25 Feb 2017

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT, MONTREAL:
500-05-065031-013

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

MIS-EN-CAUSE

& SOCIÉTÉ ST.-JEAN BAPTISTE DE MONTRÉAL *INTERVENANTE*

ABBREVIATED NOTES FOR TRIAL

COUNSEL TO PETITIONER KEITH OWEN HENDERSON

Henderson v. A.G. Quebec - Superior Court - Abbreviated Trial Notes
Revised 25 Feb 2017

I. INTRODUCTION:

Notes 1 and 1.1

➡ Since interlocutory judgment of C.A. of 30 Aug 2007 **[TAB I:6]**
➡ Surviving party is Keith Owen Henderson
➡Surviving conclusions appear in Re-Amended Motion and are
➡now numbered (1) and (2)
➡as the Court of Appeal stated them: **C.A[8] OR [89]: [TAB I:6]**

(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)** is based on ***Bertrand* v. *Bégin*, [1995] R.J.Q. 2500 (S.C.) [TAB I:2] (Lesage, J.) (8 September 1995); *dispositif* at p. 2516: "menace grave" to Petitioner's rights; ➡a "répudiation" of the Constitution and "rupture" of the legal order (p.2513). ➡The 1995 judgment was interlocutory, not final, ➡and there was no basis there for declaring null and void Bill 1 *Loi sur l'avenir du Québec* (Ex. R-14 Tab 21), – a *proposal* which was never passed, approved by the voters, or assented to. ➡We speak instead of "infringenent and denial" and ask that the *provisions of an Act* be declared of no force or effect. (DETAIL IN TRIAL NOTES below para. 17.0 ➡The contested provisions render Charter rights, including rights of citizenship, no longer absolute but *henceforth conditional on the will of Quebec's legislative institutions and electorate*, at statutory risk of *being wiped away at any time*. ➡Provincial legislation cannot validly make an absolute Charter conditional ➡ Our second conclusion makes it clear that Petitioner in this litigation is challenging *any alteration in the status of Quebec otherwise than through constitutional means. It,-- (2),– is cumulative with, and without prejudice to, (1).***

➡Act S.Q. 2000 c. 46 has been **CONSOLIDATED** as **R.S.Q. c. E-20.2, or L.R.Q. c. E-20.2**; **Court may wish to add this citation** in its reasons and orders,

II. PETITIONER'S RIGHT TO SUBMIT HIS ARGUMENTS

Notes 2.1

➡IN CONSEQUENCE OF THE DELETION BY C.A. OF OUR GENERAL CONCLUSIONS

> **(C.A. [TAB I: 6] deletes these at para. [86] & quotes them @ [85]) [**BOTH ARE ALSO quoted @ **2.3 PAGE 9 OF TRIAL NOTES**]

➡ A.-G. Quebec disputes our right to offer certain arguments (*Mémoire*, Para. **14,** 63, 64,65, 69,70)

➡even **in support of our surviving conclusions** **(which are quoted at C.A. [8] and again at C.A. [89] (see [VOL I TAB 6])**:

> **TEXT OF GENERAL CONCLUSIONS [DELETED (BY [86]) ARE QUOTED AT C.A. PARA. [85]] [= C.A. PAGE 17] [TAB I: 6]**

➡ Our arguments are by this means said by A.-G. Quebec to be:--

> **➡impermissible** at **least insofar as we argue** that there can be **no constitutional change of any kind in Quebec or elsewhere in Canada, except in conformity with s. 52(1) and 52(3) and Part V**

of the *Constitution Act, 1982*,

➡and ***by inference*** **also allegedly impermissible, insofar as we *secondly* argue that the same constitutional provisions defeat not only ss. 1-5 and 13 of this Act BUT *ALSO* defeat <u>their substance, or content</u>,- i.e., the <u>statements or propositions set forth in them</u> (*Que. Mémoire*, Para. 14, 63, 64,65, 69,70) on grounds that these are *constitutionally false <u>whether found inside or outside the Act</u>*;**

➡**A.G. Que. Mémoire** (para. 14, 63, 64,65, 69,70) **relies on deletion of our general *conclusions* as also excluding these *arguments***
➡ We **respond** in our **Reply Factum** paras. 8,9,10 (pp. 6,7)

➡ **We therefore feel obliged to take the precaution of showing that**
1st ➡ Our second conclusion *very explicitly* contests the power of the Province to establish a sovereign state or **make other constitutional changes of status, and the Court of Appeal has allowed it** to proceed

2nd➡That the Court of Appeal has **summarized** our arguments and **sent them <u>ALL</u> forward** in support of our **surviving** conclusions

➡ READ: C.A. PARA. [61] [TAB I: 6]: The Court relied on SCC's 3 conditions in ***Canadian Council of Churches*** needed for **status as public interest plaintiff** to challenge the validity of legislation:

[61] Dans **Conseil canadien des Églises** c. Canada (Ministre de l'Emploi et de l'Immigration), 1992 CanLII 116 (CSC), **[1992] 1 R.C.S. 236**, la Cour suprême rappelle qu'on doit tenir compte des trois aspects suivants, lorsqu'il s'agit de reconnaître la qualité pour agir dans l'intérêt public :

1) La question de l'invalidité de la loi se pose t elle sérieusement?

2) Le requérant est il directement touché par la loi ou a t il un intérêt véritable quant à sa validité?

3) Y a t il une autre manière efficace et raisonnable de soumettre la question à la Cour?

➡ C.A. holds 3 conditions satisfied: see C.A. [61] to [64] and [65] , in particular Condition #1: and **see C.A. [65] and [70]**

➡In C.A. judgmt [TAB I:6] paras. [65] to [70]

➡the Court **summarizes** our arguments **succinctly but fully**

➡**sends the case to trial ([65] and [70]) on the basis of those arguments**,–

[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.

and in particular:

➡**specifically cites (C.A. paras [66],[67]) our arguments** based on ***Con. Act 1982*** ss. **45, 52 and Part V,–** ***in other words, arguments requiring compliance with the amending processes*** **for ALL CONSTITUTIONAL CHANGE;**

[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.

➡ C.A. **in para. [67]** specifically **notes that we contest the legislation as asserting powers including secession, and**

➡ C.A. **in para. [68]** specifically **notes our reliance on the *Secession Reference***

[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.

SO C.A. SENDS OUR CASE FORWARD ON THE BASIS OF ALL OUR ARGUMENTS: READ [65] AND [70]

To be clear:

➡ We contest ***not only the statutory form*** but **also** the ***substance*** of ss. 1 to 5 & 13,– **i.e,. the propositions expressed in them**

➡On the ground that ss. **1 to 5 & 13 have no const. basis even outside the Act (contrary to position of A.-G. Quebec)**

➡We feel we should be explicit because of the position of Minister Facal from the start, adopted by A.-G. Que.[Mémoire para. 25], that the propositions in the sections would survive independently of the Act *even if the sections themselves* were declared invalid. (Trial Notes 2.6):

✱✱➡ This was the position of Minister Facal in Bill 99 Debate (Ex. R-6, p. 6168) (25 May 2000, left col. 5th fresh para.) :

> [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 nouveaux droits."

✱✱➡ A.-G. Quebec adopts this position (*Mémoire* para. 25)
✱✱➡We respectfully submit: Court has power to make the position clear if it agrees with us on the substance

Notes 2.2 to 2.5

Since we have respecfully submitted that:
➡ .A,G. Que. is **mistaken**
➡in **relying on <u>deletion of our general conclusions</u> as <u>excluding our arguments</u>** (in A.-G. Quebec's Mémoire (para. 14, 63, 64,65, 69,70)

➡How do <u>we</u> explain deletion of the general conclusions?

See Petitioner's Factum paras 5, 6, 7 and Reply Factum paras. 8, 9, 10

➡**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 phraseology,– too broad as statements of principle,– and not narrowly tailored with the precision and specificity suitable for orders (*dispositifs*)**.

➡**The C.A. makes precisely *this* criticism** of a general conclusion in the Singh Case of 1995, described as **"vague et imprécise"** and **"vague et générale"** in connection with *lis pendens*:

[55] Il est peu vraisemblable qu'un tribunal puisse faire droit à cette partie des conclusions de la requête en jugement déclaratoire de 1995 pour invalider tout

> projet de loi ou loi non autrement identifiés que par une formulation aussi vague et imprécise que celle qui apparaît au paragraphe (6) des conclusions de la requête dans le dossier *Singh*.
>
> [56] Retenir qu'il y a identité d'objet à cause d'une conclusion aussi vague et générale dans un recours antérieur toujours pendant au moment de discuter de l'irrecevabilité (et qui, d'ailleurs, l'est encore à ce jour, bien que le dossier soit inactif depuis 1996), en l'opposant à une requête pour jugement déclaratoire qui vise clairement et directement l'invalidité de certaines dispositions d'une loi spécifiquement identifiée ne permet pas de conclure à identité d'objet.

IN ANY EVENT:

➡Whatever the defects in **our** deleted conclusions
➡The **S.C.C.'s findings and statements in Sec Ref cannot be at fault**, and ➡**must be citable jurisprudence** in this or any other case ➡ **So with respect, we cite it and we rely on it** (as per C.A. para. [68])

On our arguments as summarized (CA[66] to [69]), the Court concludes:

[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.

➡**C.A. [83] itself implicitly shows secession is at issue here:**

> "... 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 (para [83]) also meets the A.-G.'s renewed argument, already rejected by the C.A. in its interlocutory judgment, that our proceedings are premature because nothing unconstitutional has yet been done

➡ **Unconstitutional administration of a valid Act**: In this connection we should make it clear that we agree with the authorities cited by Quebec that a statute ➡valid on its face and ➡not authorizing anything unconstitutional is not invalid ***simply because of later unconstitutional administration***. But

➡But here there ***is*** **no Act which can be presumed valid because**

➡**S.Q. 2000 c. 46, ss 1-5 and 13, are far outside powers** of s. 45 of the C.A. 1982, and ➡**no other relevant provincial legislative power exists**

➡**Are not only *ultra vires* s. 45 but <u>also</u> in contradiction of ss. 52 and 41(e)**

➡**Therefore these sections *do* declare power in the Assembly and electorate to undertake *constitutionally-unlawful action***

➡**We are not imagining unconstitutional administration of an innocent Act, but provisions which are *ultra vires* on their face.**

➡What is <u>un</u>suitable for <u>conclusions</u> and <u>orders</u> can be perfectly suitable for a Court's <u>reasons;</u> we submit simply that:

➡The Court of Appeal has imposed no contraints on this Court's *decision* or *reasons for judgment* or the *arguments it can entertain.*

The appropriate reasons for any judgment this Court may be pleased to render

➡are <u>a matter for *this Court* to decide *without constraint*</u>,

➡of course addressed to the surviving conclusions only

III. SUMMARY OF PROPOSITIONS TO BE ESTABLISHED

Notes 3.1: Outline of propositions to be established

➡ **1st**: Ss. 1-5 & 13 constitutionally void for violating each of 3 provisions, each sufficient by itself to render the sections void

➡ Summarize ss. 52, 45, 41(e) of the *Constitution Act, 1982*

➡**2nd** that the challenged provisions are colourable **attempts to assert** what the SCC has held they **cannot constitutionally achieve**

➡i.e. right or power to secede unilaterally from Canada

➡this is shown by their **constitutional history**:

in ➡**legislative debates**, ➡**political programmes** & ➡**other extrinsic material** such as **1995 Referendum Bill**

➡**Extrinsic material admissible** in accordance decisions of the SCC , **as showing their**

➡**Operation** and **effect**; and ➡**true objects and purposes**

➡**3rd** that the **provisions cannot be saved by revising or curtailing them judicially into a constitutionally-conforming text**

➡Because it cannot be affirmed that the Leg're would have accepted them in revised and limited form rather than having them struck down altogether; as the rules for severance require

➡And also: Because to do so the Court would be obliged to make *ad hoc* `choices from a variety of possibilities, therefore lacking in remedial precision (as is required by the Supreme Court)

