500-09-027501-188

Court of Appeal of Québec

Montréal

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

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

KEITH OWEN HENDERSON

APPELLANT – Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT – Respondent

-and-

ATTORNEY GENERAL OF CANADA

MIS EN CAUSE – Intervener

-and-

SOCIÉTÉ SANT-JEAN-BAPTISTE DE MONTRÉAL

MISE EN CAUSE – Intervener

APPELLANT'S BRIEF

Volume 1 : pages 1 to 42

Dated October 9, 2018

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CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

COURT OF APPEAL

No. 500-09-027501-188 C.A.
No. 500-05-065031-013 S.C.

KEITH OWEN HENDERSON

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APPELLANT'S ARGUMENT

PART I – FACTS

1. APPELLANT/Petitioner Keith Owen Henderson (hereinafter the "Appellant") appeals from the judgment of the Superior Court of the District of Montreal rendered by the Honourable Justice Claude Dallaire on April 18, 2018 (received by the Appellant on April 19, 2018). This judgment dismissed the Appellant's Re-Amended Motion for a Declaratory Judgment pursuant to Article 453 of the old C.C.P. and Re-Amended Application for Declaratory Relief pursuant to sections 24(1) and 52 of the *Constitution Act, 1982,* in respect of ss. 1 to 5 and 13 of the Act S.Q. 2000, c. 46 **(Ex. R-1 and R-2, Appellant's Brief, hereinafter « A.B. », vol. 2, p. 276, 279).**

2. Notice of Appeal dated May 10, 2018 was duly served on all parties and filed on May 11, 2018.

3. The proceedings originate in a motion for declaratory judgment filed on May 9, 2001 by the Appellant and the Equality Party, and later amended and re-amended. In interlocutory proceedings instituted by the Attorney-General for Quebec this Court, in its judgment of August 30, 2007, dismissed Appellant's motion as regards the other Petitioner, the Equality Party. It also deleted certain conclusions. But this Court allowed the Appellant's appeal from the Superior Court's dismissal of his motion, and it sent the application for trial with the conclusions as stated below, which here add the citation Revised Statutes of Quebec, chapter E-20.2. (See below **PART IV. Order Sought para. 3) Conclusion (1)**). This Court also, on August 30, 2007, summarized the issues for trial in paragraphs [66] to [70] of its judgment. These are reproduced in paragraph [136] of the judgment of Hon. Madame Justice Dallaire, now on appeal.

PART II – ISSUES IN DISPUTE

4.1 Are sections 1, 2, 3, 4, 5 and 13 of *An Act respecting the fundamental rights and prerogatives of the Québec people and the Québec State*, Statutes of Quebec 2000, c. 46, – now *Revised Statutes of Quebec*, c. E20.2, – both individually and as read with one another, validly enacted in whole or in part?

4.2 If not fully valid, do they require textual or substantial severance, or judicial restatement, to achieve conformity with the Constitution of Canada, and, more particularly, conformity with ss. 52(1) and 52(3) and Part V of the *Constitution Act, 1982* ("the 1982 Act")?

4.3 Can the rules of textual or substantial severance be applied to ***substitute*** constitutionally-conforming texts of the contested provisions, ***or*** to ***circumscribe*** these to achieve constitutional conformity?

4.4 Do the contested provisions constitute an unjustified infringement and denial of Appellant's rights under the *Canadian Charter of Rights and Freedoms*, and are they accordingly unlawful, invalid, and of no force or effect?

PART III – SUBMISSIONS

5. *Appeal.* Appellant appeals from the judgment of the Superior Court on the basis, respectfully submitted, that both the order itself, and the reasons given in its support, are in error.

6. *Grounds of Appeal.* Appellant invokes the following grounds. In summary:

Sections 1, 2, 2, 4, 5 and 13 of *An Act respecting the fundamental rights and prerogatives of the Québec people and the Québec State*, Statutes of Quebec 2000,c. 46, now *Revised Statutes of Quebec*, c. E20.2, both individually and as read with one another, are not validly enacted, for these reasons, summarized here as six points:

6.1 *Ibid.* **(1)** They are, on their face, declaratory ***statutory*** statements as to Quebec's constitutional position and powers, but they are statements which on their face are in direct contradiction with the provisions of the Constitution of Canada. Particularly is this so since, in their explicit assertions of unlimited powers of constitutional change, they confront the supremacy of the Constitution of Canada, s. 52 (1) of the 1982 Act. Their claims are absolute.

6.2 *Ibid.* More particularly affronting s. 52(1), they in no way recognize, accommodate, or respect the requirement (s. 52(3)) that all constitutional change must be made in accordance with the Constitution. The relevant prescribed amending

procedures are those set out in Part V of the 1982 Act "PROCEDURE FOR AMENDING CONSTITUTION OF CANADA". But Part V itself is amendable only under s. 41(e), with the unanimous consent of all provinces, and so is impervious to federal or provincial statute alike.

6.3 ***Ibid.*** This confrontation between S.Q. 2000, c. 46, and the Constitutional texts is linked to attacks, – found ***both*** on the face of the legislation ***and*** in the debates on the Bill, – on the process of Constitutional "Patriation" through which the 1982 Act was enacted. But these attacks have been rejected by the Supreme Court of Canada in the two *Patriation References* (see below **Brief, para. 26. 4**). The Court upheld both the legality and the legitimacy of the Patriation process. The Court reaffirmed the legitimacy of the Patriation process in *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, para. [47] (read with para. [33]) (hereinafter *Secession Reference*).

6.4 ***Ibid.*** **(2)** When read with relevant extrinsic material, the contested provisions can be seen not only not to conform to the Constitution of Canada. They are also in plain, – indeed, *avowe*d, – defiance of its terms. This extrinsic material consists primarily of the legislative debates on Bill 99 of the 36th Legislature, 1st Session, which became the statute under review, and of the Programmes and Platforms of the Parti Québécois, under whose auspices and legislative majority the statute was enacted. It includes also the 1995 referendum Bill, which would have declared independence unilaterally and in disregard of the Constitution. (See below, **Brief, para. 15.**)

6.5 ***Ibid.*** **(3)** Even aside from their broad confrontation with the true constitutional position of Quebec as a Canadian Province, the subject-matter of the contested provisions is, very specifically, beyond the legislative authority of the province under s. 45 of the 1982 Act, the provincial power of constitutional amendment. Other than s. 45, no provincial legislative power is available or relevant to support those provisions, while the six provisions are *ultra vires* s. 45.

6.6 ***Ibid.*** **(4)** The judgment below does not merely, as a matter of history, treat the Act under review, S.Q. 2000, c. 46, as a legislative *response* to the federal statute, the *"Clarity Act", An 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, c. 26 (**Ex. R-4, A.B., vol. 2, p. 299**). Appellant invokes the many citations listed below in **Brief, paras. 37, 37.3,** to show that the language of the judgment *a quo encourages*, – and even appears at least tacitly to *approve*, – these two propositions: **1.** The provisions contested by Appellant were and are *justified* by, and even appropriate *retaliation* for, the *Clarity Act*. **2.** The *Clarity Act* itself is illegitimate and even (Judgment paras. [85], [87], [560]) constitutionally invalid and unlawful. Thus the court cites with apparent approval attacks on the *Clarity Act's* legitimacy and even on its validity. More broadly, – and as one example of many, – in the Bill 99 debates, the excoriation of Canadian federalism by M. Marc Boulianne specifically focuses on the *Clarity Act* (referred to as the Bill, "C-20"). See ***Debates*, 21 Nov. 2018, p. 8018, Compendium of the A.-G. Canada, Tab 5, Exhibit PGC-1, A.B., vol. 3, p. 720; Ex. R-4, A.B., vol. 2, p. 299**.

6.7 ***Ibid.*** **(5)** Though the Court below interprets the contested provisions as ***not*** asserting a right to unilateral secession, that Court generally defines unilateral secession as secession not preceded by negotiations, without making it clear that secession requires a constitutional amendment compliant with Part V of the *Constitution Act, 1982*. Rather, the Court's references to this requirement are at best oblique. Indeed, the Court below *itself* asserts a right to unilateral secession in the event that negotiations were to fail. The Court below in any case rejects the need formally to circumscribe, or "read down", the contested provisions, even where it considers their language *ex facie* too wide and requiring some restraint or qualification in their interpretation.

6.8 ***Ibid.*** **(6)** The A.-G. Quebec shelters the contested provisions behind the presumption of constitutionality. Appellant offers, in sum, four responses, all completely congruent with one another. **1.** The absolute and unqualified language of the contested statutory provisions. These, individually and together, assert an unlimited power of constitutional change on the part of the legislative institutions and population of Quebec. **2.** The repeated explicit rejection by the responsible Minister in the course of the Bill 99 debate, of: **(i)** the processes prescribed for constitutional amendment in Canada; of **(ii)** the constitutional provisions which impose them (i,e., the *Constitution Act, 1982*);

and of **(iii)** generally, the need to judge the legislation in terms of Canadian constitutional law. **3.** The historical precedent of the 1995 Referendum Bill which proposed to authorize a unilateral declaration of independence, and which is invoked both in the Preamble to the Act and in the debates on Bill 99. **4.** The Programs and Platforms of the Parti Québécois, under whose auspices Bill 99 was enacted at S.Q. 2000, c. 46, and which repeatedly propose unilateral secession failing agreement on the terms of secession. What more could possibly be demanded of Appellant to overcome the presumption of constitutionality? What more could possibly be offered beyond explicit text and explicit avowals by the responsible institutions and recognized spokespersons?

