Henderson v. A.G. Quebec - Superior Court - Trial Notes - 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***

NOTES OF COUNSEL TO PETITIONER KEITH OWEN HENDERSON FOR TRIAL HEARING

NOTES OF PETITIONER KEITH OWEN HENDERSON FOR TRIAL HEARING

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MAY IT PLEASE THE COURT:

I. INTRODUCTION

1. ***Surviving party and conclusions*.** After the judgment of the Court of Appeal of 30 August 2007 (in record 500-09-012698-023) there survive only the individual petitioner, Keith Owen Henderson, and only the following conclusions, as stated in Petitioner's Re-Amended Motion; the second one as edited by the Court of Appeal **[PARA [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; (p.2513) a "répudiation" of the Constitution and a "rupture" of the legal order.**
➡The 1995 judgment was interlocutory, not final, and there was no basis for a declaration of nullity *of a proposal*, Bill 1 *Loi sur l'avenir du Québec* (Ex. R-14 Tab 21), which indeed 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 null and void. ***SEE DETAIL IN TRIAL NOTES below para. 17.0***
➡The contested provisions render Charter rights no longer *absolute* but *conditional* on the will of Quebec's legislative institutions and electorate, at risk of being wiped away at their will, making C.A. 1982 s. 24(1) and 52)1) applicable. To make the Charter conditional is *at least* an infingement but is *also* a denial.
➡ 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 is cumulative with, and without prejudice, to (1).*

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

II. PETITIONER'S RIGHT TO SUBMIT HIS ARGUMENTS

2.1 ***Court of Appeal*** **[TAB I:6]** ***holds Petitioner's grounds appropriate as basis for the surviving conclusions*** The Attorney-General for Quebec, as appears in her *Mémoire* of 16 May 2016,– ***Mémoire***, **Para. 14**, **63, 64,65, 69,70**)– disputes Petitioner's right to make some or all of the arguments offered in our Factum of March 2nd, 2016 even as we offer them ***in support of our surviving conclusions***.

➡Alleging them to be impermissible at least insofar as Petitioner asserts in argument that there can be no **constitutional change of any kind in Quebec or elsewhere in Canada, except in conformity with s. 52(1) and 52(3) and Part V of the *Constitution Act, 1982***,
➡and **by inference also allegedly impermissible insofar as Petitioner invokes these against the validity of the substance, or content**, of **(i.e., the statements made in) the contested provisions**

The Court of Appeal **has approved and slightly edited our second conclusion** which contests the power of the Province to establish a sovereign state or make other constitutional changes**.**

We now respectfully submit that all our submissions are clearly arguments ***which the Court of Appeal has summarized as the basis for sending this case forward***. We **refer to** our Reply Factum paras. 8,9,10 (pp. 6,7)

At **[TAB I:6]** paragraph [61] the Court of Appeal reiterated **the three conditions**, laid down by the Supreme Court of Canada, which Petitioner was required to satisfy **to be a suitable public-interest plaintiff**, of which first is "**1. La question de l'invalidité de la loi se pose-t-elle sérieusement?"**

> [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?

The Court responds in the affirmative, ***summarizing Petitioner's arguments***, ***in* [TAB I: 6] paragraphs [65] to [70]** ***and holding*** **(para. [70])** ***that the proceeding can go forward on the basis of those arguments*** **and with the surviving conclusions quoted above (para. 1).**

The Court is **➡(1) specific in authorizing reliance ***both*** on s. 52 of the *Constitution Act, 1982*,– the supremacy clause,–*and on* the amending procedures in Part V of the 1982 Act. (C.A. [TAB I:6] paras. [66] and [67])**

➡(2) Specific in referring to secession as being an issue in the contestation (C.A. [TAB I:6] para. [67])

➡(3) Specific in noting that petitioner relies on the Supreme Court's decision in the Secession Reference ([68] TAB I:11)

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

It is not only their enactment in statutory form which violates ss. 45, 52, and Part V of the Constitution Act, 1982, but also the substance of the contested provisions which does so. They cannot survive as valid even outside the statute.

We respectfully submit: Court has power to make this clear if it agrees with us on the substance.

We **feel we should be explicit because of position of Minister Facal and A.-G. Que. that the propositions in the sections would survive *the sections themselves* being declared invalid (See below 2.6)**:

➡ **This was position of Minister Facal in Bill 99 Debate (Ex. R-6, p. 6168)**

> [L]e projet de loi no. 99 ne confère pas de nouveaux droits au Québec. Si, d'office, une partie ou une autre – faisons l'hypothèse – en était invalidée, nous ne perdrons pas des droits, 99 n'étant pas créateur de nouveau droits."

➡ A**.-G. Quebec adopts this position (*Mémoire* para. 25)**

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2.2 ***Defence and Mémoire filed by A.-G. for Quebec***. Both the Attorney-General's Defence and Mémoire either assert or imply, in substance, that the Quebec Court of Appeal, in refusing to permit Petitioner's ***general conclusions***, also rejected ***the related arguments of law*** even as Petitioner invokes them ***in support of Petitioner's surviving conclusions***.

These assertions are (Petitioner respectfully submits) neither fair nor accurate. On the contrary, the Court of Appeal's clearly-stated position (paras. [65] to [70]) is that Petitioner's arguments are substantial and must be permitted to go forward for adjudication on the merits in respect of Petitioner's surviving conclusions.

The **assertions which we dispute** in this connection are found in several paragraphs in the **defence of the respondent**, the Attorney-General for Quebec: paras. 13, 15, 18, 20, 22, 25, and 32, which refer to the interlocutory judgment of the Court of Appeal in this case. They are **also found in the A.-G.'s *Mémoire*** Paras.. 14, 63, 64,65, 69,70.

2.3 ***General conclusions with respect to the amending process denied by Court of Appeal. As to surviving conclusions, Petitioner's constitutional grounds held arguable and remitted to be raised before the Superior Court.*** The Court of Appeal

[Judgment,**TAB:I:6**, 30 August 2007, para [85], [2007] QCCA 1138 at para 85] did not permit Petitioner to seek ***conclusions*** formulated in these general terms:

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

2.4. ***Court of Appeal's reasons.*** The Court of Appeal gave these various alternative grounds for rejecting the suitability of these ***conclusions*** without clearly making a selection amongst them.

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

Whatever might be our failings in framing Petitioner's motion, the fault surely cannot lie in the *substance* of an assertion if it is one which the Supreme Court itself has made. One then asks, why did the Court delete the conclusions? A fair question to Petitioner.

2.5. ***Our reflections.*** If one looks at all its observations together, including its insistence on maintaining the rule of law, the Court of Appeal seems to have sent **various signals**. We cannot presume to explain para. [83] with certainty. Possibly the Court of Appeal sought to defuse this sensitive litigation by removing conclusions which (1) may have seemed to it to be unnecessary when added to the others. Perhaps (2) the conclusions were too general in their phraseolgy,– too broad as statements of principle,– and not narrowly tailored with the specificity suitable for orders (*dispositifs).* In any event,

> This seems to be supported by the Court's view as to a general conclusion in the 1995 petition in ***Singh***: in para [55], "vague et imprécise"; in para. [56]: "vague et générale".

Petitioner seeks judgment only on his s*urviving* conclusions while respectfully **relying *on the full range* of his grounds**,– which, as Petitioner respectfully submits, the **Court of Appeal left intact in its paras. [64] to [70**] – if so, ***leaving this Court free to reach its own result for its own reasons.***

As a **general observation**, Petitioner notes **that not long ago*, all statements of law were uniformly excluded from conclusions and from orders***, these being confined to *rights* arising *under* the law. **Conclusions,– and orders made in response to them,– would not have embodied any statements of the law at all.**

In any event, much that a Court deems **inappropriate for *conclusions* and for *orders* is suitable for a Court's *reasons* for judgment.**

The **appropriate reasons for any judgment this Court may be pleased to render are surely a matter for this Court to decide without constraint. Reasons articulate law and fact. *Dispositifs* embody the result.** Appeals are always a future possibility. Meanwhile the matter is fully before this Court.

✱***The Court of Appeal implicitly acknowledges that the scope of this litigation includes the issue of powers of secession***. In para. [83] the Court writes:

> "... Qu'il s'agisse d'un moment plus ou moins propice ou idéal pour engager un débat judiciaire sur une question constitutionnelle de cette nature n'est pas ici un facteur déterminant, d'autant qu'il est loin d'être acquis que l'exercice d'un tel recours judiciaire à

> l'époque contemporaine d'un référendum ou à la suite de celui-ci soit un moment beaucoup plus propice."

This clearly refers to a referendum on Quebec secession. What can this mean if not to say that these issues are timely for resolution? ➨**And of course secession is mentioned in para. [67] as one of issues, raised in the contested provisions, and which the Court of Appeal sends forward for decision on the merits.** ➨**Petitioner's reliance on the Secession Reference is noted in para. [68].**

➨**This also meets the A.-G.'s argument, already rejected by the C.A. (para. [83]), but substantially reasserted in her Mémoire, that our proceedings are premature and in "vide factuel" because nothing unconstitutional has been done in terms of attempting to change Quebec's status.**

➨ ***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**

➨Here, **at least for ss. 1-5 and 13**, there is **no legislation which can be presumed valid because at least these 6 provisions are outside the powers of s. 45 C.A. 1982**, and ***no other provincial legislative power exists***

➨They are ***also*** **in violation of s. 52 and 41(e)**

➨**And they *do* declare power in the Assembly and electorate to undertake constitutionally-unlawful action**

2.6. ***Invalidity not only of the contests provisions but of the propositions expressed in them.***The Attorney General (*Mémoire,* para. 25) adopts and quotes the position taken by the minister, M. Joseph Facal, in the Bill 99 debate (Ex. R.-6, p. 6168) that even if any of the **contested provisions** are struck down by the Court, the **propositions asserted in them** will be unaffected and remain valid law exactly as before:

> [L]e projet de loi no. 99 ne confère pas de nouveaux droits au Québec. Si, d'office, une partie ou une autre – faisons l'hypothèse – en était invalidée, nous

ne perdrons pas des droits, 99 n'étant pas créateur de nouveau droits."(Ex. R-6, p. 6168.)

