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

DECLARATION OF INTERVENTION OF THE MIS EN CAUSE ATTORNEY GENERAL OF CANADA

(*Code of Civil Procedure*, ss. 210 and 216)

IN INTERVENTION TO THE PETITIONER'S RE-AMENDED MOTION FOR A DECLARATORY JUDGMENT AND FOR DECLARATORY RELIEF, THE INTERVENER ATTORNEY GENERAL OF CANADA SUBMITS THE FOLLOWING:

1. The plaintiff and the respondent have joined issue. The mis en cause Attorney General of Canada adds the following.

1. Le demandeur et le défendeur ont lié contestation. Le mis en cause procureur général du Canada ajoute ce qui suit.

OVERVIEW

2. Sections 1 to 5 and 13 of the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, R.S.Q., c. E-20.2 (the Act) should be read down so that their potential scope of operation is brought within the limits of the legislative power of Quebec authorized by the Constitution of Canada.

2. Les articles 1 à 5 et 13 de la *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*, L.R.Q., ch. E-20.2 (la Loi) devraient recevoir une interprétation atténuée pour que leur portée soit limitée à la compétence législative que confère la Constitution du Canada au Québec.

3. This case revisits, in part, a number of issues that arose in the *Quebec Secession Reference*, and which the Supreme Court of Canada settled conclusively in its landmark opinion fifteen years ago. The Supreme Court held that there is no legal power, right or authority, under the Constitution of Canada or under international law, to effect the secession of Quebec unilaterally from Canada; that international law draws a fundamental distinction between the concepts of internal self-determination and external self-determination; and that secession, to be lawful, would require a constitutional amendment.

3. Cette affaire soulève, en partie, certaines questions qui ont été examinées dans le cadre du *Renvoi relatif à la sécession du Québec*, questions que la Cour suprême du Canada a tranchées de façon définitive dans l'avis qu'elle a rendu il y a quinze ans. La Cour suprême a statué qu'il n'y a aucun droit, pouvoir juridique ou compétence en vertu de la Constitution du Canada ou en droit international, de faire la sécession du Québec du Canada de manière unilatérale; que le droit international fait une distinction fondamentale entre le droit à l'autodétermination interne et externe; et que la sécession, pour constituer un acte légal, exigerait une modification constitutionnelle.

4. The Supreme Court has invoked the interpretive technique of reading down many times. Here, reading down by this Court may be warranted for the impugned provisions in order for them (1) to be sustainable as amendments to the constitution of the province, which means that they must bear on an organ or implement a principle of government; (2) to be compatible with the principle of federalism; (3) not to relate to fundamental terms or conditions of the federal union under the Constitution of Canada; and (4) to eliminate any incipient risk of "pro-

4. La Cour suprême a utilisé à maintes reprises la technique d'interprétation atténuée. Cette Cour devrait faire de même afin de conclure que les dispositions contestées (1) sont des modifications valides à la constitution de la province, c'est-à-dire qu'elles portent sur un organe du gouvernement ou mettent en œuvre un principe de gouvernement; (2) sont compatibles avec le principe du fédéralisme; (3) ne portent pas sur les dispositions ou conditions fondamentales de l'union fédérale garanties par la Constitution du Canada, et (4) ne sont pas susceptibles de « provoquer des bouleversements constitutionnels

found constitutional upheaval by the introduction of political systems foreign to and incompatible with the Canadian system".[1]

profonds par l'introduction d'institutions politiques étrangères et incompatibles avec le système canadien »[1].

5. Moreover, this Court should declare, amongst its conclusions, that (1) under the Constitution of Canada, Quebec is established as a province of Canada, and (2) the impugned Act does 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.

