.

wrote about this Charter and its notwithstanding clause, under section 52. According to him:

> *(…) 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.*[15]

Developing his thoughts, he gives the examples of the *Official Language Act*[16] and of section 39 of the *Cinema Act*[17] (providing that all movies not realized in French must be dubbed or subtitled in French for Quebec). In 1975, he also mentions:

> *In the Canadian context, and moreover that of Quebec, the Canadian and Quebec communities are sufficiently vulnerable (especially Quebec) for it to appear that individual freedoms should be legally protected by employing express legislative exemptions ("notwithstanding clause") 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.*[18]

Two years later, in a 1977 paper about the Quebec Charter, in which he mentioned that its notwithstanding clause appears "adapted to the Quebec context", professor Brun's opinion remained unchanged. While, on one hand, he says that "individual rights are protected by Parliament'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".[19] He continues by adding that the legislator should

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[15] Henri Brun, "La Charte des droits et libertés de la personne: domaine d'application" (1977) 37:2 R. du B. 179, at 199 (emphasis added).

[16] *Official Language Act*, S.Q. 1974, c. 6.

[17] *Cinema Act*, S.Q. 1975, c. 14.

[18] Henri Brun, "Le Québec peut empêcher la vente du sol québécois à des non-Québécois" (1975) 16:4 C de D 973, at 974-975.

[19] Henri Brun, "La Charte des droits et libertés de la personne: domaine d'application" (1977) 37:2 R. du B. 179, at 201.

only use the notwithstanding clause for situations that implicate such collective issues.[20]

Thus, according to Henri Brun, the notwithstanding clause can be legitimately employed to protect a vulnerable national community, such as Quebec, in order to enable it to safeguard some collective liberties regarding its language, its culture or, in today's words, its identity.

Of course, one cannot reduce Henri Brun's theory of the notwithstanding clause solely to national identity questions — even in a large sense — because of the concept of "collective liberty" that is also deeply rooted in the heart of this theory. This concept brings us much closer to democracy than to identity. Also, since professor Brun situates them on a "legislative level",[21] collective liberties bring us closer to parliamentary sovereignty as well.

That being said, the relationship between parliamentary sovereignty and notwithstanding clauses is more deeply analyzed in a paper published in 1988 by Guy Tremblay and Sylvain Bellavance.[22] To them, this relationship traces its roots to a British idea of charter rights that recognizes this sovereignty without question. In their article, the Authors examine the Canadian Charter's notwithstanding clause, as well as those of various human rights provincial laws (especially the Quebec Charter). At this time, the United Kingdom was still hesitating between a formalist approach, requiring a the use of express terms for a valid use of the notwithstanding clause, and a realist approach, rather requiring the legislator to explicitly state its intention to use it rather than submitting its validity to a specific formulation.[23] Because of the significant impact charter rights have on parliamentary sovereignty, the Authors conclude that "the realist approach seems better".[24]

It must be underlined, however, that the modern idea of charter rights is somewhat in tension against the British tradition and may be explained by the United Kingdom's intentions to get closer to Europe at the time — in which the *Convention for the Protection of Human Rights and*

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[20] Henri Brun, "La Charte des droits et libertés de la personne: domaine d'application" (1977) 37:2 R. du B. 179, at 202.

[21] Henri Brun, "La Charte des droits et libertés de la personne: domaine d'application" (1977) 37:2 R. du B. 179, at 199.

[22] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637.

[23] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637, at 650.

[24] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637, at 651.

Fundamental Freedom holds a strong symbolic place.[25] According to Tremblay and Bellavance, the adoption of a United Kingdom Charter incorporating this Convention's elements would allow the United Kingdom 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.[26] This contrasts with the Canadian approach under the Canadian Charter which, while not always in line with international law (*i.e.*, the *International Covenant on Civil and Political Rights*[27]), allows for a higher degree of judicial interventionism with a lesser level of deference towards the legislator's margin of appreciation.[28]

Considering the above, the Authors conclude that the Canadian Charter's notwithstanding clause should not be abolished. In their opinion, since all these instruments "do not always protect the same rights (…) give different definitions even of the most classic rights" and allow different "types of limitations", "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".[29]

The main idea to keep in mind from Tremblay and Bellavance's paper is that, notably for the sake of parliamentary sovereignty, one should not be too demanding on formal requirements to invoke the notwithstanding clause. On merit, we should hold that the use of a notwithstanding clause may be wholly justified as long as it does not violate human rights as understood in international law.[30]

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[25] *Convention for the Protection of Human Rights and Fundamental Freedom* (November 4th, 1950) S.T.E. n° 5, entered into force September 3rd, 1953.

[26] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637, at 654.

[27] *International Covenant on Civil and Political Rights*, December 16th, 1966, 999 U.N.T.S. 171, [1976] R.T. Can. n° 47 (entry in force in Canada: May 19th, 1976).

[28] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637, at 652-654.

[29] Guy Tremblay & Sylvain Bellavance, "La suprématie législative et l'édiction d'une charte des droits britannique" (1988) 29-3 C. de D. 637, at 652-655. The authors are here referring to the *International Convenant on Civil and Political Rights*.

