



From political affirmation to legal recognition:

Quebec's right to self-determination

As a source of inspiration for the peoples of Europe

From political affirmation to legal recognition:

Quebec's right to self-determination

As a source of inspiration for the peoples of Europe

From political affirmation to legal recognition:
Quebec's right to self-determination
As a source of inspiration for the peoples of Europe

Report prepared by DANIEL TURP

Emeritus Professor at the Faculty of Law of the Université de Montréal

President of the Institut de recherche sur l'autodétermination des peuples et les indépendances nationales

Member of the House of commons of Canada (1997-2000) and of the National Assembly of Quebec (2003-2008)

Member of the Advisory Scientific Council of Coppieters Foundation

© English translation – May 19, 2021

TABLE OF CONTENTS

INTRODUCTION	6
I 1960-1976: From the “Quiet Revolution” to the election of the Parti Québécois: The political affirmation of the right to self-determination	10
II May 20, 1980: The consultation on sovereignty and association: A first referendum on self-determination	16
III 1985-1992: The <i>Meech Lake Accord</i> and the consultation on the <i>Charlottetown Consensus Report</i> : A second referendum on self-determination	22
IV October 30, 1995: The consultation on sovereignty and partnership: A third referendum on self-determination	32
V 1998-2000: The <i>Reference re Secession of Quebec</i> and the <i>Clarity Act</i> : The expression of Self-Determination and the Right to Pursue Secession	38
VI December 7, 2000: The <i>Quebec Fundamental Rights Act</i> : A Legislative codification of the right to self-determination	42
VII 2001-2021: <i>Henderson v. Attorney General of Québec</i> : The legal recognition of the right to self-determination	46
CONCLUSION	52
APPENDICES	56
1 <i>Referendum Act</i> [Excerpts] [1977]	58
2 <i>An Act to recognize the right of the people of Quebec to self-determination</i> [Bills 191 and 194] [1978 et 1985]	61
3 <i>An Act respecting the Future of Quebec</i> [Bill 1] [1995]	64
4 <i>Reference Re Secession of Quebec</i> [Excerpts] [1998]	74
5 <i>Clarity Act</i> [2000]	88
6 <i>Act Respecting the Exercise of the Fundamental Rights and Prerogatives</i> <i>of the Quebec People and the Quebec State</i> [2000]	92
7 <i>Henderson c. Attorney General of Quebec</i> [Excerpts] [2021]	95
NOTES ABOUT THE AUTHOR	108

INTRODUCTION

The right to self-determination of peoples continues to be the subject of great debate. Throughout the world, the right to self-determination has been and continues to be asserted by numerous independence and autonomy movements that seek to freely determine their political status and freely pursue their economic, social and cultural development.

Although it is unthinkable to list them all, such movements are active on the African continent [Ambazonia [Cameroon], Casamance [Senegal], Chagos [United Kingdom], Kabylia [Algeria] and Western Sahara [Morocco], in the Americas [Puerto Rico [United States of America] and Quebec [Canada], in Asia [Hong Kong, Taiwan and Tibet [China], Karen [Burma] and Kurdistan [Iraq, Iran, Syria, Turkey] and in Oceania [Bougainville [Papua New Guinea], Chuuk [Federated States of Micronesia], New Caledonia and Polynesia [France]¹, not to mention the indigenous peoples of all continents who have been recognized by the United Nations General Assembly as having a right to self-determination².

This is also the case on the European continent, where a significant number of political parties, grouped within the European Free Alliance [EFA], affirmed in their most recent election manifesto that the “[w]ork to improve the prospects for all Europeans depends on the EFA’s unfailing support for the right to self-determination”³.

In this manifesto, the EFA further clarifies the scope of this right in the following terms:

The EFA believes that all peoples have the right to choose their own destiny and an institutional framework that empowers them. Whether this involves respect of linguistic and cultural rights, devolution, expansion of regional or federal powers, demands for autonomy, or the achievement of independence through referendum — all proposals that allow groups of people to express themselves and define their own institutions in a democratic, transparent, gradual and peaceful way must be supported. Self-determination is a principle, enshrined in international law, that can be adapted to the different situations faced by peoples under the jurisdiction of European states. It allows all peoples to choose what is best for them, for their development, and in some cases their survival⁴.

While no one can predict the fate of these various movements today, their number alone attests to the ever-renewed relevance of the right to self-determination. From the middle of the 20th and 21st centuries, the international community has witnessed the codification and progressive development of the right to self-determination in the international and national legal order. Such development led to a reference to the

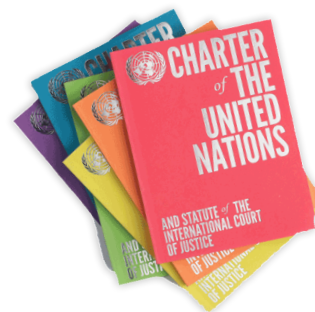
1 On the self-determination processes underway in these various continents and countries, see Daniel TURP et Anthony BEAUSÉJOUR [dir.], *L'autodétermination des peuples au XXI^e siècle : perspectives québécoises, comparées et internationales*, Montréal, Institut de recherche sur l'autodétermination des peuples et les indépendances nationales, 2021. See also Ryan GRIFFITHS, « The State of Secession in International Politics », *E-International Relations*, 23 September 2016 on line: <https://www.e-ir.info/2016/09/23/the-state-of-secession-in-international-politics>].

2 See Roméo SAGANASH, « Le droit à l'autodétermination des peuples autochtones », [1993] 24 *Revue générale de droit* 85 [on line : <https://www.erudit.org/fr/revues/rgd/1993-v24-n1-rgd04377/1057018ar.pdf>].

3 See EUROPEAN FREE ALLIANCE, *Building a Europe for all Peoples - Electoral Manifesto 2019*, p 6 [on line : https://www.e-f-a.org/wp-content/uploads/2019/04/EFA_manifesto_2019_EN-1.pdf].

4 *Ibid.* For an analysis of the right to self-determination in the European context conducted under the auspices of the Maurits Coppieters Centre (now the Coppieters Foundation), see Daniel TURP and Marc SANJAUME-CALVET, *The Emergence of a Democratic Right of Self-Determination in Europe*. Brussels, Centre Maurits Coppieters, 2016 [on line: https://ideasforeurope.eu/wp-content/uploads/2018/03/Coppieters_5282_selfdetermination_final.pdf].

respect for the principle of equal rights of peoples and their right to self-determination as one of the purposes set out in 1945 in the *United Nations Charter*⁵, but also to the adoption in 1966 of Article 1 common to the two *International Covenants on Human Rights* that affirm that “all peoples have the right of self-determination” and that “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”⁶.



In its *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*⁷, the General Assembly of the United Nations further stated on October 24, 1970 that “the establishment of a sovereign and independent State, free association or integration with an independent State, or accession to any other political status freely determined by a people constitute modalities for the implementation of the right to self-determination by that people”.

At the European level, it is worth mentioning the signing in 1975 of the *Helsinki Final Act*⁸ whose *Declaration on the Principles Governing the Mutual Relations of Participating States* recalls in particular in its Article VIII that “[b]y virtue of the principle of equal rights and self-determination of peoples, all peoples shall always have the right, in full freedom, to

determine, when and as they wish, their internal and external political status, without external interference, and to pursue their political, economic, social and cultural development as they please”. Such equality of rights of peoples and their right to self-determination was reaffirmed in 1990 in the *Charter of Paris for a New Europe*⁹.

An important development occurred in 2007 with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁰. Article 3 of this declaration states that “indigenous peoples have the right to self-determination” and that “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. It adds that “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy and self-government in matters relating to their internal and local affairs, as well as the means to finance their autonomous activities”¹¹.

5 United Nations Conference on International Organization, vol. 15, p. 365 [26 June 1945].

6 See *International Covenant on Economic, Social and Cultural Rights*, [1976] 993 U.N.T.S. 13 [16 December 1966] and *International Covenant on Civil and Political Rights*, [1976] 999 U.N.T.S. 107 [16 December 1966].

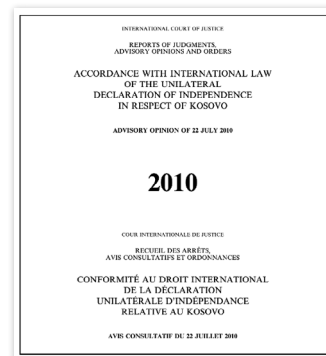
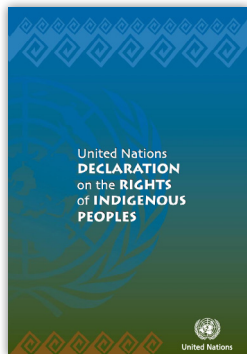
7 G.A. Res. 2625, Off. Doc. G.A. 25th session, supp. No 28, p. 131, U.N. Doc. A/5217 [24 October 1970] [hereinafter «*Declaration on Friendly Relations*»].

8 Signed on August 1st 1975, the text of the *d'Helsinki Final Act*, the official title of which is *Final Act of the Conference on Security and Cooperation in Europe* is available on line at <https://www.osce.org/files/f/documents/5/c/39502.pdf>.

9 The *Charter of Paris for a New Europe* was signed by the Participant States at the Conference for Security and Cooperation in Europe on November 21st 1990 and is on line at <https://www.osce.org/files/f/documents/3/2/39517.pdf>.

10 G.A. Res., Off. Doc. G.A. 61st session, U.N. Doc. A/RES/61/295 [2007] [13 September 2017] [on line : <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/08/PDF/N0651208.pdf>].

11 On this declaration, see Boris MARLIN, « L'engagement des États à travers la résolution 61/295 portant Déclaration des Nations Unies sur les droits des peuples autochtones », [2008] 21.1 *Revue québécoise de droit international* 211 and Ahmed Ali ABDALLAH, « *Réflexions critiques sur le droit à*



Attempts have been made to interpret the right to self-determination restrictively and to limit its scope. For example, some States continue to support the view that the right to self-determination - including the right to establish a sovereign and independent state - belongs only to colonial peoples or peoples integrated into sovereign and independent states that, to quote the safeguard clause of the *Declaration on Friendly Relations*, do not have “a government representing the whole population of the territory without distinction as to race, creed or color”. This position is based on references to the prohibition of action “of any kind whatsoever which would dismember or threaten, in whole or in part, the territorial integrity or political unity of any sovereign and independent state” found in both the *Declaration on Friendly Relations* and the *Helsinki Final Act* and *Charter of Paris for a New Europe*. In its advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*¹², the International Court of Justice recalled however that “the scope of the principle of territorial integrity is confined to the sphere of relations between States”¹³.

International practice has also shown that attempts to confine this right to self-determination to the colonial sphere and to deny non-colonial peoples the benefit of

autonomy or independence have not been successful during the latter part of the 20th century and the beginning of the 21st century¹⁴. For example, the international community has seen of Eritrea or East Timor achieve independence, as did the republics of the former Soviet Union or Yugoslavia, including Kosovo. It also saw the United Kingdom recognize in the *Good Friday Agreement* the right of the people of Northern Ireland to determine their own future and to decide, if that was the will of the majority, whether Northern Ireland should remain or cease to be part of the United Kingdom. Southern Sudan has also taken its place in the community of nations, and the U.K. has explicitly recognized the right of Scotland to hold a referendum and become an independent state if that was the wish of its people. Self-determination referendums in the Bougainville region of Papua New Guinea, as well as in New Caledonia in 2018 and 2020, also demonstrate the reality of exercising the right to self-determination, as should the independence referendum in the state of Chuuk with the consent of the Federated States of Micronesia in 2022.

The issue of the right to self-determination has also been, and continues to be, the subject of much debate in Quebec. From the slogan “Maître chez Nous” that set the tone for its “Quiet Revolution” in the early 1960’s,

l’«autodétermination des peuples autochtones dans la déclaration des Nations Unies du 13 septembre 2007», [2014] 27.1 *Revue québécoise de droit international* 61 [on line : <https://www.sqdi.org/fr/reflexions-critiques-sur-le-droit-a-lautodetermination-des-peuples-autochtones-dans-la-declaration-des-nations-unies-du-13-septembre-2007>].

12 Advisory Opinion, I.C.J. Reports, 2010, p. 403.

13 *Id.*, p. 437, § 80.

14 See on this matter François ROCH, « Réflexions sur l’évolution de la positivité du droit des peuples à disposer d’eux-mêmes en dehors des situations de décolonisation », [2002] 15.1 *Revue québécoise de droit international* 33 [on line : <https://www.sqdi.org/fr/tag/droit-des-peuples-a-disposer-deux-memes>].

to the election of the Parti Québécois in 1976, the holding of three referendums on the political status and constitutional future of Quebec in 1980, 1992 and 1995, to an advisory opinion by the Supreme Court of Canada in 1998, to the adoption of legislation by the Parliament of Canada and the National Assembly of Quebec in 2000, the issue of the right to self-determination has been present in the major public deliberations of the last five decades of the 20th century¹⁵. This matter continued to be debated during the two first decades of the 21st century by way of judicial decisions, including the judgment of the Quebec Court of Appeal of April 9, 2021, enshrining the constitutional validity and affirmation that the people of Quebec are entitled to self-determination in fact and in law, and it is holder of the right universally recognized by virtue of the principle of the equality of rights of peoples and their right to self-determination.

In this report, we will present a synthesis of debates that characterized by a political affirmation of Quebec's right to self-determination that led to the legal recognition of this right.

15 For analyses of the issue of Quebec's right to self-determination in the period from 1960 to 2000, see Daniel TURP, *Le droit de choisir : essais sur le droit du Québec à disposer de lui-même*, Montréal, Les Éditions Thémis, 2001. See also Laurent LOMBART, « Le droit à l'autodétermination des Québécois dans le cadre fédéral canadien : le Québec peut-il accéder à l'indépendance ? », [2003] 16.2 *Revue québécoise de droit international* 1 [on line : https://www.sqdi.org/wp-content/uploads/16.2_-_lombart.pdf] and David GUÉNETTE et Alain G. GAGNON, « Du référendum à la sécession – le processus québécois d'accession à la souveraineté et ses enseignements en matière d'autodétermination », [2017] 54 *Revista catalana de dret públic* 100-117 [on line : <http://revistes.eapc.gencat.cat/index.php/rcdp/article/view/10.2436-rcdp.i54.2017.2966/n54-guenette-gagnon-fr.pdf>].



I

1960-1976

From the “Quiet Revolution” to the election of the Parti Québécois: The political affirmation of the right to self-determination

In the aftermath of the creation of the United Nations and the first affirmation of the equality of peoples and their right to self-determination in its founding charter, Quebec was governed by the Union Nationale party, Nationalist without being independentist, this party sought to defend Quebec's autonomy within the Canadian federation. Its various political programs and

the national question and to constitutional reform, but also by the rise of the independence movement.

While this movement was initiated by the creation of the Alliance laurentienne whose claim to independence was based on an interpretation of the principle of nationalities and of the right of peoples to



Election of June 5, 1960 - Slogan of the Québec Liberal Party

election manifestos made no reference to the right to self-determination as recognized in the *Charter of the United Nations*.

With the election in 1960 of the Liberal Party of Quebec, whose campaign slogan was "Maîtres chez Nous", a period in Quebec's national history described as the "Quiet Revolution" began, one of whose major achievements was the nationalization of electricity. Characterized by a major political transformation of Quebec giving rise to economic emancipation, social catching up and cultural effervescence, the Quiet Revolution was marked by the emergence of a government that claimed to be that of a "state" of Quebec. This period was also illustrated by the importance given to

self-determination¹⁶, the creation of real political parties advocating Quebec sovereignty took place between 1960 and 1966. Several of them were created during this period, including the Action socialiste pour l'indépendance du Québec, the Parti républicain du Québec, the Regroupement national and the Ralliement national, which also called for the right to self-determination to support the independence project¹⁷. Support for these various parties remained limited, and none of them succeeded in winning seats in the National Assembly of Quebec in the general elections of 14 November 1962 and 5 June 1966.

In anticipation of the June 5th 1966 election and under the leadership of its new leader Daniel Johnson, who

16 See Jean-Yves CHOQUINARD, « Résumé de l'essentiel de la pensée de l'Alliance laurentienne sur l'autodétermination du peuple québécois », [1977] 66 *L'Action nationale* 422 et Raymond BARBEAU, *J'ai choisi l'indépendance*, Montréal, Éditions de l'Homme, 1961.

17 On these various political parties, read Lionel BELLAVANCE, *Les partis indépendantistes québécois*, Montréal, Les Anciens Canadiens, 1973.



aspired to take back power from the Liberal Party of Quebec by considering the path to independence ¹⁸, the Union Nationale made an explicit reference to the right to self-determination:

1. FRENCH CANADIANS FORM A NATION

This is a fact that was already recognized in the last century. After more than three hundred years of evolution, this nation has come of age and is able to assume responsibility for its destiny, without wanting to surround itself with barriers, on the contrary.

2. EVERY NATION HAS THE RIGHT TO SELF-DETERMINATION

This implies that it possesses or gives itself the necessary instruments for its development, namely: A national state; A national territory that is its main home; A national language which has primacy over the others¹⁹.

The Union Nationale won a majority of seats in the

June 5th's general election and formed a government that put equality of peoples on the agenda of the constitutional conferences that were to be convened in the following years. The failure of these conferences, however, was not enough for the Union Nationale government to implement an agenda for independence ²⁰.

The second half of the 1960's also saw the consolidation of the independence movement. A few weeks after French President Charles de Gaulle's famous "Vive le Québec libre" speech on July 24, 1967, René Lévesque, Quebec's former Minister of Natural Resources - who was responsible for the nationalization of electricity - left the Quebec Liberal Party. The party rejected his proposal that Quebec become independent while maintaining a form of union with Canada based on the models of the European Economic Community, the Nordic Council and the Benelux countries ²¹.

This departure was followed by the creation of the Mouvement Souveraineté-Association [MSA] on

18 See Daniel JOHNSON, *Égalité ou indépendance*, Montréal, Éditions de la Renaissance, 1965. In this essay, one can read the following: "There are, for nations, as for individuals, fundamental freedoms that cannot be begged for and that cannot be compromised, nor can they be horse-traded. The right to self-determination for the French-Canadian nation is of this order. It is a collective heritage that I consider to be definitively acquired and that I will never agree to put at stake any negotiation" [author's translation]: *id.*, p. 120.

19 This excerpt of the Union nationale's program is reprinted in Jean-Louis ROY, *Les programmes électoraux du Québec*, Montréal, Éditions Léméac, 1971, tome 2, p. 407.

20 On these negotiations, see Edward MCWHINNEY, *Quebec and the Constitution*, Toronto, University of Toronto Press, 1979, *passim*.

21 See René LÉVESQUE, *Un Québec souverain dans une nouvelle Union canadienne*, Montréal, 15 septembre 1967.

November 19, 1967. Benefiting from the momentum created by the holding of the Estates General of French Canada, whose constituent assembly adopted a resolution on the right to self-determination on the first day of the national conference held at the Université de Montréal on November 24, 1967²², René Lévesque undertook negotiations on behalf of the MSA negotiations with the Rassemblement pour l'indépendance nationale (RIN) and the Ralliement national (RN) with a view to a possible merger in December 1967. On January 6, 1968, he published an essay outlining the new political project he wished to put forward with the other members of the pro-independence family, whose merger with the MSA he promoted²³.



This merger was successful and led to the birth of the Parti Québécois. After affirming that the political institutions of the future country should make it possible to reconcile authentic democracy and governmental efficiency and, in relation to other nations, to reconcile

the spirit of independence and the need for open and well-calculated interdependence, the first program of this new political formation described its objectives as follows:

In this perspective, our political objectives are: a peaceful accession to sovereignty; a sufficiently flexible form of association with Canada; a Quebec constitution that ensures an eminent balance between effective government and authentic democracy; regional decentralization accompanied by municipal regroupings; a justice system that is both dynamic and social; a foreign policy that is as independent as possible, accompanied by an intimate and peaceful collaboration with the international society²⁴.

The program further stated that Quebec “will seek recognition by other sovereign states and admission to the UN” and that “to this end, it fulfills the required conditions: a territory, a population, state structures, the *right to self-determination*, acceptance of and respect for the requirements of the UN and of international society”²⁵.

The Parti Québécois entered the National Assembly with seven MNAs in the general election of April 29, 1970, obtaining 23.06% of the votes cast. In the subsequent general election of October 29, 1973, it became the Official Opposition with six MNAs, while receiving 30.22% of the vote. In the general election of November 15, 1976, the Parti Québécois won with the support of 41.37% of voters and by winning 71 of the 110 seats in the National Assembly²⁶.

22 The text of this resolution is reprinted after the text of the speech by François-Albert ANGERS, « Déclaration préliminaire sur le droit à l'autodétermination », [1968] 57 *L'Action nationale* 37, à la p. 42 [en ligne : <http://collections.banq.qc.ca/actionnationale/pdf/1968/02/03/01/1642141968020301.pdf>]. Il se lit comme suit : The Estates General of French Canada, in assembly, HAVING AGREED: that the French-Canadians constitute a people of nearly six million souls, possessing a language, a culture, institutions, a history and a collective will to live, that this people, spread throughout Canada, is concentrated above all in Quebec, that this people has in Quebec a territory and a state whose institutions reflect its culture and mentality, that the life and development of the French-Canadian people are based on the political authority, economic influence and cultural influence of Quebec, AND NOTES that the Charter of the United Nations requires “respect for the principle of equal rights and self-determination of peoples” (Article 1, paragraph 2); AFFIRM THAT: 1° French Canadians constitute a nation. 2° Quebec constitutes the national territory and the fundamental political environment of this nation. 3° The French-Canadian nation has the right to self-determination and to freely choose the political system under which it intends to live [author's translation].

23 See René LÉVESQUE *et al.*, *Option Québec*, Montréal, Les Éditions de l'homme, 1968.

24 See PARTI QUÉBÉCOIS, *La solution : le programme du Parti Québécois*, Montréal, Éditions du Jour, 1970., p. 75 [on line : http://classiques.ugac.ca/collection_documents/parti_quebecois/la_solution/la_solution.html]. The text of subsequent political programs adopted by the Parti Québécois that systematically refer to the right to self-determination are available on the website of the Société du patrimoine politique du Québec at <https://www.archivespolitiquesduquebec.com/programmes>.

25 *Id.*, p. 77 [author's italics].

