Summary by the Language Rights Support Program of the impact study entitled:

"Can the Notwithstanding Clause override Section 23 of the *Canadian Charter of Rights and Freedoms*?"

This legal question, raised in the impact study, follows the Supreme Court of Canada decision in the 2009 case *Nguyen* v. *Québec* where the Court determined the constitutionality of recent amendments to the *Charter of the French language*, regarding the eligibility of certain categories of students to attend English-language public schools and subsidized private schools in Quebec.

In its decision, the Court granted the Quebec Legislature one year to review and modify the unconstitutional legislation. The Quebec government responded by drafting two bills (Bill 103 that has become Bill 115). Members of the Quebec National Assembly have stated their intention to either re-introduce the unconstitutional legislation or make it more stringent by implementing the law using the notwithstanding clause. The notwithstanding clause raised in political debates could be used to limit constitutional language rights, particularly the educational rights set out in Section 23 of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*), which guarantees educational rights in the minority language.

The author, Michael N. Bergman starts by defining the notwithstanding clause: It is a provision of the *Canadian Charter* (Section 33) which allows Parliament or a provincial legislature to pass a law that violates the *Canadian Charter*'s rights but only if certain conditions are met. For example, its validity can only last a maximum of five years, and may be renewed under certain conditions.

The legal question is whether the notwithstanding clause can be used on legislation concerning educational rights. The impact study "Can the Notwithstanding Clause override Section 23 of the *Canadian Charter of Rights and Freedoms*?" by the Quebec English School Boards Association, seeks to answer this question. Indeed, the study examines the possibility for any government (be it federal or provincial) to use the notwithstanding clause on legislation which relates to minority-language education rights.

In his study, the author explains that the enactment of the notwithstanding clause was the result of political compromise. He notes that since its enactment in 1982, the notwithstanding clause has been used sparingly, and consequently, its scope has not been clarified by the courts.

M. Bergman concludes that minority-language educational rights stated in Section 23 of the *Canadian Charter* are off limits to the notwithstanding clause mainly for three legal arguments. For more information on the three legal arguments, please consult the full-version of the impact study.