[30] In this respect, we must note that several international instruments (such as the Covenants, for example), as well as the accompanying jurisprudence, explicitly recognize that Member States are left with a deferential "national appreciation margin" that allows them to determine the scope, reach and preferable means of application of the human rights enunciated therein. Several international instruments also openly recognize that some human rights can be

These two leading currents established, one can now turn as to how the various elements of a Quebec theory of the notwithstanding clause from Tremblay and Bellavance's work and Brun's work complete one another. Inquiry in that respect is fortunately greatly facilitated by the fact that professors Brun and Tremblay effectively joined their theories on the subject in their book "Droit constitutionnel", last reedited in 2014.[31]

In this book, Henri Brun and Guy Tremblay, joined by Eugénie Brouillet, refer to parliamentary sovereignty to justify the notwithstanding clauses' legitimacy — that of the Canadian Charter as well as of the Quebec Charter. They qualify this disposition as an institution whose purpose is: "simply put, to restore parliamentary democracy with respect to certain rights and freedoms".[32] On section 33 of the Canadian Charter, they also add:

> *(...) one should simply not overlook the federal context underlying the Charter. In convening to their adherence to a federation, the founding provinces wanted to retain the power to decide freely and for themselves on certain matters in contrast to a Canadian Charter that aims at standardizing and centralizing law in Canada.*[33]

More importantly, they also add the following words with respect to a Quebec theory of the notwithstanding clause:

> *That which holds true for the whole Canada 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 it, to some degree, to keep this power to have a final saying on some subjects.*[34]

Dating from 2014, these words remind us of Henri Brun's 1977 paper, with some developments on matters of form and, to a lesser extent, merit. Formally, his theories no longer speak of Quebec's economic and

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limited when necessary to protect "the fundamental rights of others", thus opening the door to collective interest considerations.

[31] Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville: Éditions Yvon Blais, 2014).

[32] Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville: Éditions Yvon Blais, 2014), at 968.

[33] Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville: Éditions Yvon Blais, 2014), at 970.

[34] Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville: Éditions Yvon Blais, 2014), at 970.

cultural vulnerability, but rather of Quebec's particular cultural situation. Yet, on the merits, the same core element remains: the use of the notwithstanding clause is justified in order to protect the Quebec identity. Additionally, since the 2014 text holds the same position on the Canadian Charter that the 1977 text holds on the Quebec Charter, it indicates that the same reasoning is applicable to both Charters, and is as much valid in the past as today - as is Brun's coherent approach to the notwithstanding clause's legitimacy built on parliamentary sovereignty and solely subject to judicial review of its form, not its perceived merits by the courts.

However, to corroborate the international law aspect of this Quebec theory of the notwithstanding clause, we must turn our attention to other authors.

2. Authors Continuing a Quebec Theory of the Notwithstanding Clause

In 1991, Jacques Gosselin published a book, containing a chapter titled "Strategy for an Understanding of Section 33 and Judicial Review Under the Charter".[35] In his chapter, he cites Henri Brun to remind that, along with parliamentary democracy, "collective sovereignty was already concretely existing in Canada, beyond the Constitution well before the Charter's entry in force".[36]

This author also affirms that the notwithstanding clause could be used in a law that has not yet been declared as contrary 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 this measure, that it would be preferable to preemptively protect it from judicial challenges.*[37]

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[35] Translated chapter title from: Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, Éditions Yvon Blais, 1991), at 225.

[36] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, Éditions Yvon Blais, 1991), at 288. Gosselin is citing Henri Brun, "La Charte canadienne des droits et libertés comme instrument de développement social" in Claire F. Beckton & A. Wayne Mackay, 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), at 6.

[37] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, Éditions Yvon Blais, 1991), at 234 [hereinafter "Gosselin"].

In his view:

> *There needs to be some sort of alternation between the organic powers who define which interpretation of the Charter receives authority in order to concretely ensure that, within the Canadian community, and inside the distinctive society that is Quebec, the definition of fundamental rights will not be the exclusive prerogative of jurists.*[38]

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 Jacques Gosselin, the founding principles of federalism consider 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".[39] Building on Brun's arguments (amongst others), he observes that the Canadian Charter has indeed a centralization and standardization effect.[40] In this, context, Gosselin thus 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 wither.*[41]

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 this character.[42]

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[38] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville, Éditions Yvon Blais, 1991), at 237.

[39] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 246.

[40] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 247; Henri Brun, "La Charte canadienne des droits et libertés comme instrument de développement social" in Claire F. Beckton and A. Wayne Mackay, 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) at 9-12.

[41] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 249.

[42] Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 249.

Again, according to Gosselin, the second major motive justifying the use of the notwithstanding clause resides in its potential to promote human rights that bear a collective or community value, such as those encompassed by the *International Covenant on Civil and Political Rights*.[43]

In this perspective and regarding the relationship between the notwithstanding clause and international law, Marie Paré published a paper of significant interest in 1995, entirely focused on this question. Paré observes that there are many differences between the notwithstanding clause of the Canadian Charter and the one in the *International Covenant on Civil and Political Rights* as well as, more widely, both documents in general.[44] In this light, she concludes, "the mere presence of section 33 in the Canadian Charter does not constitute a violation by Canada of its international obligations".[45]

Further nuancing this distinction, Paré points out that Saskatchewan once used the notwithstanding clause to quash strike action rights during a labour dispute, despite the fact that strike action rights are protected by the *International Covenant on Economic, Social and Cultural Rights*.[46] She also gives the example of Quebec's prior use of the notwithstanding clause to protect the *Charter of the French Language*'s dispositions on exclusive use of the French language in commercial advertising, despite the United Nation's Human Rights Committee's opinion that it

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[43] *International Covenant on Civil and Political Rights*, December 16th, 1966, 999 R.T.U.N. 171, [1976] R.T. Can. n°47 (entry in force in Canada: May 19th, 1976); See also Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 241-246.