5. De plus, la Cour devrait prononcer une conclusion déclaratoire selon laquelle (1) en vertu de la Constitution du Canada, le Québec est une province du Canada et (2) la Loi contestée ne peut en aucun cas constituer le fondement juridique d'une déclaration unilatérale d'indépendance par le gouvernement du Québec, l'Assemblée nationale ou la législature du Québec ou d'une sécession unilatérale de l'« État du Québec » de la fédération canadienne.

6. If this Court cannot read down ss. 1 to 5 and 13 of the Act as contemplated in paras. 2 to 5 above, it should declare them beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force or effect.

6. Si la Cour ne peut donner une interprétation atténuée aux art. 1 à 5 et 13 de la Loi (voir plus haut, par. 2 à 5), elle devrait déclarer qu'ils outrepassent la compétence de la législature du Québec et qu'ils sont inopérants.

I THE APPLICABLE PRINCIPLES

A- The constitutional status and powers of the provinces in Canada

7. It is fundamental law that pursuant to ss. 3, 5 and 6 of the *Constitution Act, 1867*, Quebec is a province of Canada, with executive and legislative institutions that are established by the provisions of the Constitution (ss. 58 *et seq.* and 71 of the *Constitution Act, 1867*).

8. In Canada, legislative and executive powers flow from the provisions of the Constitution of Canada. The powers are divided between the Parliament and government of Canada and provincial legislatures and governments.

9. 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

[1] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 47.

colonies "separately dependent on the Imperial Parliament for their governance..." "Federalism was the political mechanism by which diversity could be reconciled with unity."[2]

10. Within their respective jurisdictions, Parliament and the provincial legislatures are sovereign 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.*

11. As the opening words of ss. 92, 92A, 93 and 95 of the *Constitution Act, 1867* and the repeated use in s. 92 of the expression "in the province" demonstrate, provincial legislatures may not legislate extraterritorially.

12. The Constitution confers upon provincial legislatures the power to make laws: (1) in relation to the classes of subjects provided for in ss. 92 *et seq.* of the *Constitution Act, 1867*, and (2) amending the internal constitution of the province. Only the latter legislative authority is relevant for present purposes.

13. Section 45 of the *Constitution Act, 1982*, provides:

Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.	Sous réserve de l'article 41, une législature a compétence exclusive pour modifier la constitution de sa province.

Paragraph 41(a) requires that amendments in relation to the office of the Lieutenant Governor "be made by proclamation by the Governor General under the Great Seal of Canada only where authorized by resolution of the Senate and House of Commons and of the legislative assembly of each province."

14. In the context of former subs. 92(1) of the *Constitution Act, 1867*—the predecessor to s. 45—the term "constitution of the province" was defined by the Supreme Court of Canada as including, *inter alia*, constitutional provisions such as ss. 58-70 and 82-87 of the *Constitution Act, 1867* and certain provisions enacted by statutes of the provincial legislatures.[3]

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[2] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 43.

[3] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 37-38. See, for example, the *Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9, which abolished the Legislative Council of Quebec and the validity of which was upheld in *Québec (Procureur général) v. Montplaisir*, [1997] R.J.Q. 109 (C.S.).

15. Provided that it conforms to all other provisions of the Constitution of Canada (for example, the division of legislative powers), a statute relates to the constitution of the province if "it [bears] on the operation of an organ of the government of the Province".[4] An amendment is not covered by s. 45 if it modifies "a fundamental term or condition of the union formed in 1867".[5]

16. Outside the ambit of s. 45, the Constitution of Canada can only be amended by using one of the other procedures of Part V of the *Constitution Act, 1982*. This would be the case where a statute aims at amending "provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle". Power to bring about "a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system" would also be beyond the powers (*ultra vires*) of the legislature of a province.[6]

