CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-05-065031-013

S U P E R I O R C O U R T

KEITH OWEN HENDERSON, retired College Professor, domiciled and residing at 5 Fenwick Avenue, Montreal West, Quebec H4X 1P3

PETITIONER

v.

ATTORNEY GENERAL OF QUEBEC, representing Her Majesty in right of Quebec, having an office at 1 Notre-Dame Street E., Suite 8.00, Montreal, Quebec, H2Y 1B6

RESPONDENT

&

ATTORNEY GENERAL OF CANADA, representing Her Majesty in right of Canada, having an office in the Complexe Guy-Favreau, East Tower, 200 René-Lévesque Boulevard W., Ninth floor, Montreal, Quebec, H2X 1X4

And the **ATTORNEYS GENERAL** of each of the provinces listed in Annex 1

MISES-EN-CAUSE

FACTUM OF PETITIONER KEITH OWEN HENDERSON

General observations

1. ***Surviving party and conclusions*****.** After the judgment of the Court of Appeal of 30 August 2007 (in record 500-09-012698-023) there survive only the individual petitioner, Keith Owen Henderson, and only the following conclusions; the second one as edited by the Court of Appeal:

> **(1) DECLARE** that sections 1, 2, 3, 4, 5 and 13 of the *Act respecting the exercise of the fundamental rights of the Québec people and the Québec State* and la *Loi sur l'exercice des prérogatives du peuple québécois et de l'État du Québec*, being *Bill 99* of the First Session of the Thirty-sixth Legislature of Quebec, adopted on December 7, 2000 and being chapter 46 of the Statutes of Quebec for 2000, are *ultra vires*, absolutely null and void, and of no force or effect;
>
> **(2) DECLARE** that sections 1, 2, 3 4, 5 and 13 of the said *Act* purporting to confer the authority to establish Quebec as a sovereign state, or otherwise to alter the political regime or legal status of Quebec as a province of Canada, constitutes an infringement and denial of Petitioners' rights under the *Canadian Charter of Rights and Freedoms*, and is accordingly unlawful, invalid, and of no force or effect [.]

2. ***History and background of the Act, S.Q. 2000, c. 46, and Consolidation of the Act, S.Q. 2000, c. 46, as R.S.Q., c. E-20.2 or L.R.Q., c. E-20.2***. As the statute S.Q. 2000, c. 46, is now consolidated as *Revised Statutes of Quebec*, c. E-20.2, or *Lois Refondues du Québec*, c. E-20.2, the Court may be pleased in its reasons and orders to add this citation to those indicated above in Petitioner's conclusions.

In addition to its text, Petitioner will offer the Court material both as to Act's legislative history and its background and contemporary context, doing so on the basis of the authorities summarized in this Factum, para. 20. This material, extrinsic to the Act itself, is as follows: ***Clarity Act***, S.C. 48-49 Eliz. II, c. 26 (Exhibit R-4); **Debates on Bill 99***: Journal des Débats De l'Ass. Nat.*, 3 mai 2000 (Ex. R-5); 25 mai 2000 (Ex. R-6); 30 mai 2000 (Ex.R-7); 7 Dec. 2000 (Ex. R-8); *Commission permanente des institutions* 29 mars 2000 (Ex. R-13); **On the October 30th 1995 Referendum question**: in Exhibit R-11, Appendix B to the *Factum of Roopnarine Singh and Others* in *Reference re Secession of Quebec*, are reproduced *Procès-Verbaux/Votes and Proceedings - Ass. Nat.* 20 Sept 1995, 22 mai 1996, 23 mai 1996; **5 Volumes of Material filed by A.-G. Canada in *Ref. re Secession of Quebec*** (Exhibit R-14), see esp. Vol. 1 Tab 1, ***Loi sur la souveraineté du Québec (Avant-projet de loi) (6 déc. 1994)***; ***Programmes et Plateformes du Parti Québécois*** (Ex. R-15) (extracts, in which are marked relevant passages); **contemporary federal Bills from Opposition and Private Members** (Exhibits R-16. R-17, and R-18); **Early precursors in Quebec to Bill 99 and to S.Q. 2000, c. 46**: these are Ex. R-19, **Bill 194 (Fabien Roy. 1978)** and Ex. R-22, **Bill 191 (Gilbert Paquette, 1985**); **related proceedings to these Bills**, R.-20, R-21, R-23 **and Resolution of the National Assembly October 23, 2013, reaffirming the principles of S.Q. 2000, c.46** (Exhibit R-24).

Nature, Extent, and Grounds of Challenge to S.Q. 2000, c. 46

3. ***Essential basis of invalidity***. On their face ***the relevant provisions purport explicitly to declare the law, not someone's opinion as to what is the law***. This they cannot lawfully or validly do, since in so doing they exceed the legislative authority of the Province. **(I)** They directly contradict the provisions of the Constitution of Canada, rejecting its supremacy as declared in s. 52 of the *Constitution Act, 1982* (hereinafter often "C.A. 1982" or "the Act of 1982") **(II)** They flout s. 41(e) of that Act (by substituting themselves for Part V so far as Part V applies to Quebec). **(III)** And in several ways exceed the legislative powers of any Province of Canada, notably those conferred by s.45 of the 1982 Act. *Each by itself is fatal to the provisions.* The essential basis of the invalidity of the relevant provisions, – Petitioner will seek to establish, – is that these sections by their terms and plain meaning provide, – both individually and as they operate together, – that, through its population and its institutions acting by themselves, the Province of Quebec can alter its status and powers otherwise than as authorized or permitted by the Constitution of Canada, notably by and in Part V of the 1982 Act. The contested provisions enact exactly this directly and in plain terms, and this meaning and intention are borne out and clearly revealed by the legislative history and other material to be cited.

4. ***Petitioner's objective. Summary of petitioner's constitutional position.*** Counsel will ask the Court to affirm the supremacy of the Constitution of Canada (*Constitution Act, 1982*, s. 52) in the most categorical, explicit, and unequivocal terms and to strike down the impugned provisions of the Quebec statute, both individually and as they operate in conjunction with one another, as follows: **Despite the fact that they purport to be provisions of a statute duly-enacted under lawful authority**.

(i) Section 1, especially read with s. 5, is invalid on its face because it does not limit its terms to asserting ***only*** a right of ***"internal self-determination"*** , as was determined and stated by the Supreme Court of Canada:

> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at pp. 275-287, esp. 282 (paras. 126 -127), and at pp. 295-96 (para. 154). The historical background of this Act, including its legislative history is revealed in the Exhibits enumerated in Factum para. 2, especially in those items cited in Factum, para. 19. Both on the face of the Act, – and also in the light of the relevant history, – the intention is clearly to assert an *unlimited* right of self-determination.

Section 1 must at all events be limited (as the Supreme Court requires) to the exercise of rights **"within the framework of [the]... existing state"** (*Secession Ref.*, para 154), – i.e. Canada, – and thus limited to rights exercisable consistently with its Constitution. ***Textually***, constitutional compliance might hypothetically be achieved for s. 1 with *at minimum* one emendation: inserting, after "self-determination" where it first occurs, the phrase "within Canada and consistently with its Constitution,". But the rules governing severance (Petitioner submits) do not permit s. 1 to be "read down", absent clear acceptability to the Legislature of the emended text: (see Factum para. 18).

