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 Justice Claude Dallaire.

_____

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

KEITH OWEN HENDERSON

APPELLANT
(Plaintiff)

v.

PROCUREUR GÉNÉRAL DU QUÉBEC

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF CANADA

MIS EN CAUSE
(Mis en cause)

- and -

SOCIÉTÉ SAINT-JEAN-BAPTISTE DE MONTRÉAL

INTERVENER
(Intervener)

MIS EN CAUSE'S BRIEF

Dated February 20, 2019

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MIS EN CAUSE'S ARGUMENT

OVERVIEW

1. Sections 1–5 and 13 of the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*[1] are ambiguous in their scope and meaning. They can be interpreted either as providing a legal underpinning for an eventual declaration of unilateral secession, or can perhaps be understood as merely restating the powers of the Legislature of Quebec to modify the internal constitution of the province.

2. Under the first interpretation, ss. 1–5 and 13 must be declared invalid. If they are nonetheless susceptible of the second interpretation, ss. 1–5 and 13 can be read down to maintain their validity.

3. This Court should declare that (1) under the Constitution of Canada, Quebec is a province of Canada, and (2) ss. 1–5 and 13 of Bill 99, as enacted, do not and can never provide the legal basis for a unilateral declaration of independence by the government, the National Assembly or the Legislature of Quebec, or the unilateral secession of the "Québec State" from the Canadian federation.

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[1] CQLR, c. E–20.2 (Bill 99).

PART I – FACTS

4. Following the 1995 referendum in the province of Quebec, the Governor in Council referred three questions for the Supreme Court's consideration,[2] one of which is of importance to this appeal:

5. "Under the Constitution of Canada, can the National Assembly, Legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?"

6. The Supreme Court's short answer to this question is well known to be "no". The secession of a province cannot occur unless (1) a clear majority of the province's population clearly expresses that it does not wish to remain in Canada; (2) negotiations in good faith, in accordance with constitutional principles, with the federal government and with the other provinces follows; and (3) the Constitution is amended to reflect the conclusions of the negotiations and effect the secession of the province lawfully.[3] Within those constitutional parameters, the Court left to the political branches of government the task of determining how to meet those conditions within the conduct of negotiations and to ascertain if they are met.[4]

7. However, the Supreme Court emphasized that unilateral secession, that is, secession without an amendment to the Constitution of Canada, cannot be considered lawful. Negotiations are not enough. A unilateral declaration of independence would violate the constitutional and legal order of Canada.

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2 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 228, para. 2 (*Secession*).
3 *Secession*, [1998] 2 S.C.R. 217, 265–273, paras. 88–104.
4 *Secession*, [1998] 2 S.C.R. 217, 271–272, paras. 100–101.

8. In 2000, both the federal Parliament and the National Assembly[5] sought to supplement the Supreme Court's opinion. First, Parliament enacted the *Clarity Act*[6]—which, despite numerous *obiter dicta* by the Superior Court,[7] is not the subject of this appeal—to ensure that the House of Commons, as the only political institution elected to represent all Canadians, exercises its role in identifying what constitutes a "clear question" and a "clear majority" sufficient for the federal government to enter into negotiations and to preclude federal Ministers of the Crown from proposing a constitutional amendment unless the terms of secession have been addressed during negotiations.

9. The National Assembly engaged in the debate later with the introduction of Bill 99. The members of the National Assembly were sharply divided on the true purpose of the statute: was it an affirmation of the legal underpinning of unilateral secession or a reaffirmation of existing principles?[8]

10. The enactment of Bill 99 was accompanied by many considerations, including the specific characteristics of Quebec's French-speaking majority, the *Clarity Act* and the *Secession Reference*, First Nations' right to autonomy and the long-established rights of the English-speaking community.[9] However, the last five recitals in the preamble give a strong indication of Bill 99's purpose and intent:

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5 In legal terms, only the Legislature of Quebec, which comprises the Lieutenant Governor and the National Assembly, has legislative authority: *Constitution Act, 1867*, s. 71; *Act respecting the National Assembly*, CQLR, c. A–23.1, s. 2 para. 2. For reasons of convenience, this brief will usually refer to the "National Assembly" nonetheless.

6 *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.

7 See, for example, reasons of the Superior Court, paras. 12–15, 79, 82, 85, 92, 97, 294, 296, 477, 557–560.

8 See *e.g.*, Appellant's Brief, vol. 2, p. 314 (statement of Minister Facal).

9 Bill 99, preamble.

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

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

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

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

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

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

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

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

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

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

11. More substantively, Bill 99 purports to declare the Quebec people's right to self-determination (s. 1) and its "inalienable right to freely decide the political regime and legal status of Québec" (s. 2) "through its own political institutions" (s. 3); the winning option in a referendum to be that attracting 50% of the votes cast plus one (s. 4); the legitimacy of the "Québec State" being derived from "the will of the people inhabiting its territory" expressed through representatives elected in the National Assembly (s. 5); and the autonomy of the National Assembly and the "Québec people" in the exercise of its powers, authority, sovereignty or legitimacy (s. 13).

12. Mr. Henderson challenges the constitutional validity of those sections of Bill 99 on the grounds that they contravene Part V of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*.[10] Contrary to what the Superior Court found,[11] the Attorney General of Canada has been an impleaded party since the beginning of the proceedings and has participated actively in making legal arguments since the outset of this case.

13. The Superior Court did not apply the correct analytical framework and for the following reasons, declared that the impugned sections of Bill 99 are valid:

— Bill 99 does nothing more than reiterate the legal and political principles that have underpinned Quebec's society and democracy (para. 548);

— Despite their apparent meaning, ss. 1–3, 5 and 13 (properly interpreted in the context of the other provisions) do not allow for unilateral secession or modification not preceded by negotiation and not followed by a constitutional amendment (paras. 431–440, 448–456, 469, 489, 516–517, 546);

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10 See *Henderson v. Québec (Procureur général)*, 2007 QCCA 1138, [2007] R.J.Q. 2174, 2186, para. 89.

11 Reasons of the Superior Court, para. 120.

— Section 4 only reiterates what has been the rule when holding referenda and does not contemplate unilateral secession either (paras. 492–494, 506), and is in accordance with this Court's statement in *Alliance Québec v. Directeur général des élections du Québec*[12] to the effect that the Quebec Legislature could make a unilateral declaration of secession in case of fruitless negotiation with the rest of Canada (para. 510);

— Mr. Henderson has not demonstrated any *Charter* violation (para. 600).

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[12] 2006 QCCA 651, [2006] R.J.Q. 1328, 1334–1335, para. 29, reiterated in the reasons of the Superior Court, para. 510.

PART II – ISSUES IN DISPUTE

14. This appeal raises the following issue:

— Are ss. 1 to 5 and 13 of Bill 99 unconstitutional in that they are beyond the legislative authority of Quebec, as conferred by s. 45 of Part V of the *Constitution Act, 1982*?

PART III – SUBMISSIONS

15. This Court should be guided by the general principles of constitutional interpretation applied to secession (A), which provide an appropriate framework for determining the validity of ss. 1–5 and 13 of Bill 99 (B and C). This Court should consider if ss. 1–5 and 13 can be read down in accordance with those principles. It should declare ss. 1–5 and 13 invalid if they cannot be read down as to conform to those principles (D and E).

A. General principles of constitutional interpretation applied to secession

16. The Constitution of Canada "has an architecture, a basic structure" which, like the text itself, can be the subject of amendments. It is not "a mere collection of discrete textual provisions."[13]

17. The Constitution is primarily composed of the provisions of the *Canada Act 1982* and the *Constitution Acts, 1867 to 1982*,[14] and includes supporting principles and rules—such as the principles of federalism, democracy, constitutionalism and the rule of law—which ought to be observed for "the ongoing process of constitutional development and evolution of our Constitution".[15] The underlying principles of the Constitution can sometimes assist in elucidating the meaning of the constitutional text, but cannot change the basic thrust of the Constitution.[16]

18. Regarding secession, the application of these principles led the Supreme Court to impose the following constitutional framework. Secession of a province cannot lawfully occur unless (1) a clear majority of the secessionist province's population

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13 *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, para. 27 (*Senate Reform*).
14 *Constitution Act, 1982*, s. 52(2).
15 *Secession*, [1998] 2 S.C.R. 217, 239–240, 248–249, paras. 32, 52.
16 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 594, para. 66 (Binnie J.).

clearly express that they do not wish to remain in Canada; (2) negotiations in good faith and in accordance with constitutional principles with the federal government and the other provinces follows; and (3) the Constitution of Canada is lawfully amended.[17] The Supreme Court left to the political branches of government the task of determining how to meet those conditions within the conduct of the negotiations and to ascertain if they are met.[18] However, negotiations, while important, are not enough to satisfy the legal requirements of the Canadian constitutional framework and the Supreme Court's ruling. Secession, to be lawful, cannot be unilateral and requires a constitutional amendment.

B. The framework for determining the constitutional validity of Bill 99

19. Constitutional validity does not turn on whether Bill 99 is unwise or inefficient or should be drafted differently, but on whether it is invalid pursuant to s. 52 of the *Constitution Act, 1982* because it is contrary to the provisions of the Constitution.[19]

20. Legislative powers flow from the provisions of the Constitution and are divided between the federal Parliament and provincial legislatures.

21. The federal-provincial division of powers reflects the " … legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments." The *Constitution Act, 1867* "was an act of nation-building", and thus the first step in the creation of a "unified and independent political state" from former colonies "separately dependent on the Imperial Parliament for

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17 *Secession*, [1998] 2 S.C.R. 217, 265–273, paras. 88–104.
18 *Secession*, [1998] 2 S.C.R. 217, 271–272, paras. 100–101.
19 *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, 705, para. 3 (*Long-gun Registry*).

their governance…" "Federalism was the political mechanism by which diversity could be reconciled with unity."[20]

22. Within their respective jurisdictions, Parliament and the provincial legislatures are sovereign[21] and subject, in the exercise of their legislative powers, to the limitations imposed by the Constitution, such as the applicable guarantees of the *Canadian Charter of Rights and Freedoms*, and in the case of Quebec, other entrenched provisions like s. 133 of the *Constitution Act, 1867*.

23. Quebec, as a province of Canada[22] with executive and legislative institutions established by ss. 58 *et seq.* and 71 of the *Constitution Act, 1867*, has the same constitutional status as all other provinces.[23] The Legislature, of which the National Assembly is the elected chamber, has the power to make laws in relation to the classes of subjects enumerated in ss. 92 *et seq*. of the *Constitution Act, 1867*, and to amend the internal constitution of the province.[24]

24. Bill 99 is valid if (1) its subject matter, its pith and substance (2) may be classified in relation to one or more heads of powers[25] or is authorized by any other constitutional provision.[26]

25. The pith and substance of Bill 99 are its "dominant purpose or true character" or the "matter to which it essentially relates".[27] It may be identified by the statute's purpose (as opposed to the means to attain it) and its real legal and practical effects (which

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20 *Secession*, [1998] 2 S.C.R. 217, 244–245, para. 43.
21 See *Long-gun Registry*, [2015] 1 S.C.R. 693, 714, para. 27.
22 *Constitution Act, 1867*, ss. 3, 5–6.
23 *Re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, 814–815.
24 *Constitution Act, 1982*, s. 45.
25 *Long-gun Registry*, [2015] 1 S.C.R. 693, 714–715, para. 28.
26 See *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, 1070; *In re The Initiative and Referendum Act*, [1919] A.C. 935, 939 (P.C.) (*Initiative and Referendum*).
27 *Long-gun Registry*, [2015] 1 S.C.R. 693, 715, para. 29.

the Superior Court mentions only once[28]),[29] both of which are distinct.[30] Where as in this case specific provisions are challenged, its pith and substance must first be considered while taking into account the larger scheme in which it was enacted.[31]

26. Determining the purpose of Bill 99 rests primarily on its wording, but not on the use of "magical words"[32] or the number of titles and preambular clauses and recitals.[33] It cannot rest mainly if not exclusively on its declared object either[34]—irrespective of whether it is intended to be a response to the *Clarity Act*—or without any mention of its practical effects. Legislative debates, which have a relative probative value but are not determinative of the legislator's intent,[35] and other extrinsic evidence may be of assistance as long as these materials are not given undue weight.[36]

27. Classification often requires definition of the scope of the provincial legislative powers.[37] Nothing prevents the National Assembly from passing a statute "under several heads at the same time."[38]

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28 Reasons of the Superior Court, para. 582.

29 *Long-gun Registry*, [2015] 1 S.C.R. 693, 715, paras. 29, 31.

30 See, for examples of conflation of the two components, reasons of the Superior Court, paras. 336–338, 419, 431, 469, 472–473, 489, 506, 517, 567–569.

31 *Long-gun Registry*, [2015] 1 S.C.R. 693, 715, para. 30.

32 See for example, reasons of the Superior Court, para. 521.

33 See for example, reasons of the Superior Court, paras. 323, 326.

34 See for example, reasons of the Superior Court, paras. 330, 348, 541, 543, 565.

35 See for examples of undue weight on parliamentary debates, reasons of the Superior Court, paras. 250, 416; other mentions of the debates at paras. 70, 89, 94, 98, 108, 139, 332, 346–347, 351, 374–375, 398–399, 414–415, 433, 437, 458–459, 484–485, 495, 498, 524–525, 531, 540.

36 See namely *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, 796–797, para. 17; *Reference re Securities Act*, 2011 SCC 67, [2011] 3 S.C.R. 837, 868, para. 64.

37 *Long-gun Registry*, [2015] 1 S.C.R. 693, 716, para. 32.

38 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 72–75; see also *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, 189; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, 350; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, 287, paras. 114–115.

28. In keeping with the presumption of constitutional validity,[39] this Court may "read down" the impugned provisions of Bill 99 if they are ambiguous on their face and may admit of two meanings: one which is within the scope of the Legislature's jurisdiction and thus *intra vires*; the other which is beyond its jurisdiction and *ultra vires*. However, reading down must preserve Bill 99's clear meaning and objective.[40] This Court cannot rewrite the impugned provisions without undermining the National Assembly's authority to draft legislative instruments.[41]

C. The National Assembly's power to amend the constitution of the province

29. The concept of an amendment to the Constitution of Canada within the meaning of Part V of the *Constitution Act, 1982* is "informed by the nature of the Constitution and its rules of interpretation."[42] Amendments to the Constitution "are not confined to textual changes. They include changes to the Constitution's architecture."[43]

30. Aside from the provincial unilateral amending procedure, which is the most relevant to this appeal and is discussed below, Part V of the *Constitution Act, 1982* provides for four different amending procedures:

- The unanimous procedure (s. 41), which requires the approval of the federal Houses of Parliament and of the ten legislative assemblies of the provinces to make amendments in relation to subjects enumerated in s. 41, including the office of Lieutenant-Governor;

- The multilateral procedure (s. 43), which for amendments not applying to all provinces requires the consent of the federal Houses of Parliament and the legislative assembly of the province to which the amendment applies; this is how Quebec and Newfoundland and Labrador amended s. 93 of the

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39 *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, 687–688.
40 *Schacter v. Canada*, [1992] 2 S.C.R. 679, 707–708.
41 *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, 1024–1025.
42 *Senate Reform*, [2014] 1 S.C.R. 704, 725, para. 27.
43 *Senate Reform*, [2014] 1 S.C.R. 704, 725, para. 27.

Constitution Act, 1867[44] and Term 17 of the *Terms of Union between Canada and Newfoundland* with regard to denominational schools;[45]

— The federal unilateral procedure (s. 44), which operates through an ordinary statute enacted by Parliament in relation to the federal executive government and the federal Houses of Parliament;

— The general amending procedure (ss. 38, 42), applicable when other procedures do not apply, which requires the assent of the federal Houses of Parliament and two-thirds of the legislative assemblies of provinces representing at least 50% of the population of all provinces.

31. Under the provincial unilateral amending procedure (s. 45), a legislature may by ordinary statute[46] modify the "constitution of the province", which includes ss. 58–70 and 82–87 of the *Constitution Act, 1867*, common law principles and previously enacted legislative provisions of the same nature.[47]

32. A modification to the "constitution of the province" relates to "the operation of an organ of government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union".[48] It may take the form of an express

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44 *Constitution Amendment, 1997 (Quebec)*, SI/97-141 (December 22, 1997); *Potter v. Québec (Procureur général)*, [2001] R.J.Q. 2823 (C.A.).

45 *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12, 183 D.L.R. (4th) 225.

46 *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 37.

47 *OPSEU*, [1987] 2 S.C.R. 2, 37–38.

48 *OPSEU*, [1987] 2 S.C.R. 2, 40, reiterated in *Senate Reform*, [2014] 1 S.C.R. 704, 734, para. 47.

amendment of a constitutional provision[49] or an "organic" statute,[50] *e.g.* relating to public service and responsible government,[51] the members of the legislative assembly, the immunities and privileges of its members and the conduct of its business,[52] the term of office of the legislature,[53] or the procedure to enact legislation,[54] electoral laws and territorial divisions.[55]

33. In defining the "constitution of a province", reference to American constitutional law[56] is inapposite. Unlike the Constitution of Canada, the Constitution of the United States is a federal instrument, not a national one.[57] Its amending procedure is applicable to the U.S. Constitution only.[58] The states within the Union may amend their state constitutions according to their own amending procedure as long as they do not infringe upon the supremacy of the federal Constitution, including provisions such as the Guarantee Clause[59] and those contained in the Fourteenth and the

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49 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 582, para. 35. See, for example, the *Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9, which abolished the Legislative Council of Quebec, upheld in *Québec (Procureur général) v. Montplaisir*, [1997] R.J.Q. 109, 124–127, paras. 103–128 (C.S.).

50 Warren J. Newman, "Defining the 'Constitution of Canada' Since 1982: The Scope of the Legislative Powers of Constitutional Amendments under Sections 44 and 45 of the *Constitution Act, 1982*" (2003), 22 *S. Ct. L. Rev.* 423, 432, 492.

51 See *OPSEU*, [1987] 2 S.C.R. 2, 41–45.

52 *Fielding v. Thomas*, [1896] A.C. 600, 610–613 (P.C.) (privileges and immunities); *Attorney-General for Nova Scotia v. Legislative Council of Nova Scotia*, [1928] A.C. 107, 114–116 (P.C.) (number and terms of members of the legislative council appointed by the Lieutenant Governor).

53 *The King ex rel. Tolfree v. Clark, Conant and Drew*, [1943] 3 D.L.R. 684, 687, 689 (C.A. Ont.) (Riddell, Henderson JJ.A.), leave denied [1944] S.C.R. 69.