B- <u>The procedure for amending the Constitution of Canada</u>

17. Besides the provinces' power to amend their own constitutions, Part V of the *Constitution Act, 1982* sets out four different amending procedures:

    i) The unanimous consent procedure, requiring the approval of the federal Houses of Parliament and of the ten legislative assemblies of the provinces to make amendments in relation to (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province, (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented, (c) the use of the English or the French language, (d) the composition of the Supreme Court of Canada and (e) an amendment to Part V (s. 41);
    ii) For the amendment of provisions not applying to all provinces, the consent of the Senate and House of Commons and the legislative assembly of the province to which the amendment applies (s. 43);
    iii) An ordinary statute enacted by Parliament to make amendments in relation to the executive government of Canada or the Senate and House of Commons (s. 44);
    iv) A general amending procedure, applicable when ss. 41 and 43 to 45 are not, requiring the assent of two-thirds of the legislative assemblies of provinces representing at least 50 per cent of the population of the provinces and the federal Houses of Parliament (s. 38, which is also applicable in the specific cases enumerated in s. 42).

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[4] *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, 1024, reiterated in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 39.
[5] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 40.
[6] *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, 39-40, 47. See also *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Potter v. Québec (Procureur général)*, [2001] R.J.Q. 2823 (C.A.); *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12, 183 D.L.R. (4th) 225.

18. Under s. 46 of the *Constitution Act, 1982*, the "procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province".[7]

19. For example, in 1997, Quebec resorted to the amending procedure set out in s. 43 of the *Constitution Act, 1982* to make an amendment in relation to s. 93 of the *Constitution Act, 1867* on denominational schools.[8]

20. Thus, to achieve constitutional change and reform, Part V of the *Constitution Act, 1982*, may not be ignored. To the contrary, the Supreme Court pointed repeatedly to the amending procedures in the *Quebec Secession Reference* and emphasized that secession, to be lawful, would require a constitutional amendment.

C- The principles of constitutional interpretation

21. The Constitution of Canada is primarily composed of the law of the Constitution that is set out in the provisions of the *Canada Act 1982* and the *Constitution Acts, 1867 to 1982*. The Constitution also 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".[9] 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.[10]

22. To determine the constitutional validity of legislation, a court must first analyze the "pith and substance" of the challenged provisions, in order to ascertain the subject matter to which it relates, on the basis of its true purpose and effects. Then, the court must determine whether the subject matter of the legislation comes within one of the heads of legislative power assigned by the Constitution to the enacting body.[11]

23. A related concern of the courts, particularly in analysing the pith and substance of legislation, is to determine the true intention of the legislature in enacting the legislative measure. The courts may look to intrinsic evidence (the terms of the law itself, including its preamble and provisions) and extrinsic evidence (sponsoring Minister's statements, parliamentary debates and committee studies, and related materials that form part of the legislative history leading to the enactment of the legislation). Sometimes, the courts will infer a "colourable" legislative intent that suggests to the court that the real purpose behind

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[7] See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 69, 88, 150.
[8] *Constitution Amendment, 1997 (Quebec)*, SI/97-141 (December 22, 1997).
[9] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 32, 52.
[10] *Eurig Estate (Re)*, [1998] 2 S.C.R. 55, para. 66 (*per* Binnie J.).
[11] See, for example, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, paras. 52-58; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, paras. 25-27.

the ostensible aims of the legislation is to circumvent the limits of the legislature's powers and to attempt to legislate on matters that are beyond its purview.

24. One of the interpretative techniques that courts sometimes employ, in keeping with the presumption of constitutional validity—i.e., that it ought to be presumed that Parliament and the provincial legislatures generally intend to act within the limits of the legislative powers assigned to them by the Constitution, and not to exceed those limits—is to "read down" legislation that is ambiguous on its face and that may admit of two meanings: one of which is within the scope of the enacting legislature's powers and thus *intra vires*; the other which is beyond the powers (*ultra vires*) of the legislature.