7. ***Relevant provincial legislative jurisdiction***. The contested provisions deal with *institutions of, and powers of, government.* That is their subject-matter, – their "pith and substance". In support of their validity, the judgment (para. [297]) invokes three powers: **(1)** the legislative authority conferred by Constitution Act 1867, sections 92.13, "Property and Civil Rights in the Province"; and **(2)** provincial legislative jurisdiction under s. 92.16 "Generally all Matters of a merely local or private Nature in the Province". **(3)** The Court invokes lastly, – within Part V of the 1982 Act, "PROCEDURE FOR AMENDING CONSTITUTION OF CANADA", – the powers conferred by s. 45: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province". (Judgment, para. [467].)

7.1 ***Ibid.*** However, section 92.13, dealing with proprietary right and civil obligation, is far too remote to be relevant here. Section 92.16 appears only slightly more plausibly relevant. However, when it was originally enacted, s. 92.16 stood in the list of powers alongside the former s. 92.1, "The Amendment from Time to Time, notwithstanding anything in the Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor". Section 92.1, – clearly to the exclusion of s. 92.16, – from 1867 to 1982 absorbed the subject-matter of laws regarding provincial governments' institutions and processes. Then in 1982, the former s. 92.1 was replaced by s. 45 of the 1982 Act. On any reasonable interpretation s. 45 now exhausts the relevant subject-matter. Section 45 is closely defined and limited ***within*** Part V of the 1982 Act,

and ***by*** the Courts. Its stated scope cannot plausibly be extended by s. 92.16. Appellant is reluctant to impose on the Court citations of the dozens of constitutional cases establishing the scope and nature of s. 92.16: trades, professions, and transactions within the Province; local public order and safety on the streets, highways, and elsewhere; public health; and the like.

7.2 ***Ibid.*** The Government itself clearly characterized the legislation as constitutional in nature. See Judgment [158] (recording the position of A.-G. Quebec). Minister Facal in the Bill 99 debate, May 25, 2000 (**Ex. R-6 at p. 6168, A.B., vol. 2, p. 314**):

> Il faut à cet égard rappeler, M. Le Président, que le caractère novateur du projet de loi no. 99 se retrouve autant dans sa lettre que dans son esprit. Certes, ce n'est pas le projet de Constitution auquel nous avaient invités plusieurs intervenants en commission et duquel ils auraient voulu débattre. S'il n'a pas la facture d'une constitution, il en a jusqu'à un certain point l'esprit et la portée ....

Citing and relying on various statements made during Bill 99 debates, the Court below, in its Judgment para. [104], holds that the legislation afforded "l'opportunité rêvée de créer une sorte de constitution interne." To similar effect are paras. [550], [551] of the Judgment. In sum, the legislation is clearly constitutional *in nature*, but nevertheless is *ultra vires* the *limited powers* of constitutional amendment conferred on the province by s. 45 of the *Constitution Act, 1982.* (See authorities cited below **Brief, para. 8.***)* The contested sections are, of course also inconsistent with ss. 52(1) (supremacy of the Constitution) and 52(3) of the 1982 Act (compliance with prescribed amending procedures) and with Part V generally, esp. s. 41 (e). (See further below **Brief, paras. 8, 9 and 10**.)

8. ***Provincial legislative authority under C.A. 1982, s. 45.*** The provincial legislative power of constitutional amendment under the former s. 92.1 of the 1867 Act, and now under s. 45 of the 1982 Act, extends ***only*** to the ***internal institutions of the province***, and even then with major exceptions, which **exclude** from provincial amending power: **(1)** all powers of the Crown and its representatives; **(2)** the implementation of the federal principle; **(3)** any fundamental term or condition of the

Union; **(4)** anything which engages the interests of the other level of government; and **(5)** anything which alters the fundamental nature and role of the province's institutions.

The foregoing propositions are carefully drawn from the following leading cases, and they are central to resolution of the issues in this litigation:

> *Reference re Senate Reform*, [2014] 1 S.C.R. 704, paras. [47] and [48]
> *Ontario Public Service Employees' Union* v. *A.-G. Ontario*, [1987] 2 S.C.R. 2 at pp 37ff esp. pp. 38-40 and 46, *per* Beetz, J. (for himself, and McIntyre, LeDain, and LaForest, JJ., a majority of the bench)
> *In re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.) at pp. 943-945

8.1 *Ibid.* Each province's *legislative assembly* is free under s. 46(1) of the 1982 Act to *propose* any constitutional amendment it pleases. A provincial *legislature* can also authorize *consultative* referenda. But no provincial legislature by itself can in any way alter the general structure or institutions of the Canadian federation, nor alter the Province's own status or powers. Nor can its electors do so by referendum. A province cannot ***define*** its own status nor, – in violation of the 1982 Act (s. 52(3) and s. 41(e)), – ***substitute*** its own authority for the procedures of Part V.

9. *Constitutional changes beyond internal provincial institutions.* Where any proposed constitutional change ***extends beyond*** internal provincial institutions, structures, and processes, Part V requires recourse to, and compliance with, the two "multilateral" or "national" amending procedures (respectively, ss. 38 ff. and s. 41). These, alone, address matters not exclusive to the federal or provincial institutions of government (and allocated to them respectively, under ss. 44 and 45 of the 1982 Act, for independent action). By contrast, the "multilateral" or "national" amending procedures require the concurrence of the federal legislative houses and also (under ss. 38 ff.) *at least two-thirds*, – or in some instances (under s. 41), *all*, – of the provincial assemblies. (We need not here address the exceptional provisions of the *Constitution Act 1871* or of the *Constitution Act, 1886*. So far as is relevant to this litigation, s. 52(3) of the 1982 Act points to the procedures in Part V.)

9.1 *Ibid.* In the particular context of the *secession* of a Canadian Province, this requirement, – recourse to one of the "national" procedures, – is laid down by the

Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("Secession Reference"), paras. 84 (twice), 97, and 104.

> 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.

10. ***Choice of amending procedure***. In the *Secession Reference* (see para. [105]), the Court did not decide which of these two national procedures would govern secession: **(1)** ss. 38 ff. of the 1982 Act, – requiring, in addition to concurrence of the federal Houses, resolutions of the assemblies of ***two thirds*** of the provinces aggregating at least fifty per cent of the population of the provinces, – or **(2)** s. 41, – requiring concurrence of the assemblies of ***all*** the provinces.

Whenever this issue arises in the Bill 99 debates, the clear assumption on the part of the Government is that s. 41 (unanimous consent of the provinces) applies. See the quotations below from the Bill 99 debates, **Brief, paras. 13.1 to 13.4**.

11. ***Underlying constitutional principles***. The following principles manifestly underlie, and are necessarily implied by, ss. 52(1) and 52(3) and Part V of the 1982 Act:

> **(1)** The future of Canada is to be determined by all of its people collectively, through their federal and provincial legislative institutions, and not by the people or institutions of one province alone.
>
> **(2)** Every part of Canada belongs indivisibly to all of its people. Division can only be accomplished lawfully by the collective action of all the people of Canada, through their legislative institutions.

(3) The people of any given province have no constitutional right beyond **(i)** governing that province within the Constitution of Canada, in exercise of whatever powers are conferred on the province at any given time, as well as **(ii)** the right to propose changes to be accomplished by lawful means.

12. ***Extrinsic material***. In their *Mémoires* and *Factums* in the Superior Court, and also at the hearing, all parties relied heavily on extrinsic material (see e.g. Judgment para. [213]). So did the Court itself. It upheld the filings of a spectrum of Exhibits when contested (paras. [206] to [208]), and also held the extrinsic material filed by various parties to be appropriate for use by the Court (paras. [209] to [217]). The use of extrinsic material does not appear to be an issue between the parties. Appellant therefore omits here the digest of authorities regarding admissibility and use of extrinsic material, which had been submitted to the Superior Court (in *Petitioner's Factum*, para. 18 and App. II).

12.1 ***Ibid.*** Appellant relies on the following extrinsic sources as *reinforcing*, – *not* as qualifying or limiting, – the absolute and unqualified character which the contested provisions already bear on their face. For these assert, in plain words, an unlimited right of self-determination, and of constitutional change generally, – extending *ex facie* (and fully supported by the Bill 99 debates) to secession:

→ the legislative debates on Bill 99, which became the Act S.Q. 2000, c. 46,

→the 1995 referendum measure, *Loi sur l'avenir du Québec*,

→the Programmes and Platforms of the Parti Québécois, and

→Resolutions of the National Assembly in 1996 and 2013

Debates on Bill 99*: Journal des Débats de l'Assemblée Nationale*

3 mai 2000 (**Ex. R-5, A.B., vol. 2, p. 305**);

25 mai 2000 (**Ex. R-6, A.B., vol. 2, p. 310**);

30 mai 2000 (**Ex.R-7, A.B., vol. 2, p. 342**);

21 Nov. 2000 **(Compendium of the A.-G. Canada, Tab 5, Exhibit PGC-1, A.B., vol. 3, p. 720);**

7 Dec. 2000 **(Ex. R-8, A.B., vol. 2, p. 347)**;

Commission permanente des institutions, 29 mars 2000 **(Ex. R-13, A.B., vol. 3, p. 529)**;

Commission permanente des Institutions, 30 May 2000, **CI-80 (Compendium of the A.-G. Canada, Vol. II, Item 2 C, Tab 4, A.B., vol. 3, p. 766)**

On the October 30, 1995 Referendum question

In **Exhibit R-11, Appendix B to the *Factum of Roopnarine Singh and Others,*** submitted in *Reference re Secession of Quebec*, are reproduced these two items**: *Procès-Verbaux/Votes and Proceedings – Ass. Nat.* 20 Sept 1995**, and ***Resolution of the National Assembly* on the right to define political status without interference** dated ***22 May 1996 (*A.B., vol. 3, p. 403*)***.