➡**4th** that **invalidity** of the provisions **BOTH on their face AND as shown by extrinsic materials bespeak**
➡**overt and categorical defiance of the Constitution**
➡**defiance of the authority of the Courts**, and particularly of the Supreme Court of Canada
➡ **a clear statement, particularly evident in ss. 2 and 5, that the law will be determined not by the Courts of law but by the *political will of the electorate and legislative institutions of Quebec***

➡**5th in sum**: that the authority of
➡The ***Constitution***, the ***law in general***, and the **Courts** ***can only be secured by***

➡a clear, ➡a comprehensive and ➡a resolute assertion by the Courts of the

➡**supremacy** of the **Constitution** and
➡**the right of all Canadians to be governed by laws constitutionally enacted, *and no others*, and,**
➡**correlatively,** of the **indispensable need that *any* constitutional change must comply *absolutely* with the Constitution, as is declared in s. 52(3) of the C.A. 1982.**

➡**We cannot ask for a declaratory order in these terms,** because of the deletion of our general conclusions
➡**However we ask that the Court be pleased to rule in these terms ➡➡its reasons.**

IV. OVERVIEW OF THE CONTESTED PROVISIONS

Notes for 4.1: Overview of the contested provisions

We first draw attention in the preamble to **these five recitals as particularly relevant to the contested provisions**:

> **[11th]** WHEREAS Québec is facing a policy of the federal government designed to call into question the legitimacy, integrity and efficient operation

of its national democratic institutions, notably by the passage and proclamation of the Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (Statutes of Canada, 2000, chapter 26);

➡ With respect, the truth is that the Clarity Act [Ex. R-4] exactly reflects the Supreme Court's decision in the *Secession Reference,* whilst this Act attacks that decision in various ways

Notably the Clarity Act reflects the Court's ruling on:

➡ on the role of political actors
➡1st as regards the political actors' determining whether a referendum has produced a clear answer to a clear question and
`➡2nd as regards the political actors' carrying on negotiations
AND ALSO REFLECTS THE COURT'S RULING ON
➡ the need of a constitutional amendment to give effect to secession, which this Act deliberately rejects (see below Notes 9.9)
***As to this Minister Facal is perfectly explicit* (ex. R-6, p. 6193, May 23, 2000; and ex. R-8, p. 8581, Dec. 7th, 2000).He rejects it (P. 48➢)**

[12th] WHEREAS it is necessary to reaffirm the fundamental principle that the Québec people is free to take charge of its own destiny, determine its political status and pursue its economic, social and cultural development;

[13th] WHEREAS this principle has applied on several occasions in the past, notably in the referendums held in 1980, 1992 and 1995;

➡ With respect: We know of no acknowledgment by the federal Government of the validity of the assertions in the preceding preambles in **connection with these referendums**;
➡ To choose not to quarrel with claims does not imply acceptance of them
➡In particular, the claim that Quebec is free to determine its political status. This was never recognized by Canada.

➡✱✱✱The 12th recital *encapsulates the contested provisions* and the 13th recital supports the claims of the 12th recital by invoking the 1995 referendum and two others *on the very face of this Act*

***➡Therefore the two recitals and the contested provisions, all taken together, refer to, invoke, reflect, and reiterate* the 1995 referendum**

question (Ex. R-11, Appendices) and referendum Bill No. 1, *Loi sur l'avenir du Québec* (Ex. R-14, Tab 21) <u>seeking to declare Quebec a sovereign state *by unilateral and unconstitutional means*</u>.

[14th] WHEREAS the Supreme Court of Canada rend ered an advisory opinion on 20 August 1998, and considering the recognition by the Government of Québec of its political importance;

➡ Only its **political importance**, not its **legal authority**, is recognized

[15th] WHEREAS it is necessary to reaffirm the collective attainments of the Québec people, the responsibilities of the Québec State and the rights and **prerogatives of the National Assembly with respect to all matters affecting the future of the Québec people**;

➡Appears to exclude all relevant federal jurisdiction on all matters whatsoever ➡and indeed the body of the Act makes that posture clear

We submit that these recitals shed light on the

✱ operation and effect, and the
✱true objects and purposes

of the legislation.

➡READ SECTIONS 1, 2, 3, 4, 5 and 13 <u>with Conforming text</u> [see Reply Factum para. 5]; reproduced below:

V. HOW A CONSTITUTIONALLY CONFORMING TEXT WOULD READ

➡ Clearest way to show what we submit are the constitutional deficiencies of the contested provisions is to offer a constitutionally-conforming text **of the subject-matter of each disputed section of the Act**

➡though strictly speaking the Legislature probably has not power to enact even this under s. 45 of the *Constitution Act, 1982*

➡**because it is doubtful that either Parliament or the provincial Legislatures can by statute validly define their own powers at all, even if they do so correctly.**

➡ We would like nothing better than that the Court substitute this text for the contested provisions but we believe we **cannot ask that the Court** do so because the Legislature clearly would accept no dilution of its statute **(see Ex. R.-25; Resolution of October 23rd, 2013)**. **That being so, no diluted text can meet the Supreme Court's conditions for reading this or any other dilution into the Act in substitution for the existing text.**

➡ We **do however submit** it to the Court for its **consideration as to whether it is a correct statement of the law** ➡and **if the Court does decide to "read down" the legislation**, as A.-G. Canada proposes, we respectfully ask that our text be used as the substitute for ss. 1 to 5 and s. 13 of S.Q. 2000 c. 46 (as follows):

<u>Our Reply Factum para, 5 (pages 4-5) :</u>

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.

[NOTE THAT THE SUPREME COURT REQUIRES A "CLEAR MAJORITY" TO TRIGGER A DUTY TO NEGOTIATE: Sec. Ref. [1998] 2 S.C.R. 217 at p. 271 para. 100. THIS INVOLVES A DIFFERENT STANDARD FROM THE NORMAL SIMPLE-MAJORITY STATUTORY REFERENDUM RESULT, WHICH IN THE CONTEXT OF SECESSION SUFFICES ONLY FOR A CONSULTATION WITH A VIEW TO A PROPOSAL TRIGGERING A DUTY TO NEGOTIATE WOULD REQUIRE A "CLEAR" MAJORITY.]

➡On the rejection of the Supreme Court's requirement of a constitutional amendment to achieve secession, and the refusal to recognize it in this Act, see the explicit statements of Minister Facal in the debate on Bill 99: quoted below, page 48 of these Notes (Notes, Section 9.9). (He clearly considered the applicable amending procedure to be "unanimous consent" (C.A. 1982, s. 41)).

VI.Overview of the principal relevant constitutional provisions

Notes for VI:

➡First provisions of interest are section 52 and s. 53(1) of the Const. Act, 1982

READ Section 52(1), (2) and (3) and section 53(1):

➡52(1): Supremacy of the Constitution: ➡declares this in categorical language.

52(3): Amending procedures: ➨ S. 52(3) *requires recourse* to the amd'g proc's:

➡52(3) is the *correlative* of 52(1): Supreme? In what way? For how long?

➡ Answer: **Supreme subject to change *in accordance with the Constitution***

➡Essentially s. 52(3) requires compliance with Part V of the 1982 Act

➡A few other relatively minor and narrow amending procedures survive.

➡The 1982 reform did not prune every tree. S. 53(1) carries forward:

➡Constitution Act 1886: representation of Territories in Sen. & H.C.**by Act of Parl. [**See C.A. 1982, s. 53(1) and **Schedule, Item 9][on current representation of the Territories, see C.A. 1867, amended ss. 22 & 37]**

➡Constitution Act 1871 s. 3 [See C.A. 1982, s. 53(1) and Schedule, Item 5]: Section 3 of C.A. 1871 may well not have been superseded (impliedly repealed) by C.A. 1982, s. 43: if so provincial boundaries may still be alterable by concurrent federal and provincial statutes as well as by the s. 43 process

52(2): Definition of the Constitution: The "Constituon of Canada" is

➡Defined in the most comprehensive terms by 52(2) & the Schedule to the 1982 Act

➡ (a) the *Canada Act 1982* [i.e. the Imperial Act] including the *Constitution Act 1982* [which is its Schedule B **(adding e.g. the Canadian Charter)**

➡(b) the Acts and Orders in the Schedule, **incl. the *Constitution Act, 1867***

➡All the other **Imperial constitutional Acts** and **other instruments**

➡And **Canadian constitutional Acts; *all together comprehensively*:**

➡constituting the aggregate Canadian territory,

➡creating the Canadian federation,

➡creating the provinces,

➡defining their boundaries,

➡establishing the federal and provincial executive and legislative institutions,

➡ defining *their* powers,

➡and fixing other terms of Union

➡ (c) **any amendment** to any of the foregoing; so this would **include even *provincial* legislation (e.g. *all Acts amending prov const's*)**

➡**Section 52(2) uses the word "includes" rather than the word "means"**so that the **list is not exhaustive**, and other other items of law might be held to be part of the Constitution of Canada.

➡ **Whole and every part** of the constitutional system **protected** and **controlled by Part V "PROCEDURE FOR AMENDING CONSTITUTION OF CANADA"**

➡s. 52(1) does **not** say **Constitution is supreme sometimes** or **up to a point**

➡S. 52(1) <u>makes **no exception**</u>: so it is **<u>supreme absolutely & always</u>**

Next are provisions of part V, which control the amending process and therefore the entire constitutional system

✱✱✱**In *Reference re Senate Reform* [2014] 1 S.C.R.704 [TAB I:12] at p. 725 (para. 28) the Court states:** "Part V of the Constitution Act, 1982 provides the blueprint for how to amend the Constitution of Canada" and in the ***Secession Reference***, [1998] 2 S.C.R. 217 **[TAB: I:11]**, 264, para 85: " **The Constitution is the expression of the sovereignty of *<u>the people of Canada</u>*. It lies within *<u>the power of the people of Canada</u>*, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada." [All of the emphasis is added]**

The **key features of greatest interest to us in Part V** are these:

➡ **<u>C.A. 1982, s. 46(1)</u>** deals with **Initiation of bilateral and multilateral amendments**

> 46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

➡ **<u>C.A. 1982 s. 41(e)</u>**: **Unanimous-consent procedure is required to amend Part V, the amendment procedures**. They cannot otherwise be altered in any way.

> **41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province** ...
>
> **(e) an amendment to this Part.**

➡ **<u>C.A. 1982, s. 45</u> Provincial constitutional amendment power**,exercised though provincial statute (cf. S. 44, federal power).

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

➡**There is no other provincial power of constitutional amendment**, though there are **some powers of constitutional order tailored to specific institutions**;

notably establishment and tenure of provincial public offices (s. 92.4) and the "Administration of Justice in the Province" including th constitution of provincial courts (s. 92.14)

*******Relationship between the contested provisions and constitutional provisions:**

➡**In summary** we shall seek to establish these propositions ***on the relationship*** **between the constitutional provisions and the contested provisions of S.Q. 2000, c. 46. Considered <u>as a group:</u>**

➡ **1. As to s. 52(1):** The provisions of S.Q. 2000, c. 46 which we contest ***reject the supremacy of the Constitution*** **of Canada** and **seek to declare and establish instead the *supremacy of the Quebec legislature and electorate***, thus **violating s. 52(1)**.

➡**2. As to s. 41(e)**: The provisions of of S.Q. 2 000, c. 46 which we contest ➡***would sweep away, or at least supersede, the whole set of amending procedures in Part V*****,** as far as Quebec is concerned, and

➡ would give **Quebec's *electorate* and *institutions* carte blanche to replace its present status and constitutional position within Confederaton with any status they might please to substitute.**

➡**In so doing ss. 1, 2, 3, 4, 5 and 13 frontally attack section 41(e) by substituting the Quebec electorate and legislative institutions for Part V so far as Part V relates to Quebec. <u>But this requires a unanimous-consent amendment</u>.**

➡**3. As to s. 45:** Lastly, the **provisions of S.Q. 2000, c. 46, which we contest all exceed the limits of Quebec's powers of constitutional amendment** set out in **section 45** of the 1982 Act.