26 In the months leading up to the November 15, 1976 election, a Committee on the Right to Self-Determination of Quebecers was created and initiated a petition that read as follows: “We, the undersigned, without prejudging the option that the people of Quebec will choose in the exercise of their right to self-determination, ask all Members of Parliament to unite in the name of the people of Quebec so that it may be proclaimed : 1) that the people of Quebec are the holders of rights universally recognized under the principle of equal rights of peoples and their right to self-determination; 2) that only the people of



Election of November 15, 1976 - Victory of the Parti Québécois and its leader René Lévesque

This seizure of power by the Parti Québécois opened the way for an independence initiative based on the right of peoples to self-determination, as set out in the *Parti Québécois Platform*²⁷ and its *1976 Election Platform*²⁸, and which refers to the support of Quebecers through a referendum. It is important to quote the provision of these programs that describe the process of achieving sovereignty:

[...] Accession to independence
 The *right of peoples to self-determination*, that is, the right to choose their own political system, is enshrined in the Charter of the United Nations, which Canada itself signed when it joined the

United Nations, along with more than 130 other countries around the world. International law and custom provide the mechanisms by which peoples can achieve political sovereignty. Moreover, since Quebecers, like their Canadian and American neighbors, live in a democratic regime, it is the people, in this type of regime, who hold the power to decide through the mechanism of voting. It is therefore through this democratic process accepted by all that Quebec, following an election, will achieve its political sovereignty, while maintaining friendly relations with its neighbors and other countries based on the respect of international law.

Quebec have the right to choose the political regime of Quebec. We ask the National Assembly to rule : a) on the nature, scope and technical details of the exercise of the right of the people of Quebec to self-determination; b) that this right be enshrined in the current Constitution of Quebec. This petition was the source of *An Act recognizing the right to self-determination of the people of Quebec* [Bill 194] introduced in the National Assembly by MNA Fabien Roy on June 22, 1978: see *Journal des débats de l'Assemblée nationale du Québec*, 31st Legislature, 3rd Session (December 14, 1976-March 12, 1981), vol. 20, no. 56, p. 2600. This bill, the text of which is reproduced in the appendix 3 to this report, was not adopted and died on the order paper when the 31st legislature was dissolved on March 12, 1981.

27 The full text of this program is available at http://www.poltext.org/sites/poltext.org/files/plateformesV2/Quebec/QC_PL_1975_PQ_fr.pdf.

28 The full text of this program is available at http://www.poltext.org/sites/poltext.org/files/plateformesV2/Quebec/QC_PL_1976_PQ_fr.pdf.

Accordingly, a Parti Québécois government commits to:

1. Immediately set in motion the process of accession to sovereignty by proposing to the National Assembly, shortly after its election, a law authorizing:
 - A to demand from Ottawa the repatriation to Quebec of all powers, except those which the two governments may wish, for purposes of economic association, to entrust to common agencies;
 - B to enter into technical discussions with Ottawa on the orderly transfer of powers in order to achieve this objective
 - C to work out agreements with Canada on such matters as the distribution of assets and debts and the ownership of public property, in accordance with the usual rules of international law.
2. In the event that it should proceed unilaterally, to methodically assume the exercise of all the powers of a sovereign State, ensuring beforehand the support of Quebecers by means of a referendum.
3. Submit to the population a national constitution elaborated by the citizens at the county level and adopted by the people's delegates gathered in a constituent assembly²⁹.

29 *Id.*, p. 252-253 [author's italics].

II

May 20, 1980

The consultation on sovereignty and association: A first referendum on self-determination

To initiate the first major democratic deliberation on the political status of Quebec, the National Assembly was invited to implement the Parti Québécois commitment to “adopt an organic law on referendums, guaranteeing that the options offered are clear and distinct, with unambiguous wording, allowing the expression of genuine choices”³⁰. Inspired by an act passed by the United Kingdom Parliament in preparation for the 1975 referendum on remaining in the European Community [Common Market]³¹, the members of the National Assembly of Quebec adopted the *Referendum Act*³².

After the adoption of this law, the government of René Lévesque endeavoured to define the content of a sovereignty-association project on which it intended to hold a referendum. This project was set out in a White paper that was made public on November 1st 1979. The title of this White paper referred, through the use of the words “equal to equal”, to the principle of the equality of peoples, and stated that “the time has come to choose freely, democratically”³³.

The question to be put to the people of Quebec also contained a reference to “the equality of peoples”. Unveiled on December 20, 1979 and adopted by the National Assembly on March 20, 1980, it was worded as follows:

The Government of Quebec has made public its proposal to negotiate a new agreement with the

rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?³⁴

At the end of a referendum campaign in which Canadian Prime Minister Pierre Elliot Trudeau actively participated and during which he promised Quebecers “change” if they voted NO, the pro-independence camp won 40.44% of the votes, with the NO vote winning 50.56% of the votes cast. At the end of the referendum vote, in which 85.61% of voters took part, René Lévesque took note of the will of the majority and declared on May 20, 1980: “If I have understood correctly, you are telling me: see you next time” [author’s translation].

On June 9, 1980, 20 days after the holding of the referendum and on the occasion of a meeting with the Prime Minister of Canada and the Premiers of the other Canadian provinces intended as a prelude to a new round of constitutional negotiations, Prime

30 *Id.*, p. 255.

31 See *Referendum Act 1975*, United Kingdom Statutes, 1975, c. 33.

32 Consolidated Statutes and Regulations of Quebec [C.S.R.Q.], c. C-64.1. Excerpts of this Act can be found in Appendix 1 of this report.

33 See GOUVERNEMENT DU QUÉBEC, *Québec-Canada : A New Deal. The Québec Government Proposal for a New Partnership Between Equals : Sovereignty-Association*, 1979, Québec, Éditeur officiel, 1979, reprinted in *Quebec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, Québec, Secrétariat aux relations canadiennes, p. 270 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document11_en.pdf]. On this White paper, see André GAULIN, « Le livre blanc sur la souveraineté-association ou le Canada renégocié », [1979] 36 Québec français 17 [on linge : <https://www.erudit.org/en/journals/qf/1979-n36-qf1208689/51331ac.pdf>].

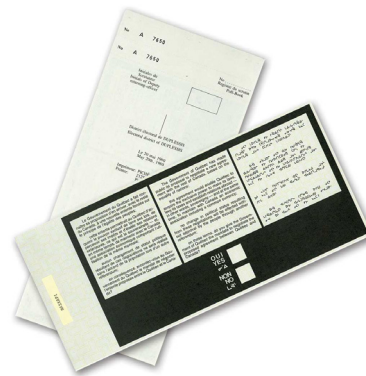
34 In his speech introducing the issue in the National Assembly, Prime Minister René Lévesque recalled that “since its birth, more than 370 years ago, the people of Quebec have never had the opportunity to decide democratically on their future. He added: “[W]hat the government is proposing to Quebecers is to become fully responsible for their community, through a new agreement based on the *fundamental equality of each of the partners* in order to achieve the following twofold objective: To give Quebec the exclusive power to make its own laws and to use its own taxes, as well as the right to participate in the community of nations and, at the same time, to maintain with Canada the close and mutually advantageous ties of an economic association and a monetary union”: See *Journal des débats de l’Assemblée nationale*, 31st legislature, 4th session [March 6, 1979 to June 18, 1980], December 20, 1979 21, no. 85, p. [on line : <http://m.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/31-4/journal-debats/19791220/121849.html>] [author’s italics]

Minister René Lévesque referred to the exercise by the Quebec people of its right to self-determination in these terms:

In the May 20 referendum, Quebecers exercised their *right to self-determination* for the first time. This exercise was done democratically and legally - and it was recognized as such by the rest of Canada since the Prime Minister of Canada and the premiers of several provinces were personally involved. It has also been recognized by the international community, which has taken a keen interest in it.

The *clear recognition of this right* is the most valuable achievement of the Quebec referendum. Whatever the result, it is now undisputed and indisputable that Quebec is a distinct national community that can choose its own constitutional status without outside intervention. Quebecers can decide to remain within Canadian federalism, just as they can democratically decide to leave it if they feel that the system no longer corresponds to their aspirations and needs. *This right to control one's own national destiny is the most fundamental right that the Quebec community has*³⁵.

The referendum defeat did not prevent the Parti Québécois from winning the general election of April 13, 1981. It returned to power for a second term, winning 49.26% of the popular vote and 80 of the 122 seats in the National Assembly. This victory came at a time when constitutional negotiations were in full



Referendum of May 20, 1980 - Ballot

swing and Quebec was seeking to assert its historic claims, including those for recognition of its national character and increased autonomy within the federation.

The constitutional talks, however, led to changes that were not what Quebecers had expected after the failed referendum of May 20, 1980. The talks ended with an agreement between the Prime Minister of Canada and the Premiers of nine Canadian provinces on the content of a resolution to amend the Canadian Constitution and propose a major reform of the Canadian constitutional order. Concluded without the knowledge of the Quebec government on the night of November 4-5, 1981, which has since been called the « The Night of the Long Knives» [« La Nuit des long couteaux »]³⁶, the agreement does not in any way satisfy Quebec's historic demands, particularly those aimed at recognizing its national character and increasing its autonomy within the federation. On the contrary, several elements of the reform reduce such autonomy, notably on the question of Quebec's powers to promote and protect the French language.³⁷

35 See Notes for an intervention by René Lévesque at the First Ministers' Meeting in Ottawa on June 9, 1980, reprinted in *Quebec's Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 33, p. 150 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/ReneLevesques1980_en.pdf] [author's italics].

36 On this dark episode in the history of Canadian democracy and its description by the Prime Minister of Quebec himself, see René LÉVESQUE, *Attendez que je me rappelle*, Montréal, Québec/Amérique, 1986.

37 For an analysis of this reform project, read Eugénie BROUILLET, *La négation de la nation- L'identité culturelle québécoise et le fédéralisme canadien*, Québec, Septentrion, 2005. As early as 1984, the infringement of Quebec's linguistic autonomy was illustrated by the Supreme Court of Canada's decision to strike down the English-language school access provisions of the *Charter of the French Language* as being contrary to section 23 of the new *Canadian Charter of Rights and Freedoms*: see *Quebec [Attorney General] v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66. Subsequent judgments of the Supreme Court will invalidate other provisions of the Charter of the French Language relating to language of signage and language of instruction, as



The May 20 1980 referendum

In the days following this “coup de force” or even “coup d’état”³⁸, the National Assembly adopted a motion recalling the right of Quebec to self-determination:

The National Assembly of Quebec, recalling the right of the people of Quebec to self-determination and exercising its historic right to be a party to and consent to any change in the Constitution of Canada which might affect the rights and powers of Quebec, declares that it cannot accept the proposed patriation of the Constitution unless it meets the following conditions:

1. It shall be recognized that the two founding peoples of Canada are fundamentally equal and that Quebec forms within the Canadian federal system a society distinct in language, culture

and institutions and possessing all the attributes of a distinct national society; [...]³⁹.

The Government of Quebec then sought to have the courts recognize its right to oppose this constitutional reform and prevent its final adoption. However, on two occasions, the Supreme Court of Canada refused to recognize the “veto power” that Quebec believed it had over constitutional amendments affecting it. The judges were of the opinion that the consent of a significant number of provinces was sufficient for the adoption of amendments and that Quebec’s own consent was not required⁴⁰. The Government of Quebec also made representations to the Government and Parliament of the United Kingdom whose interventions were necessary to implement constitutional reform and make the patriation of the Constitution to Canada

evidenced by *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, and *Nguyen v. Quebec (Education, Recreation and Sport)*, [2009] 3 S.C.R. 47.

38 See Antoine ROBITAILLE, « Point chaud - 1982: “Un coup d’État” », *Le Devoir*, 10 avril 2012, p. 1.

39 The full text of this resolution is available online in *Quebec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, Quebec, Secrétariat aux relations canadiennes [on line: <https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie3/Document18.pdf> (*author’s italics*)]. For a commentary on the draft text that was included in this resolution, see Daniel TURP, « De l’opportunité de proclamer le droit à l’autodétermination du peuple québécois », in Daniel TURP, *Le droit de choisir : essais sur le droit du Québec à disposer de lui-même*, Montréal, *supra* note 15, p. 297.

40 See *Reference: Resolution to Amend the Constitution*, [1981] 1 Supreme Court Reports [S.C.R.] 753 and *Reference re: Quebec’s opposition to a resolution to amend the Constitution*, [1982] 2 S.C.R. 793.

effective⁴¹. These efforts were also unsuccessful and the repatriation became a reality with the Proclamation of the coming into force of the *Constitution Act, 1982* on April 17, 1982⁴².

In the years following this unilateral patriation of the Constitution of Canada, the government of René Lévesque used various means to escape the influence of the *Constitution Act, 1982*. Indeed it systematically included in all Quebec legislation a provision designed to exempt them from the application of the new *Canadian Charter of Rights and Freedoms*⁴³.

Following the victory of the Conservative Party of Canada led by Quebecer Brian Mulroney in the September 4, 1984 election and his commitment to “convince the National Assembly to give its assent to the new Canadian constitution with honour and enthusiasm”⁴⁴, René Lévesque invited the Parti Québécois to take “the beautiful risk” [« le beau risque »]⁴⁵. While recalling that sovereignty should remain “the supreme insurance policy of the people”, he therefore

considered engaging Quebec in a new constitutional negotiation and his government formulated a new constitutional proposal on May 17, 1985⁴⁶. In its *Draft Constitutional Accord* [« *Projet d’Accord constitutionnel* »], the government reaffirmed Quebec’s right to self-determination in the following terms:

These proposals, it will be seen, fit into the federal framework of the present Constitution. They are intended to improve it in such a way that the people of Quebec may, as long as they so decide, find in it the most favourable conditions possible for their development. It goes without saying that they in no way alter the inalienable right of people of Quebec to democratic self-determination with regard to its constitutional future⁴⁷.

This proposal made the recognition of the people of Quebec an essential prerequisite for Quebec’s participation in the new constitutional dynamic. It set out the conditions for an agreement, including the recognition of Quebec’s primary responsibility for rights and

41 The repatriation of the Constitution was made possible by the adoption by the Parliament of the United Kingdom of the *Canada Act 1982*, UK Public General Acts 1982, c. 11, the French version of which is set out in Appendix A, and the French version of the *Constitution Act 1982*, Part I of which includes the *Canadian Charter of Rights and Freedoms*, in Appendix B [on line : <https://www.legislation.gov.uk/ukpga/1982/11/contents>].

42 Subsequent research by a Quebec historian will demonstrate the complicity, in violation of the principle of separation of powers, between the judges of the Supreme Court of Canada, the Canadian and British authorities concerning this repatriation: see Frédéric BASTIEN, *La Bataille de Londres - Dessous, secrets et coulisses du rapatriement constitutionnel*, Montréal, Boréal, 2013.

43 See the *Act respecting the Constitution Act, 1982*, R.S.Q., c. L-4.2. Section 4 of that Act is still in force today and provides that “[t]he Government may not authorize the proclamation referred to in paragraph 1 of section 59 of the Constitution Act, 1982 without first obtaining the consent of the National Assembly. This provision thus prevents the Government of Quebec from agreeing to the application of paragraph 1 (a) of section 23 of the *Canadian Charter of Rights and Freedoms*, according to which any person whose mother tongue is English may receive the education of himself and his children in that language”.

44 This excerpt from Brian Mulroney’s “Sept-Îles Speech” of August 6, 1984 is reprinted in René Lévesque’s speech of May 17, 1985 available at <https://www.archivespolitiquesduquebec.com/discours/p-m-du-quebec/rene-levesque/allocution-du-premier-ministre-du-quebec-monsieur-rene-levesque-quebec-le-vendredi-17-mai-1985>.

45 This choice by René Lévesque led to the resignation of several Parti Québécois MNAs who sat as independents. On behalf of the group of independent MNAs grouped in the Rassemblement démocratique pour l’indépendance (RDI), MNA Gilbert Paquette will introduce in the National Assembly on May 15, 1985 *An Act recognizing the right of free disposition of the Quebec people* [Bill 191]: see *Journal des débats de l’Assemblée nationale du Québec*, 32nd legislature, 5th session [May 19, 1981-October 23, 1985], vol. 28, no. 60, p. 3550. In a press release issued the same day under the title “Quebec must be able to decide its political future”, MNA Paquette stated: “In the new perspective in which the Quebec government has placed itself, and given the weak state in which it is undertaking constitutional discussions, the adoption of this bill by the summer would also allow the government to rely on the National Assembly to demand, during the next constitutional talks, that the Canadian constitution recognize the fundamental right of the people of Quebec to the free disposition of the Quebec people. It is a question of adapting the Canadian constitution to the rights of Quebec rather than the other way around and keeping the paths of the future wide open” (the underlining is by the author of the communiqué). This bill has the same title and is identical in content to Bill 194 introduced by MNA Fabien Roy on June 22, 1978: see *supra* note 26 and Appendix 2. Like Fabien Roy’s bill, MP Paquette’s bill was not adopted and died on the Order Paper when the 31st Parliament was dissolved on October 23, 1985.

46 See *Draft Agreement on the Constitution - Proposals by the Government of Quebec*, reprinted in *Quebec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, *supra* note 33, p. 327 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document20_en.pdf] [hereinafter “*Draft Agreement on the Constitution*”].

47 *Id.*, p. 351. In his speech of May 17, 1985, the Premier of Quebec repeated this formula, stating: “Of course, this must be done within the federal framework of the current constitution, but with a view to modifying it in such a way that Quebecers, for as long as they so decide, will find in it the most favourable conditions possible for their development. It goes without saying, therefore, that there is nothing in our proposals that could alter the inalienable right of the people of Quebec to dispose of their national future democratically [on line : <https://www.archivespolitiquesduquebec.com/discours/p-m-du-quebec/rene-levesque/allocution-du-premier-ministre-du-quebec-monsieur-rene-levesque-quebec-le-vendredi-17-mai-1985>].”



Signing of the Proclamation bringing the *Constitution Act, 1982* into force
Pierre Elliott Trudeau, Prime Minister of Canada and Queen Elizabeth II - April 17, 1982

freedoms, changes to the constitutional amendment procedure, as well as the reorganization of powers, reform of the judicial institutions and the need to continue constitutional negotiations⁴⁸.

If René Lévesque was the bearer of this proposal, it is his minister Pierre-Marc Johnson who was tasked with promoting it when he became leader of the Parti Québécois after the resignation of its founder. But in the general election of December 2, 1985, the Liberal Party of Quebec regained power and relegated the Parti Québécois and its new leader to the opposition. With the support of 55.99% of the electorate, the Liberal Party of Quebec won 99 seats and formed the government with the return of Robert Bourassa as Prime Minister. The new leader of the Parti Québécois is elected with 22 other colleagues and obtained 38.69% of the vote⁴⁹.

Hence, between 1976 and 1985, nearly ten years were devoted not only to the quest for independence by the Parti Québécois, but also to the assertion of a right to self-determination. A new government of the Liberal Party of Quebec will attempt to exercise anew this right by initiating a constitutional reform itself.

48 *Id.*, p. 353-373.

49 In his capacity as leader, and not without having recalled in the program adopted at the Xth Convention of the Parti Québécois on June 14, 1987, that “[f]rom natural law to international law, there flows an inalienable and fundamental freedom: the right of the Quebec people to self-determination, which inspires and legitimizes its actions, and which must be asserted with constancy and continuity,” Pierre Marc Johnson proposed to act through a process of “national affirmation”. This is presented as follows: “Quebec, which was on the defensive because of the referendum result, the unilateral patriation of the constitution and the economic crisis, must regain the initiative. For that and to progress towards sovereignty, we propose a firm national affirmation approach, as an instrument of progress and development of the Quebec people. <: see PARTI QUÉBÉCOIS, *Programme 1987*, chapitre 1, articles 4 et 5 [on line : <https://web.archive.org/web/20120823193641/https://d.pq.org/sites/default/files/Programme1987.pdf>].

III

1985-1992

*The Meech Lake Accord and the consultation on
the Charlottetown Consensus Report:*
A second referendum on self-determination

In the inaugural speech read in the Quebec National Assembly on December 16, 1985, the new Quebec government of the Liberal Party of Quebec stated its intention to “complete negotiations with the federal government to accede, on the basis of the conditions already indicated, to the 1982 constitutional charter”⁵⁰. It affirmed its commitment “to developing harmonious and positive relations with the federal government and the other governments of the country, with the vigorous defence of Quebec’s own interests as the dominant theme”⁵¹.

Quebec would thus once again become the defender of a federal structure put in place when the Dominion of Canada was created in 1867⁵². If the principle of autonomy was of the utmost importance to Quebec at the time of the adoption of the *Constitution Act, 1867*, it was because it was seen to allow Quebec to preserve its specificity, particularly in matters of language and culture. Since then, Quebec has fought to maintain such specificity and has resisted federal attempts to diminish the powers of its National Assembly, particularly because of the Supreme Court of Canada’s centralizing approach to the application and interpretation of the division of powers⁵³.

It is worth recalling that even before the Parti Québécois came to power in 1976 multiple conferences were held to discuss constitutional reforms. Successive Quebec governments had submitted proposals to give Quebec more power not only over culture and language, but also over social policy and international

relations. If approved, these constitutional reforms would have given Quebec special status and led to a form of asymmetrical federalism. These negotiations failed because the governments of Canada and the other nine Canadian provinces not only refused to accede to Quebec’s demands but also proposed reforms that would have led to further centralization of power in Ottawa, as evidenced by the failure of the 1967 Confederation Constitutional Conference and Quebec’s refusal to approve the *Victoria Charter* adopted at the 1971 conference⁵⁴.

With respect to the patriation in 1982 of the Constitution of Canada without Quebec’s consent, the new Quebec Liberal Party government made a point of recalling Quebec’s historical rights. It affirmed that the Constitution Act, 1982 could be acceptable to Quebec if certain modifications were made to it, and set out the five conditions for its future adherence to that Act:

Quebec does not object, of course, to the fact that Canada has taken back from London full jurisdiction over its own constitution. What we do object to is that this patriation was used as a pretext for substantially amending the Canadian Constitution without taking into account Quebec’s historical rights. Four years after the proclamation of the Constitution Act, 1982, Quebec, under a new government, has still not adhered to it. It must be said that no Quebec government of any political stripe could sign the Constitution Act, 1982 as it

50 See *Journal des débats de l’Assemblée nationale*, 34th Legislature, 1st Session [December 16, 1985 to March 8, 1988], Vol. 29, No. 1, December 16, 1985 [on line : <http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/33-1/journal-debats/19851216/122661.html>].

51 *Ibid.*

52 Although Canada is a “federal state” or “federation”, it is still sometimes described, but incorrectly, as a confederation: see Benoît PELLETIER, « Le Canada n’est pas une confédération ! », *Journal de Québec*, 3 septembre 2014 [on line : www.journaldequebec.com/2014/09/03/le-canada-nest-pas-une-confederation].

53 For a detailed analysis of this centralizing approach, see Eugénie BROUILLET, « La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada », [2004] 45 *Cahiers de droit* 7.