D- <u>The principles of legislative interpretation</u>

25. The principles of legislative interpretation are well established. "The object of statutory interpretation is to establish Parliament's intent by reading the words of the provisions in question in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".[12] For more clarity, s. 41.1 of the *Interpretation Act* of Quebec adds:

41.1. The provisions of an Act are construed by one another, ascribing to each provision the meaning which results from the whole Act and which gives effect to the provision.	41.1 Les dispositions d'une loi s'interprètent les unes par les autres en donnant à chacune le sens qui résulte de l'ensemble et qui lui donne effet.

26. The interpretation of Quebec statutes is subject to further rules of construction. The preamble of a statute, which is part of the statute, "shall... assist in explaining its purport and object".[13]

27. For more clarity, some words such as "province", "Parliament", "government", "Her Majesty", "Governor-General", and "Governor-General in Council", "the Union" (which means "the Union of the provinces effected under the British North America Act, 1867, and subsequent Acts") are defined in s. 61 of the *Interpretation Act*.

28. Legislative provisions are also "deemed [*réputées*, in French] to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit".[14]

[12] *Re:Sounds v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376, para. 32. See also *Interpretation Act*, R.S.Q., c. I-16, subs. 41(2).
[13] *Interpretation Act*, s. 40.
[14] *Interpretation Act*, s. 41.

29. Despite that latter presumption, a statute may be declaratory, meaning that it is "not intended to create or amend a statutory norm, but instead to clarify the existing one".[15] The declaratory statute may simply say what the law is.[16]

30. "[B]ecause [it] usually [is] introduced in response to judicial interpretation that the legislature finds unacceptable", a declaratory statute essentially generates, but not always, immediate and retroactive effect as well.[17]

E- The use of extrinsic evidence in constitutional cases

31. As already explained, courts ascertain the constitutional validity of a legislation by determining its "pith and substance". To do so, two aspects must be examined: "the purpose of the enacting body, and the legal effect of the law".[18]

32. The *legal* purpose of a statute may be established through the use of extrinsic evidence like Hansard and governmental publications, if relevant and reliable and given the appropriate weight.[19]

33. Purpose can also be determined "by considering the 'mischief' of the legislation—the problem which [the legislature] sought to remedy".[20]

II EXPERT REPORTS ON FOREIGN LAW

34. The admissibility of an expert report will be determined by its relevance, utility, necessity and probative value.[21]

35. The Attorney General of Quebec relies on two expert reports that have been filed on his behalf. The first is from Professor Robert F. Williams, who was asked to provide his opinion "on the nature and effect of American state constitutional provisions stating, in a number of different specific formulations, that the government of the states is based on the idea that 'all power is inherent in the people'". The second is from Professor Matthias Niedobitek, who was asked similar questions but with regard to the principles proclaimed in the constitutions of the *Länder* (or states) and the compatibility of such statements with German federal constitutional law.

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[15] Stéphane Beaulac, *Handbook on Statutory Interpretation*, Toronto, LexisNexis, 2008, p. 361. See also Pierre-André Côté, *Interprétation des lois*, 4th ed., Montréal, Thémis, 2009, p. 597.
[16] *Régie des rentes du Québec v. Canadian Bread Company*, 2013 SCC 46, para. 26.
[17] Ruth Sullivan, *Construction of Statutes*, 5th ed., Toronto, LexisNexis, 2008, p. 659, 682. See also *Régie des rentes du Québec v. Canadian Bread Company*, 2013 SCC 46, para. 28; Beaulac, *op.cit.*, note 15, p. 361.
[18] *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, para. 16.
[19] *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, para. 17; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, para. 64.
[20] *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, para. 17.
[21] *Burla v. Canadian Pacific Railways*, 2003 CanLII 71905, para. 1 (Que. C.A.).

36. While comparisons with other federal systems may be instructive, they are in no way conclusive, and at the end of the day, the Court must be guided by the requirements of the Canadian federal system.

37. In particular, both expert reports are irrelevant to the present case, as both deal with constitutional systems that differ in material respect from Canada's. Those systems are the result of specific legal, historical, political and cultural context of those particular countries.

