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

PETITIONER

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT

&

ATTORNEY GENERAL OF CANADA

MIS-EN-CAUSE/INTERVENER

&

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

MISES-EN-CAUSE

REPLY TO THE MÉMOIRE OF ATTORNEY-GENERAL FOR QUEBEC

1. *Summary of A.-G. Quebec's defences.* In summary, – and as Petitioner reads and condenses the submissions in her counsel's *Mémoire* or Factum, – the Attorney-General for Quebec responds to Petitioner's submissions in the following way and in substance asserts the following:

(i) The contested provisions of S.Q. 2000, c. 46 do not create new law, or confer any powers or authorize any action either by any person, or by any institution, and so they cannot be constitutionally invalid. (*Mémoire,* paras. 7 (read with 6) , 8, 9, 11, 12; heading C (p. 7) and paras.24 and following).

(ii) The contested provisions merely "codify" rights (apparently meaning positions asserted from time to time by legislative and executive institutions and office-holders of the Province). These are here asserted to be "the most fundamental rights and prerogatives of the Quebec people", and consequential "responsibilities of organs of state". The provisions are therefore, by implication, normal and natural dispositions of provincial government, which "create no new law" and raise no constitutional issues. (*Mémoire,* paras. 9, 10, 12, 13, heading C (p.7) and paras. 24, 25, 26, 27 ff.)

(iii) The contested provisions are on their face fully consistent with the Constitution of Canada and do not express or imply any authority on the part of Quebec's institutions to do anything inconsistent with that Constitution, and are intended to be and should be presumed to be consistent with the Constitution. (*Mémoire*, paras. 7, 8, 9, 12, 13, 24, 25, 31, 48, 56, 57, 59, 60)

(iv) Petitioner's litigation is premature, and the institution of any relevant litigation by Petitioner or others must await actual unlawful conduct on the part of the institutions, or electorate, or office-holders of the Province. Nothing unconstitutional appears on the face of the contested provisions, or flows from them, and Petitioner's objections are hypothetical. (*Mémoire*, paras. 11, 50, 57, 58, 59, 60)

(v) The contested provisions must be taken to be constitutionally valid on their face because constitutionally-unlawful behaviour, if it occurs, would result from wrongful implementation of the provisions, not from the provisions themselves [regardless of the breadth and generality of their terms]. (*Mémoire*, paras. 11, 22, heading D) ff., 50, 51, 55)

(vi) The part of the Court of Appeal's interlocutory judgment restricting Petitioner's conclusions renders, – in the Attorney-General's view, – illegitimate certain of Petitioner's submissions in support of the surviving conclusions, – illegitimate (that is) at least insofar as Petitioner asserts in argument that there can be no constitutional change of any kind in Quebec or elsewhere in Canada, except in conformity with ss. 52(1) and 52(3) and Part V of the *Constitution Act, 1982,* and therefore invokes these against the validity of the substance, or content, of (i.e., the statements in) the contested provisions. (*Mémoire*, Para. 14, 63, 64, 65, 69, 70)

(vii) Some foreign federations, in particular Germany and the United States, recognize a form of popular sovereignty as a basis for the governance of their political units or subdivisions, – respectively Germany's länder and the American States; and a similar popular sovereignty applies to Quebec and can justify the expressions of popular sovereignty, asserted in the contested provisions, as the legal basis of Quebec's institutions. (*Mémoire*, paras. 10, 32ff.)

(viii) Most of Petitioner's extrinsic material is irrelevant to the issues here and should be rejected. (*Mémoire*, paras. 23, 71)

Petitioner responds as follows. Petitioner in particular welcomes A.-G. Quebec's reliance on the Bill 99 debates (*Mémoire*, paras. 10, 25), and respectfully suggests that the Court may find them of assistance in understanding the issues underlying the contested provisions. Petitioner points to some particular passages but considers the whole debate informative.