The foregoing is true whether or not a relevant "people" for the purposes of a right of self-determination exists within Quebec and, if a relevant "people" does exist, whether that "people' consists of all, or of part only, of the Quebec population. These are questions left open by the Supreme Court of Canada in the *Reference re Secession of Quebec*, *supra*, at para. 125, pp. 281-82, as unnecessary for decision because any right of self-determination was, in any event, limited to self-determination *within the existing Canadian state* and did *not* extend to secession. Depending on the proper conclusion as to "people", – were that to be decided, – achieving textual constitutional compliance for s. 1 might require also deleting "The Québec people is the holder" and substituting: "The ethno-linguistic peoples of Quebec are the holders".

In these proceedings, too, it appears unnecessary to decide these questions, because Quebec's powers can be exercised by its electorate and institutions ***only*** if that is done consistently with the Constitution of Canada. Petitioner submits, however, that any rights of the ethno-linguistic French-Canadian population of Quebec must exist, separately ***and equally, for other*** distinctive ethno-linguistic populations within Quebec. Petitioner respectfully rejects all attempts to present the heterogeneous population of Quebec as a single, monolithic, civic "people" all bound to accept decisions of legislative or of referendum majorities even on matters beyond the existing constitutional powers of the Province. On Quebec's heterogeneity, see *Reference re Secession*, *supra*, [1998] 2 S.C.R. 217 at pp. 281-2, paras. 124 and 125; and at p. 287, para. 138. Indeed, in the light of s. 91,24 of the *Constitution Act, 1867* and of sections 35 and 35.1 of the *Constitution Act, 1982*, as amended, it is impossible to defend constitutionally the concepts of a single, monolithic, "Quebec people" or "Quebec nation". Section 91.24 of the 1867 Act, a head of federal jurisdiction, excludes "Indians and Lands reserved for the Indians" from provincial jurisdiction. And ss. 35 and 35,1 of the 1982 Act establish a special constitutional régime for aboriginal peoples, whom the Supreme Court treats as distinct "peoples" in connection with secession, whether that be attempted unilaterally or by constitutional means: *Reference Re Secession*, [1998] 2 S.C.R. at pp. 287-88, para. 139. ***Quebec is a heterogeneous province in fact and in law, with not one only, but several, ethnolinguistic communities, entitled to "self-determination" but only within Canada and within its Constitution.***

(ii) Section 2, especially read with ss. 3 and 5, is invalid in its entirety, as asserting unlimited powers of unilateral constitutional change which neither the electorate of Quebec nor its institutions possess:

> *Constitution Act ,1982,* ss. 41(e), 45, and ss. 52(1) and 52 (3) read with 52 (2); *Reference re Senate Reform,* [2014] 1 S.C.R.704 at 734 (paras. 47 and 48); *Ontario Public Service Employees' Union* v. *A.-G. Ontario,* [1987] 2 S.C.R. 2 (hereinafter cited as O.P.S.E.U.), portions cited in para. 14 of this Factum. As applied to proposals for secession, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, esp. pp. 263-64 (para. 84); p. 270 (para. 97), and p, 273 (para. 104). *The Court there repeatedly affirms the requirement for an amendment to the Constitution of Canada to accomplish secession*, – necessarily meaning a ***multilateral*** amendment for that purpose, because, as the Court states, secession cannot be accomplished by the Assembly or the Legislature alone. Of the amending procedures, only s. 38 ("7/50" formula) and s. 41(unanimous consent formula) appear to be relevant for the purpose.

(iii) Section 3 is invalid in its entirety whether considered alone or read in conjunction with section 2:

➡ also, like section 2, because it asserts the existence of unilateral powers of constitutional change which neither the electorate of Quebec nor its institutions possess: see authorities cited in **(ii)** above. It exceeds the powers conferred by s. 45 of the C.A., 1982 in the powers it purports to attribute to political institutions of Quebec, be they the Legislature or referendums (*Secession Reference*, [1997] 2 S.C.R.at 265 para. 87 holds that referendums are consultative only). Moreover s. 3 is also invalid

➡ because s. 3 not only impermissibly **(a)** ***purports to define the extent of*** the authority of the Parliament and Government of Canada to consult the people, – the population, – of Quebec by referendum, – Quebec having no legislative power whatsoever to do so, – but, in addition, s. 3 also impermissibly **(b)** ***denies*** the authority of the Parliament and Government of Canada to consult the people, – the population, – of Quebec by referendum. This constitutes a denial either of a right to consult the people of Quebec *at all* or, ***at minimum***, it is a denial of a right to consult them *in a relevant and meaningful way*, – with respect to the political régime and legal status of Quebec. Defining or removing federal authority are beyond Quebec's powers of constitutional amendment.

> See authorities cited above para. **(ii).** On federal consultation, see also *Referendum Act* of Canada, S.C. 1992, c. 30, as amended, s. 3; *Haig* v. *Chief Electoral Officer* and *A.-G. Canada*, [1993] 2 S.C.R. 995, esp. p. 1030 (right of the Government of Canada to hold a national referendum and to include Quebec if it chose to do so. The validity of the Act is assumed throughout by the Court; thus Parliament can authorize what referenda it pleases).

And s 3 is invalid also

➡ because s. 3, like s. 2, denies the authority of the Parliament and Government of Canada on the one hand to uphold the Constitution of Canada, and, on the other, to reject, to resist, and to repel attempts at **unlawful** constitutional change, when they are either mounted *directly* by the institutions or electorate of Quebec, – or *indirectly*, pursuant to their measures or decisions. We refer to changes by Quebec's institutions or electorate as being "unlawful" if these were planned or attempted in excess of their lawful powers under the Constitution of Canada. Such a denial of federal authority is the clear meaning of s. 3 because the section asserts that the Quebec people "shall determine **"alone**" (emphasis added) how Quebec's political régime and legal status shall be chosen. The purport is that they can also carry out any such changes by themselves. A false cloak of legality is thus thrown by s.3 over even measures which would overthrow the Canadian state. Quebec cannot define, deny, remove or nullify federal powers in view of ss. 52, 45, and 41(e) of the *Constitution Act*, *1982*.

> In addition to the authorities cited above, as regards powers which ss. 2 and 3 would deny or nullify, see *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co.,* [1923] A.C. 695 (P.C) (defence of the constitution, government, and territorial integrity of Canada against war, invasion or insurrection, real or apprehended); *Gagnon* v. *The Queen*, [1971] C.A. 454 (insurrection); and, in the *Constitution Act, 1867*, esp. the residuary power in s. 91; and ss. 91.7 and 91.27. The *establishment* of any régime anywhere in Canada by revolutionary means, and the *implementation of most of its measures*, would involve the most gravely unlawful acts, in

> contravention of existing Canadian laws regarding public order, protection of persons, and protection of property. Undeniably, oppression of a population, especially alien subjugation or domination, or discrimination, may confer a *moral* right to change a régime even by revolutionary means, or to establish a new state, and this is reflected in international law: *Reference re Secession of Quebec*, [1982] 2 S.C.R. 217 at pp. 284 ff. But as the Supreme Court holds (pp. 286-87), these conditions do not apply to Quebec. Invocation by the Canadian state of the defensive powers mentioned above, disturbing as that would be, should only be needed in the event that revolutionary acts are directed at the Canadian Constitution and State, and defensive measures become necessary to address such acts. We may all hope that it may never be necessary to exercise such powers, but since the Legislature rejects their existence, Petitioner must reassert them resolutely.

