Tsvi Kahana

The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter

Sommaire : La plupart des Canadiens pensent que la clause dérogatoire, à savoir l'article 33 de la *Charte des droits et libertés*, n'a été utilisée qu'à quelques reprises par le passé et qu'à l'heure actuelle aucune loi se prévalant de l'article 33 n'est en vigueur. Le présent article révèle que la clause dérogatoire a en fait été utilisée par seize différents textes législatifs (en plus de l'usage général qui en est fait au Québec) et que sept lois se prévalant du mécanisme sont encore en vigueur. L'article soutient ensuite que les deux principales raisons pour lesquelles le public ne remarque pas le recours à l'article 33 s'expliquent par le fait que ces cas étaient à la fois invisibles et inaccessibles. Ils étaient invisibles parce qu'ils portaient sur des sujets qui n'étaient pas à l'ordre du jour public et ils étaient inaccessibles parce qu'ils traitaient de questions de politiques compliquées. L'article conclut en argumentant qu'on ne devrait recourir à la clause dérogatoire qu'en réaction à une décision de la Cour suprême et non avant une telle décision. Il est probable qu'une décision de la Cour suprême aurait rendu ces recours ignorés à l'article 33 à la fois plus visibles, plus accessibles, et de ce fait plus évidents.

Abstract: Most Canadians believe that the notwithstanding clause, namely section 33 of the Charter of Rights and Freedoms, has been used only a few times in the past and that currently no legislations invoking section 33 is in force. This article reveals that the "notwithstanding mechanism" was actually used in sixteen different pieces of legislation (in addition to its omnibus use by Quebec) and that seven acts invoking the mechanism are still in force. The article then argues that two main reasons for the lack of public response to these invocations of section 33 were that these uses were both invisible and inaccessible. They were invisible because they dealt with matters that were not on the public agenda and they were inaccessible because they dealt with complicated policy questions. The article concludes by contending that the notwithstanding mechanism should only be used in response to a Supreme Court deci-

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sion and not prior to it. It is likely that a Supreme Court decision would have made these ignored uses of section 33 both more visible and more accessible and hence more noticeable.

If you are a constitutional lawyer or a political scientist who specializes in constitutional law and politics, see if you can answer the following questions:

1. In addition to its omnibus use in Quebec between 1982 and 1985,[1] how many times has the notwithstanding mechanism, created by section 33 of the Canadian Charter of Rights and Freedoms,[2] been invoked in Canada to protect specific pieces of legislation?
2. Which Canadian governments have invoked this mechanism?
3. How many uses of section 33 are currently in force?

The right answer to question one is sixteen, to question two is, in chronological order, Yukon, Saskatchewan, Quebec and Alberta, and the answer to question three is eight. Since you are an expert in your field and since the use of the notwithstanding mechanism is a big deal, why did you get the answers so wrong? This article will try to answer this question.

In short, this is the answer: you did not know about most of these uses of the notwithstanding mechanism (NM)[3] because *nobody* knew about them -- they were ignored. One reason they were ignored was that these were pre-emptive uses of the NM, that is, situations where the mechanism is invoked along with the legislation in order to prevent judicial review altogether. If the NM is used in a remedial fashion, to re-enact legislation struck down by a court, there is a higher chance that this use of the mechanism would be on the public agenda. Indeed, you certainly do know about the most famous use of the NM, which was a remedial use: Quebec's use of the mechanism in December 1988 to re-enact its sign policy after it was struck down by the Supreme Court in *Ford* v. *Quebec*.

This article has two purposes. First, I will introduce the entire practice of the NM in Canada, focusing on the "ignored" practice of the mechanism, namely those invocations that did not provoke any public discussion. Second, I will argue that the NM should only be used in response to a Supreme Court decision, and not prior to it. I connect these two arguments by arguing that pre-emptive uses of the NM might occur with no public discussion.

The second part of this article presents the practice of the NM in Canada. There is wide acknowledgement in the existing scholarship of only two instances where the NM was invoked in order to protect specific pieces of legislation. The first took place in Saskatchewan in 1986, when the provincial government used the NM in back-to-work legislation. The second instance occurred in Quebec, in 1988, when Premier Robert Bourassa's gov-

ernment used section 33 to re-enact legislation that required that outdoor public signs in Quebec be in French. Most of the existing scholarship refers only to these two uses of the NM, but I will show how the NM has actually been invoked, not in two statutes, but in sixteen. Thirteen of these sixteen uses occurred in Quebec, one occurred in the Yukon, one in Saskatchewan, and one in Alberta. In addition to sign law and back-to-work legislation, the subject-matters of these acts included land planning, pension plans, education, agricultural operations, and same-sex marriage. It seems that the other seven provinces and two territories, as well as the federal Parliament, have never invoked the NM.[4] Beyond the sixteen acts that actually invoked the NM, I also discuss one incident in which a government tabled but did not enact a bill that included the NM. This happened in Alberta when the government tabled a bill that limited compensation for victims of sterilization. I include this bill in the examination of the practice of the NM because its story is relevant to my discussion of the public's reaction to the use of the NM. As far as I was able to verify, this was the only time that a notwithstanding declaration was included in a governmental bill not passed into law. For the purposes of my analysis, therefore, the practice of the NM is composed of seventeen pieces of legislation – sixteen acts and one bill.

The third part of this article presents public reaction to these seventeen pieces of legislation in which notwithstanding declarations were included. Thirteen of these seventeen incidents did not provoke any noticeable public discussion. There was no general public debate whatsoever regarding either the use of the NM or the merits of the policy enacted through its invocation with regards to most of the Quebec uses and the one Yukon use of the NM. The ignored acts were those dealing with land planning, pension plans, education, and agricultural operations. The analysis in the third part of the article compares the absence of public reaction to these thirteen statutes to the public reaction in the cases of the other four uses of the NM: Saskatchewan back-to-work legislation, the Quebec sign law, the Alberta marriage act, and the Alberta sterilization bill.

The two final parts of the article move from description to evaluation, from practice to theory. The analysis attempts to explain why some uses of the NM were ignored while others provoked public attention. I then discuss various suggestions that would ensure public discussion of notwithstanding legislation and identify two factors – inaccessibility and invisibility – that might contribute to the public's ignorance of the use of the NM. Notwithstanding acts are *inaccessible* when they deal with complicated policy questions. They are *invisible* when the issues they address were not on the public agenda prior to their enactment. After identifying these two factors, I suggest that the best way to ensure that all uses of the NM are both accessible and visible is to require that the NM be used only in response to a Supreme Court decision.

The practice of the notwithstanding mechanism – an overview

Tables 1 through 6 describe the main features of the seventeen pieces of legislation in which the NM was invoked. As the tables demonstrate, only three provinces (Quebec, Saskatchewan, Alberta) and one territory (Yukon) have included notwithstanding declarations in their legislation. The thirteen uses of the NM in Quebec can be divided into four groups, based on the four issues with which they dealt: pension plans, education, agricultural operations, and the French language. The first five of the thirteen acts dealt with pension plans (Table 1). The Quebec government was concerned that the provisions that treated men and women differently, as well as provisions that restricted pension eligibility to certain kinds of employees,[5] were potential violations of the Charter's equality rights (by "violation" I refer to a limit on a right that is not justified according to the section 1 limitation clause). In the second group are six acts that deal with education (Table 2). The need to use the NM arose because of the status, in terms of appointments and the character of educational institutions, that these acts accorded to certain "religious confessions" or "religious denominations." These acts were seen as possible violations of the rights to equality and freedom of religion in both the Canadian and Quebec charters.[6] The third group of notwithstanding legislation includes only one act that dealt with the development of the agricultural sector in Quebec (Table 3). Here the problem was with the eligibility criteria for government grants to assist in the buying or leasing of new farms. The criteria included age restrictions that were thought to be potential violations of the Charter's equality rights. Lastly, the NM was used in the Act to Amend the Charter of the French Language in order to protect the "French only" requirement for outdoor signs (Table 3). This policy was said in the *Ford* decision to violate the freedom of expression and the right to equality.

In Yukon, the one usage of the NM involved nominations to the Land Planning Board and Committees by the Council for Yukon Indians (Table 4). Similarly to the notwithstanding acts in Quebec that dealt with education, there was a fear that such nominations would violate equality rights.[7] However, the single Yukon notwithstanding act was never brought into force despite being enacted in 1982. It has not been consolidated nor repealed since.[8] In Saskatchewan, the only invocation of the NM occurred in a back-to-work statute (Table 5). The government acted in order to protect this law from possibly being struck down as a violation of the right to strike, which at the time was thought to be protected by the Charter. In Alberta, the NM was invoked in an amendment to the Marriage Act, stipulating that marriage in Alberta meant a commitment made between a man and a woman only. The Alberta government also included a notwithstanding declaration

in a bill that limited the amount of money that victims of forced sterilization by the Alberta government could sue for compensation. This bill was later withdrawn by the government (Table 6).

Thirteen of the seventeen pieces of legislation in which the NM was involved were ignored. These include all the Quebec notwithstanding acts, with the exception of the sign law, and the one Yukon notwithstanding act

The second, third and fourth columns in each table provide general information with regards to the provisions in the various pieces of legislation that are protected by the NM and the provisions in the Canadian and provincial rights protection documents that are overridden by the notwithstanding acts.[9]

The rest of the columns demonstrate that two of the seventeen pieces of legislation never came into force. Yukon's only notwithstanding act was enacted but never brought into force, and the Alberta sterilization bill was withdrawn by the government. Another four declarations were repealed (Quebec's agricultural act and French language act) or expired (Quebec's private education act and Saskatchewan's back-to-work act). Most of the acts that dealt with pension plans and education were renewed once, twice, three or four times. The first four pension plan acts were enacted in 1986 (by act "A" in Table 1), and re-enacted in 1991 (by act "B"), 1996 (by act "C") and 2001 (by act "D"). They will expire in 2006. The fifth pension plan act was recently enacted and will also expire in 2006. Similarly, three of the education notwithstanding acts were enacted in 1986 (by act "E" in Table 2) and were renewed in 1988 (by act "F") and 1994 (by act "G"). The 1994 renewal also renewed two additional education acts (nos. 9 and 10), enacted in 1988 and 1989. Of the five acts renewed in 1994 (by act "G"), four were renewed in 1999 (by act "H"), and two were renewed in 2001 (by act "I"). These two will expire in 2006.

Public reaction to the uses of the NM

Thirteen of the seventeen pieces of legislation in which the NM was involved were ignored. These include all of the Quebec notwithstanding acts, with the exception of the sign law, and the one Yukon notwithstanding act. There seems to be no evidence of any public debate being provoked over these thirteen acts. Moreover, there seems to be some evidence that they were ignored. The twelve ignored uses of the NM in Quebec were not mentioned – still less discussed, analysed or criticized – in two of Quebec's main newspapers, Montreal's *The Gazette* and Quebec City's *Le Soleil*, in the three days following the enactments or renewals of acts nos. 1 to 12 by acts "A" to

Table 1. *Pieces of Legislation in Which Notwithstanding Declarations Were Included – Quebec Pension Plans*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial charter deviated from*	*Initial enactment*	*Renewal*[1]	*Renewal*	*Renewal*
1. An Act Respecting the Pension Plan of Certain Teachers, s. 62[2]	"The provisions of this Act"	s. 15 (equality)	s. 10 (equality)	"A" An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic Sectors, 1986[3]	"B" An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors, 1991[4]	"C" An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision, 1996[5]	"D" An Act Respecting the Pension Plan of Management Personnel, 2001[6]
2. An Act Respecting the Government and Public Employees Retirement Plan, s. 223.1[7]	Specific provisions concerning pension eligibility[8]						
3. An Act Respecting the Teachers Pension Plan, s. 78.1[9]	Specific provisions concerning pension eligibility[10]						
4. An Act Respecting the Civil Service Superannuation Plan, s. 114.1[11]	Specific provisions concerning pension eligibility[12]						
5. An Act Respecting the Pension Plan of Management Personnel, s. 240[13]	Specific provisions concerning pension eligibility[14]						(initial enactment of act no. 5)

1 This is relevant only regarding the Canadian Charter; the NMs in the provincial rights protecting documents do not include a sunset mechanism.
2 R.S.Q. c. R-9.1.