54 On these various attempts to reform the Constitution of Canada, see Edward MCWHINNEY, *Quebec and the Constitution*, Toronto, University of Toronto Press, 1979 and André TREMBLAY, *La réforme de la Constitution au Canada* Montréal, Éditions Thémis, 1995. Despite the failure of these multilateral constitutional conferences, it is worth noting that the Government of Quebec signed a number of bilateral intergovernmental agreements with the Government of Canada during this period, notably on old age pensions, post-secondary scholarships and immigration: see Johanne POIRIER, « Intergovernmental Agreements in Canada: At the Crossroads between Law and Politics », in Institute of Intergovernmental Relations, Queen’s University, *The State of the Federation 2001-2002*, Montréal-Kingston, McGill-Queen’s University Press, 2003, p. 425.

stands. However, if certain changes were made, it might be acceptable to Quebec [...]

On December 2, 1985, the people of Quebec gave us a clear mandate to carry out our electoral program, which sets out the main conditions that would lead Quebec to adhere to the Constitution Act, 1982. These conditions are:

- explicit recognition of Quebec as a distinct society;
- the guarantee of increased powers in matters of immigration; and;
- limitation of the federal spending power;
- recognition of a veto power;
- Quebec's participation in the appointment of judges to the Supreme Court of Canada⁵⁵.

Negotiations were undertaken and a draft constitutional amendment meeting these five conditions, known as the *Meech Lake Accord*, was approved by Canadian Prime Minister Brian Mulroney, Quebec Premier Robert Bourassa and the Premiers of the other nine Canadian provinces on April 30, 1987⁵⁶. A legal text of the agreement was made public on June 3,

1987 and became the draft *Constitution Amendment, 1987*⁵⁷. Among other things, it contained an interpretive rule “that any interpretation of the Constitution of Canada must be consistent with the recognition that Quebec is a distinct society within Canada and that it is the role of the legislature and government of Quebec to protect and promote the distinct character of Quebec⁵⁸.”

Under the provisions of the *Constitution Act, 1982*, the amendments were subject to the unanimous consent procedure and needed to be approved by resolutions of the Parliament of Canada, the National Assembly of Quebec and the legislative assemblies of the nine other Canadian provinces in order to come into force. This approval needed to be given within a maximum period of three years after the adoption of the first resolution, in this case June 23, 1990, due to the first approval of its resolution by the National Assembly of Quebec on June 23, 1987⁵⁹.

Even before the approval process began, however, the *Meech Lake Accord* was the subject of serious challenges, including from the Liberal Party of Canada and

55 See the text of the speech delivered by Mr. Gil Rémillard, Minister for Canadian Intergovernmental Affairs, on the occasion of the colloquium “Rebuilding the Relationship: Quebec and its Confederation Partners”, Mont-Gabriel, May 9, 1986, reprinted in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 33, p. 157 [on line: https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/GilRemillard1986_en.pdf].

56 For the text of the April 30, 1987 agreement and all documentation related to this agreement, see « Meech Lake Documents », [19992] 37 *McGill Law Journal* 144 [on line: <https://lawjournal.mcgill.ca/wp-content/uploads/2018/09/7600838-SpecialSection.pdf>].

57 The text of the draft *Constitution Amendment, 1987* is reprinted in Henri BRUN, Guy TREMBLAY et Eugénie BROUILLET, *Droit constitutionnel*, 6e éd., Montréal, Éditions Yvon Blais, 2014, p. 1365-1374 and is available on line at <https://www.canada.ca/fr/affaires-intergouvernementales/services/federation/accord-constitutionnel-1987.html>.

58 The wording of section 1 of the draft *Constitution Amendment, 1987* was as follows:

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

2. (1) The Constitution of Canada shall be interpreted in a manner consistent with the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and the recognition that Quebec constitutes within Canada a distinct society

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

On the relationship between the concept of «distinct society» and the right to self-determination, see Daniel TURP, « La portée de la qualification du Québec comme “société distincte” ou “peuple” dans la Constitution du Canada », p. 307 et « Le caractère distinct et le droit à l'autodétermination », dans Daniel TURP, *Le droit de choisir*, supra note 15, p. 307 et 325.

59 For the text of the resolution proposing that “the National Assembly authorize the amendment of the Constitution of Canada by proclamation of His Excellency the Governor General under the Great Seal of Canada and which includes the text of the draft Constitution Amendment, 1987, see *Journal des débats de l'Assemblée nationale*. 33rd Legislature, 1st Session [December 16, 1985 to March 8, 1988], June 23, 1987, Vol. 29, no. 130, pp. 9535-9540 [on line: <http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/33-1/journal-debats/19870623/122969.html>].



Speech to the Quebec National Assembly following the rejection of the Meech Lake Accord
Robert Bourassa - Prime Minister of Québec - June 22, 1990

in particular on the part of its former Prime Minister of Canada Pierre Elliot Trudeau ⁶⁰.

Objections would multiply over the next two years and undermine the agreement. Despite the recommendations of a House of Commons Special Committee chaired by MP Jean Charest ⁶¹ and a First Ministers' Meeting to salvage the accord held on June 3-10, 1990, two provincial legislatures, Manitoba and Newfoundland, did not pass resolutions by the June 23, 1990 deadline to proclaim the *Constitution Amendment, 1987* ⁶².

The failure of the *Meech Lake Accord* gave Premier Robert Bourassa the opportunity to reiterate Québec's right to self-determination by appealing to its freedom and its ability to assume its destiny. In a solemn

declaration before the National Assembly of Quebec on June 22nd 1990, he stated:

So, since 1985, the question is: What does Canada want? ...and we are still waiting for Canada's answer in this regard. Mr. Chairman, English Canada must understand very clearly that, whatever is said or done, Quebec is, today and forever, a distinct society, free and capable of assuming its destiny and its development ⁶³.

The rejection of the *Meech Lake Accord* led to a significant increase in pro-independence sentiment in Quebec, and polls showed support for sovereignty by nearly two-thirds of voters, as the following table shows ⁶⁴ [see next page].

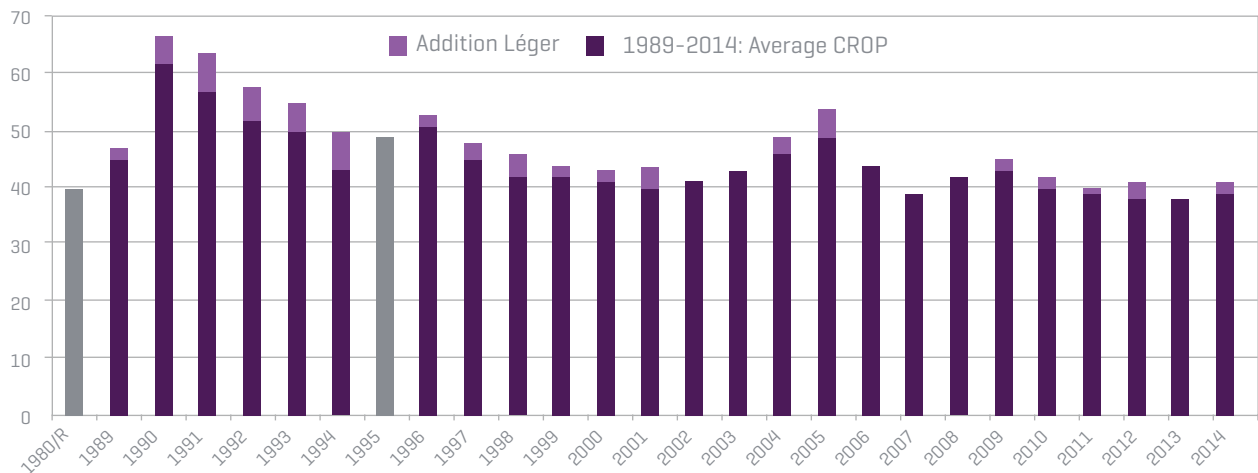
60 See Pierre Elliott TRUDEAU, « L'accord du lac Meech rendra le Canada impotent », *La Presse*, 27 mai 1987, p. A1, published in an English version in the *Toronto Star* the same day under the title « Say Goodbye to the Dream of One Canada » [on line : <https://primarydocuments.ca/say-goodbye-to-the-dream-of-one-canada>].

61 See HOUSE OF COMMONS OF CANADA, Special Committee to Review the Draft Companion Resolution to the Meech Lake Accord, *Report* (Ottawa: Queen's Printer, 1990) and its summary available at http://bilan.usherbrooke.ca/voutes/callisto/dhsp3/lois/Rapport_Charest.html.

62 For a chronology of the Meech Lake Accord negotiations, see "De la signature à l'échec", *Le Devoir*, June 19, 2010 [on line : <https://www.ledevoir.com/politique/canada/291195/de-la-signature-a-l-echec>]. See also Carol ROGERSON and Katherine SWINTON, *Competing Constitutional Visions: the Meech Lake Accord*, Toronto, Carswell, 1988 and Andrew COHEN, *Deal Undone: The Making and Breaking of the Meech Lake Accord*, Toronto, Douglas & McIntyre, 1990.

63 See *Journal des débats de l'Assemblée nationale*, 34th Legislature, 1st Session, [November 28, 1989 to March 18, 1992], Vol. 31, No. 62, June 22, 1990 [on line : <http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/34-1/journal-debats/19900622/63259.html>] [*author's italics*]. In the "Message to the population from the Prime Minister of Quebec following the failure of the Meech Lake Accord, June 23, 1990", Robert Bourassa added: "In short, Quebec has the freedom of its choices. But it must make its choice realistically, calmly and lucidly. As for me, I can assure you that my only guide will be the best interests of the Quebec people": see *Québec's positions in the constitutional and intergovernmental fields, from 1936 to March 2001*, *supra* note 33, p. 184 [on line : <https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie2/RobertBourassa1990-2.pdf>].

64 See Jean-François LISÉE, *L'appui à la souveraineté : état des lieux*, 29 avril 2014 [on line : <https://jflisee.org/lappui-a-la-souverainete-etat-des-lieux>].



Sovereignty Polls 1980-2014 - Annual averages of CROP polls [+ Slight purple when different]
Proportional distribution of undecideds. In 1980 and 1995, the actual referendum vote

To study the options available to Quebec, the National Assembly adopted in 1990 *An Act to establish the Commission on the Political and Constitutional Future of Quebec*⁶⁵. Borrowing from the terminology of Article 1 common found in the *International Covenants on Human Rights*, the first recital of its preamble affirms “that Quebecers are free to determine their own destiny, their political status and their economic, social and cultural development.

Named after its two co-chairs and composed of members of the National Assembly, but also including individuals from the union, business, cooperative, educational, cultural and municipal sectors, as well as three members of the House of Commons of Canada, the Bélanger-Campeau Commission held public hearings in the various regions of Quebec. It also conducts hearings with experts and on specific aspects of the mandate’s subject matter, particularly the social, cultural, demographic and regional development aspects.

Many of the presentations and studies presented by the experts solicited by the Commission dealt with the right to self-determination of Quebec⁶⁶.

The Bélanger-Campeau Commission reported on March 27, 1991⁶⁷ and formulated, in accordance with its order of reference, recommendations on the political and constitutional status of Quebec. Before listing its recommendations, it recalled that Quebec is a modern society with its own identity, presented an analysis of the evolution towards the impasse and proposed two paths to a solution, which it summarizes as follows:

To break the impasse and redefine its constitutional political status, Quebec can only take two paths. In the first path, Quebec would seek to have a redefinition of its status accepted within the constitutional framework of the Canadian federation. This route assumes that its integration

65 Statutes of Quebec [S.Q.], 1990, c. 34 [on line : http://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=86733].

66 See José WOEHLING, *Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec* et Daniel TURP, *Exposé-réponse (Options d’avenir politique et constitutionnel pour le Québec)*, 18 décembre 1990, also available at [1991-1992] 7 *Revue québécoise de droit international* 12 et 141.

67 For the French language version on this report, see COMMISSION SUR L’AVENIR POLITIQUE ET CONSTITUTIONNEL DU QUÉBEC, *Rapport*, 27 mars 1991 [hereinafter *Rapport de la Commission Bélanger-Campeau*] [on line : https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=45126]. For a synthesis of the work of the Bélanger-Campeau Commission, see Alain-G. GAGNON et Daniel LATOUCHE [dir.], *Allaire, Bélanger, Campeau et les autres- Les Québécois s’interrogent sur leur avenir*, Montréal, Québec-Amérique, 1991 [on line : http://classiques.uqac.ca/contemporains/gagnon_alain_g/allaire_belanger_campeau_et_al/allaire_belanger_campeau_et_al.html].



into the political system is maintained, but profoundly reorganized. A second option would be for Quebec to withdraw from the constitutional framework of the Canadian federation, with or without the agreement of the other parts of Canada, with a view to achieving full political sovereignty and becoming a State independent of the Canadian State, open to the establishment of economic ties with the latter ⁶⁸.

In presenting the second option, the Commission addressed the issue of the right to self-determination, without using that term, from the perspective of democratic expression and political legitimacy, stating:

The Canadian Constitution does not mention the right of a province to secede, that is, to withdraw from the federation. The democratic expression of a clear will of the population to become an independent state, combined with Quebec's commitment to respect the principles of the international legal order, would provide the basis for the political legitimacy of Quebec's move towards sovereignty ⁶⁹.

The recommendations of the Bélanger-Campeau Commission consisted of proposing the adoption in the spring of 1991 of a law establishing the process for determining the political and constitutional future of Quebec. In detailing its content, it stated that this law should contain "three sections, namely a preamble, a first part dealing with the holding of a referendum on the sovereignty of Quebec, and a second part dealing with the offer of a new partnership of a constitutional nature" ⁷⁰.

The National Assembly of Quebec acted on these recommendations and adopted on June 20, 1991 *An Act respecting the process for determining the political and constitutional future of Quebec* ⁷¹. As in the law that established the Bélanger-Campeau Commission and in response to its recommendation concerning the content of the preamble, the second recital of this law recalls that "Quebecers are free to assume their own destiny, to determine their political status and to ensure their economic, social and cultural development".

Providing for a referendum on sovereignty and establishing two special parliamentary committees, the first

68 See *Rapport de la Commission Bélanger-Campeau*, p. 52.

69 *Id.*, p. 59.

70 *Id.*, p. 89.

71 S.Q. 1991, c. 34, reprinted in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 33, p. 400 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document25_en.pdf].

Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty and the second Committee to Examine any Offer of a Constitutional Partnership. The first six sections of the Act are worth quoting:

CHAPTER I REFERENDUM ON SOVEREIGNTY

1. The Gouvernement du Quebec shall hold a referendum on the sovereignty of Quebec between 8 June and 22 June 1992 or between 12 October and 26 October 2 1992.

If the results of the referendum are in favour of sovereignty, they constitute a proposal that Quebec acquire the status of a sovereign State one year to the day from the holding of the referendum.

CHAPTER II COMMITTEE TO EXAMINE MATTERS RELATING TO THE ACCESSION OF QUEBEC TO SOVEREIGNTY

2. A special parliamentary committee called the Committee for the Examine Matters Relating to the Accession of Quebec to Sovereignty is hereby established, under the authority of the National Assembly.

3. The order of reference of the Committee is to examine and analyze matters relating to the accession of Quebec to full sovereignty, that is, to a position of the exclusive jurisdiction, through its democratic institutions, to make its own laws and levy taxes in its territory and to act on the international scene for the making agreements and treaties of any kind with other independent States and to

participating in various international organizations, and to make recommendations to the National Assembly in that regard.

A further order of reference of the committee is to examine and analyse any formal offer of economic partnership that may be made by the Government of Canada, and to make recommendations to the National Assembly with regard to the offer.

CHAPTER III COMMITTEE TO EXAMINE ANY OFFER OF A NEW CONSTITUTIONAL PARTNERSHIP

4. A special parliamentary committee called the Committee to Examine any Offer of a New Constitutional Partnership is hereby established, under the authority of the National Assembly.

5. The order of reference of the Committee is to assess any offer of a constitutional partnership made to the Gouvernement du Quebec by the Government of Canada and to make recommendations to the National Assembly with regard to the offer.

6. No offer of a new constitutional partnership made to the Gouvernement du Quebec may be submitted to the assessment of the committee unless it is formally binding on the Government of Canada and the other provinces.

In the following months, the Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty will further the research carried out by the Bélanger-Campeau Commission in preparation for the 1992 referendum. Several studies addressed the issue of Quebec's right to self-determination⁷² and these

72 See Daniel TURP, *[Exposé-réponse] [Processus d'accèsion à la souveraineté]*, dont la première partie porte sur le droit à l'autodétermination, [on line : http://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=46291] and Stephen A. SCOTT, *Autodétermination, sécession, division, légalité : observations* [on line : http://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=46015]. Both texts were updated in 2002 and are available for Daniel Turp's text at <http://www.saic.gouv.qc.ca/documents/institutions-constitution/commission-accession-souverainete/QA-22-%20DanielTurp.pdf> and for the text of Stephen Scott at <http://www.saic.gouv.qc.ca/documents/institutions-constitution/commission-accession-souverainete/QA-13-StephenAScott.pdf>. See also Thomas M. FRANCK, Rosalyn HIGGINS, Alain PELLET, Malcolm N. SHAW et Christian TOMUSCHAT, *L'intégrité territoriale du Québec dans l'hypothèse de l'accèsion à la souveraineté*, 1991 [on line : http://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=46013].

were to be taken into account in the draft report of the committee⁷³. In its section devoted to the attributes of a sovereign Quebec, the draft report focused on the “Quebec people” and stated:

Over the years, Quebecers have become aware that they form a people, a distinct national community. Moreover, a broad consensus has developed about the composition of the Quebec people: all those who have their residence in Quebec are Quebecers. In fact, when Quebecers are called upon to decide on their political and constitutional future, everyone is called upon to vote, regardless of their origin or language. Quebecers form a modern, multi-ethnic community, based on shared values, a common language of communication and participation in community life⁷⁴.

In the discussion of the implications of the implementation of sovereignty, and as in the Bélanger-Campeau Commission report, the question of the right to self-determination was not addressed directly either, but rather from the perspective of the popular will and the democratic tradition:

Again, it is important to note that, even in the event of a constitutional amendment authorizing secession, Quebec’s sovereignty would not be conferred by the Canadian Constitution or by an agreement between Quebec and Canada. Rather, it would be based on the will of the people of Quebec, and only normative acts deriving from

that will would have effect on the territory of Quebec from the day of accession to sovereignty.

Moreover, the long democratic tradition of Canada and Quebec leads one to believe that neither the National Assembly nor the Canadian Parliament would seek to impose on Quebec a constitutional order that would run counter to the will of the people of Quebec⁷⁵.

This report remained in draft form because the Government of Quebec resumed negotiations with the Government of Canada and the governments of the other nine provinces of Canada. Having decided to favour the path of constitutional partnership, and joining in August 1992 discussions undertaken by the Government of Canada with the governments of the nine other Canadian provinces, Premier Robert Bourassa participated in a series of meetings that led to the adoption on August 28 of the *Charlottetown Consensus Report*⁷⁶. The content of this document was based on a report of the Special Joint Committee on the Renewal of Canada, which served as a starting point for discussions between representatives of the governments of Canada, the nine other provinces, the three territories and the Aboriginal peoples, in the absence of Quebec. This report included not only proposed amendments to the Constitution of Canada to meet the same conditions set out by the Bourassa government in the wake of the rejection of the *Meech Lake Accord*, but also those governing the status of aboriginal peoples in Canada and providing for a major reform of the Senate of Canada.

73 For the French language version on this draft report, see COMMISSION D’ÉTUDE DES QUESTIONS AFFÉRENTES À L’ACCESSION DU QUÉBEC À LA SOUVERAINETÉ, *Projet de rapport - Document de travail*, 16 septembre 1992 [on line : http://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=46311].

74 *Id.*, p. 10.

75 *Id.*, p. 70-71.

76 The full text of the report is available in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, *supra* note 33, [on line : <https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie3/Document27.pdf>]. On Prime Minister’s Robert Bourassa’s shift, see the two essays of Jean-François LISÉE, *Le tricheur - Robert Bourassa et les Québécois - 1990-1991*, Montréal, Boréal, 1994 and *Le naufrageur - Robert Bourassa et les Québécois 1991-1992*, Montréal, Boréal 1994 an abridged and revised version of which was published under the title *Le petit tricheur*, Montréal, Éditions Québec, Amérique, 2012.

Unlike the draft *Constitution Amendment 1987*, which put the *Meech Lake Accord* into legal terms, the draft *Constitution Amendment, 1992*⁷⁷ did not result in resolutions being presented to the Parliament of Canada, to the National Assembly of Quebec or to the legislatures of the other nine Canadian provinces. Instead, it was the *Charlottetown Consensus Report* that was referred to in the following question to be answered by the peoples of Quebec and Canada in the referenda to be held on October 26 1992: «Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?».

To allow Quebecers to answer this question, the National Assembly adopted on September 8, 1992 *An Act to amend the Act respecting the process for determining the political and constitutional future of Quebec*⁷⁸. The adoption of this act was made necessary for the purpose of setting aside the referendum from sovereignty as originally intended. Section 1 of the Act, as amended, would state that “[t]he Gouvernement du Québec shall, not later than October 26, 1992, hold a referendum on the agreement concerning a new constitutional partnership resulting from the meetings on the constitution held in August 1992”.

While the people of nine Canadian provinces and three territories were asked to vote on October 26, 1992 in a consultation held pursuant to an Act of the Parliament of Canada, called the *Referendum Act*⁷⁹. It is interesting to note that the referendum held in Quebec on the same day of October 26, 1992, was held under its own *Referendum Act*. In two separate referendum votes, 57.6% of Quebec voters did not accept that the Constitution of Canada be renewed on the basis of the agreement reached on August 28, 1992, while for the rest of Canada the no vote reached 54.3%⁸⁰.

This issue of a separate referendum in Quebec was a further illustration of Quebec’s right to freely determine its political status by applying its own legislation in the popular consultation. The choice of Quebecers not to consent on October 26, 1992 to the constitutional changes proposed in the *Charlottetown Consensus Report* was ultimately another act of self-determination by the people of Quebec.

After the rejection of these two attempts at constitutional reform, the conditions were met for a return in force of the independence movement. In fact, the rejection of the *Meech Lake Accord* and the

77 The full text of this draft is available at <http://bilan.usherbrooke.ca/voutes/callisto/dhsp3/lois/Chalottetown.html>. The interpretive rule referring to Quebec as a distinct society now read as follows: 2.