[44] On one hand, the Canadian Charter's notwithstanding clause applies to human rights deemed as inviolable by the Covenant, such as the right to life and the protection against cruel treatments. On the other hand, s. 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 Covenant. Moreover, as opposed to some international agreements such as the European Convention on Human Rights, 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 Covenant are very different in nature: the first being legally binding *per se*, while the second is not, due to state sovereignty. Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 635-641 [hereinafter "Paré"].

[45] Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 640-641.

[46] *International Covenant on Economic, Social and Cultural Rights* (December 16th, 1966) 999 U.N.T.S. 171 (ICCPR), (entered into force January 3rd, 1976); Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 645-646.

contravenes the *International Covenant on Civil and Political Rights*.[47] Immediately after those observations, Paré pleads in favour of the notwithstanding clause. Quoting Jacques Gosselin in her support, she states 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".[48] Finally, relying on Canada's and Quebec's interventions in front of the Committee on democracy and parliamentary sovereignty, as well on Gosselin's papers and a text from Lorraine Weinrib,[49] 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".[50]

In a comparable perspective, André Binette published an article on the notwithstanding clause in 2003, in which he quotes Paré and reaches similar conclusions on matters of international law.[51] He then submits an analysis of Canadian dynamics. After reviewing the relationship between the notwithstanding clause and parliamentary sovereignty, he observes two occasions in which Quebec used the notwithstanding clause which generated a great deal of controversy in the rest of Canada: the *Act Respecting the Constitution Act, 1982*[52] which added a general reference to the notwithstanding clause to all laws already in force in Quebec, and the *Act to amend Bill 101, Charte de la langue française*.[53] Even more interestingly, he points out that: "all other cases involving the Canadian Charter's notwithstanding clause, systematically accompanied by a reference to the Quebec Charter's notwithstanding clause, generated a lot

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[47] Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 646.

[48] Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 653; Jacques Gosselin, *La légitimité du contrôle judiciaire sous le régime de la Charte* (Cowansville: Éditions Yvon Blais, 1991), at 247.

[49] Lorraine Weinrib, "Learning to Live with the Override" (1990) 35 McGill L. J. 542, at 557-569.

[50] Marie Paré, "La légitimité de la disposition dérogatoire de la Charte canadienne des droits et libertés en droit international" (1995) 29 R.J.T. 627, at 655.

[51] 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 edition, R. du B. 109, at 125-128 [hereinafter "Binette"].

[52] *Act Respecting the Constitution Act*, *1982,* S.Q. 1982, c. 21.

[53] *Act to Amend Bill 101, Charte de la langue française*, S.Q. 1988, c. 54; 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 edition, R. du B. 109, at 117-118.

less controversy".[54] Further down, he also 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 the fact that Quebec is the only province in which several references to notwithstanding clauses are still in force".[55]

In Binette's opinion, the notwithstanding clause allows legislation to set aside conservative jurisprudence in order for more progressive measures to prevail — which is reminiscent of professor Brun's previous analysis.[56] Binette also quotes Donna Greshner and Ken Norman saying: "It ought not to be forgotten that the record of the United States Supreme Court, in striking down progressive legislation at the beginning of this century, was precisely what motivated Premier Blakeney to argue for s. 33 in the first place".[57] For Binette, the notwithstanding clause is therefore important for social progress to move forward despite potential judicial conservatism.[58] In such context, he explicitly rallies to Jacques Gosselin's position, stressing the importance to allow the respective wisdom of judiciary and parliamentary powers to alternate and balance one another.[59]

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*.[60] To him, section 33 of the Canadian Charter is a meeting ground for

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[54] 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 edition, R. du B. 109, at 119.

[55] 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 edition, R. du B. 109, at 149.

[56] 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 edition, R. du B. 109, at 139. In 1986, Brun mentioned that "a charter of rights is a particularly conservative instrument" and insisted on the importance of legislative actions for social progress. (see Henri Brun, "La Charte canadienne des droits et libertés comme instrument de développement social" in Claire F. Beckton & A. Wayne Mackay, 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) at 7).

[57] Donna Greshner & Ken Norman, "*Engaging the courts and section 33*" (1987) 12 Queen's L. J. 155, at 172 quoted in 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 edition, R. du B. 109, at 139.

[58] 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 edition, R. du B. 109, at 136.

[59] *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 edition, R. du B. 109, at 138.

[60] *Reference Re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R 217 (S.C.C.).

federalism and democracy.[61] This section would also manifest both the principle of constitutionalism and 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.[62]

In conclusion, we can say that from Henri Brun to Jaques 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 with several recurring elements. Its leading principles submit that, even prior to a judicial ruling invalidating a law on Charter grounds, using 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's distinctive identity or to push forward social progress, issues concerned with matters of collective rights and interests that may, in some circumstances, be more important than some individual liberties, in a way not contrary to the human rights principles recognized by international law.

As this vision is coherent and has been elaborated by a significant number of Quebec authors during a substantial period of time, we believe that we can describe it as a legitimate Quebec theory of the notwithstanding clause. Especially when this theory materializes in practice through the numerous instances in which Quebec laws referred to the notwithstanding clause.[63]

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[61] 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 edition, R. du B. 109, at 146.

[62] 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 edition, R. du B. 109, at 146.