3 S.Q. 1986 c. 44, ss. 62, 87, 97 and 105. Section 62 enacted the notwithstanding declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 87 enacted the notwithstanding declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 97 enacted the declaration in the Act Respecting the Teachers Pension Plan (act no. 3), and s. 105 enacted the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

4 S.Q. 1991 c. 14, ss. 1, 29, 37 and 43. Section 1 renewed the declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 29 renewed the declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 37 renewed the declaration in the Act Respecting the Teachers Pension Plan (act no. 3); and s. 43 renewed the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

5 S. Q. 1996 c. 10, ss. 5-8. Section 5 renewed the notwithstanding declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 6 renewed the declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 7 renewed the declaration in the Act Respecting the Teachers Pension Plan (act no. 3); and s. 8 renewed the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

6 S.Q. 2001, c. 31, ss. 211, 235, 360, 378 and 392. Section 211 enacted the notwithstanding declaration in the Act Respecting the Pension Plan of Management Personnel (act no. 5). Section 235 renewed the declaration in the Act Respecting the Persion Plan of Certain Teachers (act no. 1); s. 360 renewed the declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 378 renewed the declaration in the Act Respecting the Teachers Pension Plan (act no. 3); and s. 392 renewed the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

7 R.S.Q. c. R-10.

8 The notwithstanding declaration (s. 223.1) refers to ss. 98 and 115.4.

9 R.S.Q. c. R-11.

10 The notwithstanding declaration (s. 78.1) refers to ss. 28, 32 and 51.

11 R.S.Q. c. R-12.

12 The notwithstanding declaration (s. 114.1) refers to ss. 56, 84, the first paragraph of s. 90, and the ninth paragraph of s. 96.

13 S.Q. 2001, c. 31.

14 The notwithstanding declaration (s. 240) refers to ss. 139 and 148.

Table 2. *Pieces of Legislation in Which Notwithstanding Declarations Were Included – Quebec Education*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial charter deviated from*	*Initial enactment*	*Initial enactment/ renewal*	*Renewal*	*Renewal*	*Renewal*
6. An Act Respecting the Conseil supérieur de l'Éducation, s. 31–32[1]	"The provisions of this Act which grant rights and privileges to a religious confession"[2]	s. 2(a) (freedom of religion) and s. 15 (equality)	s. 2 (fundamental freedoms, including freedom of religion) and s. 10 (equality)	"E" An 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, 1986[3]	"F" Education Act, 1988[4] (First renewal of acts nos. 6–8; initial enactment of act no. 9) An Act Respecting School Elections, 1989[13] Expired after 5 years (in 1997) and not renewed	"G" An Act Respecting Certain Declarations of Exception in Acts Relating to Education, 1994[5] (Second renewal of acts nos. 6–8; First renewal of acts nos. 9–10)	"H" An Act Respecting Certain Declarations of Exception in Acts Relating to Education, 1999[6] (Third renewal of acts nos. 6–8; Second renewal of act no. 9) Expired after 5 years (in 1999) and not renewed	Acts 6–7 were repealed in 2001 by act "I"[7] "I" An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters[10] (Fourth renewal of act no. 8; Third renewal of act no. 9)
7. An Act Respecting the Ministère de l'Éducation, ss. 17–18[8]								
8. The Education Act for Cree, Inuit and Naskapi Native Persons, ss. 720–721[9]								
9. Education Act, s. 726-7[11]								
10. An Act Respecting School Elections, s. 283–4[12]								
11. An Act Respecting Private Education, ss. 175-6[14]				An Act Respecting Private Education, 1992[15]				

1 R.S.Q. c. C-60.
2 This is the text of all the notwithstanding declarations. Act no. 10 uses the term "a religious denomination" as opposed to "a religious confession."
3 S.Q. 1986 c. 10, ss. 10–12. Section 10 enacted the notwithstanding declaration in the Act Respecting the Conseil supérieur de l'Éducation (act no. 6); s. 11 enacted the declaration in the Education Act for Cree, Inuit and Naskapi Native Persons (act no. 8); s. 12 enacted the declaration in the Act Respecting the Ministère de l'Éducation (act no. 7).
4 S.Q. 1988 c. 84, ss. 571-2, 655–6, and 662–3. Sections 571–72 re-enacted the declarations in the Act Respecting the Conseil supérieur de l'Éducation (act no. 6); ss. 655–56 enacted the declarations in the Education Act for Cree, Inuit and Naskapi Native Persons (act no. 8); ss. 571–72 enacted the declarations in the Act Respecting the Ministère de l'Éducation (act no. 7). Aside from renewing the notwithstanding declarations, the declaration in each act was split into two sections – one regarding the Canadian Charter and one regarding the Quebec Charter. This explains why each renewal was done in two sections and why I use "declarations" instead of "declaration." The reason that the declarations were re-enacted after two years rather than five is that some of the education acts underwent reform. (This explains why act "E" is entitled "An 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," while act "F" is entitled "Education Act"). The content of the declarations was not changed. The text of the declarations was technically changed from "[T]his act, as far it grants rights and privileges ..." to the current text of "[T]he provisions of this Act which grant rights and privileges ..."
5 S.Q. 1994, c. 11, s. 1. Unlike the enactment and first and fourth re-enactments of the declarations (in acts "E," "F" and "I"), the second and third re-enactments (in acts "H" and "I") were accomplished by one section that applied to all five declarations.
6 S.Q. 1999 c. 28, s. 1. The notwithstanding declarations were renewed for only two years rather than the five-year maximum. There's an indication in the debates that the National Council of the Parti quebécois recommended the government repeal the notwithstanding declarations, with a permissible two-year transitional period. See *Journal des débats*, June 2, 1999, online at <http://www.assnat.qc.ca/archives-36leg1se/fra/Publications/debats/journal/ch/990602.htm#990602107>.
7 An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters, S.Q. 2000, s. 16 and 18. Section 16 repealed the declaration in the Act Respecting the Conseil supérieur de l'Éducation (act no. 6); s. 18 repealed the declaration in the Act Respecting the Ministère de l'Éducation (act no. 7).
8 R.S.Q. c. M-15.
9 R.S.Q. c. I-14.
10 S.Q. 2000 c. 24, ss. 44, 61. Section 44 renewed the declaration in Education Act (act no. 9), and s. 61 renewed the declaration in the Education Act for Cree, Inuit and Naskapi Native Persons (act no. 8).
11 R.S.Q. c. I-13.3.
12 R.S.Q. c. E-2.3.
13 S.Q. 1989 c. 36.
14 R.S.Q. c. E-9.1.
15 S.Q. 1992 c. 68.

Table 3. *Pieces of Legislation in Which Notwithstanding Declarations Were Included – Quebec Agricultural Operations and French Language*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial charter deviated from*	*Initial enactment*	*Current status*
12. An Act to Amend the Act to Promote the Development of Agricultural Operations, s. 16[1]	"The distinction based on age" in certain provisions[2]	s. 15 (equality)	—	1986	Repealed in 1987[3]
13. An Act to Amend the Charter of the French Language, s. 10[4]	Two specific provisions regarding French-only signs and firm names[5]	s. 2(b) (freedom of expression) and s. 15 (equality)	s. 2 (fundamental freedoms, including freedom of expression) and s. 10 (equality)	1988	Repealed in 1993[6]

1 S.Q. 1986 c. 54.
2 The provisions that the notwithstanding declaration refers to are ss. 3 and 5.
3 The notwithstanding declaration was not explicitly repealed. The entire Act to Promote the Development of Agricultural Operations was replaced by the Act Respecting Farm Financing, S.Q. 1987 c. 86. The replacement act did not include a notwithstanding declaration.
4 S.Q. 1988 c. 54.
5 The notwithstanding declaration (s. 10) refers to the entire Act to Amend the Charter of the French Language. However, this acts amends only two of the provision of the Charter of the French language itself, namely s. 58–62 (regarding signs) and s. 68–9 (regarding firm names).
6 The notwithstanding declaration was not explicitly repealed. Sections 58 and 68, to which the declaration refers, were amended such that there was no need for the legislature to again decide on the issue of deviation.

Table 4. *Piece of Legislation in Which a Notwithstanding Declaration Was Included – Yukon*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial rights protection document deviated from*	*Initial enactment*	*Force/Repeal/ Expiration*
14. Land Planning and Development Act, s. 39(1)[1]	"The provisions of this act relating to the nomination of persons of the [planning] board or committees by the Council for the Yukon Indians"	s. 15 (equality)	—	1982	The act was never brought into force nor repealed

1 S.Y. 1982, c. 22.

Table 5. *Piece of Legislation in Which a Notwithstanding Declaration Was Included – Saskatchewan*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial rights protection document deviated from*	*Initial enactment*	*Force/Repeal/ Expiration*
15. An Act to Provide for Settlement of a Certain Labour–Management dispute between the Government of Saskatchewan and the Saskatchewan Governments' Employees Union, s. 9[1]	"This Act"	s. 2(d) (freedom of association)	The entire Saskatchewan Human Rights Code	1986	Expired in 1991[2]

1 S.S. 1984-85-86, c. 1:1.
2 Since the purpose of this act was to settle a specific labour dispute, there was no need to renew it.

"I".[10] Similarly, the Yukon's use of the NM was not mentioned in *The Whitehorse Star* on the three days following its enactment.[11] While such a limited media analysis is by no means conclusive, it provides some indication of public awareness, since it is likely that if these enactments were publicly acknowledged, they would have been reported. In addition, the twelve ignored Quebec uses of the NM have never been discussed by a scholar writing in English,[12] and the Yukon use has never been mentioned in any academic work published in English to date.[13]

The use of the NM was ignored by the public not only when the NM declarations were just one aspect of a larger act but also in the two Quebec cases in which the only purpose of the legislation was the renewal of the declarations. These were the two acts entitled An Act Respecting Certain Declarations of Exception in Acts Relating to Education (acts "G" and "H"), which renewed the notwithstanding declarations in five of the six education acts in 1994 and four in 1999. Unlike the other ignored notwithstanding acts that included tens or hundreds of sections and in which the notwithstanding declarations were just individual provisions, two acts were one page in length and were enacted, as their titles suggest, solely for the purpose of renewing the notwithstanding declarations.