VII. THE AMENDING POWERS AS INTERPRETED JUDICIALLY

<u>Notes to 7.2.</u>

➡ **Under s. 46(1):** The **legislative assembly** of **Quebec or of any other Province** can, at any time, **propose any constitutional amendment it pleases;**
AND IN ADDITION:
➡ Supreme Court has held in the ***Reference re Secession*** **[1998] 2 S.C.R. 217 [TAB I:11], at p. 265 (para 87)**(quoted below), the Province **can submit its proposals to**

referendum of the Province's electorate <u>to secure a mandate to advance them</u>

✱➡BUT the Supreme Court states that a referendum is **purely consultative and can have no direct legal effect.**

✱➡AND *no proposal* can become law *except* as a valid constitutional amendment, *which necessarily means compliance with Part V*
✱✱ ➡The Constitution does not accept the principle of simple majority rule <u>unless those voting have the capacity and power to make the relevant decision</u>: *Secession Reference*, paras. 76 & 78, p. 260.

[WE READ WITH OUR OWN EMPHASIS ON HIGHLIGHTS:]

***Reference re Secession* [1998] 2 S.C.R. 217, at p. 265 (para 87) [VOL I TAB 11]**

> Although the Constitution does not itself address the use of a referendum procedure, and **the results of a referendum have no direct role or legal effect in our constitutional scheme**, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though **a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession**. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that **it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means**. **In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves**.

<u>Notes to 7.3</u>

PART V OF THE CONST ACT 1982: IS A COMPREHENSIVE SET OF AMENDING PROCEDURES

PART V CREATES A SORT OF TWELVE-HOUSE PARLIAMENT *<u>ALONGSIDE</u> THE FEDERAL PARL & PROVINCIAL LEGISLATURES*

THE SCHEME OF PART V IS AS FOLLOWS; *<u>INTEGRATED</u> INTO THE*

COMPREHENSIVE SET OF PART. V AMENDING PROC'S ARE:

THE UNILATERAL AMENDING PROCEDURES:

➡There are **parallel unilateral federal and provincial amending powers**

➡***Both exercisable by ordinary statute***:

➡the **federal power under s. 44** of the C.A. 1982, ***is a narrower successor*** to the old s.91.1 of the C.A. 1867; ***ordinary federal bill*** **(detail);**

➡the **provincial power under s. 45** of the C.A. 1982, ***successor*** to the old s. 92.1 of the C.A. 1867; ordinary provincial bill **(detail)**

➡**Now integrated into Pt. V. SO *PART V IS A COMPREHENSIVE SCHEME GOVERNING THE WHOLE CANADIAN CONST. SYSTEM***

7.4 BILATERAL AND MULTILATERAL PROCEDURES (ss. 38, 41, 42 and 43) (DESCRIBE)

➡ all involve **resolutions of the federal and provincial legislative bodies** in various numbers and combinati ons, followed by a **proclamation of the Governor-General**.if, when and as authorized by the required resolutions

➡The **bilateral amending procedure** (C.A. 1982, **s. 43**) (**Senate, House of Commons, Assemblies of affected provinces**) **(narrow scope)**

➡**The multilateral procedures:**

➡**"General procedure": C.A. 1982, ss. 38, 42 (Senate, House of Commons and Assemblies of 2/3 of provinces with 50% of the total population of the Provinces)** ,

➡ **"unanmous consent" procedure: s. 41 (Senate, House of Commons, and resn's of ALL legislative assemblies**)

NOTES TO 7.5

SCOPE OF PROVINCIAL AMENDING POWER (s. 45):

➡**The two key decisions, both from the Supreme Court, are *Reference re Senate Reform*, [2014] 1 S.C.R.704 [TAB I:12]**

and *Ontario Public Service Employees' Union* v. *Attorney General for Ontario*, [1987] 2 S.C.R. 2 [TAB I:8], commonly referred to as *OPSEU*,which is **approved and followed by the unanimous Court in the Senate Reference**,

➡ **OPSEU is the most comprensive, detailed, and authoritative**

exposition of the provincial power, then in C.A. 1867 s. 92.1
➨ ***both decisions*** **limit s. 45 to internal institutions of the province**

➡In the ***Senate Reference*** **[TAB I:12]** the **Court reviewsthe old ss, 91.1 & 92.1 and follows OPSEU, and states:➡➡ ([2014] 1 S.CR. 704 at p. 734, paras. 47 and 48**): **[THE EMPHASIS IS ADDED]**

> **[47]** Sections 91(1) and 92(1) of the Constitution Act, 1867 granted the federal and provincial governments the power to amend their respective constitutions, **provided that the amendments did not engage the interests of the other level of government**. ...**[✱✱NOTE that Court proceeds to Discussion of s. 91.1]** ***& AFTERWARDS:***
>
> **... 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
>
> **[48]** 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.**

➡**In OPSEU [TAB I: 8] [1987] 2 S.C.R. 2** the Supreme Court unanimously **upheld the validity of Ontario legislation restricting the political activities of provincial public officers and public servants**.

➡ Various members of the Court relied on C.A. 1867 s. **92.1 – the predecessor to C.A. 1982, s. 45,– s. 92.4 (establishment and tenure of provincial offices) and 92.13** (**Property and Civil Rights in the Province**) to support the legislation in question.

➡Beetz, J., and those who concurred with him,– McIntyre, LeDain and La Forest, JJ.)– .
➡Were a majority, and
➡Grounded the legislation **both** on **ss. 92.1 and on s. 92.4.[QUOTE 92.4]**

➡ Since the legislation had been **enacted before the Constitution Act 1982 had come into force**, Beetz, J., in supporting the legislation on provincial powers of constitutional amendment, **upheld it on the basis of s. 92.1,** while **doubting that s. 45 had made any material change.**

➡Beetz, J., [1987] 2 S.C. R. 37 ff., **defines the subject-matter which is properly the "Constitution" of a Province**, and so within provincial legislative authority (now under s. 45), **as distinct from the general body of the Constitution of Canada**, lying **outside provincial jurisdiction**.

➡ To define what is part of the "Constitition of the Province" the **first step is to decide whether a given rule or provision is constitutional in nature**.

➡ Then it is necessary to distignuish and decide **what is part of the Constitution *of the Province.***
Here are his Lordship's **remarks in part: [1987] 2 S.CR. 2 at pp. 38-40:**

> If Ontario were a unitary state, like the United Kingdom, the question whether a given enactment forms part of its constitution or amends its constitution could be resolved in the affirmative by only one relatively simple test: is the enactment consti-**[39]**tutional in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in Attorney General of Quebec v. Blaikie, 1979 CanLII 21 (SCC), [1979] 2 S.C.R.

1016, at p. 1024, does "it [bear] on the operation of an organ of the government of the Province"? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government? In a unitary state without a comprehensive written constitution, this test is the only one available.

At p. 38 (the emphasis is added by myself here and at pp. 39-40):

> **Because Ontario, following the British model, is without a comprehensive written constitution, its laws do not qualify as constitutional laws unless they also satisfy first the test as to whether they are constitutional in nature**.
>
> This first test, however, even if *prima facie* satisfied, is not determinative of the issue whether an Ontario statute forms part of the constitution of Ontario or is an amendment of the constitution of Ontario, within the meaning of s. 92(1) of the Constitution Act, 1867. **[39]The main reason for the insufficiency of the first test is that Ontario is not a unitary state. It is an integral part of a federal one and provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle, are beyond the reach of the amending power bestowed upon the province by s. 92(1). 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. Prior to 1982, that part of the constitution of the federation was **[40]**therefore entrenched in the sense that it could only be amended by the Parliament at Westminster, in accordance with constitutional conventions.

[At p. 40] Furthermore, other provisions of the Constitution Act, 1867 could be similarly entrenched and 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. Thus, s. 133 of the Constitution Act, 1867 was held in Blaikie, supra, to constitute such a provision and to be a "part of the Constitution of Canada and of Quebec in an indivisible sense" and not a part of the constitution of Quebec within s. 92(1).

*****To sum up, therefore, and subject to the caveat I will mention later, an enactment can generally be considered as an amendment of the constitution of a province when it bears on 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, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant Governor and, presumably and a fortiori, the office of the Queen who is represented by the Lieutenant Governor.**

➡**Beetz J, notes other important limits on provincial constitutional-amendment power.**

➡Thus, **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" of Lieutenant Governor includes at least certain essential powers of that office. This is very broadly stated by the Privy Council in *Re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.) at 943 [TAB I: 7], as excluding from provincial amendment "any power which the Crown possesses through a person who directly represents it".**

➡**Hence, after concluding that the impugned legislation in *O.P.S.E.U.* was valid as *an ordinary legislative amendment to the provincial***

constitution of Ontario **to ensure civil-servants' neutrality and impartiality**, **Beetz J. writes, 1987] 2 S.C. R. 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,**[TAB I:7] Beetz, J. surmises (at 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**."

[✱✱This last position seems to be adopted by the Supreme Court in the Senate Reference (quoted passage) regarding ss. 44 & 45 amendments to federal and provincial institutions when the Court imposes this proviso: **"... provided that their fundamental nature and role remain intact ....]**

NOTES TO 7.6.1

Summary of the limits on the provincial amending-power

7.6.1 ***Summary of the authorities***. **The following propositions result from a reading of these and other authorities:**

(1) A provincial legislature **cannot** (under s. 45, or indeed otherwise) **interfere with the *offices*** (which, so far as is relevant here, **include at least the essential *powers***) of the **Queen, the Governor-General, or the Lieutenant-Governor** of the province itself.

➡**In particular their powers to grant or withhold royal assent to provincial Bills or disallow provincial Acts cannot be impaired by the Province.**

(2)&(3) **A** provincial **legislature cannot interfere with the general constitution of Canada [see Trial Notes para. 3,2].**

The general Constitution of Canada includes:

➡**Canadian territory; national or provincial boundaries; institutions and structures other than provincial ; the distribution of federal and provincial powers; constitutional guarantees**

➡ **any constitutional rule essential to the federal principle,** or

➡**Anything which is a fundamental term or condition of the Canadian Union.**

Except only for specifically provincial institutions, and even then subject to limits mentioned.

Consequences of the foregoing limits for the contested provisions:

➡The **amendment of the general Constitution** of Canada, **is itself the subject of the various procedures set out in sections 38 to 44 of the *Constitution Act, 1982*,– NOT s. 45 (i.e. NOT the provincial amending power)**

➡**Which (ss. 38 to 44) *all* require *at least* action by the Sovereign or Governor-General, and one or both Houses of the federal Parliament, for any valid constitutional amendment; and in most**

cases at least two-thirds of the provinces' legislative assemblies

➡**Therefore NO individual province's legislation can impair the federal system in any way,** ***as the contested provisions claim the right and power to do***

4) SINCE a provincial legislature **cannot** interfere with the **general constitution,** or a **constitutional rule essential to the federal principle,** or one which **is a fundamental term or condition of the Canadian Union**

➡ It necessarily follows that, under the Constitution of Canada, **a provincial legislature has no authority whatsoever to effect the secession of the province from the Canadian Union**, ***or*** **to change its status** ***in any way***.

➡**A province has legislative <u>authority only in respect of those</u> <u>internal provincial</u> <u>institutions</u> <u>and provincial</u> <u>governmental processes contemplated</u> <u>by s. 45 and</u> <u>not specifically excepted</u> <u>from it.</u>**

➡A province cannot define the extent of its own powers, as the contested provisions attempt to do. This is a matter exclusively for the general Constitution of Canada.

VIII. THE GOVERNING PRINCIPLES OF-- WHICH UNDERLIE -- THE CANADIAN CONSTITUTION AND CONSTITUENT POWER

8.1 NOTES ON THE PRINCIPLE UNDERLYING *PART V*

8.1 The relevant **fundamental political and constitutional principle**
➡***implicit in*** **Part V** and
➡***underlying*** **Part V** of the Constitution Act, 1982
➡is that **the whole of Canada is a single country**.
➡**One country,,--Divided into provinces <u>only</u> for the IMPORTANT BUT LIMITED purposes of provincial government**

Sections 3 and 5 of the 1867 Act make that clear:

➡ Section 3 amalgamates the three old provinces into "One Dominion under the name of Canada"

➡Section 5 then divides Canada into provinces (Ont., Que., N.S.,N,B.)