2. ***In reply to 1. (i) above: The contested provisions are statutory and declare the existence of powers said to be enjoyed by the institutions and population of Quebec.*** It is clear that the contested provisions, read individually (esp. ss. 1, 2 and 3) and together, ***declare rights and powers*** which they *attribute to* the Quebec populaton and institutions. They also (esp. s. 13), – again in declaratory language, – ***deny powers to other (by implication, federal) institutions***. Whether or not a provision is expressed to ***grant powers***, or simply to ***declare the existence of powers*** is a meaningless distinction, because the effect of the provision ***if valid*** would be exactly the same in either case. (Similarly, it is irrelevant whether the statute says that another Government or Parliament ***shall not have, or has not,*** **a certain power,** or that ***it may not, or cannot,*** **do specified things.**)

A statute has the same effect whether (as here) it **declares** that "X" has the power to do "Y", or whether *ex facie* it **authorizes** "X" to do "Y". ***In either case a statutory power flows from and is provided by the statute***, – and a statute, as the Court of Appeal holds here, ***is always judicially reviewable***: [2007] QCCA 1138, paras. [80] and [81], citing *Thorson* v. *A.-G. Canada*, [1975] 1 S.C.R. 138 at p. 151. There is therefore no substance in the distinction drawn by the Attorney-General or in the argument based on it. Constitutional validity or invalidity is the same, however the provision is framed. But there is more. The *propositions stated in* the contested provisions *by their very terms* violate the Constitution, *quite aside from* their taking the form of statutory provisions which are *ultra vires* C.A. 1982, s. 45. Petitioner respectfully submits that this too should be recognized by the Court.

3. ***In reply to 1. (ii) above: The alleged constitutional basis of the contested provisions.*** A.-G. Quebec seeks to present the contested provisions as simply a codification of rights, – i.e., essentially claims asserted at various times by the legislative institutions and office-holders of Quebec. ***It is simply assumed by the Attorney-General, not only that those assertions are constitutionally valid and accurate, but also that they can be validly stated or restated in statutory form, – as the contested provisions do.*** This is presented as being simply a normal exercise of provincial government. **No source** of provincial legislative power from the Constitution Acts is offered by the Attorney-General as the basis of that legislation. Moreover, these so-called "fundamental rights" do not exist in law. They are ***claims asserted legislatively***, simultaneously **un**constitutional and **anti-**constitutional.

Petitioner searches Attorney-General's *Mémoire* in vain for any specific attempt to ground ***either*** these provisions ***or*** the rights and powers *asserted in them*, in any relevant provincial constitutional power. Yet ***(1) any power asserted*** and ***(2) any statute enacted***, whether federal or princincial, must be founded on a power granted by the Constitution Acts, *and this power must be* ***specified*** *by any party supporting the validity of legislation which is challenged.* The only possible provincial power available would be the provincial constitutional amending power, s. 45 of the *Constitution Act, 1982.*

With respect, s. 45 could not sustain the validity of the contested provisions. It reads:

> 45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

The Courts have repeatedly held this power to be strictly limited. **The contested provisions cannot be supported by s. 45.** The limits of s. 45 are summarized by the Supreme Court in *Reference re Senate Reform*, [2014] 1 S.C.R. 704; referring to its predecessor, s. 92.1 of the 1867 Act:

> 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 stakeholders 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.

In particular, the **Legislature of Quebec *has no legislative authority to define its own powers*, *even if it were to do so correctly*. That is always outside the limits of s. 45.** Constitutional provisions ***defining*** provincial authority are **not** part of the constitution "***of*** *the Province*" within the meaning of s. 45. This is clearly stated by Beetz, J., speaking for the majority in *Ontario Public Service Employees' Union* v. *Attorney General for Ontario* [1987] 2 S.C.R.2 at p. 39:

> . . . An obvious example is the whole of s. 92 itself. With respect to Ontario, it is in a sense constitutional in nature in so far as it defines the legislative competence of the legislature of this province. But it also sets limits to the legislative competence of Parliament. It lies at the core of the scheme under which legislative competence is distributed in the federation. It forms part of the constitution of the federation considered as a whole rather than of the constitution of Ontario, within the meaning of s. 92(1) of the *Constitution Act*, 1867. . . .

With respect, it is illusory for A.-G. Quebec to invoke (in *Mémoire*, paras. 31 ff. and others) presumptions of constitutionality, and in particular on s. 6 of S.Q. 2000, c. 46, – and also to cite examples from Germany and the U.S. (Para. 41) – in an effort to escape the plain, all-embracing, meaning of the contested provisions, in an effort to rewrite, or to reinterpret or to palliate them, and by this means to bring them within constitutional limits.