While a limited media analysis could not be a basis for a conclusive finding, the reader might be interested in the following two episodes, which best symbolize the public's lack of awareness of the twelve ignored uses of the NM in Quebec. On 20 June 1986, the day after the Quebec national assembly broke for summer vacation, the Montreal *Gazette* told its readers that "[y]esterday marked the end of a week of day-and-night debate to rush through some sixty bills that have kept MNAs busy since the session resumed in March."[14] The report went on to enumerate eight of these bills, one of which was Bill 55, An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic Sector (act "A"). The report suggested that "some 2,500 teachers who left religious orders after 1965 will be eligible for better pensions under Bill 55." While this statement may have been true, it did not represent the full impact of the legislation. Indeed, when Bill 55 was introduced in the national assembly, the Treasury Board president explained that since this policy might violate the equality rights of teachers who were not included in the program (in addition to discriminating between men and women with respect to retirement ages), it had also been decided that the legislation should contain the NM.[15] However, these side effects were not mentioned in the newspaper report. Failing to report an act containing a notwithstanding declaration is disappointing enough. However, reporting such an act with no mention of the NM at all is much worse. This could only be the result of the media's failure to notice the notwithstanding clause, even when staring it in the face.[16] The second glaring instance of apparent igno-

Table 6. *Pieces of Legislation or Bill in Which Notwithstanding Declarations Were Included – Alberta*

Act	*What is deviating?*	*Section of Canadian Charter deviated from*	*Section of provincial rights protection document deviated from*	*Initial enactment*	*Force/Repeal/ Expiration*
16. Marriage Act, s. 1.1[1]	"This Act"	All available Charter rights	The entire Alberta Bill of Rights	2000[2]	Still in force
17. Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act[3]	"The provisions of this act"	All available Charter rights	The entire Alberta Bill of Rights	Tabled 1998	Never passed

1 R.S.A. c. M-6, s. 1.1.
2 Marriage Amendment Act, S.A. 2000 c. 3, s. 5.
3 2nd Sess., 24th Leg., Alberta, 1998.

rance took place on 23 December 1988. On this date, the Quebec national assembly passed act "F," yet the media did not appear to notice. Eight days prior to the enactment of this statute, on 15 December 1988, the Supreme Court of Canada handed down its decision in *Ford*. One day prior to the enactment, the national assembly passed Bill 178 (act no. 13 in Table 3), which overrode *Ford* and led to a crisis in the relations between Quebec and the rest of Canada. In other words, act "F" was enacted in the midst of a public debate concerning language rights and the NM. In the midst of such a crisis, what could have been more topical than an additional use of the NM by the national assembly? Yet, still, the NM was never mentioned![17]

In contrast to the thirteen ignored uses, the other four pieces of legislation – the Alberta marriage law, the Saskatchewan back-to-work law, the Quebec sign law and the Alberta sterilization bill – that invoked the NM received public attention and reaction. In the remainder of this part I describe these reactions starting with the marriage law, which received relatively little public attention, continuing with the back-to-work law, which provoked more public attention, and concluding with the sign law and sterilization bill, which created harsh public outrage.

The Alberta marriage law (Table 6), passed in March 2000, stipulates that "'marriage' means a marriage between a man and a woman." Bill 202, which proposed this legislation, was a private member's bill. The legislative debates on the bill do not reveal what prompted its tabling in early 1999, but it is reasonable to assume that this was part of the backlash caused by the Supreme Court of Canada's decisions in *Egan* v. *Canada* and *Vriend* v. *Alberta*, and by the decision of the Ontario Court of Appeal in *M.* v. *H.*, recognizing sexual orientation as a forbidden ground for discrimination under section 15 of the Charter.[18]

This act is probably unconstitutional despite the NM's aid, since according to the Constitution Act, 1867, marriage and divorce is a federal rather than a provincial responsibility[19] and section 33 does not apply to that part of the Constitution. Nonetheless, the act does more than merely change the legal definition of marriage. It includes a preamble that declares the Province of Alberta's views on marriage. The preamble says that the "public" is "deeply interested" in maintaining the "purity" of marriage. It informs us that "marriage is the foundation of family and society, without which there would be neither civilization nor progress," implying that same-sex marriages are uncivilized and hinder progress. This preamble is not merely the preamble to the amending act. Rather, it is the preamble to the entire Alberta Marriage Act, added by virtue of the amending act. In other words, the Alberta Marriage Act begins with a declaration denouncing same-sex couples as impure and by excluding them from "civilization" and "progress."

Such statements might not be rare in Canadian political culture, but they certainly are rare in Canadian statute books. Nevertheless, the enactment of

the Marriage Amendment Act with the NM was a non-issue for Canadian media sources. Of the two nationally circulated newspapers and the two provincially circulated newspapers, only the *Calgary Herald*'s front page reported the event on the day following the enactment of the bill. *The Edmonton Journal* reported the event in its internal pages, and although the *National Post* also did report the event on its front page, it did so two days after the enactment had taken place. *The Globe and Mail* never reported the incident. None of the newspapers stimulated any public debate on the matter.[20]

The following episode is indicative of the lack of response to the marriage law. In June 2000, three months after its passage, leading Canadian political scientist Howard Leeson published a paper on the NM in the respectable *Choices* periodical. This paper did not mention the marriage law, indicating instead that the NM has been used only in Quebec and Saskatchewan.[21]

Public condemnation was more significant after the enactment of the Saskatchewan back-to-work law (Table 5). The history of this law begins in January of 1986, after talks between the Government of Saskatchewan and the Saskatchewan Government Employees Union (SGEU) concerning a new collective agreement came to a standstill. This impasse was followed by rotating strikes and an agreement to appoint a conciliator. When the SGEU refused to accept the conciliator's report, the government enacted a back-to-work law to implement the conciliator's recommendations.[22] This act included a notwithstanding declaration regarding section 2(d) of the Canadian Charter and the entirety of the Saskatchewan Human Rights Code.[23] The reason for the invocation of the NM was a ruling by the Saskatchewan Court of Appeal deciding that a similar law had violated the right to freedom of association contained in section 2(d) of the Canadian Charter and section 6 of the Saskatchewan Code.[24] This decision was appealed by the Government of Saskatchewan to the Supreme Court of Canada. The Supreme Court allowed the appeal in 1987 and held that the right to freedom of association did not include the right to strike.[25] This meant that the use of the NM was unnecessary,[26] but the government could not have known this with certainty in 1986.

While the public was certainly aware of this back-to-work legislation, commentators have different views about the magnitude of the public's reaction. Frederick Morton writes that "[t]he action was widely criticized by labour and civil liberties groups across the country." Donna Greschner and Ken Norman believe that the response of the press and the public was "at low volume," but there were several reactions by the press and the public inside and outside of Saskatchewan. Leeson suggests that the back-to-work legislation was "fiercely opposed" by "most of the informed opinion," but "[t]he general public seemed apathetic."[27] Whichever account is accurate, it is clear that the Conservative government in Saskatchewan did not suffer

political consequences from this use of the NM and in fact might have gained from it politically. Nine months after the enactment of the back-to-work law, elections took place that returned the Conservatives to power. They did lose some support in urban areas but made gains in rural Saskatchewan. Morton's explanation for this was that the invocation of the NM "was a nonissue in the rural areas, while in the more heavily unionized cities ... it was one of the several factors that contributed to the perception of the Devine Conservative government as anti-labour." He concludes that this case "suggests that if the legislative override is used in a politically astute fashion, it will not necessarily harm a government, and may even help."[28]

The use of the NM in response to *Ford* v. *Quebec (A.G.)* was much more controversial. In this decision, the Supreme Court of Canada ruled that a provision forcing the use of solely (as opposed to mainly) French signs violated the right to freedom of expression contained in both the Quebec and Canadian charters.[29] Responding to this decision, the Quebec national assembly enacted Bill 178 (act no. 13 in Table 3), which modified the French-only stipulation for exterior signs and allowed interior bilingual signs. In direct conflict with the *Ford* judgement, the act included a notwithstanding declaration regarding the right to freedom of expression and the equality provisions, sections 2(b) and 15 of the Canadian Charter and sections 3 and 10 of the Quebec Charter.[30] This enactment not only provoked public attention but also had political consequences.

If the public is unaware of a use of the NM, then it is deprived of the opportunity of evaluating the government's interference with the protection of its rights

The bill deepened the divide between anglophones and francophones in Quebec, and between francophones in Quebec and the rest of Canada. All four anglophone ministers resigned from the Quebec Liberal government.[31] Outside of Quebec, the Province of Manitoba withdrew its support for the unratified Meech Lake Accord. The accord would have secured the Quebec government's consent to the Constitution Act, 1982, including the Charter, and would have given Quebec the status of a "distinct society" within Canada.[32] Many understood Bill 178 as an expression of the Quebec government's traditional hostility towards the anglophone minority. The use of the NM symbolized that Quebec was a French-speaking, not a bilingual, society. This was an issue that, at the time, was debated across Canada and was of central importance to the Meech Lake Accord. Support for the accord subsequently decreased throughout English Canada and it was rendered defunct when, in June 1990, the time within which it had to receive the approval of

all of the provincial legislatures ran out.[33] While support for the accord had already been weak for other reasons, many believe that the sign law sealed its fate.[34]

In March 1993, the United Nations Human Rights Committee declared that the sign law violated the International Covenant on Civil and Political Rights.[35] Following this, the Quebec government amended the legislation to allow for bilingual signs and bilingual firm names as long as French was used predominantly.[36] Naturally, the notwithstanding declaration was not renewed.[37]

The public's reaction to the Quebec sign law was harsh but not sufficiently negative to force the government's retreat. It took five years and international intervention for the government to amend the sign law. In contrast, it took the Alberta government less than twenty-four hours of mainly provincial pressure to back off from its plan to enact the sterilization bill.

Bill 26, the Institutional Confinement and Sexual Sterilization Compensation Bill (no. 17 in Table 6), was drafted and tabled to respond to prospective lawsuits for damages suffered by victims of forced sterilization at the hands of Alberta governmental institutions. Under the authority of the Sexual Sterilization Act, 2,822 people were involuntarily sexually sterilized in Alberta.[38] This legislation was enacted in 1928 and was repealed in 1972. The Eugenics Board established by the act was empowered to authorize the sterilization of the "mentally defective" in order to prevent them from transmitting their conditions to their children, and to avoid mental injury.[39] As if the substance of the legislation were not sufficiently horrific, the Eugenics Board also abused its powers under the Sexual Sterilization Act. The board's powers were used "not in accordance with either scientific principles or legislative standards, but in support of social policy about who should be allowed to have children in Alberta."[40] The board was biased against women generally, people from Eastern Europe, as well as Catholic and First Nations women.[41]

Until 1998, there was no legislation regarding the compensation of these victims. Their only recourse was to sue the Province of Alberta in accordance with tort law and ordinary court procedures. In 1996, one victim, Leilani Muir, won such a lawsuit and was awarded $740,000 in damages. Consequently, between 1996 and 1998 about 700 victims filed similar claims.[42] Fearing potential liability in the range of hundreds of millions of dollars, the Government of Alberta tabled the sterilization bill on 10 March 1998.[43] The main elements of the bill were as follows. First, limitation defences were cancelled;[44] second, actions filed 180 days after the coming into force of the act were prohibited;[45] third, like the limitation defences, any possible defences against liability in a claim regarding sexual sterilization were cancelled;[46] fourth, the amount that courts could award a victim was capped at $150,000 ($300,000 if a sexual assault was also proven);[47] fifth, the courts were prohibited from awarding non-compensatory, punitive, exem-

plary or aggravated damages,[48] as well as pre-judgement interest,[49] and were ordered to limit the amount of costs.[50] The bill included a notwithstanding declaration in section 3, which stated that the act was to operate notwithstanding all available Charter rights – sections 2 and 7 to 15 of the Charter – and the entire Alberta Bill of Rights.[51]