➡Territories added from timeto time– incorporated into the Dominion

➡ DIRECTLY AS provinces (B.C., P.E.I., Nfld.) – or from which provinces were *created* (Man., Alta., Sask.)

➡Or *extended*: Quebec Boundary Extension Acts 1898 & 1912

✱✱➡As a single country Canada belongs indivisibly to all its people

✱✱➡Therefore the future of the country *is to be decided by* all of its people, *not* by the people of a single province alone

✱✱T➡That is the clear meaning and message of Part V of the Constitution Act, 1982

As Part V is explained by the S.C.C. e.g. in *the Secession Reference*

[1998] 2 S.C.R. 217 [TAB I:11] ***para. 85:*** **"The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada" ; and explained again in**

Reference re Senate Reform **[2014] 1 S.CR. 704 at p. 734, para. 48 [TAB I:12]**

> 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. [Emphasis added]**

8.2 NOTES [LOCUS OF CONSTITUENT POWER]

What do the constitutional texts and history say about constituent power– the power to create and reconstitute states ,– *institutionally*, the amending powers?

➡ **Central issue in this case is in essence the *locus of constituent power***

➡✱✱**This Act includes section 5, which bases the authority of the Province on the *will of the people*, not on the *Constitution of Canada*.**

➡ **The legitimacy and by inference *authority*, even *existence*, of the Cdn Const in Quebec are by s. 5. made *contingent* on the will of the Quebec people on theories of direct or popular democracy**

➡**A.G. Quebec invokes republican constitutions: U.S. and Germany and even brings expert evidence on those constitutions**

➡**But these are absolutely irrelevant to Canada, and in any case can prove nothing against us here *because the states of both countries are absolutely bound by their federal constitutions***

2nd ➡**In *Re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.) [TAB I:7] the Privy Council held that a province could not introduce lawmaking by referendum unless *any proposal approved by the electorate was presented for royal assent and given royal assent*. Direct popular lawmaking is excluded.**

3rdly ➡***Re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.) [TAB I:7] the P. C. *also* excludes (see p. 943) from provincial amendment "any power which the Crown posseses through a person who directly represents it."**

➡ **And *Canada* and its provinces are juridically *creatures of* the *Constitution Acts*, *never* of direct *constituent acts of the population***

➡ **No Canadian federal or provincial law has *ever been constitutionally possible without royal assent*: C.A. 1867, ss. 56 & 90; C.A. 1982, s. 41(a)**

➡**The Canadian federation and its provinces have *no* existence, *no* rights, *no* powers beyond or outside the Constitution of Canada.**

➡ **No part of which can be altered except under Part V or a few other narrow provisions in a few specific cases;**

S.C.C. has held that ss. 44 and 45 do not allow Parl. or Prov leg'res to make fundamental changes to the Can. system

➡ **Constituent power was held and exercised exclusively by the Imperial Parliament prior to 1867, and in 1867, and afterwards until April 17th, 1982, though qualified by the *Statute of Westminster 1931***

➡ **The 1982 patriation legislation transferred constituent power *to***

Canadian institutions exactly as prescribed therein*, – in particular by Part V of C.A.1982, *not to the population at large

➡In sum: Constituent authority never existed, and was never exercised, in Canada on a republican basis

➡ not by assumed popular authority,–
➡not by popular sovereignty
➡not by popular acts.

➡Republican concepts are not applicable to the Canadian constitutional system:

C.A. 1982, s. 45 , and C.A. 1982, s. s. 41(a) make it impossible to introduce republican concepts by provincial authority under s. 45;

➡Law may be made ONLY according to law,– therefore pursuant to established authority,– which must be complied with when changing the lawmaking processes themselves.

IX. SPECIFIC OBJECTIONS TO THE VALIDITY OF THE CONTESTED PROVISIONS AS A GROUP AND INDIVIDUALLY

NOTES 9.2

➡ The contested provisions are **not simple expressions of opinion**
➡ They are **declaratory expressions of law**; **explicit statements of law**
➡contained in a **statute passed and assented** to as Statutes of Quebec 2000, c. 46

➡And are reviewable as such [TAB I: 6]; Court of Appeal in this record]:

> "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 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]:

> . **[80] Il appartient aux tribunaux de s'assurer du respect de la primauté du droit, comme la Cour suprême l'a souvent rappelé, notamment dans l'arrêt du Renvoi : Droits linguistiques au Manitoba, 1985 CanLII 33 (CSC), [1985] 1 R.C.S. 721, la page 745 :**
>
> **[…] Il appartient au pouvoir judiciaire d'interpréter et d'appliquer les lois**

du Canada et de chacune des provinces et il est donc de notre devoir d'assurer que la loi constitutionnelle a préséance.

[81] Comme l'appelant recherche une déclaration judiciaire de l'invalidité de certaines dispositions de la Loi, il soulève à cet égard une question justiciable. Dans l'arrêt Thorson c. Le Procureur général du Canada, (1974 CanLII 6 (CSC), [1975] 1 R.C.S. 138), le juge Laskin (alors juge puîné) de la Cour suprême écrit, au nom de la majorité, à la page 151:

La question de la constitutionnalité des lois a toujours été dans ce pays une question réglable par les voies de justice. [*Thorson*: Authorties TAB I:14]

9.3 *Act* contrasted with *resolution*: opinions in resolutions can be disregarded

➡ The National Assembly reasserted the contested provisions in its **resolution of October 23rd 2013** ; **Exhibit R-24** reiterating views expressed in the contested provisions
AND earlier in its **resolution of May 22nd 1996** (**Exhibit R-11, Appendices**)

➡ **A resolution merely expressing opinions** may be **unreviewable *as to its validity* but *perhaps subject to a corrective declaratory statement of law by the courts***

➡ In any case, the **Courts can simply ignore a resolution expressing opinions**

➡ But we are concerned with **an Act** whose **provisions purport to declare the law** and therefore

➡***if valid*, cannot simply be ignored**: **Courts cannot ignore valid Acts,**
➡and **so an Act must be reviewed to determine its validity if it is challenged**.
See Minister Facal, Ex. R-6, p. 6194 (25 May 2000):

"M. le Président, ce n'est pas compliqué. Des droits, notre peuple en a ou il n'en a pas. S'il en a, il ne faut pas qu'il craigne de les affirmer ou de leur faire franchir le test des tribunaux.

9.4 Specific objections to the provisions of S.Q. 2000 c. 46 *Both* individually *and* read as a group:

We submit that the contested provisions are invalid not only
➡ ***on their face***
➡**but also** in the light of the **extrinsic evidence, in particular:**

➡the **debates on this Bill,– Bill 99–** and **National Assembly Resolutions**
➡the **1995 referendum question and referendum Bill**, and
➡Ihe **Parti Québécois Programs and Platforms**

The **extrinsic evidence makes clear** the **3 vices of the contested provisions outlined earlier**: namely :
**
➡**First**. they **directly contradict the supremacy of the Constitution of Canada as declared in s. 52 of the Constitution Act, 1982**,

by purporting to declare the Quebec electorate and National Assembly supreme and able to alter Quebec's status and powers
➡departing from the status and powers prescribed by the Constitution
➡ by means not authorized nor permitted by the Constitution of Canada.

➡**Secondly, they violate s. 41(e) of the 1982 Act**
because ***they substitute the Quebec people and Quebec institutions for the amendment processes of Part V of the1982 Act***;
➡in other words **purport to amend Part V, which cannot, however, be amended except in accordance with s. 41(e).**

➡ **Thirdly**, they ***far*** **exceed** ***any*** **conceivable limits to the Quebec's powers of constitutional amendment under s. 45** of thec1982 Act.

Severance: 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"), to be addressed in due course.

The **legislative history** and **other 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**: see below.

9.5 and 9.6. Extrinsic material [See Factum para. 20]

➡Although we submit that the contested provisions are ***invalid on their face***,
➡we rely also on ***extrinsic evidentiary material*** **to demonstrate**

➡their ***intended operation and effect*** as well as
➡***their real objects and purposes***

We submit that the extrinsic materials
➡***underscore*** the need **to reaffirm, judicially, the integrity and supremacy of the Constitution in the clearest and most categorical terms.**

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.**

We rely particularly on this material, extrinsic to the Act itself, some of which we will cite as appropriate for the above-stated purposes:

> **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**);
>
> ➡✱✱**The October 30th 1995 Referendum question**: reproduced 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, (here, in the French-language text):**
>
> > **"Acceptez-vous que le Québec devient souverain, après avoir offert formellement au Canada un nouveau partenariat économique et politique, dans le cadre du projet de loi sur l'avenir du Québec et de l'entente signée le 12 juin 1995?"**
>
> **and, on 22 May 1996, the Resolution of the National Assembly asserting the right to define Quebec's political status without interference: Ex. R-11, Appendices to Factum of Roopnarine Singh filed in *Secession Reference*:**
>
> > QUE l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut politique et d'assurer son développement économique, social et culturel.
> >
> > THAT the National Assembly reaffirm that the people of Québec are free to take charge of their own destiny, to define without interference their political status and to ensure their economic, social and cultural development.

5 Volumes of Material filed by A.-G. Canada in *Ref. re Secession of Quebec,* Exhibit R-14. Vol. III,

✱➡especially Tab 21, Projet de loi No. 1. *Loi sur l'avenir du Québec* (7 septembre 1995*) authorizing a unilateral delaration of independence*

***Programmes et Plateformes du Parti Québécois* (Ex. R-15)** (extracts, in which are **marked the relevant passages**)

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 (Ex. R-25)

SECTION 1 OF THE ACT

9.8 Specific objections to Section 1

➡ Section 1 ESPECIALLY WHEN READ with 2,3,4,5, 13 asserts an *unlimited right* to self-determination extending to secession:

➡An innocent picture of the Act is painted in her Mémoire by the Attorney-General of Quebec in the present Government. But when it was in Opposition at the time of the enactment of this statute, M. Benoît Pelletier, leading against Minister Facal (Ex. R-6, 25 May 2000, p. 6173), read s, 1 as we do. The phrase "leur droit à disposer d'eux-mêmes**", appears in the French text of s. 1. M. Pelletier contrasted this with the word "autodétermination",–which appears** as "self-determination" in the English text. M. Pelletier said:

> "...le droit des peuples à disposer d'eux-mêmes a une connotation bien précise et implique que ces peuples ont le droit à la sécession, ce a quoi n'a pas droit le Québec justement en vertu du renvoi sur la sécession de la Cour suprême du mois d'août 1998."

➡But **Supreme Court of Canada** has held (**see quotations below at 9.8.2**) that:

➡ whether thare are one or many peoples in Quebec,

➡they have **only the right to self-determination** ***within Canada***

9.8.1 Claims on behalf of "the Quebec people"/ "le peuple Québécois"

➡✱✱The Act speaks *in the singular* in ss. 1, 2, 3, 4 and 13, ➡and does so in both languages when it makes its claims of a right of self-determination

➡The Act makes its **claims on behalf of *A*,– meaning ONE,-- "Quebec people**"

➡Obviously **Quebec has a population and an electorate**.

➡But the **"Quebec people" is not in this Act meant simply to be synonymous with "population" or "electorate"**.

➡Rather it is **a political and legal construct**

➡in which the heterogeneous Quebec population,– which includes various ethnic and linguistic minorities, –

➡is presented as having been merged and consolidated

➡into one single "people" identified with the French-speaking ethnolinguistic majority in order to meet the criteria for claims to self-determination

➡to achieve a political and social identity necessary for international law claims

***➡ manufactured to be one people monolithic and congruent with Quebec's boundaries*, acting as one in a referendum**

➡To produce a single collective expression binding everyone in Quebec, regardless of ethnolinguistic identity.

➡On the theory that **one, single, ethnolinguistic people has then spoken**

➡This population is often presented as ***a single civic nation or people***

➡ In a Quebec of many ethnolinguistic peoples.