38. To the extent that the expert reports may nonetheless be considered relevant, they must be read in the legal and constitutional context of their respective countries.

39. Besides, both reports conclude that "intrastate constitutions" or "constitutions of the *Länder*" must operate in accordance with the countries' constitution. For example, in the United States of America, the provisions of state constitutions are declared invalid when they "come into conflict with the Federal Constitution". The same is true in Germany, as the "Basic Law", the federal constitution, limits the powers of the *Länder*.[22]

40. Those conclusions concord as well with those of two expert reports filed on behalf of the Attorney General of Canada, by Professor Richard S. Kay and Dr. Dirk Hanschel, respectively.

41. Professor Kay emphasizes that declarations of popular sovereignty in American state constitutions "must be understood as referring to the ultimate authority of the people of the various states to change their government only within the limits of the supreme federal law that binds them."[23]

42. As such, the provisions analyzed in Quebec's expert reports "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."[24]

43. Furthermore, provisions of the American state constitutions do not grant any power, explicitly or implicitly, "to alter the state's relationship" with the country.[25]

44. Dr. Dirk Hanschel takes a similar view in respect of the German federal state and the *Länder*. "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

[22] Expert report of Professor Robert F. Williams, p. 9; expert report of Professor Matthias Niedobitek, p. 3. See also the expert report of Professor Richard S. Kay, pp. 18 *et seq.*, filed on behalf of the Attorney General of Canada.
[23] Expert report of Professor Richard S. Kay, p. 19.
[24] Expert report of Professor Richard S. Kay, p. 15-16.
[25] Expert report of Professor Richard S. Kay, p. 23.

law."[26] References to popular sovereignty or self-determination "are a priori constrained by the overriding constitutional order of the Basic Law."[27]

III ANALYSIS OF THE IMPUGNED PROVISIONS

Introduction

45. The statute in question is entitled: *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State* (*Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*). The preamble to the Act indicates that the Act is a legal response to the Supreme Court of Canada's ruling in the *Quebec Secession Reference* and to 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* (*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*).[28]

46. The Act purports to declare the basis for the Quebec people's perceived right to self-determination (s. 1) and to decide the political regime and legal status of the Province (ss. 2-3). It effectively defines, exclusively in quantitative terms, the criterion of what constitutes a "clear majority" (50% of the votes cast plus one) referred to in the *Quebec Secession Reference* (s. 4). It introduces the concept of a "Québec State" and identifies the source of where it derives its legitimacy (from "the will of the people inhabiting its territory", and how and by whom that will may be expressed) (s. 5). In its final provision, it declares that "[n]o 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 Quebec people to determine its own future" (s. 13).

47. The Act, particularly ss. 1 to 5 and 13, is a declaratory statute.

A- Section 1

48. Section 1 provides:

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 the self-determination of peoples.	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.

[26] Expert report of Dr. Dirk Hanschel, p. 4.
[27] Expert report of Dr. Dirk Hanschel, p. 18.
[28] S.C. 2000, c. 26.

49. To be compatible with the provisions of the Constitution of Canada and the ruling of the Supreme Court in the *Quebec Secession Reference*, this provision would need to be interpreted and read down as purely declaratory and limited to a putative right of internal, not external, self-determination.

50. In the *Quebec Secession Reference*, the Supreme Court emphasized that the right to self-determination of a people is "normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state." The right to external self-determination, including the potential assertion of a right to unilateral secession, "arises only in the most extreme of cases and even then, under carefully defined circumstances."[29]

51. As the Supreme Court stated, even if the population of Quebec constitutes a "people", "as do other groups within Quebec and/or Canada",[30] within the meaning of the right of self-determination in international law, something the Supreme Court declined to determine, the Court stated that "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."[31]

52. 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".[32] A claim to a right of external self-determination only arises in the most exceptional of circumstances. In international law, "the right to self-determination only 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." Manifestly, none of these situations are applicable to Quebec under existing conditions. "Accordingly, neither the population of the province of Quebec, even if characterized in terms of 'people' or 'peoples', nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada."[33]

53. In the alternative, s. 1 is beyond the powers (*ultra vires*) of the Legislature of Quebec and is, pursuant to s. 52 of the *Constitution Act, 1982*, of no force or effect if it is held or interpreted to be declaratory of an external right of self-determination.

