500-09-027501-188

Court of Appeal of Québec

Montréal

On appeal from a Judgment of the Superior Court, District of Montréal, rendered on April 18, 2018 by the Honourable Claude Dallaire, J.S.C.

No. 500-05-065031-013 S.C.M.

KEITH OWEN HENDERSON

APPELLANT – Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT – Respondent

-and-

ATTORNEY GENERAL OF CANADA

MIS EN CAUSE – Mis en cause

-and-

SOCIÉTÉ SANT-JEAN-BAPTISTE DE MONTRÉAL

INTERVENER – Intervener

APPELLANT'S BRIEF IN REPLY TO SOCIÉTÉ SAINT-JEAN-BAPTISTE DE MONTRÉAL

Dated May 7, 2019

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SOCIÉTÉ SANT-JEAN-BAPTISTE DE MONTRÉAL

INTERVENER – Intervener

APPELLANT'S ARGUMENT IN REPLY TO SOCIÉTÉ SAINT-JEAN-BAPTISTE DE MONTRÉAL

PART I — FACTS

1. The facts are as set out in Part I of Appellant's Brief **("Brief")** of October 9th, 2019.

2. ***Appellant's Brief in Reply.*** Appellant now respectfully replies to the *Mémoire* of the Intervener Société Saint-Jean-Baptiste de Montréal **("SSJBM")**, dated 28 March 2019, with this **"Reply Brief"**, herein distinguished from **"Appellant's Brief"** of October 9th, 2019.

PART II — ISSUES IN DISPUTE

3. The issues in dispute are set out in Part II of Appellant's Brief of October 9th, 2019.

PART III — SUBMISSIONS

4. ***Intervener's Paragraph 1.*** Intervener, in its **SSJBM para 1.,** adopts paras. 1 to 16 of the submissions of the respondent Attorney General of Quebec in the latter's *Mémoire*. To this, it adds objections of its own: **SSJBM para. 24.** Appellant respectfully points out that, though this Court's interlocutory judgment of August 30th 2007, — reported as **[2007] QCCA 1138**, — held that certain of Appellant's *original* ***conclusions*** (which sought statements of law) were inappropriate, this Court at the same time, in **paras. [65] to [70]** summarized the ***issues*** which it sent forward for trial to be addressed by Appellant in support of Appellant's surviving conclusions. Appellant submits that all his submissions lie within this framework. All are addressed to the validity of the contested sections.

4.1 ***Ibid.*** Appellant has asked, and continues to ask, that the contested sections be declared *ultra vires*, null and void, on the grounds fully set forth in his Brief of October 9th, 2018. And Appellant respectfully asks that the Court should *in its reasons* rely on those grounds. Therefore Appellant continues to seek orders exactly as set forth in paras. **3) (1)** and **(2)** of his principal **Brief**. Why then does Appellant add subsidiary conclusions?

4.2 ***Ibid.*** The position of the Attorney General of Canada has been, and remains, that the Court has power to, — and may choose to, — "read down" the provisions, possibly in the terms suggested by him. The Appellant, with respect, cannot simply ignore the fact that the Court may adopt the position of the Attørney General of Canada. Appellant must therefore proceed on the basis **(1)** that the Court has power to make the orders which it

considers appropriate when it adjudicates on the merits and **(2)** that the Court has power to state the law in the terms it considers correct. For this reason, ***and contingently on the Court's agreeing with the Attorney General of Canada as to "reading down"***, Appellant adds his subsidiary conclusions as set forth in Conclusion para **3) (3)** as *possible alternatives* to those proposed by the A.-G. Canada. Appellant does not seek to widen the debate nor to disrespect this Court's interlocutory judgment, and has indeed, in great detail, pointed out in his principal **Brief, para. 41**, the obstacles to "reading down".

5. *Deference to the trial judgment.* Intervener's Brief **SSJBM para. 4** submits, in respect of "la preuve extrinsèque", "qu'il n'y a pas lieu de réexaminer sauf erreur manifeste et déterminante de la part du tribunal de première instance....". With great respect to the trial judge, this is a pure constitutional case, involving only issues of legislative powers, and in which (Appellant submits) the standard for appeal is correctness. If so this Court is therefore not bound by the decisions of the trial judge, but is free to reach its own conclusions on every issue and on every aspect of the case, including the effect of extrinsic evidence. In any event the explicit statutory language of the contested provisions, supported by the several kinds of concurrent extrinsic evidence detailed in **Appellant's Brief, paras. 12 to 19.1,** shows (Appellant most respectfully submits) that the trial judgment suffers from "erreur manifeste et déterminante". On the applicable standard of review on questions of jurisdiction and, more specifically, on constitutional questions:

> *Barrie Public Utilities* v. *Canadian Cable Television Assn.*, [2003] 1 SCR 476, pp. 489-493 (majority); 505-07, paras. [9] to [19], [59]-[66] (dissent); (concurring on standard)
>
> *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board)* v. *Laseur*, [2003] 2 SCR 504 at 529-530, paras. [30], [31]
>
> *A.-G. B.C. v. Paul, (indexed as Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 SCR 585, at 606-607, para. [31]
>
> *Casimir* v. *A.-G. Quebec*; indexed as *Solski (Tutor of)* v. *Quebec (Attorney General)*, [2005] 1 SCR 201 (Court of Appeal and Supreme Court each in turn deciding constitutional issues on the merits without obligation to defer, and each reversing the Court below in whole or in part)
>
> *Quebec (Education, Recreation and Sports)* v. *Nguyen*, [2009] 3 SCR 208 (Supreme Court and Court of Appeal each reviewing lower court decisions on constitutional issues on appeal on the merits without a duty to defer)
>
> *T.B.* c. *Québec (Ministre de l'Éducation)*, 2007 QCCA 1112, [33] to [36]; [2007] RJQ 2150, 2158-9

Multani v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, pp. 273-74, paras. [20], [21] (correctness standard for review of Superior Court judgment)

H.N. c. *Québec (Ministre de l'Éducation)*, 2007 QCCA 1111 para [18]; [2007] RJQ 2097, 2105 (correctness standard, both on appeal and on review, on constitutional issue)

Dunsmuir v. *New Brunswick*, [2008] 1 SCR 190 at p. 222, para [50]

Syndicat des salariés de béton St-Hubert — CSN c. *Béton St-Hubert inc.*, 2010 QCCA 2270, para. [25] to [27] (correctness for appeal and for review on natural justice)

5.1 ***Deference to the trial judgment. Supervening event.*** The trial judgment has furthermore been overtaken by a supervening event, the Resolution of the National Assembly of 28 March 2019, quoted below, and annexed hereto as **ANNEX 1**, **Reply Brief, para. 20, annexed p. 17**. Prompted by the Attorney General of Canada's Brief in this appeal, the March 28th 2019 Resolution directly contradicts the trial judgment and the grounds urged in support of the legislation. Citing the Quebec people's "right to self-determination", the Assembly affirms, explicitly, that the Quebec people, have "an inalienable right to choose Quebec's status" and that the Assembly "condemn the Federal Government's intent to undermine the Québec people's right to freely choose Québec's political status, by making it conditional on an amendment to the Canadian Constitution." The Assembly, by now rejecting any limited meaning of its own Act, acknowledges, — as Appellant has contended throughout, — the unlimited nature of the claims in the legislation now before this Court. The Assembly does so in the face of consistent disclaimers. The Assembly now affirms what the statute states on its very face, — that the Quebec people have the unlimited power of constitutional change, ***unconditionally***, and, in particular, ***without regard to any of the amending processes prescribed by Part V of the Constitution Act, 1982.***

6. ***The Quebec people.*** The concept of a "Quebec people" or "peuple québécois" is textually implicated in each of ss. 1, 2, 3, 4 and 13, and, inferentially, in s. 5, — all in issue constitutionally in this appeal. Appellant respectfully responds to the submissions of the Intervener in **SSJBM paras. 4 to 9** of its *Mémoire.*

7. ***Ibid. Conflating the linguistic and cultural "people" with the heterogeneous civic "people.***" Appellant can perhaps clarify his position (see **Appellant's Brief, paras 29 to 31**) with this summary: The contested sections conflate Quebec's majority, French speaking, linguistic and cultural "people", — which has the rights of internal

self-determination under s. 1 of the Act, — with Quebec's entire heterogeneous civic "people", — or citizenry, — or population, — or electorate, which, for example, votes in the elections or referendums referred to in s. 5. Appellant's concrete concern is that a referendum majority of the civic "people " contemplated by s. 5 could be invoked as an expression of the will of the linguistic and cultural "people" under s. 1 and thereby found claims of rights to self-determination, — binding the whole citizenry of Quebec as having spoken as one "people" under s. 1.

8. ***Ibid. Dual concept of people.*** The term "people" in the sections of the Act seeks to accomplish two different things simultaneously. It must refer to a ***linguistically and culturally identified*** people so that it can meet the conditions for self-determination in international law **(Act, s. 1)**. But it must also include the ***whole*** population of the province to ensure that all may vote in a referendum, and will be bound by the referendum result **(ss. 2 to 5)**. These two purposes can only be accomplished together, — with a single meaning of the word "people" throughout the Act, — by legislatively absorbing into the French-speaking linguistic and cultural "people" all those in the Province of other languages and ethnicities. It is this construction *by statute* of an *artificial* "people" that informs the contested sections, and which Appellant submits is constitutionally objectionable. This arises because both categories are embraced in the one word "people".