Petitioner respectfully invites this Court to decide whether Petitioner's propositions in para. 5 below correctly state the law on the very points addressed in the contested provisions. If the Attorney-General joins Petitioner in this request, this would go far to resolve the differences between the parties. Petitioner respectfully desires the Court's ruling thereon, and submits that the Court is free to do so without constraint. As to the statements by Minister Facal, referred to by A.-G. Quebec in *Mémoire*, para. 43, the Minister accepted **only** that there would be **negotiations** regarding secession, but ***not*** the need of a multilateral constitutional amendment as required by the Supreme Court of Canada. Thus he did not accept, – but instead specifically rejected, – the *Constitution Act, 1982,* and the need for ***consent of Canada as a whole*** for the secession of Quebec**. (**See M. Facal at Ex. R-8, p. 8581.**)** The meaning of the contested provisions is made clear by the 1995 Referendum question and Bill, "Projet de loi No. 1", (Ex. R-14, Vol. III, Tab 21). (See citations in para. **6.** below.)

4. ***In reply to 1. (iii) above: The contested provisions are not consistent with the Constitution of Canada, but are massively in defiance of it.*** The contested provisions, esp. S.Q. 2000, c. 46, ss. 2, and 3, assert in declaratory language an unrestricted power of the Quebec population and Quebec political institutions to "freely decide the political régime and legal status of Québec." Though on their face this **includes** asserting a right of secession, – and the debates on Bill 99 (e.g., Premier Bouchard, Ex. R-8, pp. 8577-78) show that this is their **object** and **purpose**, – the provisions are all-embracing **in their terms**. So no "procès d'intention" *(Mémoire*, para. 7) is needed. Given the limits of s. 45 of the C.A. 1982, as established by the Supreme Court in the cases Petitioner cites. Quebec's population and institutions have **NO authority of any kind** to alter Quebec's political régime and legal status ***in any respect whatsoever, whether as regards secession or otherwise.*** There are **no** relevant powers; so they can have no possible ***valid*** scope or use. No institution, *federal or provincial*, and no electorate, has any power save what may be conferred by the Constitution Acts, and none of those asserted here are so conferred. Reiteration, partisan or non-partisan, however frequent, by Quebec Governments, legislative bodies, Ministers, or others (*Mémoire*, paras. 9-13; 24-27 ff.) are of no legal effect. They authorize nothing and justify nothing. The assertions that these powers exist, – whether in statutory form ***or independently of statute***, – are constitutionally baseless in the absence of textual foundation in the Constitution Acts. The only relevant power is that conferred by s. 46(1) of the 1982 Act: *to propose* amendments for enactment by multilateral processes under Part V, and also the power to seek a referendum mandate to do so. The provincial constitutional-amendment power extends only to *internal* provincial institutions and *even then* is subject to major limits.

In sum: ***A***.-G. Quebec's Mémoire seeks here ***to assume*** rather than to ***demonstrate*** the validity of the contested provisions by reference to the Constitution Acts. It furthermore offers no specific answers to Petitioner's principal Factum, paras 4 (i) to 4 (vi). (There Petitioner offers detailed submissions as to the ways in which each of the contested provisions is specifically in violation of the provisions of the Constitution.)

Despite the Attorney-General's argument here, the contested provisions are neither innocent nor innocuous. Their **terms** also flout the Supreme Court's decision in the *Secession Reference*, [1998] 2 S.C.R. 217, notably as to the need of a multilateral constitutional amendment under C.A. 1982, Part V, to alter Quebec's constitutional status: see [1998] 2 S.C.R. 2 at pp. 263-64 (para. 84); p. 265 (para.87); p. 270 (para. 97). **Petitioner invokes the Court of Appeal's judgment, paras. [66] to [69], as the basis for his citing that jurisprudence based on Part V and s. 52 of the C.A. 1982.** The Court expressly refers in para **[68]** to the *Secession Reference* as part of Petitioner's allowed grounds.