[63] Prior to this discussion we must point out that in our previous paper on the notwithstanding clause (Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 (2) R.G.D. 343, at 400-401) while we contended that there was a correlation between the distinctive theory of the notwithstanding clause according to the Quebec scholarly authors and the legislative practice of the National Assembly in that matter, we were not saying that, historically, there has been a *causation* between the two. While it remained very possible that authors may have been influenced by the National Assembly's debates when drafting their theories and inversely, that members of the legislature may have been influenced by what they read from academic authorities when debating the notwithstanding clause in chamber, previously we had not witnessed direct, relevant and influencing references made from one to another (the only exception being André Binette who did address Quebec legislative practice (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 edition, R. du B. 109, at 117), but we do not gather a sense of direction in his work that would stem from empirical observation of the National Assembly's practice). Therefore, neither theory nor practice appeared as the other's point of origin. We issued this opinion in our 2017 paper, but last June, the Minister responsible for the *Act respecting the laicity of the*

II. THE NOTWITHSTANDING CLAUSE IN PRACTICE: "RAISON D'ÊTRE" AND EMPIRICAL USE FROM THE NATIONAL ASSEMBLY'S PERSPECTIVE

Since the Quebec Charter's entry in force, in 1975, the elected representatives used its notwithstanding mechanism on more than one hundred occasions in over thirty distinct laws,[64] frequently while simultaneously referring to the Canadian Charter's notwithstanding clause as well. In this perspective, we intend to specifically mention these dual references. But first, let's look at the "raison d'être" of the notwithstanding clause according to the elected officials who were the first to comment on it.

1. The Notwithstanding Clause's "Raison d'Être" According to the Elected Officials at the Origins of Its Adoption or First Use

The first time that Quebec elected representatives officially commented on the notwithstanding clause was in the wake of its adoption as section 52 of the Quebec Charter. For the Minister of Justice

State referred to the Quebec theory of the notwithstanding clause revealed by our 2017 study, saying: "[N]otwithstanding clauses are introduced in the Bill (…) Quebec has used these provisions more than 100 times since 1975. Almost always, it has done so to promote its distinct character or to allow social progress. With Bill 21, we are entering into this tradition and we are fully embracing it" (QUÉBEC, ASSEMBLÉE NATIONALE, *Journal des débats. Commissions parlementaires*, Commission des institutions, 1st sess., 42th legis., June 4, 2019 (Simon Jolin-Barette) (final pagination pending)). In our opinion, the absence of "direction" (i.e., the theory did not flow mainly from practical observation, and the practice did not felt obligated to go in the direction of a predefined theory) during 44 years actually greatly authenticates both, forming two independent intellectual approaches to the same intellectual problem that corroborate one another. 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. And the fact that recently the Minister responsible for a Bill invoking the notwithstanding clauses referred to our findings regarding this theory and adhered to it also confirms this proposition. For the sake of transparency, please note that one of the authors of this study acted as counsel to the Minister responsible for this bill and that the other intervened in commission during the Bill's parliamentary study.

[64] To compile those cases, we referred to an extensive document from the Quebec Ministry of Justice titled "Lois concernant 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 September 13th, 2011. Regarding the Quebec Charter, we also referred to Brisson and Deschênes for the 1975-1989 time period (Jean-Maurice Bisson & Yves Deschênes, *Texte annoté de la Charte des droits et libertés de la personne du Québec* (Montreal: SOQUIJ, 1989), at 143-145). On the Canadian Charter, we referred to Tsvi Kahana, *The Partnership Model of the Canadian Notwithstanding Mechanism: Failure and Hope*, doctorate thesis (Toronto: University of Toronto, 2000) at 293-294. We also conducted a keyword-based search in legal databases such as CanLII on both charters for the 1989-2019 time period.

at the time, this notwithstanding clause 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".[65] At another occasion, he referred to "circumstances in which society and State imperatives outweigh individual needs".[66] He also added that it would not be appropriate to require a special majority from future parliaments to use the notwithstanding clause, as it would go against the principles of "parliamentary democracy" and those of "England, (...) the mother of all Parliaments".[67]

Later on, the first time that Quebec elected representatives officially commented on the Canadian Charter's notwithstanding clause was in the wake of the *Act Respecting the Constitution Act*, *1982*, whose 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".[68]

Thus, the notwithstanding clause was associated with democracy or parliamentary sovereignty by both the Quebec Government responsible for the adoption of the Quebec Charter and the one to first use the Canadian Charter's notwithstanding clause, as it is by academic authors. As for the fundamental motivations behind such uses, they seemingly stem from state imperatives or social objectives. Of course, those social imperatives remind us of Jacques Gosselin's social rights and André Binette's progressive measures. At this stage, the motivation for using the clause are much more about social justice than about identity, 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.[69] Subsequent developments would prove him right.

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[65] Quebec, Assemblée Nationale, *Journal des débats*. *Commissions parlementaires*, Commission permanente de la justice, 3rd Sess., 30th Legis., June 26, 1975, at B-5134 (Jérôme Choquette).

[66] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale du Québec*, 2nd Sess., 30th Legis, November 12, 1974, at 2749 (Jérôme Choquette).

[67] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale du Québec*, 2nd Sess., 30th Legis, November 12, 1974, at 2749 (Jérôme Choquette).

[68] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale du Québec*, 3rd Sess., 32nd Legis, May 19, 1982, at 3616 (Marc-André Bédard).

[69] Henri Brun, "La Charte des droits et libertés de la personne: domaine d'application" (1977) 37:2 R. du B. 179, at 199.