After the tabling of the bill, numerous reports appeared throughout the province and the rest of the country. The reports condemned the legislation and profiled the heartbreaking stories of the victims.[52] The following morning, Bill 26 was featured on the front page of the nationally circulated *Globe and Mail* as well as the front pages of Alberta's two main newspapers – the *Calgary Herald* and *The Edmonton Journal*.[53] It wasn't only members of the media who unleashed a "barrage of criticism"[54] and anger. Conservative politicians received hundreds of phone calls from citizens expressing their objections to the legislation.[55]

The government reacted quickly to the public outcry. On the morning of 11 March 1998, less than twenty-four hours after Bill 26 had been tabled, the minister of justice announced to the legislative assembly that the government would no longer be proceeding with the bill.[56] The premier attributed his government's misstep to the fact that his "political sense probably didn't click into gear."[57] The opposition and the press continued to attack the Alberta government for the Bill 26 affair in the following days. They suggested that the fiasco in tabling and then quickly withdrawing the bill symbolized the government's incompetence, lack of seriousness, and unaccountability. They further urged Albertans to watch for the next time the government would act oppressively.[58] The government's public relations continued to suffer even after they had withdrawn the offensive piece of legislation.[59]

Public discussion, accessibility and visibility

What can account for these differences in public reaction? Why did the public ignore the Quebec and Yukon uses but respond to the Saskatchewan back-to-work law, the Quebec sign law, and the Alberta sterilization bill? Upon examination, all the cases raise important questions. Take, for example, the pension plan acts (acts nos. 1 to 5 in Table 1). The notwithstanding declarations in these acts dealt with the "bread and butter" issue of pension plans for civil servants and teachers. These acts differentiated between men and women by holding that men had to reach the age of sixty-five before being eligible for pension benefits while the applicable age for women was sixty. This issue raises questions: Why did the government of Quebec create such a distinction? How many employees were affected? Who were the people affected? How much money was foregone by potential recipients because of this gender-based difference in the eligibility criteria? How much

money did the government save? How did other provinces deal with these problems?

Moreover, in a rights-protection regime any overriding of constitutional rights should be a serious event and a source of public discussion, even if the NM is used with regard to a trivial matter. If the legislature is so interested in a piece of legislation that it is willing to enact it notwithstanding the constitution, the public should be aware of it. Clearly, public discussion can result either in support of, or in objection to, the legislation – that is, supporting or rejecting the conclusion that a given use of the NM is either a legitimate use or an abuse of it. However, this should be the *result* of public discussion, not the reason for its absence. If the public is unaware of a use of the NM, then it is deprived of the opportunity of evaluating the government's interference with the protection of its rights.

This point is clearly supported by the surprisingly weak public response to Alberta's marriage law, both in Alberta and in the rest of Canada. The specific issue of same-sex couples' rights, and the more general issue of gay rights, have been on the Canadian agenda for a long time and have provoked passionate debate. The Supreme Court dealt with these matters in *Egan* v. *Canada*, *Vriend* v. *Alberta*, and *M.* v. *H.*, and each of those decisions provoked great public deliberation. Indeed, following the *Vriend* case, the Alberta government considered using the NM to override the decision but ultimately decided not to do so.[60] It is unclear why legislation that regulates an important symbolic goal of the gay rights movement – marriage – passed with so little public attention and discussion. I suspect that the reason was not so much a lack of public interest in the issue but a lack of public awareness of the legislation.[61]

The story of the Alberta sterilization bill demonstrates another problem with public discussion of notwithstanding legislation. The public apparently did not notice two points that might have shown the bill in a less horrifying light. First, as objectionable as it was, the bill did contain one positive aspect: the abolition of limitation defences. In the *Muir* v. *Alberta* decision, the court explicitly recognized that the government could have used the delay in Muir's lawsuit as "a *complete* answer to all of Ms. Muir's claims."[62] Partly in recognition of the government's non-reliance on this advantage, the court refused to award punitive damages. The court even went so far as to specify that the government's decision to not invoke the limitation defence, coupled with the admission it made in 1972 when repealing the Sexual Sterilization Act, saved it from having to pay $250,000 in punitive damages. This amount represented twenty-five per cent of Muir's award.[63] Bill 26 would have guaranteed that in future cases, the government would not have had the ability to invoke a limitation defence. Thus the bill represented a voluntary governmental waiver of a valid legal instrument. Second, even if the bill were oppressive and tyrannical, it might not have been unconstitutional. It

may be that limiting the amount of damages that the victims of forced sterilization could receive would infringe victims' section 7 rights to life, liberty and security of the person. It might also be that it discriminates against them on the basis of disability, in contravention of section 15's guarantee of "equal protection and equal benefit of the law." But these are claims that would have to be made, and there is no guarantee that a court would accept them.[64] Even if a court found a rights infringement, it would not necessarily mean that the act would be unconstitutional, since section 1 of the Charter allows limitations on rights that are "demonstrably justified in a free and democratic society." It is not perfectly clear from the case law whether saving public money is a justification for rights infringements, and it is not at all obvious that the courts would have rendered the sterilization law unconstitutional.[65] Indeed, it is not clear why the Alberta government decided to invoke the NM instead of tabling the bill without it.[66]

What could have improved the public's awareness of the notwithstanding legislation? What could have encouraged the public to discuss the uses of the NM in Quebec? As well, what could have led the public to be more even-handed in its discussion of the Alberta sterilization bill? Arguably, one reason for the public's lack of discussion of the ignored uses of the NM is that the public was not informed about them – the uses were invisible because they dealt with issues that were not on the public's agenda prior to their enactments. In contrast, the Alberta marriage law, the Saskatchewan back-to-work law, the Quebec sign law, and the Alberta sterilization bill were all well-known issues before, and independent of, the invocation of the NM. In addition to being invisible, the ignored uses of the NM dealt with issues that were relatively inaccessible. The marriage law, the back-to-work law, the sign law, and the sterilization bill all dealt with straightforward questions, which seem to have received uncomplicated, though hotly contested answers: Should same-sex couples be allowed to marry? Should government workers be allowed to strike if it harms the public? Is it justifiable for Quebec to impose a "French-only" sign law? Should there be a limit on how much money a victim of sterilization can sue the province for? Although lawyers might think that these are complicated questions, and although a layperson might have a different view of what the question actually is,[67] a layperson could certainly form an opinion on these specific issues.

Moreover, the four noticed pieces of legislation can be understood without any knowledge of the more general legislative schemes in which they operate. The sterilization bill and the back-to-work law were enacted as independent statutes. The marriage law and the sign law were amendments to the Alberta Marriage Act and the Quebec Charter of the French language, respectively,[68] but the amendments can be understood without being familiar with the larger acts.

Conversely, the other notwithstanding acts were relatively inaccessible

because they dealt with more complicated questions. All of them are longer than the marriage law, the back-to-work law, the sign law, or the sterilization bill. Most of them are much longer, containing tens or hundreds of sections. In order to understand why the NM was used in these thirteen acts and what the consequences were, one had to have a reasonable mastery of the legislation, something that should not be assumed the public had. Moreover, as tables 1 and 2 demonstrate, for all five pension plan acts and some of the education acts, an enactment or an amendment to one act inserted notwithstanding declarations into other acts (acts "A" to "D" enacted and renewed acts nos. 1 to 5, and acts "E," "F" and "G" to "I" enacted and renewed acts nos. 6 to 9). This further complicated an understanding of the legislation's impact, since in the case of a renewal a reader would simply see the notwithstanding declaration without any context or substance.

Clearly, visibility and accessibility affect, and are affected by, media coverage. The more visible and accessible a use of the NM is, the higher the chances are that the media would report and analyse it. At the same time, the media has the power to make the NM visible by reporting it and accessible by explaining it.

If it is correct to suggest that visibility and accessibility are factors in facilitating public discussion of the NM, one should think of ways to make notwithstanding acts both more visible and more accessible. One way to do this would be to adopt the ruling of the Quebec Court of Appeal in *Alliance des Professeurs de Montréal* v. *A.-G. Québec*, which directs that a legislature must state the connection between the use of the NM and the right being infringed upon.[69] Another version of this idea would be to force the legislature to add preambles to notwithstanding acts, as the Saskatchewan legislative assembly did in the back-to-work law. However, since what these proposals are really about is adding other declarations to the notwithstanding declaration, it is questionable as to whether they would be capable of increasing awareness. Indeed, acts "G" and "H" were both *entitled* An Act Respecting Certain Declarations of Exception in Acts Relating to Education and dealt *only* with the matter of section 33 exceptions, and yet they too were ignored. These acts also demonstrate the failure of another attention-grabbing strategy, which is to make the use of the NM the only matter discussed in the notwithstanding act.[70] Moreover, even if these solutions do contribute to visibility, they will do nothing to increase accessibility.

Another solution would be to conduct a referendum prior to the use of the NM. A referendum would guarantee public awareness of the use of the NM, since it is hard to believe that any referendum would go unnoticed.[71] The problems with this solution are the traditional problems associated with referenda. First, in a case dealing with a risk to Charter rights, it might not be a good idea to resort to crude majoritarianism.[72] Second, while a referendum would contribute to visibility, it would not solve the problem of accessibility;

in fact, it might aggravate it. The drafting of a referendum question is always a problem in terms of clarity, even with a straightforward issue. The clarity problem would be aggravated if a complicated social science question, such as pension plans, were at stake. It is likely that in order to bring such a question to the people, the drafter would simplify the question, which would not capture the various intricacies of the issue.

I would suggest that the best solution for both visibility and accessibility would be the presence of a Supreme Court decision prior to an invocation of the NM. In other words, the NM should not be used to prevent litigation altogether nor be in response to a lower court decision and before the Supreme Court ruled on the matter. In order to support this argument, I turn to the question of pre-emptive versus remedial uses of the NM.

An argument in favour of invoking the NM only after a Supreme Court decision

The text of section 33 of the Charter of Rights and Freedoms clearly permits the legislatures to use the NM in both pre-emptive and remedial ways. It stipulates that "Parliament or the legislature of a province may expressly declare ... that [an] Act or a provision ... shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." The section does not require that the legislature use the NM only as a response to a Supreme Court decision and, furthermore, does not mention judicial decisions at all.

[W]aiting for a Supreme Court decision is rooted not in the court's virtue as a legal institution (accessibility) but in its virtue as a political institution (visibility)

Nevertheless, most theorists who have written on section 33 have suggested that the NM only be used in response to a Supreme Court decision and not prior to it (or, when there is no right of appeal to the Supreme Court, and leave to appeal is refused, then only after the decision of the highest court possible). The arguments put forward in the literature, while supporting the use of the NM in response to *a* judicial decision only, do not explain why the legislature should wait for a *Supreme Court* decision. I suggest an argument in favour of using the NM only in response to a Supreme Court decision, building on the notions of visibility and accessibility. I argue that using the NM in response to a Supreme Court decision is more likely to make NM invocations both more visible and more accessible. I conclude by fortifying this argument with the evidence from the ignored uses of the NM.