➡ *Each one* would enjoy *its own* rights of self determination in international law

➡ This would if recignized subvert the *propositons* in the Act and its *purposes*

➡Whatever may be regarded as **an accurate description of the ethno-linguistic character of Quebec**,

➡the Province derives **no additional *constitutional* latitude therefrom**

***➡➡ to enact the provisions of this statute* OR**

➡➡defend the assertions which it makes

9. 8.2. ***Self-determination must be within Canada; the Act cannot provide otherwise***

Supreme Court*. Any right of "self determination" *must* (the Supreme Court holds) be exercised *within the framework of the existing Canadian state:

➡***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at pp. 275-287, esp. 282 (paras. 126 -127) [TAB I:11]: (our emphasis on the most essential passages)**

** **126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.** External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

➡and at pp. 295-96 (para. 154).

` **154** We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". **Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation;**

and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.

➡✱✱**Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.**

➡✱✱✱ **This is no longer open to discussion in any Canadian court of law, and no province can constitutionally enact a statute which provides otherwise.**

9.8.3. *Agenda is made clear in extrinsic material.*

Not only ***on the face of the Act***, – ***but also*** also **in the light of** ***the relevant history*****,**

the intention of s**. 1 (read with ss. 2 and 3) is clearly to assert an *unlimited* right of self-determination, extending to secession**; as made clear in

➜ the **legislative debates on Bill 99;**
➜the **1995 referendum measure**, and
➜the **Programmes of the Parti Québécois**
➡ **Resolutions of the National Assembly in 1996 and 2013**

9.8.4 *Resolution 22 May 1996.*

And **this claim to "self-determination" beyond constitutional limits is**

➡**asserted [Ex. R-11] as a right in** ***resolution of the National Assembly of 22 May 1996,*** and
➡***later reaffirmed by the Assembly's resolution 23 October 2013*** **[Ex. R-25]** [✱✱**see notes 18 [PAGE 63 BELOW] where it is quoted in full**

➡***Votes and Proceedings/Procès-Verbaux of the Assemblée nationale*****, 22 May 1996**; resolution of the National Assembly on motion of M. Lucien Bouchard,

Prime Minister of Quebec (22 May 1996); **passed 22 May 1996** (**Exhibit R-11, Factum of Interveners Singh et al. In *Reference re Secession*; Appendices**):

QUE l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut politique et d'assurer son développement économique, social et culturel.

THAT the National Assembly reaffirm that the people of Québec are free to take charge of their own destiny, to define without interference their political status and to ensure their economic, social and cultural development.

9.8.5 *Premier Bouchard's Speech on Bill 99*.

Thus **Premier Lucien Bouchard ended his speech on Bill 99** in these words (**Exhibit R-8**, *Journal des debats de l'Assemblé nationale*, **December 7th, 2000**, pp. 8577-78:

En terminant, je laisserai la parole à un autre ancien premier ministre du Québec, M. René Lévesque, et je cite: «Le droit de contrôler soi-même son destin national

est le droit le plus fondamental que possède la collectivité québécoise.» Fin de la citation. M. le Président, nous sommes conviés ce matin à affirmer hautement et à défendre ce droit sacré face à l'histoire.

9.8.6. *1995 Referendum Bill: Loi sur l'avenir du Québec*

The **measure proposed in the October 30th 1995 referendum purported to authorize a unilaterateral declaration of independence:**

5 Volumes of Material filed by A.-G. Canada in *Ref. re Secession of Quebec* (Exhibit R-14), see esp. **Vol. III Tab 21**, ***Loi sur l'avenir té du Québec (Projet de loi No. 1) (7 sept. 1995)***;

[Excerpts]
LE PARLEMENT DU QUÉBEC DÉCRÈTE CE QUI SUIT:

DE l'AUTODÉTERMINATION

1. L'Assemblée nationale est autorisée, dans le cadre de la présente loi, à proclamer la souveraineté du Québec.

Cette proclamation doit être précédée d'une offre formelle de partenariat économique et politique avec le Canada.

DE LA SOUVERAINETÉ

2. A la date fixée dans la proclamation de l'Assemblée nationale, la déclaration de souveraineté inscrite au préambule prend effet et le Québec devient un pays souverain; il acquiert le pouvoir exclusif d'adopter toutes ses lois, de prélever tous ses impôts et de conclure tous ses traités.

ENTRÉE EN VIGUEUR

26. Les négociations relatives à la conclusion du traité de partenariat ne doivent pas dépasser le 30 octobre 1996, à moins que l'Assemblée nationale n'en décide autrement.

La proclamation de la souveraineté peut être faite dès que le traité de partenariat aura été approuvé par l'Assemblée nationale ou dès que cette dernière aura constaté, après avoir demandé l'avis du comité d'orientation et de surveillance des négociations, que celles-ci sont infructueuses.

27. La présente loi entre en vigueur le jour de sa sanction.
➡THIS WAS PROPOSED FOR APPROVAL OF VOTERS BY THE 1995 REFERENDUM QUESTION

9.8.7 *Parti Québécois Programmes.*

➡➡✱✱Proposals to declare independence unilaterally are repeatedly reasserted in Platforms of the Parti Québécois and we mark them in the Exhibit (R-15):

<u>Parti québécois platforms</u> (Ex. R-15; <u>excerpts, copied with marked passages</u>)

> ***Programmes et Plateformes du Parti Québécois*** (Ex. R-15) (extracts, in which are marked relevant passages); from the following are taken:
>
> **✱✱ ➡ 1969 Programme; Ex. R-15 at p. 5:**
> **"Le droit international ne reconnait pas, en principe, le droit de sécession des états fédérés, mais il reconnait par ailleurs le droit d'autodétermination des peuples ...."** [emphasis added]
>
> **...**
>
> "**Si toute entente s'avérait impossible, le Québec devrait procéder unilatéralement".**

➡The **acknowledgment in this first** of the two sentences that **international law does not** recognize a right of **secession** of **members of a federation**

➡is **<u>juxtaposed</u>** here with the assertion that **international law *does***

recognize a right of **self-determination of peoples**
➡**which is assumed,-- contrary to the Secession Reference,-- to include a right of unilateral secession,**
➡**Unilateral secession is then included in the Programme**

➡**This juxtaposition in the 1969 Programme of (1) self-determination and (2) secession**
✱✱**ALSO explains the insistence reflected in the Parti Québécois Programmes for 1997 and 2001** ✱✱**that the entire population of Quebec consists of a single "people"**
➡**Congruent with provincial boundaries**
➡**therefore all bound by a referendum result**
➡**This clearly reveals the** ➡**strategy and** ➡**meaning of the contested sections of this Act, ss. 1 to 5 and 13, as well as the Preamble.**
➡**These clearly *reflect* and *implement* the Programme into law**

.
✱**From the Parti Québécois Programme of 1997**:

✱✱" Le **peuple québécois, composé de l'ensemble de ses citoyennes et ses citoyens**, est libre de décider lui-même de son statut et de son avenir..." **[Ex. R-15, p. 55]**

➡✱✱**and again 2001**: **[Ex. R.-15 p. 60]**

" Le **peuple québécois, composé de l'ensemble de ses citoyennes et citoyens**, est libre de décider lui-même de son statut et son avenir.

Further assertions of intention to secede unilaterally:
Parti québécois programmes, Ex. R.15; passages are marked:

✱✱✱✱➡ **1970 Programme**, Ex. R-15 at p. 7: Si toute entente s'avérait impossible, le Québec devrait procéder unilatéralement".

✱✱✱✱➡ **1973 Programme**, Ex. R-15, at p. 13 [emphasis sdded]:

> En conséquence, un gouvernement du Parti Québécois s'engage à:

1. Mettre immédiatement en branle le procesus d'accession à la souveraineté dès que celle-ci aura été proclamé en principe par I'Assamblée nationale - la passation des pouvoirs et Ie transfert de compétence pouvant s'échelonner sur quelques mois - en s'opposant à toute intervention fédérale **y compris sous forme de référendum comme étant contraire au droit des peuples à disposer d'eux-mêmes**

✱✱➡ **1975 Programme**, Ex. R-15, at p. 15:

En conséquence, un gouvernement du Parti Québécois s'engage à:

1. Mettre immédiatement en branle le processus d'accession à la souverainteté en proposant à l'Assemblée nationale, peu après son élection, une loi autorisant:

a) à exiger d'Ottawa le repatriement au Québec de tous les pouvoirs, à l'exception de ceux que les deux gouvernements, pour des fins d'association économique, voudront confier à des organismes communs;

•••

2. Dans le cas où il faudrait procéder unilatéralement, assumer méthodiquement l'exercice de tous les pouvoirs d'un Etat souverain, en assurant au préalable l'appui des Québécois par voie de référendum.

➡**1978 Programme**, Ex. R-15, at p. 19:

En conséquence, un gouvernement du Parti Québécois s'engage à:

1. S'assurer, par voie de référendum, et au moment qu'il jugera opportun, à l'intérieur d'un premier mandat, l'appui des Québécois sur la souveraineté du Québec

2. Mettre en branle le processus d'accession à la souverainteté en proposant à l'Assemblée nationale, une loi autorisant:

a) à exiger d'Ottawa le repatriement au Québec de tous les pouvoirs, à l'exception de ceux que les deux gouvernements, pour des fins d'association économique, voudront confier à des organismes communs.

•••

3. Assumer méthodiquement l'exercice de tous les pouvoirs d'un Etat

souverain, dans le cas où il faudrait procéder unilatéralement.

➡ **Programme 1980**, Ex. R-15, p. 25:

. En conséquence, un gouvernement du Parti Québécois s'engage à:

1. Exiger, dès que les Québécois lui en auront donné mandat par voie de référendum, le repatriement au Québec de tous les pouvoirs inhérents à un pouvoir souverain et proposer au Canada de réaliser avec lui une association des états souverains devant succéder aux arrangements constitutionnels actuels.

•••

4. Demander aux citoyens du Québec, dans l'éventualité où il paraîtra impossible d'en arriver à une entente satisfaisante avec le Canada, le mandat d'exercer sans partage les pouvoirs d'un Etate souverain.

➡ **Programme 1982**, Ex. R-15, p. 29:

1. Que les prochaines élections générales portent principalement sur la souveraineté du Québec.

2. Que l'accession du Québec à la souveraineé se fasse avec l'accord majoritaire des citoyens et des citoyennes. Qu'en conséquence, dès que les Québécoises et les Québécois lui en auront donné le mandat, le gouvernement mette en marche le processus politique et juridique devant permettre l'accession du Québec à la souveraineté et qu'en même temps, sans cependant qu'il y ait un lien nécessaire entre les deux opérations, il

offre au Canada de constituer avec lui une association économique basée sur la souveraineté et l'égalité des partenaires.

3. Que le gouvernement voie à obtenir la reconnaissance des autres Etats et qu'il demande admission du Québec aux Nations Unies.

➡ **Programme 1984-85**, Ex. R-15, p. 33

2. L'accession du Québec à la souveraineté se fera par des voies démocratiques, avec l'accord majoritaire des citoyens et des citoyennes. Ce faisant, l'État québécois se dotera de tous les pouvoirs et instruments dont sont pourvu les États modernes, ce qui comprendra en particulier ...

> 3. Dès qu'il aura reçu le mandat, le gouvernement mettra en marche le processus politique et juridique de l'accession du Québec à la souveraineté. En même temps, sans qu'il y ait un lien nécessaire entre les deux opérations, il offrira au Canada de constituer avec lui une association économique, établie par un traité international fondé sur la souveraineté et l'égalité des partenaires. ...
>
> 5. Le Québec réaffirmera ses droits inaliénables sur son territoire, notamment le Labrador et les îles du littoral du Nouveau-Québec, le plateau continental, la limite côtière de trois cents kilomètres, de même que la portion québécoise de l'actuelle région de la Capitale fédérale. Il réclamera la possession des îles et des terres arctiques actuellement canadiennes qui lui reviennent au même titre que les autres pays nordiques. À défaut d'accord à ce sujet, il posera des gestes d'occupation juridique et portera la cause devant la Cour internationale de justice.