9. ***Intervener's positions on the central elements of Appellant's case.*** Intervener's submissions address, — in some respects differently from those of the Attorney General of Quebec, — the central elements of Appellant's case, which, in summary, are these:

(i) the indispensable necessity that any constitutional change, — secession in particular, — must comply strictly with the amending procedures prescribed by Part V of *Constitution Act, 1982* (**C.A. 1982**); the Canada-wide procedures specifically;

(ii) that on their face, and on their literal meaning, supported by their Preamble, the contested sections do assert a right and power of Quebec's people, either by referendum or through their legislative institutions, to make any constitutional change they wish without complying with those prescribed procedures;

(iii) that this interpretation is supported by the extrinsic material cited by Appellant (in **Appellant's Brief paras. 12 to 18**), — legislative debates; party programmes; resolutions; constitutional history (of 1995 in particular); and now also by the Assembly's Resolution of 28 March 2019 (**ANNEX 1**, **Reply Brief para. 5.1** and below, **para. 20, annexed p. 17).**

10. ***As regards compliance with the amending procedures.*** Contesting Appellant's positions summarized above, **para. 9, Intervener** argues (in Appellant's summary) to the following effect, to which **Appellant's Reply** follows **below, in paras. 11 to 14.1:**

(1) Intervener appears **(**in **SSJBM paras. 12 to 14)** to propose compliance, not with the text of C.A. 1982, Part V, as such, but rather with an "implicit" amending process, said to be founded on the Supreme Court's implied duty of negotiation and also "fondée sur une conception spéciale et *sui generis* du droit canadien relatif à la sécession".

(2) Intervener supports this with the fact that, in the *Secession Reference*, the Supreme Court of Canada refrained from choosing the specific amending process to be applied to secession. Intervener appears to infer from this that the Court was, in this way, distancing itself from Part V, — at least as Part V is textually framed.

(3) Intervener relies **(in its paras. 14 and 32)** on the Court's definition of unilateral secession as secession not preceded by negotiations. From this, Intervener appears to infer a retreat by the Court from its insistence on a constitutional amendment to an emphasis on negotiations. There seems no recognition by SSJBM of the need of a "Part V" amendment.

(4) Intervener **(in its para. 18)** cites the observation in this Court in *Alliance Québec* v. *Directeur général des élections du Québec*, [2006] QCCA 651, para. [29], that in case of failure of negotiations, Quebec could choose to make a unilateral declaration of independence, which would be valid under the Constitution and bind the rest of Canada.

11. ***Necessity of compliance with Part V of the C.A. 1982.*** Yet s. 52 and Part V of the C.A. 1982 are clear and explicit in their terms. Moreover Part V reflects, in all respects relevant here, the joint position of eight Provinces, *including Quebec*, as to the amending

formula to come into effect on Patriation: see **Appellant's Brief paras 26.3 and 26.5,** and the **Interprovincial Agreement** cited there and reproduced **in Brief Vol. II, pp. 264-274.**

The fact is that, in the *Secession Reference,* the Court was categorically and repeatedly insistent on the need of a constitutional amendment to effect secession. Appellant **(Brief, para. 9**), quotes **para. 84** of the *Secession Reference* judgment. **Para. 97** reads as follows:

> [97] In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

(i) Negotiation is not presented here by the Court as an ***alternative* to** a constitutional amendment but as a **step *towards*** a constitutional amendment. **(ii)** Moreover there is no absolute *legal* ***entitlement*** to secession; this means that the amendment process cannot be remolded under compulsion simply from a need to facilitate secession.

12. *Choice of the relevant amending process.* Para. 105 of the *Secession Reference* judgment leaves open the choice of the amending process required to achieve secession:

> **[105]** It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination

This is readily explicable by the fact that Part V of the 1982 Act offers ***two*** relevant "Canada-wide" amending processes: that of s. 38 (the so-called "7/50") and that of s. 41 (the unanimous-consent procedure). The Court noted that it had not been asked to make a choice. Given the Court's repeated insistence on the necessity of a constitutional amendment, it is scarcely plausible that it would express itself in the language which it

used in **para. 105** to indicate that it a*bandoned* the established processes of Part V, in order to embark on some speculative processes yet to be conceived. Surely, far more explicit language would have been needed to point to so surprising a venture. During the debates on Bill 99, Minister Facal makes it clear that *he himself* understands the s. 41 procedure (unanimous consent) to apply to secession. (See quotations in **Appellant's Brief, paras. 13.1 and 13.2.)** Accordingly, he refuses, — giving *exactly that reason,* — to allow the language of his Bill to acknowledge the need to comply with the Court's decision.

13. ***Negotiations and constitutional amendments.*** Negotiations with a view to constitutional amendments are one thing. The constitutional amendments themselves are something distinct. The former cannot absorb the latter, nor displace the latter. With respect, the Court's language, fairly read, does not permit conflating the two.