Their claim amounts to this: that ***nothing this Court does*** can effectively eradicate the contested provisions completely, as being totally unconstitutional, null and void. We respond and respectfully submit that **it is not only the *statutory form* of these propositions in this Act, but also *the propositions themselves, expressed in them*, that violate the Constitution, and that the Court has power to make this clear.**

2.7 *Summary.* ➡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>

➡The Court of Appeal has imposed no contraints on this Court's *(1) decision* or *(2) reasons for judgment* or *(3) the arguments which 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.

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III. SUMMARY OF PROPOSITIONS TO BE ESTABLISHED

3.1 *Summary*. We respectfully submit, and propose to establish the propositions summarized as follows:

<u>First</u> that the provisions which we contest are on their very face face null and void as violating **three** provisions of the Constitution of Canada.– **each of them sufficient on its own,** and without need of the others**, to render the sections void**; these are respectively:

➡s. 52 of the *Constitution Act, 1982* , which **contains** the Constitution's **supremacy clause**;

➡s. 41(e) of the *Constitution Act, 1982* , which requires the ***unanimous consent*** of the provincial legislative assemblies, as well as the federal Houses of Patrliament, ***to change the constitutional-amendment process itself in any respect whatsoever***; and

➡ s. 45 of the *Constitution Act, 1982*, which confers, and defines the limits of, each Province's own powers of constitutional amendment, ***powers exercisable by and through its legislature and only through its legislature***.

In this context we offer ***particulars*** as to the way in which the contested **provisions would, *if they were valid*, affect various part of the Constitution** and therefore why the contested provisions are **invalid *because they cannot amend the Constitution to do those things*.**

Secondly that having regard to their ***history*** the impugned provisions are **colourable attempts to assert what the Supreme Court has held they cannot constitutionally achieve**, namely a ***right or power to secede unilaterally*** *from Canada*;

●and that this is shown clearly by **material extrinsic** to the Act

●which is **admissible** under rules laid down by the Supreme Court of Canada; such as legislative debates, political programmes, and the 1995 Referendum Bill.

Third, that the **impugned provisions cannot be saved by revising or limiting them judicially** so as to bring them within constitutionally-permissible limits; that is, through severance or, as one type is sometimes described, "reading down"; and that

●**this is so *first*** because it is impossible to assert,– especially with the required confidence,– that the legislature would have accepted them in a revised and limited form; the National Assembly in its resolutions in 1996, and especially in 2013, appears to have made it very clear that it will accept no dilution; and

●***secondly–*** in all probability, because any judicial revision would require the court to make ***ad hoc*** **choices from a variety of options**, so that **the remedial precision which the Supreme Court demands is impossible**, except perhaps in respect of section 1.

Fourth, that when, to the invalidity of the contested provisions ***on their face***, is added the ***extrinsic material*,** it becomes ***clear that the contested provisions amount to***

➡**overt and categorical defiance of the Constitution and**

➡**defiance of the authority of the Courts**, and particularly of the Supreme Court of Canada and

➡constitute a **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***.

In this connection we call attention to the Court of Appeal's interlocutory judgment in this case, particularly paragraphs [72] and [73], and [79] to [83], affirming the duty of the cours to protect and preserve the rule of law.

Fifth, and in sum, we seek to establish **that the**
➡**authority of the Constitution**, of the
➡of the **law in general**, and the
➡**authority of 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,

➡correlatively, of the indispensable need that *any* constitutional change must comply *absolutely* with the Constitution.

Though we cannot ask for a declaratory order in these terms, a matter we shall discuss in due course, we ask that the Court be pleased to do so in its reasons.

IV. THE PROVISIONS WHOSE VALIDITY IS CONTESTED

4.1. *Overview of impugned sections of S.Q. 2000, c. 46, with preamble for context.*

We submit: as to Preamble, para 11,
that the Clarity Act **reflects exactly the Supreme Court decision in the *Secession Reference*,** notably as to:

➡ **the role of political actors** (1) in determining whether a referendum has produced a clear answer to a clear question and (2) in carrying on negotiations
➡ **the need of a constitutional amendment** to give effect to secession
➡***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** the *Sec. Ref.* requirement,

We submit: as to Preamble, para. 13 (read with para. 12):
➡**We know of no acknowledgment by the federal Government of the validity of the assertions in the preceding paragraph** in **connection with these referendums**;
➡ **To choose not to quarrel with claims does not imply agreement or acceptance.**
➡**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) seeking to declare Quebec a sovereign state *by unilateral and unconstitutional means***.

We submit: as to Preamble, para. 14, on the Supreme Court's decision:
➡ Only its **political importance**, not its **legal authority**, is recognized

An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State	**Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec**
Preamble.	Préambule.
WHEREAS the Québec people, in the majority French-speaking, possesses specific characteristics and a deep-rooted historical continuity in a territory over which it exercises its rights through a modern national state, having a government, a national assembly and impartial and independent courts of justice;	CONSIDÉRANT que le peuple québécois, majoritairement de langue française, possède des caractéristiques propres et témoigne d'une continuité historique enracinée dans son territoire sur lequel il exerce ses droits par l'entremise d'un État national moderne doté d'un gouvernement, d'une assemblée nationale et de tribunaux indépendants et impartiaux;
WHEREAS the constitutional foundation of the Québec State has been enriched over the years	CONSIDÉRANT que l'État du Québec est fondé sur des assises constitutionnelles qu'il a enrichies au cours des ans par l'adoption de plusieurs lois fondamentales et par la création

by the passage of fundamental laws and the creation of democratic institutions specific to Québec;

WHEREAS Québec entered the Canadian federation in 1867;

WHEREAS Québec is firmly committed to respecting human rights and freedoms;

WHEREAS the Abenaki, Algonquin, Attikamek, Cree, Huron, Innu, Malecite, Micmac, Mohawk, Naskapi and Inuit Nations exist within Québec, and whereas the principles associated with that recognition were set out in the resolution adopted by the National Assembly on 20 March 1985, in particular their right to autonomy within Québec;

WHEREAS there exists a Québec English-speaking community that enjoys long-established rights;

WHEREAS Québec recognizes the contribution made by Quebecers of all origins to its development;

WHEREAS the National Assembly is composed of Members elected by universal suffrage by the Québec people and derives its legitimacy from the Québec people in that it is the only legislative body exclusively representing the Québec people;

WHEREAS it is incumbent upon the National Assembly, as the guardian of the historical and inalienable rights and powers of the

d'institutions démocratiques qui lui sont propres;

CONSIDÉRANT l'entrée du Québec dans la fédération canadienne en 1867;

CONSIDÉRANT l'engagement résolu du Québec à respecter les droits et libertés de la personne;

CONSIDÉRANT l'existence au sein du Québec des nations abénaquise, algonquine, attikamek, crie, huronne, innue, malécite, micmaque, mohawk, naskapi et inuit et les principes associés à cette reconnaissance énoncés dans la résolution du 20 mars 1985 de l'Assemblée nationale, notamment leur droit à l'autonomie au sein du Québec;

CONSIDÉRANT l'existence d'une communauté québécoise d'expression anglaise jouissant de droits consacrés;

CONSIDÉRANT que le Québec reconnaît l'apport des Québécoises et des Québécois de toute origine à son développement;

CONSIDÉRANT que l'Assemblée nationale est composée de députés élus au suffrage universel par le peuple québécois et qu'elle tient sa légitimité de ce peuple dont elle constitue le seul organe législatif qui lui soit propre;

CONSIDÉRANT qu'il incombe à l'Assemblée nationale, en tant que dépositaire des droits et des pouvoirs historiques et inaliénables du peuple québécois, de le défendre contre toute tentative de l'en spolier ou d'y porter atteinte;

Québec people, to defend the Québec people against any attempt to despoil it of those rights or powers or to undermine them;

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

WHEREAS Québec is facing a policy of the federal government designed to call into question the legitimacy, integrity and efficient operation of its national democratic institutions, notably by the passage and proclamation of the Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference (Statutes of Canada, 2000, chapter 26);

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

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

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

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

CONSIDÉRANT que l'Assemblée nationale n'a pas adhéré à la Loi constitutionnelle de 1982, adoptée malgré son opposition;

CONSIDÉRANT que le Québec fait face à une politique du gouvernement fédéral visant à remettre en cause la légitimité, l'intégrité et le bon fonctionnement de ses institutions démocratiques nationales, notamment par l'adoption et la proclamation de la Loi donnant effet à l'exigence de clarté formulée par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec (Lois du Canada, 2000, chapitre 26);

CONSIDÉRANT qu'il y a lieu de réaffirmer le principe fondamental en vertu duquel le peuple québécois est libre d'assumer son propre destin, de déterminer son statut politique et d'assurer son développement économique, social et culturel;

CONSIDÉRANT que, par le passé, ce principe a trouvé à plusieurs reprises application, plus particulièrement lors des référendums tenus en 1980, 1992 et 1995;

CONSIDÉRANT l'avis consultatif rendu par la Cour suprême du Canada le 20 août 1998 et la reconnaissance par le gouvernement du Québec de son importance politique;

CONSIDÉRANT qu'il est nécessaire de réaffirmer les acquis collectifs du peuple québécois, les responsabilités de l'État du Québec ainsi que les droits et les prérogatives de l'Assemblée nationale à l'égard de toute question relative à l'avenir de ce peuple;

Assembly with respect to all matters affecting the future of the Québec people;

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CHAPTER I

THE QUÉBEC PEOPLE

Self-determination.