The most common argument in support of using the NM in a remedial

fashion only is the understanding that the NM is a tool for responding to perverse judicial interpretation or application of the Charter.[73] If the court strikes down an act based on an erroneous interpretation of the Constitution, then the NM can be used in order to correct this judicial error. If the purpose of section 33 is to correct judicial errors, it should obviously be used only once the court has made a mistake, and it should never be used in a pre-emptive way. It seems that the Charter's drafters also understood the NM in this fashion,[74] and the faulty drafting of the section was an oversight on their part. A related argument is that in a rights-protection society, people should not be denied the right to air their claims of rights violation in the courts, even if the final word is legislative. Otherwise, the NM represents legislative supremacy and not sophisticated constitutionalism.[75]

Donna Greschner and Ken Norman suggest two additional arguments in support of only remedial uses of the NM. First, respect for the judiciary mandates that it be allowed to complete its job before the legislature responds.[76] Second, judicial decisions would promote public discussion because they would educate the public on the constitutional questions at stake, explain "what will be lost or gained by invocation of the override," and force the government to discuss the issue "in terms of rights and freedoms."[77]

While these four arguments were cited in the literature in support of the proposition that the NM should be used only in response to a *Supreme* Court decision, they do not provide full support for this conclusion, but rather for the conclusion that the legislature should wait for *a* court decision. The first argument suggests that the legislature should use the NM only in response to judicial mistake. However, if a lower court made such a mistake, why let it linger until the Supreme Court corrects it? The second argument, wherein the prevention of litigation amounts to legislative supremacy, is no longer valid after litigation in a lower court, since the litigation would give the individual a chance to argue her case in a court of law. Note that the fact that the individual does not have a right to appeal is irrelevant here. The right to appeal is needed when someone loses in court. However, if the legislature is interested in invoking the NM in response to a judicial decision, it implies that the law was struck down and that the individual won in court.

Greschner and Norman's two arguments also do not require a Supreme Court decision. The argument that respect for the judiciary compels governments to wait for a Supreme Court decision is problematic, since the notion of respect actually supports the use of the NM in response to a lower court's decision, as opposed to waiting for a Supreme Court decision. If the legislature is clear in its willingness to invoke the NM, it would be more respectful to invoke it immediately, rather than to launch an appeal, and then use the NM if the higher court did not overrule the decision. Such an appeal would be a farce and a waste of the higher court's time, since the legislature would override its decision anyway. Therefore, the respect argument might actu-

ally provide a case for using the NM pre-emptively, without waiting for *any* judicial decision. Finally, Greschner and Norman's educational argument is also insufficient. It suggests that a judicial decision would use the language of rights and freedoms and thus would be able to explain the "gains" and the "losses" of the legislation.[78] However, every court, not only the Supreme Court, speaks the language of rights and freedoms, and every judicial decision, not only a Supreme Court decision, would make the constitutional questions clearer. Moreover, the virtue of "rights talk" is questionable by many. If a Supreme Court decision is likely to yield more "rights talk" or more rights-oriented talk, it is unclear if it is worth waiting for.

Greschner and Norman's argument that a Supreme Court decision would be a better educational tool than would a lower court decision is an argument about, what I termed in the previous part, "accessibility" – it suggests that Supreme Court decisions would make the constitutional problems at stake more accessible. The reason for its failure is that lower court decisions would also make these questions more accessible. Rather than the notion of accessibility, the key for the argument in favour of waiting for a Supreme Court decision before the use of the NM, is the notion introduced in the previous part: that of visibility. In other words, waiting for a Supreme Court decision is rooted not in the court's virtue as a legal institution (accessibility) but in its virtue as a political institution (visibility).

Why is it important that *every* use of the NM be visible? The answer is accountability. One of the arguments that was raised in response to the fear that NM might be "a free ticket to religious, political, or racial discrimination"[79] was that the public would respond negatively to uses of the NM that were felt to inflict negative consequences on rights protection.[80] In a rights-protection regime, the use of the NM is an event of exceptional importance and should therefore receive exceptional public attention. Put differently, it is not sufficient that the use of the NM be visible; it should be visible *as an exceptional event*, and it should be accompanied by *exceptional* public discussion. If the NM is used in response to a Supreme Court decision, it has a better chance of being viewed as exceptional and of yielding exceptional public discussion. There are three reason for this.

First, waiting for a Supreme Court decision would put the issue on the national agenda for a longer period of time and would enable various courts to rule on the matter. This would create not only a plurality of judicial voices but also an opportunity for a longer and gradual public discussion.[81]

Second, Canada is a federal country: for an event to be exceptional it would have to be considered of national, rather than of provincial, importance. If a provincal legislature invokes the NM in response to a judicial decision in that province without waiting for the Supreme Court, the discussion has a greater chance of being considered a provincial issue, and the discussion might stay within the province. If, on the other hand, the NM is

used only after the Supreme Court of Canada ruled on the matter, there is a greater chance that the entire country would discuss the issue. Even though the NM was created partly to ensure provincial control over some constitutional issues within the province – and thus the final decision whether to invoke it or not should be made by the provincial legislature – the exceptional nature of the NM demands a country-wide discussion of the matter prior and in response to this decision.

For a NM act to be accessible, it should not address complex policy issues. For a NM act to be visible, it should involve an issue in which the public is already interested

Third, waiting for a Supreme Court decision would decrease its use and would therefore make the NM seem more exceptional in the public's eye. Waiting for a Supreme Court decision would result in fewer invocations of the NM because some acts struck down by lower courts would be upheld by the Supreme Court. Moreover, because the Supreme Court is the most prestigious court in the country, it would likely be more difficult politically to override a Supreme Court decision: the legislature would be more hesitant to use it, compared to a situation in which the NM is invoked in response to a less prestigious court's decision.[82]

To illustrate the argument, it might be useful to go back to the previous part's findings and suggest how a Supreme Court decision would have made the ignored uses of the NM both more accessible and more visible. In the case of the pension plan acts, the court would have discussed the different terms of the pension plan acts and decided whether they amounted to discrimination under section 15. Likewise, with the acts regarding education, the court would examine whether the privileges given to certain religious denominations constituted an infringement of sections 2(b) and 15, freedom of religion, and the right to equality. In both situations, the court would then examine the section 1 argument that the government would present. For example, the government could state that the privileges given to Catholics and Protestants constitute reasonable limits because they seek to protect Quebec's socio-religious history, etc. In case the court struck down the legislation, it would have stated exactly why it did so, and the public would have had the opportunity to be informed by the court's reasoning.

Similarly, a Supreme Court decision preceding the sterilization bill might have had an influence on the public's perception of that bill. The court would have addressed the question of whether Charter rights were infringed by the legislation. Its conclusion would have made it possible to criticize the government, not only for treating the weak with cruelty, but also

for violating a specific, concrete Charter right. If the court found that the legislation did limit rights, it would not have been sufficient for the Alberta government to explain that it had to "balance" the rights of the victims with the need to save taxpayers' money. It would have had to make a section 1 argument, which the court would then have scrutinized. The judicial decision would probably have discussed the constitutional scheme in light of the Alberta government's decision to renounce limitation defences and, thus, make the public realize that the legislation was not entirely negative. It might be that it would have been easier, politically, to invoke the NM after a Supreme Court decision.

Finally, it is very unlikely that the Alberta marriage law would have gained so little attention had a Supreme Court decision preceded the use of the NM. Such a decision would have exposed the public to a sophisticated and principled discussion of the questions at stake: Is it discrimination under section 15 of the Charter to make it possible for same-sex couples to enjoy the same financial benefits as opposite-sex couples yet not allow them to achieve marital status? If this is discrimination, can it be justified under section 1? The public might not have accepted the court's answer on this issue, but the public's ability to address it might have benefited from the judicial deliberation.

Conclusion

This article seeks to contribute to the discussion of both the theory and the practice of the NM in Canada. In terms of practice, it introduces the various ignored uses of the NM. The practice of the NM provides support for the argument that the NM should never be used to prevent litigation. In terms of theory, this article proposes a new argument to explain why it is not sufficient for the legislature to delay invoking the NM until *a* court strikes down legislation but why the legislature should wait for a *Supreme* Court decision.

The connectors between the practice and theory analyses are the notions of accessibility and of visibility. I argue that invisibility and inaccessibility decrease the chance of an informed public discussion of the problems addressed by notwithstanding legislation. For a NM act to be accessible, it should not address complex policy issues. For a NM act to be visible, it should involve an issue in which the public is already interested.

The notions of visibility and accessibility explain why it is necessary to wait for a Supreme Court decision before using the NM and why other proposed solutions are insufficient. The problem with the referendum solution is that it ensures visibility but not accessibility. The problem with using the NM in response to a lower court decision is that it ensures accessibility but not visibility. In contrast to these two, a Supreme Court decision is likely to promote both accessibility to and visibility of notwithstanding legislation.

It is important to note that this article does not make the argument that a Supreme Court decision is necessary or sufficient to induce and improve public discussion.[83] Indeed, the Alberta sterilization bill provoked anger and outrage even though it did not involve any judicial decision.[84] At the same time, the Alberta marriage law, which can be seen as the response to a series of judicial decisions regarding gay rights, provoked relatively little public discussion. Nothing prevents the public from engaging in rigorous public debate, even in areas where the court has said nothing; nothing guarantees that the public will engage in such deliberation even if the court does rule on an issue. The argument that I am making is that while not absolutely necessary and sufficient on its own, a Supreme Court decision prior to the use of the NM increases the chances of an informed public discussion.

The existence of public discussion prior to the use of the NM cannot, on its own, save us from oppressive or tyrannical uses of the NM. However, public discussion does at least increase our chances of being aware of when and how this powerful constitutional device is being invoked. It will increase the price that politicians will have to pay when they misuse it and, more importantly, if they abuse it.

Notes

1 See Act Respecting the Constitution Act, 1982, S.Q. 1982, c. 21. This act repealed all Quebec legislation and re-enacted it with notwithstanding declarations. In addition, the Quebec national assembly included a notwithstanding declaration in every law it passed in the following three years. This stopped in December of 1985, following the election of a Liberal government in Quebec. See Peter Hogg, *Constitutional Law of Canada*, loose-leaf edition, vol. 2 (Toronto: Carswell, 1997) at section 36.2, p. 36-3. I do not discuss these uses of the notwithstanding mechanism (NM) in this article because it was not aimed at protecting a specific piece of legislation but was instead an act of political protest against the fact that the Charter was entrenched without the Government of Quebec's consent. For an analysis of the Act Respecting the Constitution Act and the Supreme Court of Canada's decision upholding it, see *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712. See also Lorraine Weinrib, "Learning to live with the override," *McGill Law Journal* 35, no 3 (May 1990), pp. 541–71.

2 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

3 The literature often refers to a "notwithstanding clause." This term is confusing because it has three different meanings in the literature. It refers to 1) the text of section 33, 2) the mechanism that section creates, and 3) a clause in an act stating that the act shall operate notwithstanding the Charter. I use the term "notwithstanding clause" exclusively to refer to the text of section 33. (Similarly, "the limitation clause" denotes section 1 of the Charter.) In this article, the mechanism that the notwithstanding clause establishes is termed the "notwithstanding mechanism," a declaration in an act that the act or a provision thereof operates notwithstanding the Charter is called "a notwithstanding declaration," and an act in which a notwithstanding declaration appears is "a notwithstanding act." Many refer to the NM as the "legislative override." Unlike the term "notwithstanding," the term "override" does not appear in section 33, and therefore I prefer to utilize the former term.

4 This statement is based on information I received from provincial and territorial officials in the various ministries of justice and ministries of the attorney general.