(iv) section 4, while generally innocuous outside the context of this Act, is invalid when taken in conjunction with, – and insofar as it operates with, – any one or more of sections 2, 3, 5, and 13. This is so, because section 4, when read with them, purports to allow constitutional changes of every kind, including secession in particular, attempted not only unilaterally, but also on the decision of a simple majority of the electorate of Quebec. Accordingly, it would suffice for present purposes to declare s.4 to be invalid insofar as it operates in conjunction with any one or more of sections 2, 3, 5, and 13.

(v) section 5, as to its first paragraph, is invalid because it means in its statutory form to displace, – both in point of law and in the minds of the public, – the supremacy of the Canadian Constitution as declared in section 52(1) of the *Constitution Act, 1982,* as the supreme law of a pan-Canadian state. This is clear **first** from its ***text***, **next** from its ***history*** (see citations in Factum, para. 2 and esp. para. 19) and **thirdly** from its ***context with sections 2 and 3***. Section 5 is thus **also** in violation of ***"the federal principle"*** which, as the Supreme Court of Canada has stated, a Province has no legislative power to impair: *O.P.S.E.U.* v. *A.-G. Ontario,* [1987] 2 S.C.R. 2 at pp. 39 and 40; *Reference re Senate*, [2014] 1 S.C.R. 704 at 734. **In any event** the subject-matter of s. 5 is far beyond any power of constitutional amendment conferred by s. 45 of the 1982 Act, and s. 5 also violates s. 41(e). The second and third paragraphs of s. 5 are merely incidental to the first paragraph.

(vi) Section 13 is invalid as exceeding the powers conferred by C.A. 1982, s. 45, and:

➡ because it denies, and is inconsistent with, the authority of the Parliament and Government of Canada to consult the people of Quebec by referendum; this clearly being considered by the Act to be a "constraint on the democratic will of the Québec people to determine its own future"; see authorities cited in **(iii)** above; and it is also invalid

➡ because s. 13 denies, and is inconsistent with, the authority of the Parliament and Government of Canada to uphold the Constitution of Canada and to reject, resist, and repel attempts at constitutional change, by the institutions or electorate of Quebec, if and when they may be planned or attempted in excess of their lawful powers under the Constitution of Canada (the phrase employed is "to impose constraint on the democratic will of the Québec people to determine its own future"): see authorities in **(iii)** above; and it is also invalid

➡ because, behind its tendentious phraseology ("reduce the powers, authority, sovereignty or legitimacy of the National Assembly") s. 13 implicitly denies the paramount authority of the Parliament of Canada to enact, and the authority of the Government of Canada to enforce, laws to preserve the Canadian state and public order; and notably to address war, invasion or insurrection, real or apprehended; see the authorities cited above (iii).

5. ***General conclusions with respect to the amending process denied by Court of Appeal. As to surviving conclusions, Petitioner's constitutional grounds held arguable and remitted to be raised before the Superior Court.*** The Court of Appeal [Judgment, 30 August 2007, para 85, [2007] QCCA 1138 at para 85] did not permit Petitioner to seek ***conclusions*** formulated in these general terms:

> **(2) DECLARE** that, with or without the approval of the electors of Quebec by referendum, there can be no change in the political regime and legal status of Quebec, as they are established under the Constitution of Canada, except by an amendment to the Constitution of Canada made in accordance with the Constitution of Canada itself, and more particularly in accordance with Part V, sections 38 to 43 of the Constitution Act, 1982;
>
> **(3) DECLARE** that Petitioners have the right to be governed only in accordance with the Constitution of Canada itself and by laws validly made or continued under that Constitution, until such time as that Constitution, and those laws, are altered by lawful means; that is to say, altered in accordance with the Constitution of Canada itself, and not otherwise;
>
> **(5) DECLARE** that no officer, agent, or employee of the Government of Quebec, nor any person acting at its direction or with its acquiescence, nor any other person whatsoever, has any right, power, or authority, to do any act or thing whatsoever to enforce or give effect to sections 1, 2, 3, 4, 5 and 13 of the said Act;
>
> **(6) DECLARE** the judgment to intervene herein opposable to the Mises-en-Cause, whether or not they appear in these proceedings;

The Court of Appeal gave these grounds for rejecting the suitability of these ***conclusions***:

> [86] Ces autres conclusions tiennent plus de la pétition de principe, de la conjecture ou ont fait l'objet de décisions de la Cour suprême, ne serait-ce que dans le Renvoi relatif à la sécession du Québec, précité, et ne sont pas pour cette raison justiciables. Leur formulation participe davantage, à certains égards, du débat politique que du débat judiciaire.

Petitioner accepts that he cannot ask the Court to embody these propositions **in this Court's orders or *dispositifs, even though these conclusions merely restate C.A. 1982, s. 52(3).*** But the ***arguments of law summarized*** in these propositions, along with all the others, **remain the basis of Petitioner's *surviving conclusions***, reproduced above, ***and the Court of Appeal has treated them as legitimate in this respect and sent them to this Court to be determined on the merits.*** Petitioner proposes now to demonstrate that this is so.

6. ***Court of Appeal holds Petitioner's grounds appropriate as basis for the surviving conclusions.*** At paragraph [61] the Court of Appeal reiterated **the three conditions**, laid down by the Supreme Court of Canada, which Petitioner was required to satisfy **to be a suitable public-interest plaintiff**, of which first is *"***1. La question de l'invalidité de la loi se pose-t-elle sérieusement?" The Court responds in the affirmative**, *summarizing Petitioner's arguments, in paragraphs [65] to [70]* ***and holding (para. [70]) that the proceeding can go forward on the basis of those arguments*** **and with the surving conclusions quoted above (para. 1).** The Court is **specific in authorizing reliance** ***both*** **on s. 52 of the** ***Constitution Act, 1982*****,– the supremacy clause,–** ***and on*** **the amending procedures in Part V of the 1982 Act.**