54 See *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 582–583, paras. 33–36.

55 Neil Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed., Toronto: Carswell, 1986, p. 71; Nelson Wiseman, "Clarifying Provincial Constitutions" (1996), 6 *N.J.C.L.* 269, 286; Newman, *op. cit.*, note 50, at 436.

56 Reasons of the Superior Court, paras. 214–215.

57 U.S. Const., Art. VI, §2.

58 U.S. Const., Art. V.

59 U.S. Const., Art. IV, § 4.

Fifteenth Amendments.[60] The "Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States".[61]

34. The provinces' limited amending ability excludes notably a modification engaging:

— "[T]he interests of the other level of government" or the "fundamental nature and role of the institutions provided for in the Constitution";[62]

— Any "profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system";[63]

— The office and constitutional powers of the Lieutenant Governor[64] or the monarchical nature of Canada;[65]

— The provinces' legislative powers;[66]

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60 Expert Report of Professor Richard S. Kay, para. 29, **Mis en cause's Brief, hereinafter "M.C.B.", p. 56.**

61 *Texas v. White*, 74 U.S. 700, 725 (1868).

62 *Senate Reform*, [2014] 1 S.C.R. 704, 734, para. 48; see also *OPSEU*, [1987] 2 S.C.R. 2, 47.

63 *Constitution Act, 1982*, s. 41(a); *OPSEU*, [1987] 2 S.C.R. 2, 47; *Reference re Language Rights in Manitoba*, [1985] 1 S.C.R. 721, 777; *Initiative and Referendum*, [1919] A.C. 935, 942–943; *Montplaisir*, [1997] R.J.Q. 109, 122, para. 89.

64 See, for example, *Constitution Act, 1867*, ss. 58-62, 65–66, 82, 95, and 90.

65 *OPSEU*, [1987] 2 S.C.R. 2, 46; *Initiative and Referendum*, [1919] A.C. 935, 943–944; *Montplaisir*, [1997] R.J.Q. 109, 123–124, para. 97, 101, 103 (*e.g.*, assent to legislation, reserve, or disallowance; call or dissolution of legislature; appointment or dismissal of ministers); Stephen A. Scott, "Entrenchment by Executive Action: A Partial Solution to 'Legislative Override'" (1983), 4 *S. Ct. L. Rev.* 303, 312, 315–316.

66 *Constitution Act, 1867*, s. 92; see *OPSEU*, [1987] 2 S.C.R. 2, 41, relying on *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.

— The obligation to enact, print and publish Acts and similar instruments in both official languages;[67]

— The amending procedure itself;[68]

— Generally, any entrenched constitutional provision (like s. 133 of the *Constitution Act, 1867*).[69]

35. Although the foregoing is not exhaustive, one thing is certain: if Bill 99 is a "charte constituante",[70] purporting to establish the political institutions and powers of the "Québec State", it exceeds the legislative powers of the National Assembly. If it is more than an ordinary law, that is a fundamental law whose status is located between an ordinary statute and a quasi-constitutional statute,[71] it is a species unknown in Canadian law.

D. The Superior Court based its judgment on an erroneous analytical framework

36. Generally, the Superior Court should have:

— Employed a more restrictive view of the presumption of constitutional validity: it is inaccurate to say that a statute worded in large and liberal terms cannot

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67 *Blaikie*, [1979] 2 S.C.R. 1016, 1025–1027; *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032, 1039.

68 See *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker, House of Assembly)* (1991), 80 D.L.R. (4th) 11, 27 (N.S.S.C., App. Div.), aff'd on other grounds [1993] 1 S.C.R. 319.

69 Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville: Éditions Yvon Blais, 2014, p. 220, para. IV-120.

70 Reasons of the Superior Court, para. 304.

71 Reasons of the Superior Court, paras. 549–551.

possibly offend the Constitution; it may have an impermissible colourable intent;[72]

— Refrained from examining the purpose of Bill 99 in part from the point of view expressed by the same Court on a motion to strike,[73] especially considering that the judgment granting the motion was quashed;[74]

— Classified ss. 1–5 and 13 of Bill 99 in relation to one or more provincial heads of power or examined their conformity with s. 45 of the *Constitution Act, 1982* after having defined its pith and substance; a mere mention of the potential heads of power[75] is not enough;[76]

— Resorted to the reading down technique instead of declaring it was unnecessary to do so when faced with two sustainable interpretations of some impugned provisions,[77] one under which they are valid, one under which they are not; the presumption of constitutionality does not obviate this requirement;

— Examined all of the parliamentary debates preceding the enactment of Bill 99 instead of using them selectively;[78] although some statements suggest that Bill 99 "ne confère pas de nouveaux droits au Québec, il réitère des droits existants",[79] other statements strongly suggest that Bill 99 was intended to be more than a mere modification of the constitution of Quebec: it was intended to reaffirm Quebec's sovereignty "dans tous ses domaines de compétence,

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72 *Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 797–798, para. 18.
73 Reasons of the Superior Court, paras. 311, 313.
74 [2007] R.J.Q. 2174.
75 Reasons of the Superior Court, paras. 283–299.
76 The Attorney General of Canada notes that the Attorney General of Québec does not classify Bill 99 either: Respondent's Brief, para. 16.
77 Reasons of the Superior Court, paras. 422–430, 440 (as to s. 1), 472–481 (as to s. 3).
78 See, for example, Reasons of the Superior Court, paras. 396, 399, 416.
79 Appellant's Brief, vol. 2, p. 314 (statement of Minister Facal).

tant à l'interne que sur la scène internationale" and that "le droit du Québec de décider de son avenir doit s'exercer sans ingérence et sans droit de veto découlant de la formule d'amendement de 1982".[80]

E. The challenged provisions of Bill 99 are valid only if interpreted as excluding unilateral secession without a constitutional amendment

37. Properly interpreted, ss. 1–5 and 13 of Bill 99 are declaratory. They state the National Assembly's view of the law at the time of passing.[81] They do not expressly amend the constitution of the province nor are they of an organic nature. They have nothing to do with property and civil rights in the province in the accepted sense. At best, the National Assembly could only have resort to s. 92(16) of the *Constitution Act, 1867*—dealing with all matters of a local of private nature—to enact them, but these matters are neither local nor private.

38. Whatever their qualification, ss. 1–5 and 13 are all subject to constitutional scrutiny: they are part of an ordinary statute and must be declared invalid under s. 52 of the *Constitution Act, 1982* if they offend the Constitution,[82] especially the constitutional framework for lawful secession set out by the Supreme Court.

39. The ambiguous wording of ss. 1–5 and 13 of Bill 99 requires that this Court, in reading them down, circumscribe precisely and without ambiguity their purpose and their limited reach. It would be clearly insufficient to declare only that the general principles set out in Bill 99 relate to the internal constitution of Quebec or that the

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80 Appellant's Brief, vol. 2, p. 313 (statement of Minister Facal); see also *e.g.*, p. 314, 339.

81 See *Produits de l'érable Philippe Jacques inc. c. Fédération des producteurs acéricoles du Québec*, 2017 QCCA 2017, para. 24; Pierre-André Côté, *Interprétation des lois*, 4th ed., Montréal: Thémis, 2009, pp. 597–598.

82 *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 583–584, para. 35.

impugned provisions are valid simply because they do not authorize unilateral secession expressly.[83]

40. Generally, this Court should conclude that the principle or concept of self-determination that permeates ss. 1–5 and 13 must be limited to internal self-determination, that is, within the constraints of the Constitution of Canada. These provisions cannot in any case purport to grant a right to external self-determination nor in any way support an eventual unilateral declaration of secession.[84] As the Supreme Court emphasized: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. … [T]he secession of Quebec from Canada cannot be undertaken unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. … In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. … Such a notion is contrary to the rule of law, and must be rejected."[85]

41. While the Supreme Court recognized that "a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada" would support the right of the provincial government "to pursue secession", this clear expression of popular support would confer legitimacy "on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional

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83 Reasons of the Superior Court, paras. 336–338, 419, 431, 469, 472–473, 489, 506, 517, 567–568, 582.

84 See Expert Report of Professor Richard S. Kay, para. 29, **M.C.B., p. 56**; Expert Report of Dr. Dirk Hanschel, paras. 29–30, **M.C.B., p. 87**.

85 *Secession*, [1998] 2 S.C.R. 217, 263, 265, 267–270, 273, 275, para. 84, 87, 92, 96–97, 104, 107–108.

means".[86] The fact that negotiations would be complex and "difficult" does not negate the fact that "[u]nder the Constitution, secession requires that an amendment be negotiated".[87] Without an amendment (or amendments, as the case might be) to the Constitution of Canada, the secession of a province would not be lawful.

I. Section 1: external self-determination is not an option

42. Section 1 of Bill 99 provides:

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

43. To be constitutionally valid, s. 1 must be interpreted and read down to a putative right of internal, not external, self-determination. The following comments are also apposite as to the validity of s. 3.

44. The right to self-determination of a people is "normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[88]

45. External self-determination has been characterized as "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely defined by a people".[89] A claim to a right of external self-determination only arises in the most

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86 *Secession*, [1998] 2 S.C.R. 217, 265, 293, paras. 87, 151.
87 *Secession*, [1998] 2 S.C.R. 217, 265, 270, para. 97.
88 *Secession*, [1998] 2 S.C.R. 217, 282, para. 126.
89 *Secession*, [1998] 2 S.C.R. 217, 282, para. 126.

exceptional of circumstances which generates "at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development."[90]

46. Manifestly, none of these situations are applicable to Quebec under existing conditions. Assuming that the population of Quebec constitutes a "people", "as do other groups within Quebec and/or Canada",[91] "whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession."[92]

47. In the alternative, s. 1 is beyond the powers (*ultra vires*) of the National Assembly if it is interpreted to be declaratory of an external right of self-determination. Contrary to what this Court stated in *obiter dictum* in *Alliance Québec v. Directeur général des élections du Québec*,[93] unfruitful negotiations would not allow Quebec to secede unilaterally.

48. As the citations from the Supreme Court's ruling in the *Quebec Secession Reference* set out in paras. 39–40 of this brief attest, the lawful secession of the province from the Canadian federation can only be accomplished by an amendment to the Constitution of Canada. Although an amendment would perforce necessitate negotiations, negotiations themselves are not enough to alter the Canadian legal order and are no substitute for the enactment of an amendment made pursuant to

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90 *Secession*, [1998] 2 S.C.R. 217, 287, para. 138.

91 *Secession*, [1998] 2 S.C.R. 217, 281–282, 287, paras. 125–126, 138.

92 *Secession*, [1998] 2 S.C.R. 217, 281–282, para. 125; see Expert Report of Professor Richard S. Kay, para. 29 (United States), **M.C.B., p. 56**; Expert Report of Dr. Dirk Hanschel, paras. 29–30 (Germany), **M.C.B., p. 87**.

93 [2006] R.J.Q. 1328, 1334–1335, para. 29, reiterated in the reasons of the Superior Court, para. 510.

the multilateral procedures set out in Part V of the *Constitution Act, 1982*. A declaration of independence without such a constitutional amendment would be illegal and unconstitutional.

II. Section 2: the people of Quebec may only act through its representatives and within the limits of the Constitution

49. Section 2 of Bill 99 provides:

2. The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.	2. Le peuple québécois a le droit inaliénable de choisir librement le régime politique et le statut juridique du Québec.

50. To be constitutionally valid, s. 2 must be interpreted and read down to mean that the Quebec people can unilaterally change the political regime and legal status of Quebec only through its elected representatives and within the limits of the National Assembly's legislative jurisdiction under the Constitution of Canada.

51. In the alternative, s. 2 is beyond the powers (*ultra vires*) of the National Assembly if it purports to ground a right to unilateral change of Quebec's monarchical regime or the legal status as a province, which can only be achieved through multilateral amendments pursuant to Part V of the *Constitution Act, 1982*, or if it vests the people of Quebec with the power to effect such changes.[94]

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94 *Initiative and Referendum*, [1919] A.C. 935, 943–944.

III. Section 3: changes can only be ones which are permitted under s. 45 of the *Constitution Act, 1982*

52. Section 3 provides:

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.	3. Le peuple québécois détermine seul, par l'entremise des institutions politiques qui lui appartiennent en propre, les modalités de l'exercice de son droit de choisir le régime politique et le statut juridique du Québec. Toute condition ou modalité d'exercice de ce droit, notamment la consultation du peuple québécois par un référendum, n'a d'effet que si elle est déterminée suivant le premier alinéa.

53. To be constitutionally valid, s. 3 must be interpreted and read down to specify that the power of Quebec's political institutions to determine "the mode of exercise of its right to choose the political regime and legal status of Québec" can only be effected unilaterally within the constraints of s. 45 of the *Constitution Act, 1982*. Other changes, including secession, must be preceded by negotiations conducted in accordance with the constitutional principles of federalism, democracy, constitutionalism, the rule of law, and the protection of minorities, and a negotiated constitutional amendment.[95]

54. In the alternative, s. 3 is beyond the powers (*ultra vires*) of the National Assembly if it purports to exclude federal political institutions or the operation of valid federal legislation[96] from the process of constitutional changes, or to vest Quebec's political

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95 *Secession*, [1998] 2 S.C.R. 217, 265–266, 273, paras. 88, 104.

96 For example, the *Referendum Act*, S.C. 1992, c. 30.

institutions with the power to determine the fundamental political and legal status of Quebec outside of our constitutional framework.

IV. Section 4: the results of the referendum are advisory only

55. Section 4 of Bill 99 provides:

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.	4. Lorsque le peuple québécois est consulté par un référendum tenu en vertu de la Loi sur la consultation populaire (chapitre C-64.1), l'option gagnante est celle qui obtient la majorité des votes déclarés valides, soit 50% de ces votes plus un vote.

56. To be constitutionally valid, s. 4 must be interpreted and read down so as to make the results of a referendum non-legally binding only. Section 4 does not oblige the National Assembly or the Quebec government to act in compliance with the results of a consultative process such as a referendum.[97]

57. In the alternative, s. 4 is beyond the powers (*ultra vires*) of the Legislature of Quebec if it purports to oblige the National Assembly or the federal and other provincial governments to initiate constitutional negotiations. In our constitutional system, the results of a referendum have no direct legal effect[98] and would not create a legal obligation on the federal government and the other provincial governments "to accede to the secession of a province, subject only to negotiation of the logistical

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97 *Haig*, [1993] 2 S.C.R. 995, 1032.

98 *Secession*, [1998] 2 S.C.R. 217, 265, para. 87.

details of secession".[99] The other governments remain free to assess whether the result is the clear expression of a "clear majority", which is a qualitative evaluation.[100]

58. Provincial legislation cannot bind the federal government or the Parliament of Canada,[101] and the National Assembly may not legislate extraterritorially.[102] Nevertheless, the power to initiate multilateral constitutional amendments rests with the National Assembly, even if it may act on the cue of a referendum.[103]

V. Section 5: Quebec is a province, not a "State"

59. Section 5 of Bill 99 provides:

5. The Québec State derives its legitimacy from the will of the people inhabiting its territory.	5. L'État du Québec tient sa légitimité de la volonté du peuple qui habite son territoire.
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).	Cette volonté s'exprime par l'élection au suffrage universel de députés à l'Assemblée nationale, à vote égal et au scrutin secret en vertu de la Loi électorale (chapitre E-3.3) ou lors de référendums tenus en vertu de la Loi sur la consultation populaire (chapitre C-64.1).
Qualification as an elector is governed by the provisions of the Election Act.	La qualité d'électeur est établie selon les dispositions de la Loi électorale.

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99 *Secession*, [1998] 2 S.C.R. 217, 266–267, para. 90.

100 *Secession*, [1998] 2 S.C.R. 217, 265, para. 87.

101 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (looseleaf edition), Toronto: Thomson Reuters, p. 10-18.1.

102 *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, 327–335.

103 *Constitution Act, 1982*, s. 46(1); *Secession*, [1998] 2 S.C.R. 217, 257, 265–266, paras. 69, 87–88.

60. To be constitutionally valid, the terms "Québec State" in s. 5 must be interpreted and read down to apply to mean the province of Quebec as established by ss. 5–6 of the *Constitution Act, 1867.*[104]

61. In the alternative, s. 5 is beyond the powers (*ultra vires*) of the National Assembly if it is meant to provide the legislative underpinning for a legal characterization of the "legitimacy" of the "Québec State" that is inconsistent with the legal role and status of Quebec as a province under the Constitution of Canada, or with the legal limitations inherent in that role and status.

VI. Section 13: the National Assembly is sovereign within the limits of the Canadian federation

62. Section 13 of Bill 99 provides:

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

63. To be constitutionally valid, s. 13 should be interpreted and read down in accordance with the powers conferred upon the National Assembly by the Constitution of Canada and "can come from no other source" than the Constitution.[105] This means that the National Assembly is only a part of the Legislature of Quebec under s. 71 of the *Constitution Act, 1867* and exercises its provincial legislative powers jointly with the Lieutenant Governor who, as in every province, is the formal head of the

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104 *Constitution Act, 1867*, ss. 5–6.

105 *Secession*, [1998] 2 S.C.R. 217, 258–259, para. 72.

Legislature. Thus, s. 13 must be read as essentially just a variant of an assertion of a right to internal self-determination, i.e. "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state".[106]

64. In the alternative, s. 13 is beyond the powers (*ultra vires*) of the National Assembly if it is another manifestation of a claim to a right of external self-determination, to exclusive legislative authority ousting the application of federal law, and potentially, to the claim of a lawful right or power of eventual unilateral secession.

65. As provincial law cannot be extraterritorial in its ambit, the only "parliament or government" to which s. 13 must be taken to refer is the Parliament and government of Canada. The Parliament of Canada is established by s. 17 of the *Constitution Act, 1867* and exercises legislative powers on all matters that are not within the exclusive jurisdiction of the provincial legislatures.[107]

66. No Act of a provincial legislature can limit the authority of Parliament or the operation of validly enacted federal laws. Neither level of government is subordinate to the other, nor can either impose on the other level a unilateral change to the other's powers. Acting within the limits of its legislative jurisdiction, the Parliament of Canada has as much authority and legitimacy as the National Assembly to solicit an expression of democratic will by the population of Quebec, through the vehicle of federal elections and referenda.[108]

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106 *Secession*, [1998] 2 S.C.R. 217, 282, para. 126.
107 See, *e.g.*, *Constitution Act, 1867*, s. 91; *Constitution Act, 1982*, s. 44.
108 *Haig*, [1993] 2 S.C.R. 995, 1030.