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),* A.B., vol. 3, p. 540.**

Programmes et Plateformes du Parti Québécois (**Ex. R-15, A.B., vol. 3, p. 541**) (extracts, in which are marked relevant passages)

Resolution of the National Assembly October 23, 2013, reaffirming the principles of S.Q. 2000, c. 46 (**Exhibit R-24, A.B., vol. 3, p. 676**).

13. ***Rejection, during Bill 99 debates, of compliance with the amending procedures.*** The framers and promoters of this Act, in the legislative debates on Bill 99, *specifically and explicitly* reject compliance with the Constitution of Canada regarding constitutional change In particular, they reject compliance with the "multilateral" or "national" amending procedures when any attempt might be made to effect the secession of Quebec.

13.1 ***Ibid.*** The Attorney-General for Quebec, in her *Mémoire* for trial, painted a picture of this Act as constitutionally innocent, as does the judgment now under appeal. 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. The Court, – as Minister Facal himself acknowledges, – *requires* a national constitutional amendment for secession: **Ex. R-6, at p. 6193, May 23, 2000, A.B., vol. 2, p. 339:**

> ... 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 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?

(See the quotation in the very Judgment *a quo*, para. [399].) Again, on December 7, 2000, **Ex. R-8, p. 8581** (**excerpted**), **A.B., vol. 2, p. 347**, Minister Facal:

> .... L'opposition officielle ... 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.

On May 25, 2000 **Ex. R-6, p. 6167, A.B., vol. 2, p. 313**, Minister Facal:

> ... [L]e gouvernement aurait été prêt à considérer la déclaration solennelle présentée par l'opposition officielle pour autant que celle-ci comporte quelques éléments fondamentaux que j'ai énumérés hier et que je réitère aujourd'hui: ... quatrièmement, un rappel à la non-adhésion du Québec à la Loi constitutionnelle de 1982; et cinquièmement, l'affirmation que le droit du Québec de décider de son avenir doit s'exercer sans ingérence et sans le droit de véto découlant de la formule d'amendement de 1982.

On May 25th, 2000, **Ex. R-6, p. 6194, A.B., vol. 2, p. 340**, Minister Facal:

> ...En fait, M. Le Président, il est complètement contradictoire de dire d'un côté: 99 judiciarise une question politique, et, du même côté de nous dire: Il faut se lier pieds et poings à l'avis de la Cour qui n'est que ça, la judiciarisation de la politique. Comment pouvez-vous dénoncer la judiciarisation du politique et en même temps élever un cierge à la gloire de l'avis de la Cour suprême qui est justement ça, la judiciarisation de la politique? ...

13.2 *Ibid.* On May 30th, 2000, in Commission Permanente des Institutions (**CI-80, p. 6 and p. 16, A.B., vol. 3, p. 768 and 771)**, filed by A.-G. Canada, in ***Compendium*, Tab 4** (see Brief, para. 13.3 and 26.1), Minister Facal, makes further observations to the same effect as above on Bill 99, and adds this:

> ... [P]our l'opposition, toute démarche, toute affirmation du peuple québécois doit nécessairement être subordonnée, être circonscrite à l'intérieur du droit constitutionnel canadien. C'est cela que l'on dit concrètement quand on dit qu'il faut d'adhérer totalement et sans réserve à l'avis de la Cour suprême. Concrètement, ce que ça signifie, c'est que, dans l'esprit de l'opposition, tout changement de statut politique et constitutionnel du Québec suppose un amendement à la Constitution canadienne et donc suppose l'unanimité de toute législature canadienne. On sait très bien, si on accepte juste pour un instant, de vivre dans la réalité, que cela est chose absolument impossible. ...

> ... M. Le Président, je dois vous dire que, sur cette question précise, ce n'est pas une question de véhicle, mais c'est véritablement sur le fonds que je ne peux pas acheter ce que dit l'article 1 de la motion libérale, puisque ce que vient de dire, que vient de nous lire le député de Verdun a pour effet de complètement subordonner le principe d'autodétermination du peuple québécois au droit constitutionnel canadien et à ses évolutions formelles ou interprétatives futures et, notamment, a pour effet de nous entraîner à faire en sorte que l'accession du Québec à la souveraineté soit tributaire de la procédure d'amendement prévue à la Constitution de 1982.

13.3 ***Ibid.*** Minister Facal, moving passage of Bill 99, on 21 November 2000, **(Debates p. 7989, Compendium of the A.-G. Canada, Tab 5, Exhibit PGC-1, A.B., vol. 3, p. 725**):

> ...Quant au principe du constitutionnalisme, nul ne peut ignorer le fait que la Loi constitutionnelle de 1982 reste, pour le Québec et pour le peuple québécois, gravement teintée d'illégitimité. Il s'agit d'ailleurs là, – je le souligne au passage, – d'un aspect regrettable de l'avis consultatif de la Cour suprême. Bien que cet aspect soit de nature essentiellement politique, il m'apparaît qu'il ne peut pas, n'aurait pas dû être passé sous silence pas les juges de la Cour suprême.

The last two sentences here are inaccurate. The Supreme Court, in paragraph [47] of the *Secession Reference,* expressly addressed the "Patriation" process and the *Constitution Act, 1982,* and reaffirmed both their legality and their legitimacy. As to the first sentence above, Appellant in **Brief, paras. 26 to 26.5,** below, examines, in order to refute, the premises which underlie the allegations of injustice in the Patriation process and in the *Constitution Act, 1982.* The 1982 constitutional-amendment formulae *originated in an interprovincially-proposed text signed by Quebec and seven other provinces. It was not an external invention.* The enacted text was only modestly changed from the interprovincial proposal and the changes did not affect the mechanisms for changing Quebec's status within Confederation, – secession most notably. See below **Brief, para. 26.3).**

13.4 ***Ibid.*** Minister Facal continues (21 November 2000, **Bill 99 Debates, p. 7989, (A.B., vol. 3, p. 725**):

> Il est clair aussi que le gouvernement du Québec ne peut, par une acceptation sans réserve de l'intégralité du renvoi, cautionner cette rupture de 1982 et surtout ne peut cautionner l'application d'une formule d'amendement mise en place sans son accord ni celui des deux peuples fondateurs du Canada.

> Jamais un gouvernement du Québec – en tout cas le nôtre, M. le Président, je vous l'assure, – ne pourrait accepter que l'application de cette formule puisse se traduire un jour par l'octroi, à n'importe laquelle des neuf autre provinces, d'un droit de veto sur l'avenir politique du Québec et du peuple québécois.
>
> En ce sens, le projet de loi no. 99 réitère les principes politiques et juridiques qui constituent déjà les assises de la société et de la démocratie québécoise. Il consacre, notamment, le droit fondamental du peuple québécois à disposer librement, sans ingérence, de son avenir politique ....

13.5 ***Ibid.*** The Act under review by its terms authorizes unlimited unilateral constitutional change in flagrant disregard of the requirements of the *Constitution Act, 1982* applicable to constitutional change in every province including Quebec. The Bill 99 debates *prove* quite explicitly that it was intentionally drafted *to do just that*. The Act therefore cannot survive judicial review of its constitutional validity.

13.6. ***Authoritative spokesman on Bill 99.*** It should be noted that Minister Facal was referred to by the A.-G. Quebec in her *Mémoire* at Trial (16 May 2016), p. 11, as the "parrain", or godfather, of Bill 99. On behalf of the Government, he controlled every aspect of the Bill throughout its progress from introduction to assent, addressing and responding to every question about its formulation and its purposes. The Act was sometimes referred to as the *Loi Facal* (Judgment, para. [21]). Minister Facal's statements, some quoted here, must be considered authoritative *as against* the Attorney-General for Quebec.

14. ***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, A.B., vol. 2, p. 352-353**):

> 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.

In the context of Bill 99, this is an unmistakable assertion of a claim to a right of unlimited unilateral constitutional change.

15. ***The 1995 Referendum Bill: Loi sur l'avenir du Québec.*** **(1)** The measure proposed in the October 30, 1995 referendum purported to ***authorize a unilateral***

declaration of independence. **(2)** The 1995 precedent is ***specifically cited*** in the 13th preamble to the Act now under review, and **(3)** this 13th preamble is textually linked to the 12th preamble, *which encapsulates ss. 1 to 5 and 13 of the Act*, – the contested provisions themselves. So *on the very the face of the Act*, there is an explicit link between the contested sections and unilateral secession as attempted in 1995 and blocked only by the 1995 referendum result. (See 5 Volumes of Material filed by A.-G. Canada in *Ref. re Secession of Quebec* (Appellants' **Exhibit R-14**), see esp. ss. 1, 2, 26,27, Vol. III, Tab 21, *Loi sur l'avenir du Québec (Projet de loi No. 1) (7 Sept. 1995)*.

16. *Parti Québécois Programmes.* Proposals to declare independence unilaterally are repeatedly reasserted as party policy in Programmes and Platforms of the Parti Québécois, under whose auspices and under whose legislative majority Bill 99 was enacted.