14. ***Alliance Québec* v. *Directeur général des élections du Québec, [2006] QCCA 261, para. 29.*** In this case, which Intervener cites, this Court, — itself citing the *Secession Reference* as its authority, — observed that, in case of failure of negotiations, Quebec could choose to make a unilateral declaration of independence, which would be valid under the Constitution and bind the rest of Canada. In his initial **Brief, para. 23,** Appellant respectfully submitted that this is an *obiter dictum.* It has no bearing on the issues in that case and no bearing on their resolution. Moreover, with respect, it cannot be reconciled with anything said by the Supreme Court in its decision in the *Secession Reference*. It may be a misreading, or perhaps a mis-recollection of what that Court had said in the *Reference*.

14.1 ***Ibid.*** Moreover, some deeper examination is surely now appropriate. ***Who*** would decide ***that*** negotiations had failed, and ***when*** they had failed? A party wishing to minimize the burdens it must bear upon secession would have every interest to declare the failure of negotiations as soon as it was confronted with any condition to which it had a major objection. Would it then be free, at will, to dissolve the Canadian Union and claim that the Canadian State was bound to submit to that dissolution? These are surely grave questions for any Court invited to approve or to follow the proposition under consideration.

15. ***Intervener's objections to secession being conditional on a Part V amendment.*** Intervener, in its ***Mémoire*** **SSLBM paras. 19 to 25**, details its objections to Appellant's

submissions, which it variously considers restrictive, artificial, strait-jacketing Quebec in a formalistic mechanical amending procedure, creating an imbalance of power, ignoring underlying constitutional principles, and making the Constitution a straitjacket.

15.1. ***Ibid.*** Appellant understands the passionate views of Intervener and its members. Appellant responds respectfully that his views are a matter of principle. The amending procedures, *devised by Quebec and seven other provinces* and embodied in the Interprovincial Agreement (above **Reply Brief para. 11**) were, — with changes not now material, — enacted as the amending procedures of Part V of the 1982 Act. The Supreme Court has made it clear that Quebec has a right to *pursue* secession, but not necessarily to *achieve* it (see above, **para. 11,** quoting *Secession Reference* para. [97])). And this is clear even in the passages relied on by Intervener. The amending procedures are to be applied on their terms, and not remolded or rewritten to facilitate or favour secession.

15.2 ***Ibid.*** As written, the amending procedures of the 1982 Act effectively mean that every part of Canada belongs indivisibly to all of its people, and that the people of each province, — aside from the right to propose constitutional changes, — have the right only to govern the province within constitutional limits and in exercise of powers conferred by the Constitution from time to time. That the whole of a country belongs to all of its people is no ignoble principle, and it prevails widely amongst sovereign states. At least one Premier of Quebec has stated that there could be no compromise with the borders of an independent Quebec. It is also the basis of the principle of international law that self-determination is *internal only*, and belongs *only* to peoples defined as having a linguistic and cultural identity. While the Canadian Constitution allows revision of all of its terms, it does so on the basis of the prescribed amending procedures of the 1982 Act, which require a consensus of the people of the whole country for changes beyond carefully-defined provincial interests. There is no generally-accepted moral imperative demanding that a country invite or facilitate its own disintegration, or treat itself as a voluntary association of its territorial units or of the elements of its population. It is worth bearing in mind that, from the first colonization of New France, to the present day, the territory now forming Quebec has always been part of a larger Imperial or national entity from which there has been no right of secession.

16. ***Presumptions of constitutional validity.*** With all due respect to the Intervener **(SSJBM para. 31)** Appellant does not quarrel with the case law which holds that provisions which are genuinely ambiguous, and open to various interpretations, should be given a constitutionally-valid interpretation where possible.

Nor does Appellant argue that provisions of a general character, *ex facie* constitutionally valid (and of course showing no *indicia* of colourability or of other constitutional infringement), must be expressly limited in their terms with language to preclude later *ultra vires* administrative or regulatory application. Appellant makes no such argument.

17. ***Clear language of the statute, supported by clear and consistent extrinsic evidence.*** With deference, the problem is not the use of general language of possibly legitimate application. It is rather the use of explicit language which, — literally, — is in defiance of constitutional limits. For this reason, it does not matter whether in future the electors, or the legislature, ever do or do not take action pursuant to them, or whether any such action is or is not lawful. The contested provisions are (Appellant submits) to be judged **(1)** on their terms, and also **(2)** against the background of the constitutional history invoked in the Preamble, — notably the events of 1995, — and **(3)** having full regard to the avowed purposes stated during the Bill 99 debates. These three are fully congruent. So read and so interpreted, they cannot be reconciled with Part V., and so are *ultra vires*. Appellant respectfully refers to initial **Brief, paras. 12 to 18,** on the extrinsic evidence and its bearing.

18. ***The contrast between the contested sections and C.A. 1982*****, Part V**. C.A. 1982 Part V prescribes a ***defined and limited*** provincial power of constitutional amendment of provincial institutions only, conferred by s. 45, with the scope and specifics of the power defined and exemplified in detail by the Supreme Court (**Appellant's Brief, para. 8**).