5. ***Contrasting the contested provisions with the same provisions redrafted to conform to the Constitution*****.** The clearest and simplest way to respond to the Attorney-General's assertion that the contested provisions are innocent, innocuous, and valid is (Petitioner respectfully submits) to contrast them with the same subject-matter expressed in a constitutionally-conforming text, as Petitioner understands that to be. Petitioner here offers this text to the Court for its consideration as to its correctness in law. If indeed, as A.-G. Quebec asserts, Quebec intends nothing beyond its constitutional powers, it should concur in submitting this statement of the law for the Court's review.

1. The Quebec people or peoples have the right to self-determination within Canada and in conformity with its Constitution. The Quebec people or peoples hold the rights that are universally recognized under the principle of equal rights and self-determination of peoples.

2. The people of Quebec have the right, within the limits of the Constitution of Canada and in conformity with the powers which it confers, to determine, through the Legislature of the Province, the nature and structure of the governmental institutions of the Province.

3. The people of Quebec, acting through its Legislature, exercise the powers specified in section 2, within the framework of the autonomy provided for, and guaranteed, by the Constitution of Canada. The Province may hold consultative referendums to ascertain the wishes of the electorate as to the exercise of the Province's constitutional powers, which include the power of its Assembly to propose amendments of the Constitution of Canada for enactment in the manner provided for in the Constitution.

The Parliament and Government of Canada retain the right to exercise all their constitutional powers relevant in given circumstances. These include (i) the power to consult, by referendum, on matters of their choosing, the people of all or of any of the provinces or territories of Canada, and (ii) in all circumstances to express their views and to offer information as they may think proper.

4. The result of a referendum of the electorate of Quebec as to matters within the authority of the Province, including approval of proposals to amend the Constitution of Canada, is determined by the majority of the votes cast; that is to say by the whole number of votes next exceeding one-half of the number of votes cast. The Constitution of Canada may require a greater majority for certain purposes.

5. The governmental institutions of Quebec derive their authority from the Constitution of Canada and their legitimacy from the legitimacy of that Constitution.

13. The powers, authority, sovereignty and legitimacy of the governmental institutions of Quebec are protected by the Constitution of Canada from unlawful interference, but nevertheless are enjoyed and exercisable subject to the Constitution of Canada and, in particular, subject to the fundamental rights and freedoms which it protects, and subject also to the exclusive or concurrent, and paramount, powers of the Parliament of Canada.

6. ***In reply to 1. (iv) above: Petitioner's proceeding is not premature in any respect and need not await specific future unlawful behaviour as a condition of contesting the validity of the provisions now in issue.*** The Attorney-General of Quebec now revisits a position unsuccessfully pressed in the interlocutory proceedings, namely that Petitioner's proceedings are premature. The Court of Appeal decided as follows:

> [83] Le Procureur général du Québec fait observer que la requête de l'appelant est présentée dans un «vide factuel», puisque la perspective d'un référendum est éloignée. Qu'il s'agisse d'un moment plus ou moins propice ou idéal pour engager un débat judiciaire sur une question constitutionnelle de cette nature n'est pas ici un facteur déterminant, d'autant qu'il est loin d'être acquis que l'exercice d'un tel recours judiciaire à l'époque contemporaine d'un référendum ou à la suite de celui-ci soit un moment beaucoup plus propice.

It is perfectly clear to everyone in the Province that sooner or later (as many single-mindedly wish) a referendum on Quebec's future is likely, and that this referendum could well, as in the past, seek a popular mandate to declare Quebec, – *perhaps unilaterally and without conforming to the Constitution of Canada*, – to be a sovereign state. **Exactly this** occurred on October 30th, 1995. See Exhibit R-14, Tab 1, *Loi sur la souveraineté du Québec (Avant-projet de loi*) (6 déc 1994), and finally Tab 21, *Loi sur l'avenir du Québec* (*Projet de loi No. 1) (7 sept. 1995).* On the referendum question, see Ex. R-11, documents in Appendix B, *Factum of Roopnarine Singh et al* in *Reference re Secession of Quebec*. Whether and when this will occur is a critical issue in every Quebec general election, and even in the selection of leaders of the Parti Québécois. Like the 1995 Referendum itself, the principles espoused in the contested provisions reflect, and even implement in legal language, Ex. R-15, *Programmes et Plateformes du Parti Québécois.* **The Court of**

Appeal, para. [67], specifically mentions secession as one of the issues which deserves to go forward for decision on the merits; and note also [68].