1. The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.

Political regime.

2. The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.

Exclusive right.

3. The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.

Exercise of right.

No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.

Majority.

LE PARLEMENT DU QUÉBEC DÉCRÈTE CE QUI SUIT:

CHAPITRE I

DU PEUPLE QUÉBÉCOIS

Droit à disposer de soi.

1. Le peuple québécois peut, en fait et en droit, disposer de lui-même. Il est titulaire des droits universellement reconnus en vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes.

Droit au libre choix.

2. Le peuple québécois a le droit inaliénable de choisir librement le régime politique et le statut juridique du Québec.

Exercice du droit au libre choix.

3. Le peuple québécois détermine seul, par l'entremise des institutions politiques qui lui appartiennent en propre, les modalités de l'exercice de son droit de choisir le régime politique et le statut juridique du Québec.

Validité.

Toute condition ou modalité d'exercice de ce droit, notamment la consultation du peuple québécois par un référendum, n'a d'effet que si elle est déterminée suivant le premier alinéa.

Majorité des votes requise.

4. Lorsque le peuple québécois est consulté par un référendum tenu en vertu de la Loi sur la consultation populaire, l'option gagnante est

4. When the Québec people is consulted by way of a referendum under the Referendum Act, the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one.

CHAPTER II
THE QUÉBEC NATIONAL STATE

Legitimacy.

5. The Québec State derives its legitimacy from the will of the people inhabiting its territory.

Will of the people.

The will of the people is expressed through the election of Members to the National Assembly by universal suffrage, by secret ballot under the one person, one vote system pursuant to the Election Act and through referendums held pursuant to the Referendum Act.

Elector.

Qualification as an elector is governed by the provisions of the Election Act.

CHAPTER V
FINAL PROVISIONS

National Assembly.

13. 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

celle qui obtient la majorité des votes déclarés valides, soit 50 % de ces votes plus un vote.

CHAPITRE II
DE L'ÉTAT NATIONAL DU QUÉBEC

Légitimité de l'État.

5. L'État du Québec tient sa légitimité de la volonté du peuple qui habite son territoire.

Expression de la volonté du peuple.

Cette volonté s'exprime par l'élection au suffrage universel de députés à l'Assemblée nationale, à vote égal et au scrutin secret en vertu de la Loi électorale (chapitre E-3.3) ou lors de référendums tenus en vertu de la Loi sur la consultation populaire (chapitre C-64.1).

Qualité d'électeur.

La qualité d'électeur est établie selon les dispositions de la Loi électorale.

CHAPITRE V
DISPOSITIONS FINALES

Non-ingérence.

13. Aucun autre parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale ni contraindre la volonté démocratique du peuple québécois à disposer lui-même de son avenir.

the Québec people to determine its own future.

➨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.
➨*SEE PAGES 58-59 BELOW ON REJECTION OF THE AMENDMENT PROCESS*

V. HOW A COSTITUTIONALLY-CONFORMING TEXT WOULD READ

Our Reply Factum para, 5 (pages 4-5) :

A constitutionally-conforming text would, in our respectful submission, read as follows; the contrast between our text and the statute is a simple way to show what we find constitutionally-objectionable in the contested provisions

Petitioner here offers this text to the Court for its consideration as to its correctness in law. If indeed, as A.-G. Quebec asserts, Quebec intends nothing beyond its constitutional powers, it should concur in submitting this statement of the law for the Court's review.

➨Strictly speaking, these or any such provisions are probably beyond the powers of the Legislature to enact under s. 45 of the Constitution Act, 1982 since it cannot define its own powers.

➨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)**. **Therefore no diluted text can meet the Supreme Court's conditions for reading it into the Act in substitution for the existing text.**

➨If however 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):

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.

VI. OVERVIEW OF THE PRINCIPAL RELEVANT CONSTITUTIONAL PROVISIONS

6.2. *Overview of the principal or central relevant constitutional provisions*

It will be convenient to **identify the key constitutional provisions** relevant here and then to **analyze them one by one:**

(1) CONSTITUTION ACT 1982, S. 52

First is section 52 of the Constitution Act, 1982:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the Canada Act 1982, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

➡ **Supremacy** of the Constitution of Canada is ***declared*** **in C.A. 1982, s. 52 (1);** and the **Constitution is *defined* for this purpose by s. 52(2)**

➡ **S. 52(3)** is the ***correlative*** **or *corollary* of the supremacy** declared in s. 52(1): and declares that **amendments can only be made in accordance with the Constitution.**

➡**This (s. 52(3) effectively means amended in accordance with Part V of the Constitution Act, 1982,** headed PROCEDURE FOR AMENDING CONSTITUTION OF CANADA.

A few other minor and narrow amending procedures appear to survive outside Part V. For example, the ***Constitution Act, 1886,*** empowers Parliament to provide for representation in the Senate and House of Commons of territories not part of any province. And **under s. *3 of the Constitution Act, 1871,* it may still be possible to effect changes to a Province's boundaries by concurrent federal and provincial statutes**, alternatively to proceeding under s. 43 of the 1982 Act, found in Part V. **But practically speaking. S. 52(3) requires recourse to Part V.**

What then comprises the Constitution of Canada? Section 52(2) defines the Constitution of Canada so as to establish what is supreme under s. 52(1) and therefore can only be amended in accordance with s. 52(3).

The "Constitution of Canada" is defined in the most comprehensive terms.

Section 52(2), read with the Schedule to the 1982 Act, comprehends the Constitution **Acts, 1867 and 1982**,

and **all the other Imperial Acts and other instruments**,

as well as all the Canadian Acts; together:

➡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.

As well as all amendments to any of them

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.

The whole and every part of the Canadian constitutional system is *protected* and *controlled* by the amending provisions of Part V.

Section 52(1) does not say that the Constitution is supreme sometimes, or maybe, or up to a point. It is supreme absolutely and always, except when it is amended in accordance with section 52(3),– that is, **amended in accordance with the Constitution itself**,– and ***that is not an exception to, but a reiteration ofm that supremacy.***

(2) PROVISIONS OF PART V OF THE C.A. 1982: GENERAL STATEMENT

Next we should examine certain directly relevant provisions of Part V, which includes the **entire set of procedures for amending the whole of the Constitution of Canada, including the Constitutions of the Provinces.**

As the Supreme Court summarizes the matter in ***Reference re Senate Reform*** **[2014] 1 S.C.R.704 at p. 725:**"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 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."

(3) THE AMENDING PROCEDURES OF PART V OF the C.A. 1982

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

➡ **C.A. 1982, s. 46(1)** 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.

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

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

There is no other provincial power of constitutional amendment, though there are **some powers of constitutional order tailored to specific institutions**; notably provincial public offices (s. 92.4) and the provincial courts (s. 92.14)

PART V
PROCEDURE FOR AMENDING CONSTITUTION OF CANADA (101)

.....

> **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:**
>
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
>
> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

...
... ..

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

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

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.

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

...

PARTIE V
PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA (101)

41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;

b) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être représentée lors de l'entrée en vigueur de la

c) sous réserve de l'article 43, l'usage du français ou de l'anglais;

d) la composition de la Cour suprême du Canada;

e) la modification de la présente partie.

44. Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

> **45. Sous réserve de l'article 41, une législature a compétence exclusive pour modifier la constitution de sa province.**
>
> **46. (1) L'initiative des procédures de modification visées aux articles 38, 41, 42 et 43 appartient au Sénat, à la Chambre des communes ou à une assemblée législative.**
>
> (2) Une résolution d'agrément adoptée dans le cadre de la présente partie peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

In summary our submissions ***on the relationship*** **between the** ***contested provisions*** **and** ***the constitutional provisions*** **are these: that, *as a group*:**

➡ **1.** The sections we contest ***reject the supremacy of the Constitution*** **of Canada** and **seek to establish instead the** ***supremacy of the Quebec legislature and electorate***, thus **violating s. 52(1)**.

➡**2.** The sections 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 give **Quebec's** ***electorate*** **and** ***institutions*** **carte blanche to replace its present status and constitutional position within Confederation with any status it might please.** In so doing **they frontally attack section 41(e) by substituting the Quebec electorate and legislative institutions for Part V so far as Part V relates to Quebec.**

➡**3.** Lastly, the **provisions 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

7.1. *The judicial interpretation of these amending powers.* Before specifying in detail our objections to the contested provisions, individually and as a group, it is probably **most efficient to examine and analyze in more detail the various powers of constitutional amendment in Part V** of the *Constitution Act, 1982*, and to **present the decisions defining the scope of those provisions** in particular s. 45 of the 1982 Act.

7.2. ***Freedom of every Province to propose constitutional changes and submit them to referendum.*** It is perhaps useful to state this clearly at the outset: It is not, and cannot be, disputed, that under s. 46(1) of the Constitution Act, 1982, ***the legislative assembly of Quebec or of any other Province can, at any time, propose any constitutional amendment it pleases***.