19. ***Ibid.*** The contested provisions, by contrast, declare ***an unlimited*** provincial power of constitutional amendment. It is irrelevant that the contested legislation does so in ***declaratory*** terms, rather than purporting explicitly to ***change*** the terms of Part V of the 1982 Act. Declaratory legislation is no less subject to the appropriate judicial review. Parliament cannot under s. 44 of the 1982 Act define the scope of its own powers. Likewise, under s. 45, a provincial legislature cannot, by any means, define or declare the

scope or extent of provincial powers. It is also irrelevant that the contested provisions are said to reflect, or to embody, principles claimed to be democratic expressions, or traditionally accepted aspects of Quebec governance. Again, the only test for their validity is their conformity with the terms of the Constitution Acts.

20. *Resolution of 28 March 2019.* By its Resolution of 28 March 2019 **(ANNEX 1, cited above, para. 5.1, annexed p. 17)**, the Assembly, by unanimous vote, indignantly rejected the submission of the A.-G. Canada that the contested sections should be curtailed by the Court to allow secession only through a constitutional amendment complying with Part V of the Constitution Act, 1982 (meaning, in effect, a Canada-wide procedure, either s. 38 or s. 41). Appellant submits that this proceeding of the Assembly is judicially noticeable: *Bertrand* v. *Quebec (Attorney General)*, [1996] RJQ 2393 (S.C) at 2409 (Pidgeon, J,) (resolution); *Bertrand* v. *Quebec (Procureur General)*, [1995] RJQ 2500 (S.C.) at 2514 (Lesage, J.) (Projet de Loi No.1); Art. 2808 C.C.Q. If required, a motion could (with respect) be made to add it to the record by leave of the Court:

> QUE l'Assemblée nationale réaffirme que les Québécois constituent un peuple en fait et en droit et sont collectivement titulaires des droits universellement reconnus en vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes;
>
> QU'elle réitère le principe fondamental en vertu duquel le peuple québécois est libre d'assumer son propre destin, de déterminer son statut politique et d'assurer son développement économique, social et culturel;
>
> QU'elle rappelle qu'aucun autre parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale ni contraindre la volonté démocratique du peuple québécois à disposer lui-même de son avenir;
>
> QU'elle condamne la volonté du gouvernement canadien de brimer le droit inaliénable du peuple québécois de choisir librement le statut politique du Québec en le rendant conditionnel à un amendement à la constitution canadienne.

The meaning of the contested sections, now insisted on by the Assembly is, therefore, that the Quebec people, by themselves alone and without any constitutional amendment, can effect change in the Province's status.

21. *Textual analysis. Sections 2 and 3 taken together.* Intervener, in addition to presumptions of constitutionality, relies (**SSJBM paras 26-30, 34**) on several grounds of legislative interpretation to establish that the contested provisions are innocent. Appellant

can perhaps focus on the contested ss. 2 and 3 to establish that their explicit language bears the meaning confirmed by the Assembly's Resolution of March 28th 2019.

22. ***Ibid***. In a simple exercise, parse *and* combine the stated power in s. 2 with that in s. 3. Here, **both** the ***scope*** of the alleged power **(s. 2) and** the ***manner of its exercise*** **(s. 3**) are placed within the absolute, exclusive and unilateral authority of Quebec's legislative institutions and electorate, to establish or alter as they may please. The two sections add up *very explicitly* to a completely comprehensive unilateral power of constitutional change, declared by provincial statute. The powers are defined and designed to be without limit or restriction. There is here no ambiguity whatsoever to be filled by presumptions of constitutional validity. Moreover, when read together, ss. 2 and 5 would *ex facie* allow constitutional change ***by referendum*** (Intervener *contra*, ***SSJBM Mémoire*** **para.33**).

23. ***Intervener's submissions in attenuation of the literal meaning. Debates on Bill 99.*** Intervener cites, with care and detail **(SSJBM paras. 26-30, 34)**, various rules and doctrines of legislative interpretation arguably relevant to the meaning of the contested sections. Though these are, in themselves, orthodox principles, they cannot (with respect), when applied, overcome the literal terms and the extrinsic evidence adverse to the validity of the contested provisions. True, Minister Facal disclaims (as quoted by Intervener, **SSJBM para. 36**) any intention that his Act authorize secession. But it is a familiar principle that *self-serving* statements have little weight by contrast with statements *against interest*, — admissions, — such as those quoted in **Appellant's** initial **Brief paras. 13.1 to 13.4.**

24. ***Reading the sections in context.*** Intervener in **SSJBM para. 27**, seeks to have the sections read in the context of the Act as a whole. Indeed, individual provisions *should* be both scrutinized individually and also considered in context. And, in **SSJBM para. 35,** Intervener points to **ss. 6, 7, 10, and 11** of the Act, provisions which Appellant does not contest but as to which he takes no position. Do these sections, or does the entire Act, create a context supportive of the contested sections? Appellant, with respect, submits not.