B- Section 2

54. Section 2 provides as follows:

The Québec people has the inalien-	Le peuple québécois a le droit inalié-

[29] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 126.
[30] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 125.
[31] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 125.
[32] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 126, citing the *Declaration on Friendly Relations*.
[33] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 138.

able legal right to freely decide the political regime and legal status of Québec.

nable de choisir librement le régime politique et le statut juridique du Québec.

55. To be compatible with the provisions of the Constitution of Canada and the ruling of the Supreme Court in the *Quebec Secession Reference*, this provision needs to be read down to mean that the population of Quebec may participate in making democratic political choices, including electing provincial governments from time to time and making institutional changes that are within the limits of the Legislature of Quebec's legislative competence.

56. In the alternative, s. 2 is beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force or effect if it purports to ground a right to change the fundamental "political regime" and "legal status" of Quebec. Such fundamental alterations could only be effected through amendments to the Constitution of Canada in accordance with the amending procedures (with the exception of s. 45) of Part V of the *Constitution Act, 1982.*

C- Section 3

57. Section 3 states:

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.

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.

58. As noted in paragraph 51 above, the Supreme Court held, in the *Quebec Secession Reference*, that the type of exceptional circumstances that might give rise to a right of external self-determination are "manifestly inapplicable to Quebec under existing conditions", and that accordingly, "neither the population of the province of Quebec, even if characterized in terms of 'people' or 'peoples', nor its representative institutions, the National Assembly, the legislature or government of Quebec possess a right, under international law, to secede unilaterally from Canada."[34]

[34] *Reference re Secession of Quebec.* [1998] 2 S.C.R. 217, para. 138.

59. To be compatible with the provisions of the Constitution of Canada and the ruling of the Supreme Court in the *Quebec Secession Reference*, this provision would need to be construed as (a) subject to the provisions of the Constitution of Canada, and particularly, the federal-provincial division of legislative powers, and the limits of the legislative authority granted to provincial legislatures by the Constitution of Canada to enact amendments to the constitution of the province, so as to be limited to making choices in relation to provincial political institutions that are within the legislative authority of the province; and (b) subject to the finding by the Supreme Court that lawful secession would require a constitutional amendment negotiated on the basis of a reciprocal obligation on all parties to Confederation, and that those negotiations should be conducted in accordance with the constitutional principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[35]

60. In the alternative, s. 3 is beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force and effect to the extent that it purports to exclude the activities of federal political institutions or the operation of valid federal legislation, including the *Referendum Act*,[36] and *a fortiori*, if it means that the Quebec people "alone" may determine the fundamental political and legal status of Quebec, without reference to, or respect for, the Canadian constitutional framework.

D- Section 4

61. Section 4 provides:

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

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.

62. To be compatible with the provisions of the Constitution of Canada and the ruling of the Supreme Court in the *Quebec Secession Reference*, and to be declared to be within the legislative power of the provincial legislature to provide in relation to its referendum legislation that a simple majority of valid votes cast is the "winning" option, s. 4 of the Act must be construed on the basis that a referendum is a purely consultative or advisory mechanism. In that sense, the provision may be read down and thereby interpreted to conform to the limits of Quebec's legislative authority as conferred by the Constitution of Canada.