➡**The Constitution does not accept the principle of simple majority rule unless those voting have the capacity and power to make the relevant decision:** ***Secession Reference*****, paras. 76 and 78, p. 260.**

And, as the Supreme Court has held in the ***Reference re Secession*** **[1998] 2 S.C.R. 217, at p. 265 (para 87), TAB I:11**, the Province ***can submit its proposals to referendum of the Province's electorate to secure a mandate*** to advance them.

But ***no such amendment can become law save "by constitutional means",– i.e., in accordance with the amending procedures of Part V of the 1982 Act***:

> 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.

7.3. ***Unilateral federal and provincial amending powers exercisably by statute.*** The **constitutional-amendment power of each province is set forth in s. 45 of the 1982 Act**.

This power is vested in the provincial **legislature** and thus exercisable by provincial **statute**, in other words by a **Bill** passed by **its legislative assembly** (all

provincial legislatures now being unicameral) **and assented to by the Lieutenant Governor**.

The **parallel constitutional-amendment power at the federal level** is set forth in **section 44** of the 1982 Act and is similarly exercisable by a federal Act of Parliament, in other words, by a Bill which has been passed by both federal Houses and has received royal assent.

The unilateral federal and provincial amending powers in ss. 44 and 45 of the 1982 Act are **respectively successors to the former sections 91.1 and 92.1** of the Constitution Act, 1867, as amended. These are **now integrated into the comprehensive and complete series of amending powers** found in **Part V** of the 1982 Act, ss. 38 to 48 inclusive.

7.4 ***Bilateral and multilateral amending powers exercisable by specified resolutions and proclamation***

By contrast with sections 44 and 45, **all the other amending-powers are bilateral or multilateral and require both federal and provincial action**. These powers and procedures are established by sections **38, 41, 42, and 43, with elaboration from some other provisions**.

These amendments are enacted by **Proclamation of the Governor-General when so authorized by the resolutions of the federal Houses, or in some cases by the House of Common alone (s. 47), and by resolutions of the legislative assemblies of the necessary number of provinces.**

Amendments under s. 41, the "unanimous consent" procedure, require resolutions of the assemblies of all the provinces.

Amendments under 38 and 42 require at least two-thirds of the provinces aggregating amongst them at least half the population of Canada reckoning by the latest general census. So long as the requisite number of provinces concur in an amendment under s. 38, it can become law, any of the others can dissent from and therefore block an amendment derogating from their rights, powers, or privileges.

7.5. ***The scope and limits of the provincial power of constitutional amendment (s. 45 of the 1982 Act). Reference re Senate***.The most comprehensive and authoritative exposition of the amending procedures of Part V of the 1982 Act is found in the

decision of the Supreme Court of Canada in ***Reference re Senate Reform*, [2014] 1 S.C.R.704, TAB I:12.**

The Court reviews ss. 91.1 and s. 92.1 of the Constitution Act, 1867, as amended, predecessors respectively of ss. 44 and 45 of the 1982 Act. As to the amending-powers of the provincial legislatures, the Court states (p. 734, paras. 47 and 48) **citing and following** ***Ontario Public Service Employees' Union* v. *Attorney General for Ontario*, [1987] 2 S.C.R. 2, TAB I:8, commonly referred to as *OPSEU*:**

> [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. ...**[Discussion of s. 91.1]...**
>
> ... 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.

7.6 . ***The O.P.S.E.U. Case.*** As its citation in the *Reference re Senate* indicates, the Court there relied on and followed the opinion of Beetz, J., in *Ontario Public Service Employees' Union* v. *Attorney General for Ontario*, [1987] 2 S.C.R. 2, TAB I:8.

This was an opinion of a majority of the Court (Beetz, J.. and McIntyre, LeDain and La Forest, JJ.). The Court there **upheld the validity of Ontario legislation restricting the poltical activities of provincial public officers and public servants**.

Various members of the Court relied on ss. **92.1 , 92.4 and 92.13** of the 1867 Act to support the legislation in question. Beetz, J., and those who concurred with him grounded the legislation on ss. 92.1 and s. 92.4.

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

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

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 under s. 45, **as distinct from the general body of the Constitution of Canada**, lying **outside provincial jurisdiction**. Here are his remarks in part: [1987] 2 S.C. R. At pp. 38-40, TAB I:8:

> 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 constitutional 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.
>
> 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. 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 therefore entrenched in the sense that it could only be amended by the Parliament at Westminster, in accordance with constitutional conventions.
>
> 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.

The ***express textual exclusion from s.92.1 of any provincial power to amend the office of Lieutenant-Governor*** was ***transposed*** in the 1982 Act ***to s. 41(a)***, symmetrically alongside the offices of the Queen and the Governor General. But, as Beetz. J., noted **these would always have been excluded from s. 92.1 *a fortiori.*** The relevant portion of Beetz. J.'s reasons may be found at [1987] 2 S.C.R. at p. 37 ff.

The Judicial Committee of the Privy Council had already struck down the Initiative and Referendum Act of Manitoba for creating a process of legislation by referendum which the court interpreted as not requiring presentation to the Lieutenant Governor for Royal Assent: ***In re Initiative an Referendum Act,*** **[1919] A.C. 935, TAB I:7**. The Privy Council questioned whether legislation by referendum would be possible at all, but did not decide the question.

Beetz, J.'s treatment of the scope of the provincial amending power is more elaborate than the summary in *Reference re Senate.* His Lordship cites *A.G. Quebec v. Blaikie,* [1979] 2 S..C.R. 1016, TAB I:1, as deciding that s. 133 of the 1867 Act was one of a class of provisions ([1987] 2 S.C. R. at p, 40) "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 ...**"**

Beetz J, notes other important limits on provincial constitutional-amenment 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" includes certain essential powers of that office**.

Hence, after concluding that the impugned legislation in *O.P.S.E.U.* was an ordinary legislative amendment to the provincial constitution to ensure civil-servants' neutrality and impartiality, Beetz J. writes, 1987] 2 S.C. R. at p. 46, TAB I:8:

> 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.

This is explicit in *Re Initiative and Referendum Act,* [1919] 935 (P.C.) at 943 [TAB I: 7]; s. 92 is not to be construed "as permitting the abrogation of any power which the Crown posseses through a person who directly reprents it".

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."

✱✱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.

Hence a provincial legislature cannot impair the powers of the Queen, Governor-General or Lieutenant-Governor inter alia in relation to the province's executive and legislative institutions, ***including their power to grant royal assent to,– or withhold royal assent from,-or to reserve or disallow,– provincial legislation.***

(2) **A** provincial **legislature cannot interfere with the general constitution of Canada.** The amendment of the general Constitution of Canada,– as distinct from the Constitution of the Province,– is itself the subject of the various procedures set out in sections 38 to 44 of the *Constitution Act, 1982*. These provisions *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.

(3) The **"general" constitution of Canada**, in this sense, comprehends all the matters referred to and cited above in **Trial Notes para. 3.2 ,– Canadian territory and structure and powers of governmental institutions,–** ***except only*** **for those internal provincial institutions and provincial governmental processes contemplated by s. 45 and not specifically excepted from it.** Hence the "general" constitution of Canada (as opposed to any *provincial* constitution) **comprehends *inter alia* all federal institutions and structures, and all federal powers, the distribution of powers, and also constitutional guarantees such as those in the 1867 and 1982 Acts). No provincial legislation can impair them in any way.**

(4) A provincial legislature **cannot** interfere with 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**.

A fortiori, a provincial legislature ***cannot,* under s. 45 of the *Constitution Act, 1982, validly define the extent of its own powers*;** these are defined by the general Constitution of Canada.

VIII. THE GOVERNING PRINCIPLES OF THE CANADIAN CONSTITUTION AND CONSTITUENT POWER

8.1. ***Relevant underlying principle.*** The relevant **underlying political and constitutional principle** implicit in Part V and underlying Part V is that **the whole of Canada is a single country**. Section 3 of the 1867 Act makes that clear:

> ... the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

And as a single country all of Canada belongs indivisibly to all of it people. Major powers are exercisable by the people and institutions of the individual units or members into which the Federation is divided *for provincial purposes and for those only*.

Since 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*.

That is the clear meaning and message of Part V of the *Constitution Act, 1982*: see *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 see also the *Senate Reference,* para 48.

This subdivision of the one Dominion into provinces is done by s. 5 of the 1867 Act, with many further Acts and instruments adding territory and creating new provinces.

But the provincial powers, wide though they are, are defined and limited by a supreme Constitution, which can be altered only in accordance with the amendment procedures set out in Part V of the 1982 Act. Such an amendment, whichever the appropriate amending procedure, requires a substantial consensus of the Federation and the Provinces, exactly because every part of Canada belongs indivisibly to all of its people.

8.2. *The nature of the Federation and the Canadian Provinces.* The ***subject of this litigation***, broadly stated, is ***constituent power and the locus of constituent power in Canada*** because that is the subject of the contested provisions. Constituent power,– the power to create and alter states and their governance,– is reflected in constitution-amendment procedures.

The legitimacy and by inference authority, even existence, of the Canadian Constitution Quebec are by s. 5. made contingent on the will of the Quebec people; this quite apart from the other provisions asserting powers of constitutional change.

Canada as a whole ***is juridically a creature of the Constitution*** (C.A. 1867, s. 3) as are its ***institititions***, ***powers*** and ***boundaries***.

As is Canada as a whole, Canadian ***Provinces*** are juridically ***creatures of the Constitution***. (Initially, C.A. 1867, s. 5).They have no existence, rights, or powers beyond or outside the Constitution.