To demand that litigation be commenced only after a referendum has been ordered, or even after its result is declared, is to demand that timely litigation be made impossible, as there can be no time in a few short weeks for any proper process or judgment. Thus the persistent posture of the Quebec Government that constitutional violations must be imminent before litigation can commence reflects a persistent effort to prevent judicial resolution of the issues. For the Government of Quebec, such litigation will always be too early or too late. Indeed, much of the record (especially the Bill 99 debates) shows a persistent and overt view that these issues are purely political, and should be excluded altogether from judicial review. With respect, Petitioner is compelled to submit that this must be considered obstructive, and is inconsistent with the rule of law.

7. ***In reply to 1. (v) above: Only constitutionally-valid legislation enjoys the presumption that it does not authorize or cause constitutionally-unlawful action.*** Petitioner has no quarrel whatsoever with the cases cited by A.-G. Quebec (*Mémoire* paras. 50 ff.) to support the proposition that when legislation is constitutionally valid, constitutionally-unlawful actions cannot be imputed to that legislation, when these they are (1) the result of unlawful administration and (2) are not authorized by the legislation. This, of course, is correct. But the principle ***presupposes*** *the* ***existence of valid legislation***: (see A.-G. Quebec *Mémoire*, para 53). Here the contested provisions however *have no constitutional basis* and are *ultra vires* C.A. 1982, s. 45 and also in defiance of. s. 52 and of Part V (above, para. **6**). Furthermore, there is nothing hypothetical about what the contested provisions declare. Within their broad scope they explicitly assert a power of Quebec's institutions and population to do exactly what was done on October 30, 1995: to hold a referendum authorizing a declaration of independence without complying with the Canadian Constitution: see Ex. R-14, Tabs 1 and 21.

There being no relevant constitutional power, and none being cited by A.-G. Quebec (see above, paras. 3 and 4), the provisions are not valid. Thus the cases cited cannot assist the Attorney General. So no valid legislation exists to which the principle, though in itself correct, can apply. Yet every Act, federal or provincial, must be supportable on one or more identifiable grants of legislative power. The Court of Appeal insists on the rule of law: paras. [79], [80], [81].

In sum: The contested provisions are <u>on their face</u> *ultra vires* of s. 45 of the Constitution Act, 1982, and moreover inconsistent with ss. 52(1) and 52(3), and also in violation of s. 41(e). Therefore they cannot enjoy any sort of presumption that these provisions are unrelated to, and innocent of, what they (unconstitutionally, and therefore baselessly) declare to be within the scope of lawful action under lawful powers. ***Here no constitutionally lawful provisions exist; they therefore confer no powers.***

8. ***In reply to 1.(vi) above: The Court of Appeal has not restricted Petitioner's grounds or arguments by eliminating certain conclusions.*** The Court of Appeal has struck out certain conclusions which it deems unsuitable to be embodied in this Court's formal orders (*dispositifs*). In so doing (Petitioner submits that) the Court of Appeal has not restricted the nature or scope of Petitioner's grounds or arguments ***in support of the <u>surviving</u> conclusions***. In fact the Court summarizes Petitioner's grounds and arguments and holds, in its para. [65]: "... La proposition de droit avancée par l'appelant Henderson repose sur des arguments de droit qui méritent, à tout le moins, considération au fond." And the Court affirms this in para. [70]. In fact, the Court in paras. [66] to [69] summarizes Petitioner's grounds and *expressly refers to Petitioner's invoking* s. 52 of the *Constitution Act, 1982*, *as well as Part V* of that Act, and, specifically, s. 45. Why would the Court do so if

s.52(1) and s. 52(3) and Part V could not be invoked by Petitioner? Yet these concern the need to respect the multilateral amending processes of Part V in order to change Quebec's legal status. And the Court also mentions [in para. 67] Petitioner's asserting that the contested provisions deny federal powers **and it specifies secession as an issue for determination by this Court on the merits and also ([68]) *the Secession Reference* as relevant.** Though the Court's summary is very succinct, it recognizes Petitioner's grounds and sends them forward for trial. Petitioner respectfully submits that *this Court is fully entitled to consider these issues and render the judgment **it** considers appropriate*, and that Petitioner is free to offer, for the Court's consideration and judgment, the grounds he considers appropriate. With respect, in this Court nothing has been restricted by the Court of Appeal except Petitioner's conclusions.