> [65] À cet égard, la question soulevée à propos de la validité de la Loi apparaît sérieuse. La proposition de droit avancée par l'appelant Henderson repose sur des arguments de droit qui méritent, à tout le moins, considération au fond.
>
> [66] L'appelant invoque la primauté de la constitution canadienne (Art. 52(1) de la *Loi constitutionnelle de 1982*, annexe B de la *Loi de 1982 sur le Canada* (1982, R.-U., c.11), (Loi de 1982) et, par ailleurs, l'absence de compétence de l'Assemblée nationale pour modifier unilatéralement la constitution (Art. 45 a contrario de la même loi).
>
> [67] L'appelant fait valoir que les articles 2 et 3 de la Loi affirment l'existence d'un pouvoir unilatéral de sécession du peuple québécois, contredisant en cela l'article 52 de la Loi de 1982 et les formules de modification à la Constitution canadienne. Selon lui, l'article 5 de la Loi contredit l'article 52 de la Loi de 1982 et excède les pouvoirs conférés aux provinces en vertu de l'article 45 de la même loi. Quant à l'article 13 de la Loi, l'appelant le décrit comme une limitation, voire une négation, des pouvoirs du gouvernement fédéral, excédant en cela l'article 45 de la Loi de 1982 et contredisant, selon lui, la partie V de la même loi.
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> [68] Il propose essentiellement le même argument concernant l'article 1 de la Loi que pour l'article 13, en situant son argument juridique en fonction de certains propos tenus par la Cour suprême du Canada dans le *Renvoi relatif à la sécession du Québec*, précité.
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> [69] Enfin, l'appelant soutient que l'article 4 de la Loi, pris isolément, pourrait être valide, mais que sa validité est entachée par le fait d'être relié aux autres articles contestés de la Loi.
>
> [70] À l'évidence, l'essentiel de la demande tient à la conclusion recherchant une déclaration de nullité et d'illégalité des dispositions attaquées et à celle recherchant une déclaration selon laquelle ces dispositions constituent une violation des droits protégés par la *Charte canadienne des droit et libertés*[4]. Il faut donc conclure que la réponse à la première question du test préconisé dans *Conseil canadien des églises* c. *Canada*, précité, est positive.

7. ***Defence filed by A.-G. for Quebec.*** Petitioner in this connection regrets to draw attention to several paragraphs in the defence of the respondent, the Attorney-General for Quebec: paras. 13, 15, 18, 20, 22, 25, and 32, which refer to the interlocutory judgment of the Court of Appeal in this case. For the

most part, these paragraphs *ex facie* either assert or imply, in substance, that the Quebec Court of Appeal, in refusing to permit Petitioner's ***general conclusions***, also rejected ***the related arguments of law*** even as Petitioner invokes them ***in support of Petitioner's surviving conclusions***. These paragraphs of the Respondent's defence are (Petitioner respectfully submits) neither fair nor accurate. On the contrary, the Court of Appeal's clearly-stated position (paras. [65] to [70]) is that Petitioner's arguments are substantial and must be permitted to go forward for adjudication on the merits in respect of Petitioner's surviving conclusions.

The relevant provisions of the Constitution of Canada

8. ***The Constitution of Canada governs Quebec's status and political régime. Secession and the Constitution. Constitutional enactments are explicit. Definition of Constitution of Canada (C.A. 1982, s. 52(2)). Obligatory compliance with constitutionally-prescribed amending procedures: s.52(3) and 52(1).*** The central question in this case is this: How can Quebec's political status and constitutional régime be lawfully altered? The answer begins with the definition of the "Constitution of Canada" in s. 52 (2) of the *Constitution Act, 1982.* Section 52(2)(a) includes the 1982 legislation in the "Constitution". Section 52 (2) (b), requires inclusion within the "Constitution" of the items listed in the Schedule to the 1982 Act. Section 52(2)(c) includes all amendments to either. Even without judicial authority on the subject, this definition of the "Constitution" is so explicit that, when it is read with the amending provisions of Part V, there remains no reasonable room for doubt that Quebec's political régime and status can be altered only through the multilateral amending processes of Part V, and not by any action of the electorate or institutions of Quebec acting by themselves.

But not only is this textually clear in s. 52(3) (read with s. 52(2)), it is supported by unequivocal and conclusive authority: see *Reference re Senate Reform*, [2014] 1 S.C.R. 704 at pp.722-25 (paras 23 to 25; and 28) and p. 734 (paras. 47 and 48)**.**

Directly or indirectly (as with every Canadian province) **(i)** the provisions of the "Constitution of Canada", as it is defined by s. 52(2), establish ***every relevant aspect of Quebec's juridical existence, territorial boundaries, institutions, status and powers***; **(ii)** In particular, they define the limits of Quebec's legislative and executive powers; **(iii)** They establish federal institutions with which no provincial authority can interfere, and confer powers upon those federal institutions which no provincial authority can impair (and which indeed, when exercised, normally prevail over inconsistent provincial enactments); **(iv)** They explicitly impose their own supremacy; **(v)** They explicitly preclude any amendment except through prescribed amendment processes; and **(vi)** They confer upon Quebec an important, but restricted, power of constitutional amendment in respect only of its internal institutions and processes of government. In sum, *in point of law*, Canada itself and every Province, including Quebec, are pure creatures of the Constitution of Canada. And it is the law which must govern in the Courts. ***Only precisely as authorized by the Constitution itself can the Constitution be amended: s. 52(3).***

The Constitution is not silent on basic constitutional changes which might be attempted by unilateral means through Quebec's institutions or electorate, and which the contested ss. 1, 2, 3, 4, 5 and 13, separately and together, seek to authorize and justify. Far from it. For example**, the Constitution is not silent as to secession, even though secession is not addressed as such:** *Reference re Secession of Quebec:* [1998] 2 S.C.R. 217 at pp. 263-64 (para. 84): "... The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada...." ; [1998] 2 S.C.R. at p. 265 (para. 87): "to initiate the Constitution's amendment process in order to secede by constitutional means"; [1998] 2 S.C.R 217 at p. 270 (para. 97): "Under the Constitution, secession requires that an amendment be negotiated"; at p. 263 para. 84: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution ....".

The Constitution speaks loudly and explicitly: ss. 52(1) and (3) of the 1982 Act. The Constitution absolutely excludes all unilateral measures, whether in Quebec or any other province, both by s. 52 and by the very terms of Part V of the *Constitution Act, 1982*, "PROCEDURE FOR AMENDING CONSTITUTION OF CANADA." No one capable of reading their plain words in English or in French can plausibly present these constitutional provisions in any other manner.

9. Freedom of Province to propose constitutional changes and submit them to referendum. It is not, and cannot be, disputed, that under s. 46(1) of the *Constitution Act, 1982*, the legislative assembly of Quebec or of any other Province can, at any time, propose any constitutional amendment it pleases. And the Province can submit its proposals to referendum of the Province's electorate for approval. But no such amendment can become law save in accordance with the amending procedures of Part V of the 1982 Act. The Supreme Court has spoken clearly: see Factum, para. 8.

10. ***Relevant underlying principle.*** Underlying the Constitution of Canada generally, and, in particular, underlying s. 52 and Part V of the 1982 Act, there is a political and constitutional principle. The relevant political and constitutional principle (Petitioner submits) is that Canada in its entirety, is a single country (s. 3 of the 1867 Act), and as such belongs *in its entirety* to all of its people, wherever they may reside. Major powers are nevertheless exercisable by the people and institutions of the individual units, or Provinces, into which the Federation is divided (s. 5 of the 1867 Act, and various amending instruments). The Provinces are created and endowed with generous powers, – amended from time to time, – exercisable for provincial purposes, and *only* for those purposes*, within the Canadian federation*. Provincial powers are defined and subjected to certain limits by a supreme Constitution, which can be altered only in accordance with the amendment procedures set out in Part V of the 1982 Act. **Any such amendment requires a sufficient consensus of the federal and provincial legislative bodies *precisely because* every part of the country belongs to all of its people. Otherwise Part V could not read as it does.** It is not necessary here, as it was not in the *Reference re Secession,* [1998] 2 S.C.R. 217*,* to specify which amending procedures in Part V would be needed to enact amendments contemplated by sections 1, 2 or 3 of this Act. Much would depend

on the specifics of the proposed amendment. A major change to the "political regime and legal status of Québec", including secession, would likely require the use of s. 41 of the 1982 Act, involving *inter alia* the unanimous consent of the provincial legislative assemblies. (Indeed, the correlative of secession *by one* province is secession *by each of the others* individually or collectively, effectively permitting the *expulsion* of a province. This too is inconsistent with the principle of a federal union.) **This litigation essentially seeks to vindicate the supremacy of the entire Constitution,** – declared in s. 52(1) of the *Constitution Act, 1982*, and its correlative . 52(3), imposing the amendment processes prescribed by Part V, – **in the face of repeated efforts to undermine them**. **Petitioner respectfully asks the Court to affirm these propositions in its reasons and, perhaps in *considérants,* in the clearest and most explicit manner to state: Ss. 52(1) and 52(3) compel recourse to, and compliance with, the Part V Amending Procedures for any constitutional change whatsoever.**