The Constitution's ***origin***,– as we see in s. 52(2) of the 1982 Act,– is substantially a series of Acts of the ***Imperial Parliament*** , which ***transferred its powers by the 1982 Act to Canadian institutions***.

These Canadian successors to the Imperial Parliament were ***empowered to act through, and in accordance with, Part V, and, with minor exceptions, not otherwise***. Since April 17th, 1982, ***constituent authority in point of law rests there,– in Part V of the 1982 Act,– and nowhere else***, so far as this litigation is concerned.

In sum, there is ***no constituent authority outside the Constitution Acts, and in particular none of substantial significance outside Part V*** of the 1982 Act.

The Canadian State and its provinces ***were not created by direct act of the people.*** **No federal or provincial law whatsoever has ever been possible without royal assent:** Constitution Act 1867, ss. 56 and 90. **None is possible now without an amendment under s. 41(a) of the Constitution Act, 1982, requiring the unanimous consent of the provinces' assemblies.**We submit that it is idle for the Attorney-General of Quebec to attempt comparisons with various republics in order to put a gloss on the Quebec "people". In any case, ***the American states and German laender are bound absolutely by their respective national constitutions***. This is clear from all four of the experts' reports.

Constituent authority in Canada rested in 1867 with the Imperial Parliament in accordance with the supremacy declared and defined in the *Colonial Laws Validity Act, 1865*.

`Imperial authority was qualified through the *Statute of Westminster,1931*; and was finally transferred to Canadian institutions through the *Constitution Act, 1982.*

Constituent authority never existed, and was never exercised, in Canada on a republican basis by assumed popular authority, nor by popular acts. Republican concepts are not applicable to the Canadian constitutional system. Law may be made according to law, pursuant to established authority.

IX. SPECIFIC OBJECTIONS TO THE VALIDITY OF THE CONTESTED PROVISIONS

9.1. ***Essential basis of invalidity***. We propose now to develop our objection to the contested provisions in more detail than in our introductory summary.

THE PROVISIONS ARE NOT SIMPLE EXPRESSIONS OF OPINION, BUT ARE JUDICIALLY REVIEWABLE EXPRESSIONS OF LEGISLATIVE WILL:

9.2. ***The contested provision are not expressions of opinion.***

➡On their face ***the relevant provisions purport explicitly to declare the law, not someone's opinion as to what is the law***. We submit that they cannot lawfully or

validly do enact these provisions **as law**, because, individually and operating together,– ***claiming to be the law of the land***.

This is a statute with an enacting clause, passed and assented to in due form, and it must be treated as such. **It is chapter 41 of the Statutes of Quebec for the year 2000.**"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 **TAB I:6:**

> . [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, à 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.

9.3. ***Act contrasted with resolution***. The Act whose provisions we challenge, is to be contrasted with a resolution of the House, the National assembly, which is the deliberative body forming part of the Legislature. The National Assembly in fact passed a resolution (Exhibit R-24) on October 23rd 2013 reaffirming the provisions which we contest, and had passed another on May 22nd 1996 (Exhibit R-11, Appendices) to the same effect in more succinct terms.

Though ***a*** *mere expression of opinion by a resolution of the Assembly* like that of October 23, 2013, ***may perhaps*** escape judicial review, ***even a resolution*** would necessarily be reviewable if, rather than simply expressing opinions, 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 as to its validity.

Moreover, *even a resolution expressing opinions as to the law*, though perhaps not inherently invalid, could probably be contradicted, on declaratory proceedings, by judicial rulings stating the law as it truly is. **In any case, the Courts can simply treat such a resolution,– one merely expressing opinions,– as meaningless, and ignore it.**

By contrast, an Act *if valid* cannot simply be ignored, and so its validity *must be judicially determinable and determined* to ascertain whether it can or should be given any effect.

9.4 *Invalidity ex facie*

PROVISIONS ARE INVALID ON THEIR FACE:

The provisions which we contest in Statutes of Quebec 2000, chapter 46,– –on their very face and in their clear and plain meaning they violate the Constitution in the three distinct ways, mentioned earlier, each one by itself sufficient to render them invalid.

Both individually and read as a group:

➡First. they directly contradict the supremacy of the Constitution of Canada as declared in s. 52 of the Constitution Act, 1982, ***by purporting to make the Quebec electorate and National Assembly supreme instead.*** They assert that, through its population and its institutions acting by themselves, the ***Province of Quebec can alter its status and powers otherwise than as authorized or permitted by the Constitution of Canada***.

➡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 thec1982 Act***; to put it another way, the contested provisions purport to amend Part V, which cannot 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.

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 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 ***Invalidity when extrinsic evidence is applied***

THE PROVISIONS SHOULD BE READ WITH THE RELEVANT EXTRINSIC EVIDENCE:

The rules governing severance and the the extrinsic evidence will be addressed in due course: Severance, para. 18 and 19; Extrinsic evidence, para 20.

9.6. ***Extrinsic material*** Although we submit that the contested provisions are ***invalid on their face***, we rely also on ***extrinsic material*** to demonstate their ***intended operation and effect*** as well as ***their real objects and purposes***. We submit that these 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:

> **Debates on Bill 99***: Journal des Débats De l'Ass. Nat.*, 3 mai 2000 (Ex. R-5); 25 mai 2000 (Ex. R-6); 30 mai 2000 (Ex.R-7); 7 Dec. 2000 (Ex. R-8); *Commission permanente des institutions* 29 mars 2000 (Ex. R-13);
>
> **On the October 30th 1995 Referendum question**: in Exhibit R-11, Appendix B to the *Factum of Roopnarine Singh and Others* in *Reference re Secession of Quebec*, are reproduced *Procès-Verbaux/Votes and Proceedings - Ass. Nat.* 20 Sept 1995,; ***and, on 22 May 1996,Resolution of the National Assembly*** **on the right to define political status without interference**.

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

Programmes et Plateformes du Parti Québécois (Ex. R-15) (extracts, in which are marked 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 (Exhibit R-24).

9.7. ***Petitioner's objective. Summary of petitioner's constitutional position.*** Counsel will ask the Court to affirm the supremacy of the Constitution of Canada (*Constitution Act, 1982*, s. 52) in the most categorical, explicit, and unequivocal terms and to strike down the impugned provisions of the Quebec statute, either entirely, or as they operate in conjunction with one another and beyond certain specific limits, as follows: **Despite the fact that they purport to be provisions of a statute duly-enacted under lawful authority**, **the provisions are invalidly enacted on these grounds:**

9.8. ***Objections to Section 1 (corresponds to Factum para. 4(i).***

SECTION 1 OF THE ACT:

Section 1, especially read with ss. 2, 3, 4 5, and 13, is invalid on its face because it does not limit its terms to asserting ***only*** a right of ***"<u>internal</u> self-determination"*** , as was determined and **stated by the Supreme Court of Canada to be *the only right belonging to the people or peoples of Quebec in international law.***

➨Despite the innocent picture of the Act painted in her Mémoire by the Attorney-General of Quebec in the present Government, ***when 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), <u>read s, 1 as we do</u>***, saying,–by contrast to the word "autodétermination",– i.e., "self-determination" in the English text,–

> "...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."

In our submission, a constitutionally-conforming text of s. 1 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 reecognized under the principle of equal rights and self-determination of peoples.

9.8.1. ***The Quebec people.*** The Act **in its title and its text** makes claims in behalf of **a** "Quebec people".

The Act speaks in the singular; see esp.sections 1, 2, 3 , 4 and 13.

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 a single "people" with a monolithic political and legal identity. congruent with Quebec's boundaries*****.**

The whole population is presented as ***a single civic nation or people***, but yet one which is ***at the same time identified with the French-Canadian ethno-linguistic people*** for the ***purpose of synthesizing a particular political and legal identity in order to assert claims based on the self-determination of peoples in international law.*** This aims to achieve a single collective expression binding everyone in Quebec. The theory is that one "people" has spoken and is bound.

All individuals and communities are to be treated as being bound togeher as a single "people", so as to be obliged to accept a referendum majority vote even on matters beyond provincial authority.

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.

9.8.2. ***Self-determination must be within Canada: Supreme Court***. Any right of "self determination" must be exercised :with the framework of the existing Canadian state: ***this statute cannot constitutionally provide otherwise***:

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

> **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). **[Emphasis added]**

> 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.**

9.8.3. ***Agenda is made clear in extrinsic material.*** Both *on the face of the Act*, – and 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 is asserted in ***resolution of the National Assembly of 22 May 1996*** (and ***later reaffirmed by the Assembly's resolution 23 October 2013***); here, the 1996 Resolution::

> ➡*Votes and Proceedings/Procès-Verbaux of the Assemblée nationale*, 22 & 23 May 1996; resolution of the National Assembly on motion of M. Lucien Bouchard, Prime Minister of Quebec (22 May 1996); passed 23 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.

9.8.7 ***Parti Québécois Programmes.***

Proposals to declare independence unilaterally are rpeatedly reassertsed in Platforms of the Parti Québécois:

<u>Parti québécois platforms</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 secession des états fédérés, mais il reconnait par ailleurs the droit d’autodétermination des peuples ....”

...

“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 **juxtaposed** here with the assertion that international law **does** recognizes a right of **self-determination of peoples**.

Self-determination is endlessly reiterated as including a right of secession – without however adding that, so far as Quebec is concerned, self-determination (the Supreme Court has decided) it extends only to self-determination within the Canadian state.