[1] The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following characteristics:

- (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
- (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada;
- (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
- (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
- (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
- (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
- (g) Canadians are committed to the equality of female and male persons; and
- (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

[2] The role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

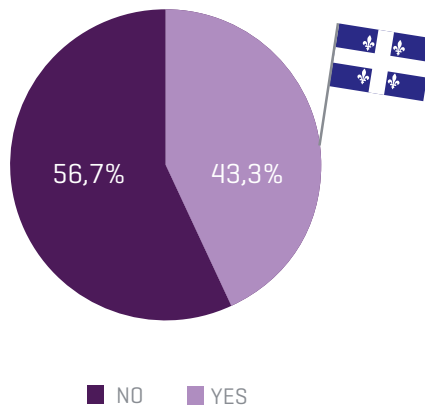
[3] Nothing in this section derogates from the powers, rights or privileges of the Parliament. On the scope of this new clause including a reference to Quebec as a distinct society, see Henri BRUN, Ghislain OTIS, Jacques-Yvan MORIN, Daniel TURP, José WOEHLING, Daniel PROULX, William SCHABAS et Pierre PATENAUDE, « La clause relative à la société distincte du Rapport du consensus sur la Constitution : un recul pour le Québec », dans Alain-G. GAGNON et Daniel TURP, *Référendum, 26 octobre 1992- Les objections de 20 spécialistes aux offres fédérales*, Montréal, Éditions Saint-Martin, 1992, p. 53.

78 S.Q. 1992, c. 47, reprinted in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001 supra* note 33, p. 438 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document28_en.pdf].

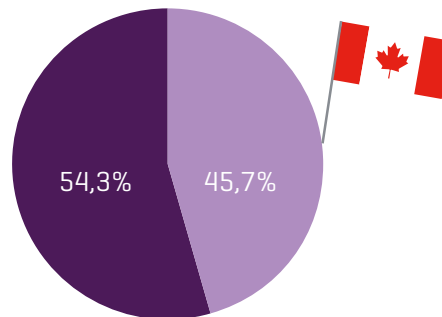
79 Statutes of Canada [S.C.], 1992, c. 30, Revised Statutes of Canada [R.S.C.], c. R-4.7 [on line : <https://laws-lois.justice.gc.ca/eng/acts/r-4.7/>].

80 On the *Charlottetown Consensus Report* and the October 26, 1992 referenda, see Kenneth MCROBERTS and Patrick MONAHAN (eds), *The Charlottetown Accord, the Referendum and the Future of Canada*, Toronto, University of Toronto Press, 1993.

Referendum results on the Charlottetown Accord in 1992 Quebec



Referendum results on the Charlottetown Accord in 1992 Canada



Charlottetown Consensus Report led to the creation and rise of a new pro-independence party on the federal scene. With the mission of promoting Quebec's independence in the Parliament of Canada, it was led by former Conservative minister Lucien Bouchard. The Bloc Québécois elected its first member that same year in the person of Gilles Duceppe, who later became its leader. The Bloc Québécois distinguished itself in the 1993 Canadian general election by winning 49.3% of the votes cast. It won 54 of Quebec's 75 seats in the House of Commons of Canada, which allowed it to form the Official Opposition.

This result was a precursor to another victory for the independence movement, that of the Parti Québécois led by Jacques Parizeau, who had a majority of members elected to the National Assembly of Quebec in the election of September 12, 1994, with a commitment to hold a new referendum on independence within the first year of his mandate.



Creation of the Bloc Québécois in 1991

IV

October 30, 1995

The consultation on sovereignty and partnership: A third referendum on self-determination

After recalling in his inaugural speech that “the greatest political decision a people can make is to become sovereign”⁸¹, Prime Minister Jacques Parizeau initiated another process aimed at making Quebec a full-fledged member of the international community by presenting to the National Assembly on December 6, 1994 a Draft Bill under the title *An Act respecting the sovereignty of Quebec*⁸². This Draft Bill included provisions relating to sovereignty, economic association, the new constitution, territory, citizenship, currency, treaties, international alliances, continuity of laws and the sharing of property and debts. The question to which Quebecers would be invited to respond was included in the Draft Bill and read as follows: “Are you in favour of the Act passed by the National Assembly declaring the sovereignty of Quebec? YES or NO”.

At the same time, the Government of Quebec launched a consultation process in which he invited citizens to contribute to the drafting of a preamble that would take the form of a declaration of sovereignty, Premier Parizeau had a series of orders-in-council adopted establishing 16 regional commissions, a Youth Commission and a Seniors Commission whose mandate was to gather testimony and examine briefs on the content of the draft bill. This consultation took place in January and February and 1995, followed by the work of the National Commission on the Future of Quebec with the mandate to synthesize all of the consultations and make recommendations regarding the content of the definite version of *An Act respecting the sovereignty of Quebec*.

In a report sent to Prime Minister Jacques Parizeau on April 19, 1995, the National Commission boasted

that it had been the largest public consultation in Quebec’s history⁸³. During this consultation, described as a “winter of the word”, 55,000 citizens attended the work of the commissions, 435 public activities were organized, 55,000 citizens attended the work of the commissions, 435 public activities were organized, 5,500 briefs were presented and 5,000 oral and written interventions were heard and read by 288 commissioners, the majority of whom came from civil society.

With respect to the right to self-determination, the National Commission’s report indicates that the draft preamble or “Declaration of Sovereignty” generated a great deal of interest and the subject of several proposals for content and wording. Among these proposals was that such a declaration should first proclaim the legitimate exercise of Quebec’s right to self-determination⁸⁴. The Commission also noted that “[t]he main objectives suggested by the stakeholders in a declaration of sovereignty are: the affirmation of the existence of the Quebec people, of its right to self-determination and of its will to occupy from now on its full place within the community of sovereign countries”⁸⁵.

In its recommendations, the National Commission on the Future of Quebec did not propose the inclusion an explicit reference to the right to self-determination in the proposed *Act respecting the Sovereignty of Quebec*. It did however suggest including as an element “the expression of our will to be masters of our own destiny, to live in a territory in America that is our own, different and distinct because of our language, our history, our customs, our way of being, acting and thinking.”⁸⁶.

81 See Discours inaugural, 29 novembre 1994 [on line : <https://www.archivespolitiquesduquebec.com/discours/p-m-du-quebec/jacques-parizeau/discours-du-trone-quebec-29-novembre-1994>].

82 The full text of the Draft Bill is available on line at <https://www.solon.org/misc/referendum-bill.html>. For a detailed analysis of this Draft Bill, see Daniel TURP, *L’Avant-projet de loi souveraineté : texte annoté*, Montréal, 1995, Éditions Yvon Blais, 1995.

83 See COMMISSION NATIONALE SUR L’AVENIR DU QUÉBEC, *Rapport*, Québec, 19 avril 1995 [on line : https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=67091].

84 *Id.*, p. 17 [author’s italics]

85 *Ibid.* [author’s italics]

86 *Id.*, p. 56.



Jacques Parizeau, Lucien Bouchard and Mario Dumont
Signature of the Agreement between the Parti Québécois, the Bloc Québécois and the Action démocratique du Québec - June 12, 1995

On the sidelines of the National Commission’s work, the three Quebec political parties that had agreed to campaign for the YES side, the Parti Québécois, the Action démocratique du Québec and the Bloc Québécois, concluded an agreement on June 12, 1995. They agreed on “a common project that will be submitted to the referendum, in order to respond, in a decisive, open manner, to the long quest of Quebecers to control their destiny”⁸⁷.

Following a review of the recommendations of the National Commission on the Future of Quebec and inspired by the June 12, 1995 Agreement, the Government of Quebec transformed its the Draft Bill “An act respecting the Sovereignty of Quebec” into an “*Act respecting the Future of Quebec* [Bill 1]”⁸⁸. In a preamble entitled “Declaration of Sovereignty”, the government made a point of affirming the freedom of the people of Quebec to choose their future by including a declaration to the effect that “We, the people of Quebec, declare that we are free to choose our future”. An explicit reference to self-determination is also

included in Bill 1 in the form of the heading of its section 1:

SELF-DETERMINATION

1. The National Assembly is authorized, within the scope of this Act, to proclaim the sovereignty of Quebec. The proclamation must be preceded by a formal offer of economic and political partnership with Canada.

The referendum question submitted to the electors during the popular consultation that will take place on October 30, 1995 was inspired by this article and will be worded as follows:

Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?⁸⁹

87 See *l'Entente entre le Parti Québécois, le Bloc Québécois et l'Action démocratique du Québec*, 12 juin 1995 [on line : https://biblio.republiquelibre.org/Loi-sur_l%27avenir_du_Qu%C3%A9bec#ANNEXE]. [author's italics]

88 The full text of *An Act respecting the future of Quebec* [Bill 1], which includes the June 12, 1995 Agreement in its schedule, is available in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 33, p. 443 [on line https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document30_en.pdf] and reprinted in appendix 3 of this report.

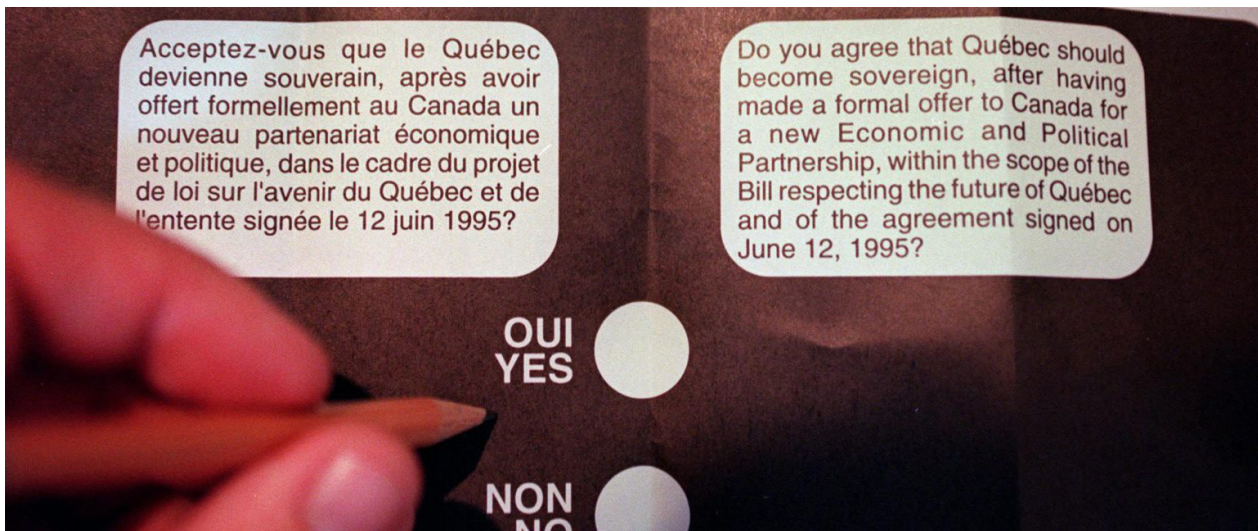
89 The motion of the National Assembly containing this question was passed on September 20, 1995 and is available in *Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 33, p. 465 [on line : https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document31_en.pdf].

If the wording of the 1995 question does not include a reference to the “equality of peoples” and, implicitly, to Quebec’s right to self-determination as was the case the referendum held on May 20, 1980, the question of the exercise of that right and of Quebec’s right to proclaim sovereignty, through its National Assembly and, if necessary, unilaterally, was provided for in Bill 1, and would become the subject of judicial debate.

This debate resulted from an attempt by lawyer Guy Bertrand to prevent the holding of the referendum by way of an injunction, arguing that “the conduct of the Government of Quebec, as well as its actions with respect to the draft bill on sovereignty and the agreement of June 12, 1995, constitute a veritable parliamentary and constitutional coup d’état, a fraud on the Canadian Constitution and a misappropriation of powers which will have the consequence of violating

and denying the rights and freedoms [...] of all Quebec taxpayers. However, this recourse was rejected by the Superior Court of Quebec on September 8, 1995 because the referendum as envisaged, by its consultative nature, “does not offend the legal or constitutional order”⁹⁰. The court also stated that “political forces cannot be prevented from being exercised” and that “it must be understood that the population wishes to express itself”⁹¹.

This judicial debate continued with the filing, seven days before the holding of the referendum, i.e. on October 23, 1995, of a new recourse seeking a declaration that the Act respecting the future of Quebec, as well as any other legislative or governmental measure aimed at modifying the status of Quebec as a Canadian province, was ultra vires the jurisdiction of the National Assembly and that it infringed on the rights



Referendum of 30 October 1995- Question

The June 12, 1995 agreement referred to in the question is the one reached between the three Quebec political parties that agreed to campaign for the YES side, namely the Parti Québécois, the Action démocratique du Québec and the Bloc Québécois. While the agreement does not make explicit reference to Quebec’s right to self-determination, it does state that the three parties agree “on a common project to be submitted to a referendum, in order to respond, in a decisive, open manner, to the long quest of Quebecers to control their destiny” (emphasis added). The full text of the agreement is contained in the schedule of *An Act respecting the Future of Quebec* (Bill 1) and is available in *Quebec’s Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*, supra note 34, p. [on line : <https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/parte3/Document30.pdf>].

90 See *Bertrand c. Bégin*, [1995] Recueil de jurisprudence du Québec [R.J.Q.] 2514.

91 *Id.*, p. 2515. However, the court agreed with the plaintiff in part by issuing a judicial declaration in the following terms: “Declares that Bill 1, entitled An Act respecting the future of Quebec, introduced by Premier Jacques Parizeau in the National Assembly on September 7, 1995, to give the National Assembly of Quebec the power to proclaim Quebec a sovereign country without having to follow the amendment procedure provided for in Part V [ss. 38 to 49 of the Constitution Act, 1982, constitutes a serious threat to the applicant’s rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms, particularly sections 2, 3, 6, 7, 15 and 24 paragraph 1”: *id.*, p. 2516.



Referendum of 30 October 1995 - Posters YES camp

guaranteed by the *Canadian Charter of Rights and Freedoms*, except in the case of an amendment to the Constitution of Canada in accordance with Part V of the *Constitution Act, 1982*⁹². However, there was no hearing of this appeal before the referendum was held. The question of Quebec's right to self-determination was not ultimately a major issue in the referendum campaign.

On October 30, 1995, 93.52% of the people registered as voters cast their ballots in the referendum. The NO side won with a majority of 50.58% of the valid votes cast, while the YES side won 49.42% of the valid votes cast. Barely 1.16% of the votes, or 54,288 votes out of the 4,671,008 votes cast, separated the two camps, with the representatives of the YES camp bowing to the defeat of their option and accepting the democratic choice of Quebecers⁹³.

However, the opponents of independence continued their judicial guerrilla warfare. On January 3, 1996,

lawyer Guy Bertrand presented an amended version of his motion for declaratory judgment and permanent injunction and filed a second motion for interlocutory judgment. In it, he contested the "government's strategy of proceeding unilaterally with the separation of Quebec from the rest of Canada, bypassing the Canadian Constitution. Yet, the Attorney General of Quebec, being of the opinion that "the process of Quebec's accession to sovereignty is essentially a fundamental democratic process which finds its sanction in public international law and that it was a matter which does not fall within the jurisdiction of the courts, filed a motion to dismiss the appeals in the Bertrand and Singh cases on April 12 and 30, 1996 respectively.

In response to the Attorney General of Canada's request to intervene in the Bertrand case, case and at the initiative of the new Prime Minister of Quebec, Lucien Bouchard, who had succeeded Jacques Parizeau on January 29, 1996, the National Assembly of Quebec

92 See *Singh c. Procureur général du Québec*, Requête pour jugement déclaratoire, Cour supérieure du Québec, District de Montréal, no 500-05-11275-953, 23 octobre 1995.

93 The study of *An Act respecting the future of Quebec* [Bill 1] did not continue in the National Assembly and Bill 1 died on the Order Paper with the dissolution of the 35th Legislature on October 21, 1998.

adopted a resolution reaffirming Quebec's right to self-determination. The resolution read as follows:

That the National Assembly reaffirms that the people of Quebec are free to assume their own destiny, to determine their political status without hindrance and to ensure their economic, social and cultural development ⁹⁴.

In a judgment of August 30, 1996, the Superior Court of Quebec dismissed the Attorney General of Quebec's motion to dismiss. It recalled that the adoption by the National Assembly of the motion of May 22, 1996 supported its proposal that the independence project was still alive and that the controversy as to the right to unilateral secession under international law that Quebec could avail itself of led to the conclusion that Quebec's situation in this regard was far from clear and defined. The Court formulated three questions which they felt deserved a judicial response:

- Is the right to self-determination synonymous with the right to secession?
- Can Quebec unilaterally secede from Canada?
- Is the process of Quebec's accession to sovereignty sanctioned by international law?
- Does international law take precedence over domestic law? ⁹⁵

In response to this judgment, the Government of Quebec announced on September 4, 1996 that it would no longer take part in any legal proceedings relating to any steps leading to Quebec sovereignty. On September 26, 1996, the Government of Canada announced its intention to refer the questions raised by the Superior Court in its judgment of August 18, 1996, to the Supreme Court of Canada for an opinion, as permitted by the statute establishing that court ⁹⁶. The Government of Quebec will reiterate its position that the process of achieving sovereignty for Quebec is essentially a political matter, but this will not prevent Canada's highest court from formulating an opinion that will prove to be of paramount importance on the issue of Quebec's right to self-determination.

94 See *Journal des débats de l'Assemblée nationale*, 35th Legislature, 2nd session, vol. 35, no. 24, 22 mai 1996, p. 1268 [on line : <https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie3/Document32.pdf>].

95 *Ibid.*

96 *Supreme Court Act*, R.S.C., c. S-26, art. 53 [2].

V

1998-2000

The Reference re secession of Quebec and the
Clarity Act: The expression of Self-determination
and the Right to Pursue Secession



Supreme Court of Canada Building Ottawa, Ontario, Canada

The legal debate on Quebec's right to self-determination will continue before the Supreme Court of Canada. The nine judges of the Court will be asked to answer the following three questions:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to affect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?⁹⁷

Thus, the Supreme Court of Canada was hence called upon to formulate an opinion on the scope of both constitutional and international law in relation to "unilateral secession". These questions would circumscribe the debate to the sole question of the right to proceed "unilaterally" with the secession of Quebec from Canada. These questions were considered by Professor Alain Pellet, as an "overly obvious attempt at political manipulation"⁹⁸.

The Supreme Court of Canada refused to answer these highly loaded questions. If the Court answered by NO, it would deny Quebec's right to become an independent

97 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, § 2 [on line: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>] [hereinafter « *Québec Secession Reference* »]. Excerpts of this reference are reprinted in Appendix 4 of this report.

98 See Alain PELLET, *Opinion juridique sur certaines questions de droit international soulevées par le renvoi sur la sécession du Québec*, p. 45 [on line: <http://www.alainpellet.eu/Documents/PELLET%20-%201992%20-%20L'int%C3%A9grit%C3%A9%20territoriale%20du%20Qu%C3%A9bec.pdf>].

and sovereign State. Yet, based on the Constitution of Canada, it formulated answers that would irrevocably lead to the conclusion that Quebec had the right to choose its political status, including the right to sovereignty and independence ⁹⁹.

In response to the first question and based on constitutional principles, the Supreme Court affirmed the existence of a “right to pursue secession” for Quebec, while also affirming an obligation to negotiate for Canada. The Court was unanimous in stating that:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. 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. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties

to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed. [...] ¹⁰⁰.

However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of

99 On international law, the Court will affirm the following: « In summary, the international law 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. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable 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: see *Quebec Secession Reference*, § 138. For an analysis of the reference from an international law perspective, see Geneviève DUFOUR et Alexandre MORIN, « Le Renvoi relatif à la sécession du Québec : critique du traitement que fait la Cour Suprême du droit international », [1999] 12.2 *Revue québécoise de droit international* 175 [on line : https://www.sqdi.org/wp-content/uploads/12.2_-_dufour-morin.pdf] and Daniel TURP, « Le Québec et le droit international », in Gilbert GUILLAUME [dir.], *La vie internationale et le droit*, Paris, Éditions Hermann, 2017, p. 179 [on line: http://danielturpqc.org/upload/2018/Turp_-_La_Quebec_et_le_droit_international_Paris_Hermann_2017_p_179-214.pdf].

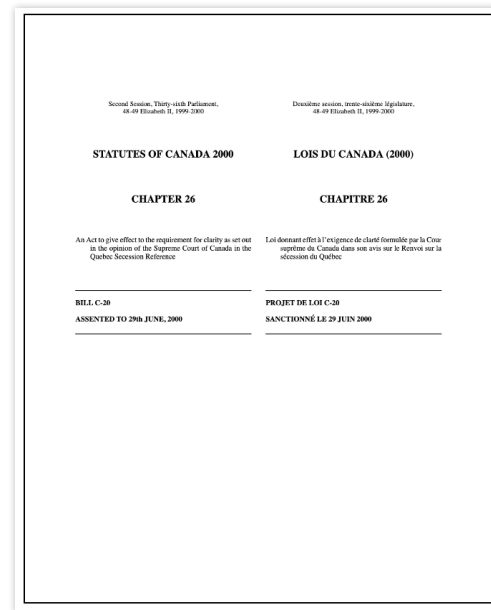
100 *Id.*, § 88.

others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec ¹⁰¹.

Clearly, the opinion of the Supreme Court of Canada did not please the Government of Canada. Deprived of the legal argument it sought, the Government of Canada would later attempt to neutralize Quebec’s right to pursue secession by having the Parliament of Canada pass *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* ¹⁰².

While the *Clarity Act* recognizes that Quebec has a right of secession ¹⁰³, a careful reading of the Act reveals that it imposes on the Government of Canada a “duty not to negotiate” and defines the circumstances in which the government “shall not enter into negotiations with respect to the terms and conditions under which a province may cease to be a part of Canada” ¹⁰⁴. Such an obligation not to negotiate is attached to a new procedure whereby the House of Commons is given the power to determine, by resolution, whether a referendum question and majority meet the clarity requirements of the law. This procedure carries with it the seeds of an implicit denial of Quebec’s right to pursue secession, even though the Supreme Court of Canada held that the constitutional principles of federalism and democracy did so and which the duty to negotiate should give effect to ¹⁰⁵.

Indeed, in examining the provisions of the *Clarity Act*, one cannot help but notice that they appear to be intended to erect obstacles to those who wish to propose that Quebec achieve sovereignty and independence and to deny the right of Quebec to pursue secession.



101 *Id.*, § 92. For a comment on the opinion of the Supreme Court of Canada, see Patrick DUMBERRY, « Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada », in Marcelo KOHEN (ed.), *Secession : International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 416.

102 Statutes of Canada [S.C.] 2000, c. 26, Revised Statutes of Canada [R.S.C.], c. C-31.8 [on line: <https://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html>]. The short title of this Act in French is *Loi de clarification*, but it is better known in Quebec and Canada as the *Loi sur la clarté*, in English the *Clarity Act*. The full text of the *Clarity Act* is reprinted in Appendix 5 of this report.

103 For example, art. 3 [1] of the *Clarity Act* recognizes a right to secede, subject to the obligation to negotiate, as it provides that « it is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally », being thus understood that such a right exists if it is not exercised unilaterally.

104 *Id.*, art. 1 [6] et 2 [4].