25. Ibid. ***The context of the contested sections***. ***First***, all the sections cited by Intervener, including s. 6, — *inter alia* declaring Quebec sovereign in its areas of

jurisdiction, — are all a*dditional* assertions of authority, and do not restrain the scope of the contested sections.

26. ***Ibid. The context of the contested sections. Secondly,*** by design or otherwise, an Act can easily be given an overall appearance distracting attention from particular provisions which are constitutionally vulnerable.

27. ***Ibid. The context of the contested sections. Third,*** it is common ground, as was found by the Court below, that the immediate impetus for the Act was the enactment of the federal "Clarity Act". The linked intent to thwart it appears very forcefully in the preamble:

> WHEREAS Québec is facing a policy of the federal government designed to call into question the legitimacy, integrity and efficient operation of its national democratic institutions, notably by the passage and proclamation of the Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (Statutes of Canada, 2000, chapter 26);
>
> WHEREAS it is necessary to reaffirm the fundamental principle that the Québec people is free to take charge of its own destiny, determine its political status and pursue its economic, social and cultural development;

The language of the second paragraph here foreshadows the terms of the contested sections. What this shows is that the contested sections are *central* to the stated purpose of the Act, — they are certainly not *incidental* provisions, nor are they even provisions merely *inter pares*. In truth, the other sections are, at best, of secondary, — even marginal, — significance.

28. ***Ibid. The context of the contested sections. Denunciation of the 1982 Act. Fourth,*** the preamble denounces the 1982 Patriation statute which the Supreme Court has held lawful and legitimate (see **Appellant's (initial) Brief para. 26.4**). This is central to the repudiation, — both in the contested sections and now also in the Resolution of 28 March 2019, — of the amending procedures *prescribed by* Part V of the *Constitution Act, 1982:*

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

29. ***Ibid. The context of the contested sections. Fifth***, the preamble refers to the *Secession Reference* decision in what can only be described as disparaging terms:

> WHEREAS the Supreme Court of Canada rendered an advisory opinion on 20 August 1998, and considering the recognition by the Government of Québec of its political importance;

30. ***Ibid. Reading the sections in context***: ***The Preamble's reference to 1995.*** The Preamble to the Act under review connects the claim of right to "take charge" of its political status very directly with the events of 1995:

> WHEREAS it is necessary to reaffirm the fundamental principle that the Québec people is free to take charge of its own destiny, determine its political status and pursue its economic, social and cultural development;
>
> WHEREAS this principle has applied on several occasions in the past, notably in the referendums held in 1980, 1992 and 1995; . . .

Of course, the measure submitted to referendum in 1995 sought to declare independence unilaterally, but died on the Order Paper after its failure in the referendum. So *on the very face of the Act now under review*, there is an *explicit link* between the contested sections and unilateral secession as attempted in 1995 and blocked only by the 1995 referendum result:

> **Appellants' Exhibit. R-14**: 5 Volumes of Material filed by A.-G. Canada in *Ref. re Secession of Quebec*, See esp. Vol. III Tab 21, *Loi sur l'avenir du Québec (Projet de loi No. 1) (7 sept. 1995)*; ***[Excerpts]***
>
> **LE PARLEMENT DU QUÉBEC DÉCRÈTE CE QUI SUIT**:
>
> DE l'AUTODÉTERMINATION
>
> 1. L'Assemblée nationale est autorisée, dans le cadre de la présente loi, à proclamer la souveraineté du Québec.
>
> Cette proclamation doit être précédée d'une offre formelle de partenariat économique et politique avec le Canada.
>
> DE LA SOUVERAINETÉ
>
> 2. A la date fixée dans la proclamation de l'Assemblée nationale, la déclaration de souveraineté inscrite au préambule prend effet et le Québec devient un pays souverain; il acquiert le pouvoir exclusif d'adopter toutes ses lois, de prélever tous ses impôts et de conclure tous ses traités.
>
> ENTRÉE EN VIGUEUR

> 26. Les négociations relatives à la conclusion du traité de partenariat ne doivent pas dépasser le 30 octobre 1996, à moins que l'Assemblée nationale n'en décide autrement.
>
> La proclamation de la souveraineté peut être faite dès que le traité de partenariat aura été approuvé par l'Assemblée nationale ou dès que cette dernière aura constaté, après avoir demandé l'avis du comité d'orientation et de surveillance des négociations, que celles-ci sont infructueuses.
>
> 27. La présente loi entre en vigueur le jour de sa sanction.

31. ***The impact of context on the contested sections.*** In sum, Appellant, for all the reasons set forth above (**Reply Brief paras 24 to 30**) submits that the statutory context of the contested provisions serves only to undermine any case for their constitutional validity.