2. Subsequent Empirical Use of the Notwithstanding Clause by the National Assembly

Over the following decades, in sharp contrast with all other provincial legislatures as well as the Federal Parliament, the Quebec National Assembly developed a recurring practice of preemptively[70] referring to the notwithstanding clause when enacting legislation pertaining to important matters of social progress or collective identity.[71]

In this perspective, matters of social progress are here construed as instances where the protected Act was drafted with a strong policy-driven intent to steer global social changes that would target the entire Quebec society or a significant part of it with a perspective of achieving grand-scale social justice. Matters of collective identity, for their part, are addressed as acts seeking to protect and promote 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 are Quebec's French Language, Catholic heritage — and recently[72], its Civil Law legal tradition. As both instances are dealing with collective populational interests (in contrast with individual interests or with purely logistical governance logistics), we address them here altogether.[73]

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[70] As opposed to employing it in in response to a Supreme Court decision invalidating a given legislation on Charter grounds.

[71] For details and all references see: Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 (2) R.G.D. 343, Appendix. While Quebec employed section 33 at least 62 times since 1982, all the other provinces combined only referred to the Canadian Charter notwithstanding mechanism 4 times during the same period. The Federal Parliament never used it. Since our previous study, the *Act respecting the laicity of the State* came into force, adding one Act containing two references (on per Charter) to our numbers; here adjusted accordingly.

[72] *Act respecting the laicity of the State*, S.Q. 2019, c. 12, Preamble. Note that while the preservation of Quebec's catholic heritage used to be a significantly strong social issue in the past, gradual secularization over the last decades caused it to lose much of its sense of collective importance. It has now been greatly replaced, if not altogether, by a collective desire for religious neutrality – which, one can observe, is still in the field of collective societal attitude towards religion.

[73] While this would fall outside the scope and editorial limitations of this article, several distinctions can be made between these two interlinked streams of the same river, notably as to the much higher social and political visibility of identity issues and their greater sense of importance during legislative debates, despite them being of a lower empirical number than social progress legislations. For a more in-depth analysis, see Guillaume Rousseau & François Côté, "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47 (2) R.G.D. 343, § 2.3 and 2.4

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 a notwithstanding clause made afterwards, we total 42 acts referring to a notwithstanding clause adopted by the National Assembly of Québec containing at least one reference — 12 of which are still in force today. Amongst those 42 laws, 10 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 33 derogations to the Quebec Charter and 19 for its Canadian counterpart. Regarding the laws still in force today, six are derogating to both Charters and six to the Quebec Charter only.

Since several of those acts featured more than a single reference to a notwithstanding clause through their various sections, we can also number those individual references, to a total of 46 paragraphs referring to the notwithstanding clause of the Quebec Charter, with 13 still in force, and 62 paragraphs referring to the notwithstanding clause of the Canadian Charter, with 6 still in force — for a combined total of 108 derogations, 19 of which still being in force.

Through parliamentary archives, it is possible to uncover the reasons that were invoked by sponsor representatives, ministers or delegates — and sometimes, exceptionally, opposition spokespersons who were favourable to it and whose words were approved by the sponsor, to justify using the notwithstanding clause in a Bill.

Eleven Acts containing a notwithstanding clause and 40 references to such a clause were adopted with an objective of collective identity preservation. For example, between 1984 and 2005, nine acts addressing the relationship between religion and the school system were adopted, many of them modifying several other laws and all of them being protected by references to a notwithstanding clause.[74] Their goals were

[74] *Act Respecting Public Elementary and Secondary Education*, S.Q. 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*, S.Q. 1986, c. 101, ss. 10-12; *Education Act*, S.Q. 1988, c. 84, today CQLR, c. I-13, ss. 726, 727; *Act Respecting the Conseil Supérieur de l'Éducation*, CQLR, c. C-60, s. 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*, S.Q. 1989, c. 36, today CQLR, E-2.3, s. 283 and 284; *Act Respecting Private Education*, S.Q. 1992, c. 68, s. 175 and 176, today CQLR, E-9.1; *Act respecting Certain Declarations of Exception in Acts Relating to Education*, S.Q. 1994, c. 11, s. 1; *Act respecting Certain Declarations of Exception in Acts Relating to Education*, S.Q. 1999, c. 28,

essentially to uphold historical rights and privileges granted to Catholic and Protestant schools, chiefly in matters of religious education. In 1999, according to the Minister of Education François Legault, as he then was, the objective underlying the reference to the notwithstanding clause was to "allow for a necessary and progressive evolution to happen in harmony with Quebec's history and culture".[75] In 2000, for the same Minister of Education, the goal is still to achieve "balance between the necessary open-mindedness of a pluralist society, while respecting the tradition, history and culture of Quebec".[76]

The notwithstanding clause was also used to defend a law specifically designed to protect French language in Quebec in 1988, with none other than the *Act to amend the Charter of the French Language* (1 Act, 2 references). This law invoked both Charters' notwithstanding clauses to protect its dispositions pertaining to exclusive use of French in exterior commercial advertisement[77] that were set aside by the Supreme Court in the *Ford*[78] case. Specifically, these dispositions were protected by a derogation to sections 2(b) 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 Quebeckers", "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".[79] It is noteworthy to stress that, here, the notwithstanding clause was used not only as a *legal* response to the Supreme Court 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 Charter rights in the Supreme Court's opinion, and deliberately chose to make the former

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ss. 1 and 3; *Act to amend Various Legislative Provisions respecting Education as regards Confessional Matters*, S.Q. 2000, c. 24, ss. 44, 61, 67 and 68; *Act to amend Various Legislative Provisions of a Confessional Nature in the Education Field*, S.Q. 2005, c. 20, ss. 9, 11, 16 and 17.