PART IV – CONCLUSIONS

67. This Court should declare that (1) under the Constitution of Canada, Quebec is a province of Canada, and (2) ss. 1–5 and 13 of Bill 99 do not and can never provide the legal basis for a unilateral declaration of independence by the government, the National Assembly or the Legislature of Quebec, or the unilateral secession of the "Québec State" from the Canadian federation.

68. Besides that declaration, the Attorney General of Canada does not take any position regarding the disposition of this appeal. No costs should be ordered in his favour or against him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, February 20, 2019

Ian Demers

Me Ian Demers
Me Claude Joyal, Ad. E.
Me Warren J. Newman, Ad. E.
Attorney General of Canada
Lawyers for the Mis en cause

PART V – AUTHORITIES

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**

SCHEDULE II

PROCEEDINGS

Notice of production of an expert report, October 16, 2013

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

Respondent

&

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT
(art. 402.1 *Code of Civil Procedures*, art. 2809 *Civil Code of Quebec*)

TO:

Me Brent D. Tyler Edifice " La Caserne " 83 St-Paul West Montreal, Quebec H2Y 1Z1	Attorney for Petitioner Keith Owen Henderson
Me Jean-Yves Bernard Bernard, Roy (Justice Québec) 1 Notre-Dame Est, Suite 8.00 Montreal, Quebec H2Y 1Z1	Attorney for Respondent Attorney General of Quebec

TAKE NOTICE that the undersigned attorneys for the Mis en cause Attorney General of Canada have filed in the court record the Expert Report of Dr Richard Steven Kay.

Copy of the said report is attached to the present notice, along with Dr Kay's Curriculum vitae.

DO GOVERN YOURSELVES ACCORDINGLY,

MONTREAL, this 16th day of October, 2013

(s) Attorney General of Canada

Procureur général du Canada /
Attorney General of Canada
Mes Claude Joyal, Warren Newman,
Dominique Guimond et Ian Demers
Attorneys for the Mis en cause

COPIE CONFORME / TRUE COPY

Attorney General of Canada

PROCUREUR GÉNÉRAL DU CANADA
ATTORNEY GENERAL OF CANADA

September 23, 2013
Expert's Report
Richard S. Kay
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INTRODUCTION AND SCOPE OF ASSIGNMENT

1. I have been asked by the Attorney General of Canada to supply a report on the meaning and force of state constitutional provisions in the United States declaring that all political power resides in "the people" or that "the people" have the right to abolish, alter, and reconstitute governments. I have also been asked about the effect of these provisions on the legal right of a state to alter its relationship with the United States of America. This second inquiry turns on the relative authority of the Constitution of the United States and that of any acts or decisions of a state claimed to represent the will of its people. I understand these questions relate to the constitutional validity and legal scope or effectiveness, in Canada, of An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State, S.Q. 2000, c. 46 (Bill 99), enacted by the Legislature of Québec.

SCOPE OF REVIEW

2. This report is based on my knowledge of American constitutional law and, in particular, on the sources cited which I have personally read and reviewed. I have been assisted by Scott Garosshen, a second-year student at the University of Connecticut School of Law, who performed substantive research and helped with the format of text and citations. My analysis is based exclusively on American federal and state law.

STATEMENT OF INDEPENDENCE AND QUALIFICATIONS

3. This report represents my own understanding and honest evaluation of the questions presented based exclusively on my knowledge of the relevant law and learned commentary. I have no personal stake in the outcome of the proceedings in connection with which it was prepared.

4. My qualifications to offer this analysis may be judged by my appended curriculum vita. I have been a scholar of United States constitutional law for forty years and have published extensively in books and law journals in the United States and in other jurisdictions. I have focused my research on the ultimate bases of constitutional authority, as understood from a comparative perspective. I have also taken a consistent interest in various aspects of the constitutional law of Canada. Although this report is exclusively based on American law, I hope my familiarity with Canadian law has allowed me to present my conclusions in a way that helps illuminate the ultimate issues involved.

SUMMARY OF REPORT

5. The report is divided into five sections. Section One provides a brief historical background of the relationship between state and federal constitutions in the United States. Section Two surveys the "popular sovereignty clauses" of the state constitutions, places them in the historical context of their enactment, and attempts to explain their persistence in subsequent constitutions. Section Three summarizes how state courts have understood these provisions and relates them to the formal machinery for constitutional change in state constitutional texts. Section Four deals with the hierarchical relationship between state constitutional power and the constitutional authority of the United States Constitution. More

particularly, it traces the emergence of the current orthodoxy, according to which state law—including state constitutions—is subordinate to the federal constitution, as interpreted by federal courts, and also to constitutionally proper federal law. In light of that prevailing assumption, the state "popular sovereignty" clauses must be interpreted as limited to internal constitutional change. My conclusions are summarized in Section Five.

REPORT

I. The Federal and the State Constitutions in the United States

6. It may be helpful, before considering the nature and effect of declarations of popular sovereignty in American state constitutions, to note briefly the separate and co-ordinate historical development of the state and national legal systems. Prior to the Declaration of Independence of 1776, the thirteen British colonies of southern North America were separate and independent legal entities. One consequence of the emerging conflict between those colonies and the United Kingdom was increasing inter-colony communication and co-operation, resulting in the Continental Congresses of the 1770s. While the colonies declared their independence from the United Kingdom collectively in the famous Declaration, each state also made an individual declaration of independence.[1]

7. Each state also created its own system of government.[2] These state constitutions preceded any national constitution. Until the states approved the Articles of Confederation in

[1] *See, e.g.*, PA. CONST. of 1776, pmbl.

[2] *See infra* note 8. Connecticut retained its colonial charter with minor changes. *See* CONN. CONST. of 1776 (adopting the CONN. CHARTER of 1662 with minor changes). Rhode Island did not adopt any new document and continued to govern under its colonial charter until 1842. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 23 (2007) (noting that Rhode Island continued to be governed under the R.I. CHARTER of 1663 until the R.I. CONST. of 1842).

1781, they conducted all collective action—including the conduct of the war of independence—under ad hoc arrangements. The Articles accorded some significant powers to the national Congress but their substantive and procedural limitations led to their replacement with the current Constitution of the United States. The Constitution was ratified in 1789 by special purpose assemblies—conventions—that met in each of the states.[3]

8. Constitutional law in the United States, therefore, continues to be of two kinds. On the one hand, the United States Constitution creates and defines the powers of national institutions, while imposing specific limits on the powers of the states. State governments, on the other hand, are defined by the constitutions of each state. Those constitutions are created by the states themselves and they are changeable according to each state's constitutional law—a law that is determined, ultimately, by state courts of last resort. The judgments of those state courts on questions of state law are not subject to review by the federal courts, including the Supreme Court of the United States. The United States Constitution, however, and federal law properly created under that constitution, are still the supreme law of the land. State courts have the last word on the content and meaning of state law but that law must conform to federal law where federal law applies. And, with respect to federal law, the United States Supreme Court is the ultimate authority. I elaborate further on the historical development of the relationship between the state and federal constitutional orders in Section Four of this report.

[3] *See generally* JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Burt Franklin, ed., 2d ed. 1974), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html (compiling documents from the state conventions).

II. The Popular Sovereignty Clauses

9. All American state constitutions but one include, typically in their bills of rights, a general statement of principle asserting that the will of the people governed by that constitution is the basis for all political power.[4] These provisions date back to the original state constitutions and they have been copied—usually unreflectively—in slightly different forms in subsequent constitutions of the original states and in the new constitutions of states later admitted to the federal union.

10. Seven states include the popular sovereignty provision only as a clause modifying the declaration of another right.[5] More commonly the principle is stated independently and explicitly. So Article I, Section 1 of the Michigan Constitution of 1964 states: "All political power

[4] Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Colorado 2:1; Connecticut 1:2; Delaware 1:16, 14:1; Florida 1:1; Georgia 1:2, ¶ 1; Hawaii 1:1; Idaho 1:2; Illinois 1:1; Indiana 1:1; Iowa 1:2; Kansas 1:2; Kentucky § 4; Louisiana 1:1; Maine 1:2; Maryland Decl. of Rts., art. 1; Massachusetts pt. 1, art. 5; Michigan 1:1; Minnesota 1:1; Mississippi 3:5; Missouri 1:1; Montana 2:1; Nebraska 1:1; Nevada 1:2; New Hampshire pt. 1, art. 1; New Jersey 1:2; New Mexico 2:2; North Carolina 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; South Dakota 6:26; Tennessee 1:1; Texas 1:2; Utah 1:2; Vermont ch. 1, art. 6; Virginia 1:2; Washington 1:1; West Virginia 2:2, 3:2; Wisconsin 1:1; Wyoming 1:1. New York is the only state without such a provision. (Citations to *current* state constitutions will be the name of the state followed, where applicable, by the article and section number.)

The doctrine of popular sovereignty is also implicit in declarations that the constitution is established or ordained by "we the people," a phrase that appears in the preambles to forty-three state constitutions. Slight variations are present in four others (Connecticut, Massachusetts, Ohio and Texas). Three state constitutions (New Hampshire, Vermont and Virginia) do not have preambles.

[5] Three states declare that to secure inalienable rights, "governments are instituted . . . deriving their just powers from the consent of the governed." Illinois 1:1; Nebraska 1:1; Wisconsin 1:1. Delaware prefaces its right to petition and assembly by noting that lawless mobs contravene the principles of republican government, which is "founded on common consent for common good." Delaware 1:16. Delaware also requires all public officers to swear an oath in which they acknowledge "that the powers of this office flow from the people I am privileged to represent." Delaware 14:1. Massachusetts and Vermont declare that, "all power residing originally in the people," Massachusetts pt. 1, art. 5, or "all power being originally inherent in and co[n]sequently derived from the people," Vermont ch. 1, art. 6, therefore public officers are accountable to the people. Minnesota declares that government is for the benefit of the people, "in whom all political power is inherent, . . ." Minnesota 1:1.

is inherent in the people."[6] Beyond, and sometimes in addition to these general pronouncements, thirty-seven state constitutions spell out the logical consequence of such ultimate authority and provide that the people may at any time alter or abolish the constitutional arrangements which they have, for the time being, established.[7] The intensity with which this dogma is expressed varies. Some examples illustrate the range. Many states use language similar to that in Article II, Section 1 of the Arkansas Constitution of 1875:

> All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper.

Article VII of the Declaration of Rights of the Massachusetts Constitution of 1780 is even more emphatic, providing that:

> [T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

And three states—Maryland (Decl. of Rts., art. 6), New Hampshire (pt. 1, art. 10) and Tennessee (1:2)—emphasize the revolutionary implications of this idea with the following additional statement:

> The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish and destructive of the good and happiness of mankind.

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[6] *See also* Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Colorado 2:1; Connecticut 1:2; Delaware, Preamble; Florida 1:1; Georgia 1:2, ¶ 1; Hawaii 1:1; Idaho 1:2; Indiana 1:1; Iowa 1:2; Kansas 1:2; Kentucky § 4; Louisiana 1:1; Maine 1:2; Maryland Decl. of Rts., art. 1; Mississippi 3:5; Missouri 1:1; Montana 2:1; Nevada 1:2; New Hampshire pt. 1, art. 1; New Jersey 1:2; New Mexico 2:2; North Carolina 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; Tennessee 1:1; Texas 1:2; Utah 1:2; Virginia 1:2; Washington 1:1; West Virginia 3:2; Wyoming 1:1.

[7] Alabama 1:2; Arkansas 2:1; California 2:1; Colorado 2:2; Connecticut 1:2; Delaware, Preamble; Georgia 1:2, ¶ 2; Idaho 1:2; Indiana 1:1; Iowa 1:2; Kentucky § 4; Maine 1:2; Maryland Decl. of Rts., arts. 1, 6; Massachusetts pt. 1, art. 7; Minnesota 1:1; Mississippi 3:6; Missouri 1:3; Montana 2:2; Nevada 1:2; New Hampshire pt. 1, art. 10; New Jersey 1:2; North Carolina 1:3; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; Tennessee 1:1; Texas 1:2; Utah 1:2; Vermont ch. 1, art. 7; Virginia 1:3; West Virginia 3:3; Wyoming 1:1.

11. The origin of these provisions is not difficult to discern. American states began to draft their constitutions in the late eighteenth century and relied heavily on the same ideas that supported those states' actions in separating themselves from the suzerainty of the United Kingdom. In the period immediately before and after the Declaration of Independence in 1776, eleven states drafted new instruments of government and the principle of popular sovereignty was, in one form or another, included in ten of them.[8] When James Madison first proposed the amendments to the United States Constitution that would eventually become the Bill of Rights, he included at the outset, three general principles that were deleted when Congress decided not to alter the Preamble. His resolution provided:

> First. That there be prefixed to the constitution a declaration That all power is originally vested in, and consequently derived from the people. That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.[9]

These original constitutional provisions echoed in unmistakable terms the most famous formulation of this principle in the Declaration of Independence of 1776:

> [W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government,

[8] DEL. DECL. OF RTS. of 1776, art. I; GA. CONST. of 1777, pmbl.; MD. DECL. OF RTS. of 1776, art. I; MASS. CONST. of 1780, pt. 1, arts. V, VII; N.J. CONST. of 1776, pmbl.; N.Y. CONST. of 1777, art. I; N.C. DECL. OF RTS. of 1776, art. I; PA. DECL. OF RTS. of 1776, arts. IV, V; S.C. CONST. of 1776, pmbl.; VA. DECL. OF RTS. of 1776, §§ 2, 3. New Hampshire adopted a short, provisional constitution without a clear popular sovereignty provision. N.H. CONST. of 1776. Connecticut and Rhode Island retained their colonial charters. *See supra* note 2.

[9] 1 ANNALS OF CONG. 433-34 (1789) (Joseph Gales ed., 1834).

> laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[10]

12. The belief that political power was legitimate only insofar as it expressed the will of the "people" was almost universally held in the American founding period. The popular will on matters as basic as the shape of the constitution, moreover, could not be expressed through ordinary elected legislatures. But since "the people" also could not exercise its will directly, that will was at its most authentic when expressed in an irregular, non-governmental representative body—namely, the special constitutional convention. [11] Summarizing this development, historian Robert Palmer observed that it meant revolution "had become domesticated in America."[12] When, therefore, the newly independent states decided to commit their first principles to written constitutions, it was natural that general statements of the people's right to institute and to change government were front and center in these texts.

13. Although the idea of the final and illimitable authority of "the people" receded in importance as representative government became the standard of legitimacy in American jurisdictions, the states retained the constitutional provisions endorsing that authority. And the thirty-seven states subsequently admitted to the union almost always included such provisions in their constitutions. That these provisions persisted is unsurprising. Most were part of the

[10] The Declaration itself borrowed heavily both its ideas and its expression from Locke's Second Treatise. *See* JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 146-47, 163-64 (ed. Charles L. Sherman, 1937).

[11] Throughout this report I use the term "constitutional convention" to refer to special-purpose elected assemblies for revising or replacing a constitution. They should not be confused with the "constitutional conventions" of the British legal system and those legal systems based on it, namely unwritten rules and principles of the constitution that are not enforceable in courts of law. The definitive treatment of the emergence of popular sovereignty as the basis of political authority in eighteenth century America and of the elected constitutional convention as the preferred form through which to express that sovereignty is GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). *See also* Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57, 71-75 (1987).

[12] ROBERT R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION 231 (1966).

state's Declaration of Rights, which, for obvious political reasons, was sometimes expanded but almost never diminished. And when new states were admitted, they usually modeled their constitutions after existing state constitutions. It is well established that state constitution-writing consists in very substantial part in a process of borrowing, copying, and adjusting the terms of other states' constitutions.[13] The various popular sovereignty provisions closely resemble each other and the same phrases recur over and over again. The exact phrase "All political power is inherent in the people" appears in twenty state constitutions[14] and the nearly identical phrase "All power is inherent in the people" appears in another seven.[15] A third variation—"All political power is vested in and derived from the people"—accounts for another seven.[16] And seventeen states describe the people's right to change the government with the words "alter" and "abolish".[17] The conclusion seems inescapable that, unlike the more specific and likely dickered provisions of state constitutions, these general provisions are entirely uncontroversial and amount to a kind of constitutional "boilerplate."

[13] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 86-87 (2009).

[14] Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Connecticut 1:2; Florida 1:1; Idaho 1:2; Iowa 1:2; Kansas 1:2; Michigan 1:1; Nevada 1:2; New Jersey 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; South Dakota 6:26; Texas 1:2; Utah 1:2; Washington 1:1. Hawaii provides that "All political power *of this State* is inherent in the people . . ." Hawaii 1:1 (emphasis added). Minnesota mentions "the people, in whom all political power is inherent . . ." Minnesota 1:1.

[15] Indiana 1:1; Kentucky § 4; Maine 1:2; Oregon 1:1; Pennsylvania 1:2; Tennessee 1:1; Wyoming 1:1.

[16] Virginia and West Virginia insert the word 'consequently.' Virginia 1:2; West Virginia 3:2. Vermont mixes the formulation with the first two and declares "That all power being originally inherent in and consequently derived from the people . . ." Vermont ch. 1, art. 6.

[17] Arkansas 2:1; Colorado 2:2; Idaho 1:2; Kentucky § 4; Maryland Decl. of Rts., art. 1; Mississippi 3:6; Missouri 1:3; Montana 2:2; North Carolina 1:3; Ohio 1:2; Oregon 1:1; Pennsylvania 1:2; Tennessee 1:1; Texas, 1:2; Virginia 1:3; West Virginia 3:3; Wyoming 1:1.

III. The Internal Effect of Popular Sovereignty Provisions

14. The popular sovereignty provisions of state constitutions have served more of a rhetorical than a legal purpose. They are rarely invoked in litigation. Courts use them mostly as a ground for rejecting challenges to legally irregular processes of constitutional amendment or revision. Even in such cases, however, the predominant approach of American courts has been to reaffirm the positive rules for constitutional change provided in the state's existing constitution.

15. The abstract popular sovereignty provisions in state constitutions must be read together with the concrete methods of constitutional change explicitly provided in those texts. One clear sign of that interdependence is the requirement in every state constitution but one that any constitutional amendment or constitutional revision must be approved by popular referendum.[18] And in eighteen states, at least some constitutional amendments may also be proposed by popular initiative.[19] When a petition with the requisite number of signatures is presented, state officials must commence a process that gives the electorate the opportunity to approve or disapprove the proposed change.

[18] In Delaware, an amendment may be initiated by a two-thirds vote in each house of the legislature. If it is approved by both houses by the same super-majority vote *after the next general election*, then it becomes part of the constitution. Delaware 16:1.