5 The Act Respecting the Teachers Pension Plan sets out (at sections 32 and 51) differential pension eligibility requirements for male and female teachers, thereby potentially offending the equality provisions of the Canadian Charter and the Quebec Charter of Human Rights and Freedoms (R.S.Q. c. C-12). Male teachers may generally receive benefits at age sixty-five, as compared with pension eligibility at age sixty for female teachers. Alternatively, after ten years of teaching service, minimum ages for pension eligibility are sixty-two and fifty-eight for male and female teachers, respectively. In addition, this act potentially violates the Quebec and Canadian charters through its incorporation (at section 28) of the pension eligibility distinctions of Part VIII of the Education Act (R.S.Q. 1964 c. 235), which date back to 1941. Part VIII of the Education Act provided (at section 519) for pension benefits to accrue after twenty years of service, with male teachers becoming eligible at age sixty, in contrast with female eligibility at age fifty-six. Similarly, the Act Respecting the Civil Service Superannuation Plan may violate sections 10 and 15 of the Quebec and Canadian charters, respectively, in that its pension requirements for male civil servants are different from those for female employees. Benefits may be paid to male civil servants who reach the age of sixty-two after at least ten years of service. In contrast, the minimum age for female workers is sixty. Deferred benefits may be paid to males at age sixty-five, in comparison with a minimum age of sixty for females under the pension plan created by the act. The notwithstanding declaration contained in the Act Respecting the Pension Plan of Certain Teachers applies to all of the provisions of the act, many of which may violate sections 10 and 15 of the Quebec and Canadian charters. The act sets out (at section 19) different pension eligibility requirements for males and females. Several other sections refer to, and incorporate, the pension eligibility criteria of the abovementioned acts and are thus potentially open to Charter equality challenges on the basis of the gender distinctions regarding eligibility that are set out in these acts. Finally, the Act Respecting the Government and Public Employees Retirement Plan and the Act Respecting the Pension Plan of Management Personnel may be the subject of Quebec and Canadian charter equality challenges in that the acts provide (at sections 98, 115.4 and 139, 148, respectively) for pension payments on the basis of the pension plans established in the first two acts mentioned, which themselves potentially contain violations of both charters.

6 The first five acts in Table 2 deal with the system of separate Catholic and Protestant education in Quebec and contain similarly worded notwithstanding declarations. Each of these acts contributes distinct elements to the separate educational scheme. Their notwithstanding declarations refer to the provisions of the acts that "grant rights and privileges to religious confessions." The Act Respecting the Conseil supérieur de l'Éducation creates the *conseil*, and mandates (at section 2) that its members must be drawn in specific proportions primarily from the Catholic and Protestant communities. In addition, the Education Act for Cree, Inuit and Naskapi Native Persons grants special privileges for the inspection of schools (at section 23) and the establishment of school boards (at section 39) by Catholics and Protestants or by officials from these groups. Further, the Act Respecting the Ministère de l'Éducation mandates that the minister is to consult with Catholic and Protestant groups (at section 7) and must uphold and "respect" Quebec's separate religious educational scheme (at section 8). As well, the Education Act confers (at section 6) special privileges for Catholic or Protestant religious "care and guidance." The Act Respecting School Elections grants no explicit rights and privileges to religious "confessions" or denominations. However, the government appears to have anticipated Charter scrutiny of this act, perhaps because it is generally a component of, and makes reference to, the Quebec separate schooling regime. Finally, the Act Respecting Private Education potentially violates sections 15 and 10 of the Canadian and Quebec charters, respectively, by submitting private school education to the general rules concerning Catholic and Protestant education set out under other notwithstanding education acts described in this note. The Act Respecting Private Educa-

tion incorporates the general rules governing Catholic and Protestant education in provisions, such as section 58, which instruct that the Catholic and Protestant committees should have the authority to approve certain educational programs.

7 This fear might not have been justified due to section 15(2) of the Charter, which allows for affirmative action, and section 25, which states that the Charter's provisions are not to be construed as limiting the rights of the aboriginal peoples of Canada.

8 I thank Sydney Horton, legislative counsel in the Department of Justice, Yukon, for this information.

9 As the fourth column shows, the notwithstanding declarations in fifteen of the seventeen pieces of legislation referred to both the Canadian Charter and the provincial rights protection document. The only two exceptions were the Quebec act that dealt with the development of Quebec's agricultural sector and the one Yukon act. The notwithstanding declarations in these two acts deviated only from the Canadian Charter and not from their respective provincial rights protection documents. The reason for the omission in the Quebec act is that this act makes a distinction based on age, which was potentially discriminatory. However, unlike the Canadian Charter, the Quebec Charter protects against discrimination based on age "except as provided by law" (section 10). Since a statute is clearly "law," Quebec's agricultural operations act would satisfy this stipulation. The Yukon notwithstanding act, enacted in 1982, did not deviate from Yukon's Human Rights Act since the latter was enacted in 1987 (S.Y. 1987, c. 3). Interestingly, Yukon's one notwithstanding declaration referred to the Canadian Bill of Rights (R.S.C., c. C-12.3). The drafter probably assumed that since Yukon was a territory and not a province, it was bound by the Canadian Bill of Rights. In *Re Branigan* [1986], 26 D.L.R (4^{th}) 268, the Yukon Territory Supreme Court suggested at p. 275 that in matters "under the legislative authority of the legislative body of the Yukon Territory," the Canadian Bill of Rights did not apply.

10 The dates on which these acts were enacted are as follows: 19 June 1986 (acts "A" and no. 12); 6 June 1991 (act "B"); 12 June 1996 (act "C"); 21 June 2001 (act "D"); 29 May 1986 (act "E"); 23 December 1988 (act "F"); 7 June 1994 (act "G"); 17 June 1999 (act "H"); 14 June 2000 (act "I"); 21 June 1989 (act no. 10); 18 December 1992 (act no. 11). The issues of Montreal's *The Gazette* and Quebec City's *Le Soleil* that were reviewed were those published on the three days following the ten dates on which the third readings of these eleven acts took place (acts "A" and no. 12 were passed on the same day). Where a Sunday or a holiday fell within these three days, only two issues were examined.

11 The Yukon's notwithstanding act passed its third reading on 6 December 1982. *The Whitehorse Star* is published three times a week, and the issues checked were those of 8 and 10 December 1982. Both issues included a column entitled "At the Legislature" in which the paper reported on legislative developments. The journalist who prepared this section apparently did not find the use of the NM interesting or important enough to report but did report that a minister had confirmed that the "beer price rose" and that another minister had confirmed that "licence plate fees will be increased." See, respectively, n.a., "At the Legislature," *The Whitehorse Star*, 8 December 1982, p. 24, and n.a., "At the Legislature," *Whitehorse Star*, 10 December 1982, p. 6.

12 The two writers who did mention the ignored Quebec uses, Ann Bayefsky and Lois MacDonald, did not offer a full account of them. Bayefsky, who wrote in 1987, mentioned the Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic Sector (act "A"), but her reference cites only one of the three notwithstanding declarations that had been inserted into three different acts by act "A." See Anne Bayefsky, "The judicial function under the Canadian Charter of Rights and Freedoms," *McGill Law Journal* 32 (1987), pp. 791–833, at p. 824. MacDonald, who probably relied on Bayefsky's reference, not only copied the oversight but did not update her account with information concerning what had happened between 1987 and

1994, the year her paper was published. She consequently omitted mention of the renewals of acts nos. 1 to 4 by acts "B" and "C," the renewals of acts nos. 6 to 8 by act "E," the enactments of acts nos. 10 and 12, and the repealing of act no. 11 (tables 1 and 2). See Lois MacDonald, "Promoting social equality through the legislative override," *National Journal of Constitutional Law* 4 (December 1993), pp. 1–27, at p. 21. The point of this comment is not to highlight the oversights of other scholars. The point is made only to demonstrate that the enactment of a notwithstanding act is not necessarily a widely noticed event in the Canadian legal and political communities.

13 The reason the statement refers to works published in English only is because I do not read French. I have no information regarding works published in French that deal with either the twelve ignored Quebec uses or the Yukon use.

14 Jennifer Robinson, "National Assembly on summer break as labor woes, welfare issue unsolved," *The Gazette* (Montreal), 20 June 1986, p. A4. Interestingly, nine of the eleven dates appearing in note 10 above are between 29 May and 21 June. These dates are close to when the Quebec national assembly usually ends its session.

15 Quebec, National Assembly, *Journal des debats*. 32nd Legislature, 4th Session, vol. 29, no. 46, 16 June 1986 (Quebec: National Assembly, 1986), p. 2873.

16 The same thing happened almost exactly four years later. On 14 June 2000, the Quebec national assembly passed An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters (act "J"), which renewed the notwithstanding declaration in two of the education acts (acts nos. 8 and 9 in Table 2). Three days later, *The Gazette* reported that "[s]ome 37 bills were adopted in the sitting. ... The assembly adopted laws on confessional schools, law enforcement, fire safety, traffic safety and municipal reform." On the same day *Le Soleil* reported that "in the course of the spring session, legislators adopted 37 bills. Legislators also passed a law creating a youth-fund; a law on cinemas and law 118 on denominationalism in the education sector." In other words, both papers did report the enactment of act "J," but did not mention the use of the NM in it, even though *The Gazette* did realize that some of the bills were "contested." See, respectively, Sean Gordon, "PQ rams through contested bills," *The Gazette* (Montreal), 17 June 2000, p. A5, and n.a., "Le gouvernement péquiste se donne des outils," *Le Soleil* (Quebec City), 17 June 2000, p. A22. The original French of the report in *Le Soleil* reads: "Au cours de cette session printaniere, les parlementaires ont adopté 37 projets de loi. Les parlementaires ont aussi voté une loi créant le Fonds-jeunesse; une loi sur le cinéma et la loi 118 sur la confessionnalité dans le secteur de l'éducation." (I thank Matthew Woodley for research in French and for translation into English.)

17 Indeed, on the day following the passage of act "F," *The Gazette* mentioned the use of the NM in Bill 178 but never mentioned the use of the NM in act "F." See Nancy Wood, "Law 'barely changes' Bill 101: premier," *The Gazette* (Montreal), 24 December 1988, p. A1.

18 Marriage Amendment Act, S.A. 2000, c. 3; Bill 202, Marriage Amendment Act, 24th Legislature, 4th Session, Alberta, 2000. The bill passed its first and second readings on 23 February 1999, and third reading on 15 March 2000. *Egan* v. *Canada*, [1995] 2 S.C.R. 418; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493; *M.* v. *H.*, (1998) 142 D.L.R. (4th) (Ont. C.A.). The Supreme Court heard arguments for the latter case in March 1998 before the tabling of the bill and issued its decision, upholding the ruling, in May 1999, between the first and second reading thereof. See *M.* v. *H.*, [1999] 2 S.C.R. 3.

19 Constitution Act, 1867 (U.K.), 30–31 Vict., c. 3, s. 91(26).

20 See Kelly Harris, "New law to ban same-sex marriage," *Calgary Herald*, 16 March 2000, p. A1, and James Cudmore, "Alberta bill bans same-sex marriages," *National Post*, 17 March 2000, p. A6. Perhaps the reason for the lack of criticism of the marriage law on behalf of the gay and lesbian community is that since the act was practically meaningless, the members of that community did not want to waste their public support reserves on such a matter.

21 Howard Leeson, "Section 33, the notwithstanding clause: A paper tiger?" *Choices – Courts*

and Legislatures 6, no. 4 (2000), pp. 1–22, at p. 14. June 2000 is the date on the cover page of the publication.

22 Donna Greschner and Ken Norman, "The courts and section 33," *Queen's Law Journal* 12, no. 2 (Fall 1987), pp. 155–98, at pp. 155–56.

23 S.S. 1979, c. 24.1.

24 RWDSU v. *Govt. of Saskatchewan*, [1985] 19 D.L.R. (4th) 609 (Sask. C.A).

25 RWDSU v. *Govt. of Saskatchewan*, [1987] 1 S.C.R. 460.

26 See Hogg, *Constitutional Law of Canada*, s. 36.2, p. 36–4.

27 See Frederick L. Morton, "The political impact of the *Canadian Charter of Rights and Freedoms*," *Canadian Journal of Political Science* 20, no. 1 (March 1987), pp. 31–55, at p. 47; Greschner and Norman, "The courts," *Queen's Law Journal*, p. 191, footnote 84; Leeson, "Paper tiger," *Choices*, p. 15.