➡ **Programme 1989**, Ex. R-15, p. 43

> Dès qu'il sera élu, un gouvernement issu du Parti québécois aura la responsabilité de déclencher le processus devant mener à la souveraineté. Ce processus passera d'abord par la voie de la négociation avec le gouvernement fédéral. Il peut aussi passer par l'utilisation d'autre moyens démocratiques et consultations populaires portant sur des pouvoirs spécifiques.
>
> > Au terme de ce processus la Constitution de l'État du Québec, qui incluera une déclaration de souveraineté et constituera l'acte de naissance d'un Québec souverain, devra être adoptée par la majorité de la population.

➡**Programme 1994**, Ex. R-15, p. 51

Dans les meilleurs délais, le gouvernement demandera à la population de se prononcer, par voie de référendum sur la souveraineté du Québec et sur les dispositions d'ordre constitutionnel permettant au Québec d'exercer sa souveraineté.

Le référendum sera l'acte de naissance du Québec souverain.

✱✱✱✱➡ **Programme 1997**, Ex. R-15, p. 55

Le peuple québécois, composé de l'ensemble de ses citoyennes et ses citoyens,

est libre de décider lui-même de son statut et de son avenir....

P. 58:

Par voie de référendum, le peuple québécois sera appelé à se prononcer sur la souveraineté du Québec et sur le dépôt d'un offre de partenariat avec le Canada. Advenant une réponse favorable, l'Assemblée nationale aura, d'une part, le mandat de proclamer la souveraineté du Québec et le gouvernement du Québec sera tenu, d'autre part, d'offrir au Canada un nouveau partenariat économique et politique.

La proclamation de la souveraineté sera faite dès que le traité de Partenariat aura été approuvé par l'Assemblée nationale ou dès que cette dernière aura constaté que les négociations sont infructueueses. Ces négociations ne dureront pas plus d'un an, sauf si l'Assemblée nationale en décide autrement.

➡**Programme 2001**, Ex, R-15, p. 60

Le peuple québécois, composé de l'ensemble des citoyennes et citoyens, est libre de décider lui-même de son statut et son avenir. Le parti québécois s'est formé à partir de la conviction qu'il y a urgence d'établir un Québec souverain avec, au premier plan, l'urgence d'assurer que le Québec demeure un territoire de langue et de culture françaises. Cela est du coeur du projet souverainiste.

Le Parti Québécois a comme objet fondamental de réaliser la souveraineté de façon démocratique. Au moment jugé opportun, le gouvernement du Québec soumettra donc à la population un projet de faire du Québec un pays souverain et de présenter au Canada une offre de partenariat.

At p. 65:

C'est par la volonté du peuple exprimé de façon démocratique que se fera la souveraineté du Québec. Les étapes du processus d'accès à la souveraineté sont la tenue d'un référendum, la négociation d'un traité de partnenariat et la proclamation de la souveraineté par L'Assemblée nationale. Par voie de référendum, dans des conditions fixées par l'Assemblée nationale, le peuple québécois sera appelé à se pronocer sur la souveraineté du Québec et sur le dépôt d'un offre de partenariat avec le Canada. Advenant une réponse favorable atteignant le seuil démocratique universellement reconnu, de 50% plus 1, l'Assemblée nationale aura d'une part le mandat de proclamer la souveraineté du Québec et le gouvernement du Québec sera tenu, d'autre part, d'offrir au Canada un nouveau partenariat économique et politique, en s'inspirant notamment du

modèle de l'Union européenne.

➡ **Programme 2005**, R-15, p. 80:

Le vote des citoyennes et des citoyens en faveur de la souveraineté politique du Québec amenera l'Assemblée nationale à déclarer la souveraineté du Québec et à donner des effets immédiats à celle-ci en posant des gestes de souveraineté nationale et internationale.

➡**Le Plan Marois [not dated]**, R-15, p. 83:
Il y a trois engagements fondamentaux que le Parti Québécois est le seule à pouvoir prendre:

... Nous ne renoncera jamais au droit absolu et inaliénable du peuple québécois à décider librement de son destin, à son droit d'accéder à la souveraineté politique au moment où il le choisira démocratiquement.

➡ **Programme 2011**, R-15, p. 87: (unilateral action is not restated)

Aspirant à la liberté politique, le Parti Québécois a pour objectif premier de réaliser la souveraineté du Québec à la suite d'une consultation de la population par référendum tenu au moment jugé approprié par le gouvernement.

➡**How then must section 1 be at least (1) *limited <u>in its operation</u>* or *possibly* (2) textually revised by the Court? IF IT IS TO SURVIVE AT ALL** Section 1 **must at all events be limited *<u>in operation</u>*** (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*.**

There are various possible ways of achieving *textual* conformity:

➡**(1) Section 1 to be *<u>textually</u>* compliant would *at minimum* require one emendation**: inserting, after "self-determination" where it first occurs, **the phrase "within Canada and consistently with its Constitution"**. But the **rules regarding severance would only permit this phrase (or any other text) to be actually read into the Act *if the Court can be confident that the Legislature would have accepted it in place of its own*. Surely it would not accept it; if so s. 1 is null and void entirely.**

➡**(2) *<u>If</u>* this Court wished also to settle the so-called "peoples" question, left open by the Supreme Court, it could (were it of that opinion) decide that Quebec, because of its heterogeneity, comprehends *a number of distinct "peoples"*. Then 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". *Doing so is purely a matter of this Court's preference.*

➡ **(3)** Or simply, ***leaving open the "people" question entirely, if the Court agreed that this is correct, approve and state*** the following: (see Reply Factum, para. 5) or above, (Notes, head **V.** "How a constitutionally-conforming text would read"):

> **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**.

➡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** and below **Notes 18.**) .This being so, it is ultra vires, null, and void.

***The peoples "question" – one or many,– was left open by the Supreme Court in the Sec. Ref* .[TAB I:11]** 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**

Petitioner respectfully submits on the "people" issue:

> **➡1**. In these proceedings, too, as in the *Secession Reference*, it **appears unnecessary to decide the question whether Quebec has one or mny peoples,** because **Quebec's powers can be exercised by its electorate and institutions *only*** if that is done **consistently with the Constitution of Canada.**
>
> **➡2**.Petitioner simply submits that **any rights of "self-determination" given by international law to any one ethno-linguistic population of Quebec must exist**, s***eparately and equally, for all other*** distinctive ethno-linguistic populations within Quebec.
>
> **➡3. Petitioner respectfully rejects the attempt in the Act to present the heterogeneous population of Quebec as a single, monolithic, civic "people" identified with the French-speaking majority and all bound to accept decisions of legislative or of referendum majorities *even on matters beyond the existing constitutional powers of the Province*. ➡The Supreme Court having left the question open, the Province cannot foreclose it in the Act and make it the foundation of a power of unilateral constitutional change.**

Supreme Court appears to acknowledge Quebec's heterogeneity (**emphasis added**):

***Reference re Secession*, [TAB I:11], [1998] 2 S.C.R. 217 at pp. 281-2, paras. 124 and 125; and at p. 287, para. 138. At para. 125:**

> 125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", **as do other groups within Quebec and/or Canada**, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

Aboriginal nations are constitutionally recognized as distinct peoples:

➡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 does nit seem possible to defend constitutionally the concepts of a single, monolithic, "Quebec people" or "Quebec nation", even if the Supreme Court has formally left the issue open:**

➡ 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.

➡ The **Supreme Court certainly *refers to*, and also appears to *treat*, indigenous peoples as distinct "peoples" in connection with secession**, whether secession be attempted unilaterally or by constitutional means: ***Reference Re Secession*, [1998] 2 S.C.R. at pp. 287-88, para. 139 [TAB I:11]. [Emphasis added to four references]**

> 139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the **rights and concerns of aboriginal peoples** in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by **aboriginal peoples.** However, the concern of **aboriginal peoples** is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution

to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the **aboriginal peoples** in this Reference.

➡***The "people issue" is left open in our draft of a constitutionally-conforming section 1, though in our submision Quebec is indeed 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.***

➡Accordingly, a constitutionally conforming text could read:

> **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.

➡And in any case we submit that this correctly states the true constitutional position.

9.9 *Objections to Section 2 (corresponds to Factum para. 4(ii))*

SECTION 2 OF THE ACT:

In our submission, **a constitutionally-conforming text** of section 2 would read:

> **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.

➡**Section 2 of the Act, 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 under the Constitution of Canada**:

➡**<u>As regards s. 2, we rely on our general submissions on ss. 52, 41(e) and 45 of the ConstitutionAct, 1982, and the relevant judicial decisions cited.</u>**

The various relevant authorities are listed in <u>para. 4(ii) (page 3) of our prtincipal Factum</u>:

> *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); uoted above , Trial Notes Para 4.5; Factum, para. 13.**[TAB I:12**]
>
> *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 Factum; quoted

above Trial Notes para 4.6. **[TAB I:8]**

As applied to proposals for secession, see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [TAB I:11], 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.

In addition to the authorities cited earlier, we offer the following submissions.

As the Supreme Court makes clear:

➡***The Constitution is not silent*** on how to accomplish **lawfully** basic constitutional changes which might be **unlawfull**y 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, clearly seek to authorize and justify**.
➡A **constitutional amendment can be initiated under s. 46(1) and enacted under the appropriate section of Part V.**

Far from silence. For example, *the* ***Constitution is not silent****, specifically, as to secession,* ***even though secession is not addressed as such*** and the word does not appear in Constitutional texts.. **The Supreme Court makes this clear in the passages quoted below from the *Secession Reference [emphasis added]*:**

***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, esp. pp. 263-64 (para. 84)[TAB I:11];**

➡

84 **The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation**. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an

amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, **although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements**. **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.**

***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, p. 270 (para. 97):**

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

➡**Of the amending procedures, only s. 38 ("7/50" formula) and s. 41 (unanimous consent formula) appear to be relevant for the purpose. Given what is decided in *Reference re Senate Reform*, [2014] 1 S.C.R. 704 [TAB I:120, as regards abolition of the Senate, section 41 would seem to be the necessary amending procedure.**

The Court concludes:

***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, p. 274, para 104:**

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. **Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order.**

➡**The present Attorney-General for Quebec in her Mémoire paints a picture of this Act as constitutionally innocent. But when moving Bill 99 through the Assembly, Minister Facal *consistently rejected* the Supreme Court's judgment,– and *refused in the text of Bill 99 to require compliance with* that Court's judgment, which, *as Minister Facal acknowledges*, requires a national constitutional amendment for secession: Ex. R-6, at p. 6193, May 23, 2000:**

... être pour l'avis de la Cour suprême au complet, c'est être pour une formule d'amendement qui dit: Si les Québécois veulent changer de statut constitutionnel, il faut qui'ils aient la permission de toutes les Législatures provinciales du Canada et du gouvernement fédéral. Alors, ça vaut quoi, dire qu'on est pour le droit des

> Québécois à décider, si en même temps on reconnait au Parlement de l'Île-du-Prince-Édouard, 120,000 habitants,– hier, j'ai dit "200,000", c'est une erreur, ils sont encore moins nombreux – le droit de bloquer le choix des Québécois?

Again, on December 7th, 2000, **Ex. R-8, p. 8581** (**excerpted**), Minister Facal:

> .... L'opposition officielle ... invite le gouvernement à accepter sans réserve l'avis de la Cour suprême du Canada, alors que cet avis aurais 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, sans son consentement, par cette même Loi constitutionnelle de 1982.

➡The Act by its terms authorizes constitutional change in flagrant disregard of the requirements of the *Constitution Act, 1982,* for constitutional change in Quebec.
➡It was drafted quite explicitly to do exactly that, *and the Minister admits it.*

9.10 *Objections to Section 3 (corresponds to Factum para. 4(iii))*

SECTION 3 OF THE ACT

In our sunbmission, **a constitutionally-conforming text** of s. 3 would

> **➡state the right of constitutional change *by constitutional means*,**
> **➡acknowledge the Assembly's right to *propose* amendments under s. 46(1) of the 1982 Act and to *consult* the electorate, and**
> **➡*respect all* relevant federal powers**:
>
> 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 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.