[19] Arizona 21:1; Arkansas 5:1; California 18:3; Colorado 5:1; Florida 11:3; Illinois 14:3; Massachusetts amend. 48, ch. 4, §§ 1-5; Michigan 12:2; Mississippi 15:273; Missouri 12:2(b); Montana 14:9; Nebraska 3:1; Nevada 19:2, cl. 1; North Dakota 3:1; Ohio 2:1; Oklahoma 5:1; Oregon 4:1(2)(a); South Dakota 23:1. Many state constitutions distinguish between limited-subject amendments, which may be promulgated through the initiative-referendum procedure, and wholesale constitutional revisions, which must first be committed to a constitutional convention. *See* William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 499-500 (2006).

16. Forty-two state constitutions, moreover, provide for some kind of a constitutional convention to undertake major constitutional revisions.[20] As noted, in the eighteenth century, the special constitutional convention was regarded as the most appropriate vehicle for determining the will of the sovereign people.[21] State constitutions adopt various means of calling a constitutional convention into being. In thirty-nine, the legislature can vote to initiate the process for electing such a convention.[22] Eight seem to allow the people to call a convention by submitting a petition with enough signatures.[23] And fifteen state constitutions automatically submit the question of whether to hold a convention to voters once every set number of years (ranging from nine to twenty).[24]

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[20] Alabama 17:286; Alaska 13:2; Arizona 21:2; California 18:2; Colorado 19:1; Connecticut 13:1; Delaware 16:2; Florida 11:2, 4, 6; Georgia 10:1, ¶ 4; Hawaii 17:2; Idaho 20:3; Illinois 14:1; Iowa 10:3; Kansas 14:2; Kentucky § 258; Louisiana 13:2; Maine 4:15; Maryland 14:2; Michigan 12:3; Minnesota 9:2; Missouri 12:3(a); Montana 14:1; Nebraska 16:2; Nevada 16:2; New Hampshire pt. 2, art. 100(b); New Mexico 19:2; New York 19:2; North Carolina 13:1; North Dakota 3:1; Ohio 16:2; Oklahoma 24:2; Oregon 17:1; Rhode Island 14:2; South Carolina 16:3; South Dakota 23:2; Tennessee 11:3; Utah 23:2; Virginia 12:2; Washington 23:2; West Virginia 14:1; Wisconsin 12:2; Wyoming 20:3.

[21] *See supra* p. 8, ¶ 12.

[22] Alabama 17:286; Alaska 13:2; Arizona 21:2; California 18:2; Colorado 19:1; Connecticut 13:1; Delaware 16:2; Georgia 10:1, ¶ 4; Hawaii 17:2; Idaho 20:3; Illinois 14:1; Iowa 10:3; Kansas 14:2; Kentucky § 258; Louisiana 13:2; Maine 4:15; Michigan 12:3; Minnesota 9:2; Missouri 12:3(a); Montana 14:1; Nebraska 16:2; Nevada 16:2; New Hampshire pt. 2, art. 100(b); New Mexico 19:2; New York 19:2; North Carolina 13:1; Ohio 16:2; Oklahoma 24:2; Oregon 17:1; Rhode Island 14:2; South Carolina 16:3; South Dakota 23:2; Tennessee 11:3; Utah 23:2; Virginia 12:2; Washington 23:2; West Virginia 14:1; Wisconsin 12:2; Wyoming 20:3.

[23] Arizona 21:2, 4:1; Florida 11:4; Michigan 2:9, 12:3; Montana 14:2; North Dakota 3:1; Oklahoma 5:1, 24:2; Oregon 4:1, 17:1; South Dakota 23:1-2. The ambiguity arises because Arizona, Michigan, Oklahoma, Oregon, and South Dakota permit a convention to be called "by law" or "after laws providing for such Convention shall be approved by the people" and also grant the people power to propose laws by initiative but do not expressly state whether these "laws" include those enacted by initiative.

[24] Alaska 13:3 (ten years); Connecticut 13:2 (twenty years); Florida 11:2 (twenty years); Hawaii 17:2 (nine years); Illinois 14:1(b) (twenty years); Iowa 10:3 (ten years); Maryland 14:2 (twenty years); Michigan 12:3 (sixteen years); Missouri 12:3(a) (twenty years); Montana 14:3 (twenty years); New Hampshire pt. 2, art. 100(b) (ten years); New York 19:2 (twenty years); Ohio 16:3 (twenty years); Oklahoma 24:2 (twenty years); Rhode Island 14:2 (ten years). In recent years, such referenda almost always fail. *See* Williams, *supra* note 13, at 388.

17. One could read the popular sovereignty clauses of state constitutions as merely the theoretical underpinning of these formal devices for consulting the will of the people on state constitutional questions. The will of the sovereign controls but its exercise has been channeled and institutionalized through formal procedures. Thus the New Jersey Supreme Court, after quoting its constitutional popular sovereignty provision, went on to note that "there is no machinery in our State, constitutional or statutory," for the people to exercise this power "*on their own initiative.*"[25] And when the political authorities in Indiana, "with no pretense of complying with or proceeding under the provisions of the present constitution for amendment of it," passed a law placing a new draft constitution before the voters, the state Supreme Court—notwithstanding language in the existing constitution recognizing the people's "indefeasible right to alter and reform their government"[26]—upheld an injunction against the referendum.[27] The Court quoted a treatise on constitutional conventions:

> The idea of the people thus restricting themselves in making changes in their Constitution is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and therefore always under the restraints of law.[28]

[25] *Jackman v. Bodine*, 205 A.2d 713, 723 (N.J. 1964) (emphasis added).

[26] Indiana 1:1.

[27] *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912).

[28] *Id.* at 7 (quoting JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 548 (1887)).

The Court also noted that "there has never been a time when the people might not, if they pleased and if they had believed it necessary, have made any change desired in the orderly ways provided."[29]

18. In light of the ample "orderly ways" in which the people may exercise their constituent authority, the constitutional popular sovereignty declarations have had a limited impact on constitutional decision-making. Courts rarely cite them. They arise most often in cases involving the amendment or replacement of a state constitution in a manner not clearly authorized by existing law.

19. Sometimes courts accept these provisions as justification for the otherwise unauthorized constitutional modification. For instance, in a 1935 advisory opinion, the Rhode Island Supreme Court held that the legislature could call a constitutional convention which could draft a new constitution and submit it to the voters even though the existing constitution provided for only one method of amending the constitution—proposal by the *legislature* and ratification by the electorate.[30] The Court relied on Article I, section 1 of the state constitution, which declared the right of the people "to make and alter their constitutions of government" but that provision also stated that an existing constitution was binding "till changed by an explicit and authentic act of the whole people."[31] Notwithstanding this qualification, the Supreme Court found that the constitutional recognition of this right combined with the

[29] *Id.* at 17. The Court did acknowledge that a proper constitutional convention might be called by the legislature even if not provided for in the constitution. *Id.* at 18.

[30] *In re Opinion to the Governor*, 178 A. 433 (R.I. 1935). The opinion has a full review of other state judgments and commentary on parallel questions as they stood at the time.

[31] *Id.* at 436.

obligation imposed on the legislature in Article IV, section 1 "to pass all laws necessary to carry this constitution into effect" justified the proposed legislation.[32] The Court reasoned that a convention "may be needed, at any time or from time to time, to enable the people by an explicit and authentic act to make a new constitution or to alter the present one."[33]

20. In a 1966 judgment, the Kentucky Court of Appeals held it lawful to put to the voters a new constitution drafted by an appointed Constitutional Revision Assembly, even though the existing constitution made no provision for this procedure.[34] The Court held, in light of the popular sovereignty clause of the state Bill of Rights, that the existing constitutional amendment procedures could not be treated as exclusive:

> So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.[35]

Other courts have invoked the popular sovereignty clauses to support a less drastic proposition—that the constitutional rules describing the procedures for initiating or ratifying a constitutional amendment ought to be construed liberally so that mere technical departures do not deprive the people of their chance to make constitutional changes. It is enough, on this

[32] *Id.* at 457-58.

[33] *Id.* at 437-39; *accord Ellingham*, 99 N.E. at 18; *Stander v. Kelley*, 250 A.2d 474, 478-79 (Pa. 1969).

[34] *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966).

[35] *Id.* at 721. Judge Hill vigorously dissented, arguing the decision meant that "the present safeguards for the revision and or amendment of the Constitution are now obviously discarded and obsolete" and that any future amendment rules will be "little more than camouflage." *Id.* at 724 (Hill, J., dissenting) . *See also Wheeler v. Bd. of Trustees*, 37 S.E.2d 322 (Ga. 1946) (upholding a new constitution that the legislature presented to voters despite pre-existing constitutional rules requiring a convention for wholesale revision). The Georgia Supreme Court relied on the popular sovereignty clause of the old constitution and the approval by a large majority of the voters.

view, if there has been "substantial compliance" with the governing provisions.[36] This approach has been applied with special force when an irregularly proposed amendment is challenged after it has already been approved in a referendum.[37]

21. But not all courts have held that popular sovereignty clauses legitimate irregular constitutional changes that have been or may be approved by referendum. I have already noted the Indiana case where the legislature was held to have improperly attempted to put a draft constitution to referendum.[38] More dramatically, courts have been willing to hold constitutional amendments invalid even after ratification by the electorate. For instance, the Iowa Supreme Court struck down an amendment to the state constitution instituting prohibition after approval by the voters because the legislature had not twice passed the amendment in identical terms, as required by the constitutional amendment procedure.[39] In response to the citation of Article II, section 1 of the constitution reciting the people's right to "alter or reform" the government, the court insisted that this right had to be exercised "in the manner prescribed in the existing constitution."[40] Quoting Cooley's *Treatise on Constitutional Limitations*, the court declared that the "voice of the people can only be of legal force when expressed at the times and under the conditions which they themselves have prescribed and

[36] *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 16 (Mo. 1981); *see also id.* at 10-12; *Harper v. Greely*, 763 P.2d 650, 655 (Mont. 1988); *McCarney v. Meier*, 286 N.W.2d 780, 783-85 (N.D. 1979).

[37] *Larkin v. Gronna*, 285 N.W. 59, 63-64 (N.D. 1939) ("When will is expressed in the manner required, departures from prescribed rules taking place prior to the expression of the will must be grave indeed to set aside the authoritative declaration of the people.").

[38] *See supra* p. 12, ¶ 17 - p. 13, ¶17.

[39] *Koehler v. Hill*, 15 N.W. 609 (Iowa 1883).

[40] *Id.* at 615.

pointed out by the constitution."[41] The Missouri Supreme Court similarly stated that although the constitutional right of the people to alter their government may appear by its terms "unlimited":

> the people, in their wisdom, have usually in their organic law, always of their own making, prescribed limitations upon and defined the course to be pursued in the exercise of this power. Conformity with these requirements is as obligatory upon the whole people as is the duty of the individual to obey the law.[42]

Thus, the formal amendment procedures must be read as "a modification of or limitation upon section 2 [the popular sovereignty provision]."[43]

22. Popular sovereignty clauses have also sometimes been successfully invoked to justify actions by state constitutional conventions that exceeded legislatively imposed limits on their procedures or on the permissible subjects on which they might act. This argument is premised on the idea that these conventions represent the people in their full sovereign authority. One Pennsylvania judge declared that a convention, "*quasi* revolutionary in its character. . . [has] absolute power, so far as may be necessary to carry out the purpose for which [it was] called into existence."[44] It could be neither "subverted nor restrained by the legislature."[45] This position, however, was subsequently repudiated by the Pennsylvania Supreme Court which

[41] *Id.* at 616; *see also Johnson v. Craft*, 87 So. 375, 385-86 (Ala. 1921); *Graham v. Jones*, 3 So. 2d 761, 782-84 (La. 1941).

[42] *Erwin v. Nolan*, 217 S.W. 837, 839 (Mo. 1920).

[43] *Id.*

[44] *Wood's Appeal*, 75 Pa. 59, 67 (1874).

[45] *Id.* at 68.

insisted that such conventions were governed by controlling legislation.[46] The convention was the "off-spring of *law*. It had no other source or existence."[47] This latter opinion more accurately reflects the prevailing judicial view of the "convention-as-sovereign" argument.[48]

23. Thus, although popular sovereignty provisions of state constitutions have been in force for more than two centuries, their practical application has been marginal at best. Not in every case, but in most cases, recognition of popular sovereignty in the states has been confined to those processes and institutions defined by pre-existing law. Thus, when a litigant argued that Article 10 of the New Hampshire Bill of Rights—preserving the people's right "to reform the old or establish a new government" and condemning "the doctrine of nonresistance against arbitrary power and oppression" as "absurd, slavish and destructive of the good and happiness of mankind"—prevented the legislature from prohibiting activities intended to overthrow the government by force, the state Supreme Court issued a sharp reply.[49] The right in question did not extend to "insurrection and rebellion" for a dissatisfied group when "the adoption of peaceful and orderly changes properly reflecting the will of the people may be accomplished through the existing structure of government."[50]

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[46] *Wells v. Bain*, 79 Pa. 39 (1875).

[47] *Id.* at 48. Note, however, that the Supreme Court also accepted the binding nature of the constitution that the convention produced once it had been approved in a referendum. *Wood's Appeal*, 75 Pa. at 68-69. *See also* Richard S. Kay, *Constituent Authority*, 59 AM J. COMP. L. 715, 728-30 (2011).

[48] *See* Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563, 565-75 (1982).

[49] *Nelson v. Wyman*, 105 A.2d 756 (N.H. 1954).

[50] *Id.* at 770 (upholding a state "subversive activities" law); *see also Scales v. United States*, 367 U.S. 203, 275-78 (1961) (Douglas, J., dissenting).

IV. State Sovereignty and the Federal Union

24. My discussion so far has been confined to the effect of popular sovereignty provisions on the internal government of a state. The effect of such a provision on the relationship between that state and the United States presents an analytically separate question. While a matter of genuine doubt in the early years of the republic, it has now been settled that no state law—constitutional or otherwise—can alter a state's basic relationship to the United States. Consequently, the popular sovereignty provisions under study must be—and are—interpreted as referring only to the *internal* law and institutions of a state and, therefore, as consistent with the supremacy of the federal constitution and law. The "people" referred to in a state constitutional popular sovereignty clause clearly refers to the people of the state in whose constitution it appears. Given the federal system of which those states are a part, the nature of this people's right to change their constitutional situation is subject to two different interpretations. On the one hand, taken literally and in isolation, the "indefeasible" right of the people of, say, Kentucky to "alter, reform or abolish their government in such manner as they may deem proper"[51] might be understood to include the right to replace the existing state government with one that that stands in a different relationship to the United States, or, indeed, has no ties to the United States at all. Alternatively, we might read the people's right in these provisions as limited to the internal institutions and powers of government within the individual state. On this second understanding, the state's relationship with the United States would be subject to a different and superior law, the constitutional law of the United States. That law is necessarily beyond the political reach of the people of any given state.

[51] Kentucky § 4.

25. In fact, a significant period of American constitutional history is defined by the opposition of these two viewpoints. According to the first, ultimate political authority rested in the various peoples of the states. The political authority of this collective assent undergirded the legal authority of the United States including the role of the state governments in the federal system. According to the second viewpoint, United States law and, in particular, the United States Constitution was based on the political authority of a single "people of the United States." The people of any given state had no inherent right to alter, abolish, or reform the law and government of the United States. These two visions of the American polity were in serious contest in the eighty years following ratification of the new constitution in 1789.

26. Two important state documents, the Virginia and Kentucky Resolutions of 1798 and 1799 (written respectively by James Madison and Thomas Jefferson) protested the federal Alien and Sedition Acts. More to our point, they also asserted that a state had the right to "nullify" federal law that, in that state's judgment, violated the federal constitution. Consistent with the theory of the authority of the federal Constitution just described, the resolutions presumed that the states that "formed the constitution," being "sovereign and independent," had the ultimate right to "judge of its infraction."[52] The controversy was put to a judicial test in 1819 in the great case of *M'Culloch v. Maryland*, in which the United States Supreme Court endorsed an expansive reading of the powers of the federal government in upholding the constitutionality of the Bank of the United States.[53] Chief Justice Marshall took account of the state's argument

[52] *Kentucky Resolution* (1799) *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 184 (Henry S. Commager ed., 1948).

[53] 17 U.S. (4 Wheat.) 316 (1819).

that the Constitution should be construed "not as emanating from the people, but as the act of sovereign and independent states."[54] Marshall firmly rejected this proposition:

> The government proceeds directly from the people; is 'ordained and established,' in the name of the people; . . . [The] people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.[55]

27. Even such a declaration, however, did not put the issue to rest. The theory of the Constitution as a "compact" among sovereign states, ultimately controllable by them persisted in a series of conflicts culminating in the great catastrophe of the American Civil War.[56] In the run-up to the secession of the southern states, the idea that the American union was ultimately founded on the continuing sovereignty of the individual states was naturally prominent. Although the popular sovereignty provisions of the state constitutions were not cited in them, the various secession ordinances routinely repeated their substance. So Tennessee's ordinance "assert[ed] the right, as a free and independent people, to alter, reform, or abolish our form of government in such manner as we think proper."[57] Defenders of the Union explicitly challenged this view of the Constitution, noting inter alia that Article VI declared the Constitution and laws of the United States to be "the supreme law of the land, by which the judges of every state shall be bound, anything in the laws or constitution of the state to the contrary notwithstanding."[58]

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[54] *Id.* at 402.

[55] *Id.* at 403-04.

[56] *See* Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIB. L. REV. 161, 177-79 (1997).

[57] TENN. DECL. OF INDEP. of 1861, *available at* http://www.constitution.org/csa/ordinances_secession.htm #Tennessee.

[58] U.S. CONST. art. VI, cl. 2.

In his inaugural address—delivered after seven states had already declared their secession—President Lincoln insisted that "[n]o state upon its own mere motion can lawfully get out of the Union. . . . I therefore consider that, in view of the Constitution and the laws, the Union is unbroken . . . ."[59]

28. This profound disagreement about the limits of state sovereignty is usually thought to have been decisively settled by the outcome of the war and the passage of the thirteenth, fourteenth and fifteenth amendments to the United States Constitution, which drastically limited the autonomy of the states. The Supreme Court emphatically adopted the restricted vision of state sovereignty in its opinion in *Texas v. White* in which it held void the sale of United States bonds by the secessionist government of Texas.[60] The United States Constitution, the Court held, "makes of the people and states which compose [the United States] one people and one country" resulting in "an indestructible Union, composed of indestructible States."[61] "Considered therefore as transactions under the Constitution, [the secession and all acts giving effect to that secession] were absolutely null. They were utterly without operation in law."[62] Challenges to this view of the relationship between federal and state sovereignties have since that time diminished to near the vanishing point.[63]

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[59] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 265 (1953).