Assuming **(as it does)** a right of secession, the Legislature needs to establish**:**

➡**that there is only ONE ethnolinguistic "people**" in Quebec qualifying, as such, under the international law criteria, for a right of self-determination,– **NOT SEVERAL, each having such a right individually**

➡that **that ONE people is, or is identified with,– the French-Canadian ethnolinguistic people**

➡that this people is congruent with the boundaries of Quebec

➡ and that **the whole population of the province is part of that ONE people, and therefore all bound by the referendum result**

The juxtaposition in the 1969 Programme explains the insistence reflected in the Parti Québécois Programmes for 1997 and 2001 that the entire population of Quebec consists of a single "people" – an artificial construct intended to bind all individuals and communities to accept a referendum decision in favour of secession. And this is clearly reflected in the contested sections 1, 2, 3 4, and 13 of theAct, as well as in the preamble.

It is **reflected in the Parti Québécois Programmes**, **in particular that 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 dee son avenir..."

and again 2001:

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

➡ **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:

> 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-1, 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-1, 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-5, 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-5, 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 souverainté 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-5, 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-5, 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-5, 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-5, 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-5, 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**, 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]**, 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**, p. 87:
>
> 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.

Section 1 must at all events be ***limited in its operation*** (as the Supreme Court requires) to the exercise of rights **"within the framework of [the]... existing state"** (*Secession Ref.*, para 154), – i.e. Canada, – **and thus limited to rights exercisable consistently with its Constitution.**

Textually, constitutional **compliance might hypothetically be achieved** for s. 1 with ***at minimum*** **one judicial emendation if textual revision is held to be permissible** inserting, after "self-determination" where it first occurs, **the phrase "within Canada and consistently with its Constitution"**. But the **rules governing severance (Petitioner submits) do not permit s. 1 to be "read down", and treated as text, absent clear acceptability to the Legislature of the emended text**: (see Factum para. 18 and below Notes para. 18.) . Strictly speaking, it must be noted that neither Parliament not the provincial legislatures have authority under ss. 44 and 45 of the 1982 Act to define their own powers, even if they do so correctly, though if they did so correctly no one would be likely to object.

That s. 1 *cannot* lawfully assert *any* right of self-determination *outside* the Canadian state, is constitutionally true whether or not

➡a relevant "people" for the purposes of a right of self-determination exists within Quebec, and,

➡ and, if a relevant "people" does exist, whether that "people' consists of all, or of part only, of the Quebec population.

These ("the people question" as the Supreme Court calls it) are questions left open by the Supreme Court of Canada in the *Reference re Secession of Quebec*, *supra*, at para. 125, pp. 281-82 **TAB I:11**, 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.

If Quebec were, because of its heterogeneity, held to comprehend *a number of* distinct "peoples", achieving textual constitutional compliance for s. 1 might require also deleting "The Québec people is the holder" and substituting: "The ethno-linguistic peoples of Quebec are the holders".

In these proceedings, too, as in the Secession Reference, it appears unnecessary to decide these questions, because Quebec's powers can be exercised by its electorate and institutions ***only*** if that is done consistently with the Constitution of Canada.

➡Petitioner submits, however, that **any rights of "self-determination" given by international law to the ethno-linguistic French-Canadian population of Quebec must exist**, s***eparately and equally, for other*** distinctive ethno-linguistic populations within Quebec.

➡Petitioner respectfully rejects all attempts to present the heterogeneous population of Quebec as a single, monolithic, civic "people" all bound to accept decisions of legislative or of referendum majorities even on matters beyond the existing constitutional powers of the Province. ➡The Supreme Court having left the "peoples" question open, the Province cannot foreclose it in the Act and make it the foundation of a power of unilateral constitutional change.

On Quebec's heterogeneity, see *Reference re Secession*, *supra*, [1998] 2 S.C.R. 217 **(TAB I:11)** at pp. 281-2, paras. 124 and 125; and at p. 287, para. 138. At para. 125 Quebec's heterogeneity is acknowledged by the Court:

> 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 would seem impossible to defend constitutionally the concepts of a ***single, monolithic***, "Quebec people" or "Quebec nation", fashioned from a diverse and pluralistic Quebec community or society,

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 indigenous peoples, whom the Supreme Court certainly refers to repeatedly as "peoples",– and apparently treats 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].**

> 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

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, though the Legislature of the Province, the nature and structure of the governmental institutions of the Province.

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

> *Constitution Act ,1982,* ss. 41(e), 45, and ss. 52(1) and 52 (3) read with 52 (2);
>
> *Reference re Senate Reform,* [2014] 1 S.C.R.704 at 734 (paras. 47 and 48); 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.**

The Constitution is not silent on basic constitutional changes which might be attempted by unilateral means through Quebec's institutions or electorate, and which the contested ss. 1, 2, 3, 4, 5 and 13, separately and together, seek to authorize and justify.

Far from it. For example, the Constitution is not silent, 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]* :**

.

Of the amending procedures, only s. 38 ("7/50" formula) and s. 41 (unanimous consent formula) appear to be relevant for the purpose.

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

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) (TAB I:110 :**

> 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.**

***Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, p. 274, para 104 (TAB I:11) :**

> 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,– and refused in the text of Bill 99 to require compliance with,– the Supreme Court's judgment, which, as Minister Facal acknowledges, requires a (national) constitutional amendment for secession (which he indicates requires unanimity): 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, and it was drafted quite explicitly to do just that.

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 and to *consult* the electorate, and

➡*respect all* relevant federal powers.

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

> 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.

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

➡ also, like section 2, because <u>it asserts the existence of unilateral powers of constitutional change</u> which neither the electorate of Quebec nor its institutions possess: see authorities cited in Trial Notes para. 9.9 above (Factum, 4 (ii) and 4 (iii)).

Section 3 exceeds the powers conferred by s. 45 of the C.A., 1982 in the powers of direct constitutional change it purports unconstitutionally to attribute to political institutions of Quebec, ***be they the Legislature or referendums***.

Secession Reference*, [1997] 2 S.C.R. at 265 (para. 87) (TAB I:11)** holds that ***referendums are consultative only: [The emphasis below is added:]

> **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.**

Moreover s. 3 is **also invalid**

➡ because s. 3 not only **impermissibly**

(a) ***purports to define the extent of*** the **authority of the Parliament and Government of Canada to consult the people, – the population, – of Quebec by referendum,** – Quebec **having no legislative power whatsoever to do so,** – but, in addition, s. 3 also impermissibly

(b) ***denies* the authority of the Parliament and Government of Canada to consult the people, – the population, – of Quebec by referendum**. This constitutes a denial either of a right to consult the people of Quebec ***at all*** or, *at minimum*, it is a denial of a right to consult them ***in a relevant and meaningful way***, – with respect to the political régime and legal status of Quebec.

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

The meaning of section 3 of Act is clearly shown in

➡ **1973 Programme**, 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 mois - 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**. [Emphasis added.]

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):

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 breferendum, especially if also excluded from a concurrent provincial referendum.

The validity of the Act is assumed throughout by the Court; thus Parliament can authorize what referenda it pleases. [Emphasis added]

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. ...**

And **s 3 is invalid also**

➡ because s. 3, like s. 2, **denies the authority of the Parliament and Government of Canada on the one hand to uphold the Constitution of Canada, and, on the other, to reject, to resist, and to repel** attempts at **unlawful** constitutional change, whether these are either **mounted *directly* by the institutions or electorate of Quebec, – or *indirectly*, pursuant to their measures or decisions**.

The overthrow of the state is the ultimate attack on the rule of law.

We refer to changes by Quebec's institutions or electorate as being "unlawful" if these were planned or attempted in excess of their lawful powers under the Constitution of Canada. **These are revolutionary acts.**

Such a **denial of federal authority is the clear meaning of s. 3** because the **section asserts that the Quebec people "shall determine "*alone*"** (emphasis added) **how Quebec's political régime and legal status shall be chosen *and this is made even clearer and more explicit in s. 13.***

The purport of s. 3 is that they can also carry out any such changes by themselves, exactly as the 1995 Referendum, and Referendum Bill, attempted to do (*Loi sur l'avenir du Québec*, Ex. R-14, Tab 21).

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

Quebec cannot define, deny, remove or nullify federal powers in view of ss. 52, 45, and 41(e) of the *Constitution Act, 1982*.

> In addition to the authorities cited above, as regards defensive powers which ss. 2, 3, and 13 would deny or nullify, see ***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 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.

Canada is a "real country" and a real country has a right to defend its existence.

A revolutionary régime would demand, that ***all public officers***, all ***judges in all courts***, the ***armed forces***, abandon the Canadian state and join or submit to the revolutionary state. It would compel them to do so in virtue of its asserted statehood.

What are unlawful changes? Changes 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.

Undeniably, **oppression of a population**, especially alien subjugation or domination, or discrimination, **may confer a *moral* right to change a régime even by revolutionary means**, or to establish a new state, and this is reflected in international law: *Reference re Secession of Quebec*, [1982] 2 S.C.R. 217 at pp. 284 ff. But as the Supreme Court holds (pp. 286-87), **these conditions do not apply to Quebec.**

Invocation by the Canadian state of the defensive powers mentioned above, disturbing as that would be, should only be needed in the event that revolutionary acts are directed at the Canadian Constitution and State, and defensive measures become necessary to address such acts. We should all hope that it may never be necessary to exercise such powers, but since the Legislature rejects their existence, 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.

Section 4, while generally innocuous outside the context of this Act, is **invalid when taken in conjunction with, – and insofar as it operates with, – any one or more of sections 2, 3, 5, and 13**.

This is so, because section 4, when read with them, purports to allow constitutional changes of every kind, including secession in particular, **attempted not only unilaterally, but also on the decision of a simple majority of the electorate of Quebec**.