11. ***Legality and legitimacy of the Constitution Act, 1982 and of the amending procedures of Part V.*** It is often sought to disparage the legitimacy of the Constitution Act, 1982, and therefore of its provisions, – including Part V, the amending procedures, – by pointing to the fact that Quebec did not concur in its enactment. Specifically in the debates on the Bill (Bill 99) for this Act, see the Minister's remarks: Exhibit R-6, pp. 6168, 6193; and very explicitly in R-8 p. 8581. All Quebecers and other Canadians are entitled to their own views on the history of the 1982 Act. As to the Courts themselves, however, the Supreme Court has held the 1982 Act to have been enacted not only validly and lawfully but also in compliance with the conventions of the Constitution; concluding*:*

> *"*The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force": *Re: Objection by Quebec to a Resolution to amend the Constitution,* [1982] 2 S.C.R. 793 at p. 806.

Even underlying constitutional principles "could not be taken as an invitation to dispense with the written text of the Constitution": *Reference Re Secession*, [1998] 2 S.C.R. 217 at 249, para. 53. The text of the Constitution of Canada must govern the disposition of this litigation. But as the debates on "Bill 99" dispute the legitimacy of the 1982 Act, with its new amending procedures, it should be noted that ***these amending procedures enacted in 1982 were in fact based on proposals by a group of eight provinces, including Quebec.*** Though the ultimate "package" was rejected by Quebec, the only objection Quebec raised to the amending procedures which became Part V of the 1982 Act was as to what is now contained in s. 40, namely the compensation payable to a province which, under s.38(3), opts out of ("dissents" from) an amendment governed by s. 38(2).

> The relevant history may be found in a study prepared, by one of Petitioner's counsel, for the *Royal Commission on the Economic Union and Development Prospects for Canada*: see S. A. Scott, "Quebec and the Amending Process" (pp. 94-105) in "The Canadian Constitutional Amendment Process: Mechanisms and Prospects", in Beckton & MacKay, eds., *Recurring Issues In Canadian Federalism* (University of Toronto Press, 1986), pp. 77 ff.

12. ***The governing constitutional provisions, and how they are infringed by the contested provisions of S.Q. 2000, c. 46***, The contested provisions (ss. 1, 2, 3. 4, 5, and 13) are challenged on the basis of three provisions of the *Constitution Act, 1982*, each sufficient by itself (Petitioner submits) to render them null and void under the terms of s. 52(1) and s. 52(3) of the 1982 Act.

First, **the contested provisions contravene s. 52(1) itself, immediately and directly.** This is so because, in place of the supremacy of the Constitution of Canada, the contested sections purport to attribute supremacy instead to the will of the electorate and legislative institutions of Quebec, and to the measures adopted by them pursuant to the contested provisions. Under s. 52(1) however the supremacy of the Constitution of Canada is unqualified and absolute. Its correlative, or corollary, is s. 52(3), requiring that amendments to the Constitution be made only in accordance with authority contained in the Constitution. These two subsections are thus directly linked with one another.

Second, **the contested provisions contravene s. 41(e) of the 1982 Act.** This is so because the contested provisions (especially ss. 1, 2, 3 and 5) give *carte blanche* to Quebec's electorate and legislative institutions to adopt by themselves any and all constitutional changes they might choose. In so doing **these provisions if valid would supersede, displace, and override all and any of the amending procedures of Part V of the 1982 Act as they apply to Quebec**. This is impermissible because of s. 41(e). **Under s. 41(e) *all* changes to the amending procedures themselves require a national constitutional amendments enacted with the consent of the federal houses of Parliament and with the consent of all provincial legislative assemblies. The contested provisions cannot infringe s. 41(e) and yet survive.** They are therefore null and void.

Third, the contested provisions **exceed the limits of the powers of constitutional amendment conferred on the provincial legislatures by s. 45 of the 1982 Act**, again infringing s. 52(3) and attracting the sanction of nullity under s. 52(1). They are invalid for this reason *regardless of any other.*

13. ***The scope and limits of the provincial power of constitutional amendment (s. 45 of the 1982 Act). Reference re Senate.*** The most comprehensive and authoritative exposition of the amending procedures of Part V of the 1982 Act is found in the decision of the Supreme Court of Canada in *Reference re Senate Reform,* [2014] 1 S.C.R.704. The Court reviews ss. 91.1 and s. 92.1 of the *Constitution Act, 1867*, as amended, predecessors respectively of ss. 44 and 45 of the 1982 Act. As to the amending-powers of the provincial legislatures, the Court states (p. 734, paras. 47 and 48):

> **...** Likewise, s. 92(1) allowed the provincial legislatures to enact amendments only in relation to "the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union": OPSEU , at p. 40, per Beetz J

> As the successors to those provisions, ss. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stake holders in the Canadian constitutional design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.

14. ***The O.P.S.E.U. Case.*** As its citation in the *Reference re Senate* indicates, the Court there relied on the opinion of Beetz, J., in *Ontario Public Service Employees' Union* v. *Attorney General for Ontario*, [1987] 2 S.C.R. 2. This was an opinion of a majority of the Court (Beetz, J.. and McIntyre, LeDain and La Forest, JJ.). The Court there upheld the validity of Ontario legislation restricting the political activities of provincial public servants. Various members of the Court relied on ss. 92.4 and 92.13 of the 1867 Act to support the legislation in question. Since the legislation had been enacted before the 1982 Act had come into force, Beetz, J., in supporting the legislation on provincial powers of constitutional amendment (as well as on s. 92.4), did so on the basis of s. 92.1, while doubting that s. 45 of the 1982 Act had made any material change. The express textual exclusion from s.92.1 of any provincial power to amend the office of Lieutenant-Governor was transposed in the 1982 Act to s.41(a), symmetrically alongside the offices of the Queen and the Governor General. But, as Beetz. J., noted these would always have been excluded from s. 92.1 *a fortiori.* The relevant portion of Beetz. J.'s reasons may be found at [1987] 2 S.C.R. at p. 37 ff.

Beetz, J.'s treatment of the scope of the provincial amending power is more elaborate than the summary in *Reference re Senate.* His Lordship cites *A.G. Quebec v. Blaikie,* [1979] 2 S.C.R. 1016, as deciding that s. 133 of the 1867 Act was one of a class of provisions "held to be beyond the reach of s. 92(1), not because they were essential to the implementation of the federal principle, but because, for historical reasons, they constituted a fundamental term or condition of the union formed in 1867.": [1987] 2 S.C.R. 2 at p. 40.