32. ***Characterization and distribution of legislative jurisdiction (SSJBM paras. 26, 38 to 40).*** Though legislative subject-matter is comprehensively allocated as between Parliament and the provincial legislatures, some legislation could not, at any time in the constitutional history of this country, have been enacted *either* by Parliament *or* by the legislature of a province. For example, neither could ever have abrogated s. 133 of the Act of 1867; *Att. Gen. of Quebec* v. *Blaikie et al.*, [1979] 2 SCR 1016. Like the remainder of Canada's constitutional structure, such matters are now relegated to the amending processes of Part V of the *Constitution Act, 1982*, with only limited portions within the "unilateral" federal and provincial amending powers of ss. 44 and 45. Moreover, it is not the case that every conceivable set of legislative provisions must fall, as a group, all within federal or all within provincial legislative jurisdiction. It took perhaps a half-century for the courts to delimit the respective jurisdictions on the marketing of agricultural products, so that interlocking federal and provincial legislation could establish the current system of "supply management". The observations of the Judicial Committee of the Privy Council, on the federal *Natural Products Marketing Act, 1934*, as amended, in *A.-G. B.C.* v. *A.-G. Can. et al.,* [1937] AC 377 (P.C.) at p. 389, *per* Lord Atkin, are apposite:

> ... It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could

> in co-operation with the other achieve the complete power of regulation which is desired. ... **But the legislation, will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.** . . .
>
> [Emphasis added]

33. ***Ibid. The Act under review and the contested sections.*** Applying these principles, the statute under review cannot be taken as an aggregate whole and all held to be within provincial legislative authority. Here, the competing jurisdiction in respect of the contested sections is not that of the federal Parliament, but rather the exclusive jurisdiction of the Canada-wide amending procedures of Part V of the 1982 Act. If the contested sections are scrutinized individually and with one another, and assessed in terms of those amending procedures, they appear *ultra vires* C.A. 1982, s. 45; ***supra*, para. 18;** initial **Brief**, **para. 8**.

34. ***Invalidity of the contested sections***. Appellant respectfully submits that for all the reasons offered in his principal Brief of October 9th, 2018, and in this Brief in reply to the Intervener, the contested provisions, ss. 1, 2, 3, 4, 5, and 13 of the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, Statutes of Quebec 2000, c. 46, Revised Statutes of Quebec, chapter E-20.2 should be held and declared *ultra vires*, null and void.

PART IV — CONCLUSIONS

35. ***Disposition.*** Appellant humbly prays that this Court give judgment in accordance with his Conclusions in Part IV of his Brief of October 9th, 2018.

Montreal, Quebec, May 7, 2019

(S) CHARLES O'BRIEN

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CHARLES O'BRIEN
ATTORNEY FOR *APPELLANT/Petitioner*

(S) STEPHEN A. SCOTT

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STEPHEN A. SCOTT
COUNSEL FOR *APPELLANT/Petitioner*

PART V — AUTHORITIES

Paragraph(s)

CASE LAW

S C H E D U L E I

(no documents)

S C H E D U L E II

(no documents)

SCHEDULE III

NATIONAL ASSEMBLY OF QUÉBEC

FIRST SESSION FORTY-SECOND LEGISLATURE

Votes and Proceedings

of the Assembly

Thursday, 28 March 2019 — No. 26

President of the National Assembly:
Mr. François Paradis

By leave of the Assembly to set aside Standing Order 185, Mrs. Dorion (Taschereau), together with Mr. Proulx (Jean-Talon), Mr. Arseneau (Îles-de-la-Madeleine) and Mrs. Fournier (Marie-Victorin), moved:

> THAT the National Assembly note the letter in support of Québec City's transit network structuring project, signed by 30 business community members from Québec City, Charlevoix and Lévis, which is added to the support voiced by Chambre de commerce et d'industrie de Québec leaders;
>
> THAT it also note the confirmation of the Québec Government's $1.8 billion commitment in the last budget;
>
> THAT it ask the Federal and Québec Governments to reach an agreement as soon as possible to provide the sums needed to carry out the project.

The question was put on this motion, and a recorded division was thereupon demanded.

The motion was carried on the following vote:

(Division No. **44** in Appendix)

Yeas: **104** Nays: **0** Abstentions: **0**

By leave of the Assembly to set aside Standing Order 185, Mr. Bérubé, Leader of the Third Opposition Group, together with Mr. Nadeau-Dubois, Leader of the Second Opposition Group, and Mrs. Fournier (Marie-Victorin), moved:

> THAT the National Assembly reaffirm that Quebecers constitute a people in fact and in law and are collectively entitled to rights that are universally recognized under the principle of people's equal rights and their right to self-determination;

THAT it reiterate the fundamental principle according to which the Québec people is free to assume its destiny, determine its political status and ensure its economic, social and cultural development;

THAT it recall that no other parliament or government may reduce the National Assembly's powers, authority, sovereignty or legitimacy, or impose constraints on the Québec people's democratic will to determine its own future;

THAT it condemn the Federal Government's intent to undermine the Québec people's inalienable right to freely choose Québec's political status, by making it conditional on an amendment to the Canadian Constitution.