[75] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission de l'éducation, 1st sess., 36th legis., June 2, 1999 (François Legault).

[76] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission de l'éducation, 1st sess., 36th legis., June 1, 2000 (François Legault).

[77] *Act to Amend Bill 101, Charte de la langue française,* S.Q. 1988, c. 54, s. 10.

[78] *Ford v. Quebec (Attorney General),* [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

[79] Quebec, Assemblée Nationale, *Journal des débats de l'Assemblée nationale*, 2nd sess., 36th legis., December 19, 1988, at 4373-4375 (Guy Rivard).

prevail in the greater 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.

Finally, the latest (and highly discussed) use of the notwithstanding mechanism made by the National Assembly, in the 2019 *Act respecting the laicity of the State*, can also be characterized as aiming to protect legislation made to defend and promote matters of national identity. As the sponsor Minister Jolin-Barrette put it in chamber after the Act's final vote of adoption: "This Act represents a historical milestone for Quebec, it is the result of journey and of an evolutionary process that are specific to Quebec. Laicity is part of our identity and today, finally, Mrs. Speaker, it can be entirely assumed"[80]. Earlier on, in parliamentary commission, he justified using both Charters' legislative overrides in these terms:

> *It is legitimate for Members of the National Assembly, as representatives of the Quebec nation, to make this choice, to legislate upon it and to use the notwithstanding mechanisms to ensure that this societal choice is made in Parliament. Organizing the relationship between the State and religions should not be something left to be defined by tribunals.*[81]

He also mentioned the following: "[N]otwithstanding clauses are introduced in the Bill (…) Quebec has used these provisions more than 100 times since 1975. Almost always, it has done so to promote its distinct character or to allow social progress. With Bill 21, we are entering into this tradition and we are fully embracing it"[82].

Turning now to matters of social progress, 21 Acts containing a notwithstanding clause and 54 references to such a clause were adopted with such objectives in mind. For example, the *Act Respecting Pension Coverage for Certain Teachers and amending Certain Dispositions*

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[80] Quebec, Assemblée Nationale, *Journal des débats de l'Assemblée nationale*, 1st sess., 42nd legis., June 16, 2019 (Simon Jolin-Barrette) (final pagination pending).

[81] Quebec, Assemblée Nationale, *Journal des débats, Commissions parlementaires*, Commission des institutions, 1st sess., 42nd legis., May 9, 2019 (Simon Jolin-Barrette) (final pagination pending).

[82] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission des institutions, 1st sess., 42th legis., June 4, 2019 (Simon Jolin-Barette) (final pagination pending).

respecting Pension Coverage in the Public and Parapublic Sector[83], adopted in 1986, contained four sections invoking the notwithstanding clauses. In all four cases, 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*[84] was enacted in 2001 with a reference to the notwithstanding clauses made in the same perspective. Every five years, those references to section 33 are renewed.[85] Those five cases of double reference to notwithstanding clauses are still in force today in five different Acts.[86]

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.

In 2001, the State Minister to Administration and Public Service mentioned that the Act encompassed by the notwithstanding clause was "socially speaking, extremely justified".[87] In 2004, the Government Administration Minister justifies the Act on the ground that it flows from an agreement reached with a labour union.[88] In 2009, her successor spoke of the "benefits aiming to compensate the particular work conditions that

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[83] *Act Respecting Pension Coverage for Certain Teachers and Amending Certain Dispositions Respecting Pension Coverage in the Public and Parapublic Sector*, S.Q. 1986, c. 44; today *Act Respecting the Pension Plan of Certain Teachers*, CQLR, c. R-9.1, s. 62, 87, 97 and 105.

[84] *Act Respecting the Pension Plan of Management Personnel*, S.Q. 2001, c. 31, s. 211; today CQLR, c. R-12.1.

[85] *Act to Amend Various Legislative Provisions Concerning Pension Plans in the Public and Parapublic Sectors*, S.Q. 1991, c. 14, s. 1, 29, 37 and 43; *Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provisions*, S.Q. 1996, c. 10, s. 5-8; *Act Respecting the Pension Plan of Management Personnel*, *op. cit.*, note 120*,* s. 235, 360, 378 and 392; *Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions*, S.Q. 2004, c. 39, s. 78, 174, 196, 214 and 272; *Act to Amend Various Pension Plans in the Public Sector*, S.Q. 2009, c. 56, s. 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*, S.Q. 2014, c. 11, s. 1, 8, 9, 10 and 15.

[86] *Act Respecting the Pension Plan of Certain Teachers*, CQLR, c. R-9.1, s. 62; *Act Respecting the Government and Public Employees Retirement Plan*, CQLR, c. R-10, s. 223.1; *Act Respecting the Teachers Pension Plan*, CQLR, c. R-11, s. 78.1; *Act Respecting the Civil Service Superannuation Plan*, C.R.L.Q., c. C-12, s. 114.1; *Act Respecting the Pension Plan of Management Personnel*, CQLR, c. R-12.1, s. 211.

[87] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission des finances publiques, 2nd sess., 36th legis., June 13, 2001 (Sylvain Simard).