Section 3 is invalid in its entirety whether considered alone or read in conjunction with section 2: **BECAUSE**

➡ FIRST, Section 3 , like section 2, <u>asserts the existence of unilateral powers of</u>

constitutional change which neither the electorate of Quebec nor its institutions possess: see auhorities cited in **Trial Notes para. 9.9 and Factum, 4 (ii)) and 4 (iii)**; **IN PARTICULAR**

> ✱✱➡**Section 3 exceeds the powers *conferred by s. 45 of the C.A., 1982* in attributing unrestricted powers of direct constitutional change both to *the Legislature and to referendums***.

✱**BY CONTRAST *Secession Reference*, [1997] 2 S.C.R. at 265 (para. 87) page 265 [TAB I:12]** holds that ***referendums are consultative only***:

> [87] **Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.** The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. **Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.**

✱✱➡**SECONDLY** Moreover s. 3 is **also invalid for infringing federal powers to consult the population of Quebec.**

Defining or removing federal authority are beyond any province's powers of constitutional amendment.

➡ But **section 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,

(b) *but even to deny* that authority outright. (P.Q. Programme 1973. Ex. R-15, p. 13 quoted below

✱➡Section 3 is a denial **➡either of a right to consult the people of Quebec *at all*** or, ***at minimum***,
➡ to consult them *in a relevant and meaningful way*, –
with respect to the political régime and legal status of Quebec.

This meaning of section 3 of Act is clearly shown in

➡ **1973 Programme of the Parti Québécois**, Ex. R-15, at p. 13: [emphasis added]

> En conséquence, un gouvernement du Parti Québécois s'engage à:
>
> 1. Mettre immédiatement en branle le procesus d'accession à la souveraineté dès que celle-ci aura été proclamé en principe par I'Assamblée nationale - la passation des pouvoirs et Ie transfert de compétence pouvant s'échelonner sur quelques mols - **en s'opposant à toute intervention fédérale y compris sous forme de référendum comme étant contraire au drolt des peuples à disposer d'eux-mêmes.**

See authorities cited above Trial Notes para 5.6, or Factum para.4 (iii).

✱On federal consultation, see *Referendum Act* of Canada, S.C. 1992, c. 30, as amended, s. 3; esp. s. 3(1): [emphasis added]

> Proclamation of referendum
>
> 3 (1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the **electors of Canada or of one or more provinces specified in the proclamation** at a referendum called for that purpose.....

In *Haig* v. *Chief Electoral Officer* and *A.-G. Canada*, [1993] 2 S.C.R. 995, esp. p. 1030 [TAB I: 5] the Supreme Court affirmed the right of the Government of Canada to hold federal referenda and to include Quebec if it chose to do so. Only Charter issues were involved,– in respect of citizens excluded from the federal referendum, especially if also excluded from a concurrent provincial referendum.

The validity of the Act is assumed throughout by the Supreme Court; it follows that ➡➡ Parliament can authorize what referenda it pleases.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ. was delivered by L'Heureux-Dubé. At p. 1030:

... There were two referenda held on October 26, 1992, both, it is true, concerning the Charlottetown Accord, but pursuant to separate and distinct legislative schemes. Though the federal government may well have taken note of the results of the Quebec referendum, it would be unfounded in law to suggest that the federal government "allowed" Quebec to administer part of what was really a "national" referendum. Quebec did not need the authorization of the federal government to hold its referendum, and the Quebec referendum legislation was not within federal control or authority. **Had the federal government wished to hold a "national" referendum, it could have included Quebec in the proclamation. Though it had every right to do so, it chose not to, as it also had the right to do. ...** [Emphasis added.]

✱✱➡**THIRDLY** And **s 3 is invalid also**

➡ because s. 3, like s. 2, **denies the authority of the Parliament and Government of Canada**

➡to uphold and defend the Constitution and Government of Canada against <u>the ultimate attack on the rule of law– the overthrow of the state</u>

➡And, in so doing, to reject, to resist, and to repel attempts at **unlawful,– in other words revolutionary,– constitutional change.**

➡either mounted *directly* by the institutions or electorate of Quebec,
➡or *indirectly*,– carrying out their measures or decisions.

✱✱✱exactly as the 1995 Referendum, and Referendum Bill, attempted to do (*Loi sur l'avenir du Québec*, Ex. R-14, Tab 21)

✱✱✱Denial of such federal authority is the clear meaning of s. 3

✱✱because **section 3 asserts that the Quebec people "shall determine "*alone*"** (emphasis added) **how Quebec's political régime and legal status shall be chosen**,– ***<u>as was attempted in 1995.</u>***

✱✱The purport of s. 3 is that the Quebec people *<u>can also carry out</u>* any such changes by themselves and *this is made even cleaer in s. 13.*

A <u>false cloak of legality</u> is thus thrown by s.3 over even measures which would overthrow the Canadian state.

✱✱Canada is a "real country" and a real country, or sovereign state, has a right to defend its existence.

➡A revolutionary régime would demand that ➡all public officers, ➡*including all judges in all courts*, ➡the amed forces, ➡abandon the Canaduan state, and ➡join or submit to the revolutionary state.

What then are "unlawful changes"? *Any* changes *whatsoever* by Quebec's institutions or electorate would be "unlawful" if these were planned or attempted in excess of their lawful powers under the Constitution of Canada.

✱✱Federal powers to defend the existence of the Canadian <u>state cannot be defined, denied, or removed by any province</u>: C.A. 1982 ss. 52, 45, and 41 (e):✱

> **Defensive federal powers which ss. 2, 3 and 13 attempt to deny or nullify**, include those upheld in ***Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co.*,** [1923] A.C. 695 (P.C) **[TAB I: 3]** (**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 [TAB I:4]**(**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 a**nywhere** in Canada by revolutionary means, and the ***implementation of most, or even all, 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 **[TAB I:11**] at pp. 284 ff.

➡But as the Supreme Court holds (pp. 286-87), **these conditions do not apply to Quebec.**

✱✱✱We should all hope that it may never be necessary to

exercise constitutional powers to defend the Canadian Constitution and the Canadian state against revolutionary acts.

*****But since the Legislature here rejects the existence of these powers, Petitioner must reassert them resolutely.**

9.11 ***Objections to s. 4 of the Act (corresponds to Factum, para. 4(iv).***

SECTION 4 OF THE ACT:

We submit that a constitutionally-conforming text would read as follows:

> 4. The result of a referendum of the electorate of Quebec as to matters within the authority of the Province, including proposals to amend the Constitution of Canada, is determined by the majority of the votes cast; that is to say 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.

Section 4 as it now exists is **generally innocuous outside the context of this Act.**

But when read with sections 1, 2, 3. 5 and 13, **section 4 purports to allow constitutional changes of every kind, including secession in particular**, **attempted <u>not only unilaterally</u>, but also <u>on the decision of a simple majority of the electorate of Quebec</u>**.

Section 4 is therefore <u>invalid when taken in conjunction with</u>, – and <u>insofar as it operates with</u>, – any one or more of those sections.

Accordingly, it would **<u>suffice for present purposes to declare s.4 to be invalid insofar as it operates in conjunction with any one or more of sections 1. 2, 3, 5, and 13.</u>**

9.12. ***Objections to s.5 of the Act (corrsponds to Factum, para. 4(v)***

SECTION 5 OF THE ACT

We submit that a constitutionally-conforming text of section 5 would read as follows:

> 5. The governmental institutions of Quebec derive their authority from the

> Constitution of Canada and their legitimacy from the legitimacy of that Constitution.

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 basis of Quebec's institutions***.

This intention is clear ➡first from its ***text***, **introducing direct or popular sovereignty ➡next** from its ***history*** as reflected in the National Assembly speeches on Bill 99, and the Programmes of the Parti Québécois claiming powers of unilateral secession

> (see citations above Trial Notes paras. 9.8.3 to 9.8.7and in Petitioner's Factum, para. 2 and esp. para. 19)

➡and **thirdly** from its ***context with sections 2, 3, and 13***.

In effect, **the section means that if the Quebec electorate rejects the Constitution of Canada, ➡➡its *legitimacy* AND *its authority* BOTH disappear and ➡➡ no longer apply to Quebec. Under s. 5, the Quebec electorate is made sovereign.**

➡ This is **not an innocent provision**. **There are four reasons why it is invalid.**

➡ **(1) *Firs*t,** It **seeks to introduce republican principles**, as is shown by the Quebec Attorney-General's expert evidence on the German and U.S. Constitutions

➡That is inconsistent with **ss. 56 and 90 of the C.A. 1867 and s. 41(a) of the C.A. 1982**

There can be absolutely no law in Canada without royal assent

➡(2) *Second*, The subject-matter of s. 5 is in any event *not "the Constitution of the Province" as defined by the Supreme Court of Canada* and therefore is *far beyond any power of constitutional amendment conferred by s. 45* of the 1982 Act,

> ➡ ***Re Initiative and Referendum Act*** [1919] A.C. 935 (P.C.) **[TAB I:7]** at 943
> **(➡A province cannot abrogate any power of a representative of the Crown)**

> ➡***Reference re Senate Reform*, [2014] 1 S.C.R.704 (at para. 48) [TAB I:12]:**
> ... 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.**

➡ ***Ontario Public Service Employees' Union* v. *Attorney General for Ontario*, [1987] 2 S.C.R. 2 at p. 40 [TAB I:8] (per Beetz J. for a majority):**

> ...To sum up, therefore, and subject to the caveat I will mention later, an enactment can generally be considered as an amendment of the constitution of a province when it bears on 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, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant Governor and, presumably and a fortiori, the office of the Queen who is represented by the Lieutenant Governor....

and at **[1987] 2 S.C.R. 2 at p. 47** , referring to the obiter dictum in *Re Initiative and Referendum Act*. [1919] A.C. 935 (P.C.) [TAB I:7]:

> ... While this obiter is confined to the particular facts of that case, it may stand for the wider proposition 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 political institutions foreign to and incompatible with the Canadian system**.

➡ **(3) *Third,* S. 5 also violates s. 41(e) of the C.A. 1982 by attributing general constituent power to the Quebec electorate and Legislature**. **But under 41(e) the Province *cannot* amend the constitutional-amenment process.** The **second and third paragraphs** of s. 5 are **merely incidental to the first paragraph**.

➡**(4) *Fourth*** Section 5, **by rejecting the Constitution of Canada as the basis of Quebec's institutions,** 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 **[TAB I:8]**; *Reference re Senate*, [2014] 1 S.C.R. 704 at 734 **[TAB I:11]**.

9.13. Objections to s.13 of the Act (corrsponds to Factum, para. 4(vi))

SECTION 13 OF THE ACT

We submit that a constitutionally-conforming text of s. 13 would read:

> **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.

✱✱Section 13 is invalid as ➡***exceeding the powers conferred by C.A. 1982, s. 45***,** ➡***infringing s. 52, and*** ➡***also infringing s. 41(e)***:

➡**FIRST read in context** with the other sections,– **especially s. 3,which specifies referendums, – section 13 clearly rejects federal authority to consult the Quebec** electorate **as a "constraint on the democratic will of the Québec people to determine its own future"**;

> see authorities cited above in connection with s. 3 of the Act **(Trial Notes para. 9.10** above; corresponds to **Factum para. 4(iii)**);
>
> **1973 Parti Québécois Programme**, Ex. R-15, at p. 13:
>
> > En conséquence, un gouvernement du Parti Québécois s'engage à:
> >
> > 1. Mettre immédiatement en branle le procesus d'accession à la souveraineté dès que celle-ci aura été proclamé en principe par I'Assamblée nationale - la passation des pouvoirs et Ie transfert de compétence pouvant s'échelonner sur quelques mols - **en s'opposant à toute intervention fédérale y compris sous forme de référendum comme étant contraire au drolt des peuples à disposer d'eux-mêmes**

and it is **also invalid**

➡**SECONDLY** 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 any unlawful attempts at constitutional change, by the institutions or electorate of Quebec*****, if and when they may be planned or attempted;** ➡**such defence of the Constitution clearly being conidered a "constraint on the democratic will of the Québec people to determine its own future";**

see authorities cited in **Trial Notes para.9.10above**; corresponds to **Factum 4. (iii)**;

and it is also invalid

➡ **THIRDLY** 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 authorities cited in **Trial Notes para 9.10 above** ; corresponds to **Factum 4. (iii).**

PETITIONER RESPECTFULLY COMMENDS PARAGRAPHS 10 THROUGH 16 OF HIS FACTUM AND OF THESE NOTES TO THE COURT AND WILL NOT ADDRESS THEM NOW UNLESS THE COURT HAS QUESTIONS

17. ***Infringement of Charter Rights.*** The **conclusions numbered (2)** reproduced above in Trial Notes para. 1 and 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 [TABI:2]**.