[60] 74 U.S. (7 Wall.) 700 (1868).

[61] *Id.* at 721, 725.

[62] *Id.* at 726.

[63] *See Cooper v. Aaron*, 358 U.S. 1 (1958) (denouncing a claim by Arkansas officials that they were entitled to resist what they took to be erroneous interpretation of the United States Constitution by the United States Supreme Court). The Court quoted Chief Justice Marshall: "If the legislatures of the several states may, at will, annul the judgments of the court of the United States, and destroy the rights acquired under those judgments, the

29. The supremacy of the United State Constitution manifests itself in holdings that state constitutional provisions are invalid insofar as they contravene the Constitution. Indeed, in at least two cases, state constitutional provisions initiated by popular petition and approved by popular referendum—that is, state constitutional rules that represented the will of the people of that state in a particularly direct way—have been struck down.[64] The state constitution popular sovereignty provisions must be read against this almost uniformly accepted background. They must be understood as referring to the ultimate authority of the people of the various states to change their government only within the limits established by the supreme federal law that binds them. The provisions cannot be read to empower the states to sever those bonds.

30. This interpretation is supported by a more comprehensive examination of the texts of many of the state constitutions.

31. First, the state constitutions are littered with references to the United States, so much so that much of the machinery of state government makes little sense if considered apart from federal law. For example, the Maine Constitution, which declares that the people have "an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it," goes on to mention the United States nineteen times.[65] Furthermore, almost all states constitutions require public officers to take oaths to support both the state constitution *and* the Constitution of the United States.[66]

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constitution itself becomes a solemn mockery . . . ." *Id.* at 18 (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

[64] *Reitman v. Mulkey*, 387 U.S. 369 (1969); *Romer v. Evans*, 517 U.S. 620 (1996).

[65] Maine 2:1 (three times); 2:4; art. 4, pt. 1, § 4; art. 4, pt. 3, § 1; art. 4, pt. 3, § 11; art. 5, pt. 1, § 4; art. 5, pt. 1, § 5; art. 5, pt. 1, § 7; 6:5; 7:4; 7:5; 9:1; 9:2; 9:14; 9:14-D (twice); 9:25.

32. Even more relevant to the proper interpretation of popular sovereignty clauses are the common explicit references to the supremacy of the United States Constitution. Nineteen states contain such affirmations.[67] These range from the simple statement in Article II, Section 3 of the Arizona constitution of 1912—"The Constitution of the United States is the supreme law of the land"—to the elaborate statement in Article I, Section 33 of the 1869 Georgia constitution that "every citizen owes paramount allegiance to the Constitution and Government of the United States and no law or ordinance of this State, in contravention or subversion thereof, shall ever have any binding force." Thirteen state constitutions are explicit on the question of any claimed people's right to separate from the Union, insisting that the state is an inseparable part of the United States.[68] Perhaps most revealing is the fact that, in nine of the states with express declarations of the people's right to alter or abolish their government, that right is explicitly qualified by an statement that such changes must be compatible with the United States Constitution. So the relevant provision of the Oklahoma constitution of 1907, Article II, Section 2 reads:

> All political power is inherent in the people; and government is instituted for their protection, security and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States.

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[66] *See, e.g.*, Alabama 16:269; Connecticut 11:1; Illinois 3:30; Maine 9:1; Texas 7:1; *see also* U.S. CONST. art. VI, cl. 3 (requiring all state officers to take such an oath).

[67] Arizona 2:3; California 3:1; Colorado 2:2; Georgia 1:1, ¶ 33; Idaho 1:3; Maryland Decl. of Rts., art. 2; Mississippi 3:7; Missouri 1:3; Nevada 1:2; New Mexico 2:1; North Carolina 1:5; North Dakota 1:23; Oklahoma 1:1; South Dakota 6:26; Texas 1:1; Utah 1:3; Washington 1:2; West Virginia 1:1; Wyoming 1:37.

[68] California 3:1; Georgia 1:1, ¶ 33; Idaho 1:3; Mississippi 3:7; Nevada 1:2; New Mexico 2:1; North Carolina 1:4; North Dakota 1:23; Oklahoma 1:1; South Dakota 6:26; Utah 1:3; West Virginia 1:1; Wyoming 1:37.

It is true that such limitations began to appear only after the issue of federal supremacy reached a critical phase in the period during and after the Civil War. But they continue to reflect the prevailing understanding of the limits of popular power to alter state governments.[69]

33. The same limitations are suggested by another feature of the enactment of state constitutions. With the exception of the thirteen original states, every state was admitted to the Union pursuant to the power granted to Congress by Article IV, section 3 of the federal Constitution. Once admitted to the Union, every state stands on an "equal footing" and (within the limits of the Constitution) may alter its law as it sees fit.[70] But the achievement of statehood in the first place is subject to such conditions as Congress may choose to impose at the time. In some cases, Congress has specified particular requirements for the initial constitution of the new state or has insisted on approval of the constitutional text itself.[71] According to the Supreme Court "Congress may require, under penalty of denying admission, that the organic

[69] In three constitutions the power of the people to control their state governments is expressly limited to the "internal" government of the state. Mississippi 3:6; Missouri 1:3; North Carolina 1:3.

[70] *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

[71] *See, e.g.*, Act of March 3, 1821, 16 Stat. 645 (1821):

> That Missouri shall be admitted . . . upon the fundamental condition, that the fourth clause of the twenty-sixth section of the third article of the constitution submitted on the part of said state to Congress, shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileged and immunities to which such citizen is entitled under the constitution of the United States: *Provided*, That the legislature of the said state, by a solemn public act, shall declare the assent of the said state to the said fundamental condition, and shall transmit to the President of the United States, on or before the fourth Monday in November next, an authentic copy of the said act . . .

Similarly, Congress admitted Nebraska to the union on the condition that it change its constitution to permit black suffrage. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 119-20 (2004); *see also id.* at 129-31 (compiling admission conditions). And Louisiana's enabling act required the territory to submit its constitution to Congress for review. *See* Act of Feb. 20, 1811, 21 Stat. 641, 642-43. Once a state is admitted, however, Congress can enforce any such admission conditions only if it could validly pass a new law to the same effect. *See Coyle*, 221 U.S. at 573.

laws of a new State at the time of admission shall be such as to meet its approval."[72] Congress has regularly admitted new states with constitutions containing the kind of provision under discussion. Its acquiescence to that constitutional language is strong evidence that Congress does not regard these clauses as authorizing the states to modify their relationship to the United States.

34. Judicial readings of the popular sovereignty clauses have taken this limited interpretation to be a matter of course. The Supreme Court of Tennessee, for example, acknowledged that, under Section 1 of the state Bill of Rights—a provision that made no explicit reference to the federal Constitution—the "people are possessed with ultimate sovereignty and are the source of all State authority. The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."[73]

V. Conclusions

35. To summarize, my conclusions based on the research reflected in this memorandum are:

A. "Popular sovereignty" clauses of varying degrees of assertiveness are present in most state constitutions. They express the prevailing political philosophy of the founding era reflected in the Declaration of Independence. They have persisted in later constitutions through a process of retention and borrowing.

[72] *Coyle*, 221 U.S. at 568; *see also id.* at 569 (quoting *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 609 (1845)).

[73] *Cummings v. Beeler*, 223 S.W.2d 913, 923 (Tenn. 1949).

B. The popular sovereignty clauses have had a limited impact on state decision-making. Judicial decisions applying them or taking note of them have largely been confined to questions concerning the process of constitutional amendment and the relative powers of state legislatures and state constitutional conventions. Most, although not all, judicial interpretations have subjected that process to existing positive law.

C. However they may have been regarded in the first eighty years of American independence, since the Civil War these clauses have been understood as referring only to the power of the people to alter the internal structure of state government subject to the requirements of the United States Constitution and, therefore, they exclude explicitly or implicitly, any power to alter the state's relationship to the United States. So interpreted they are entirely consistent with the United States Constitution.

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Fall, 2000	Visiting Professor of Law, Boston College Law School, Newton, Massachusetts. Subjects taught: Evidence, Secured Transactions.
Fall, 1996	Visiting Professor of Law, University of San Diego, San Diego, California. Subjects taught: European Human Rights Law, Evidence.
Fall, 1985	Visiting Professor, University of Exeter (England). Subjects taught: Contracts; Constitutional Law.
Fall, 1982	Visiting Professor of Law, Boston University School of Law, Boston, Massachusetts. Subjects taught: Commercial Paper, Evidence.
1973-1974	Law Clerk, Hon. Paul C. Reardon, Supreme Judicial Court of Massachusetts.
Summer or Short Term Teaching	Western New England College, School of Law; University of San Diego, School of Law; Catholic University of Brabant (Netherlands); University of Puerto Rico, School of Law; Penn. State- Dickinson School of Law (Florence, Italy, Vienna, Austria), University of Coimbra (Portugal).

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1970-1973	Harvard Law School, Cambridge, Massachusetts. J.D. *magna cum laude*. Harvard Law Review, Editor, 1971-73.
1968-1969	Yale University Graduate School, New Haven, Connecticut, Department of Economics, M.A. (awarded 1974).
1964-1968	Brandeis University, Waltham, Massachusetts, A.B. *cum laude*. Phi Beta Kappa.

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Occasional consultant to various state agencies, private companies and law firms

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Notice of production of an expert report, October 16, 2013

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-05-065031-013

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

KEITH OWEN HENDERSON

Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

Respondent

&

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT
(art. 402.1 *Code of Civil Procedures*, art. 2809 *Civil Code of Quebec*)

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TAKE NOTICE that the undersigned attorneys for the Mis en cause Attorney General of Canada have filed in the court record the Expert Report of Dr Dirk Hanschel.

Copy of the said report is attached to the present notice, along with Dr Hanschel's Curriculum vitae.

DO GOVERN YOURSELVES ACCORDINGLY,

MONTREAL, this 16th day of October, 2013

(s) Attorney General of Canada

Procureur général du Canada /
Attorney General of Canada
Mes Claude Joyal, Warren Newman,
Dominique Guimond et Ian Demers
Attorneys for the Mis en cause

COPIE CONFORME / TRUE COPY

Attorney General of Canada

PROCUREUR GÉNÉRAL DU CANADA
ATTORNEY GENERAL OF CANADA

Dr. Dirk Hanschel
Reader
School of Law
University of Aberdeen, UK

Aberdeen, 11 October 2013

Expert Brief on Certain Aspects regarding the

Relationship of German *Länder* Constitutions to the Federal Constitution

A. SUBMISSION

I have been asked by the Attorney-General of Canada and have undertaken to draft a report providing information on the effect of provisions of state constitutions of the *Länder*, that, in one form or another, recognize the principle that all political power resides in "the people" or that "the people" have the right to abolish, alter or to reconstitute their governments.

As part of the report, I shall also provide an opinion on the effect of such provisions on the legal right of a *Land* to alter the relationship of that state to Germany; that is, on the authority of the constitutional or Basic Law of Germany and national law relative to such acts or decisions of the *Länder* governments as may be claimed to represent the will of the sovereign people of any given *Land*.

I understand that these questions are put in connection with the issue of the constitutional validity and legal scope or effectiveness, in Canada, of an Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State (Bill 99).

B. OVERVIEW OF THE REPORT

The report is divided into three sections. Section 1 lays out the overall constitutional framework of the German federal state which constrains the scope for constitutional autonomy of the *Länder* in several ways, in particular through its distribution of powers, the hierarchy of norms, the principle of preemption as well as the homogeneity principle. Section 2 deals with the exercise of constitutional autonomy of the *Länder* within that framework, in particular by looking at expressions of popular sovereignty, rules for constitutional amendment and on self-determination in their constitutions. Section 3 concludes by asserting

in essence that the German federation provides no convincing evidence that a *Land* people might determine its relationship towards the federal state on its own behalf, without safeguarding the permanent federalist conception provided by the Basic Law which in turn expresses the *pouvoir constituant* of the German people as a whole.

C. STRUCTURE OF THE REPORT

I. The overall constitutional framework of the German federal state

1. The basic notion of federalism under the German Basic Law
2. Statehood of the *Länder*
3. Distribution of powers, hierarchy of norms and preemption
4. The homogeneity principle as a limitation to constitutional autonomy of the *Länder*
5. Restrictions on territorital reforms
6. *Länder* participation in changes to the Basic Law
7. The principle of federal loyalty as an expansion of *Länder* powers?
8. Right to or prohibition of secession?

II. The exercise of constitutional autonomy by the *Länder* within that framework

1. Remaining scope for constitutional autonomy
2. An overview of typical expressions of constitutional autonomy
3. Particular aspects of constitutional autonomy
   a) Expressions of popular sovereignty
   b) Rules for constitutional amendment
   c) Reliance on the right to self-determination?

III. Conclusions

D. REPORT

I. The overall constitutional framework of the German federal state

1. The basic notion of federalism under the German Basic Law

(1) According to Art. 20 (1) of the Basic Law[1] "the Federal Republic of Germany is a "democratic and social federal state".[2] The two levels of government of the federal state are the Federation and the 16 German states (*Länder*[3]) as listed in the Preamble of the Basic Law.[4] The German Federal Constitutional Court adheres to a two-tiered federalist notion, whereby the Federation results from the unification of the *Länder*, performs central functions of government and hence constitutes the federal state.[5] The Court distinguishes between three types of legal interaction, namely amongst federal institutions, between federal and *Länder* institutions and amongst *Länder* institutions.[6] As members of the federal state, the *Länder* are equal to each other; hence the German state adheres to the principle of symmetric federalism.[7] By contrast, the relationship between the federal state and the *Länder* as organized by the Basic Law is characterized, as a matter of principle, by the superiority of the former.[8] The Court articulates this very clearly by attributing the so-called *Kompetenz-Kompetenz*, i.e. the power to create powers, to the federal state.[9] Equality of the federal state and the *Länder* may only be asserted in fields that have not been organized by the Basic Law.[10] This is the crucial start and end point for this analysis as it determines that the *Länder* lack the legal authority to depart from the federal constitutional framework of which they constitute an integral part.

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[1] Basic Law (*Grundgesetz*, hereafter "GG"), here and thereafter as translated by Tomuschat/Currie (2010), available at https://www.btg-bestellservice.de/pdf/80201000.pdf (last accessed on 7 October 2013).
[2] See Pieroth, Art. 20, para. 16 et seq.; Menzel (2002), p. 147 et seq.
[3] This correct German spelling has been standardized throughout this report even in direct quotations that might spell the term as "*Laender*" instead.
[4] See BVerfGE 6, 309 (340).
[5] See BverfGE 13, 54 (77 f.); for comparison see the three-tiered notion of German federalism developed by Kelsen (1927), p. 130 et seq. which elucidates the different functions of the federal state vis-à-vis the *Länder*; see furthermore Isensee (2008), § 126, para. 90.
[6] BVerfGE 13, 54 (78); Pieroth (2012), Art. 20, para. 17.
[7] Pieroth (2012), Art. 20, para. 17.
[8] See BVerfGE 1, 14 (51); 13, 54 (78); somewhat more cautious Bartlsperger (2008), § 128, para. 45.
[9] BVerfGE 13, 54 (78 et seq.)
[10] BVerfGE 13, 54 (78 et seq.)

2. Statehood of the *Länder*

(2) This finding does not conflict with the notion that the *Länder* are themselves considered as states. According to the three-elements-doctrine (*Drei-Elemente-Lehre*) developed by Georg Jellinek, statehood consists of state territory, state people and state power.[11] The Federal Constitutional Court has reiterated that these elements are fulfilled not only by the federal state itself, but also by its component parts, the *Länder*.[12] As the Court stated in its decision *Niedersächsisches Besoldungsgesetz*: "...It is a feature of the federation that the overall federal state and its member states both possess the quality of states".[13] While the exercise of governmental powers is split between these two levels of statehood, the degree to which the *Länder* may exercise their own statehood and constitutional autonomy [14] (or constitutional supremacy, *Verfassungshoheit*[15]) is limited by the Basic Law.[16]

(3) Admittedly, such autonomy or supremacy is hard to conceive without popular sovereignty.[17] However, presupposing that sovereignty can be split, its substance on the *Länder* level, whilst not being derived from the federal state, is nevertheless confined to a degree of constitutional autonomy within the overarching framework of the Basic Law. Accordingly, the Federal Constitutional Court stated that "the *Länder* are, as members of the federal state, states with their own sovereignty, which whilst limited in substance is not derived from the federal state, but recognized by it".[18]

(4) Clearly, the relationship amongst the *Länder* or between the *Länder* and the federal state cannot be compared to the relationship of sovereign nations under international law. Instead, as the Court has stated, the federal-*Land* relationship is solely governed by the Basic Law, i.e. by federal constitutional law.[19] The Basic Law in turn provides

[11] Jellinek, Allgemeine Staatslehre (1905), p. 381 et seq.; see furthermore Hanschel (2012), p. 296 with further references.
[12] BVerfGE 1, 14 (34); 36, 342 (360); BVerfGE 60, 175 (207); for a more critical account see Menzel (2002), p. 135 et seq.
[13] BVerfGE 36, 42 (360), own translation.
[14] See Oeter (1997), p. 79, who even considers the constitutional autonomy to be the core of *Länder* statehood.
[15] See Dittmann (2008), § 127, para. 9 et seq.
[16] Pieroth (2012), Art. 20, para. 17; Degenhart (2012), para. 7.
[17] See Oeter (1997), p. 79.
[18] See BVerfGE 1, 14 (34), own translation.
[19] BVerfGE 34, 216 (231).

a notion of popular sovereignty which emanates from the German people as a whole and may, apart from popular votes including referenda[20], be exercised by the election of representatives both at the federal and at the *Länder* levels (see Art. 20 (2) GG).[21]

3. Distribution of powers, hierarchy of norms and preemption

(5) The basic distribution of powers is determined by Art. 30 GG which affirms that "[e]xcept as otherwise provided or permitted by this Basic Law, the exercise of State powers and the discharge of State functions is a matter for the *Länder*".[22] Subsequent provisions list federal powers, in particular as regards legislation (Art. 70 et seq. GG) and the executive (Art. 83 et seq. GG), resulting in a clear domination of federal legislative powers, which are further strengthened by supremacy and preeemption rules.

(6) Supremacy as stipulated in Art. 31 GG simply states that "[f]ederal law shall take precedence over *Land* law" which means that any federal law (not only the Basic Law) can override *Land* constitutional law.[23] Preemption concerns the area of concurrent legislation (Art. 72, 74 GG).[24] As expressed in Art. 72 (1) GG, this concept reduces *Länder* powers by stipulating that the latter shall only "have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law". The actual distribution of powers in this field is organized by three categories: unconditional federal powers (Art. 72 (1) GG), conditional federal powers (Art. 72 (2), (4) GG) based on necessity, as well as derogatory *Länder* powers (Art. 72 (3) GG). In the latter case (which is rather limited in terms of substance) the *Länder* may deviate from federal legislation, but their legislation may in turn be superseded by subsequent federal law.[25]

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[20] On the scope for such popular votes see e.g. Pieroth (2012), Art. 20, para. 7.