[88] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission des finances publiques, 1st sess., 37th legis., December 8, 2004 (Monique Jérôme-Forget).

were imposed upon female teachers (who) 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. Still speaking of the notwithstanding clause derogating to the Canadian Charter, she added that "its renewal is necessary to preserve historically recognized benefits".[89]

Other examples of references to the clause adopted with an objective of social progress are related to the "Small Claims Court". In December 1976, the Government adopted the *Act to authorize municipalities to collect duties on transfers of immoveables*[90], which directs legal proceedings to the "Small Claims Court" and refers to the notwithstanding clause. This reference is justified by the fact that representation by counsel is prohibited in that court, while section 34 of the Quebec Charter provides that: "Every person has a right to be represented by an advocate or to be assisted by one before any tribunal". 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.[91] This explains that, today still, the *Code of Civil Procedure*[92], the *Act respecting the Régie du Logement*[93] and the *Tax Administration Act*[94], contain references to the notwithstanding clause regarding the entire Quebec Charter or its section 34.

In 1976, this reference to the notwithstanding clause is introduced by the Minister of Municipal Affairs without substantial justification[95], most probably because the then still recent rule prohibiting representation by counsel in front of the "Small Claims Court" has been adopted only a

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[89] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale*, 1st sess., 39th legis., November 17, 2009 (Monique Gagnon-Tremblay).

[90] *Act to Authorize Municipalities to Collect Duties on Transfers of Immoveables*, S.Q. 1976, c. 30, s. 16.

[91] *Act to Amend the Code of Civil Procedure*, S.Q. 1977, c. 73, s. 43; *Act to Establish the Régie du Logement and to Amend the Civil Code and Other Legislation*, S.Q. 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*, S.Q. 1981, c. 32, s. 4.; *Act to Amend Certain Fiscal Legislation to Institute New Proceedings for Taxpayers*, S.Q. 1983, c. 47, s. 2; *Act to Reform the Code of Civil Procedure*, S.Q. 2002, c. 7, s. 148; *Act to Establish the New Code of Civil Procedure*, S.Q. 2014, c. 1, s. 542.

[92] *Code of Civil Procedure,* CQLR, c. C-25.01, s. 542.

[93] *Act Respecting the Régie du Logement*, CQLR, c R-8.1, s. 73.

[94] *Tax Administration Act*, C.Q.L.R, c A-6.002, s. 93.18. (formerly *Act Respecting the Ministère du Revenu*, S.R.Q. c. M-31) (modified by the *Act to Amend Certain Fiscal Legislation to Institute New Proceedings for Taxpayers*, S.Q. 1983, c 47).

[95] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale du Québec,* 1st sess., 31st legis., December 22, 1976, at 330 (Guy Tardif).

few years before.[96] To understand the underlying motivation to this reference, one can quote the previous government's Minister of Justice, whom, a year and a half before, at the adoption of the Quebec Charter, gave this very situation as an example of the notwithstanding clause's usefulness. He specified that, through this prohibition, the legislator: "sought to reach the social objective of achieving justice under simple and efficient conditions, without excessive formalism".[97]

This justification behind the use of the notwithstanding clause in small claims matter will be 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 rights and freedoms (...) without generating injustice, to the contrary*[98].

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.[99] In 1981, the Minister of Habitation wished that "there should be simple and efficient proceedings available when one party fails to respect its obligations flowing from the lease".[100] In 2002, the Minister stated that his goal was to avoid having people renounce to pursue their claims in fear of attorney costs.[101] In 2014, as the Minister of Justice points out, the goal was still to favour access to justice.[102]

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[96] *Act to Promote Access to Justice*, S.Q., 1971, c. 86, s. 1.

[97] Quebec, Assemblée Nationale, *Débats de l'Assemblée nationale du Québec,* 2nd sess., 30th legis, November 12, 1974, at 2749 (Jérôme Choquette).

[98] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission permanente de la justice, 2nd sess., 31st legis., November 15, 1977, at B-7670 (Marc-André Bédard).

[99] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission permanente des affaires municipales, 4th sess., 31st legis., September 6, 1979, at B-6283 (Guy Tardif), QUEBEC, ASSEMBLÉE NATIONALE, *Journal des débats. Commissions parlementaires*, Commission permanente du revenu, 4th sess., 32nd legis., December 14*,* 1983, at B-11180 (Alain Marcoux).

[100] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission permanente des affaires municipales, 3rd Sess., 32nd Legis., December 16, 1981, at 1582 (Guy Tardif).

[101] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission des institutions, 2nd sess., 36th legis., May 14, 2002, at B-6283 (Paul Bégin).

[102] Quebec, Assemblée Nationale, *Journal des débats. Commissions parlementaires*, Commission des institutions, 1st sess., 40th legis., December 5, 2013, at B-6283 (Bertrand St-Arnaud).

Considering the Acts and references adopted with an objective of collective identity preservation or social progress, we count 32 Acts (11 for identity and 21 for social justice) and 94 references (40 for identity and 54 for social justice) with a total of 41 Acts and 105 references (we exclude the *Act Respecting the Constitution Act, 1982*). Therefore, 78% (27% for identity and 51% for social justice) of the Acts containing a notwithstanding clause and 89,5% (38% for identity and 51,5% for social justice) of the references to such a clause were made with an objective of collective identity preservation or social progress.

Finally, 40 Acts containing a notwithstanding clause and 103 references to such a clause, therefore 97.5% and 98% of the total, were adopted preemptively. The -only- exception is the *Act to amend Bill 101, Charter of the French Language* adopted following *Ford v. Québec*.

These numbers indicate two major trends within the empirical practice of the Quebec National Assembly when it comes to legislative overrides.