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

In our Reply Factum, para 5, we offer for the Court's consideration what we submit is a constitutionally-conforming text of s. 4, though we do not argue that the rules regarding severance permit the courts to substitute our text for that in the statute.

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 <u>to displace, – both (1) *in point of law* and (2) *in the minds of the public*, – the supremacy of the Canadian Constitution</u>** as declared in section 52(1) of the *Constitution Act, 1982,* as the supreme law of a pan-Canadian state. Patriation in 1982 transferred sovereignty ***to the institutions defined in Part V of the C,A., 1982*, *not to the population at large of all or any of the provinces.***

This intended displacement is clear ➡**first** from its ***text***, which introduces direct or popular sovereignty into the Canadian constitutional system

➜**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 secesssion (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 also*** its **authority** disappear and no longer apply to Quebec. They all evaporate.

This is **not an innocent provision**.

➡ It **seeks to introduce republican principles of direct popular sovereignty**, as is shown by The Attorney-General's expert evidence on the German and U.S. Constitution

➡ **But it has never been possible in Canada to enact any law without royal assent:** Constitution Act, 1867, ss. 56 and 90, nor can this be altered without a constitutional amendment enacted under s. 41 (a) of the Constitution Act 1982 (unanimous-consent procedure).

➡Section 5 is inconsistent with ***inter alia*** s. 41(a) of the C.A. 1982

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 so 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](emphasis added):**
>
> ... 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** (emphasis added), referring to the obiter dictum in *Re Initiative and Referendum Act*. [1919] A.C. 935 (P.C.):

... 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**.

Section 5 **also violates s. 41(e)** by attributing general constituent power to the Quebec electorate and Legislature. The **second and third paragraphs** of s. 5 are **merely incidental to the first paragraph**.

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; *Reference re Senate*, [2014] 1 S.C.R. 704 at 734.

.

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 and paramount powers of the Parliament and Government of Canada.

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

➡ because it denies, and is inconsistent with, the authority of the Parliament and Government of Canada to consult the people of Quebec by referendum; this clearly being considered by the Act to be a "constraint on the democratic will of the Québec people to determine its own future"; see authorities cited above in connection with s. 3 of the Act **(Trial Notes para. 9.10** above; corresponds to **Factum para. 4(iii)**);

1973 Programme, 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**

and s. 13 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 attempts at constitutional change, by the institutions or electorate of Quebec*, if and when they may be planned or attempted in excess of their lawful powers under the Constitution of Canada. (The phrase employed by s. 13 to do so is its rejection of all external power "to impose constraint on the democratic will of the Québec people to determine its own future"): see authorities cited in **Trial Notes para. 9.10** above; corresponds to **Factum 4. (iii)**; and s. 13 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).**

X. GENERAL SUBMISSIONS

10. *Legality and legitimacy of the Constitution Act, 1982 and of the amending procedures of Part V.*

It is often sought to disparage the legitimacy of the *Constitution Act, 1982*, and therefore of its provisions, – including Part V, the amending procedures, – by pointing to the fact that Quebec did not concur in its enactment.

The preamble to this Act contains this recital:

> WHEREAS the National Assembly has never adhered to the Constitution Act, 1982, which was enacted despite its opposition;
>
> CONSIDÉRANT que l'Assemblée nationale n'a pas adhéré à la Loi constitutionnelle de 1982, adoptée malgré son opposition;

And in the debates on the Bill (Bill 99) for this Act, see the Minister's remarks: Exhibit R-6, 25 May 2000, M. Joseph Facal, pp. 6168:

> Rappelons-nous le rapatriement de 1982, alors que, d'une Constitution fondée sur un compromis politique qui avait suscité, en 1867, l'adhésion des représentants du peuple qu'on qualifiait de canadien-français à l'époque, le Canada passe, sans l'accord du Québec, à une nouvelle vision constitutionnelle où la spécificité du Québec et où la dualité canadienne sont restées sans reconnaissance, ...

and at 6193;

> Continuons. Au-delà des figures imposées sur le peuple et sur l'État, je note que le député de Chapleau reste étrangement muet sur les autres conditions posées par le gouvernement, ne serait-ce qu'envisager de considérer ces déclarations. Pas un mot sur la non-reconnaissance par le Québec de la Constitution de 1982. Vous nous dites: De toute façon, ce n'est pas grave qu'on ne la reconnaisse pas, elle s'applique. Le député de Chapleau, lui...
>
> Enfin, disons que le député de Laurier-Dorion a certainement le mérite d'aller à l'essentiel. Le député de Laurier-Dorion, lui, nous dit: Dans le fond, la clé, c'est l'avis de la Cour suprême. La question, c'est de savoir: Est-ce que nous y sommes subordonnés ou pas? Dans le fond, M. le Président, quand on dit d'un côté de la bouche: Bien oui, on reconnaît aux Québécois le droit de décider, et de l'autre côté: Oui, mais, évidemment, on est pour l'avis de la Cour suprême au complet, bien, on se contredit parce que 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 qu'ils aient la permission de toutes les Législatures provinciales au 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 reconnaît 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?

and very explicitly in R-8, 7 December 2000, M. Facal, p. 8581:

> Je note d'abord une première contradiction grave dans la logique de l'opposition. On sait que l'Assemblée nationale n'a pas adhéré à la Loi constitutionnelle de 1982 et n'y adhère toujours pas. L'opposition officielle reconnaît cela, mais, du même souffle, elle invite le gouvernement à accepter sans réserve l'avis de la Cour suprême du Canada, alors que cet avis aurait 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.
>
> Alors, M. le Président, comment l'opposition peut-elle en même temps ? en même temps ? nous dire que les Québécois sont libres de leur choix, mais que cette liberté est subordonnée au consentement des autres provinces? On ne peut pas dire une chose et son contraire en même temps. Mais il faut dire que la confusion intellectuelle est vraiment devenue la marque de commerce de l'opposition officielle.

The apparent agenda is to give the *Constitution Act, 1982* and the amending formula in particular an aura of illegitimacy and unfairness. An this goes hand in hand with the contested provisions of "Bill 99", S.Q. 2000, c. 46

All Quebecers and other Canadians are entitled to their own views on the history of the 1982 Act. As to the Courts themselves, however, the Supreme Court has held the 1982 Act to have been enacted **not only *validly* and *lawfully* but also *in compliance with the conventions of the Constitution***; concluding*:*

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

It is indisputable that even underlying constitutional principles "could not be taken as an invitation to dispense with the written text of the Constitution": *Reference Re Secession*, [1998] 2 S.C.R. 217 at 249, para. 53.

The **text** of the Constitution of Canada **must therefore govern the disposition of this litigation.**

But as the debates on "Bill 99" dispute the legitimacy of the 1982 Act, with its new amending procedures, it should be noted that ***these amending procedures enacted in 1982 were in fact based on proposals by a group of eight provinces, including Quebec.***

Though the ultimate "package" was rejected by Quebec, the ***only*** objection Quebec raised to the amending procedures,– which became Part V of the 1982 Act,–

was as to what is now contained in s. 40, namely the compensation payable to a province which, under s.38(3), opts out of ("dissents" from) an amendment governed by s. 38(2).

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

11. ***Legal discontinuities and revolutions.*** In *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 **[TAB I:10]** (the "First Patriation Reference"), Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer, JJ. ("Majority: Convention") refer (p. 882) to " a state of legal discontinuity, that is, a form of revolution . . .".

While legal discontinuities of sufficient significance may be revolutions in no more than a technical sense, and may not involve social disorder, it is still true that major attempts by non-constitutional means to displace constitutional systems and governmental institutions are likely to cause very grave disruptions in civil and economic life.

Especially will this be true where an attempt is made by such means to establish a new sovereign state in place of the old. A contest will arise for the loyalty and obedience of the civil authorities and the law-enforcement officers, including the armed forces, not to mention the courts and the public at large. In question will be the nature of the response of the authorities of the pre-existing state.

An attempt by extra-constitutional means to establish an independent Quebec state would entail demands from the insurrectionary régime that every public

officer, federal, provincial or municipal, every member of every police force,every member of the armed forces, and including every judge in every court, abandon his or her allegiance to the Canadian state and Constitution and adhere to the new régime or putative state.

12. ***Respect for constitutional order and compliance with constitutional process.*** This underscores the importance of all branches of government insisting without compromise on punctual respect for constitutional order, and on their refusal to condone ***any*** departure ***whatsoever*** from due constitutional process. It is no service to society to evade these issues.

Without suggesting that the Court treat as fact the historical assessments of journalists, however distinguished they may be, a recent review of the Quebec Referendum of October 30th, 1995 offers realistic scenarios of the possible consequences of attempts to achieve either sovereignty, or a referendal authorization of sovereignty, by unilateral or other unlawful or questionable means.

13. ***Implications of the October 30, 1995 Quebec referendum.*** **The review of the evebts of 1995 by Chantal Hébert and the late Jean Lapierre is offered only in argument on the issue of compliance with constitutional process, and is not offered as evidence of historical fact. Rather it is presented in argument here as an expression of informed opinion whose** conclusions as to the events of the 1995 Quebec referendeum (we submit) offer a clear lesson: **Without strict compliance with the Constitutional amending procedures, there can be no assurance as to (1)** ***behaviour*** **or as to (2)** ***process*** **or as to (3)** ***outcome*****.** The authors present Canada as having been at risk of imminent collapse had there been even the slightest "Yes" majority:

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

14.0. ***Referendum majorities and secession.*** It must again be emphasized that ***no referendum majority, however great, can either effect secession or create an entitlement to secession***.