63. However, in the context of a referendum on the secession of the province from Canada, the Supreme Court of Canada stated in the *Quebec Secession Reference*: "In this context,

[35] *Reference re Secession of Quebec*. [1998] 2 S.C.R. 217, paras. 88, 104.
[36] S.C. 1992, c. 30.

we refer to a 'clear' majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."[37] The Supreme Court underlined: "In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people."[38] Thus, "the 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." [39]

64. In the alternative, s. 4 is beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force or effect if it purports to make the results of the referendum legally binding on the federal Parliament and government and upon the legislatures and governments of the other provinces.

E- Section 5

65. Section 5 provides:

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

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

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

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

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).

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

66. To be compatible with the provisions of the Constitution of Canada, the term the "Québec State" must be read down as meaning nothing more nor less than the "Province of Que-

[37] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 87.
[38] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 88.
[39] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 104.

bec" as established by the Constitution of Canada (see ss. 5-6 of the *Constitution Act, 1867.*

67. In the alternative, s. 5 is beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force or effect 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.

F- Section 13

68. Section 13 provides:

No 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.	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.

69. The proposition expressed in this provision should be read down in accordance with the powers conferred upon the province of Quebec by the Constitution of Canada which powers and lawful authority "can come from no other source".[40] The National Assembly is the Legislative Assembly of Quebec, which is established as part of the Legislature of Quebec by s. 71 of the *Constitution Act, 1867*. The Legislature (now consisting of the Lieutenant Governor and the National Assembly) exercises the power to make laws within provincial jurisdiction.

70. The Parliament of Canada is established by s. 17 of the *Constitution Act, 1867* ([t]here shall be One Parliament for Canada...") and exercises the power to make laws for the peace, order and good government of Canada on all matters that are not within the exclusive jurisdiction of the provincial legislatures. The Parliament of Canada, acting within the limits of its legislative jurisdiction, has as much authority and legitimacy as the Legislature of Quebec to solicit an expression of democratic will by the population of Quebec, through the vehicle of federal elections and referenda.

71. 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. 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. Therefore, if the provision purports to single out and to oust the application of valid federal law

[40] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 72.

in the province, or of the lawful actions of the federal government, it is beyond the powers (*ultra vires*) of the Legislature of Quebec.

72. To be compatible with the provisions of the Constitution of Canada and with the ruling of the Supreme Court in the *Quebec Secession Reference*, s. 13 must be read as essentially just a variant of an assertion of a right to internal self-determination, i.e. the "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state".[41]

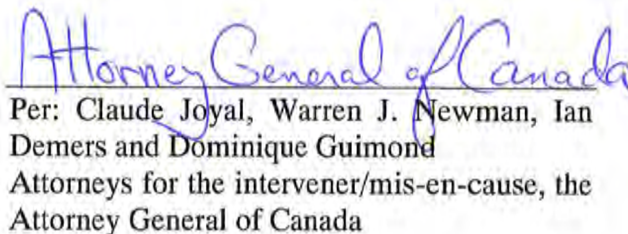
73. In the alternative, s. 13 is beyond the powers (*ultra vires*) of the Legislature of Quebec and of no force or effect if it is characterized by the court as another manifestation of a claim to a right of external self-determination, to exclusive legislative authority ousting the application of federal law, and potentially, to the claim of a lawful right or power of eventual unilateral secession.

IV CONCLUSION

74. The Attorney General of Canada requests that Mr. Henderson's re-amended motion for a declaratory judgment be determined in accordance with the above principles. The Attorney General of Canada also requests that there be no order for costs against him.

THE WHOLE RESPECTFULLY SUBMITTED.

MONTRÉAL, this 16th day of October 2013
ATTORNEY GENERAL OF CANADA



Per: Claude Joyal, Warren J. Newman, Ian Demers and Dominique Guimond
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[41] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 126.

N° : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

Respondent

&

ATTORNEY GENERAL OF CANADA

Mis en cause

DECLARATION OF INTERVENTION
OF THE MIS EN CAUSE
ATTORNEY GENERAL OF CANADA
(*Code of Civil Procedure*, ss. 210 and 216)

ORIGINAL

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