105 On this question of the powers of the House of Commons of Canada, see Patrick TAILLON, « De la clarté à l’arbitraire : le contrôle de la question et des résultats référendaire par le Parlement canadien », [2014] 20 *Revista d’estudis autonòmics i federals* 13 [on line: <https://www.raco.cat/index.php/REAF/article/view/283090>].

VI

2000

The Quebec Fundamental Rights Act:
A Legislative codification of the right
to self-determination

Evidently based on the wording of sections of bills introduced in 1978¹⁰⁶ and 1985¹⁰⁷, the Government of Quebec responded to the *Clarity Act* by having the National Assembly adopt *An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State*¹⁰⁸. Described as a true charter of political rights for the people of Quebec¹⁰⁹, the *Quebec Fundamental Rights Act* does not hesitate to affirm Quebec's right to choose its own political and constitutional future. This Act is to be seen as a legislative codification of Quebec's right to self-determination, as evidenced by its first three sections:

CHAPTER I THE QUEBEC PEOPLE

- 1.** The right of the Quebec people to self-determination is founded in fact and in law. The Quebec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
- 2.** The Quebec people has the inalienable right to freely decide the political regime and legal status of Quebec.
- 3.** The Quebec 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 Quebec. No condition or mode of exercise of that right, in particular the consultation of the Quebec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.

The *Quebec Fundamental Rights Act* reflects a clear desire to affirm the very existence of the Quebec people and to declare their right to self-determination. Article 1 states that the Quebec people have "rights" by virtue of the principle of equal rights of peoples and their right to self-determination. We note that the language used is that of the *United Nations Charter* and that several rights seem to derive from these principles and rights. One of the rights that appears to be derived from this reference and which is enshrined in section 2 of the Act is the "inalienable right" to "freely choose the political system and legal status of Quebec". This latter terminology is similar to, but not identical in all respects to, the terminology used in Article 1 common to both *International Covenants on Human Rights*, according to which peoples "freely determine their political status and freely pursue their economic, social and cultural development". It is further specified that the determination of the modalities for the exercise of this right is made "through political institutions of its own" and "alone".

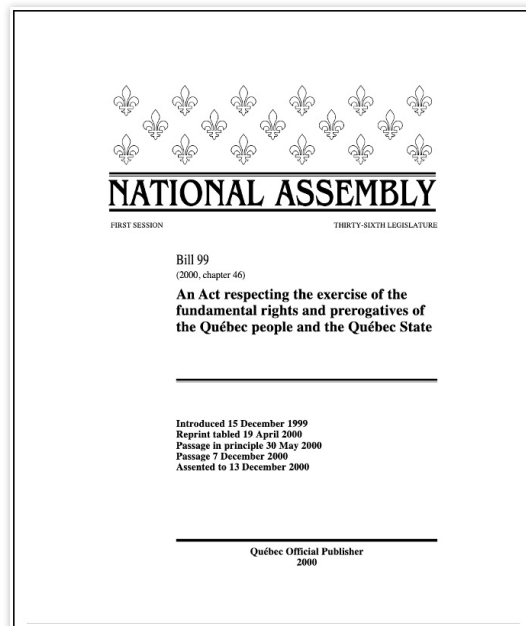
Taken together, these three articles are firstly a response to the requirements and conditions that Canada seems to want to impose on Quebec in order for it to exercise its democratic right to pursue secession. Secondly, it is a challenge to the authority conferred by the *Clarity Act* on the House of Commons of Canada, as well as on the other political actors identified in the Act, which could be seen to infringe on Quebec's right to determine "through its own political institutions, [...] alone the mode of exercise of its right to choose the political regime and legal status of Quebec".

106 See *supra* note 26.

107 See *supra* note 46.

108 S.Q. 2000, c. 46, C.S.R.Q., c. E- 20.2 [on line : <http://legisquebec.gouv.qc.ca/fr/ShowDoc/cs/E-20.2>] [hereinafter "*Quebec Fundamental Rights Act*"]. The full text of this act is reprinted in appendix 6 of this report.

109 This characterization is that of Quebec Prime Minister Lucien Bouchard who, during the debate on the adoption of the *Quebec Fundamental Rights Act* on December 7, 2000, recalled the existence of the right to self-determination on several occasions and said of this future law that "it is therefore more than a simple law" and "has more in common with a charter of political rights of the people of Quebec": see *Journal des débats de l'Assemblée nationale*, 7 décembre 2000, vol. 36, no. 149 [on line : <http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/36-1/journal-debats/20001207/9425.html>].



The *Quebec Fundamental Rights Act* makes a final reference to the right of the Quebec people to self-determination in Article 13, which reads as follows:

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 Quebec people to determine its own future.

The importance of this section cannot be overlooked as it constitutes a further challenge to the *Clarity Act* and the right it appears to have conferred on the House of Commons and the Government of Canada to limit the scope of Quebec's right to pursue secession from Quebec and thereby frustrate the democratic will of the Quebec people to self-determination.

The provisions of the *Quebec Fundamental Rights Act* highlight the fact that it is on a collision course with the *Clarity Act*. While the *Clarity Act* implicitly defines the manner in which Quebec's right to choose its political system and legal status is to be exercised, the *Quebec Fundamental Rights Act* asserts that this is the sole responsibility of Quebec.

The *Quebec Fundamental Rights Act* was almost immediately the subject of a constitutional challenge. On April 9 2021, more than 20 years after its adoption, the judgment has confirmed its constitutionality of this law and recognized Quebec's right to self-determination.

VIII

2001-2021

Henderson v. Attorney General of Québec:
The legal recognition of the right
to self-determination

The beginning of the 21st century saw the birth of several pro-independence political parties in Quebec. Were born first, in 2002, the Union des forces progressistes (UFP) and then, in 2004, Option citoyenne. These two parties merged in 2006 to create Québec solidaire. A new political party was also created in 2011 under the name Option nationale. The latter was absorbed by Québec solidaire in 2017. Québec solidaire elected its first MNA in 2008, won two seats in 2012 and three in 2014. In its 2018 electoral platform, Québec solidaire referred to Quebec’s “right to decide:” “Like all peoples of the world, the people of Quebec are sovereign.”

1. So that the people of Quebec can assert their right to decide their future, Québec solidaire will launch a constituent assembly process as soon as it comes to power.
2. The Constituent Assembly will be elected and will have as its mandate to draw up a draft constitution for an independent Quebec. This project will be submitted to the population by a referendum ¹¹⁰.



While the *Clarity Act* continued to be opposed in Quebec ¹¹¹, between 2001 and 2021 attention turned to the *Quebec Fundamental Rights Act* which became the subject of a constitutional challenge. Thus, on May 9, 2001, just a few months after the Act came into force, Kevin Henderson, the leader of the Equality Party, a new political party led by English-speaking Quebecers opposed to independence, filed an application for declaratory judgment on behalf of himself and his party to have several provisions of the *Quebec Fundamental Rights Act* declared unconstitutional ¹¹².

This action gave rise to multiple interlocutory decisions, including a motion to dismiss filed by the Attorney General of Quebec ¹¹³. On appeal from a judgment of the Quebec Superior Court dated August 16, 2002 ¹¹⁴, the Quebec Court of Appeal granted the motion to dismiss in part on August 30, 2007, thereby authorizing the Quebec Superior Court to rule on the conclusions seeking to have sections 1, 2, 3, 4, 5 and 13 of the Act declared *ultra vires*, absolutely null and void, and without any force or effect ¹¹⁵.

As an impleaded party in this case, the Government of Canada participated in the proceedings and filed a Declaration of Intervention on October 16, 2013 in which it invited the Court to give a mitigated interpretation to sections 1 to 5 and 13 of the Quebec Fundamental Rights Act or to declare them beyond the juris-

110 See QUÉBEC SOLIDAIRE, *Plateforme 2018*, p. 42 [on line : <https://cdn.quebecsolidaire.net/QS-Plateforme-F%CC%81lectorale.pdf>] [*les italiques sont de nous*]. In the 2018 general election, Québec solidaire won 10 seats, a number equal to that of the Parti Québécois. The Parti Québécois was however credited with a higher number of votes than Québec solidaire and became the second largest opposition group. With the resignation of a Parti Québécois MNA, Québec solidaire took away the Parti Québécois’ status as the second largest opposition group in the National Assembly: see Patricia CLOUTIER, « Le PQ perd son titre de deuxième groupe d’opposition au profit de QS », *Le Soleil*, 20 mars 2019 [on line : <https://www.lesoleil.com/actualite/politique/le-pq-perd-son-titre-de-deuxieme-groupe-dopposition-au-profit-de-qs-e6d99cbb8a86841641e2a58d32ea66e3>].

111 In his inaugural speech on March 6, 2001, the new Prime Minister of Quebec, Bernard Landry, stated the following : “The government, with the support of the other parties in this Assembly, has reiterated and will continue to reiterate that the Clarity Act is illegitimate and that it cannot reduce the powers, authority, sovereignty and legitimacy of the National Assembly, nor can it force the democratic will of the Quebec people to determine their own future”: see *Journal des débats de l’Assemblée nationale*, 36^e législature, 2^e session [22 mars 2001 au 12 mars 2003], 22 mars 2001, vol. 36, no. 1 [on line : http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/36-2/journal-debats/20010322/9443.html#_Toc509989645].

112 The text of the original motion for declaratory judgment is available at <https://ssjb.com/files/uploads/2017/04/2001-05-09-Henderson-Reguete-introductive-dinstance-initiale-1.pdf> and all the documentation related to this case, compiled by Maxime Laporte who who acted as attorney for the Société Saint-Jean-Baptiste [see *infra* note 114] is available at <https://ssjb.com/loi99-1/#2001>.

113 *Quebec [Attorney General] c. Henderson*, 2001 CanLII 38417 [QCCA] [on line : <https://www.canlii.org/fr/qc/qcca/doc/2001/2001canlii38417/2001canlii38417.html>].

114 *Henderson c. Attorney General for Quebec*, 2002 CanLII 527 [QC CS] [on line : <https://www.canlii.org/fr/qc/qccs/doc/2002/2002canlii527/2002canlii527.html>].

115 *Henderson c. Attorney General for Quebec*, 2007 QCCA 1138 [on line : <https://www.sqrc.gouv.qc.ca/affaires-intergouvernementales/institutions-constitution/dossiers-judiciaires/documents/loi-99-cour-appel-2007-rjq-2174.pdf>].

diction of the Quebec legislature and inoperative¹¹⁶.

In a “reaffirmation of the fundamental principles inherent in Quebec society and democracy”, the Quebec Minister for Canadian Intergovernmental Affairs, Francophonie and Sovereign Governance, Alexandre Cloutier, reacted to the Government of Canada’s participation in the proceedings by recalling the right of the Quebec people to self-determination:

Quebec governments, both sovereigntist and federalist, have defended and applied these principles, notably in three referenda, in 1980, 1992 and 1995. Need we remind you that the rules we are talking about here were in force at the time of the Charlottetown referendum, which dealt with the renewal of federalism? So these principles are not partisan. They do not have to be characterized as sovereigntist or federalist. They simply reaffirm the fundamental right of the Quebec people to freely determine their own future, nothing more, nothing less. Let us recall here, in this place that symbolizes Quebec democracy, that these fundamental principles that are ours originate from the birth of a people and a state that predates the Canadian Constitution by more than two centuries. Our nation, against the winds and tides of history, has been able to bear these immanent principles in various forms, of which the law under attack today is the most contemporary expression.

Today, therefore, it is the foundation of our institutions that is being called into question by the

federal government, because that is what it is all about. This is nothing less than an attempt to deny our history, our freedom to determine our future as a nation. By wanting to give its own interpretation of our collective rights, the federal government is in clear contradiction with the recognition of the Quebec nation. The federal government is thus attacking principles that unite Quebecers and appeal to all political currents.

The Quebec government will spare no effort to defend the collective rights of Quebecers and the fundamental principles that underpin Quebec democracy. Faced with this new attack on freedom, we can only measure the accuracy of René Lévesque’s statement: “There is a time when quiet courage and daring become for a people, at key moments in its existence, the only form of prudence that is appropriate.”

We therefore solemnly ask the federal government to withdraw from its desire to put an end to and abolish the law on fundamental rights¹¹⁷.

At the invitation of Quebec’s Prime Minister Pauline Marois, the National Assembly adopted a resolution unanimously reaffirming these principles in the following terms:

That the National Assembly of Quebec unanimously reaffirm and proclaim the fundamental principles set out in the Act respecting the exercise of the fundamental rights and prerogatives

116 The text of the « Declaration of intervention » of the Government of Canada is available at <https://ssjb.com/files/uploads/2017/04/2013-10-16-PG-Canada-Acte-d'intervention.pdf>. On this intervention of the Government of Canada, see Radio-Canada, « Souveraineté : Ottawa s’attaque à la règle du 50 % plus une voix », 19 octobre 2013 [on line : <https://ici.radio-canada.ca/nouvelle/637501/ottawa-conteste-loi-99>]. For an in-depth analysis of the argument presented- and later rejected - by the Attorney General of Canada, see Anthony BEAUSÉJOUR et Daniel TURP, *Le droit du Québec à l’autodétermination et la constitution du Canada : une évaluation des arguments du Canada dans l’affaire Henderson*, Note n° 2, Montréal, Institut de recherche sur l’autodétermination des peuples et les indépendances nationales, 2019 [on line : http://danielturpqc.org/upload/2019/IRAI-Note_2-Le_droit_a_lautodetermination_2019.pdf], reprinted under the same title in [2019] 53 *Revue juridique Thémis de l’Université de Montréal* 269 [on line : http://danielturpqc.org/upload/2020/Beausejour_et_Turp_Affaire_Henderson_et_Loi_99_2019_53_RJTUM_366-394.pdf].

117 See *Journal des débats de l’Assemblée nationale* 40e législature, 1re session [30 octobre 2012 au 5 mars 2014], 23 octobre 2013, 23 octobre 2013, p. 5076-5077 [on line : http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/40-1/journal-debats/20131023/98991.html#_Toc370390259].

of the people of Quebec and of the State of Quebec;

That the National Assembly reaffirms that Quebecers have the right to choose their future and to decide their own political status;

That the National Assembly reaffirms that when Quebecers are consulted by referendum held under the Referendum Act, the democratic rule then applicable is that of an absolute majority, namely 50% of the votes declared valid plus one vote;

That the National Assembly reaffirms that only the National Assembly of Quebec has the power and capacity to set the terms and conditions for holding a referendum in accordance with the Referendum Act, including the wording of the referendum question;

That the National Assembly reaffirms that no Parliament or government may reduce the powers, authority, sovereignty and legitimacy of the National Assembly, nor compel the democratic will of the people of Quebec to determine their own future;

That the National Assembly condemns the intrusion of the Government of Canada into Quebec democracy by its desire to have the contested provisions of the Act respecting the exercise of the fundamental rights and prerogatives of the people of Quebec and the State of Quebec invalidated;

That the National Assembly demands that the Government of Canada refrain from intervening and challenging the Act respecting the exercise of fundamental rights and prerogatives of the people of Quebec and the State of Quebec before the Superior Court of Quebec¹¹⁸.

The Government of Canada will not acquiesce to the request of the National Assembly. It will participate in the proceedings, as will the Société Saint-Jean-Baptiste de Montréal, a civil society organization wishing to present arguments in defence of the constitutionality of the *Quebec Fundamental Rights Act* and which will be allowed to intervene as a friend of the court¹¹⁹.

In an April 18, 2018 ruling, the Superior Court concluded that the claims that sections 1, 2, 3, 4, 5 and 13 of the *Quebec Fundamental Rights Act* are constitutionally valid¹²⁰. In a comprehensive judgment, Justice Claude Dallaire stated the following:

We find ... nothing in Bill 99 that runs counter to the statements in the Supreme Court's 1998 Advisory Opinion on the Secession of Quebec that would suggest that Quebec does not intend to negotiate its way out if a favourable vote is taken for secession. We also see nothing in Bill 99 that would lead to anarchy or revolution, as the petitioner fears, and is tired of the threat that has hung over Quebec's future for too long. In adopting Bill 99, did the legislator wish to clarify any ambiguity as to the role played by all the actors covered by the content of this Act? In our view, no. In our view, there has never been any ambiguity about the role played by each of them in the history of the Canadian federation. No one

118 See *Journal des débats de l'Assemblée nationale*, 40e législature, 1re session [30 octobre 2012 au 5 mars 2014], 23 octobre 2013, vol. 43, n° 82, p. 5080 [on line : http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/40-1/journal-debats/20131023/98991.html#_Toc370390264].

119 First rejected by the Quebec Superior Court in a judgment issued on September 1, 2016, the text of which is available at <https://ssjb.com/files/uploads/2017/04/2016-09-01-CS-décision-interlocutoire-sur-requête-en-intervention.pdf>, the motion will be granted by the Quebec Court of Appeal on January 27, 2017 : see *Société St-Jean-Baptiste de Montréal c. Henderson*, 2017 QCCA 179 [on line : <https://www.canlii.org/fr/qc/qcca/doc/2017/2017qcca179/2017qcca179.html>].

120 See *Henderson c. Procureur général du Québec*, 2018 QCCS 1586 [on line : <http://t.soquij.ca/q3H5P>].

has questioned that the people of Quebec have always elected their representatives, that those representatives derive their legitimacy from the fact that the people place power in their hands, that the elected representatives are the ones who carry out the business of the province, and that they represent the legitimate authority for whatever causes the people ask them to defend. Was it then for the purpose of looking ahead to an eventual process of determining the future of Quebec? We do not believe so. And what is essential to the disposition of the dispute is that the National Assembly had the constitutional jurisdiction to pass all the sections of Bill 99. After this lengthy exercise, the true character of Bill 99, that is, the objective[s] it seeks to accomplish, reveals nothing twisted, hidden, unhealthy, or illegal, so that no intervention by the Superior Court of Quebec is required ¹²¹.

This decision was appealed and in a judgment of April 9, 2021, the Quebec Court of Appeal will confirm, as did the Superior Court, the constitutional validity of the articles of the *Quebec Fundamental Rights Act* and in particular those that affirm Quebec's right to self-determination ¹²². In rejecting the submissions of the appellants and the Attorney General of Canada, and speaking for a unanimous three-judge panel, Mr. Justice Robert Mainville clearly wished to emphasize that Quebec is not a province like others, and he did so in the following terms:

That Quebec is a Canadian province is an indisputable juridical fact, and a judicial declaration to that effect would serve no specific legal purpose. Given its legal futility, it might, instead,

lead to uncertainty as to its purpose and legal effect. It would also almost certainly exacerbate the serious tensions regarding Quebec's status within the Canadian confederation, including its status as a "distinct society" or "distinct nation" put forth by the Government of Quebec and a number of other political actors, and endorsed in 2006 by a resolution of the Canadian Parliament, as well as the shift towards an asymmetrical federalism favoured by some. With all due respect for the contrary opinion, Quebec is not a province like others. This is an indisputable sociological and political fact. Among other things, Quebec is the hearth and home of the French language and culture in North America and its legal regime based on the civil law differs markedly from those of its partners and neighbours. The purpose of these observations is not to negate or diminish the significant and important special characteristics of the other provinces of Canada, but rather to prevent Quebec's own significant and indisputable characteristics from being eclipsed or eliminated from the legal discourse. That said, the specific legal effects of these characteristics are not the subject of this appeal and it would be inappropriate for the Court to opine in any way on these matters in this appeal, whether directly or indirectly.¹²³

121 *Id.*, 572-579.

122 *Henderson c. Attorney General for Quebec*, 2021 QCCA 565, p. 21 [on line : <https://courdappelduquebec.ca/jugements/details/henderson-c-procureur-general-du-quebec>] [hereinafter « *Henderson 2021 QCCA* »]. Excerpts of this judgment are reprinted in appendix 7 of this report. On the this judgment, read Robert DUTRISAC, « Les droits du peuple québécois confirmés », *Le Devoir*, 13 avril 2021, p. A-6 [on line : <https://www.ledevoir.com/opinion/editoriaux/598687/loi-99-les-droits-du-peuple-quebecois-confirmes>] and André BINETTE, « La Cour d'appel a validé la loi 99 », *L'Aut' Journal*, 13 avril 2021 [on line <https://lautjournal.info/20210413/la-cour-dappel-valide-la-loi-99>].

123 *Henderson 2021 QCCA*, p. 37, § 104.



In attempting to recall the conclusions of the Supreme Court of Canada's opinion in its *Reference re Secession of Quebec* and refusing to accept the arguments of the appellant and the Attorney General of Canada¹²⁴, the Quebec Court of Appeal affirmed that the conclusion of the litigation is limited to the dismissal of the judicial recourse and that the Quebec Prerogatives Act remains in force and effect. [...] ¹²⁵

The judgment of the Quebec Court of Appeal thus recognized the constitutional validity and the affirmation that the people of Quebec can, in fact and in law, dispose of themselves and that they are the holders of rights universally recognized by virtue of the principle of the equality of rights of peoples and their right to self-determination contained in the Act respecting the fundamental rights of Quebec.

The appellant's decision not to bring this judgment before the Supreme Court of Canada make it final and definitive. It thus puts an end to a legal offensive whose objective was to bring the courts to deny Quebec's right to self-determination, which the judges of Quebec and Canada, in the end, refused to do¹²⁶.

124 It should be noted that the Court of Appeal did not go back on the statements it had made in an earlier judgment of May 9, 2006 concerning a request for access to all documents relating to the October 30, 1995 referendum, according to which "[t]he Constitution also requires, should a majority of Canadian citizens domiciled in Quebec vote in favour of Quebec's withdrawal from the Canadian federation, that the Government of Quebec enter into negotiations with the rest of Canada on the amendments to the Constitution required to give effect to the popular will [*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217]. S.C. 217). Only if such negotiations are unsuccessful can the Parliament of Quebec choose to make a unilateral declaration of independence that is valid within the meaning of the Constitution and that would thereby bind the political institutions of the rest of Canada [*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217] : see *Alliance Quebec et al. c. Directeur général des élections du Québec*, 2006 QCCA 651, § 29 [on line : <http://t.soquij.ca/o6YLf>].

125 See *Henderson 2021 QCCA*, p. 41 § 147.

126 See on this matter Mylène CRÊTE, « La loi sur l'autodétermination du Québec est constitutionnelle », *Le Devoir*, 10 avril 2021, p. A-3 [on line : <https://www.ledevoir.com/politique/quebec/598542/la-loi-99-sur-l-autodetermination-du-quebec-validee-par-la-cour-d-appel>].

CONCLUSION

Over the past seven decades, Quebec has made a point of asserting its right to self-determination and that of the Quebec people to self-determination. It has succeeded in exercising this right, and three referenda, including two on independence, have enabled it to consult its population on its political status and the means to enable it to freely ensure its economic, social and cultural development. Quebec has also been able to rely on the Supreme Court of Canada to enshrine its “right to pursue secession” and on the Court of Appeal of Quebec to recognize the constitutional validity of its right to self-determination.