9. *Further on 1.(vi): What is suitable for reasons (motifs) may not be suitable for orders (dispositifs).* The Court of Appeal in its para. [83] explains its rejection of certain conclusions and does so in rather dismissive terms. Petitioner accepts, as he is obliged to do, the deletion of the conclusions in question. The Court gives various reasons, including one suggestion that they "ont fait l'objet de décisions de la Cour suprême, ne serait-ce que dans le Renvoi relatif à la sécession du Québec, précité". The Supreme Court (Petitioner agrees) *did* so decide, though in other language. Whatever might be Petitioner's failings, the Court of Appeal certainly cannot have meant that, when the Supreme Court so decided, that Court's statements were improper. Thus the fault cannot lie in the *substance* of an assertion invoked by Petitioner if it is in fact one *which the Supreme Court itself* has made. (Indeed, note para. [68] which is permissive.) But it is fair to ask Petitioner why, in his view, the conclusions were deleted.

If one looks at all its observations together, including its insistence on maintaining the rule of law, the Court of Appeal seems to have sent several signals. Possibly the Court of Appeal sought to defuse this sensitive litigation by removing conclusions which (1) may have seemed to it to be unnecessary when added to the others. Perhaps (2) the conclusions were too general in their phraseolgy, – too broad as statements of principle, – and not narrowly tailored with the specificity suitable for orders (*dispositifs).* (See [55] and [56].) In any event, Petitioner seeks judgment **only** on his ***surviving*** conclusions while respectfully relying *on the full range* of his grounds, – which, as Petitioner respectfully submits, are intact; – if so, leaving this Court free to reach its own result. Petitioner notes that not long ago, *all statements of law were uniformly excluded from conclusions and from orders*, these being confined to *rights* arising *under* the law. Conclusions and orders would not have embodied *any* statements of the law. In any event, much that a Court deems inappropriate for *conclusions* and for *orders* is suitable for a Court's *reasons* for judgment. The appropriate reasons for any judgment this Court may be pleased to render are surely a matter for this Court to decide without constraint. Reasons articulate law and fact. *Dispositifs* embody the result. Appeals are always possible. Meanwhile the matter is before this Court.

10. *Further on 1. (vi): The Court of Appeal implicitly acknowledges that the scope <u>of this litigation</u> includes the issue of powers of secession*. [67] and [68] aside, in para. [83] the Court writes: ". . . Qu'il s'agisse d'un moment plus ou moins propice ou idéal pour engager un débat judiciaire sur une question constitutionnelle de cette nature n'est pas ici un facteur déterminant, d'autant qu'il est loin d'être acquis que l'exercice d'un tel recours judiciaire à l'époque contemporaine d'un référendum ou à la suite de celui-ci soit un moment beaucoup plus propice." This clearly refers to a referendum on Quebec secession. What can this mean if not to say that the issues are timely for resolution?

11. *In reply to 1. (vii):. Analogies to constitutions of republics.* The Attorney-General relies on the constitutions of the United States of America and the Federal Republic of Germany to provide analogies to those contested provisions of S.Q. 2000, c. 46, which assert popular sovereignty as an alleged basis for constitutional position

of Quebec. Petitioner notes first that, – as all the experts whose reports are filed appear to agree, – the American States and German länder are absolutely bound by their respective federal constitutions, and can do nothing outside or beyond them. In the U.S. Constitution, see Art. VI.

Secondly, the analogy to republics is false. Governmental authority in Canada is not now, and never has been, the creation of acts of popular sovereignty. It rests on the law. Law is made according to law. Government is empowered by, and conducted according, to law. The Constitution of Canada, and therefore those of the Provinces which it creates, rest on the basis of the long history of Imperial Acts, common law, and royal executive instruments, and the legal continuity they provided. Since Patriation in 1982, the Constitution of Canada, as defined by s. 52(2), is alone supreme and the sole foundation of provincial authority. To substitute a new, republican or popular, basis of sovereignty is far outside the powers of any province under C. A. 1982, s. 45 , as s. 45 has been defined and limited by the Courts.