[21] Generally on popular sovereignty under German constitutional law, including the terms of "pouvoir contituant" and "pouvoir constitué" see Degenhart (2012), para. 16 et seq., 24 et seq.; Pieroth, Art. 20, para. 4 et seq.

[22] For a detailed account on the distribution of powers in the German Federation see Isensee (2008), § 133, as well as Rengeling (2008), § 135.

[23] On Art. 31 see in detail Pietzcker (2008), § 134, para. 38 et seq.

[24] See generally Rengeling (2008), § 135, para. 151 et seq.

[25] For the details of this rather unusual construction which can in effect lead to a "ping-pong game" between federal and *Land* legislation see e.g. Pieroth (2012), Art. 72, para. 28; generally on the dominance of federal powers in spite of the recent decentralization efforts see Hanschel (2012), p. 119 et seq., 216 et seq.

(7) In spite of these deviation competencies, recent judgments of the Federal Constitutional Court which have interpreted the necessity requirement in Art. 72 (2) GG more narrowly, and the rendering of additional powers to the *Länder* in the federalism reform of 2006, the federal parliament has maintained a dominant position.[26] This impression is confirmed when looking at the catalogue of exclusive federal legislative powers (Art. 71, 73 GG).[27] Conversely, *Länder* powers are more extensive in the administrative field (Art. 83 et seq. GG), since they are not confined to areas of *Länder* legislation, but include the power to "execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit" (Art. 83 (1) GG).[28] Nevertheless, dominant central legislative powers, the coordination of the exercise of remaining *Länder* powers and the exchange of such powers against a mere participation in federal legislation through the *Bundesrat* (only partially reversed by the federalism reform of 2006) still qualify Germany as a unitary federal state, as aptly claimed by the constitutional lawyer Konrad Hesse in the 1960ies.[29]

4. The homogeneity principle as a limitation to constitutional autonomy of the *Länder*

(8) A further limitation of *Länder* autonomy is provided by the principle of homogeneity (*Homogeneitätsprinzip*) as stipulated in Art. 28 (1), clause 1 GG, according to which the "constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law". This clause, which renders void any contravening *Land* law, both presupposes and limits the constitutional autonomy of the *Länder*.[30] Art. 28 (2) GG lays down municipal (not state) autonomy "within the limits prescribed by the laws". Art. 28 (3) GG stipulates that "[t]he Federation shall guarantee that the constitutional

[26] On the residual Länder powers see e.g. Rengeling (2008), § 138, para. 328 et seq.
[27] See e.g. Hanschel (2012), p. 196 et seq.
[28] This is why German federalism is also labeled as executive federalism (*Exekutivföderalismus*), see Hanschel (2012), p. 82 et seq.
[29] See Hesse (1962), p. 12 et seq.; see furthermore Hanschel (2012), p. 84 et seq.
[30] Pieroth (2012), Art. 28, para. 1, 2; more fundamentally Dittmann (2008), § 127, para. 11 et seq.; on the restrictions of *Land* constitutional autonomy and of the *pouvoir constituant* see also fundamentally BVerfGE 1, 14 (61) and the judgment of the Land Constitutional Court of Brandenburg, Case 18/95, Judgment of 21 March 1996, B. II 2. C. aa., at http://www.verfassungsgericht.brandenburg.de/sixcms/detail.php?id=5lbm1.c.57342.de&template=bbo_mandant_verfassungsgericht_d (last accessed on 7 October 2013).

order of the *Länder* conforms to the basic rights and to the provisions of (1) and (2) of this Article". Put in a nutshell, Art. 28 GG shows that the *Länder*, whilst constituting states in the sense of Jellinek's three-elements-doctrine, are not (fully) sovereign, since they lack the capacity to set up by themselves a superior and unchallengable legal order.[31] Instead, they have to respect the *Staatsfundamentalnormen*, i.e. the fundamental norms of the state as stipulated by the Basic Law, as well as its general election principles as laid down in Art. 38 GG.[32]

(9) Admittedly, this leaves a substantial amount of scope for the design of *Länder* constitutions,[33] even though the Federal Constitutional Court has sometimes postulated a more pronounced and immediate effect of the Basic Law on them.[34] In essence neither conformity nor uniformity of *Länder* constitutions is required.[35] As the Federal Constitutional Court has stated, homogeneity requires little more than a minimum as the *Länder* may even set up fundamental norms which are not identical to those of the federal state.[36] Art. 31 GG as the general supremacy rule does not apply in this context, since the homogeneity requirements of Art. 28 GG are considered to be more specific.[37]

(10) The reason for the Court's rather generous reading of the homogeneity requirement is that compatibility of norms can be asserted to the extent that they merely claim validity in different sections of the overall legal order (e.g. rules for dissolution of the federal or a *Land* parliament or the indictment of a federal or *Land* minister).[38] This would certainly not be the case where a *Land* sets up a procedure that would allow for secession, as this might clearly affect its legal relationship with the federal state.

[31] Degenhart (2012), para. 8
[32] Pieroth (2012), Art. 28, para. 3 et seq.
[33] Pieroth (2012), Art. 28, para. 1; BVerfGE 4, 178 (189); 64, 301 (317).
[34] See BVerfGE 1, 108 (257), e.g. for Art. 21 GG which deals with the political parties. On the controversy regarding this view see Pieroth (2012), Art. 28, para. 1.
[35] Pieroth (2012), Art. 28, para 1 with further references.
[36] BVerfGE 36, 342 (360 et seq.)
[37] Ibid at 362.
[38] Idem.

5. Restrictions on territorial reforms

(11) Further limitations of *Länder* autonomy ensue from the fact that any internal resctructuring of German state territory is strictly regulated by Art. 29 GG[39] which demands a federal law for any major changes (Art. 29 (2) GG) to be confirmed by a national referendum[40], whilst the *Länder* are merely consulted. Only minor changes of territory within existing borders, e.g. concering domestic border adjustments, between neighbouring *Länder* (Art. 29 (7) GG) or as regards the internal reorganisation of *Land* administration (Art. 29 (8) GG) can be decided upon autonomously. Such changes may be implemented by a *Länder* agreement which, however, is governed by federal law or requires federal legislative approval.

(12) This illustrates the limited role that popular votes including referenda play under the Basic Law which places a clear focus on the representative character of the democracy. It further shows that the legal position of the *Länder* as regards territorial changes is rather weak, even where such changes do not alter the size of the federal territory as such, as they would in the case of secession. It is striking that in practice no attempt to reorganize the territory according to Art. 29 GG has so far ever been successful.[41] The restrictions on territorial changes as stipulated in that provision hence allow to infer a general principle of territorial stability serving to secure the functioning of the German federal state.[42]

6. *Länder* participation in changes to the Basic Law

(13) Related to that is the question to what extent the *Länder* can effectuate changes to the Basic Law, which might allow them to expand their autonomy and hence create the necessary leeway for popular votes and other expressions of sovereignty. According to Art. 79 (2) GG, any amendment to the Basic Law requires a two thirds majority of members of the federal parliament, the *Bundestag*, as well as of votes of the

[39] Generally on the rules regarding territorial change see Würtenberger (2008), § 132, in particular on Art. 29 see para. 29 et seq.
[40] According to Art. 29 (3), (6) GG, the referendum is held in the concerned *Länder* as a whole and in the concerned areas within them and generally requires a combined majority of votes based on a quorum.
[41] Hanschel (2012), p. 297.
[42] See Hanschel (2012), p. 297, with further references.

Bundesrat.[43] The latter, whilst not constituting a fully-fledged second chamber, participates in federal legislation and is composed of representatives of the *Länder* governments. Depending on the extent to which federal legislation affects the *Länder* autonomy, the *Bundesrat* has veto powers, whereas in other areas its decisions may be overruled by the *Bundestag*.[44]

(14) This shows that the *Länder* cannot alter the federal constitutional set-up on their own behalf, but may only enact changes by participating at the level of federal legislation. Even when doing so they are subjected to clear limitations: pursuant to Art. 79 (3) GG "[a]mendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process [...] shall be inadmissible". Whilst this in itself is not a guarantee of the current composition of the German federal state (although some argue that there have to be at least three *Länder*), this provision guarantees a minimum of autonomy and a core area of autonomous tasks for the existing *Länder*.[45] The *Länder* can neither renounce this autonomy nor expand it to full sovereignty.

7. The principle of federal loyalty as an expansion of *Länder* powers?

(15) The principle of federal loyalty (or duty of friendly behavior towards the Federation), so-called *Bundestreue*, has been identified by the German Constitutional Court as an unwritten, but implied principle of German federalism.[46] It is, however, not a free-standing title that a *Land* could rely on, but rather a subsidiary norm which is accessorial to existing rights and duties established under the Basic Law, which merely serves to fill gaps, and which does not by itself confer rights and duties on the Federation or the *Länder*.[47] Quite on the contrary, the principle of federal loyalty shows that German federalism is characterized by the notion of cooperation instead of unilateral decision-making. Hence, the principle may serve to constrain the *Länder*

[43] On these votes see Art. 51 (2) GG according to which each *Land* has at least three votes, whilst *Länder* with more then 2 mio. inhabitants have four, *Länder* with more than 6 mio. inhabitants five and *Länder* with more than 7 mio. inhabitants six votes. Art. 51 (3) GG stipulates that the votes of each *Land* can only be cast in a uniform fashion.

[44] See Hanschel (2008), p. 146 et seq.; fundamentally on the participation of the *Länder* in law-making see Anderheiden (2008), § 140.

[45] See Pieroth (2012), Art. 79, para. 8.

[46] BVerfGE 1, 299 (315); see, in detail, Isensee (2008), § 126, para. 160 et seq.

[47] Isensee (2008), § 126, para. 166.

when relying on autonomy where this would amount to an exploitation of their legal position to the detriment of the Federation (and vice versa).

8. Right to or prohibition of secession?

(16) The Basic Law contains no explicit prohibition of *Länder* secession.[48] However, the concept of the German federal state constitutes what may be referred to as an eternal federation ("Ewiger Bund") which already the German Reich of 1871 had referred to in its preamble.[49] This corresponds to a conception of the German people which is clearly unitary.[50] The Basic Law does not accumulate or tie up *Länder* peoples together, but instead presupposes a national unity of a German people which is divided up territorially as regards certain fields of governmental activity.[51] For the purpose of *Länder* statehood, the respective part of the German people that resides in a certain *Land* territory and hence has, at least geographically, a closer link with its government, constitutes the people of that *Land*.[52] This is reflected in the fact that the *Land* citizenship is generally attributed not to any notion of ethnic, religious, linguistic or other belonging, but to territorial residence.[53] Hence, the *pouvoir constituant* is primarily vested in the German people as such, not divided in regional units; as a consequence the *pouvoir constitué* as organized in a federalist manner originates from the same source.[54] As Isensee has pointed out, the following classical definition of uniform democratic legitimation by *The Federalist* may also claim validity for German federalism: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes".[55]

(17) It follows from this that secession of any part of the federal state is simply beyond constitutional scope; the Basic Law does not intend to leave this question at the

[48] Hanschel (2012), p. 298.
[49] Isensee (2008), § 126, para. 61 et seq.
[50] Isensee (2008), § 126, para. 61.
[51] Isensee (2008), § 126, para 61.
[52] On the qualification of *Land* inhabitants as state people in the sense of the *Drei-Elemente-Lehre* see Herdegen (2008), § 129, para 11.
[53] Herdegen (2008), § 129, para. 11.
[54] Isensee (2008), § 126, para. 62; see also Oeter (1997), p. 77 et seq.; for a more cautious account see Menzel (2002), p. 140 et seq.
[55] Isensee (2008), § 126, para. 62, quoting from Madison (1961), p. 315.

disposition of the *Länder* and does not recognize any autonomous *Länder* peoples other than as parts of the German people itself.[56] This is reflected in Art. 146 GG as amended after reunification which states that the Basic Law is now valid for the whole German people.[57] This notion is in line with the fact that the *Länder* by and large do not show a clear and uniform ethnic, religious or other identity that might be recognized as an expression of a distinct regional popular sovereignty.

II. The exercise of constitutional autonomy by the *Länder* within that framework

1. Remaining scope for constitutional autonomy

(18) Within the confinements of the federal constitutional framework as laid out above, the *Länder* are left with a considerable amount of constitutional autonomy.[58] The Basic Law does not directly stipulate that right, but presupposes it when restricting its scope through the principle of homogeneity. The Basic Law constitutes a binding framework for the *Länder* which all branches of their governments have to respect. As a consequence, whilst substantial constitutional autonomy is recognized by the Basic Law, this autonomy is restricted by the homogeneity principle. Furthermore, *Länder* law may not disrespect the distribution of powers, compromise the supremacy clause or redefine the *pouvoir constituant* and hence claim a sovereignty that would clash with the German notion of federalism. These norms provide axioms applying to any conflict between the *Länder* and the federal state that must be resolved under the Basic Law.[59] In essence, they limit the constitutional autonomy of the *Länder* to the extent that they are barred from leaving the federal state on grounds of an asserted popular sovereignty.

[56] Isensee (2008), § 126, para. 63, more cautious Menzel (2002), p. 142 et seq. who, however, mainly discusses a potential factual acceptance of secession without claiming that it might be legally justified.
[57] On Art. 146 GG see generally Jarass (2012), Art. 146.
[58] Menzel (2002), p. 160 et seq.
[59] Generally on conflict resolution in federations see Hanschel (2012).

2. An overview of typical expressions of constitutional autonomy

(19) All *Länder* constitutions express the intention to organize regional matters with some degree of autonomy, the result being a certain constitutional pluralism.[60] As part of that, fundamental rights guarantees may well exceed the catalogue displayed in Art. 1-19 GG, and the foundations of society are referred to in a way that elucidates the various religious, historical and cultural backgrounds in different parts of Germany. Moreover, *Länder* constitutions contain multiple references to direct democracy, division of powers, rule of law, the principle of the social state, fundamental aims of government or programmatic rules, e.g. as regards education.[61] The homogeneity principle leaves plenty of scope for regional elements of direct citizens' participation, e.g. through referenda, and all *Länder* constitutions contain stronger elements of direct democracy than the Basic Law which clearly favors representative democracy.[62] Furthermore, by contrast to the Basic Law, they set up one chamber parliaments.[63] Moreover, they each stipulate their own specific rules on the organization of *Land* government.[64] Finally, they contain particular expressions of popular sovereignty, rules for constitutional amendment and in some cases regarding self-determination which deserve a more in-depth analysis as undertaken below.

3. Particular aspects of constitutional autonomy

a) Expressions of popular sovereignty

(20) The definitions of *Länder* constituencies vary.[65]

Most of the *Länder* constitutions address their citizens merely as "people of...".[66]

The Constitution of North Rhine-Westphalia is even more cautious by merely referring to the "men and women of".[67] This is certainly no coincidence as this *Land*

[60] On this and the following see Menzel (2002), p. 152 et seq.
[61] See generally Herdegen (2008), § 129, para. 1-10.
[62] See, for instance, Herdegen (2008), § 129, para. 14 et seq.
[63] Herdegen (2008), § 129, para. 26 et seq.
[64] Herdegen (2008), § 129, para. 33 et seq.
[65] For an overview see Menzel (2002), p. 387 et seq.
[66] Menzel (2002), p. 387.

is an amalgamation of previously distinct territories, each of them with their own respective cultural identity.

The Constitution of Rhineland-Palatinate (another artificial product of post-war reconstruction) attributes *Land* citizenship to "the Germans living in Rhineland-Palatinate or habitually residing there".[68]

Only the Bavarian Constitution has made a real attempt to distinguish the Bavarian people from the Germans living in Bavaria, but has never defined who the former might be.[69]

In turn, the Constitution of Saxony uniquely defines its people in Art. 5 as follows: "The people of the free state of Saxony is constituted by citizens of German, Sorbian and other ethnicity".[70] Whilst this definition may sound potentially far-reaching at first glance, it actually does not depart in any way from the Basic Law: Since Art. 115 of the Constitution of Saxony attributes *Land* citizenship to Germans as encompassed by Art. 116 GG, its Art. 5 is viewed as referring to aspects of ethnicity rather than citizenship strictu sensu (although the Sorbs living in Saxony would typically be Germans, as well).[71] At the same time, this provision shows that whilst there is no majority of citizens in a given *Land* which may invoke a redefinition of their status vis-a-vis the federal state, there clearly are minority ethnicities (like the Sorbs in Saxony or the Danes in Schleswig-Holstein) which may aptly claim and have been granted minority rights within the respective *Land* in which they reside.