Before 1982, the office of the Lieutenant Governor of a province was excluded from the legislative authority of a province under the terms of s. 92.1 of the 1867 Act, just as it is now under s. 41(a) of the 1982 Act. It must to be presumed that the "office" includes certain essential *powers* of that office. Hence, after concluding that the impugned legislation in *O.P.S.E.U.* was an ordinary legislative amendment to the provincial constitution to ensure civil-servants' neutrality and impartiality, Beetz writes at p. 46:

> However, let me say one word of caution before I conclude this chapter. The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.

As regards the obiter dictum in the Privy Council's decision *In re Initiative an Referendum Act*, [1919] A.C. 935, at p. 945, Beetz, J., – after quoting it, – surmises (p. 47) (without deciding):

> "... that the power of constitutional amendment given to the provinces by s. 92(1) of the *Constitution Act, 1867*, does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of institutions foreign to and incompatible with the Canadian system."

15. ***Legal discontinuities.*** In *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 (the "First Patriation Reference"), Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer, JJ. ("Majority: Convention") refer (p. 882) to " a state of legal discontinuity, that is, a form of revolution . . .". While legal discontinuities of sufficient significance may be revolutions in no more than a technical sense, and may not involve social disorder, it is still true that major attempts by non-constitutional means to displace constitutional systems and governmental institutions are likely to cause very grave disruptions in civil and economic life. Especially will this be true where an attempt is made by such means to establish a new sovereign state in place of the old. A contest will arise for the loyalty and obedience of the civil authorities and the law-enforcement officers, not to mention the courts and the public at large. In question will be the nature of the response of the authorities of the pre-existing state. This underscores the importance of all branches of government insisting without compromise on punctual respect for constitutional order, and on their refusal to condone ***any*** departure ***whatsoever*** from due constitutional process. It is no service to society to evade these issues. Without suggesting that the Court treat as fact the historical assessments of journalists, however distinguished they may be, a recent review of the Quebec Referendum of October 30th, 1995 offers realistic scenarios of the possible consequences of attempts to achieve either sovereignty, or a referendal authorization of sovereignty, by unilateral or other unlawful or questionable means. ***This review is offered only in argument on that issue, and is not offered as evidence of historical fact. Rather it is presented in argument here as an expression of informed opinion whose*** conclusions as to the events it investigates support Petitioner's submission that, absent rigourous compliance with the Constitutional amending procedures, there can be no assurance as to *behaviour* or as to *process* or as to *outcome*:

> Chantal Hébert with Jean Lapierre, *The Morning After*: *The 1995 Quebec Referendum and the Day that Almost Was* (Alfred A. Knopf Canada, 2014); *Confessions post- referendaires: Les acteurs politiques de 1995 et le scenario d'un oui* (Les Editions de l'Homme, 2014).

It must be emphasized that ***no referendum majority, however great, can either effect secession or create an entitlement to secession***. In *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, the Court finds an implied duty to negotiate [see e.g. p. 265. para. 88] as a correlative to the Constitution's "conferring a right **to initiate** constitutional change on each participant in Confederation" [*ibid*., p. 257, para. 69; the emphasis is added here and below]. In the case of secession the "initial impetus for for negotiation, namely **a clear majority on a clear question in favour of secession"** [p. 271, para. 100] in a referendum is itself **"subject only to political evaluation"** [*ibid.*] by the actors having the duty to negotiate. So too are "the political aspects of constitutional negotiations" over which "the Court has no supervisory role" (*ibid.*). The right of the Government and

population with the referendum mandate is a right **"to pursue secession"** [paras. 88, 92; pp. 265, 267], **not to achieve it.** States the Court: The **"referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession"** [para. 87, p. 265]. **The Court** [para. 90, pp. 266-67] **also *rejects* the proposition "that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province subject only to negotiation of the logistical details of secession".** "Secession is a legal act as much as a political one" [para. 83, p. 263]. **"The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution ...."** [para. 84, p. 263].

16. ***Lawful means of constitutional change.*** Petitioner again acknowledges categorically that the National Assembly of Quebec has power, at **any** time, to propose **any** constitutional change of **any** kind, by a resolution under s. 46(1) of the *Constitution Act, 1982*; has power to seek support for its proposed change by referendum; and has power through the Government to initiate negotiations with the Federation and other provinces. But no such proposal can become law except through compliance with the amendment procedures of Part V of the *Constitution Act, 1982.* The legitimate pride of the ethno-linguistic French-Canadian people in their identity, survival and achievements, cannot justify or excuse resort to revolutionary measures. Petitioner seeks to vindicate these principles, and to do so finds himself compelled to seek recourse from the Courts through the present litigation.

Petitioner has encountered uncomprising resistance in this effort. Why so? All three branches of government have a duty to uphold the law, and the Supreme Court of Canada has spoken in the *Reference re Secession*, [1998] 2 S.C.R. 217, a decision highly conciliatory both in the language it employs and in its far-reaching exercise of interpretative power in finding an implied duty to negotiate in stated circumstances. Yet the legislative branch of government in Quebec has responded both by statute, – in S.Q. 2000, c. 46, containing the provisions contested, here, – and by the Resolution of 23 October 2013 (Exhibit R-25), in both cases reasserting unilateral powers of constitutional change which are entirely inconsistent both with the constitutional provisions, and with the Court's decision. Within the electorate and within the National Assembly are well-known differences of opinion as to the future of Quebec within the Canadian federation. Yet these differences are not reflected in the vote of 100 Yeas and 0 Nays by which the Assembly passed the Resolution of 23 October 2013. Buried in this vote are no doubt strategic considerations, but, whatever they may be, it is clear that ***the Courts of law and the Courts alone are now in a position to vindicate the Constitution, vindicate the law in general, and vindicate the integrity of the Canadian state. The Quebec Legislature will not do so.*** On the contrary, though using other language, it defies the authority of the Courts in general and of the Supreme Court of Canada in particular, – notably its decision the *Secession Reference.*

Only the Courts by clear and categorical judgments can hope to end the cycle of contemplated unlawful measures and of referenda (e.g. Ex. R-14, Vol. 1 Tab 1) proposing such measures, – or threats of them, – all of which by their very nature tend to destabilize the Province and the country and to impede their economic progress. Unlike material things and human persons, the state (it must be remembered) is a legal and political abstraction, which organizes persons and things in legal

relationships. Reiterated attacks on the Constitution have the effect, and the obvious purpose, of undermining the state and legal system, – undermining, in the public mind, all three branches of government as lawfully established. *For it is in the public mind that they must exist if they are to exist at all.* The state and its legal system can only exist through general belief in their authority, just as a currency can only survive and hold value if there is belief that it will be accepted by others. As to protecting the authority of the Canadian Constitution in Quebec, firm intervention by the Courts is indispensable to that end.