In ***Reference re Secession of Quebec,*** **[1998] 2 S.C.R. 217,[TAB I:11]** the Court

➡finds an ***implied duty to negotiate*** [see e.g. **p. 265. para. 8**]

➡ as a ***correlative*** to the Constitution's "conferring a right **to initiate** constitutional change on each participant in Confederation" [***ibid*****., p. 257, para. 69**; the emphasis is added here and below].

In the case of secession

➡the "initial impetus for for negotiation, namely **a clear majority on a clear question in favour of secession"** [**p. 271, para. 100]** in a referendum

➡is itself **"subject only to political evaluation"** [***ibid.***] **by the actors having the duty to negotiate**.

So too are

➡**"the political aspects of constitutional negotiations"** over which
➡**"the Court has no supervisory role" (*ibid.*)**.

The right of the Government and population with the referendum mandate is

➡a right **"to pursue secession"** [paras. 88, 92; pp. 265, 267], **not to achieve it.**

States the Court:

➡The **"referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession" [para. 87, p. 265]**.

The Court [para. 90, pp. 266-67]

➡**also *rejects* the proposition "that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province subject only to negotiation of the logistical details of secession".**

➡"**Secession is a legal act as much as a political one**" [para. 83, p. 263].

➡**"The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution ...."** [**para. 84, p. 263**].

14.1 ***Lawful means of constitutional change.*** Petitioner again acknowledges categorically

➡that the National Assembly of Quebec has power, at **any** time, to propose **any** constitutional change of **any** kind, by a resolution under s. 46(1) of the *Constitution Act, 1982*;

➡has power to seek support for its proposed change by referendum; and

➡has power through the Government to initiate negotiations with the Federation and other provinces.

But no such proposal can become law except through compliance with the amendment procedures of Part V of the *Constitution Act, 1982.*

The legitimate pride of the ethno-linguistic French-Canadian people in their identity, survival and achievements,– reflected in the preamble,– cannot justify or excuse resort to revolutionary measures.

15. ***Recourse to the Courts. Resistance by the Legislature. The Courts alone can vindicate Constitutional legality***. Petitioner seeks to vindicate these principles, and to do so finds himself ***compelled*** **to seek recourse from the Courts** through the present litigation.

Petitioner has encountered uncomprising resistance in this effort. Why so? All three branches of government have a duty to uphold the law, and the Supreme Court of Canada has spoken in the *Reference re Secession*, [1998] 2 S.C.R. 217 [TAB I:11] a decision highly conciliatory *both* in the *language* it employs and in its *far-reaching exercise of interpretative power in finding an implied duty to negotiate in stated circumstances*.

Yet the legislative branch of government in Quebec has responded *both* by statute, – in S.Q. 2000, c. 46, containing the provisions contested, here, – *and* by the *Resolution of 23 October 2013* (Exhibit R-25), *in both cases asserting or reasserting unilateral powers of constitutional change which are entirely inconsistent both with the constitutional provisions, and with the Court's decision*.

Within the electorate and within the National Assembly are well-known differences of opinion as to the future of Quebec within the Canadian federation. Yet **these differences are not reflected in the vote of 100 Yeas and 0 Nays by which the Assembly passed the Resolution of 23 October 2013**.

Buried in this vote are no doubt strategic considerations, but, whatever they may be, it is clear that the Courts of law **and the Courts alone** are now in a position to vindicate the Constitution, vindicate the law in general, and vindicate the integrity of the Canadian state. The Quebec Legislature will not do so. On the contrary, though using other language, it defies the authority of the Courts in general and of the Supreme Court of Canada in particular, – notably its decision the Secession *Reference*.

Only the Courts by clear and categorical judgments can hope to end the cycle of contemplated unlawful measures and of referenda (e.g. Ex. R-14, Vol.

1 Tab 1) proposing such measures, – or threats of them, – all of which by their very nature tend to destabilize the Province and the country and to impede their economic progress.

16. ***The State is an abstraction existing in the mind and dependent on belief in its existence***. Unlike material things and human persons, the state (it must be remembered) is a legal and politcal abstraction, which organizes persons and things in legal relationships.

Reiterated attacks on the Constitution have the effect, and the obvious *purpose, of undermining the Canadian state and Canadian legal system, – undermining, in the public mind,* all three branches of government as lawfully established.

For it is in the public mind that they must exist if they are to exist at all.

The state and its legal system can only exist through general belief in their authority, just as a currency can only survive and hold value if there is belief that it will be accepted by others. As to protecting the authority of the Canadian Constitution in Quebec, firm intervention by the Courts is indispensable to that end.

17. ***Infringement of Charter Rights.*** The conclusions numbered **(2)** reproduced above in 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) **[TAB I:2]**; *dispositif* at p. 2516.

Though it had ***neither*** *been* ***(1) passed nor (2) assented to, nor (3) approved in a referendum***, the Bill (Bill No. 1, 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, there was no basis for a declaration of nullity.** Nor was there anything yet enacted which could be declared null and void.

This was however a threat because once enacted it would **purport to 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 and no answer. The present Act asserts that the rights will last as long as Quebec wishes and no longer. In other words, the Act makes the Charter rights conditional.

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*.** These are of course mandatory.

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.

We speak instead of "infringement and denial", rather than "threat", as the new threat through S.Q. 2000, c. 46, is both *more muted* and *less imminent* than was the case with the 1995 Referendum Bill. But it is still real.

More *muted* than in 1995 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 under S.Q. 2000, c. 46, unilateral sovereignty is not (as with Projet de Loi No. 1) effective as soon as its specified conditions are satisfied.

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.*

A provincial legislature cannot by its statute render the unconditional rights of the Charter conditional, no matter what conditions it chooses to impose.

***What the Legislature could not enact directly, it cannot authorize in advance*, nor declare its power to do,– 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. **Sections 24 and 52 of the C.A. 1882 each provide remedies.**

18. ***Constraining and emending texts to achieve constitutional conformity***.

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

(1) by *excision of* ***specifed text*** ("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 and reproduced in the Books of Authorities Volume II.**

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"), formulated above (para 18).

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

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..

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 possible one? The rules require remedial precision, not a choice.

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.

What is more, ***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 (some 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, 22 & 23 May 1996; 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 III Tab 21, Projet de loi No. 1, *Loi sur l'avenir 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.

Exhibits 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 aserts 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 of 22 May 1996 (in Exhibit R-11, Appendices) **(textually reproduced above, Note 9.8.4, at page 44) ,** 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 statute in general, or the contested provisions in particular, be treated as if they were a simple expression of opinion contained in a resolution of the Assembly adopted on motion. This course of action (a resolution of the Assembly) was explicitly rejected from the outset by the Minister when moving the Bill (Bill 99, 36th Leg., 1st Sess,) and its text was enacted in *statutory* form *precisely and expressly so as to have the force of law*: Exhibit R-6, esp. pp. 6167, 6168.*This is a statute with an enacting clause, passed and assented to in due form, and it must be treated as such.*

"The question of the constitutionality of legislation has in this country always been a justiciable question": *Thorson* v. *A.-G Canada*, [1975] 1 S.C.R. 138 at p. 151 [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 <u>perhaps</u>*** escape judicial review as to its validity, ***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); esp.:

> **"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.

The legislative debate (esp. in Exhibits R-6 and R-8) on Bill 99, which resulted in this Act, is punctuated with repeated references to the federal Bill (C-20) resulting in the *Clarity Act* (Exhibit R-4) and to earlier referenda on sovereignty. The preamble to this Act itself denounces the *Clarity Act*.

The Bill 99 debate, and this very Act itself, show throughout *a preoccupation, explicit and implicit, with using the provisions* contested in these proceedings, – framed though they are in more general, – all-embracing, – terms, – specifically to assert a claim of a right to unilateral secession. (See Premier Bouchard, Ex. R-8, esp. p. 8577-8, on unilateral determination of Quebec's future. (This is textually reproduced in part above, Note 9.8.5, page 45.)

Thus the present Act, S.Q. 2000, c. 46, *deliberately, consciously, and colourably*, reasserts, – though in different and more oblique terms, – what had been rejected by the Supreme Court in the *Secession Reference* (which the Preamble to this Act recognizes as having "political", rather than legal "importance").

In so doing, this Act repudiates not only the authority of Canadian Constitution but specifically the authority of the Courts of law. *S.Q. 2000, c. 46 implicitly asserts that the political institutions of Quebec, not the Courts, will settle the*

law. These proceedings are Petitioner's necessary response.

Lastly, it should scarcely be necessary to assert that there is no reason for, or basis for, or plausibility for, any attribution of "temporary validity" to the contested provisions.

A period of validity for what?

➡For unilateral secession?

➡For resistance to the supremacy of the constitution and to federal authority?

➡For *ultra vires* constitutional changes to be attempted?

20. ***Legislative history and other extrinsic material.*** The legislative history and other extrinsic material cited in these Notes and through this Factum are cited on the basis of the following rules and principles, which are a best-efforts synthesis by Petitioner's counsel of the governing authorities, relying on the cases cited in **Factum Appendix IIL and in Books of Authorities Vol. III**.

Petitioner has respectfully requested the Attorneys-General for Quebec and for Canada to to indicate in what respects if any they consider these rules not to be accurate statements of the law so that the hearing can address matters genuinely in controversy. No objection to these rules or principles has been received, though the Attorney-General of Quebecd herself rejects the relevance of at least some of Petitioner's extrinsic material while 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.

All of which is respectfully submitted.

Montreal, this 25th day of February, 2017.

Stephen A. Scott
Counsel to Petitioner