However, there appear to be obstacles in the way of Quebec exercising its right to self-determination. For example, the Clarity Act, which is still in force, could come into play if a future Quebec government initiates a new sovereignty process and the National Assembly approves a question inviting Quebec voters to answer a question on independence. It is possible that the Canadian House of Commons could decide to rule on the issue of the clarity of the question and majority, as authorized by the *Clarity Act*. It could conclude that a referendum question is not clear or that the results of a referendum do not show that a clear majority of the people of Quebec have declared that they want Quebec to cease to be part of Canada.

Such conclusions could be inconsistent with those of the Quebec National Assembly. If the Quebec National Assembly approves a question in accordance with the Referendum Act, that question is the one that Quebecers would answer in the referendum vote, regardless of the conclusion of the Canadian House of Commons regarding its clarity. With respect to the clarity

of the majority, the Quebec Fundamental Rights Act states in section 4 that “[w]here the people of Quebec are consulted by a referendum held under the Referendum Act, the winning option is the one that obtains a majority of the votes declared valid, namely fifty percent of those votes plus one vote. With such a majority of 50% + 1, would the House of Commons consider that a clear majority of the people of Quebec had declared that they wanted Quebec to cease to be part of Canada? If not, this would be a real conflict, which Quebec has anticipated by inserting in the Fundamental Rights Act section 13, which provides that “no other Parliament or government may reduce the powers, authority, sovereignty and legitimacy of the National Assembly or compel the democratic will of the people of Quebec to determine their own future”.

The courts could be called upon to arbitrate such a conflict if the Quebec government relied on section 13 of the *Quebec Fundamental Rights Act* to ensure the exercise of the right of self-determination of the people of Quebec, which is affirmed in that same Act. In its judgment of April 9, 2021, the Quebec Court of Appeal raised the possibility of judicial review of the constitutionality of that Act if it were to be the source of a declaration of sovereignty, even in the case of a refusal by the Government of Canada to negotiate with Quebec based on the findings of the House of Commons of Canada on the clarity of the question or of the majority. In the context of such a review, the Court suggests that “while the Clarification Act and the Quebec [Fundamental Rights] Act must be reconciled with each other by the courts, since they are both part of Quebec’s substantive law, there may be circumstances where such reconciliation is impossible.”¹²⁷

¹²⁷ See *Henderson 2021 QCCA*, p. 40 § 116.

The impossibility of such conciliation could lead the courts to consider whether or not the obligation to negotiate referred to by the Supreme Court of Canada in its Reference on the Secession of Quebec has been respected, or it could simply reaffirm the Court's views on the significant international repercussions of a refusal to negotiate, particularly in terms of international recognition:

To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the

negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane. [...] ¹²⁸

While the possibility of a refusal to negotiate by Canada on the basis of the *Clarity Act* in the event of a referendum in favour of Quebec's independence cannot be ruled out, there is reason to believe that the democratic principle, which has proven to be the source of the "right to pursue secession" that the Supreme Court enshrined in the *Quebec Secession Reference*, would prevail. In this regard, it is worth recalling a statement by the then federal Minister of Justice and Attorney General of Canada, Allan Rock:

Leading political figures in all our provinces and the Canadian public have long agreed that the country will not remain united against the clearly expressed will of Quebecers. Our government agrees with this position. This thinking stems in part from our traditions of tolerance and mutual respect, but it also exists because we know instinctively that the very quality and functioning

128 See *Quebec Secession Reference*, § 103. The Supreme Court of Canada further elaborated on the issue of international recognition in its opinion, stating: "142. [...] Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession": see also § 143 et 144. On this question, see Daniel TURP, « La reconnaissance internationale dans le *Renvoi relatif à la sécession du Québec* de la Cour suprême du Canada », in Daniel TURP, *Le droit de choisir*, *supra* note 15, p. 653 and in its English version under the title « International Recognition in the Supreme Court of Canada's Quebec Reference », [1998] 35 *Canadian Yearbook of International Law* 335.

of our democracy requires the broad consent of all Canadians.¹²⁹

If the democratic principle and the quality and functioning of democracy translate into recognition, why should it be any different beyond the borders of Canada and Quebec? All peoples who aspire to self-determination could remind the governments of the states of which they are a part that their right to decide is also based on the democratic principle, which is enshrined in many constitutions around the world. This principle provides a solid basis for other peoples, including the peoples of Europe whose right to choose is promoted by the European Free Alliance, to invoke the democratic principle to empower themselves. In her victory speech in the Scottish election of May 6, 2021, First Minister Nicola Sturgeon reiterated the importance of the democratic principle when she stated that “there is simply no democratic justification whatsoever for [U.K. Prime Minister] Boris Johnson or anyone else seeking to block the right of the people of Scotland to choose our future”¹³⁰.

Would it not be appropriate to point out in this regard that the *Treaty on European Union*¹³¹ refers in its preamble to democracy and the democratic nature of the institutions and that Article 2 states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, and that these values are common to the Member States in a society

characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men? Could one not think that the democratic principle is one of the “general principles” resulting from the constitutional traditions common to the member States and that it could be invoked before the Court of Justice of the European Union to have the peoples of Europe recognized, as the Supreme Court of Canada did for Quebec, as having a right to self-determination, including a “right to pursue secession”, the respect of which the European Union could guarantee and ensure?¹³²

While waiting for such recognition, the peoples of Europe should affirm, as they have done and will continue to do, their right to self-determination and give themselves the means to act, drawing inspiration from those that Quebec has put in place to exercise its right to self-determination and to make such exercise, to use a beautiful formula of Ernest Renan, “a plebiscite of every day” [« un plébiscite de tous les jours »].¹³³

129 CANADA, *Debates of the House of Commons*, 35th Legislature, 2nd session, 26 September 1996 [on line: <https://www.ourcommons.ca/DocumentViewer/en/35-2/house/sitting-75/hansard>].

130 See “SNP Election Win : Johnson sets up summit as Sturgeon pledges second referendum”, *The Guardian*, 8 May 2021 [on line : <https://www.theguardian.com/uk-news/2021/may/08/nicola-sturgeon-second-independence-referendum-snp-scottish-elections-holyrood>]. See also AGENCE FRANCE PRESSE, « Victoire des indépendantistes qui exigent un référendum d’autodétermination », *La Presse*, 8 mai 2021 [on line : <https://www.lapresse.ca/international/europe/2021-05-08/elections-en-ecosse/victoire-des-independantistes-qui-exigent-un-referendum-d-autodetermination.php>] and Pauline FROISSART, « Un bras de fer se dessine entre Londres et Édimbourg », *La Presse*, 9 mai 2021 [on line : <https://www.lapresse.ca/international/europe/2021-05-09/referendum-en-ecosse/un-bras-de-fer-se-dessine-entre-londres-et-edimbourg.php>].

131 The consolidated version of the treaty is available on line at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e-6da6.0002.02/DOC_1&format=pdf].

132 See on this matter Nicolas LEVRAT, *The Right to National Self-determination within the EU: a Legal Investigation*, Euborders Working Paper 8 September 2017 [on line: https://www.dcu.ie/sites/default/files/law_and_government/levrat.pdf].

133 See Ernest RENAN, *Qu’est-ce qu’une nation?*, Paris, Calman-Lévy, 1882, p. 28.

APPENDICES



Appendice 1

Referendum Act [Excerpts] [1977]

Appendice 2

Act to Recognize the Right of Self-determination of the People of Quebec
[Bills 191 and 194] [1978 et 1985]

Appendice 3

Act respecting the Future of Quebec [Bill 1] [1995]

Appendice 4

Reference Re Secession of Quebec [Excerpts] [1998]

Appendice 5

Clarity Act [2000]

Appendice 6

*Act Respecting the Exercise of the Fundamental Rights and Prerogatives
of the Quebec people and the Québec State* [2000]

Appendice 7

Henderson c. Attorney General of Québec [Excerpts] [2021]

Referendum Act

[Excerpts]

Statutes of Quebec [S.Q.] 1978 c. 6, Consolidated Statutes and Regulations of Quebec [C.S.R.Q.], c. C-64.1 [On line: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-64.1>]

CHAPTER III

SUBJECT OF THE REFERENDUM

7. The Government may order that the electors be consulted by referendum
 - a) on a question approved by the National Assembly in accordance with sections 8 and 9, or
 - b) on a bill adopted by the National Assembly in accordance with section 10.

As soon as the National Assembly is informed of the question or bill contemplated in the first paragraph, the Secretary General of the National Assembly shall notify the chief electoral officer thereof in writing.

8. On a motion of the Prime Minister, the National Assembly may adopt the text of a question which is to be the subject of a referendum. The debate on this motion is business having precedence over any other question, except the debate on the Opening Speech of the session.
9. During debate of the motion contemplated in section 8, a member may propose a motion of amendment or sub-amendment, but the latter motion does not restrict the right of another member to introduce a similar motion, or to address the substantive motion and the motions

of amendment or sub-amendment at the same time. The rule that a member may speak only once does not apply. Upon 35 hours of debate, the President of the National Assembly, after conferring with the house leaders of the parliamentary groups, must put the motions of amendment or sub-amendment and the substantive motion to the vote, in such order as he may determine.

10. A bill adopted by the National Assembly cannot be submitted to a referendum unless it contains, at the time of being tabled, a provision to that effect, as well as the text of the question submitted for the referendum.

This bill cannot be presented for assent until it has been submitted to the electors by way of a referendum.

11. A bill submitted to a referendum may be assented to after the prorogation of the session during which it was adopted, provided that it be before the dissolution of the Legislature which voted its adoption.
12. There shall not be, during the same Legislature, more than one referendum on the same subject or on a subject which, in the opinion of the Conseil du référendum, is substantially similar to the former subject.

CHAPTER IV

REFERENDUM WRIT

13. The holding of a referendum is instituted by a writ of the Government addressed to the chief electoral officer. This writ enjoins him to hold a referendum on the date fixed therein.

The chief electoral officer shall send a copy of the writ to the returning officer of each electoral division, and the returning officer must comply with it.

14. No writ instituting the holding of a referendum may be issued before the eighteenth day following the day on which the National Assembly was informed of the question or bill contemplated in section 7.
15. From the time a writ instituting the holding of a general election is issued, every writ instituting the holding of a referendum ceases to have effect and no writ may be issued before the general election is held.

CHAPTER VIII

THE REFERENDUM CAMPAIGN

DIVISION I

NATIONAL COMMITTEES

22. Upon the adoption of the text of a question or of a bill that is to be submitted to the referendum by the National Assembly, the secretary general of the Assembly must inform the chief electoral officer of it, in writing.

He shall also send to each member of the National Assembly a notice to the effect that the latter may, within five days after the adoption of the question or of the bill, register with the chief electoral officer in favour of one of the options submitted to the referendum.

23. All the members of the National Assembly who, within five days after the adoption of a question or of a bill that is to be submitted to the referendum, register with the chief electoral officer for one of the options, shall form the provisional committee in favour of such option.

Where, at the end of the period provided for in the first paragraph, no member of the National Assembly has registered in favour of one of the options, the chief electoral officer may invite not less than three nor more than twenty electors to form the provisional committee in favour of such option.

Such electors must be chosen from among the persons publicly identified with such option.

The chief electoral officer shall, with the least possible delay, call a meeting of each provisional committee at the place, day and time he indicates. At such meeting, the members of each provisional committee shall adopt the by-laws to govern the national committee in favour of such option and appoint the chairman thereof.

24. The by-laws governing a national committee may determine any matter relating to its proper operation, including the name under which it is to be known and the manner in which it is to be established.

Such by-laws may also provide for the setting up of local authorities of this committee in each electoral division, provided that each of these authorities is authorized by the chairman of the national committee.

These by-laws must furthermore provide for the affiliation to the committee of groups which are favourable to the same option and see to the establishment of the norms, conditions and formalities governing the affiliation and financing of these groups.

- 24.1. Any application for affiliation to a national committee must be made within seven days after the adoption of the by-laws of the national committee.

The national committee must decide the application within seven days after the application is made.

25. The resolution of a provisional committee appointing the chairman of a national committee and that adopting the by-laws thereof must be certified by the signature of the majority of the members of such provisional committee. They shall take effect when they are forwarded to the chief electoral officer. They shall be replaced or amended only in accordance with the same procedure.

DIVISION II
THE RIGHT TO INFORMATION

26. Not later than ten days before the holding of a poll, the chief electoral officer must send the electors a single booklet explaining each of the options submitted to the referendum, wherein the text is established by each national committee, respectively. Equal space, as fixed by the chief electoral officer, must be given in this booklet to each option.

APPENDIX 2

Bill 194

An Act to recognize the right of the people of Quebec to self-determination

22 June 1978
M. FABIEN ROY

WHEREAS, the people of Quebec, as a distinct community, has its own characteristics and a historical continuity rooted in the territory of Quebec, over which it exercises a right of possession through its Government and Legislature

Whereas the Legislature has the power to adopt laws in order to amend the Constitution of Quebec;

Whereas the members of the National Assembly of Quebec are elected through universal suffrage by the people of Quebec;

Whereas the National Assembly of Quebec derives its legitimacy from the people of Quebec and constitutes the only legislative institution under its control;

Therefore, Her Majesty, with the advice and consent of the National Assembly of Quebec, enacts as follows

CHAPTER I GENERAL PROVISIONS

1. The people of Quebec is composed of:
 - a) persons born and domiciled in Quebec;
 - b) Canadian citizens resident in Quebec.
2. Birth and residence in Quebec are established in conformity with the Civil Code.

Bill 194

An Act to recognize the right to self-determination of the people of Quebec

15 May 1985
Introduced by par Mr. GILBERT PAQUETTE

WHEREAS, the people of Quebec, as a distinct community, has its own characteristics and a historical continuity rooted in the territory of Quebec, over which it exercises a right of possession through its Government and Legislature

Whereas the Legislature has the power to adopt laws in order to amend the Constitution of Quebec;

Whereas the members of the National Assembly of Quebec are elected through universal suffrage by the people of Quebec;

Whereas the National Assembly of Quebec derives its legitimacy from the people of Quebec and constitutes the only legislative institution under its control;

Therefore, Her Majesty, with the advice and consent of the National Assembly of Quebec, enacts as follows

CHAPTER I GENERAL PROVISIONS

1. The people of Quebec is composed of:
 - a) persons born and domiciled in Quebec;
 - b) Canadian citizens resident in Quebec.
2. Birth and residence in Quebec are established in conformity with the Civil Code.

3. The legislative authority of the Government of Quebec draws its legitimacy from the possession of its territory and from the will of its inhabitants; that will is expressed in elections by universal suffrage held by secret ballot or by an equivalent procedure ensuring freedom of vote.

3. The legislative authority of the Government of Quebec derives its legitimacy from the possession of its territory and from the will of the people who reside there; this will is expressed through universal suffrage and by secret ballot or through an equivalent process guaranteeing such freedom.

CHAPTER II
POLITICAL RIGHTS AND FREEDOMS OF THE PEOPLE
OF Quebec

4. The people of Quebec is, in fact as well as of right, entitled of rights universally recognized by virtue of the principle of the equality of rights of peoples and their right to self-determination.
5. The people of Quebec possesses, alone, have the right to choose its political regime and juridical status [Bill 194] Only the people of Quebec have the right to choose the political regime and legal status of Quebec [Bill 191]
6. The Assemblée nationale alone possesses the right to legislate on the nature, scope and technical procedures of the right of the people of Quebec to self-determination.
7. In the event of interference with the right of the people of Quebec to self-determination, or with the competence of the Assemblée nationale, or with the free operation of the political institutions of Quebec, the Government of Quebec, on the recommendation of the Assemblée nationale, may appeal directly to international bodies to the people of Quebec in its rights

CHAPTER II
POLITICAL RIGHTS AND FREEDOMS OF THE PEOPLE
OF QUEBEC

4. The people of Quebec is endowed, in fact as well as in law, with such rights as universally recognized by virtue of the principle of equality of the rights of peoples and their right to self-determination.
5. The people of Quebec has the exclusive right to determine the political system and the legal status of Quebec.
6. The National Assembly has the exclusive right to legislate with respect to the nature, the extent and technical conditions by which the people of Quebec shall exercise its right to self-determination.
7. In the event of the denial of the right of the people of Quebec to self-determination, should the National Assembly be prevented for exercising its powers or should the free operation of the political institutions of Quebec, be impaired, the Government of Quebec, upon the advice of the National Assembly, has the right to appeal directly to international organizations to ensure the respect of the rights of the people of Quebec.

**CHAPTER III
MISCELLANEOUS PROVISIONS**

8. This act may shall not be construed in such a way as to limit the rights defined herein.
9. This act forms part of the constitution of Quebec.
10. This act comes into force on the day it is sanction.

**CHAPTER III
MISCELLANEOUS PROVISIONS**

8. This act may shall not be interpreted in a manner to restrict the rights defined herein.
9. This Act forms is inscribed in the Constitution of Quebec.
10. This Act shall come into force on the day it is sanction.

APPENDIX 3

An Act Respecting the Future of Quebec

[Bill no 1]

[On line: <https://www.sfu.ca/~aheard/bill1.html#text>]

PREAMBLE

DECLARATION OF SOVEREIGNTY

PREAMBLE: The time has come to reap the fields of history. The time has come at last to harvest what has been sown for us by four hundred years of men and women and courage, rooted in the soil and now returned to it. The time has come for us, tomorrow's ancestors, to make ready for our descendants harvests that are worthy of the labours of the past. May our toil be worthy of them, may they gather us together at last.

At the dawn of the 17th century, the pioneers of what would become a nation and then a people rooted themselves in the soil of Quebec. Having come from a great civilization, they were enriched by that of the First Nations, they forged new alliances, and maintained the heritage of France.

The conquest of 1760 did not break the determination of their descendants to remain faithful to a destiny unique in North America. Already in 1774, through the Quebec Act, the conqueror recognized the distinct nature of their institutions. Neither attempts at assimilation nor the Act of Union of 1840 could break their endurance.

The English community that grew up at their side, the immigrants who have joined them, all have contributed to forming this people which became in 1867 one of the two founders of the Canadian federation.

We, the men and women of this place.

Because we inhabit the territories delimited by our ancestors, from Abitibi to the Îles-de-la-Madeleine, from Ungava to the American border, because for four hundred years we have cleared, ploughed, paced, surveyed, dug, fished, built, started anew, discussed, protected, and loved this land that is cut across and watered by the St. Lawrence River;

Because the heart of this land beats in French and because that heartbeat is as meaningful as the seasons that hold sway over it, as the winds that bend it, as the men and women who shape it;

Because we have created here a way of being, of believing, of working that is unique;

Because as long ago as 1791 we established here one of the first parliamentary democracies in the world, one we have never ceased to improve;

Because the legacy of the struggles and courage of the past compels us irrevocably to take charge of our own destiny; Because it is this land alone that represents our pride and the source of our strength, our sole opportunity to express ourselves in the entirety of our individual natures and of our collective heart;

Because this land will be all those men and women who inhabit it, who defend it and define it, and because we are all those people. We, the people of Quebec, declare that we are free to choose our future.

We know the winter in our souls. We know its blustery days, its solitude, its false eternity and its apparent deaths. We know what it is to be bitten by the winter cold.

We entered the federation on the faith of a promise of equality in a shared undertaking and of respect for our authority in certain matters that to us are vital.

But what was to follow did not live up to those early hopes. The Canadian State contravened the federative pact, by invading in a thousand ways areas in which we are autonomous, and by serving notice that our secular belief in the equality of the partners was an illusion.

We were hoodwinked in 1982 when the governments of Canada and the English-speaking provinces made changes to the Constitution, in depth and to our detriment, in defiance of the categorical opposition of our National Assembly.

Twice since then attempts were made to right that wrong. The failure of the Meech Lake Accord in 1990 confirmed a refusal to recognize even our distinct character. And in 1992 the rejection of the Charlottetown Accord by both Canadians and Quebecers confirmed the conclusion that no redress was possible.

Because we have persisted despite the haggling of which we have been the object;

Because Canada, far from taking pride in and proclaiming to the world the alliance between its two founding peoples, has instead consistently trivialized it and decreed the spurious principle of equality between the provinces;

Because starting with the Quiet Revolution we reached a decision never again to restrict ourselves to mere survival but from this time on to build upon our difference;

Because we have the deep-seated conviction that continuing within Canada would be tantamount to condemning ourselves to languish and to debasing our very identity;

Because the respect we owe ourselves must guide our deeds;

We, the people of Quebec, declare it is our will to be in full possession of all the powers of a State: to vote all our laws, to levy all our taxes, to sign all our treaties and to exercise the highest power of all, conceiving, and controlling, by ourselves, our fundamental law.

For the men and women of this country who are the warp and weft of it and its erosion, for those of tomorrow whose growth we are now witnessing, to be comes before to have. And this principle lies at the very heart of our endeavour.

Our language celebrates our love, our beliefs and our dreams for this land and for this country. In order that the profound sense of belonging to a distinct people be now and for all time the very bastion of our identity, we proclaim our will to live in a French-language society.

Our culture relates our identity, it writes of us, it sings us to the world. And through varied and new contributions, our culture takes on fresh colour and amplitude. It is essential that we welcome them in such a way that never will these differences be seen as threats or as reasons for intolerance.

Together we shall celebrate the joys, together we shall suffer the sorrows that life will set upon our road. Above all we shall assume not only our successes but our failures too, for in abundance as in adversity the choices we make will have been our own.

We know what determination has gone into achieving the successes of this land. Those men and women who have forged the dynamism of Quebec are eager to pass down their efforts to the determined men and women of tomorrow. Our capacity for mutual support and our appetite for new undertakings are among our greatest strengths. We commit ourselves to recognize and encourage the urge to put our hearts into our work that makes us builders.

Along with other countries of like size, we share the virtue of adapting quickly and well to the shifting challenges of work and trade. Our capacity for consensus and our spirit of invention will enable us to take a good and rightful place at the table of nations.

We intend to uphold the imaginative powers and the abilities of local and regional communities in their activities of economic, social and cultural development.

As guardians of the land, the air, the water, we shall act in such a way as to be respectful of the world to come. We, the men and women of this new country, acknowledge our moral duties of respect, of tolerance, of solidarity towards one another.

Averse to authoritarianism and violence, honouring the will of the people, we commit ourselves to guarantee democracy and the rule of law.

Respect for the dignity of women, men, and children and the recognition of their rights and freedoms constitute the very foundation of our society. We commit ourselves to guarantee the civil and political rights of individuals, notably the right to justice, the right to equality, and the right to freedom.