Even if S,Q. 2000, c. 46, s. 5, or other provisions are not (see *Mémoire*, paras. 32 ff.) assertions of rights to achieve sovereignty *outside* Canada, they are still beyond the powers conferred by C.A. 1982, s. 45. A province *cannot* change the "fundamental nature and role" of its institutions: above para. 3.

12. ***In response to 1. (iv) and broadly: Dilatory strategies and resistance to judicial authority.*** Petitioner was obliged by the Attorney-General's interlocutory motion to reach the Court of Appeal before establishing not only his standing but *even the very justiciability of the validity of the contested provisions*, – and moreover that this litigation is not premature. ***Again here*** the Attorney-General seeks to assert, in effect, that this litigation is hypothetical and premature, that the contested provisions are innocuous and even constitutional, and therefore that resolution of the constitutional issues surrounding them must await future constitutional violations. This reflects a long-standing and consistent posture which Petitioner respectfully asks that the Courts should no longer tolerate.

Several interlocutory objections, comparable to those earlier in the present proceedings, were unsuccessfully raised by the then Attorney-General in opposition to proceedings in 1996 by Guy Bertrand contesting unilateral secession: *Bertrand* v. *Bégin*, [1996] R.J.Q. 2396 (Pidgeon, J.) (Those proceedings had commenced prior to the October 30, 1995, referendum.)

The Attorney-General of the time declined to appear in the Supreme Court in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, so the Court was obliged to appoint an *amicus curiae* to argue the points which the Attorney-Geeral of Quebec could have taken. Later, the decision of the Supreme Court is referred to in the preamble of S.Q. 2000, c. 46, as having "political importance" (as distinct from legal authority). And its authority is defied by the terms of this Act itself.

In the debate on "Bill 99" for the present Act, it was common ground between the Government and the Opposition that the issues raised by the contested provisions are purely political, hence outside the jurisdiction of the Courts. (See e.g. Ex. R-6, p. 6168, *per* the Minister, Hon. Joseph Facal.) The Opposition accused the Government of making Quebec vulnerable by enacting a statute subject to judicial review. (See pp. 6173, 6177, M. Benoît Pelletier.) The Minister responded (p. 6194): "Des droits, notre peuple en a ou il n'en a pas. S'il en a, il, il ne faut pas qu'il craigne à les affrmer ou de leur faire franchir le test des tribunaux." This would concede that the asserted powers *are* reviewable.

On the other hand, the Minister *also* declared that ***even if provisions of the Act are held invalid, the rights***

which they declare will survive unaffected: "... [L]e projet de loi no. 99 ne confère pas de nouveaux droits au Québec. Si, d'office, une partie ou une autre – faisons l'hypothèse – en était invalidée, nous ne perdrons pas des droits, 99 n'étant pas créateur de nouveau droits." In other words, the claims in the statute will continue as before even if the provisions are struck down. **The Courts' authority to decide definitively is thus rejected in advance by Minister Facal. The Attorney-General now cites this with approval: *Mémoire*, para. 25.** Therefore Petitioner hopes that the Court will find constitutionally invalid *the assertions* ***within*** *the contested provisions*, and not merely *their statutory expression* in this Act. These assertions are indeed repeated in the Assembly's resolution of 23 October 2013 (Ex. R-25). Clearly, they will not be effectively eradicated as being unconstitutional, once and for all, unless they are explicitly rejected by the Court as contrary to the Constitution, *both* in form *and* in content.