Going beyond the Constitution of Saxony, Art. 3 of the Constitution of Brandenburg appears to expand the range of citizenship, but provides a clear caveat as regards differences of status following from the Constitution or ordinary legislation; as a

[67] Preamble of the Constitution of North Rhine-Westphalia, see http://www.landtag.nrw.de/portal/WWW/GB_II/II.2/Gesetze/Verfassung_NRW.jsp (last accessed on 7 October 2013), own translation.
[68] Art. 75 (2) of the Constitution of Rhineland-Palatinate, see http://www.rlp.de/unser-land/landesverfassung (last accessed on 7 October 2013), own translation.
[69] The distinction may be inferred from Art. 8 of the Bavarian Constitution, which reads (official translation): "All Germans resident in Bavaria shall possess the same rights and obligations as Bavarian citizens.", see http://www.bayern.landtag.de/de/196.php (last accessed on 7 October 2013). Art. 6 adds the criteria of how state citizenship may be acquired and mandates the legislator to regulate the details, which, however, has not happened so far. As a consequence, the Bavarian Constitutional Court has ruled that a concrete conferral of Bavarian state citizenship is not possible, see Bay VfGH, Judgment of 12 March 1986, VF23-VII-84; on the whole issue see Menzel (2002), p. 387 et seq.
[70] See http://www.freistaat.sachsen.de/538.htm (last accessed on 7 October 2013), own translation.
[71] Menzel (2002), p. 388.

consequence the norm is still considered to be in line with the homogeneity principle stipulated in Art. 28 GG.[72]

(21) Many *Land* constitutions contain manifestations of popular sovereignty which reflect the clause in Art. 20 (2) GG by stating (sometimes with slight variations) that all government power emanates from the people and is exercised by the people through elections and popular votes and through specific legislative, executive and judicative organs.[73] This is reflected in Art. 25 (2) of the Constitution of Baden-Württemberg[74], Art. 66 of the Constitution of Bremen[75], Art. 3 of the Constitution of Mecklenburg-West Pomerania[76], Art. 2 (1) of the Constitution of Lower Saxony[77], Art. 61 (1) of the Constitution of the Saarland[78], Art. 3 (1) of the Constitution of Saxony[79], Art. 3 (2) of the Constitution of Hamburg[80], Art. 2 (1) and (2) of the Constitution of Schleswig-Holstein[81] and Art. 45 of the Constitution of Thuringia.[82]

By comparison the Constitution of North Rhine-Westphalia simply states that the people expresses its will through elections, popular petitions and popular decisions (Art. 2), and adds in Art. 3 (1) that legislation is carried out by the people and the people's representatives.[83]

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[72] Menzel (2002), p. 388; see http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#3 (last accessed on 7 October 2013).
[73] Herdegen (2008), § 129, para. 5.
[74] http://www.lpb-bw.de/bwverf/bwverf.htm (last accessed on 7 October 2013)
[75] http://www.bremen.de/fastmedia/36/landesverfassung_bremen.pdf (last accessed on 7 October 2013)
[76] http://www.landtag-mv.de/fileadmin/media/Dokumente/Druckerzeugnisse/LT_Verfassung_01-2012.pdf (last accessed on 7 October 2013).
[77] http://www.nds-voris.de/jportal/portal/t/140w/page/bsvorisprod.psml;jsessionid=D7F46A85ACFFEC0BAA0DD2235C65B5FF.jp35?doc.hl=1&doc.id=jlr-VerfNDrahmen&documentnumber=1&numberofresults=92&showdoccase=1&doc.part=X&paramfromHL=true#focuspoint (last accessed on 7 October 2013).
[78] http://www.saarland.de/dokumente/thema_justiz/100-1.pdf (last accessed on 7 October 2013).
[79] http://www.revosax.sachsen.de/Details.do?sid=118544044111 (last accessed on 7 October 2013).
[80] http://www.hamburg.de/contentblob/1604280/data/verfassung-2009.pdf (last accessed on 7 October 2013).
[81] http://www.gesetze-rechtsprechung.sh.juris.de/jportal/?quelle=jlink&query=Verf+SH&psml=bsshoprod.psml&max=true&aiz=true (last accessed on 7 October 2013).
[82] http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/F6A7AF01618CE6BFC12572D5002372DA/$File/Verfassung%20des%20Freistaats%20Th%C3%BCringen.pdf?OpenElement (last accessed on 7 October 2013).
[83] http://www.landtag.nrw.de/portal/WWW/GB_II/II.2/Gesetze/Verfassung_NRW.jsp (last accessed on 7 October 2013), own translation.

Art. 2 (1), clause 1 of the Bavarian Constitution stipulates that "Bavaria is a people's state"[84], thus arguably emphasizing the role of direct democracy in this *Land*.

The Constitution of Saxony-Anhalt, whilst setting up a representative system of government like all other *Länder*, stipulates in Art. 2 (2) cl. 1 that the people holds the sovereign power.[85]

By contrast, the Constitution of Berlin is particularly anxious to emphasize the federal link by stating: "Public authority is held by all Germans residing in Berlin" (Art. 2, clause 1).[86] This suits the cosmopolitan character of this city state whose inhabitants may feel strong about being Berlin citizens, but certainly do not consider themselves as a people of its own.

Other constitutions such as those of Brandenburg (Art. 2 (2))[87] or Rhineland-Palatinate (Art. 74 (2))[88] simply state that public authority is held by the people. Art. 70 of the Constitution of Hesse adds the attribute "unalienably".[89]

(22) Hence, in spite of a certain degree of variation, all these manifestations of popular sovereignty[90] are ultimately framed rather cautiously and in any event have to be read in light of the restrictions set up by the Basic Law. They correspond to hesitant (if at all) invocations of regional identity, confirming the view that for the purpose of determining popular sovereignty any regional people is in essence a territorially confined part of the German people. Hence, none of these provisions would allow inferring any rights that a *Land* or "its" people may exercise independently of the overall German *pouvoir constituent*, as manifested in the Basic Law which sets up the *pouvoir constitué*.

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[84] http://www.bayern.landtag.de/de/196.php (last accessed on 7 October 2013), official translation.
[85] http://www.landtag.sachsen-anhalt.de/fileadmin/downloads/Verfassung_02.pdf (last accessed on 7 October 2013), own translation, the German term being "der Souverän".
[86] http://www.berlin.de/rbmskzl/verfassung/abschnitt1.html (last accessed on 7 October 2013), own translation.
[87] http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#2 (last accessed on 7 October 2013), own translation.
[88] http://landesrecht.rlp.de/jportal/portal/t/gvu/page/bsrlpprod.psml?doc.hl=1&doc.id=jlr-VerfRPrahmen:juris-lr00&documentnumber=1&numberofresults=181&showdoccase=1&doc.part=X&paramfromHL=true (last accessed on 7 October 2013), own translation.
[89] http://www.rv.hessenrecht.hessen.de/jportal/portal/t/228m/page/bshesprod.psml?doc.hl=1&doc.id=jlr-VerfHErahmen%3Ajuris-lr00&documentnumber=1&numberofresults=187&showdoccase=1&doc.part=X&paramfromHL=true#jlr-VerfHEpArt65 (last accessed on 7 October 2013), own translation.
[90] See Herdegen, § 129, para. 5, with references to the various *Länder* constitutions.

b) Rules for constitutional amendment

(23) Like the Basic Law, the *Länder* constitutions contain rules on constitutional amendment (usually modeled along the lines of Art. 79 (3) GG); however, they generally also allow for referenda (usually by a qualified majority of actual voters or based on a quorum) instead of or in combination with a parliamentary decision.[91]

Bavaria is exceptional in that the referendum, at least when looking at the wording of Arts. 72, 74, 75 of its Constitution, does not appear to provide any such restrictions. However, the Bavarian Constitutional Court has derived a qualified quorum from the Bavarian Constitution as well as from Art. 28 GG in this regard.[92] This illustrates that even in the *Land* with the strongest manifestation of popular sovereignty the federal principle of homogeneity is adhered to and used by the *Land* Constitutional Court to read down a *Land* constitutional provision.

(24) The substantive limitations of constitutional change in the *Länder* constitutions are generally modeled along the lines of Art. 79 (3), 28 (1) of the Basic Law.[93] Sometimes, however, the *Länder* add specific constraints, such as Art. 150 of the constitution of Hesse which stipulates that the fundamental democratic ideas and the republican-parliamentarian form of government are untouchable and the establishment of a dictatorship is prohibited.[94]

(25) Generally, court decisions appear to have focused largely on the validity of constitutional change as measured by the yardstick of the procedural and substantive restrictions stipulated in the *Länder* constitutions themselves.[95]

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[91] Within this spectrum there is quite a variety of combinations across the *Länder*, see e.g. Herdegen (2008), § 129, para. 56, as well as Menzel (2002), p. 393 et seq, with further references.

[92] See on the debate Menzel (2002), p. 393, who also comments on the controversial requirements regarding the Constitution of Hesse.

[93] See Menzel (2002), p. 394.

[94] http://www.rv.hessenrecht.hessen.de/jportal/portal/t/228m/page/bshesprod.psml?doc.hl=1&doc.id=jlr-VerfHErahmen%3Ajuris-lr00&documentnumber=1&numberofresults=187&showdoccase=1&doc.part=X&paramfromHL=true#jlr-VerfHEpArt65 (last accessed on 7 October 2013), own translation; see Menzel (2002), p. 394.

[95] For an overview see Menzel (2002), p. 395; on decisions with regard to the validity vis-à-vis the Basic Law see Pieroth (2012), Art. 28, para. 3 et seq.

c) Reliance on the right to self-determination?

(26) The right to self-determination as expressed in the Preamble of the Basic Law is equally reflected in some of the *Länder* constitutions, namely in the preambles of the constitutions of Mecklenburg-West Pomerania[96], Saxonia-Anhalt[97] or Thuringia[98]. The Constitution of Brandenburg instead uses the expression "by free decision".[99] However, the Federal Constitutional Court has clarified at a very early stage that any such right cannot be exercised in an autonomous fashion and is restricted by the confinements of the Basic Law.[100] This clearly excludes any reliance on the right to self-determination that is intended to break up the federal state.[101]

(27) A related question would be to what extent the right to self-determination as accepted under international law might allow the *Länder* to claim a degree of autonomy domestically that goes beyond what has been stated so far. Attempts to apply this international concept to them may not simply be countered by referring to the fact that the *Länder* are no fully-fledged subjects of international law, or by the German Constitutional Court's rejection of international law analogies as regards the Federation. Such counter-arguments would be deficient since the principle of self-determination attributes a right to peoples, not to states, and the corresponding duty would be incumbent on the German federal state.[102] The principle of self-determination is partially recognized by treaty law (e.g. the joint Arts. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). These norms have entered German law through implementing legislation according to Art. 59 (2) GG[103], and hence rank as ordinary federal law which may not displace any rules of the Basic Law. To the extent

[96] http://www.landtag-mv.de/fileadmin/media/Dokumente/Druckerzeugnisse/LT_Verfassung_01-2012.pdf (last accessed on 7 October 2013)
[97] http://www.landtag.sachsen-anhalt.de/fileadmin/downloads/Verfassung_02.pdf (last accessed on 7 October 2013).
[98] http://www.thueringer-landtag.de/imperia/md/content/landtag/jahr_der_verfassung/verfassung_des_freistaats_thueringen.pdf (last accessed on 7 October 2013).
[99] http://www.bravors.brandenburg.de/cms/detail.php?gsid=land_bb_bravors_01.c.23338.de#2 (last accessed on 7 October 2013), own translation.
[100] BVerfGE 1, 14 (50)
[101] This follows from BVerfGE 13, 54 (93) where the Court states that there is no right to self-determination which might be directed against the state.
[102] Fundamentally on the right to self-determination see Thürer (1976); see furthermore Ipsen (2004), p. 421 et seq.
[103] See Jarass (2012), Art. 59, para. 9 et seq.

that the principle is also part and parcel of customary international law, Art. 25 GG provides it with priority over ordinary federal law, but (according to the Federal Constitutional Court and most scholars) not over the Basic Law.[104] Hence, even if such a norm would be considered as directly applicable in German law, it would not have the capacity to render void the constitutional framework as analysed above.

(28) This conclusion might only be challenged if one could argue that people's sovereignty as stated under the *Länder* constitutions or the actual referral to the right of self-determination in some of their preambles needs to be interpreted in line with the right to self-determination as construed under international law. But as clarified above, these references are a priori constrained by the overriding constitutional order of the Basic Law. Furthermore, there is largely an agreement amongst scholars that the right to self-determination as recognized under international law is today limited to an internal component, i.e. autonomy of a people within a given state, but does not encompass a right to secession.[105] Finally, even as regards internal self-determination, it appears difficult to carve out *Länder* peoples with identities that would be distinctly different from the German people as such (although there clearly are ethnic minorities in some of the *Länder* which qualify as peoples or parts of them). Hence, due to the heterogenous composition of *Länder* peoples under the Basic Law (partially following from the redrawing of *Land* borders after the Second World War, but equally due to the overriding national German identity of most citizens), it might be impossible simply to identify a distinct and exlusive bearer of the right to self-determination at the regional level (apart from regional ethnic minorities which benefit from certain minority rights).

[104] See for this position BVerfG 37, 271 (279), as well as Jarass (2012), Art. 25, para. 14, with further references as regards competing views. This position is confirmed by the wording of the provision which merely suggests priority over the laws, not the Basic Law itself.

[105] Ipsen (2004), p. 423, 435 et seq. Yet, some controversy remains, see Hanschel (2012), p. 288, with further references.

III. Conclusions

(29) As the analysis has shown, the German federation provides no convincing evidence which would allow for an assertion that a *Land* may rely on the notion of popular sovereignty and claim that its own people may determine its relationship towards the federal state on its own behalf, i.e. without safeguarding the rules of the overarching Basic Law. Whilst these rules leave substantial scope for *Länder* autonomy, they clearly establish the homogenous and subordinate character of *Länder* law. Furthermore, the German federation is based on popular sovereignty of the German people as such, which has organized itself through central and regional governments, the latter applying to regional sub-units of this people, even though some of these units have their own history and a certain identity. Hence, the *pouvoir constituant* has been exercised and may only be exercised (e.g. through a new constitution; see Art. 146 GG) by the German people as such. This process of amalgamation corresponds to the historic transition from a confederal to a federal structure (with the exception of the Third Reich, of course) which shows that there is now an indissoluble alliance characterized by an overriding and overarching constitutional framework.[106] Whilst a confederation is based on a treaty that may be subject to termination, a federation is based on a Constitution that clearly is not.[107]

(30) Beyond this, Germany may aptly be qualified as a unitary federal state. But notwithstanding its peculiarities, this country may serve to illustrate that changes to a federal system essentially require the political consensus of all concerned units.[108] The German federation exemplifies this neatly by demonstrating that for any major changes to occur, whether they are shifts in the distribution of powers or internal territorial changes, both the Federation and the *Länder* (either themselves or through their votes in the *Bundesrat*) will have to consent in one way or another. Having said this, secession certainly is not one of the options provided in this system, whether consented to or not.

[106] For a historical overview see Bartlsperger (2008), § 128, para. 11 et seq.
[107] See Oeter (1997), p. 76 et seq.
[108] This may even be considered to be part of a definition of federalism, see Hanschel (2012), p. 13

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Lexicon of German terms

Bundesrat: the second organ of federal legislation (next to the *Bundestag*), composed of representatives of the *Länder* governments and equipped with a limited veto right

Bundestag: the German parliament as the main actor of federal legislation

Bundestreue: principle of federal loyalty which applies between the Federation and the *Länder* and may limit powers when exercised to the detriment of the either side

Drei-Elemente-Lehre: definition of statehood as developed by the German scholar Georg Jellinek claiming that a state consists of state territory, state people, and state power

Exekutivföderalismus: denoting the dominance of *Länder* powers in the execution of laws rather than their making

Grundgesetz (GG): the German Basic Law

Homogenitätsprinzip: principle requiring the constitutional order of the *Länder* to be in homogeneity with the federal requirements stipulated under Art. 28 (1) GG

Kompetenz-Kompetenz: the power to create powers (vested in the federal state)

Länder: the 16 regions of the German federal state as listed in the preamble of the German Basic Law

Land: any of the 16 *Länder* (see above)

Staatsfundamentalnormen: the fundamental norms of the state which the *Länder* need to respect under Art. 28 (1) of the Basic Law

Verfassungshoheit: constitutional supremacy of the *Länder* as limited by the Basic Law

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PROFILE

Dr. Dirk Hanschel specializes in comparative constitutional, European and international law with a particular focus on energy, environmental and human rights law as well as negotiation/conflict resolution. Having published a book on conflict resolution in federations (Konfliktlösung im Bundesstaat, Mohr Siebeck, 723 p.), he currently undertakes research on constitutional responses to secessionist tendencies in federations and devolved regions.

CURRICULUM VITAE

Since 1/2013	Reader, School of Law, University of Aberdeen
2010-2012	Senior Lecturing Positions at the Universities of Trier, Münster, Göttingen, Würzburg and Hannover
2010	Habilitation, award of venia legendi (postdoctoral lecture qualification) in the fields of public law, public international law, European law and comparative law awarded by the University of Mannheim, Germany
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2004	Second Legal State Examination (Rhineland-Palatinate, Germany)
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PUBLICATIONS

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OTHER DOCUMENT

Étude du Projet de loi n° 99 par l'Assemblée nationale : Extraits des débats de l'Assemblée nationale du 25 mai 2000 – Adoption du principe (pièce R-6)

M. Joseph Facal Ministre délégué aux affaires intergouvernementales canadiennes	**M. Benoit Pelletier** Député de Chapleau	**M. Joseph Facal** Ministre délégué aux affaires intergouvernementales canadiennes **Réplique**
pp 6167-6168, 6170-6171 M. Facal: M. le Président, le projet de loi dont l'Assemblée nationale entreprend aujourd'hui le débat pour l'adoption du principe, a quelque chose d'unique. Pour la première fois dans l'histoire politique du Québec, en fait pour la première fois depuis que le Québec possède ses propres institutions parlementaires, soit depuis plus de 200 ans, un texte législatif issu de ses institutions vise spécifiquement à affirmer certains des droits et prérogatives les plus fondamentaux du peuple québécois et de l'État du Québec. En quelques mots, le projet de loi n° 99 réitère les principes politiques et juridiques qui constituent les assises de la société et de la démocratie québécoise. Il consacre notamment le droit fondamental du peuple québécois de disposer librement de son avenir politique. Il réaffirme la souveraineté de l'État du Québec dans tous ses domaines de compétence, tant à l'interne que sur la scène internationale, ainsi que l'intégrité du territoire	p 6176 […] Permettez-moi, M. le Président, maintenant de vous dire un mot du projet de loi n° 99. D'abord, je ferai quelques affirmations préliminaires, mais par la suite je vais parler du véhicule, je vais parler de l'idée de procéder par un projet de loi qui, à mon avis, ici est quand même au coeur des divergences de vues qu'il y a entre l'opposition officielle et le parti ministériel. Mais permettez-moi tout simplement de vous dire que l'opposition officielle n'est pas dupe. Dans le projet de loi n° 99, tel que réimprimé, on s'attendait vraiment à ce que la réimpression porte sur des choses qui soient extrêmement importantes, qui soient fondamentales. On s'attendait à une réimpression de fond en comble du projet de loi. Ce ne fut pas le cas. Mais, peu importe, ça a été la décision du ministre. Mais on retrouve un considérant reconnaissant l'importance politique du renvoi de la Cour suprême du Canada du mois d'août 1998. Soit! C'est bien. On retrouve ça dans	p 6194 […] 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 du 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 du politique? Il faudrait savoir! […]

Tableau des extraits des débats parlementaires de l’Assemblée nationale (25 mai 2000)