➡Though it had ***neither*** *been* ***(1) passed nor (2) assented to, nor (3) approved in a referendum***, the Bill (Bill No. 1, 35th Leg're, 1st Sess.), *An Act respecting the future of Québec / Loi sur l'avenir du Québec* (Ex R-14 Tab 21), which was to be, and which was, submitted to the October 30th, 1995 referendum, **was nevertheless held by Lesage, J. to be a grave threat,– "une menace grave",– to Petitioner's rights,** under the *Canadian Charter of Rights and Freedoms*. **As the judgment was interlocutory, not final, and nothing had been enacted, there was no basis for a declaration of nullity**.

➡This was a threat because Bill No. 1 would **wipe away that** ***Charter*** **and the rights and freedoms which it confers, – notably rights flowing from Canadian citizenship**, and fundamental freedoms. That other rights might be substituted is of no help.
➡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**.

➡In the present case **the threat is both more muted and less immediate than with the 1995 Referendum Bill, but it is still real**.

More muted **in that S.Q. 2000, c. 46, declares a** ***right to*** **unilateral sovereignty rather than (like Projet de Loi No. 1)** ***sovereignty itself*****.**

Less immediate **in that unilateral sovereignty is not (as with Projet de Loi No. 1) effective as soon as specified conditions,** ***already set in motion*****, are satisfied.**

Our conclusion (2) speaks of "infringement and denial" rather than "threat". The statute in effect says that the Constitution and with it the Charter ***will remain in force so long as, but no longer than, the Legislature or electorate wishes*****. ➡The Act therefore makes the Charter and Charter rights** ***contingent on their will.***

➡This we submit is ***at very least an infringement***, and ***also a denial***, of ***Charter rights which are unconditional and cannot be made conditional by the Province..***

What the Legislature could not enact directly, it cannot (1) authorize in advance**, nor (2) declare its power to authorize,– as the Legislature seeks,– very clearly,– to do on the face of these contested provisions**.

There is **no mistake about what the contested provisions intend to authorize or declare power to accomplish**.

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* [Factum para. 18; Authorities in Factum App. II]

The Attorney-General for Canada has raised the possibility of severance,– specifically, "reading down", the text of the Act to achieve conformity with the

Constitution.

Severance of constitutionally-invalid subject-matter can in principle be achieved

(1) by *excision of* ***specifed text ("textual severance")*** or

(2) by *excision of* ***specified subject-matter*** **(so-called "reading down" or "substantial severance"✱✱)**,
– 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 of his principal Factum.

Petitioner's counsel has respectfully requested 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. No such objection has been received.

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 by the Court to any of ss. 1, 2, 3, 4, 5 and 13, in order to bring them within constitutional limits, depends upon the application of the rules regarding severance (including so-called "reading down" or "reading in"), summarized in the set of propositions formulated above (para 18).

Petitioner gladly offers a revised text of the ***subject-matter*** of the contested provisions which (he submits) conforms to the Constitution (**Notes, V**.). The Court can at least decide whether the propositions in this text are accurate as a matter of law.

The question then is whether the rules governing severance permit the Courts to impose them on the Legislature and substitute them in this Act.

Petitioner regrets that the governing rules do not appear to permit imposition of this or any other constitutionally-conforming text on the Legislature in substitution for the existing provisions of S.Q. 2000, c, 46.

Suppose that the contested sections can, **hypothetically,** ***as a matter of drafting***, – if only that were in issue, – be textually revised to achieve constitutional conformity. ***One immediately encounters the rule against making impermissible choices amongst possible texts***.

Major surgery would be required at very least, and, in the circumstances, especial care and clarity in framing the text to be substituted and imposed on the Legislature.

It is not 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. Is our constitutionally-conforming draft the only possibe one? The rules require remedial precision, rather than choice amongst competitors.

It seems, *at most*, practicable that the emendations could avoid impermissible judicial choices *as to the **way in which** the reworded texts were **expressed,– in other words, stylistic choices***.

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.**

On the contrary, ***any* narrowing or dilution are (1) inconsistent with their (i.e., the contested provisions') ➡history in the Debates on this Act and ➡in predecessor programmes, ➡proposals and ➡measures** (sometimes outside Quebec):

Exhibit R-5, Journal des débats, Assemblée nationale,, 3 mai 2000

Exhibit R-6, Journal des débats, Assemblée nationale, 25 mai 2000

Exhibit R-7, Journal des débats, Assemblée nationale, 30 mai 2000

Exhibit R-8, Journal des débats, Assemblée nationale, 7 décembre 2000

Exhibit R-11, Factum of Interveners Singh et al. In *Reference re Secession*; **Appendices**, showing

➡Order in Council for the Referendum of 30 October 1995 and Votes and Proceedings/Procès Verbaux of the Assemblée nationale (20 September 1995), reproducing the resolution framing and ordering the referendum question

➡Votes and Proceedings/Procès-Verbaux of the Assemblée nationale, Ex. R-11 (App.), resolution of the National Assembly on motion of M. Lucien Bouchard, Prime Minister of Quebec (22 May 1996); passed 22 May 1996:

> **QUE l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut**

politique et d'assurer son développement économique, social et culturel.

THAT the National Assembly reaffirm that the people of Québec are free to take charge of their own destiny, to define without interference their political status and to ensure their economic, social and cultural development.

, Exhibit R-13. Journal des débats de la Commission permanente des institutions. Assemblée nationale, 20 mars 2000

Exhibit R-14, Material filed by the Attorney-General for Canada in *Reference Re Secession*, 5 vols., esp. Vol 1 Tab 1, Avant projet de Loi, *Loi sur la souveraineté du Québec* (submitted to referendum of October 30th. 1995)

Exhibit R-15 *Programmes et Plateformes du Parti québécois* (portions indicated on the texts).

Exhibit R-16, House of Commons Bill C-341, 2nd Sess. 35th Parl., *An Act to establish the terms and conditions that must apply to a referendum relation to the separation of Quebec from Canada before it may be recognizaed as a proper expression of the will of the people of Quebec* (October 30, 1996) (Private Member's Bill, Mr. Stephen Harper.

Exhibit R-17, House of Commons Bill C457, *An Act to repeal the Clarity Act,* 1st Sess. 41st Parl., (2011-12), Private Member's Bill, M. André Bellavance (B.Q.)

Exhibit R-18. House of Commons Bill C-470,1st Sess. 41st Parl., Jan. 28, 2013, *An Act respecting democratic constitutional change*; Private Member's Bill of Mr. Craig Scott (N.D.P.). Essentially supoortive of a right to unilateral secession.

Exhbits R-19, R-20,and R-21 (together): R-19: National Assembly Bill 194, *An Act to recognize the of the people of Quebec to self-determination* 3rd Session, 31st Legislature of Quebec, June 22, 1978 (Private Member's Bill; M. Fabien Roy). English and French versions. R-20:related Journal des débats; R-21: related Procès-verbal/Votes and Proceedings. Bill asserts in substance a right of unilateral secession.

R-22. R-23 and R-24 (together): R-22: National Assembly Bill 191, *An Act to recognize the right to self-determination of the people of Quebec to self-determination*, 5th Session 32nd Legislature of Quebec (Private Member's Bill: M. Gilbert Paquette) (English and french versions. R-23: related proceedings in Journal des débats. R-24: Related procedings in Procès-Verbal/Votes and Proceedings. Bill asserts in substance a right of unilateral secession.

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

Various of the Exhibits just cited, particularly:

Resolution 22 May 1996 (in Exhibit R-11) **(copied above, page 63)**

and

Exhibit R-25, Resolution of the National Assembly, October 23rd, 2013.

QUE l'Assemblée nationale du Québec réaffirme et proclame unanimement les principes fondamentaux formulés dans la Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec;

QUE l'Assemblée nationale réaffirme que les Québécois et les Québécoises ont le droit de choisir leur avenir et de décider eux-mêmes de leur statut politique;

QUE l'Assemblée nationale réaffirme que lorsque les Québécois et Québécoises sont consultés par référendum tenu en vertu de la Loi sur la consultation populaire, la règle démocratique alors applicable est celle de la majorité absolue, soit 50 % des votes déclarés valides plus un vote;

QUE l'Assemblée nationale réaffirme que seule l'Assemblée nationale du Québec a le pouvoir et la capacité de fixer les conditions et modalités entourant la tenue d'un référendum conformément à la Loi sur la consultation populaire, y compris le libellé de la question référendaire;

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

QUE l'Assemblée nationale condamne l'intrusion du gouvernement du Canada dans la démocratie québécoise par sa volonté de faire invalider les dispositions contestées de la Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec;

QUE l'Assemblée nationale réclame que le gouvernement du Canada s'abstienne d'intervenir et de contester la Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec devant la Cour supérieure du Québec.

And in English:

THAT the National Assembly of Québec reaffirm and unanimously proclaim the fundamental principles set forth in the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*;

THAT the National Assembly reaffirm that Quebecers have the right to decide their future and to determine their political status;

THAT the National Assembly reaffirm that when Quebecers are consulted by way of a referendum under the *Referendum Act*, the applicable democratic rule is that of absolute majority, namely 50 % of the valid votes cast plus one;

THAT the National Assembly reaffirm that the National Assembly of Québec alone has the power and capacity to establish the terms and conditions for the holding of a referendum in accordance with the *Referendum Act*, including the wording of the referendum question;

THAT the National Assembly reaffirm that no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future;

THAT the National Assembly condemn the intrusion by the Government of Canada into Québec's democracy by seeking to invalidate the impugned provisions of the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*;

THAT the National Assembly call on the Government of Canada to refrain from intervening and challenging the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State* in the Superior Court of Québec.

Accordingly, ss. 1, 2, 3, 4, 5 and 13 ***cannot be "read down" or emended and are wholly invalid, because, as this makes clear, a constitutionally-confirming text would not be acceptable to the Legislature.***

Nor can the contested provisions simply be treated as if they were an *expression of opinion* contained in a *resolution* adopted *on motion*,– an option explicitly and repeatedly rejected from the start.

➡This course of action (a resolution of the Assembly) was ➡explicitly rejected from the outset by the Minister when moving the Bill for this Act (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. *See above, p. 5,*

> ***where the Minister is quoted. 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 [TAB I:14] (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 (we submit) 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).

> **"M. le Président, ce n'est pas compliqué. Des droits, notre peuple en a ou il n'en a pas. S'il en a, il ne faut pas qu'il craigne de les affirmer ou de leur faire franchir le test des tribunaux."**

And this was so, even though he was, and had been, fully warned **of the risks of proceeding by statute** (rather than by resolution), by jurists and others *sympathetic to his perspectives*: see quotations at pp. 6177-78 and elsewhere.

See generally Petitioner's Reply Factum (July 12, 2016), esp. paras, 7, 12.

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 in these Notes and through Petitioner's 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 Petitioner's Factum Appendix III.**

➡These propositions are found in Petitioner's Factum para. 20. ➡No objection to these rules or principles themselves has been received in response to our request for and objections, ➡though the Attorney-General of Quebec herself rejects the ***relevance*** of **at least some of *Petitioner's* extrinsic material while *herself* citing the Bill 99 debates**.

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 other extrinsic material as regards their use.

21. ***Prayer for judgment***. Petitioner humbly prays that judgment be given in accordance with the conclusions reproduced 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 respectfully submitted:

Montreal, February 25th , 2017.

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Stephen A, Scott,
Counsel to Petitioner