> ***Programmes et Plateformes du Parti Québécois*** (**Ex. R-15**) (extracts, in which are marked relevant passages); from the following is taken:
>
> **→ 1969 Programme; Ex. R-15 at p. 5, A.B., vol. 3, p. 547:**
>
> "Le droit international ne reconnait pas, en principe, le droit de sécession 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".

As is the case here, the international-law of self-determination of peoples has been endlessly reiterated as including a right of secession. There is no acknowledgement that, so far as Quebec is concerned, self-determination (the Supreme Court has decided) extends only to self-determination ***within the Canadian state***: *Secession Reference*, paras. [122], [127] to [133], [136], [138], [154].

16.1 *Ibid.* In varying formulations, some more muted, these claims, stated in 1969, are repeated in the Parti Québécois 1970 Programme **(Ex. R-15, p. 7, A.B., vol. 3, p. 549)**, the 1973 Programme **(Ex. R-15, p. 13, A.B., vol. 3, p. 555)**, the 1975 Programme **(Ex. R-15, p. 15, A.B., vol. 3, p. 557)**, the 1978 Programme **(R-15 p. 19, A.B., vol. 3, p. 561)**, the 1980 Programme **(Ex. R-15, p. 25, A.B., vol. 3, p. 567)**, the 1982 Programme **(Ex. R-15, p. 29, A.B., vol. 3, p. 571)**, the 1984-85 Programme

(Ex. R-15, p. 33, A.B., vol. 3, p. 575), the 1989 Programme **(Ex. R-15, p. 43, A.B., vol. 3, p. 585)**, the 1994 Programme **(Ex. R-15, p. 51, A.B., vol. 3, p. 593)**, the 1997 Programme **(Ex. R-15, p. 55, A.B., vol. 3, p. 597),** the 2001 Programme **(Ex. R-15, p. 60, A.B., vol. 3, p. 602)**, the 2005 Programme **(Ex. R-15, p. 80, A.B., vol. 3, p. 622)**, the Plan Marois (not dated) **(Ex. R-15, p. 83, A.B., vol. 3, p. 625)**; the 2011 Programme **(Ex. R.-15, p. 87, A.B., vol. 3, p. 629)**.

17. *Resolution 22 May 1996.* Not long after the 1995 Referendum, the following was asserted in the *Resolution of the National Assembly of 22 May 1996.* It was later reaffirmed by the Assembly's resolution 23 October 2013.

> ➞*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, **A.B., vol. 3, p. 477, 487**)
>
> 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.

18. *Resolution 23 October 2013.* The Resolution of the National Assembly of 23 October 2013 **(Exhibit R-25, A.B., vol. 3, p. 686)** is not contemporaneous with the statute under review. It is, however, strong evidence of the unwillingness of the Legislature to accept any judicially-modified text of the contested provisions rather than having them struck down. Moreover, particularly since Appellant had impleaded the Attorney-General for Canada *from the very outset of proceedings*, the remonstrance here against that Attorney-General's participation should be considered an unwarranted intrusion into the judicial process, clearly intended to isolate the Appellant and trivialize his petition.

19. *Statutes and Resolutions*. Legislative bodies are in principle free to express their opinions by resolution, but not by statute unless they do so strictly within their legislative authority. This is so because resolutions expressing opinions do not bind the courts, but statutes produce legal consequences if valid. The contested provisions, being statutory, require full judicial review. This Court, in its interlocutory judgment of 30 August 2007,

[2007] QCCA 1138, esp. paras, [80] to [82], held that the validity of statutes was *always* justiciable and the Court sent the contested provisions forward for decision on the merits.

19.1 ***Ibid.*** Even merely symbolic or exhortatory pronouncements, if statutory, can only be enacted if they are *intra vires*, – and the contested provisions are far more than symbolic or exhortatory. During the Bill 99 debates, the Government invited judicial review of Bill 99: Minister Facal, May 25, 2000, **Ex. R-6 at p. 6194, A.B., vol. 2, p. 340**:

> Des droits, notre peuple en a ou il n'en a pas. S'il en a, il ne faut pas qu'il craigne à les affirmer ou de leur faire franchir le test des tribunaux.

And M. Jacques Côté, the Member for Dubuc, on 21 November 2000 **(Debates p. 8015, Compendium of the A.-G. Canada, Tab 5, Exhibit PGC-1, A.B., vol. 3, p. 756)** said:

> S'il fallait que le gouvernement, par peur que ses lois sont contestées, ne passent pas lesdites lois, nous ne passerions jamais de lois et nous n'en adopterions jamais.

20. ***Rules of legislative interpretation***. Aside from some details, Appellant does not quarrel in principle with the rules of interpretation relied on in the judgment, but rather with their application. The literal language of the contested provisions *does* assert *unrestricted* powers of unilateral constitutional change on the part of Quebec's legislative institutions and electorate. The *plain meaning* of the words employed is the primary rule of interpretation of statutes. Presumptions of constitutionality may cure ambiguity only, not an explicit text which *also* reflects the concurrent objectives and intentions of the framers and promoters expressed and avowed in legislative debate and indeed elsewhere. The six contested sections, when read together, *reinforce* one another. The rules of interpretation cannot be applied to make them *attenuate* one another.

21. ***Attenuation***. The contested provisions cannot (as the judgment does) be rendered innocuous or constitutionally *intra vires* by treating them merely as:

(1) an internal codification of governing principles (e.g. Judgment [308], [330] & [331], [384], [467], [468], [565]) or principles of democracy;

(2) a codification of allegedly fundamental or traditional or established rights or claims: Judgment, paras. [104], [108], [304], [308], [309], [316], [323], [329], [348], [548], [549], [552], [565]. (Paras. [158] and [159] are submissions of A.-G. Quebec);

Rather, they must be assessed constitutionally by their actual terms and by the extrinsic evidence regarding their purposes and their provenance within the legal system.

22. *Defining lawful secession*. The Supreme Court insists not merely on negotiations but on a constitutional amendment (necessarily, a national amendment) to effect the secession of Quebec (*Secession Reference,* para [84], quoted above in **Brief, para 9.1**). But the judgment *a quo* relies largely on acknowledgments, by the framers and promoters of the Act under review, that ***precedent negotiations*** are required. The judgment does so in order to read the contested sections as constitutionally compliant and, therefore, as valid. In effect, precedent negotiations are equated with lawful secession. This is so even in the face of the framers' repudiation of compliance with the amending process; this repudiation indeed being *actually quoted* by the judgment (para. [399]). The contested provisions are upheld on the assumption that they ***implicitly*** accept the need of negotiations, and negotiations are treated as if they were constitutionally sufficient for constitutional change: see e,g. Judgment, paras. [415], [434], [435], [469], [547], [571]. Quotations from the *Secession Reference* are accurate in themselves, but are offered in isolation from the other required conditions: Judgment, paras. [28], [59], [68], [157], [226], [349], [351], [415], [434], [452], [467], [469], [489], [524], [571]. There is indeed in the judgment reference and allusion to amending procedures (e.g. [64], [296], [452], [467], [510]), though this is quite muted.

22.1 *Ibid.* Thus the Court acknowledges that an amendment is needed at least to remove the word "Quebec" (paras. [296], [455], [456]) from the Constitution Acts. But not only is this **(1)** buried in the judgment, and **(2)** not reflected in the decision on the validity of the sections, but **(3)** it is overwhelmed by the repeated references to negotiation, and **(4)** it is on the whole treated as if it were insignificant.

23. *Alliance Quebec v. D.G.E.Q. [2006] QCCA 651*. The judgment relies, (paras. [510], [512]) on a passage in a judgment of this Court *(Alliance Québec* v. *Directeur*

Général des Elections du Québec, 2006 QCCA 651 at para 29) to support the proposition that a unilateral declaration of independence would be lawful were negotiations on secession unsuccessful. But, with respect: **(1)** This passage is an *obiter dictum* (not being a step in the reasoning toward disposition of the questions in issue); and **(2)** It misreads the *Secession Reference*, in which the Supreme Court nowhere either expresses or implies that such a process would be lawful. Indeed that would constitute revolutionary overthrow of the Canadian State and Constitution. Yet, even while relying on the cited passage, – which ***assumes*** a right in certain circumstances to unilateral secession, – the Judgment *a quo* nevertheless holds categorically that the Act under review claims ***no*** right to unilateral secession (see e,g. paras. [431] to [435]). This is indeed directly contradictory.

24. ***Certain inapposite grounds of judgment.*** The judgment *a quo* is, with respect, in error in relying on all or any of the following, whether they be relied on **(a)** as extending provincial jurisdiction or **(b)** as justifying, or authorizing, or supporting the validity or legitimacy of the contested legislation. These three, with respect, cannot assist the contested sections:

24.1 ***Ibid.*** **(1)** The assertions in the Preamble, since these seek to *justify,* but do not *qualify, limit, or otherwise alter*, the actual substance of the legislation, which is explicit on its face, – far too explicit to be qualified by preambles even if these contained limiting language, which they do not.

24.2 ***Ibid.*** **(2)** The enactment by the Parliament of Canada of one or more statutes, in particular, the *"Clarity Act", An 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*, S.C. 2000, c. 26 **(Ex. R-4, A.B., vol. 2, p. 299)**. The *Clarity Act* is alleged by the Preamble and by the Bill 99 debates, – and is apparently accepted by the trial Court, – to have provoked the enactment of the contested provisions. (Judgment paras. [12] to [15], [17], [20], [29], [30], [72] to [74], [391]). Even if the statute under review is a *response* to the *Clarity Act*, the *Clarity Act* cannot in itself furnish a constitutional *basis* for the contested provisions, esp. ss. 3 and 13. These provisions must all stand on their own constitutional foundation, if one exists.