Indeed, the Minister, Hon. M. Facal makes his view clear in the Bill 99 debate (Ex. R-6, p. 6193)) that to accept the Supreme Court's decision is to accept that Quebec's status can only be changed through compliance with the constitutional amending processes in the *Constitution Act, 1982*, and therefore with the concurrence of other Provinces. Accordingly ***he*** (unlike, he claims, the Opposition) ***rejects both*** **the Supreme Court** ***decision and*** **its** ***consequences***. At Ex. R-8, p. 8581, the Minister openly admits that the Supreme Court in the *Secession Reference* **has held** unilateral secession inconsistent with the *Constitution Act, 1982*: "L'opposition officielle . . . invite le gouvernement à accepter sans réserve l'avis de la Cour suprême du Canada alors que cet avis avait justement pour effet de subordonner le droit fondamental du peuple québécois à disposer librement de son avenir à la formule d'amendement imposée au Québec, san son consentement, par cette même Loi constitutionnelle de 1982." *But the Attorney-General of Quebec* ***does not acknowledge this here***, – that is, the inconsistency of this Act with the Supreme Court's decision. ***Instead*** the Attorney-General now insists (see above **1.** (ii) and **1.** (iii)) that the contested provisions are innocent and *assert no right or power to secede* (i.e., "disposer librement de son avenir") without complying with Part V, or to effect any other unconstitutional change.

And though the Supreme Court's decision was (Petitioner submits) conciliatory both in its language (using muted terms) and in its substance (finding an implied duty to negotiate), both this Act, and the Assembly's resolution of October 23rd, 2013, are the Legislature's confrontational response, essentially rejecting the Supreme Court's decision. And to what end does the resolution "réclame" that the Attorney-General for Canada withdraw [in English "call on" to withhdraw] from this case?

Is it then unreasonable for Petitioner to conclude that successive Quebec Attorneys-General have employed every strategy to prevent or defer judicial resolution of the issues in this litigation; to escape involvement and binding judgment whenever possible; to reject the jurisdiction of the Courts to adjudicate on the issues; and to repudiate their decisions when rendered? If so, what conclusion should be drawn from these strategies? Contrary to the Attorney-General's submissions, unequivocal resolution of all the issues is not premature, but rather (Petitioner respectfully submits) long overdue, to ensure the political, social and economic stability of Quebec and of Canada.

13. ***In reply to 1. (viii): On admissibility and relevance of Petitioner's extrinsic evidence***: The debates on Bill 99 are invoked even by the Attorney-General's counsel in their *Mémoire*. All the Petitioner's exhibits illustrate the constitutional history of the contested provisions, or their reaffirmation by the National Assembly (Ex. R-25), which is directly relevant also to severance, *and refers expressly to this proceeding*. ➡The contested provisions, enacted under a Government of the Parti Québécois, reflect the stated purposes of the Parti Québécois in its *Programmes et Plateformes* (Ex. R-15). ➡Exhibit R-14, especially the October 30, 1995 Referendum Bill, Tab 21, *Projet de loi No. 1. Loi sur l'avenir du Québec*, – and Ex. R-11, especially the details of the 1995 referendum question, – show (as the Bill 99 debates demonstrate) (1) what has previously occurred in this context and (2) what the contested provisions can reasonably be understood to contemplate. ➡The *Clarity*

Act (Ex. R-4), is itself a major issue raised in the Bill 99 debates. ➡Exhibits 19 to 24 concern precursors of the contested provisions. Perhaps A.-G. Quebec might welcome these (see above, para. **1 (ii)**).

Petitioner respectfully submits that these extrinsic materials are all ***admissible,*** and in principle ***relevant***, within the Supreme Court's rulings, and that their ***weight*** is in each instance for this Court to decide. The weight obviously varies: thus the precursor statutes are less significant, but still illustrative of constitutional history. Petitioner notes the alleged "codification" invoked by the Attorney-General in *Mémoire* paras. 9 and 10, 25, 26, 27 in support of the contested provisions. This plainly refers (*Mémoire*, paras. 25, 26, 27) to the official declarations and statements from time to time made by Quebec government officials and institutions, – in other words, to the constitutional history of the legislation. Petitioner is surely entitled to do likewise, supported by extrinsic documentation. The Attorney-General's extrinsic material invokes German and U.S. constitutional law (see above, **1**.(vii)) – far more remote from the issues here than are *any* of Petitioner's exhibits. All Petitioner's material appears admissible under the Supreme Court's decisions to show the ***object*** and ***purpose*** of constitutionally-disputed legislation and its ***background***. Its weight is properly a matter for this Court.

The whole respectfully submitted.

Montreal, this day of July, 2016.

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(S) Charles O'Brien, Attorney for the Petitioner

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(S) Stephen A. Scott, Counsel for the Petitioner