17. ***Infringement of Charter Rights.*** The conclusions numbered **(2)** reproduced above in Factum paragraph **1.** are included here *in addition* to, and *without prejudice* to, the conclusions numbered **(1)** reproduced immediately preceding them. Conclusions **(2)** are founded on the decision of this Court in *Bertrand* v. *Bégin*, [1995] R.J.Q. 2500 (S.C.) (Lesage, J.) (8 September 1995); *dispositif* at p. 2516. Though it had ***neither*** *been* ***(1) passed nor (2) assented to, nor (3) approved in a referendum***, the Bill ("Bill No. 1"), Draft Bill, *An Act especting the sovereignty of Québec* (Ex R-14 Tab 1), which was to be, and which was, submitted to the October 30th, 1995 referendum, **was nevertheless held to be a threat to Petitioner's rights** under the *Canadian Charter of Rights and Freedoms*. This was so because it would wipe away that *Charter* and the rights and freedoms which it confers, – notably rights flowing from Canadian citizenship, and fundamental freedoms. It will be noted that ***directly in the dispositif***, Lesage, J. did not hesitate in his order to rely on the intention to proceed with Bill No. 1 ***without complying with the conditions of Part V*** **of the** ***Constitution Act, 1982*****.** In the present case the legislation now challenged gives *carte blanche* to enact , or to submit to referendum, *measures* ***of any kind***. Like Bill No, 1 in 1995, such measures could seek, – *yet again without complying* with Part V of the 1982 Act, – to establish Quebec as a sovereign state. *What the Legislature could not enact directly, it cannot authorize in advance*, as the Legislature seeks to do on the face of these contested provisions. Thus *Bertrand* v. *Bégin* applies here (Petitioner submits), and if so the challenged provisions infringe and deny Petitioner's *Charter* rights. They are void **for that** ***and all other*** reasons.

18. ***Constraining and emending texts to achieve constitutional conformity***. Severance of constitutionally-invalid subject-matter can in principle be achieved (1) by *excision of* ***specifed text*** or (2) by *excision of* ***specified subject-matter*** **(so-called "reading down")**, – provided in either case that the remainder can survive as constitutionally valid, or (3) by securing constitutional conformity through ***implication of terms*** **(so-called "reading-in")**. Petitioner's counsel offer the following rules as a best-efforts synthesis of the governing authorities, relying on the cases cited in Appendix II. ***Petitioner's counsel respectfully request the Attorneys-General for Quebec and for Canada to indicate in what respects if any they consider these rules not to be accurate statements of the law, so that the hearing can address matters genuinely in controversy*****:**

> **1.** In principle, ***constitutionally-invalid subject-matter*** may be ***severed from*** a legislative enactment in order to achieve the result that legislation survives to the extent, but only to the extent, that it is in conformity with the Constitution. (The Supreme Court has said that "the bulk of the legislative policy" must be constitutionally valid for severance to be permissible, with invalid applications "trimmed off".)

2. By the same token, it will be appropriate in certain cases, under compulsion of the Constitution, to ***imply into*** a legislative enactment, – or, in other words, to "read in", – ***terms necessary to ensure that the legislation is in conformity with the Constitution***. In such cases, however, it may be more difficult to achieve the precision necessary in framing the language to be "read in" to the statute than it is to define text to be severed and struck out.

3. Severance of constitutionally-invalid subject-matter may be appropriate whether that invalid (constitutionally-impermissible) subject-matter consists of:

(i) ***specified matter identifiable textually*** within an enactment (as e.g. sections or sub-sections, phrases, words, etc.), which can be treated judicially as if they were deleted, or

(ii) *some specified, – defined and definable, –* ***subject-matter comprised within*** *an enactment, – or* ***some part of its scope of operation*** (whether this be certain persons, places, things, or circumstances). **This is so even if that impermissible subject matter or scope does not correspond to, – or is not congruent with, – particular *parts* of the text.** In such instances, legislation may simply be treated, and referred to, as "constitutionally inapplicable" to the relevant, constitutionally-impermissible, subject-matter. In such instances the impermissible subject-matter is carefully defined and notionally carved out judicially.

4. To permit severance of any kind it is necessary that the portions intended to be held valid be distinguishable, and be distinguished, from the invalid portions of an enactment, **with a precision sufficient to make clear what is valid and what is not.** Similarly, **if terms are to be implied or "read in"** to achieve constitutional conformity, **it is necessary that they be defined with clarity and with certainty**. In cases where sufficient precision cannot be attained, it must be left to the Legislature to fill in the gaps. It is then for the Legislature, not the Courts, to fill in the details that will render legislative lacunae constitutional. The Court will not, in order to "read in" a curative measure, make its own *ad hoc* choices from a variety of options. There must, in sum, be ***remedial precision***. It may therefore be impossible for the courts to make the emendations needed for the legislation to survive.

5. While severance in its various forms is an "ordinary and everyday part of constitutional adjudication", severance or implication of terms are permissible only in cases where it is possible to conclude with confidence that the legislature would have enacted a constitutionally-conforming text in preference to having no text survive. It is impermissible *inter alia* for the court to impose emendations with budgetary impacts which would change the nature of the legislation.

6. Accordingly, severance (whether by excision of specified text or by "reading down"), – or implication of terms ("reading in"), – or more than one of these in combination, – is, or are, warranted only "in the clearest of cases". These are cases where one of these is clear: ➡ (i) that the legislature would have chosen to enact the portion it constitutionally had power to enact, without the portion it could not, or,➡ (ii) as the case may be, that the legislature would have enacted the legislation with the additional terms read in under compulsion of the Constitution.

> The severance or "reading in" must *either* ➡ further the legislature's objective, – which must itself be clearly established, – *or* ➡ involve less interference with that objective than would simply striking down the legislation. Thus if the portion of the legislation which would survive after severance would be substantially changed by proposed severance, severance is not permissible. This is so because severance would intrude into the legislative function. ***If it is to be made, the assumption that the legislature would have enacted the surviving portion must be a safe assumption.*** It appears that some additional latitude is permissible to achieve *Charter* objectives.

19. ***Possibility of "severance"/reading down"/ "reading in" to save the contested provisions.*** Whether a restricted operation can be given to any of ss. 1, 2, 3, 4, 5 and 13, in order to keep them within constitutional limits, depends upon the application of the rules regarding severance (or so-called "reading down" or "reading in"), summarized above (para 18).

Suppose that the contested sections might, **hypothetically,** ***as a matter of drafting***, – if only that were in issue, – be textually revised to achieve constitutional conformity. Major surgery would be required, and, in the circumstances, especial care and clarity in framing the substituted text. It is much less obvious that judges undertaking such textual revision could avoid judicial choices amongst alternatives *differing amongst themselves as to their* ***substance***; that of course being impermissible. It seems, *at most*, conceivable that the emendations could avoid impermissible judicial choices *as to the way in which the reworded texts were* ***expressed***. The greatest difficulty here lies however in the requirement that *in order to sever or to imply terms one must be able to affirm* ***with confidence that the legislature would have enacted the revised text*** *if it had known that its own text was constitutionally invalid and could not become law.*

The legislative history and extrinsic evidence establish (Petitioner submits) that none of these sections can, consistently with the established conditions for severance, be circumscribed ("read down") to conform to constitutionally-permissible limits, or otherwise be judicially emended. First, there is no basis whatever to affirm with the required confidence that a narrower scope, or diluted terms of any kind, would have been acceptable to the Legislature. What is more, ***any*** narrowing or dilution are **(1)** inconsistent with their (i.e., the contested provisions') history in this Act and in predecessor programmes, proposals and measures

> (Exhibits R-5, R-6, R-7, R-8, R-11 (appendices), R-13. R-14, esp. Vol 1 Tab 1, R-15 (where indicated); R-19, R-20,and R-21 (together); R-22. R-23 and R-24 (together), – either seeking secession, or asserting a right to achieve secession unilaterally, or both at the same time)

and **(2)** narrowing or dilution have been clearly and consistently rejected:

> Various of the Exhibits just cited, and Exhibit R-25 (Resolution of the National Assembly, October 23rd, 2013).