28 Morton, "Political impact," *Canadian Journal of Political Science*, p. 47.

29 *Ford* v. *Quebec (A.G.)*, p. 768–87.

30 Janet Hiebert argues that Bill 178 was not necessarily in conflict with the *Ford* decision, and she suggests that its use of the NM was pre-emptive rather than remedial. See Janet Hiebert, *Limiting Rights – the Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queen's University Press, 1996). Hiebert argues that because the court found that the purpose of preserving French dominance in Quebec was constitutional and it was only the means that were not the least drastic, it is possible that the inside–outside compromise "might [have been] interpreted by the Court as a reasonable attempt to ensure that the promotion of the policy objective did not impose an overly severe restriction on freedom of expression," pp. 143–44. I disagree with this analysis. The court did not suggest that the *package* created by the legislation was unconstitutional. What it said was that the *specific means* of French-only signs was unconstitutional since it was unnecessary in achieving the legitimate goal of preserving French dominance in Quebec. The French-only requirement for signs would have therefore remained unconstitutional, whether it applied to certain kinds of signs or all signs. Hiebert would have been right had the court struck down the sign policy based on the proportionality part of the *Oakes* test, where the court weighs the overall benefit of the legislation against the cost to rights protection. (See *R.* v. *Oakes*, [1986] 1 S.C.R. 138.) If that were the case, the fact that the new sign law was less restrictive of rights might have been relevant in considering the overall impact of the legislation. But, since the policy was struck down on minimal impairment grounds (the third stage of the *Oakes* test, Ibid.), the fact that the new act was less restrictive of rights is irrelevant.

31 See Patrick Monahan, *Meech Lake – The Inside Story* (Toronto: University of Toronto Press, 1991), pp. 159–60; Andrew Cohen, *A Deal Undone – the Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990), p. 200.

32 Ibid. The text of the Meech Lake Accord appears at p. 297.

33 Ibid., p. 4.

34 Ibid., pp. 164–66; Cohen, *Deal Undone*, pp. 197–200, Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd edition (Toronto: Oxford University Press, 2001), pp. 186–87; Hiebert, *Limiting Rights*, pp. 140–41.

35 U.N.H.R.C., 47th Sess., UN Doc. CCPR/47/D/359/1989 and 385/1989. This document is a communication of opinions submitted by John Ballantyne, Elizabeth Davidson and Gordon McIntyre and was adopted on 31 March 1993.

36 An Act to Amend the Charter of the French Language (S.Q. 1993 c. 40, ss. 18, 22), which amended, respectively, sections 58 and 68 of the Charter of the French Language (R.S.Q. c. C-11). The "explanatory notes" in the bill stated that it sought to amend the legislation "in order to bring some of its provisions ... into harmony with the decisions rendered by various authorities." Bill 86, An Act to Amend the Charter of the French Language, 34th Legislature, 2nd Session, Quebec, 1993. The non-renewal of the notwithstanding declaration was not mentioned in the explanatory notes.

37 In *La Procureure générale du Québec* c. *Les Enterprises W.F.H. ltée*, [1999] J.Q. No. 4586 (QL), it was held that *Ford*'s approval of the predominantly French requirement was no longer in force since, ten years after *Ford*, the government had an obligation to reintroduce evidence that the status of the French language remained vulnerable in Quebec. Since no such evidence was presented, the court struck down section 58. The Quebec minister of justice announced that the province would appeal, but the option of using the NM was not even mentioned. See Campbell Clark, "Judge strikes down key part of language law," *National Post*, 21 October 1999, p. A1; Ingrid Peritz, "Sign rules struck down in Quebec," *The Globe and Mail*, 21 October 1999, p. A1. The decision was reversed on appeal. See [2000] J.Q. No.1165 (QL).

38 Report by expert witness Gerald Robertson, a law professor at the University of Alberta, and submitted to the Alberta Court of Queen's Bench as part of the evidence considered in *Muir* v. *Alberta* (1996), 132 D.L.R. (4th) 695 (Alta. Q.B.). The report was endorsed by the court (pp. 721–23) and was included at p. 744 as Appendix "A" to the judgement. See also p. 745.

39 Ibid., p. 744.

40 Ibid., pp. 721–22.

41 Ibid., pp. 722–23.

42 The exact amount was $740,780 but this figure did not include costs or certain interest items. See *Muir* v. *Alberta*, p. 699. The government of Alberta states that the amount was "approximately $1,000,000 in damages, interest and costs." See Alberta, Ministry of Justice, *News Release, "Background Information" for the Institutional and Sexual Sterilization Compensation Act*, 10 March 1998 (Edmonton: Ministry, 1998).

43 Alberta, Legislative Assembly, *Debates and Proceedings (Hansard)*. 24th Legislature, 2nd Session, no. 23, 10 March 1998 (Edmonton: Queen's Printer, 1998), p. 775; Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act, 24th Legislature, 2nd Session., Alberta, 1998.

44 Ibid., s. 4 (1).

45 Ibid., s. 4(2).

46 Ibid., ss. 4(3), 4(4).

47 Ibid., s. 5(1).

48 Ibid., ss. 5(2), 5(3).

49 Ibid., s. 6.

50 Ibid., s. 8.

51 R.S.A. 1980, c. A-16.

52 Ken Nelson, a sterilization victim, said to the media, "I stood in the legislature gallery today and watched the Premier of Alberta take the rights away from 700 hundred people" (cited in Larry Johnsrude, "Province revokes rights," *The Edmonton Journal*, 11 March 1998, p. A1). It seems that the opposition parties, who knew in advance about the tabling of the bill, made sure that some sterilization victims would be present at the legislature. Mr. Nelson later appeared with his story on national television (Jeffs and Thomson, "Victims anger moved Klein," *Edmonton Journal*, p. A5). One politician stated that it was this television appearance that made Klein question the bill (Ibid.).

53 Brian Laghi, "Alberta to limit compensation for eugenics victims," *The Globe and Mail*, 11 March 1998, p. A1; Steve Chase, "Sterilized Albertans irate over cash deal," *Calgary Herald*, 11 March 1998, p. A1. See Johnsrude, "Province revokes rights," *Edmonton Journal*. The March 11 issue of *The Edmonton Journal* is a good reflection of the public outrage surrounding the bill. The newspaper dedicated a large amount of space to reports, editorials and accounts of the horrors the victims suffered. The stories and editorials were replete with charged language such as "a black day for Alberta," "blatant disrespect for its citizens," "an arrogant move," and "robbery of handicapped people" (Ibid.). Other examples of this type of reaction in the same issue: "absolutely draconian" (Conservative Senator Ron Ghitter, a spokesman for the Alberta Dignity Foundation and a former Conservative MLA, as quoted

in Ibid.), "terribly repugnant" (Ibid.), "a totalitarian regime" (Ibid.), "mean-spirited"(Ibid.), "heavy-handed" (lawyers for the victims as quoted in Ibid., p. A16), "draconian" (Ibid.). Although the government withdrew the bill from the legislature on 11 March, the 12 March issue of *The Edmonton Journal* continued its fierce attack, using expressions such as "the nightmare scenario" (Kathleen Mahoney, a University of Calgary law professor, as quoted in Tom Arnold, "Use of 'sledgehammer' law condemned," *The Edmonton Journal*, 11 March 1998, p. A5), "like ... in banana republics and repressive dictatorial regimes" (Ibid), "[a] strong-arm tactic" (Ibid.), "big, bullying, paternalistic government at its worst" ("Editorial: An outrage, and an abuse of power," *The Edmonton Journal*, 11 March 1998, p. A12), "humiliating" (Ibid.), "frightening" (Ibid.), "legislative tyranny" (Ibid.), "moral emptiness" (Linda Goyette, "Decency doesn't live here anymore," *The Edmonton Journal*, 11 March 1998, p. A12), "the hard slap that overwhelms other injustices" (Ibid.), "a cheat" (Ibid.), "[saving] bucks at the expense of disabled citizens" (Ibid.), "disgrace" (Ibid.), "bunch of cowards" (Ibid.), "disgusting" (Ibid.), "shrinking the scope of liberal democracy" (Ibid.); "mean, dumb and gutless" (Marc Lisac, "Alberta's Bill 26 is mean, dumb and gutless," *The Edmonton Journal*, 11 March 1998, p. A13), "chicken-hearted" (Ibid.), "pea-brained"(Ibid.), "the morality of an egg-stealing magpie and the social conscience of a coyote" (Ibid.), "remorselessly" (Ibid.), "a large person shoving a small one onto the floor" (Ibid.). I chose to quote only the short expressions used by the critics. The reports and editorials obviously went beyond these expressions to also attack the legislation on its merits and on the lack of political wisdom displayed by the introduction of such a bill.

54 Brian Laghi, "Klein retreats in rights scrap," *The Globe and Mail*, 12 March 1998, p. A1.

55 *The Edmonton Journal* stated that Premier Klein's office received about 250 calls and that this brought home to him the extent of the public's anger (Allyson Jeffs, "About face," *The Edmonton Journal*, 12 March 1998, p. A1). See also Graham Thomson, "Victims," *The Edmonton Journal*, 12 March 1998, p. A5; Allyson Jeffs and Graham Thomson, "Victim's anger moved Klein," *The Edmonton Journal*, 12 March 1998, p. A5; Larry Johnsrude, "A problem of perception," *The Edmonton Journal*, 12 March 1998, p. A5.

56 Alberta, Legislative Assembly, *Debates and Proceedings (Hansard)*. 24th Legislature, 2nd Session, no. 23, 11 March 1998 (Edmonton: Queen's Printer, 1998), pp. 812–13.

57 Jeffs, "About face," *The Edmonton Journal*.

58 Alberta, Legislative Assembly, *Debates*, 11 March 1998, pp. 854–55.

59 A question that I am not addressing here is what it was that made the public respond negatively to the uses of the NM in the sign law and in the sterilization bill. Was it the very invocation of the NM? Was it the way in which it was invoked? Was it the specific policy enacted in the notwithstanding acts? Can these factors be isolated from each other? For a discussion of these points, see Tsvi Kahana, "The Partnership Model of the Canadian Notwithstanding Mechanism – Failure and Hope" (S.J.D. diss., Faculty of Law, University of Toronto, 2000), pp. 216–26.

60 The reason for this decision is probably that the backlash from the sterilization bill made the Alberta government very apprehensive about proposing to use the NM again. See Kahana, "Partnership Model" (diss.), pp. 221–25.

61 The suspicion that the public was generally unaware of this legislation is supported by the following episode. On 22 March, only one week after the passage of the marriage law in the Alberta legislature, a similar incident took place in the federal Parliament. The government amended the bill that extends benefits to same-sex couples, to make it explicit that the bill does not change the definition of marriage as a union between a woman and a man. This amendment created controversy in Parliament, and a report on this controversy was the first item on the CBC's evening news program, *The National* (22 March 2000). Obviously, what happened in Alberta a week prior would have been a very interesting thing to include in the report since both legislative developments dealt with exactly the same thing: same-sex mar-

riage. Nevertheless, Alberta's week-old legislation was not mentioned in the report. The suspicion that indeed the CBC news desk was unaware of the Alberta marriage law is enhanced by the fact that the Alberta marriage law was not reported by the CBC's *The National* in the five days following its enactment (available online at: <http://cbc.ca/national/trans/index.html>).