24.3 ***Ibid.*** **(3)** Earlier decisions, actions, or omissions of the Parliament and Government of Canada, – and their involvement, or non-involvement, – in addressing earlier provincial proposals, bills, or referendums. These earlier federal courses of conduct can have many explanations, including perhaps the view that federal involvement was unnecessary. But earlier federal abstentions cannot (despite the implicit assertions in the Preamble) be taken as *commitments* one way or another as to future federal action or abstention, nor as *barring* future federal action, nor even as *relevant to* future federal action. (Judgment, para. [402], appears to imply otherwise. See Preamble, recitals 12 and 13, and Judgment, paras. [45], [400] to [406].) Nor can these earlier federal courses of conduct serve as a constitutional basis for the contested provisions, particularly sections 3 and 13. They must stand or fall on their own.

25. ***Federal intervention***. Rather, it is for the Courts themselves, not the Legislature or other institutions of Quebec, to determine, in case of dispute, the legitimacy and legality of any federal activity in relation to provincial measures attempting constitutional change. Indeed all governmental actions, federal as well as provincial, are judicially reviewable on their own merits as occasion requires.

26. ***Legitimacy of the Constitution Act, 1982.*** In the *Secession Reference* (paras. [33], [47]) the Supreme Court of Canada addresses *both* legitimacy *and* legality, links them, and finds that the 1982 Act satisfied both, so confirming its earlier decisions in the two *Patriation References*. Here the legitimacy of the *Constitution Act, 1982*, itself is under attack, both on the face of the Act and in the Bill 99 debates. The evident purposes of this delegitimization are **(i)** to undermine the amending procedures established by the *Constitution Act, 1982,* and, at the same time, **(ii)** to bolster the legitimacy of the Act under review here, S.Q. 2000, c. 46, which *ex facie* rejects those procedures.

26.1 ***Ibid.*** For example, on 21 November 2000 (**Debates, p. 8016, Compendium of the A.-G. Canada, Tab 5, Exhibit PGC-1, A.B., vol. 3, p. 758**) on the motion to pass Bill 99, M. Jacques Côté (Dubuc), said:

> ... [J]'aimerais dire quelques mots sur cet avis de la Cour suprême. Il faut dire, tout d'abord, que le Québec n'a pas l'obligation de s'y conformer parce que le

> Québec ne connaît pas la légitimité de la Constitution de 1982, une constitution qui nous a été imposée et que le Québec n'a jamais signée....

26.2 ***Ibid.*** The legitimacy of the *Constitution Act, 1982* is attacked both textually and in the Bill 99 debates, as follows. **(1)** Through the 10th Preamble, the Act S.Q. 2000, c. 46, on its face attacks the legitimacy of the *Constitution Act, 1982*. The 1982 Act's provisions are central to this litigation, since they establish the processes for lawful constitutional change. It is important that they be understood to have been legitimately enacted, as the Supreme Court has held (citations below). **(2)** Furthermore, – and entirely aside from the Preamble of S.Q. 2000, c. 46, – the framers and promoters of the Act now under review also, in the course of Bill 99, explicitly reject the 1982 Act and its amending procedures as illegitimate and unacceptable. (See e.g. above **Brief, paras. 13**, **13.1, 13.2, 13.3, 13.4** especially five of the quoted comments of Minister Facal.) This widely disseminated alleged grievance, based on the non-concurrence of Quebec in the 1982 Act, is (Appellant submits) based on false historical premises, for these three reasons:

26.3 ***Ibid.*** Appellant offers three distinct responses to the attacks on the legitimacy of the *Constitution Act, 1982* and on the amending formulae which it establishes.

First: (i) The amending procedures of Part V of the *Constitution Act, 1982*, are those which had been ***proposed by Quebec itself*** along with seven other provinces ***in opposition to*** the patriation proposals of the Government of Canada under Rt. Hon. Pierre Trudeau: See the interprovincial ***Constitutional Accord, April 16, 1981,*** signed by Premier René Lévesque. The exception concerns limits on compensation payable to provinces which might (as they are entitled to do) opt out of possible *future transfers of powers to the federal Parliament*. But this divergence has no plausible relevance to the process for constitutional changes in the status of Quebec as a member of the Canadian Federation and so is irrelevant either to secession or to any other change in Quebec's status. (The April 16, 1981 Interprovincial Accord is found published on the Government of Quebec's website for ***Secrétariat aux relations canadiennes*** under the category ***Québec's Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001***, and under this URL:

https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document14_en.pdf. An English version is included in the Statutory and Other Provisions part, **A.B., vol. 2, p. 264**). Though the Government of Quebec did not in the end concur in the Patriation "package", this does not mean that the amending procedures which it included constituted an outside invention or a repressive intervention. These were designed and proposed with the full concurrence of Quebec.

26.4 ***Ibid.*** **Secondly: (ii)** The *Constitution Act, 1982*, and with it the amending procedures of Part V, were held by the Supreme Court of Canada in the Patriation References to have been enacted both *lawfully* and also *legitimately* in compliance with the conventions of the Constitution: *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 ("First Patriation Reference"); *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 ("Second Patriation Reference"). (Again, see the confirmation of both by that Court in the *Secession Reference*, para. [47]).

26.5 ***Ibid.*** **Thirdly: (iii)** A detailed examination of the history of the Patriation process (Appellant submits) shows a picture very different from the view widely prevalent in Quebec, and indeed reflected in the 10th Preamble and in the remarks quoted above, **Brief paras. 13.1, 13.4**) by Minister Facal. This history may be found in a study commissioned by, – and prepared by one of Appellant'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. The cited *sources* themselves seem largely judicially noticeable. Counsel would not presume to offer his *analyses* as authority, but, should they be of interest to the Court, they may perhaps be treated as part of Appellant's argument. The seven opposing provinces which joined the final settlement had achieved an enormous success: expanded provincial legislative authority (the new s. 92A. of the 1867 Act); the amending process nearly as they had proposed it; the power to override most provisions of the Charter. And Quebec had made a major fresh demand which had never been part of the joint negotiating position.

27. *The claims made and the principles invoked by the contested sections.* The six contested sections are formulated to assert, on their face, claims to an unlimited right of constitutional change, and for this purpose they appeal to two distinct principles:

(1) The six sections appeal to ***the right of self-determination of peoples in international law***. This claim is anchored in section 1, with its *scope* broadly defined by sections 2 and 3, and the *means of exercise* stated in ss. 3, 4 and 5. This is asserted even though the Supreme Court of Canada has held that only oppressed peoples have a right of secession; that this has no application to Quebec; and that Quebec's people or peoples have only rights of "internal" self-determination exercisable within the Canadian Confederation. (*Secession Reference*, paras. [122], [126] to [133], [136], [154]**.)**

(2) The six sections also appeal to ***general democratic principles***. This claim is anchored in section 5, with the broad *scope* of the claim stated in sections 2 and 3, and the *manner of exercise* stated in sections 3, 4 and 5. This claim is made →even though no general democratic principles justify a right to constitutional change otherwise than through prescribed procedures for constitutional change; and →even though Quebec's institutions fundamentally derive their *authority* directly from the Constitution of Canada, and their *legitimacy* from that Constitution, and from the free and democratic institutions which the Canadian Constitution creates and authorizes. (Contrast s. 5 of the Act.)

28. ***Section 1 of the Act. Permissible limits.*** Section 1 cannot, consistently with the Supreme Court's decision in the *Secession Reference,* extend beyond the exercise of rights "within the framework of [the] existing state" (*Secession Reference* (para. [154]), – i.e. Canada, – and thus limited to rights exercisable consistently with its Constitution. International law confers no more. The present section is impermissibly broad, particularly when read in conjunction with the other contested sections.

(The French versions of the impugned provisions discussed in this section are included in the Statutory and Other Provisions part, **A.B., vol. 2, p. 254**)

> **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.

Given the fact that the Court (*Secession Ref.*, para. [125]) has left open the question as to how many, and which, "peoples" inhabit Quebec, a conforming text could read:

> **1.** The Quebec people or peoples have the right to self-determination within Canada and in conformity with its Constitution. On this basis the Quebec people or peoples as defined in international law hold the rights that are universally recognized under the principle of equal rights and self-determination of peoples.

29. ***"People" in this Act and in the judgment.*** The judgment addresses the subject of the Quebec "people" in paras. [334] to [363], particularly [334] to [354], and [358]. The Court below finds no constitutional difficulty in the statutory affirmations regarding the "Québec people" and none in the sections as a group (see [352] and [353]). Why does the Appellant find difficulty, and where?

The term "Québec people" appears in ss. 1, 2, 3, 4 and 13, and appears to be defined implicitly by s. 5 to include all those who inhabit Quebec's territory, – thus, a civic people. (See Judgment [346]). In isolation that is unobjectionable. But Section 1, read with section 5 and in the context of this Act, by its terms permits a referendum result in which the whole ***heterogeneous*** Quebec population has supposedly spoken as if, – though considered a "civic" people, – it has ***also*** become ***one, single, linguistic and cultural (usually ethno-linguistic) people in international law,*** – and as such entitled to speak as one ***under s. 1.***

30. ***"People" in ordinary language and in law.*** Quebec obviously has a population and an electorate, which, *in ordinary, non-technical, language*, can be called a "people". Quebec also embraces identifiable sub-groups which can also be called "peoples" (*Secession Reference* paras. [123], [124], [125]). Section 5, on its face and when read in isolation, appears innocuous. However, when it operates with section 1, s. 5 becomes, in effect, a political construct, primarily important when the two sections operate *together and with the other contested sections*. Whereas international law defines "self-determination" in terms of, – and confers limited rights of self-determination

only on, – a ***"people" with a cultural and linguistic identity*, – which in Quebec, is most prominently the French-speaking ethno-linguistic majority**, – by means of s. 5 the "people" is expanded to embrace the *entire* Quebec population (see Judgment [346]), so as to create a wider "people" for s. 1, and, therefore, for the exercise of claims to "self-determination". The impact of s. 5 is the same on ss. 2, 3, 5, and 13. (On a "people" in international law, see *Secession Reference* [para. 125].)