We observe, first, a natural tendency to use them first and foremost, by far, to ensure the validity and efficiency of legislative measures that propose a departure from all-encompassing substantive equality to promote collective rights or interests of large segments of the population in need of additional legislative protection (when it's not the entire population of Quebec as a sociological whole, in need of a global cultural protection as a minority civilian French-speaking distinct society) and protect them from judicial invalidation grounded in individualistic claims. Overrides made simply for statecraft and governing efficiency are few and far between one another. When Quebec restricts Charter rights of some individuals, it's thus almost always done to protect collective rights. Given that this latter is a concept that the Canadian Charter (and the dominant caselaw) seem to struggle with[103] it could constitute a strong reason for the National Assembly to refer to the notwithstanding clause when facing conceptual dissonance.

Second, we can also observe a functionally universal (over 98%) tendency for the National Assembly to employ the notwithstanding mechanism preemptively rather than following a Supreme Court decision which ended striking down a legislation. Several reasons seem to support

[103] It is noteworthy to observe here that the Canadian Charter (whose doctrines of interpretation now sway that of the Quebec Charter in courts) is a squarely liberal instrument that is almost exclusively concerned with individual rights and, save for very limited instances (linguistic rights, confessionnal education, First Nations rights), almost entirely ignores collective rights as a socio-legal concept.

this coherent and constant way of proceeding, amongst which: a desire to protect the legislation from the judicial challenge in itself and a collective desire to proclaim as valid a distinct normative model that the one homogeneously set forth by the Supreme court and the Canadian Charter case law, which at times seems very reluctant to even consider any dialogue with different models.[104]

III. CONCLUSION

To justify the references to the notwithstanding clause of both Charters made in the *Act to amend Bill 101, Charter of the French Language* following the *Ford* case, the Delegate Minister of Cultural Affairs invoked "the vulnerability of French language in Quebec and in Canada", "the cultural insecurity befalling French-speaking Quebeckers", "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".[105]

The use of the notwithstanding clauses following the *Ford* case is therefore coherent with the leading theory of the notwithstanding clause found in the Québec academic productions, which supports using the notwithstanding clause after a judicial decision invalidating a law on Charter grounds (while not opposed to pre-emptive uses) and using it with an objective of collective identity preservation.

This use of the notwithstanding clauses is only partly congruent with the "raison d'être" of these clauses according to the elected officials mentioned above. They insisted mainly on state imperative, social progress or autonomy, while the use of the notwithstanding clauses following the *Ford* case is related to autonomy but mostly to identity and collective issues (and to some lesser extent only to social progress, since the sections of the CFL on the language of commerce and business were originally linked to the promotion of francophones formerly underrepresented in the business community).

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[104] For the most recent discussion on this topic and the apparent failure of Charter rights jurisprudence to effectively dialogue with Quebec's legislatures and consider different legal models than common law liberalism, see Patrick Taillon, *Une loi nécessaire pour corriger les excès de la jurisprudence canadienne*, parliamentary memorandum submitted to the Commission des institutions, Assemblée Nationale du Québec, May 15th, 2019.

[105] Quebec, Assemblée Nationale, *Journal des débats.*, 2nd sess., 33rd legis., December 19, 1988, at 4373-4375 (Guy Rivard).

This use of the notwithstanding clauses is a representative example of all uses of notwithstanding clauses made by the National Assembly between 1976 and 2019 in regard to the justifications, not in regard to the timing of the use. The empirical survey shows that 77.5% (acts) or 89% (references) were made with an objective of collective identity preservation or social progress. But 97.5% (acts) or 98% (references) were made preemptively, while the use of the notwithstanding clauses was made following the Supreme Court judgment in the *Ford* case. While the theoretical grounds for the legitimacy of using the notwithstanding clauses -both those of the leading theoreticians and of the National Assembly- strongly support invoking it to preserve parliamentary sovereignty when it comes to matters of collective rights that should not be quashed by individual interests, the *Ford* case and the *Act to Amend Bill 101* involved an *a posteriori* use of the notwithstanding mechanism, following a court ruling. In the 30 years that followed, *a priori* use of the notwithstanding mechanism became widespread both in theory and practice (in fact, *all* the legislative overrides made in the decades following the *Ford* case and the *Act to Amend Bill 101* were made preemptively — as well as *all* those made before). This leads us to conclude that while the *Ford* case and the *Act to Amend Bill 101* are still relevant to a theoretical and empirical approach of the notwithstanding mechanism in Quebec, decades of development led both theory and practice to outgrow these initial landmark, allowing for a broader — but not contradictory — scope of legitimacy for referring to legislative overrides of Charter rights.

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All this said, while there have certainly been a lot of academic writing and an ample use of the notwithstanding mechanism by the National Assembly in Quebec in the last four decades, the issue neither generated any widespread public attention nor flurry of theoretical activity outside the circles of constitutionalists, elected officials (on a punctual basis when they needed to) and theoreticians... until very recently. After decades of peaceful and uncontroversial doctrinal and legislative evolution, the notwithstanding mechanism once again became a centre of attention by being invoked in the *Act respecting the laicity of the State.* As this Act touches a sensitive social issue, it has, unsurprisingly, been challenged in court by its political opponents mere moments after its adoption to see it struck down. At the time of this article's submission, the trial hearing was still at its very early preliminary stages, but there is

no doubt in these authors' minds that, given its high political sensitivity, this case will go all the way to the Supreme Court — and that, in the process, the validity of Quebec's use of legislative overrides to protect the Act is very likely to be challenged.

Now, all that remains is to wait and see how — or if — the Canadian courts will recognize this distinct Quebec theory and practice — or if they will endeavour to set it aside and impose another in its stead. No doubt, soon we will know how the courts will react to this volcano roaring again.