Accordingly, ss. 1, 2, 3, 4, 5 and 13 cannot be "read down" or emended and are wholly invalid.

Nor can the statute in general, or the contested provisions in particular, be treated as if they were a simple expression of opinion contained in a resolution of the Assembly adopted on motion. This course of action (a resolution of the Assembly) was explicitly rejected from the outset by the Minister when moving the Bill (Bill 99, 36th Leg., 1st Sess,) and its text was enacted in *statutory* form *precisely and expressly so as to have the force of law*: Exhibit R-6, esp. pp. 6167, 6168. ***This is a statute with an enacting clause, passed and assented to in due form, and it must be treated as such.*** "The question of the constitutionality of legislation has in this country always been a justiciable question": *Thorson* v. *A.-G Canada*, [1975] 1 S.C.R. 138 at p. 151 (the division within the Court was as to standing, not justiciability), – applied by the Court of Appeal in its interlocutory judgment here, paras. [80] and [81]. Though ***a*** *mere expression of opinion by a resolution of the Assembly* ***may perhaps*** escape judicial review, ***even a resolution*** would necessarily be reviewable if it purported directly to take action, such as declaring Quebec a sovereign state, or either ordering or authorizing action by other persons. But this litigation concerns a statute, and it is unconditionally reviewable. Moreover, *even a resolution expressing opinions as to the law*, though perhaps not inherently invalid, could be contradicted, on declaratory proceedings, by judicial rulings stating the law as it truly is.

Furthermore, the Minister *acknowledged, and seems even to have welcomed, the fact that, because it was an Act, its validity would be reviewable by the Courts in litigation:* Exhibit R-6 p. 6194 (3 paras. in right-hand column). And this was so, even though he was, and had been, fully warned of the risks of proceeding by statute, by jurists and others *sympathetic to his perspectives*: see quotations at pp. 6177-78 and elsewhere.

The legislative debate (esp. in Exhibits R-6 and R-8) on Bill 99, which resulted in this Act, is punctuated with repeated references to the federal Bill (C-20) resulting in the *Clarity Act* (Exhibit R-4) and to earlier referenda on sovereignty. The preamble to this Act itself denounces the *Clarity Act*. The Bill 99 debate, and this very Act itself, show throughout a preoccupation, explicit and implicit, with using the provisions contested in these proceedings, – framed though they are in more general, – all-embracing, – terms, – specifically to assert a claim of a right to unilateral secession. (See Premier Bouchard, Ex. R-8, esp. p. 8577-8, on unilateral determination of Quebec's future.) Thus the present Act, S.Q. 2000, c. 46, ***deliberately, consciously, and colourably***, reasserts, – though in different and more oblique terms, – **what had been rejected by the Supreme Court in the *Secession Reference*** (which the Preamble to this Act recognizes as having **"political"**, rather than legal **"importance"**). In so doing, this Act repudiates not only the authority of Canadian Constitution but specifically the authority of the Courts of law. ***S.Q. 2000, c. 46 implicitly asserts that the political institutions of Quebec, not the Courts, will settle the law.*** These proceedings are Petitioner's necessary response.

Lastly, it should scarcely be necessary to assert that there is no reason for, or basis for, or plausibility for, any attribution of "temporary validity" to the contested provisions. A period of validity for what? For unilateral secession? For resistance to the supremacy of the constitution and to federal authority? For *ultra vires* constitutional changes to be attempted?

20. ***Legislative history and other extrinsic material.*** The legislative history and other extrinsic material cited through this Factum are cited on the basis of the following rules and principles, which are a best-efforts synthesis by Petitioner's counsel of the governing authorities, relying on the cases cited in Factum Appendix IIL ***Petitioner respectfully requests the Attorneys-General for Quebec and for Canada to to indicate in what respects if any they consider these rules not to be accurate statements of the law so that the hearing can address matters genuinely in controversy***:

1. When not inherently unreliable, or offending against public policy, or irrelevant, material extrinsic to a legislative text being considered by a court is, in certain circumstances and for certain purposes, admissible and relevant. Extrinsic material may potentially consist *inter alia* of public general knowledge of which a court could take judicial notice; material from outside a legislative process, including economic data not necessarily judicially noticeable; and legislative history. Prior to about 1976 legislative history was admitted rarely and cautiously, but since that time it has been consistently admitted for defined purposes, elaborated below.

2. Legislative history, – which may be admissible and relevant in appropriate circumstances,– may consist of "background" material (such as royal-commission or law-reform-commission studies or reports, "white paper" or "green-paper" proposals: parliamentary committee proceedings and reports; bills or legislation recently operating or intended to operate concurrently with the legislation under consideration; and pertinent earlier legislation or bills. It may consist of economic data. It may also consist of legislative debates, which, again, may be admissible and relevant for specific purposes.

3. Legislative history, including legislative debates, is, generally speaking, not relevant to the direct construction of the language of a legislative enactment, though it has exceptionally been used for this purpose and said to be admissible to that end. But legislative history may show the mischief which a legislature was addressing, and so may be indirectly relevant to construction under the "mischief rule".

4. Legislative history is however relevant in constitutional cases to assist in the appreciation of the constitutional validity of an enactment, particularly but not only where there are allegations of colourability. Extrinsic evidence, including legislative history, may be considered to ascertain not only the ***operation*** and ***effect*** of the impugned legislation but its ***true object*** and ***purpose*** as well. Most of the cases now adopt this position.

5. There are instances of the use of legislative debates, even for purposes of construction, in the jurisprudence of the Supreme Court of Canada. But most instances are for the same purposes as other legislative history (above, **4**.). Caution in the use of debates has been considered necessary because: (1) legislation is the product of "an incorporeal entity", the Legislature, so that the views or intentions of individual legislators are not necessarily those

of the Legislature; (2) individual legislators may speak with a variety of individual motives which can change in the course of the legislative process leading to a statute. For some years legislative debates have however normally been admitted on the same basis as other legislative history, and for several years the decisions of the Supreme Court of Canada have not usually distinguished them from from other extrinsic material as regards their use.

21. Petitioner humbly prays that judgment be given in accordance with the conclusions in Paragraph 1 and the submissions herein, with such further and other relief as the Court may be pleased to grant in the premises. The whole is respectfully submitted.

Montreal, Quebec, this 2nd day of March, 2016

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APPENDIX I - GENERAL TABLE OF CASES CITED

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APPENDIX II - CASES CITED IN SUPPORT OF RULES GOVERNING SEVERANCE (Factum Para. 18)

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McKay v. *The Queen*, [1965] S.C.R. 798

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