31. *"Civic people", "linguistic and cultural people", and international law.* Any rights of self-determination conferred by international law belong ***only*** to *peoples with a* linguistic-cultural identity (most often ethno-linguistic peoples), ***not*** to entire heterogeneous populations. Thus, only the French-speaking majority in Quebec can be these two things simultaneously: **(1.)** ***"the", –*** plainly meaning ***only one***, – "people" contemplated by s. 1, while also being qualified as **(2.)** a linguistic and cultural "people" and, as such, capable of exercising appropriate rights of self-determination. This is true even when that self-determination is limited, – as it has been by the Supreme Court, – to "internal" self-determination. Therefore (Appellant submits) in the context of the contested sections, especially s. 1, the Superior Court's finding as to "people" (in paras. [348], [352], [353], [358]), is, at minimum, too widely stated. The Superior Court disclaims any reading of s. 1 which would authorize secession (paras. [421] to [440]). But its upholding the widening of "people" in s. 1 to include the entire civic population has the result of permitting the framers of the Act to satisfy the linguistic and cultural requirements for self-determination in international law in a way which binds even those not part of the linguistic majority. Since s. 1 is clearly based on international law, this expansive formulation should be held constitutionally impermissible in light of the *Secession Reference*.

32. *Section 2 of the Act.* Appellant contests the validity of this section on the grounds stated above, in Appellant's **Brief**, **paras, 6 to 15 and paras. 18 to 25**, and on the basis of the authorities cited there. In sum, both on its face, and as read with the extrinsic material cited, s. 2 is, **(a)**, in excess of provincial legislative authority, esp. s. 45 of the 1982 Act, **(b)**, in asserting direct and unrestricted rights of constitutional change, s. 2 is inconsistent with ss. 52(3) and Part V of the 1982 Act, (the amending process), and it

flouts the supremacy of the Constitution of Canada. (Section 52(1) of the 1982 Act). **(c)** Section 2 is also inconsistent with the law laid down by the Supreme Court in the *Secession Reference* (above, Appellant's **Brief,** para. 9).

As it stands, s. 2 reads:

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

A constitutionally-conforming text could 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.

33. ***Section 3 of the Act.*** Appellant contests the validity of section 3 on the same grounds, and invokes the same authority, as are advanced against s. 2. (See above, **Brief**, **para. 32**, and others cited there.)

> **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.
>
> 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.

Section 3 asserts powers of unilateral constitutional change which the Province does not possess.

33.1 ***Section 3 defining and removing federal authority.*** In addition s. 3 not only **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 goes further and **(b)** *denies categorically* 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 *any* federal authority are beyond any of Quebec's legislative powers.

33.2 *Federal consultation of the people.* On federal consultation, see the *Referendum Act* of Canada, S.C. 1992, c. 30, as amended, esp. s. 3(1). The Governor in Council may order a referendum in any one or more provinces when he or she considers that to be in the public interest. See *Haig* v. *Chief Electoral Officer* and *A.-G Canada*, [1993] 2 S.C.R. 995, esp. at 1030. The Court affirmed the right of the Government of Canada to hold federal referenda and to include Quebec if it chose to do so. The inherent validity of the Act is assumed by the Court, perhaps given the constitutional history of federal referenda since Confederation.

33.3 *Section 3 and its rejection of federal consultation.* In the 1973 *Programme* of the Parti Québécois **(Ex. R-13, p. 15, A.B., vol. 3, p. 536)** the Party proposes to commence the process of achieving sovereignty "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." Section 3 on its face rejects federal consultation unless with the permission of the Province.

33.4 *Ibid.* A constitutionally-confirming text of s. 3 could read (alongside Appellant's proposed text of s. 2):

> **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.

34. *Section 4 of the Act.* While it would be generally innocuous if it appeared ***outside*** the context of this Act, section 4 is invalid within the Act, particularly in conjunction with, – and insofar as it operates with, – any one or more of sections 1, 2, 3, 5, and 13.

> **4.** When the Québec people is consulted by way of a referendum under the Referendum Act (chapter C 64.1), the winning option is the option that

> obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one.

This is so, because section 4, when read with those other sections, 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 might suffice for present purposes to declare s.4 to be invalid insofar as it operates within the Act in conjunction with any one or more of ss. 1, 2, 3, 5, and 13.

34.1 ***Section 4 and "clarity" issues.*** Section 4 can however in no way exclude or impair the Supreme Court's requirements of "clarity" in a referendum question and answer. The Supreme Court's requirements of clarity apply ***regardless*** of the provisions in the *Referendum Act.* The *Secession Reference* (paras. [87], [153]) imposes a specific standard obligatory for the specific purpose. In particular, the "clear majority" required by the Supreme Court need not be merely the bare majority formally required by the *Referendum Act*. (Contrast however the Judgment *a quo*, paras. [493] ff., which appears to hold otherwise.) The "clarity" required by the Supreme Court does not affect the referendum question or result under Quebec law*, but it does affect any obligation of other governments to respond to that result.*

34.2 ***Constitutionally conforming text of s. 4.*** A constitutionally-conforming text of s. 4 could read:

> **4.** The result of a consultative 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. A response by the Parliament or Government of Canada, or of other Canadian Provinces, may depend on further conditions.

35. ***Section 5 of the Act.*** Appellant submits that the first paragraph of s. 5 is invalidly enacted. The second and third paragraphs are not inherently invalid, but they are not severable from the first paragraph. So if the first paragraph falls, the others fall with it.

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

> 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 (chapter E 3.3), and through referendums held pursuant to the Referendum Act (chapter C 64.1).
>
> Qualification as an elector is governed by the provisions of the Election Act.

35.1 ***Section 5 2nd and 3rd paragraphs.*** Appellant (see Judgment paras. [132], [514]) did not at trial object to the *inherent validity* of the second and third paragraphs ***taken by themselves***. But his position at trial (stated but possibly with insufficient emphasis, though it was responded to by the Court) was, and it remains, that, as they appear in s. 5. However, the latter two paragraphs *are not severable from* the first paragraph, and must fall with it.

35.2 ***Grounds of objection to s. 5.*** Section 5, as to its first paragraph, is invalid because it purports in its statutory form to displace, – both (1) in point of law and (2) in the minds of the public, – the supremacy of the Canadian Constitution, – as declared in section 52(1) of the *Constitution Act, 1982*, – as the supreme law of a pan-Canadian state. Patriation in 1982 transferred sovereignty to the ***institutions*** defined in Part V of the 1982 Act, **not** to the ***population at large*** of all, or of any, of the Provinces.

35.3 This expressed displacement of sovereignty in favour of the electorate is clearly shown→**first** from its text, which quite literally introduces direct or popular sovereignty into the Canadian constitutional system. This is so since the terms of s. 5 are not confined to *consultative* referenda *only,* as the Supreme Court requires: See *Reference re Secession,* paras [75], [87]; *Reference re Senate Reform*, para. 48 (fundamental changes); and cases cited above in **Brief**, **para. 8**, especially *In Re Initiative and Referendum Act*, [1919] A.C. 945 (P.C.), barring legislation by simple referendum;→**next** from its history as reflected in the National Assembly speeches on Bill 99, and the Programmes of the Parti Québécois claiming powers of unilateral secession by referendum (**Brief, paras. 13 to 19.1**) and →**thirdly** from its context with ss. 2 and 3. In effect, s. 5 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, simply for lack of popular support.

35.4 ***Further objections to s. 5.*** Section 5 is not an innocuous provision, even if its objective is in some degree symbolic or exhortatory. Aside from displacing the primacy of the Constitution of Canada, on its face it introduces reliance on republican principles of direct popular sovereignty, as is shown by the A.-G. Quebec's expert evidence on the German and U.S. Constitutions. 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 (the unanimous-consent procedure). See *Re Initiative and Referendum Act* [1919] A.C. 935 (P.C.), esp. pp. 943-945.

A constitutionally-conforming text could read:

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

36. ***Section 13.*** The objections to the other contested sections apply here. Section 13 reads:

> **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 the Québec people to determine its own future.

36.1 ***Objections to s. 13.*** **(1)** Section 13 on its face, and also as understood through the extrinsic material cited, exceeds, as to its subject-matter, the legislative authority of the province, notably under s. 45 of the 1982 Act. **(2).** It also confronts the supremacy of the Constitution declared in s. 52(1), as well as s. 53(3), and Part V of the 1982 Act, prescribing the lawful processes for constitutional amendment.