62 *Muir* v. *Alberta*, p. 735 (emphasis added).

63 Ibid., pp. 734–35.

64 Current case law (which has not changed since the tabling of the sterilization bill in March 1998) would not be in favour of the victims, either on the section 7 front or on the section 15 front. Two section 7 arguments that are relevant to the sterilization matter were rejected by the courts. The first was the argument that since damages in tort are intended to make the victim whole again, limiting the compensation amount curtails the victim's ability to fully heal. Another possible argument would be more practical to suggest that since damages are awarded to help the victim pay for the care and assistance they now require, limiting their amount limits the victim's liberty and security. Both these arguments were rejected since the courts refused to read the protection of economic interests into section 7. See *Whitbread* v. *Walley*, [1988] B.C.J No.733; *aff'd* [1990] 3 S.C.R. 1273.A. Section 15 arguments would also not necessarily succeed. In *Re Workers' Compensation Act 1983 (Newfoundland) ss. 32 & 34*, [1989] 1 S.C.R. 922, the Supreme Court of Canada found that the Newfoundland Workers' Compensation Act, 1983 did not infringe on section 15 even though it denied workers and their families the right of action against their employer and any resulting compensation for injuries received at work. The court ruled that the status of workers under this act was not a ground analogous to those listed section 15(1) and therefore such a limitation on these workers' rights of action was not discrimination within the meaning of section 15. It might be argued, of course, that there is a difference between workers and sterilization victims. Being a sterilization victim is "personal and immutable" whereas workers can leave their jobs whenever they want. Therefore, there is a better reason to consider their disability as an "analogous ground." See Hogg, *Constitutional Law of Canada*, s. 52.7(b), p. 52–18 and s. 52.7(e), p. 52–9. Hogg's argument, however, has not yet been adopted in the case law. In fact, in *Hernandez* v. *Palmer*, [1992] O.J. No. 2648 (Gen. Div.), the Ontario Court of Justice, citing the *Workers' Compensation Reference (1983)*, noted that being the victim of a particular kind of tort is not an analogous ground of discrimination.

65 The possibility that the bill might not have infringed any Charter rights was mentioned neither by the media nor even by the politicians who supported the bill. In fact, as much as the discussion in the press concentrated on "human rights" and on the Charter, there was hardly any reference to actual Charter rights. The two exceptions were 1) the text of section 15 was mentioned in an article reporting what a lawyer for some of the victims had said (Chase, "Sterilized Albertans irate over cash deal," *Calgary Herald*, p. A2); and 2) a report citing a comment by Premier Klein to the effect that the legal advice the government received cautioned that the bill might violate "legal rights" (Steve Chase, "Klein says goal was to spare tax-payers," *Calgary Herald*, 12 March 1998, p. A3).

66 Responding to questions by MLAs, the premier and minister of justice said that in the preparation of the bill the government received legal advice from the Department of Justice as well as two law firms. See Alberta, Legislative Assembly, *Debates and Proceedings (Hansard)*. 24th Legislature, 2nd Session, no. 26, 12 March 1998 (Edmonton: Queen's Printer, 1998), p. 855. The government refused to release these opinions (Ibid.). A possible line of argument in favour of invoking the NM with the enactment of the bill without waiting for a judicial decision could have been the following: if the bill had been enacted without a notwithstanding declaration, the victims would have sued for more than $150,000 and would have asked the court to declare the $150,000 cap unconstitutional. If indeed the court had found that this cap constituted a limit on a Charter right and was not justified under section 1, it would

have been too late to use the NM, since the *Ford* case ruled that section 33 cannot be used retroactively. Thus, invoking the NM after actions had been filed would have meant that the government would have had to pay more than $150,000 to the victims who filed their claims before the invocation of the NM, and the purpose of the legislation would have been undermined. The desire to ensure that the legislation was valid at all costs probably explains why the notwithstanding declaration (section 3) referred to all available Charter rights (sections 2 and 7 to15) even though the bill clearly did not violate most of these rights (e.g., freedom of association [section 2(d)] and the right to an interpreter in court proceedings [section 14]).

67 This is especially clear in the sign law example. The courts phrased the question as a minimal impairment question and asked whether the French-only sign policy was necessary for the survival of the French language in Quebec. The question was discussed by many Quebec legislators as a purely political question regarding the relations between two groups of people (i.e., should anglophone Quebeckers have the right to post their signs in English, or would this be too great a concession?). For the debate in the Quebec national assembly regarding Bill 178, see Kahana, "Partnership Model" (diss.), pp. 207–14.

68 See R.S.A. c. M-6, s. 1.1; R.S.Q. c. C-11.

69 [1986] 21 D.L.R. (4th) 354 (Que. C.A.). This decision was overruled by the Supreme Court of Canada in *Ford* v. *Quebec (A.G.)*.

70 Aside from acts "G" and "H" (Table 2), there is another act among the thirteen ignored Quebec notwithstanding acts that dealt mainly, but not exclusively, with the renewal of notwithstanding declarations. This was the Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provisions (act "C" in Table 1). Four of the eleven sections of this two-page act dealt with renewing the notwithstanding declarations in four of the pension plan acts. Even the other sections of this act, which included amendments to the Quebec Charter of Human Rights and Freedoms, involved pensions and retirement or insurance plans. This act was also ignored. It should be noted, however, that while the strategy of making the enactment or renewal of the notwithstanding declaration the sole or main part of the act did not seem to affect the level of public awareness, it did seem to increase the notice paid to the acts by the drafters of the legislation. The explanatory notes to three acts – "C," "G" and "H" – mention the renewal of the notwithstanding declaration. However, the explanatory notes attached to the other notwithstanding acts do not. This is significant because the explanatory notes represent what the drafters felt were the most important and relevant features for legislators to know.

71 For such a proposal, see Scott Reid, "Penumbras for the People: Placing Judicial Supremacy under Popular Control," in Anthony A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform* (Toronto: Oxford University Press, 1996), pp. 186–213. This idea was adopted in Alberta in Bill 38, Constitutional Referendum Amendment Act, 24th Legislature, 3rd Session, Alberta, 1999 (first reading 29 April 1999, second reading 11 November 1999). This bill was tabled after the sterilization bill fiasco. Ironically, the bill explicity states that the referendum requirement does not apply to "a Bill or a provision of a Bill within the jurisdiction of the Legislature that relates to who may marry" (section 2.1[3]). In other words, even if this proposal were law, the Alberta marriage law would have been exempt from the otherwise required referendum, which would surely provoke angry responses from Albertans and other Canadians.

72 See Manfredi, *Judicial Power*, pp. 191–92.

73 See Paul C. Weiler, "Of judges and rights, or should Canada have a constitutional bill of rights?" *Dalhousie Review* 60 (1980–81), pp. 205–39, at pp. 221–27 and 231–36; Paul C. Weiler, "Rights and Judges in a democracy: A new Canadian version," *University of Michigan Journal of Law Reform* 18, no. 1 (Fall 1984), pp. 51–92, at pp. 64–5; Peter Russell, "Standing up for notwithstanding," *Alberta Law Review* 29, no. 2 (Winter 1991), pp. 293–309, at pp. 295–99. Weiler's 1980 paper, which is a pre-Charter proposal for a NM to override judicial decisions,

does not even discuss the possibility of using such a mechanism pre-emptively. Neither Weiler's 1984 paper nor Russell's paper explicitly states that the NM should only be used remedially, but their talk of the NM as a mechanism for the correction of judicial errors necessarily implies that the NM should be used only after the Supreme Court has ruled on a matter and erred. Manfredi explicitly suggests amending section 33 such that it allows only for remedial uses of the NM. See Manfredi, *Judicial Power*, pp. 192–93.

74 See Leeson, "Paper tiger," *Choices*, p. 15.

75 Manfredi seems to be making the same argument using different language. He suggests that using the NM in a pre-emptive fashion amounts to legislative supremacy because "[t]he doctrine of constitutional supremacy includes an important review function for the courts" (Manfredi, *Judicial Power*, p. 192). However, Manfredi's emphasis on the court's "important function" and not on the individual's right to air her rights claim misses the point. The fact that a few individual acts invoke the NM pre-emptively and thus prevent judicial review does nothing to the court's "important review function" since in the vast majority of cases the NM is not invoked and the court may perform a review. In contrast, if we look at the matter from the individual's perspective, pre-emptive uses of the NM block access to the courts and the individual therefore loses the chance to air her grievances: it does not matter that in most other cases individuals have access to justice.

76 Greschner and Norman, "The courts," *Queen's Law Journal*, p. 193.

77 Ibid., pp. 191–92. For this argument, see also Janet L. Hiebert, "Why must a bill of rights be a contest of political and judicial wills? – The Canadian alternative," *Public Law Review* 10, no. 1 (March 1999), pp. 22–36, at p. 33. The argument that a remedial use of the NM is likely to produce a better public discussion assumes – rather than demonstrates – that judicial review will generate public discussion and that the court has the ability to educate the public. Needless to say, this assumption is not uncontested. Many believe that a judicially enforced rights-protecting constitutional regime sterilizes politics, constrains deliberation, and moves the discussion of important political issues out of the political institutions and into the courts. This important theoretical disagreement is beyond the scope of this article. I should say, however, that even critics of the Supreme Court of Canada believe that the court does have the power to educate the public and has done so in the past. See Weiler, "Rights and judges in a democracy," *University of Michigan Journal of Law Reform*, pp. 76–7; Russell, "Standing up," *Alberta Law Review*, pp. 300–301. Hiebert, "Why must a bill of rights be a contest?" *Public Law Review*, pp. 25–9. For a discussion of the ways in which a remedial NM can contribute to public discussion, see Mark Tushnet, "Policy distortion and democratic debilitation: Comparative illumination of the countermajoritarian problem," *Michigan Law Review* 94, no. 2 (November 1995), pp. 245–301.

78 Greschner and Norman, "The courts," *Queen's Law Journal*, p. 192.

79 Brian Slattery, "Canadian Charter of Rights and Freedoms – Override clauses under s. 33 – whether subject to judicial review under section 1," *Canadian Bar Review* 16, no. 1 (March 1983), pp. 391–97, at p. 397. See also John D. Whyte, "On not standing for notwithstanding," *Alberta Law Review* 28, no. 2 (Winter 1990), pp. 347–57, at pp. 354–57.

80 See Weiler, "Of judges and rights," *Dalhousie Review*, p. 234, and Weiler, "Rights and judges," *University of Michigan Journal of Law Reform*, p. 81.

81 For how the passage of time can influence people's and legislators' preferences, see Tushnet, "Policy distortion," *Michigan Law Review*, pp. 293–94.

82 This argument would obviously weaken if the lower court struck down the law unanimously, while the Supreme Court ruling was a majority decision. In this case, the Supreme Court decision would make it easier for the legislature to invoke the NM since it could argue that rather than acting against rights protection, it adopted the judicial opinion of the dissent. In other words, a divided Supreme Court decision might actually legitimize the use of the NM.

83 For the problem of "democratic debilitation" created by legislative and popular reliance on the judiciary to deliberate on important issues, see Ibid., pp. 245–49 and 275–77.

84 There was, of course, an element of the courts–legislatures relationship in the bill, since the bill's purpose was to limit the amount courts could award in certain cases. Indeed, Opposition Leader Pam Barrett criticized the bill, among other reasons for "interfering with the judiciary" (Alberta, Legislative Assembly, *Debates*, 10 March 1998, p. 780). However, the bill itself was not enacted in response to a court's decision, nor did it stand in direct opposition to such a decision.