The question was put on this motion, and a recorded division was thereupon demanded.

The motion was carried on the following vote:

(Division No. **45** in Appendix)

Yeas: **103** Nays: **0** Abstentions: **0**

By leave of the Assembly to set aside Standing Order 185, Mr. Jolin-Barrette, Minister of Immigration, Diversity and Inclusiveness, together with Mr. Bérubé, Leader of the Third Opposition Group, and Mrs. Fournier (Marie-Victorin), moved:

THAT the National Assembly mandate the Office of the National Assembly, following the passage of Bill 21, An Act respecting the laicity of the State, to move the crucifix from the National Assembly Chamber ("Salon bleu") in order to showcase it elsewhere in the parliamentary precincts.

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Assemblée Nationale du Québec. Procès-verbal de l'Assemblée, 42e lég. (Qc), 1re sess., 28 mars 2019 – Nº 26

ASSEMBLÉE NATIONALE DU QUÉBEC

PREMIÈRE SESSION — QUARANTE-DEUXIÈME LÉGISLATURE

Procès-verbal

de l'Assemblée

Le jeudi 28 mars 2019 — N° 26

Président de l'Assemblée nationale :
M. François Paradis

Du consentement de l'Assemblée pour déroger à l'article 185 du Règlement, Mme Dorion (Taschereau), conjointement avec M. Proulx (Jean-Talon), M. Arseneau (Îles-de-la-Madeleine) et Mme Fournier (Marie-Victorin), propose :

> QUE l'Assemblée nationale prenne acte de la lettre d'appui au projet de réseau de transport structurant de la ville de Québec, provenant d'une trentaine de membres de la communauté d'affaires de Québec, Charlevoix et Lévis et qui s'ajoute aux voix des dirigeants de la Chambre de commerce et d'industrie de Québec;
>
> QU'elle prenne aussi acte de la confirmation de l'engagement du montant de 1,8 milliard de dollars du gouvernement du Québec dans le dernier budget;
>
> QU'elle demande aux gouvernements du Québec et du fédéral de s'entendre dans les plus brefs délais à fournir les sommes nécessaires à la réalisation du projet.

La motion est mise aux voix; un vote par appel nominal est exigé.

La motion est adoptée par le vote suivant :

(Vote n° **44** en annexe)

Pour : **104** Contre : **0** Abstention : **0**

Du consentement de l'Assemblée pour déroger à l'article 185 du Règlement, M. Bérubé, chef du troisième groupe d'opposition, conjointement avec M. Nadeau-Dubois, leader du deuxième groupe d'opposition, et Mme Fournier (Marie-Victorin), propose :

> QUE l'Assemblée nationale réaffirme que les Québécois constituent un peuple en fait et en droit et sont collectivement titulaires des droits universellement reconnus en vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes;

QU'elle réitère le principe fondamental en vertu duquel le peuple québécois est libre d'assumer son propre destin, de déterminer son statut politique et d'assurer son développement économique, social et culturel;

QU'elle rappelle qu'aucun autre parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale ni contraindre la volonté démocratique du peuple québécois à disposer lui-même de son avenir;

QU'elle condamne la volonté du gouvernement canadien de brimer le droit inaliénable du peuple québécois de choisir librement le statut politique du Québec en le rendant conditionnel à un amendement à la constitution canadienne.

La motion est mise aux voix; un vote par appel nominal est exigé.

La motion est adoptée par le vote suivant :

(Vote n° **45** en annexe)

Pour : **103** Contre : **0** Abstention : **0**

Du consentement de l'Assemblée pour déroger à l'article 185 du Règlement, M. Jolin-Barrette, ministre de l'Immigration, de la Diversité et de l'Inclusion, conjointement avec M. Bérubé, chef du troisième groupe d'opposition, et Mme Fournier (Marie-Victorin), propose :

QUE l'Assemblée nationale mandate le Bureau de l'Assemblée nationale, suivant l'adoption du projet de loi n° 21, Loi sur la laïcité de l'État, afin que ce dernier déplace le crucifix du Salon bleu pour le mettre en valeur dans l'enceinte du Parlement.

DEPOSITIONS

(no documents)

ATTESTATION

I, the undersigned, Me Charles O'Brien hereby attest that this appeal brief is in compliance with the Civil Practice Regulation of the Court of Appeal.

The time requested for my oral arguments is 60 minutes.

Montreal, Quebec, May 7, 2019

(S) CHARLES O'BRIEN

CHARLES O'BRIEN
ATTORNEY FOR *APPELLANT/Petitioner*