36.2 ***Further objections to s. 13.*** Further to grounds **(1)** and **(2)** Appellant submits **(3):** In addition, s. 13 too suffers from the vices of s. 3 of the Act, and is invalid for the same reasons. This is so because, at least implicitly, s. 13 prohibits federal intervention in general and prohibits federal referenda in particular. A province has no authority to define or limit federal powers, including the federal powers to uphold the Constitution in the face of forcible resistance (as was threatened and intended by the 1995 referendum Bill *Loi sur l'avenir du Québec* (Appellant's **Brief, para. 15 above**).

Behind its tendentious phraseology ("reduce the powers, authority, sovereignty or legitimacy of the National Assembly") s. 13 implicitly denies (as do ss. 2 and 3) 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 *Fort Frances Pulp and Power Co. Ltd.* v. *Manitoba Free Press Co.,* [1923] A.C. 695 (P.C) (defence of the constitution, government, and territorial integrity of Canada against war, invasion or insurrection, real or apprehended); *Gagnon* v. *The Queen*, [1971] C.A. 454.

36.3 *Constitutionally-conforming text of s. 13.* A constitutionally-conforming text could 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.

37. *The Clarity Act.* As submitted above (**Brief 6.6**), the judgment *a quo* is heavily focused on the *Clarity Act*, S.C. 2000, c. 26 **(Ex. R-4, A.B., vol. 2, p. 299)**. (See Judgment, paras.[14], [17], [29], [74], [79], [80] ff. to [104], – in [103] invocation of the *lex talionis*, – [295], [330], [331], [332], [347], [391], [395], [397] to [399], [461], [477], [484], [485], [498], [543], [557], [559], [560], [563] ("coup de semonce")). The constitutional validity of the *Clarity Act* is not however formally at issue in this appeal. Can the *Clarity Act* then be simply ignored in this proceeding?

37.1 *Ibid.* The judgment *a quo* rightly acknowledges that the Supreme Court in the *Secession Reference* has established that **(1)** the clarity of a referendum question on a secession proposal, and **(2)** the clarity of the answer in a secession referendum, are both matters for decision by the political actors, as is also **(3)** the conduct of any consequent negotiations: Judgment paras. [7], [57], [58], [586].

37.2 *Ibid.* But, despite this acknowledgment, the judgment nevertheless cites the attacks on **(1)** the legitimacy of, and **(2)** even the constitutional validity of, the *Clarity Act*: see e.g. Judgment, paras. [85], [86]). The judgment does so with evident approval

(see e.g. paras. [476], [477], addressing s. 3 of the Act). The judgment permits, even invites, a reading that the Superior Court considers the *Clarity Act* constitutionally invalid. This would become a matter of serious public concern were another referendum held on secession.

38. *Submission on the Clarity Act.* Were this Court to address the Superior Court judgment's treatment of the *Clarity Act*, this Court could perhaps, – short of a ruling on its constitutional validity, – consider indicating that no valid basis has been raised for doubting the validity of that Act. This, at least, seems appropriate because *ex facie*:

(i) The *Clarity Act* is constitutionally supported by the federal residuary power, a well-established basis for federal legislation on federal institutions: *Jones* v. *A.-G. New Brunswick*, [1975] 2 S.C.R. 182 at 189. The Act directs the manner in which federal institutions respond to a provincial referendum result.

(ii) The *Clarity Act* now is supported jurisdictionally also by the terms of s. 44 of the *Constitution Act 1982.*

(iii) Moreover the *Clarity Act* complies exactly with the requirements set forth by the Supreme Court in the *Secession Reference* on the role of the political actors. The *Clarity Act* is *itself* the product of Parliament, a *political* branch of government. The Act sets minimum standards and time-lines, creating a framework. Then, exactly as the *Secession Reference* directs, the *Clarity Act* then *remits to political actors*, – namely the federal legislative bodies and the federal executive government: (1) the determination of the clarity of the referendum questions and answer, and (2) the conduct of any succeeding negotiations.

(iv) In addition, a constitutional amendment is declared to be necessary to effect secession, exactly as the *Secession Reference* requires in its paras. 84 (twice), 97, and 104. In relation to s. 3(2) of the *Clarity Act*, see *Secession Reference* paras. [97] and [139] on determination of boundaries of a seceding province.

Broader consultations are contemplated, and ultimately the involvement of the provincial governments, – again, all of them political actors.

38.1 Ibid. Meaning of clarity requirement. It must again be emphasized that the "clarity" required by the Supreme Court does not affect the formal referendum question or result under Quebec law, but it does address any obligation of other governments to respond to that question and that result. The Clarity Act too addresses that and only that. Quebec remains free to set its own referendum conditions, but not free to compel a response.

39. Infringement of the Charter. The contested provisions violate the rights of the Appellant under the Canadian Charter of Rights and Freedoms because they authorize unconstrained constitutional changes in the status of Quebec, some of which would, – and other changes which could, – remove or constrain the operation of that Charter in Quebec: that is to say: (i) constitutionally-unlawful secession which *would entirely*, – and (ii) also other changes which could *entirely or partly*, – remove the operation of the *Charter.*

39.1 *Grounds*. In so doing the contested provisions themselves render *Charter* rights not absolute but instead *conditional on the will of Quebec's electorate and institutions*, and therefore precarious. The Charter rights are made to last as long as, but no longer than, the Quebec electorate and legislature so decide. All depends on what constitutional changes the electorate and legislature choose to make pursuant to ss. 1 to 5 and 13 of S.Q. 2000, c. 46. It is not, however, constitutionally permissible for a provincial statute to make the *Charter* conditional on the will of a province's electorate or legislative institutions.

39.2 *Basis of submission on Charter infringement.* This submission, and Appellant's conclusion based on it (**Part IV, Order Sought, Para. 3). (2**)) are founded on the decision of the Superior Court (Lesage, J.) in *Bertrand* v. *Bégin* [1995] R.J.Q. 2500 (8 September 1995). This concerned the 1995 Referendum Bill, *Loi sur l'avenir du Québec.* (The Bill is cited and quoted above, **Brief, para. 15**.) At [1995] R.J.Q. 2500, p. 2516, the Court:

> Déclare que le Projet de loi no. 1, intitulé Loi sur l'avenir du Québec, présenté par le Premier Ministre Jacques Parizeau à l'Assemblée nationale le 7 septembre 1995, visant à accorder à l'Assemblée nationale du Québec le pouvoir de proclamer que le Québec devient un pays souverain sans avoir à

> suivre la procédure de modification prévue à la Partie V de la Loi constitutionnelle de 1982 constitue une menace grave aux droits et libertés du demandeur garantis par la Charte canadienne des droits et libertés, particulièrement aux articles 2, 3 6, 7, 15 et 24 paragraphe 1 ...

In its reasons, the Court stated at p. 2513:

> Le changement proposé par le gouvernement du Québec emporterait une rupture dans l'ordre juridique, ce qui est manifestement contraire à la Constitution du Canada....

39.3 ***Ibid. Distinctions***. This 1995 judgment was interlocutory, not final. Thus there was, at that stage, no basis for a declaration of nullity of what then was only a proposal, not a statute. Indeed Bill No. 1 was never approved by the voters, nor passed, nor assented to. By contrast, this appeal concerns a final, not an interlocutory, judgment on a statute. Appellant here speaks of "unjustified infringement and denial", – of rights, rather than threat ("menace grave") to rights, and asks that provisions of an Act be declared null and void.

39.4 ***Ibid.*** Appellant acknowledges that the contested provisions are less immediate in their impact than Bill No. 1 would have been if it had been if it had been enacted. Rather than making *immediate and direct* constitutional changes, – as Bill No. 1 would have done by unconstitutional means, – the contested provisions here declare by statute *the unfettered right and power* to do so. In other words, the contested provisions declare Appellant's Charter rights to be contingent and conditional on the future action of the Quebec electorate or legislature. This, Appellant submits, is in itself unlawful. It is in itself a violation of Appellant's *Charter* rights. Appellant's *Charter* rights are unconditional, even if some are subject to defined and limited powers of "override". They cannot be made contingent and conditional.

39.5 ***Conclusions cumulative.*** Appellant's conclusion on this subject is cumulative and without prejudice to his other conclusions. Appellant in this litigation is challenging any alteration in Quebec's status or powers otherwise than by constitutional means.

40. ***Constraining and emending texts to achieve constitutional conformity***. Severance of constitutionally-invalid subject-matter can in principle be achieved **(1)** by *excision of* ***specified text*** or **(2)** by *excision of* ***specified subject-matter*** (so-called

"reading down"), – provided in either case that the remainder can survive as constitutionally valid, or **(3)** by securing constitutional conformity through ***implication of terms*** (so-called **"reading-in")**. Under what conditions could or should these techniques be applied in this appeal?

41. The rules governing "textual severance", "substantial severance" and "implication of terms". Appellant understands the governing rules to be as follows:

(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 by implication of terms ("reading in"), – or by 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, – in a way unacceptable to the Legislature, – 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.