M. Joseph Facal Ministre délégué aux affaires intergouvernementales canadiennes	**M. Benoit Pelletier** Député de Chapleau	**M. Joseph Facal** Ministre délégué aux affaires intergouvernementales canadiennes **Réplique**
québécois. Il affirme aussi avec force qu'aucun autre Parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale. Il réitère aussi les principes sous-jacents de la Charte de la langue française. Il précise enfin que la règle de la majorité de 50 % plus un des votes validement exprimés, universellement reconnue et appliquée, est celle qui continuera de prévaloir dans l'interprétation des résultats de tout référendum tenu en vertu de la Loi sur la consultation populaire par lequel le peuple québécois exercera son droit à disposer de lui-même. Et tout ceci, il convient de souligner, dans le respect des droits consacrés de la communauté québécoise d'expression anglaise et dans le respect des droits existants des 11 nations autochtones du Québec. Contrairement à ce que certains ont pu affirmer, il n'y a dans le projet de loi n° 99 aucune manigance, aucun complot de quelque nature que ce soit. Permettez-moi, M. le Président, avant d'aller plus loin, quelques commentaires d'actualité. Dans le présent contexte, le gouvernement demeure convaincu qu'une loi aura plus de poids pour riposter à C-20 qu'une résolution, même si cette résolution est qualifiée de déclaration solennelle.	un considérant, on retrouve ça dans le préambule. C'est bien. Mais, lorsqu'on lit le corps du texte, on se rend compte que nulle part il n'est fait mention du renvoi et nulle part n'a-t-on tenu compte du renvoi, par ailleurs. Nulle part n'a-t-on tenu compte du renvoi. Est-ce que vous pensez vraiment que l'opposition officielle est dupe à ce point de tomber dans le piège de se satisfaire d'une affirmation nébuleuse dans un préambule, alors que vous auriez très bien pu faire preuve d'une meilleure volonté et tenir compte du renvoi de la Cour suprême dans le corps même de votre projet de loi? Par ailleurs, M. le ministre, sans entrer dans les moindres détails du contenu de ce projet de loi qui contient de nombreux vices, donc, en ce qui concerne le contenu, bien entendu, vous me permettrez aussi d'ajouter que j'ai été étonné de voir que, dans le projet de loi, tant dans le préambule que dans le corps, on ne retrouve aucune mention de la question claire. J'avoue que je suis très étonné. À aucun égard le gouvernement tient-il à ce qu'un prochain référendum porte sur une question claire. C'est extrêmement étonnant. […]	

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Cependant, dans un effort ultime pour parvenir à l'unanimité, le 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: En tout premier lieu, une référence au peuple québécois; en second lieu, une affirmation du caractère inacceptable du projet de loi fédéral C-20; en troisième lieu, une affirmation forte de l'inviolabilité des frontières québécoises; quatrièmement, un rappel de 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 droit de veto découlant de la formule d'amendement de 1982. […] Si le gouvernement du Québec ne ripostait pas par une loi, il est aussi à craindre que la population du Québec n'ait en ces matières devant elle qu'une loi, la loi fédérale, et que, donc, la population se dise: L'ordre légal, c'est celui qui nous vient du gouvernement fédéral; si on ne s'y rallie pas, on est des hors-la-loi. Non, M. le Président, il y aura maintenant deux lois, et le peuple du Québec aura à décider laquelle des deux il	Mais, au-delà, donc, M. le Président, de ces remarques que je viens de formuler... Et je pourrais en formuler bien d'autres quant au contenu du projet de loi n° 99, mais je m'en abstiendrai pour le motif suivant, c'est parce que, au-delà même de son contenu, ce qui pêche avec le projet de loi n° 99, là où le bât blesse, c'est qu'on n'a pas utilisé un bon véhicule pour affirmer les droits et les pouvoirs des Québécois et des Québécoises en ce qui concerne leur avenir collectif. Pourquoi on n'a pas utilisé un bon véhicule? C'est parce que, contrairement à une déclaration solennelle comme nous le proposions, le projet de loi n° 99 judiciarise tout le débat. Le projet de loi n° 99 est attaquable devant les tribunaux, sera possiblement attaqué devant les tribunaux. Je dois vous dire que, personnellement, je ne le souhaite pas. […]	

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estime légitime: celle adoptée par le Parlement qui le représente véritablement ou celle adoptée par un Parlement au sein duquel la grande majorité des députés viennent de l'extérieur du Québec et au sein duquel les députés issus du Québec furent très majoritaires à voter contre C-20. […] Il faut à cet égard aussi rappeler, M. le Président, que le caractère novateur du projet de loi n° 99 se retrouve autant dans sa lettre que dans son esprit. Certes, ce n'est pas le projet de Constitution auquel nous avait invités plusieurs intervenants en commission et duquel ils auraient voulu débattre. S'il n'a pas la facture d'une constitution, il en a peut-être jusqu'à un certain point l'esprit et la portée, ce qui en fait, me semble-t-il dans les circonstances, une réponse ferme et appropriée à l'assaut perpétré par le gouvernement fédéral contre les droits fondamentaux du peuple québécois. […] Pourquoi cette référence à la notion de peuple est-elle à ce point importante? D'abord, bien sûr parce qu'elle vient décrire une réalité fondamentale: le peuple québécois, il existe, il croît et s'affirme. Mais aussi parce que cette		

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affirmation vise à faire contrepoids à une stratégie fédérale qui vise précisément à banaliser, voire même, dans certaines circonstances, à nier l'existence du peuple québécois. […] Évidemment, je connais très bien la thèse du complot mise de l'avant par l'opposition officielle pour justifier sa position. Pour elle, le projet de loi n° 99 s'inscrit dans une vaste stratégie qui doit déboucher d'ici quelques mois sur la tenue d'un nouveau référendum, tout ceci est orchestré. M. le Président, ça n'a aucun sens. Ça n'a aucun sens parce que le projet de loi n° 99 se veut une réaction à un geste fédéral. S'il n'y avait pas eu de projet de loi fédéral C-20, il n'y en aurait sans doute pas eu de projet de loi n° 99. Alors, dire que tout ceci est initié dans une perspective référendaire relève vraiment du conspirationnisme. Ce n'est quand même pas le Québec, ce n'est quand même pas son premier ministre, ce n'est quand même pas le Parti québécois, ce n'est quand même pas moi qui avons pris l'initiative de la loi fédérale C-20. Le projet de loi n° 99 a vu le jour uniquement en raison de l'atteinte portée par le projet de loi C-20 contre les droits fondamentaux du peuple québécois.		

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C'est d'ailleurs pourquoi, M. le Président, on ne peut évidemment parler de la portée du projet de loi n° 99 sans dire un mot – et c'est ce que je vais faire – de la portée du projet de loi fédéral C-20. M. le Président, c'est quoi, C-20, dans le fond? C-20, c'est une pièce législative qui vise tout simplement à rendre impossible la souveraineté du Québec en confiant un droit de tutelle, sur le cheminement pouvant peut-être aboutir à ce choix, à un Parlement au sein duquel la majorité des députés sont de l'extérieur du Québec. En fait, C-20, c'est un verrou législatif qui vise à entraver le droit de choisir librement et sans ingérence son statut politique. C-20, c'est aussi une grossière déformation de l'avis de la Cour suprême. C-20, c'est aussi le reniement de certains principes démocratiques universellement reconnus. C-20, c'est un lot de fausse tés sur la divisibilité du territoire québécois. C-20 est une démarche aussi par laquelle on infantilise les Québécois, laissant entendre qu'ils ne sont pas assez matures politiquement pour juger eux-mêmes de la clarté de ce qui leur est soumis, mais qu'évidemment un honnête député du Manitoba ou de la Saskatchewan, lui, aura des lumières particulières pour statuer sur la clarté du projet soumis aux Québécois. […]		

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pp 6169-6170 […] Abordons maintenant une autre notion assez mal comprise, celle du droit du Québec de décider seul de son avenir. Notre peuple a exercé trois fois, en 1980, 1992 et 1995, son droit de contrôler lui-même son destin national. Eh bien, ce droit se retrouve au coeur même du projet de loi n° 99. En fait, c'est l'exercice même de ce droit que le projet de loi cherche à réaffirmer, notamment par les articles 1 à 4. […] Avec respect, je souligne qu'il y a une grave confusion intellectuelle au sein de l'opposition officielle entre «droit à l'autodétermination» et «droit à la sécession». Ça n'a rien à voir. Puis-je rappeler que le peuple québécois possède, comme tous les peuples, en vertu des instruments internationaux, le droit imprescriptible et inaliénable de décider de son avenir, et que ce droit lui confère la possibilité de déterminer son statut politique en toute liberté, sans aucune ingérence extérieure, et que ce droit, il l'a déjà exercé à trois reprises?	p 6173 […] J'entendais par ailleurs M. le ministre expliquer en quoi l'article 1 du projet de loi n° 99 ne contenait pas une affirmation voulant que les Québécois aient le droit de faire la sécession au plan externe. Il nous a expliqué la nuance qui existe entre le droit à l'autodétermination et le droit à la sécession. Je dois vous dire que, a priori, jusqu'à un certain point – je dis bien jusqu'à un certain point – le ministre a raison, puisqu'il y a une différence entre le droit à l'autodétermination et le droit à la sécession à proprement parler. Un droit à l'autodétermination peut très bien n'être exercé que sur un plan interne. Dans ce contexte là, il signifie qu'un peuple a droit à une autonomie, comme c'est le cas pour le Québec qui bénéficie non seulement d'une autonomie mais également d'une souveraineté dans le contexte de la Fédération canadienne. Et ça n'implique pas pour autant que le Québec soit séparé du Canada, ce droit interne à l'autodétermination n'implique pas pour autant le droit à la sécession. Et le ministre nous a dit que donc il avait utilisé à bon escient le mot «autodétermination» à l'article 1 du projet	p 6193 […] Le député de Chapleau me dit: Oui, mais c'est parce que le ministre, lui, il a une conception sociologique du mot «peuple». Moi, je suis dans le juridique, le dur. M. le Président, c'est exactement le contraire. La définition de «peuple» que, moi, j'ai, elle a des effets juridiques, elle a des conséquences juridiques, elle donne au peuple québécois des droits qui sont précisément ceux que 99 vient affirmer: au premier chef, le droit à l'autodétermination, duquel il est vrai qu'il ne faut pas faire découler un droit à la sécession. Mais, vous, en termes de droit à l'autodétermination, vous me dites que nous n'avons que le droit interne de gigoter dans nos petites compétences provinciales tous les jours envahies par le gouvernement fédéral. Elle ne va que jusque-là, dans votre esprit, la reconnaissance de nos droits collectifs. Donc, c'est le député de Chapleau qui a une conception purement sociologique: Oui, je reconnais qu'une collectivité a des traits distinctifs, mais il ne faut surtout pas que ça lui donne des droits. […]

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Puis-je signaler que l'avis consultatif de la Cour suprême du Canada n'a pas nié au peuple québécois le droit à l'autodétermination? En fait, la Cour ne s'est pas prononcée sur cette question, mais elle a néanmoins tenu à préciser, au paragraphe 123, que c'est au peuple que le droit international accorde le droit à l'autodétermination. Elle a aussi indiqué, un paragraphe peu lu, qu'un peuple peut s'entendre d'une partie seulement de la population d'un État existant, rejetant ainsi un des arguments du Procureur général du Canada qui prétendait, rappelez-vous, que seul l'ensemble de la population canadienne, le peuple canadien, peut être titulaire de ce droit à l'autodétermination – c'est le très intéressant paragraphe 124 de l'avis de la Cour. Elle a aussi signalé, la Cour, que la majeure partie de la population du Québec partage bon nombre de traits pris en considération pour déterminer si un groupe donné est un peuple au sens des instruments internationaux – c'est le paragraphe 125 qu'il faudrait lire ou relire. […] Ce que le Cour suprême a rejeté, c'est l'idée que le Québec puisse détenir, en vertu du droit à l'autodétermination, un droit de sécession unilatérale, c'est-à-dire, sur les termes mêmes employés par la Cour,	de loi n° 99 justement pour qu'on ne comprenne pas que le Québec a le droit à la sécession sur le plan international ou sur le plan externe. Or, lorsqu'on lit l'article 1 du projet de loi n° 99, on ne voit pas mention du droit à l'autodétermination; il n'est pas fait mention du droit à l'autodétermination. Ce que l'on y voit, M. le Président, c'est que l'on reconnaît que les Québécois et Québécoises sont titulaires des droits universellement reconnus en vertu du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes. Or, en droit international, le droit des peuples à disposer d'eux-mêmes a une connotation bien précise et implique que ces peuples ont le droit à la sécession, ce à quoi n'a pas droit le Québec justement en vertu du renvoi sur la sécession de la Cour suprême du mois d'août 1998. En d'autres termes, lorsque le ministre affirme que le Québec est titulaire des droits universellement reconnus des peuples à disposer d'eux-mêmes, il réfère, qu'il le veuille ou non, à un concept juridique, à un concept établi en droit international, et ce concept établi en droit international implique le droit à la sécession, ce à quoi, je répète, le Québec n'a pas droit, puisqu'il n'est pas un peuple colonisé, puisqu'il n'est pas un peuple qui est opprimé de façon caractérielle.	

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un droit de sécession sans négociations préalables. Car, là encore, M. le Président, il faut voir comment la Cour suprême définit la sécession unilatérale. Elle la définit comme une sécession sans négociations préalables. Sur ce point, la Cour suprême n'invente rien de nouveau. On se rappellera que les cinq experts consultés par l'Assemblée nationale en 1992 en étaient déjà arrivés à cette même conclusion. À ce que je sache, les gouvernements formés par le Parti québécois n'ont jamais proposé autre chose qu'une accession du Québec à la souveraineté réalisée à la suite de négociations menées d'égal à égal avec le reste du Canada. Il n'a jamais été question d'une accession à la souveraineté sans négociations préalables et sans période de transition. Bien sûr, dans la mesure où le gouvernement fédéral s'est entêté pendant 20 ans à dire aux Québécois que jamais il ne négocierait quoi que ce soit, bien il a nécessairement fallu envisager l'hypothèse que des négociations menées de bonne foi de la part d'Ottawa puissent être impossibles. Même la Cour suprême, qui n'a quand même pas vécu en vase clos pendant toutes ces années, a dû admettre cette possibilité, elle a soulevé cette éventualité. Et c'est dans ce contexte de négociations qui ne seraient pas conduites en bonne foi et qui ne permettraient pas d'aboutir à un accord mutuellement	[…]		

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satisfaisant qu'elle évoque le recours possible à la reconnaissance internationale pour concrétiser l'accession du Québec à la souveraineté. […] Or, justement, que dit l'article 1 du projet de loi n° 99? Est-ce qu'il vient proposer, comme l'a prétendu l'opposition officielle, un droit de sécession sans négociations préalables? Pas du tout. Ce n'est pas ça qu'il dit, l'article 1. L'article 1 dit, et je cite: «Le peuple québécois peut, en fait et en droit, disposer de lui-même. Il est titulaire des droits universellement reconnus en vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes.» […]		
p 6172 […] Et puis il faut lire C-20 qui est un monument élevé à la mauvaise foi. Sur la question de la clarté de la majorité, on nous dit qu'après le vote le Parlement fédéral pourra prendre en considération, ouvrons les guillemets, «tout	p 6173 […] Je rajouterai par ailleurs ceci, M. le Président. Il me semble que le ministre, lorsqu'il utilise le mot «peuple», il l'utilise dans un sens sociologique d'abord et avant tout. Je ne l'en blâmerai pas, le ministre lui-même est	p 6193 […] Alors, qui au juste a une conception étroitement sociologique? À vrai dire, M. le Président, le député de Chapleau a la même conception du peuple québécois que le gouvernement fédéral, et je vais vous le démontrer.

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autre facteur pertinent». Ça veut dire, ça, qu'après le vote on ne connaît même pas exactement où se situe la ligne d'arrivée. M. le Président, c'est contre tout ça qu'il faut réagir, c'est contre tout ça qu'il faut lutter. Autant de rebuffades pendant des décennies aux revendications du Québec, autant de manigances maintenant de la part d'un gouvernement fédéral qui n'essaie même plus de tendre la main, tout cela nous amène à conclure que le temps de la supplique, il est bel et bien révolu. Le peuple québécois, il existe et il compte aujourd'hui l'affirmer. Désormais, le peuple québécois, il entend se prévaloir de tous les droits, de tous les attributs, de toutes les prérogatives que son statut de peuple lui confère, et c'est ça que le projet de loi n° 99 veut faire. C'est dans cette démarche-là qu'il veut s'inscrire. […]	sociologue de formation, mais, lorsque le mot «peuple» est utilisé dans le contexte d'une loi, il prend alors un caractère juridique. C'est ce que ne semble pas mesurer le ministre. Et, lorsque l'on dit que le peuple a le droit de disposer de lui-même en vertu des grands textes internationaux, eh bien, là, à ce moment-là, on réfère à une réalité non seulement juridique, mais par ailleurs à une réalité bien établie en droit international, et cette réalité, c'est celle qui veut que ledit peuple ait le droit de faire la sécession, ce qui, je répète, n'est pas conforme au renvoi de la Cour suprême du mois d'août 1998 et ce qui, je répète, ne s'applique pas à l'égard du Québec.	Oui, je vais vous le démontrer. En 1995, quand la Chambre des communes a adopté cette futile résolution sur la société distincte, le sénateur Jean-Claude Rivest et le sénateur Andreychuk avaient demandé un avis juridique sur la portée qu'il fallait donner exactement à cette motion sur la société distincte. La réponse des juristes du gouvernement fédéral fut transmise par écrit. Je vous lis un extrait de la réponse des juristes du gouvernement fédéral. Je cite: «Au cours des dernières années, les juristes du droit constitutionnel et international au ministère de la Justice et les juristes au ministère des Affaires étrangères ont donné des avis au sujet de l'emploi du mot "peuple". La signification de l'expression "peuple du Québec" dans le contexte de la résolution est celle de "vox populi", le peuple qui, directement ou par le biais de représentants élus, a exprimé le désir de voir reconnaître la société distincte qu'il forme au sein du Canada.» Écoutez bien la suite: «L'expression "peuple du Québec" dans ce contexte n'est pas utilisée dans le sens d'une collectivité identifiable qui pourrait revendiquer un droit à l'autodétermination.» Ça, c'est la définition des juristes du gouvernement fédéral, strictement la même que celle que nous a livrée ce matin le député de Chapleau.

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

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		on reconnaît au Parlement de l'Île-du-Prince-Édouard, 120 000 habitants – hier, j'ai dit «200 000»; c'est une erreur, ils sont encore moins nombreux – le droit de bloquer le choix des Québécois? […]

ATTESTATION

We undersigned, M[e] Ian Demers, hereby attest that the above Mis en cause's Brief is in compliance with the requirements of the *Civil Practice Regulation of the Court of Appeal*.

Time requested for the oral arguments: 90 minutes

Montréal, February 20, 2019

Ian Demers

M[e] Ian Demers
M[e] Claude Joyal, Ad. E.
M[e] Warren J. Newman, Ad. E.
Attorney General of Canada
Lawyers for the Mis en cause