To battle against misery and poverty, to support the young and the elderly, are essential features of the society we would build. The destitute among us can count upon our compassion and our sense of responsibility. With the equitable sharing of wealth as our objective, we commit ourselves to promote full employment and to guarantee social and economic rights, notably the right to education and the right to health care and other social services.

Our shared future is in the hands of all those for whom Quebec is a homeland. Because we take to heart the need to reinforce established alliances and friendships, we shall safeguard the rights of the First Nations and we intend to define with them a new alliance. Likewise,

the English-speaking community historically established in Quebec enjoys rights that will be maintained.

Independent and hence fully present in the world, we intend to work for cooperation, humanitarian action, tolerance and peace. We shall subscribe to the Universal Declaration of Human Rights and to other international instruments for the protection of rights.

While never repudiating our values, we shall devote ourselves to forging, through treaties and agreements, mutually beneficial links with the peoples of the earth. In particular, we wish to formulate along with the people of Canada, our historic partner, new relations that will allow us to maintain our economic ties and to redefine our political exchanges. And we shall marshal a particular effort to strengthen our ties with the peoples of the United States and France and with those of other countries both in the Americas and in the Francophonie.

To accomplish this design, to maintain the fervor that fills us and impels us, for the time has now come to set in motion this country's vast endeavour;

We, the people of Quebec, through our National Assembly, proclaim: Quebec is a sovereign country.

The Parliament of Quebec enacts as follows:

SELF-DETERMINATION

1. The National Assembly is authorized, within the scope of this Act, to proclaim the sovereignty of Quebec. The proclamation must be preceded by a formal offer of economic and political partnership with Canada.

SOVEREIGNTY

2. On the date fixed in the proclamation of the National Assembly, the Declaration of sovereignty appearing in the Preamble shall take

effect and Quebec shall become a sovereign country; it shall acquire the exclusive power to pass all its laws, levy all its taxes and conclude all its treaties.

PARTNERSHIP TREATY

3. The Government is bound to propose to the Government of Canada the conclusion of a treaty of economic and political partnership on the basis of the tripartite agreement of June 12, 1995 reproduced in the schedule.

The treaty must be approved by the National Assembly before being ratified.

4. A committee charged with the orientation and supervision of the negotiations relating to the partnership treaty, composed of independent personalities appointed by the Government in accordance with the tripartite agreement, shall be established.
5. The Government shall favour the establishment in the Outaouais region of the seat of the institutions created under the partnership treaty.

NEW CONSTITUTION

6. A draft of a new constitution shall be drawn up by a constituent commission established in accordance with the prescriptions of the National Assembly. The commission, consisting of an equal number of men and women, shall be composed of a majority of non-parliamentarians, and shall include Quebecers of various origins and from various backgrounds.

The proceedings of the commission must be organized so as to ensure the fullest possible participation of citizens in all regions of

Quebec, notably through the creation of regional sub-commissions, if necessary.

The commission shall table the draft constitution before the National Assembly, which shall approve the final text. The draft constitution shall be submitted to a referendum and shall, once approved, become the fundamental law of Quebec.

7. The new constitution shall state that Quebec is a French-speaking country and shall impose upon the Government the obligation of protecting Quebec culture and ensuring its development.
8. The new constitution shall affirm the rule of law, and shall include a charter of human rights and freedoms. It shall also affirm that citizens have responsibilities towards their fellow citizens.

The new constitution shall guarantee the English-speaking community that its identity and institutions will be preserved. It shall also recognize the right of the aboriginal nations to self-government on lands over which they have full ownership and their right to participate in the development of Quebec; in addition, the existing constitutional rights of the aboriginal nations shall be recognized in the constitution. Such guarantee and such recognition shall be exercised in a manner consistent with the territorial integrity of Quebec.

Representatives of the English-speaking community and of each of the aboriginal nations must be invited by the constituent commission to take part in the proceedings devoted to defining their rights. Such rights shall not be modified otherwise than in accordance with a specific procedure.

9. The new constitution shall affirm the principle of decentralization. Specific powers and corresponding fiscal and financial resources shall be attributed by law to local and regional authorities.

TERRITORY

10. Quebec shall retain its boundaries as they exist within the Canadian federation on the date on which Quebec becomes a sovereign country. It shall exercise its jurisdiction over the land, air and water forming its territory and over the areas adjacent to its coast, in accordance with the rules of international law.

CITIZENSHIP

11. Every person who, on the date on which Quebec becomes a sovereign country, holds Canadian citizenship and is domiciled in Quebec acquires Quebec citizenship.

Every person born in Quebec who, on the date on which Quebec becomes a sovereign country, is domiciled outside Quebec and who claims Quebec citizenship also acquires Quebec citizenship. In the two years following the date on which Quebec becomes a sovereign country, any person holding Canadian citizenship who settles in Quebec or who has established a substantial connection with Quebec without being domiciled in Quebec may claim Quebec citizenship.

12. Quebec citizenship may be obtained, once Quebec has become a sovereign country, in the cases and on the conditions determined by law. The law must provide, in particular, that Quebec citizenship shall be granted to every person born in Quebec, or born outside Quebec to a father or mother holding Quebec citizenship.

13. Quebec citizenship may be held concurrently with Canadian citizenship or that of any other country.

CURRENCY

14. The currency having legal tender in Quebec shall remain the Canadian dollar.

TREATIES AND INTERNATIONAL ORGANIZATIONS AND ALLIANCES

15. In accordance with the rules of international law, Quebec shall assume the obligations and enjoy the rights set forth in the relevant treaties and international conventions and agreements to which Canada or Quebec is a party on the date on which Quebec becomes a sovereign country, in particular in the North American Free Trade Agreement.

16. The Government is authorized to apply for the admission of Quebec to the United Nations Organization and its specialized agencies. It shall take the necessary steps to ensure the participation of Quebec in the World Trade Organization, the Organization of American States, the Organization for Economic Cooperation and Development, the Organization for Security and Co-operation in Europe, the Francophonie, the Commonwealth and other international organizations and conferences.

17. The Government shall take the necessary steps to ensure the continuing participation of Quebec in the defence alliances of which Canada is a member. Such participation must, however, be compatible with Quebec's desire to give priority to the maintenance of world peace under the leadership of the United Nations Organization.

CONTINUITY OF LAWS, PENSIONS, BENEFITS, LICENCES AND PERMITS, CONTRACTS AND COURTS OF JUSTICE

18. The Acts of the Parliament of Canada and the regulations thereunder that apply in Quebec on the date on which Quebec becomes a sovereign country shall be deemed to be laws and regulations of Quebec. Such legislative and regulatory provisions shall be maintained in force until they are amended, replaced or repealed.
19. The Government shall ensure the continuity of the unemployment insurance and child tax benefit programs and the payment of the other benefits paid by the Government of Canada to individuals domiciled in Quebec on the date on which Quebec becomes a sovereign country. Pensions and supplements payable to the elderly and to veterans shall continue to be paid by the Government of Quebec according to the same terms and conditions.
20. Permits, licences and other authorizations issued before October 30, 1995 under an Act of the Parliament of Canada that are in force in Quebec on the date on which Quebec becomes a sovereign country shall be maintained. Those issued or renewed on or after October 30, 1995 shall also be maintained unless they are denounced by the Government within one month following the date on which Quebec becomes a sovereign country.

Permits, licences and other authorizations that are so maintained will be renewable according to law.

21. Agreements and contracts entered into before October 30, 1995 by the Government of Canada or its agencies or organizations that are in force in Quebec on the date on which Quebec becomes a sovereign country shall be maintained, with

the Government of Quebec substituted, where required, for the Canadian party. Those entered into on or after October 30, 1995 shall also be maintained, with the Government of Quebec substituted, where required, for the Canadian party, unless they are denounced by the Government within one month following the date on which Quebec becomes a sovereign country.

22. The courts of justice shall continue to exist after the date on which Quebec becomes a sovereign country. Cases pending may be continued until judgment. However, the law may provide that cases pending before the Federal Court or before the Supreme Court shall be transferred to the Quebec jurisdiction it determines.

The Court of Appeal shall become the court of highest jurisdiction until a Supreme Court is established under the new constitution, unless otherwise provided for by law.

Judges appointed by the Government of Canada before October 30, 1995 who are in office on the date on which Quebec becomes a sovereign country shall be confirmed in their functions and shall retain their jurisdiction. The judges of the Federal Court and of the Supreme Court of Canada who were members of the Quebec Bar shall become, if they so wish, judges of the Superior Court and of the Court of Appeal, respectively.

FEDERAL PUBLIC SERVANTS AND EMPLOYEES

23. The Government may, in accordance with the conditions prescribed by law, appoint the necessary personnel and take appropriate steps to facilitate the application of the Canadian laws that continue to apply in Quebec pursuant to section 18. The sums required for the

application of such laws shall be taken out of the consolidated revenue fund.

The Government shall ensure that the public servants and other employees of the Government of Canada and of its agencies and organizations, appointed before October 30, 1995 and domiciled in Quebec on the date on which Quebec becomes a sovereign country, shall become, if they so wish, public servants or employees of the Government of Quebec. The Government may, for that purpose, conclude agreements with any association of employees or any other person in order to facilitate such transfers. The Government may also set up a program of voluntary retirement; it shall honour any retirement or voluntary departure arrangement made with a transferred person.

INTERIM CONSTITUTION

24. 24. The Parliament of Quebec may adopt the text of an interim constitution which will be in force from the date on which Quebec becomes a sovereign country until the coming into force of the new constitution of Quebec. The interim constitution must ensure the continuity of the democratic institutions of Quebec and of the constitutional rights existing on the date on which Quebec becomes a sovereign country, in particular those relating to human rights and freedoms, the English-speaking community, access to English-language schools, and the aboriginal nations.

Until the coming into force of the interim constitution, the laws, rules and conventions governing the internal constitution of Quebec shall remain in force.

OTHER AGREEMENTS

25. In addition to the partnership treaty, the Government is authorized to conclude with the Government of Canada any other agreement to facilitate the application of this Act, in particular with respect to the equitable apportionment of the assets and liabilities of the Government of Canada.

COMING INTO FORCE

26. The negotiations relating to the conclusion of the partnership treaty must not extend beyond October 30, 1996, unless the National Assembly decides otherwise. The proclamation of sovereignty may be made as soon as the partnership treaty has been approved by the National Assembly or as soon as the latter, after requesting the opinion of the orientation and supervision committee, has concluded that the negotiations have proved fruitless.
27. This Act comes into force on the day on which it is assented to.

SCHEDULE

Text of the AGREEMENT between the Parti Québécois, the Bloc Québécois, and the Action démocratique du Québec. Ratified at Québec City on June 12, 1995 by Jacques Parizeau, Lucien Bouchard, and Mario Dumont

A COMMON PROJECT

As the representatives of the Parti Québécois, the Bloc Québécois and the Action démocratique du Québec, we have reached agreement on a common project to be submitted in the referendum, a project that responds in a modern, decisive and open way to the long quest of the people of Quebec to become masters of their destiny.

We have agreed to join forces and to coordinate our efforts so that in the Fall 1995 referendum, Quebecers can vote for a real change: to achieve sovereignty for Quebec and a formal proposal for a new economic and political partnership with Canada, aimed among other things at consolidating the existing economic space.

The elements of this common project will be integrated in the bill that will be tabled in the Fall and on which Quebecers will vote on referendum day.

We believe that this common project respects the wishes of a majority of Quebecers, reflects the historical aspirations of Quebec, and embodies, in a concrete way, the concerns expressed before the Commissions on the future of Quebec.

Thus, our common project departs from the Canadian status quo, rejected by an immense majority of Quebecers. It is true to the aspirations of Quebecers for autonomy and would allow Quebec to achieve sovereignty: to levy all of its taxes, pass all of its laws, sign all of its treaties. Our project also reflects the wish of Quebecers to maintain equitable and flexible ties with our Canadian neighbours, so that we can manage our common economic space together, particularly by means of joint institutions, including institutions of a political nature. We are convinced that this proposal is in the interests of both Quebec and Canada, though we cannot of course presume to know what Canadians will decide in this regard.

Finally, our project responds to the wish so often expressed in recent months that the referendum unite as many Quebecers as possible on a clear, modern and open proposal.

THE REFERENDUM MANDATE

Following a Yes victory in the referendum, the National Assembly, on the one hand, will be empowered to proclaim the sovereignty of Quebec, and the government,

on the other hand, will be bound to propose to Canada a treaty on a new economic and political Partnership, so as to, among other things, consolidate the existing economic space.

The referendum question will contain these two elements.

ACCESSION TO SOVEREIGNTY

Insofar as the negotiations unfold in a positive fashion, the National Assembly will declare the sovereignty of Quebec after an agreement is reached on the Partnership treaty. One of the first acts of a sovereign Quebec will be ratification of the Partnership treaty.

The negotiations will not exceed one year, unless the National Assembly decides otherwise.

If the negotiations prove to be fruitless, the National Assembly will be empowered to declare the sovereignty of Quebec without further delay.

THE TREATY

The new rules and the reality of international trade will allow a sovereign Quebec, even without a formal Partnership with Canada, continued access to external markets, including the Canadian economic space. Moreover, a sovereign Quebec could, on its own initiative, keep the Canadian dollar as its currency.

However, given the volume of trade between Quebec and Canada and the extent of their economic integration, it will be to the evident advantage of both States to sign a formal treaty of economic and political Partnership.

The treaty will be binding on the parties and will specify appropriate measures for maintaining and improving the existing economic space. It will establish rules for the division of federal assets and management of the

common debt. It will create the joint political institutions required to administer the new Economic and Political Partnership, and lay down their governing rules. It will provide for the establishment of a Council, a Secretariat, an Assembly and a Tribunal for the resolution of disputes.

As a priority, the treaty will ensure that the Partnership has the authority to act in the following areas:

- customs union;
- free movement of goods;
- free movement of individuals;
- free movement of services;
- free movement of capital;
- monetary policy;
- labour mobility;
- citizenship.

In accordance with the dynamics of the joint institutions and in step with their aspirations, the two member States will be free to make agreements in any other area of common interest, such as:

- trade within the Partnership, so as to adapt and strengthen the provisions of the Agreement on Internal Trade;
- international trade [for example, to establish a common position on the exemption with respect to culture contained in the WTO Agreement and NAFTA];
- international representation [for example, the Council could decide, where useful or necessary, that the Partnership will speak with one voice within international organizations];
- transportation [to facilitate, for example, access to the airports of the two countries or to harmonize highway, rail or inland navigation policies];
- defence policy [for example, joint participation in peace-keeping operations or a coordinated participation in NATO and NORAD];

- financial institutions [for example, to define regulations for chartered banks, security rules and sound financial practices];
- fiscal and budgetary policies [to maintain a dialogue to foster the compatibility of respective actions];
- environmental protection [in order to set objectives in such areas as cross-border pollution and the transportation and storage of hazardous materials];
- the fight against arms and drug trafficking;
- postal services;
- any other matters considered of common interest to the parties.

JOINT INSTITUTIONS

1. The Council

The Partnership Council, made up of an equal number of Ministers from the two States, will have decision-making power with regard to the implementation of the treaty.

The decisions of the Partnership Council will require a unanimous vote, thus each member will have a veto.

The Council will be assisted by a permanent secretariat. The Secretariat will provide operational liaison between the Council and the governments and follow up on the implementation of the Council's decisions. At the request of the Council or the Parliamentary Assembly, the Secretariat will produce reports on any matter relating to the application of the treaty.

2. The Parliamentary Assembly

A Partnership Parliamentary Assembly, made up of Quebec and Canadian Members appointed by

their respective Legislative Assemblies, will be created.

It will examine the draft text of Partnership Council decisions, and forward its recommendations. It will also have the power to pass resolutions on any aspect of its implementation, particularly after receiving the periodical reports on the state of the Partnership addressed to it by the Secretariat. It will hear, in public sessions, the heads of the bipartite administrative commissions responsible for the application of specific treaty provisions.

The composition of the Assembly will reflect the population distribution within the Partnership. Quebec will hold 25% of the seats. Funding for Partnership institutions will be shared equally, except for parliamentarians' expenses, which will be borne by each State.

3. The Tribunal

A tribunal will be set up to resolve disputes relating to the treaty, its implementation and the interpretation of its provisions. Its decisions will be binding upon the parties.

The working procedures of the Tribunal could be modeled on existing mechanisms, such as the panels set up under NAFTA, the Agreement on Internal Trade or the World Trade Organization Agreement.

THE COMMITTEE

An orientation and supervision committee will be set up for the purposes of the negotiations. It will be made up of independent personalities agreed upon by the three parties (PQ, BQ, ADQ). Its composition will be made public at the appropriate time. The Committee will

1. take part in the selection of the chief negotiator;
2. be allowed an observer at the negotiation table;
3. advise the government on the progress of the negotiations;
4. inform the public on the procedures and on the outcome of the negotiations.

The democratically appointed authorities of our three parties, having examined and ratified the present agreement yesterday, Sunday, June 11, 1995 - the Action démocratique du Quebec having met in Sherbrooke, the Bloc Québécois in Montréal, and the Parti Québécois in Quebec - we hereby ratify this common project and we call upon all Quebecers to endorse it.

***Reference Re Secession du Québec,
[1998] 2 S.C.R. 217***

[Excerpts- Footnotes omitted]

[On line: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do>]

Introduction

[...] 2. The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

A. Question 1

Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? [...]

[4] The Operation of the Constitutional Principles in the Secession Context.

88. The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. 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. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed. [...]

90. The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91. For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92. However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec

would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93. Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the

clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

103. To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party’s actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government’s claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane. [...]

B. Question 2

Does international law give the National Assembly, legislature or government of Quebec the right to effect

the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? [...]

[1] Secession at International Law

111. It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their “parent” state. This is acknowledged by the experts who provided their opinions on behalf of both the *amicus curiae* and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of “a people” to self-determination. The *amicus curiae* addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the *amicus curiae*, for reasons that we will briefly develop.

a) Absence of a Specific Prohibition

112. International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the

right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part [R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at p. 8-9]. Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

b) The Right of a People to Self-determination

113. While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the “rights” of entities other than nation states -- such as the right of a people to self-determination.

114. The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond “convention” and is considered a general principle of international law. [A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171-72; K. Doehring, “Self-Determination”, in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.]

115. Article 1 of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

.....
Article 1

 2. To develop friendly relations among nations based on respect for the principle of

.....
 equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116. Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.

117. This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, *supra*, at p. 60:

.....
 The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118. For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.’s *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and its *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, states:

.....
 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119. Similarly, the U.N. General Assembly’s *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970 [*Declaration on Friendly Relations*], states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120. In 1993, the U.N. World Conference on Human Rights adopted the *Vienna Declaration and Programme of Action*, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

1. ... Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind ... [Emphasis added]

121. The right to self-determination is also recognized in other international legal documents. For example, the *Final Act of the Conference on Security and Co-operation in Europe*, 14 I.L.M. 1292 [1975] [*Helsinki Final Act*], states [in Part VIII]:

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added]

122. As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

I Defining "Peoples"

123. International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination

of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of “peoples”, the result has been that the precise meaning of the term “people” remains somewhat uncertain.

124. It is clear that “a people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

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

cannot in the present circumstances be said to ground a right to unilateral secession.

II Scope of the Right to Self-determination

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

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

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

128. The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction ... [Emphasis added]

129. Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the *Helsinki Final Act* again refers to peoples having the right to determine "their internal and external political status" [emphasis added], that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the *Helsinki Final Act*, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" [emphasis added]. Principle 5 of the concluding document states that the participating states (including Canada):

... confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the

purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added]

Accordingly, the reference in the *Helsinki Final Act* to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, *supra*, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130. While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled

to the protection under international law of its territorial integrity.

III Colonial and Oppressed Peoples

131. Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of “parent” states. However, as noted by Cassese, *supra*, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised “externally”, which, in the context of this Reference, would potentially mean secession:

... the right to external self-determination, which entails the possibility of choosing [or restoring] independence, has only been bestowed upon two classes of peoples [those under colonial rule or foreign occupation], based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their ‘territorial integrity’, all but destroyed by the colonialist or occupying Power, should be fully restored

132. The right of colonial peoples to exercise their right to self-determination by breaking away from the “imperial” power is now undisputed, but is irrelevant to this Reference.

133. The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations*:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- a) To promote friendly relations and co-operation among States; and
- b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134. A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent “the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally

frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the *amicus curiae*, Addendum to the factum of the *amicus curiae*, at paras. 15-16:

[TRANSLATION]

15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.

16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed

toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136. The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a “sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction”.

137. The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138. In summary, the international law 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. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable 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.

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

[2] Recognition of a Factual/Political Reality: the “Effectivity” Principle [...]

140. No one doubts that legal consequences may flow from political facts, and that “sovereignty is a political fact for which no purely legal authority can be constituted ...”, H. W. R. Wade, “The Basis of Legal Sovereignty”, [1955] *Camb. L.J.* 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a “legal” right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.
141. As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g., European Community Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1486 [1992], at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence

of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where [as here] international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144. As a court of law, we are ultimately concerned only with legal claims. If the principle of “effectivity” is no more than that “successful revolution begets its own legality” [S. A. de Smith, “Constitutional Lawyers in Revolutionary Situations” [1968], 7 *West. Ont. L. Rev.*93, at p. 96], it necessarily means that legality follows and does not precede the successful revolution. *Ex hypothesi*, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as “a revolution”. It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to

mean that secession was achieved under colour of a legal right. [...]

C. Question 3

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147. In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148. As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149. The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence [economically, socially, politically and culturally] based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150. The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession

initiative which all of the other participants in Confederation would have to recognize.

151. Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152. The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities,

namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153. The task of the Court has been to clarify the legal framework within which political decisions are to be taken “under the Constitution”, not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes “a clear majority on a clear question” in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.
154. We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question

did so on the basis of the recognized right to self-determination that belongs to all “peoples”. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155. Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of

secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156. The reference questions are answered accordingly.