Attorney-General for Alberta v. *Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at pp. 518-520; *Attorney-General for Ontario* v. *M* and *H,* (indexed as *M.* v. *H.*), [1999] 2 S.C.R. 3. at pp. 82-87; *Casimir* v. *A.-G. Quebec*; indexed as *Solski* v. *Quebec*, [2005] 1 S.C.R. 201 at p. 225; *Clark* v. *Canadian National Railway Co.*, [1988] 2 S.C.R. 680 at pp. 709-710; *Derrickson* v. *Derrickson* [1986] 1 S.C.R. 285 at p. 296; *Hogarth et al.* v. *Hall et al* and *Grail* v. *Ordon et al.*(indexed as *Ordon Estate* v. *Grail*) [1998] 3 S.C.R.437. pp, 496-499, 528; *MacMillan Bloedel Ltd.* v. *Simpson,* [1995] 4 S.C.R. 725 at p. 757; *McKay* v. *The Queen*, [1965] S.C.R. 798; *Public Service Commission v. Millar et al.*; *Public Service Commission* v. *Osborne et al.*; *Public Service Commission* v. *Barnhart et al*, (indexed as *Osborne v, Canada (Treasury Board)*), [1991] 2 S.C.R. 69 at 76-77; 78; 101-105*; The Queen* v. *Baron* (indexed as *Baron* v. *Canada*), [1993] 1 S.C.R. 416; at pp. 453-454; *Hall v. The Queen* (indexed as *R.* v. *Hall*), [2002] 3 S.C.R. 309 at p. 317, at pp. 334-35; *The Queen* v. *Heywood* (indexed as *R.* v. *Heywood*), [1994] 3 S.C.R. 761 at pp. 803-804; *The Queen* and *Canada Employment and Immigration Commission* v. *Schachter* (indexed as *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 (herein usually "Schachter"), at pp. 695 to 702; 705 to 715; 717 to 718;. 726 ff., pp. 726 to 728; *The Queen* v. *Sharpe* (indexed as *R.* v. *Sharpe*), [2001] 1 S.C.R. 45, at pp.. 109-119; *Demers v. The Queen,* (indexed as *R.* v. *Demers* , [2004] 2 SCR 489 at pp. 520-24; *The Queen* v. *Johnson*, et al. (indexed as *R.* v. *Laba*), [1994] 3 SCR 965 at pp. 1012-1017; *Ruby* v. *Solicitor General of Canada (*indexed as *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3 at p. 35;*U.F.C.W., Local 1518*, v. *KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at 1133; *Vriend et al.* v. *The Queen in right of Alberta* (indexed as *Vriend* v. *Alberta*), [1998] 1 S.C.R 493; at pp. 567 ff.; pp. 567-579. pp. 585-588.

42. *Application of severance in this Appeal*. Appellant doubts that it is possible to devise any constitutionally-conforming text of the contested sections which would also be acceptable (and which the Court could confidently affirm as acceptable) to the

Legislature in substitution for its own, in preference to seeing the provisions struck down. The Resolution of the Assembly of 23 October 2013 (**Brief, para 18.** above) would seem to make this clear.

43. *Constitutionally-conforming texts.* Appellant has however offered for each of the contested sections a constitutionally-confirming draft (**Brief 28.** for Act s. 1; **Brief 32** for Act s. 2; **Brief 33** for Act s. 3; **Brief 34.2** for Act s. 4; **Brief 35.4** for s. 5; **Brief 36.3** for s. 13.). Each is drafted with the sole purpose of accurately reflecting the true constitutional position as regards the subject-matter with which it deals. Appellant respectfully submits them for the Court's consideration as helpful in fortifying constitutional order.

44. *Submission proposing conforming texts.* If this Court accepts the accuracy of Appellant's draft provisions but cannot, by reason of the rules regarding textual and substantial severance, read them into the Act in substitution for the enacted text, this Court could perhaps, when ruling on the six sections, indicate that Appellant's draft texts do indeed reflect the true constitutional position.

45. *Order constraining operation of the Act.* And subsidiarily, should this Court be unable to strike down some or all of the contested provisions outright, safeguarding of the Constitution's integrity might be achieved by declaring simultaneously the following three propositions:

> **(1)** That any constitutional change in Quebec's status, position, or powers within the Canadian Confederation can be accomplished only by means of an amendment to the Constitution of Canada enacted in accordance with the provisions of the *Constitution Act, 1982, Part V*; and
>
> **(2)** That the Quebec people or peoples have the right to self-determination within Canada and in conformity with its Constitution. On this basis, the Quebec people or peoples as defined in international law hold the rights that are universally recognized under the principle of equal rights and self-determination of peoples; and

(3) That sections 1, 2, 3, 4, 5 and 13 of *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*, Chapter 46 of the Statutes of Quebec for 2000 and now Revised Statutes of Quebec Chapter E-20.2, operate subject to the foregoing declaration of this Court and only as an internal statement of policy of the Government of Quebec without force of law.

46. *Objectives sought*. Proposition **(1)** resolves the central dispute in this litigation. Proposition **(2)** defines correctly the rights of self-determination applicable in Quebec, according to the Supreme Court's decision in the *Secession Reference.* Appellant's proposed condition **(3)**, – that the contested sections shall operate "only as an internal statement of policy of the Government of Quebec without force of law" is (with respect) required in order that these six sections be made to respect the limits of a province's power to legislate under s. 45 of the *Constitution Act, 1982.* Those limits have been well established by the authorities cited above: **Brief, para. 8**. In particular, a province cannot by its own legislation define its own legislative powers. Nor, in particular, can it define its own powers of constitutional change. Still less can it extend those powers.

47. *Submission.* *As* they stand, the contested sections do all these last-mentioned constitutionally-prohibited things. This can be ended if the contested sections are denied statutory authority and, in that way, are precluded from maintaining their ostensible status as statute law, – a status which would be constitutionally-appropriate only for validly-enacted law but is not appropriate for these sections. By these means, the contested sections would, as regards their legal effect, then become analogous to resolutions. They would survive as such. Under the severance rules, such a course seems ***less*** intrusive than simply striking down the sections outright. By contrast, judicially imposing and inserting revised text seems ***more*** intrusive than striking down the sections outright as being null and void.

PART IV – CONCLUSIONS

FOR THESE REASONS, THE APPELLANT/PETITIONER PRAYS THAT THIS HONOURABLE COURT:

1) **MAINTAIN** the present appeal;

2) **REVERSE** the judgment of the Superior Court of the District of Montreal rendered by the Honourable Justice Claude Dallaire on April 18, 2018;

3) **RENDER** the judgment that ought to have been rendered as follows:

(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, now Revised Statutes of Quebec Chapter E-20.2, 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, constitute an unjustified infringement and denial of Appellant's rights under the *Canadian Charter of Rights and Freedoms*, and is accordingly unlawful, invalid, and of no force or effect;

(3) Or subsidiarily, **ORDER** that the said sections be either judicially restated or alternatively circumscribed, if the rules respecting textual and substantial severance permit the Court to do so, in terms which render the said sections in clear conformity with the Constitution of Canada; specifically circumscribing them on the following terms:

1. Order that six contested sections are circumscribed particularly in requiring that all constitutional change be carried out in strict conformity

with the amending procedures prescribed by Part V of the *Constitution Act, 1982;*

2. Order that the Quebec people or peoples have the right to self-determination within Canada and in conformity with its Constitution, and that, on this basis, the Quebec people or peoples, as defined in international law, hold the rights that are universally recognized under the principle of equal rights and self-determination of peoples; and

3. Order that the contested provisions operate subject to a declaration of this Court in the foregoing terms, and operate only as an internal statement of policy of the Government of Quebec without force of law;

4) **ORDER** such further and other relief as may be just and expedient in the premises;

5) **THE WHOLE** with costs in this Court.

MONTREAL, October 9, 2018

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ATTORNEY FOR APPELLANT/Petitioner

MONTREAL, October 9, 2018

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PART IV – AUTHORITIES

CASES RELATING TO SEVERANCE

All cited only in Para. 41, Pg. 36

Attorney-General for Alberta v. *Attorney-General for Canada*, [1947] A.C. 503 (P.C.)
Attorney-General for Ontario v. *M* and *H,* (indexed as *M.* v. *H.*), [1999] 2 S.C.R. 3

Casimir v. *A.-G. Quebec*; indexed as *Solski* v. *Quebec*, [2005] 1 S.C.R. 201 at p. 225

Clark v. *Canadian National Railway Co.*, [1988] 2 S.C.R. 680

Derrickson v. *Derrickson* [1986] 1 S.C.R. 285

Hogarth et al. v. *Hall et al* and *Grail* v. *Ordon et al.* (indexed as *Ordon Estate* v. *Grail*) [1998] 3 S.C.R.437

MacMillan Bloedel Ltd. v. *Simpson,* [1995] 4 S.C.R. 725

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

Public Service Commission v. Millar et al.; *Public Service Commission* v. *Osborne et al.*; *Public Service Commission* v. *Barnhart et al*, (indexed as *Osborne v, Canada (Treasury Board)*), [1991] 2 S.C.R. 69 at 76-77; 78; 101-105

The Queen v. *Baron* (indexed as *Baron* v. *Canada*), [1993] 1 S.C.R. 416

Hall v. The Queen (indexed as *R.* v. *Hall*), [2002] 3 S.C.R. 309

The Queen v. *Heywood* (indexed as *R.* v. *Heywood*), [1994] 3 S.C.R. 761

The Queen and *Canada Employment and Immigration Commission* v. *Schachter* (indexed as *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 (usually referred to as "Schachter")

The Queen v. *Sharpe* (indexed as *R.* v. *Sharpe*), [2001] 1 S.C.R. 45

Demers v. The Queen, (indexed as *R.* v. *Demers*, [2004] 2 SCR 489

The Queen v. *Johnson*, et al. (indexed as *R.* v. *Laba*), [1994] 3 SCR 965

Ruby v. *Solicitor General of Canada (*indexed as *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3

U.F.C.W., Local 1518, v. *KMart Canada Ltd.*, [1999] 2 S.C.R. 1083

Vriend et al. v. *The Queen in right of Alberta* (indexed as *Vriend* v. *Alberta*), [1998] 1 S.C.R 493