Clarity Act

An Act to Give effect to the Requirement for Clarity as set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference

Statutes of Canada [S.C.], 2000, c. 26, Revised
Statutes of Canada [R.S.C.], c. C-38.1
[On line: <https://laws-lois.justice.gc.ca/eng/acts/c-31.8/page-1.html>]

Preamble

WHEREAS the Supreme Court of Canada has confirmed that there is no right, under international law or under the Constitution of Canada, for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally;

WHEREAS any proposal relating to the break-up of a democratic state is a matter of the utmost gravity and is of fundamental importance to all of its citizens;

WHEREAS the government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question;

WHEREAS the Supreme Court of Canada has determined that the result of a referendum on the secession of a province from Canada must be free of ambiguity both in terms of the question asked and in terms of the support it achieves if that result is to be taken as an expression of the democratic will that would give rise to an obligation to enter into negotiations that might lead to secession;

WHEREAS the Supreme Court of Canada has stated that democracy means more than simple majority rule, that a clear majority in favour of secession would

be required to create an obligation to negotiate secession, and that a qualitative evaluation is required to determine whether a clear majority in favour of secession exists in the circumstances;

WHEREAS the Supreme Court of Canada has confirmed that, in Canada, the secession of a province, to be lawful, would require an amendment to the Constitution of Canada, that such an amendment would perforce require negotiations in relation to secession involving at least the governments of all of the provinces and the Government of Canada, and that those negotiations would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities;

WHEREAS, in light of the finding by the Supreme Court of Canada that it would be for elected representatives to determine what constitutes a clear question and what constitutes a clear majority in a referendum held in a province on secession, the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada;

AND WHEREAS it is incumbent on the Government of Canada not to enter into negotiations that might lead to the secession of a province from Canada, and that could consequently entail the termination of citizenship and other rights that Canadian citizens resident in the province enjoy as full participants in Canada, unless the population of that province has clearly expressed its democratic will that the province secede from Canada;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

House of Commons to consider question

1. The House of Commons shall, within thirty days after the government of a province tables in its legislative assembly or otherwise officially releases the question that it intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada, consider the question and, by resolution, set out its determination on whether the question is clear.

Extension of time

2. Where the thirty days referred to in subsection [1] occur, in whole or in part, during a general election of members to serve in the House of Commons, the thirty days shall be extended by an additional forty days.

Considerations

3. In considering the clarity of a referendum question, the House of Commons shall consider whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state.

Where no clear expression of will

4. For the purpose of subsection [3], a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from

a) referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or

b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.

Other views to be considered

5. In considering the clarity of a referendum question, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government is proposing the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government is proposing the referendum on secession, and any other views it considers to be relevant.

No negotiations if question not clear

6. The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada if the House of Commons determines, pursuant to this section, that a referendum question is not clear and, for that reason, would not result in a clear

expression of the will of the population of that province on whether the province should cease to be part of Canada.

House of Commons to consider whether there is a clear will to secede

2. [1] Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

Factors for House of Commons to take into account

[2] In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

- a) the size of the majority of valid votes cast in favour of the secessionist option;
- b) the percentage of eligible voters voting in the referendum; and
- c) any other matters or circumstances it considers to be relevant.

Other views to be considered

[3] In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease

to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.

No negotiations unless will clear

[4] The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

Constitutional amendments

3. [1] It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.

Limitation

[2] No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.

APPENDIX 6

Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec people and the Quebec State

Statutes of Quebec [S.Q.] 2000, c. 46, Consolidated Statutes and Regulations of Quebec [C.S.R.Q.], c. E-20.2 [On line : <http://legisquebec.gouv.qc.ca/fr/ShowDoc/cs/E-20.2>]

WHEREAS the Quebec people, in the majority French-speaking, possesses specific characteristics and a deep-rooted historical continuity in a territory over which it exercises its rights through a modern national state, having a government, a national assembly and impartial and independent courts of justice;

WHEREAS the constitutional foundation of the Quebec State has been enriched over the years by the passage of fundamental laws and the creation of democratic institutions specific to Quebec;

WHEREAS Quebec entered the Canadian federation in 1867;

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

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

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

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

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

WHEREAS it is incumbent upon the National Assembly, as the guardian of the historical and inalienable rights and powers of the Quebec people, to defend the Quebec people against any attempt to despoil it of those rights or powers or to undermine them;

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

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

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

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

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

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

THE PARLIAMENT OF QUEBEC ENACTS AS FOLLOWS:

CHAPTER I

THE Quebec people

1. The right of the Quebec people to self-determination is founded in fact and in law. The Quebec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
2. The Quebec people has the inalienable right to freely decide the political regime and legal status of Quebec.
3. The Quebec 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 Quebec.

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

4. When the Quebec 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.

CHAPTER II

THE QUEBEC NATIONAL STATE

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

The will of the people is expressed through the election of Members to the National Assembly by universal suffrage, by secret ballot under the one person, one vote system pursuant to the Election Act ([chapter E-3.3](#)) [and through referendums held pursuant to the Referendum Act ([chapter C-64.1](#))]

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

6. The Quebec State is sovereign in the areas assigned to its jurisdiction within the scope of constitutional laws and conventions.

The Quebec State also holds, on behalf of the Quebec people, any right established to its advantage pursuant to a constitutional convention or obligation.

It is the duty of the Government to uphold the exercise and defend the integrity of those prerogatives, at all times and in all places, including on the international scene.

7. The Quebec State is free to consent to be bound by any treaty, convention or international agreement in matters under its constitutional jurisdiction.

No treaty, convention or agreement in the areas under its jurisdiction may be binding on the Quebec State unless the consent of the Quebec State to be bound has been formally expressed

by the National Assembly or the Government, subject to the applicable legislative provisions.

The Quebec State may, in the areas under its jurisdiction, establish and maintain relations with foreign States and international organizations and ensure its representation outside Quebec.

8. The French language is the official language of Quebec.

The duties and obligations relating to or arising from the status of the French language are established by the Charter of the French language ([chapter C-11](#)).

The Quebec State must promote the quality and influence of the French language. It shall pursue those objectives in a spirit of fairness and open-mindedness, respectful of the long-established rights of Quebec's English-speaking community.

CHAPTER III

THE TERRITORY OF QUEBEC

9. The territory of Quebec and its boundaries cannot be altered except with the consent of the National Assembly.

The Government must ensure that the territorial integrity of Quebec is maintained and respected.

10. The Quebec State exercises, throughout the territory of Quebec and on behalf of the Quebec people, all the powers relating to its jurisdiction and to the Quebec public domain.

The State may develop and administer the territory of Quebec and, more specifically, delegate authority to administer the territory to local or regional mandated entities, as provided by law. The State shall encourage local and regional communities to take responsibility for their development.

CHAPTER IV

THE ABORIGINAL NATIONS OF QUEBEC

11. In exercising its constitutional jurisdiction, the Quebec State recognizes the existing aboriginal and treaty rights of the aboriginal nations of Quebec.

12. The Government undertakes to promote the establishment and maintenance of harmonious relations with the aboriginal nations, and to foster their development and an improvement in their economic, social and cultural conditions. 2000, c. 46, s. 12.

CHAPTER V

FINAL PROVISIONS

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 Quebec people to determine its own future.

14. The provisions of this Act come into force on the dates to be fixed by the Government.

Henderson v. Attorney General of Québec

[Excerpts- Footnote omitted]

[On line :https://courdappelduquebec.ca/fileadmin/Fichiers_client/Jugement/Traduction_Henderson_.pdf]

6. The appellant appeals against the April 18, 2018 judgment of the Superior Court, District of Montreal [the Honourable Madam Justice Claude Dallaire] [2018 QCCS 1586], which dismissed his motion for declaratory relief [paragraph [602] of the judgment] and, for greater certainty, declared that sections 1, 2, 3, 4, 5 and 13 of the *Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State* [the “*Act respecting the prerogatives of Québec*”, the “*Act*” or “*Bill 99*”] respect the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms* [the “*Canadian Charter*”] [paragraph [603] of the judgment].
7. The proceedings initiated by the appellant have been ongoing for nearly 20 years. In essence, the appeal pertains to questions the Supreme Court of Canada refused to answer in the *Reference re Secession of Quebec* [the “*Secession Reference*”]. The appellant seeks to draw the Court into essentially hypothetical and theoretical politico-legal debates on the definition of the Quebec people, on its right to internal and external self-determination and on the mechanisms for referendums, negotiations and constitutional amendments in order to achieve such self-determination.
8. Despite this Court’s intervention in 2007 in order to define the legal issues, the appellant is still attempting to obtain judicial declarations on appeal pertaining to questions the Supreme Court previously answered or refused to answer due to their political or hypothetical nature, or on a pragmatic basis. By challenging the constitutionality of certain provisions of the *Act respecting the prerogatives of Québec*, the appellant’s grounds of appeal do not make these questions any more justiciable at this stage nor do they shed new light that would allow the Court to set out the legal and constitutional framework applicable to the secession of Quebec beyond what the Supreme Court opined on in the *Secession Reference*.
9. The *Act respecting the prerogatives of Québec*, assented to on December 13, 2000, was the Quebec National Assembly’s legislative response to the political questions that went unanswered in the *Secession Reference*. In fact, the *Act* was enacted as a direct reaction 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* [the “*Clarity Act*” or “*Bill C-20*”], which was assented to on June 29, 2000 and was itself enacted by the Canadian Parliament as a legislative response to the same questions. Indeed, depending on what may happen in the future, the implementation of some of the provisions of the *Act respecting the prerogatives of Québec* could contradict those of the *Clarity Act*. The impugned provisions of the *Act respecting the prerogatives of Québec* deal, among other things, with the political process leading to Quebec’s independence, the right to initiate such a process having been recognized in the *Secession Reference* and being

the prerogative of the “democratically elected representatives of the people”.

10. The *Act respecting the prerogatives of Québec* can be seen and construed as affirming the National Assembly’s endorsement of the principles that have marked the evolution of Canadian constitutional arrangements applicable to a proposed change of Québec’s constitutional status leading to secession. In this sense, these provisions may be perceived as being constitutional, as the Attorney General of Canada in fact acknowledges. Thus, the impugned provisions of the *Act respecting the prerogatives of Québec* establish certain internal norms regarding the means for arriving at and expressing a legitimate democratic will to propose an amendment to Québec’s political regime or Québec’s legal status within the framework of the currently applicable Canadian constitutional arrangements.
11. The impugned provisions, however, also use vocabulary specific to international law, which some associate with the assertion of a right to unilateral secession. That being said, the ordinary meaning of their words does not lead to a clear and absolute conclusion that they create the basis for such a right in violation of the applicable Canadian constitutional framework for the secession of a province. All would depend on the concrete factual context in which these legislative provisions were to be invoked and used. Thus, the scope of the *Act respecting the prerogatives of Québec* is potentially much broader than the existing Canadian constitutional framework. The *Act respecting the prerogatives of Québec* could effectively serve as the basis for a new Québec constitution in the event of a change in its constitutional status, including its attainment of independent statehood, with or

without a formal amendment to the Canadian Constitution.

12. There is no need, at this time or in the foreseeable future, to analyze the lawfulness or adequacy of these legislative provisions in the specific context of Québec’s attainment of independent statehood, because the fundamental change in Québec’s legal status required for this potential scope of application of the *Act respecting the prerogatives of Québec* to arise, within the framework of a constitutional legal system different from Canada’s, depends on events and political decisions that are highly conjectural.
13. In the present case, it is appropriate for this Court to confirm paragraph [602] of the trial judgment’s conclusions, which [TRANSLATION] “rejects the conclusions of the motion for a declaratory judgment, as drafted”, and thus confirm the dismissal of the appellant’s proceedings seeking a declaratory judgment.
14. However, since the scope of the *Act respecting the prerogatives of Québec* is potentially much broader than the existing Canadian constitutional framework, in certain contexts and depending on the circumstances in which they were to be invoked, it is possible that some provisions of this statute would, at that time, be inapplicable or inoperative in light of then existing Canadian law. It is therefore appropriate to strike paragraph [603] of the trial judgment’s conclusions which, [TRANSLATION] “for greater certainty”, formally declares the validity of sections 1, 2, 3, 4, 5 and 13 of the *Act respecting the prerogatives of Québec*. Indeed, this detail, which is unnecessary from a legal standpoint,

could give rise to confusion and misunderstandings regarding the true scope of the trial judgment.

ANALYSIS

81. I note once again that the appellant's grounds in this appeal largely reflect his submissions as an intervener before the Supreme Court of Canada in the *Secession Reference*. The Supreme Court did not accept his submissions, either dismissing them, finding that they fell within the political rather than the legal arena or determining, on a pragmatic basis, that it was not appropriate to answer them. The grounds raised by the appellant before the Court seem to indicate that he is dissatisfied with the Supreme Court of Canada's answers and that he is trying to obtain a second advisory opinion on the same questions, without, however, the context having changed substantially since then. In order to demonstrate this, it is therefore appropriate to examine the *Secession Reference*.

82. In the *Secession Reference*, the Supreme Court was careful to circumscribe the limited advisory role conferred on it in order to answer the questions submitted with respect to the possible secession of Quebec. It began by characterizing its task, specifying that the reference "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". It then considered the scope of its jurisdiction with regard to the reference questions and addressed the arguments raised against their justiciability. Given its specific jurisdiction in the context of a reference, as opposed to litigation, it rejected the arguments that the questions were theoretical, speculative or of a political nature or that they were not ripe for judicial decision, specifying, nonetheless,

that "the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer".

83. The Supreme Court was very careful to avoid slipping into the highly charged political arena of secession and insisted on limiting the debate to legal issues, citing, in that regard, the following passage from the *Reference Re Canada Assistance Plan*:

[...] In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. [...] In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis in the original]

84. The Supreme Court therefore concluded that it could decline to answer a reference question on the basis of "non-justiciability" in the following circumstances:

- I if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or
- II if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

85. It thereby ensured that it would interpret only the legal and justiciable aspects of the reference questions, being careful to apply judicial restraint to refuse to answer questions that,

while otherwise of a legal nature, were more a matter for political decision-making within the established legal framework. It described the legal aspects of a province's secession under Canadian constitutional law as follows:

[84] The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. [...] It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession [...] undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound [...] does not negate their nature as amendments to the Constitution of Canada [...]. [Emphasis added]

86. Even though the Canadian Constitution is silent as to the ability of a province to secede, the Supreme Court stated that:

It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. [Emphasis added]

87. Under Canadian law, the secession of a province therefore requires a constitutional amendment, which necessarily implies the negotiation of the amendment. A referendum whose results are "free of ambiguity both in terms of the

question asked and in terms of the support it achieves"¹⁰² could trigger the negotiation process with a view to secession. Indeed, faced with such a referendum result, the other parties to the Canadian confederation would have the obligation to negotiate constitutional amendments in order to respond to the expressed desire:

The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed. [Emphasis added]

88. The conduct of the parties during such negotiations would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. These principles would not oblige the other provinces and the federal government to accede to the secession, subject only to negotiation of the logistical details for secession, but, rather, would impose the obligation to negotiate so as to address the interests of the federal government, of Quebec and the other provinces, and of other participants, as well as the rights of all Canadians both within and outside Quebec. The negotiations would undoubtedly be difficult and complex and there is a possibility they could reach an impasse.

89. However, determining what constitutes a "clear" question and a "clear" majority in a referendum,

thereby triggering the negotiation process, as well as what the content or conduct of such negotiations should be and the ramifications of a breakdown in negotiations are primarily, if not exclusively, political issues:

[100] The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

[101] If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political

actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

[102] The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the *Auditor General's* case, *supra*, at p. 90, and *New Brunswick Broadcasting, supra*, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

[103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above

undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane. [Emphasis added]

90. In this regard, with respect to the constitutional procedure that must be followed in order for Quebec to secede, including the application of the constitutional amending formulas set out in Part V of the *Constitution Act, 1982*, although the issue was broached in the course of the reference, the Supreme Court refused to rule on it:

[105] It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses

one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination. [Emphasis added]

91. Indeed, the *Secession Reference* does not mention Part V of the *Constitution Act, 1982*, which deals with the constitutional amending formulas, precisely because the Supreme Court did not rule on the required formula, stating, instead, that “the Constitution is not a strait-jacket” and can evolve.
92. The *Secession Reference* also addressed the issue of the “Quebec people” and its right to self-determination. The Supreme Court concluded that it was not necessary to explore the legal characterization of the “Quebec people” or to determine whether, should a “Quebec people” exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Indeed, regardless of the answer to these questions, the Quebec population, however defined, does not have the right, under international law, to secede unilaterally from Canada, because the conditions required under international law to do so – namely, colonization, oppression or exclusion – have not been satisfied:

[138] In summary, the international law 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. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable 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. [Emphasis added]

93. Based on this brief, albeit incomplete summary of the *Secession Reference*, the appellant’s grounds in support of this appeal should be dismissed.
94. As the appellant himself points out, his main proposal is based on the constitutional amending formulas set out in Part V of the *Constitution Act, 1982*, which, he argues, Quebec would have to comply with, failing which it could not secede. As discussed earlier, however, the Supreme Court did not determine which constitutional amending process would apply to Quebec’s secession, saying that it would not do so “unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination”. As was the case then, there are still no clear facts that

would raise a justiciable question on this subject. Indeed, for more than 25 years, there has been no referendum in Quebec with respect to a process to achieve independence and it is improbable that such a process will be initiated in the foreseeable future. As the appellant did in the context of the *Secession Reference*, he is seeking to entrench an eventual hypothetical initiative for Quebec’s independence in a mold within which each Canadian province and the federal government would have an absolute and unilateral right of veto over the process. The Supreme Court, however, did not endorse this approach.

95. Beyond the issue of the constitutional amending procedure or formula, which it is not appropriate to address in this appeal, the appellant also argues that the *Act respecting the prerogatives of Québec* allows for a unilateral declaration of independence without proceeding within the legal framework established by the Supreme Court for doing so. After a lengthy analysis of the evidence submitted, the trial judge, however, concluded that this was neither the goal nor the purpose of the *Act*. That being said, it does seem that the *Act* has two aspects, one constitutional and the other not, depending on the circumstances in which its provisions would be invoked. I will come back to this later when I discuss the Attorney General of Canada’s submissions.
96. Moreover, in light of the *Secession Reference*, I cannot accept the appellant’s arguments to the effect that the impugned provisions of the *Act respecting the prerogatives of Québec*, particularly the notion of a “Quebec people”, base the secessionist project on the right to self-determination of peoples in international law by subsuming Quebec’s minorities into Quebec’s French-speaking majority. As the Supreme

Court concluded, there is no need to explore the legal characterization of the “Quebec people” or to determine whether such a people encompasses the entirety of the provincial population or just a portion thereof in order to find that, in the current context, the population of Quebec does not satisfy the applicable international law criteria for invoking a unilateral right to secede from Canada.

97. That being said, there is nothing preventing a provincial government from referring to its population as a “people” without thereby infringing the Canadian constitutional framework. The expressions “people of Ontario”, “Ontario people”, “people of Alberta”, “people of Canada” or “Canadian people” can certainly be used without infringing the Canadian Constitution or necessarily invoking a right to external self-determination under international law. Why would it be otherwise for the expression “people of Quebec” or its French equivalent “*peuple du Québec*” or “*peuple québécois*”? The appellant has not submitted any convincing arguments that would support his assertion that this is a serious constitutional breach that renders the *Act* irreparably unconstitutional. On the contrary, his argument seems to be based on a largely outdated view of the modern Canadian constitutional order. In short, this is a non-issue that seeks to deny the existence of a civic concept of “people”, referring, instead, exclusively to the ethnic or sociological concept of “people”. There is no reason for the Court to be drawn into such a debate, which, in any event, serves no legal purpose given the position expressed in the *Secession Reference*.
98. Moreover, it follows from the *Secession Reference* that a secessionist initiative by the Government of Quebec or the National Assembly

does not, in and of itself, violate the Canadian constitutional order, provided it fits within the legal framework established in the *Secession Reference* in that it seeks to give rise to negotiations consistent with constitutional principles so as to arrive at the constitutional amendment required to give effect to it.

99. The foregoing is sufficient to dismiss the appellant’s grounds of appeal.
100. Let us now consider the position of the Attorney General of Canada.
101. He argues that the impugned provisions of the *Act respecting the prerogatives of Québec* are ambiguous and can be read very differently depending on the context in which they might be invoked.
102. The Attorney General of Canada acknowledges that if these provisions are read as applying only to Quebec’s internal constitution, as the trial judge concluded, they are constitutionally valid. He therefore does not support the appellant’s motion seeking to have the provisions declared invalid and unconstitutional, stating that he does not have to take a position on the disposition of the appeal. Nonetheless, the Attorney General of Canada submits that the Court should specify the scope of the *Act respecting the prerogatives of Québec* and, by necessary implication, that of the trial judgment, by declaring [1] that under the Canadian Constitution, Quebec is a province of Canada; and [2] that sections 1 to 5 and 13 of the *Act* do not and can never provide the legal basis for a unilateral declaration of independence by Quebec or its unilateral secession from Canada.

103. There is no need to make such declarations in this appeal.

104. That Quebec is a Canadian province is an indisputable juridical fact, and a judicial declaration to that effect would serve no specific legal purpose. Given its legal futility, it might, instead, lead to uncertainty as to its purpose and legal effect. It would also almost certainly exacerbate the serious tensions regarding Quebec's status within the Canadian confederation, including its status as a "distinct society" or "distinct nation" put forth by the Government of Quebec and a number of other political actors, and endorsed in 2006 by a resolution of the Canadian Parliament, as well as the shift towards an asymmetrical federalism favoured by some. With all due respect for the contrary opinion, Quebec is not a province like others. This is an indisputable sociological and political fact. Among other things, Quebec is the hearth and home of the French language and culture in North America and its legal regime based on the civil law differs markedly from those of its partners and neighbours. The purpose of these observations is not to negate or diminish the significant and important special characteristics of the other provinces of Canada, but rather to prevent Quebec's own significant and indisputable characteristics from being eclipsed or eliminated from the legal discourse. That said, the specific legal effects of these characteristics are not the subject of this appeal and it would be inappropriate for the Court to opine in any way on these matters in this appeal, whether directly or indirectly.

105. As regards the "Quebec State", this is a political expression that some might characterize as pompous. Certainly, it may annoy many, but it has no legal effect. Indeed, everyone understands that it refers to the government of the province of Quebec and its bureaucratic

apparatus within the Canadian confederation and not to an independent state. While a provincial park may be referred to as a "national park", other than the public confusion this may create as to which government is responsible for its management, it has no real legal consequences. Must the Court specify this in a formal judicial declaration? I do not think so.

106. As for the declaration sought with respect to sections 1 to 5 and 13 of the *Act respecting the prerogatives of Québec*, it is intended to counter a unilateral declaration of independence by Quebec resulting in its unilateral secession from Canada, that is, without negotiations or subsequent to a breakdown in negotiations. The Supreme Court, however, already addressed these issues in the *Secession Reference* and its remarks in that regard are just as applicable to the *Act respecting the prerogatives of Québec* should it be invoked for such purposes.

107. Ultimately, according to the Supreme Court, a unilateral secession by Quebec, that is to say, without prior negotiations in accordance with constitutional principles, would not be lawful under Canadian law. The Supreme Court specified the legal effect of such a unilateral secession without constitutionally principled negotiations:

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

108. It follows from this conclusion that legislation that forms part of a secessionist project may be invalidated if it amounts to a unilateral secession or if it embodies legislative norms that are not in conformity with the constitutional principles applicable to a secession process.
109. As to what would happen in the event of an impasse or a breakdown in negotiations on a possible future secession, the Supreme Court expressly refused to answer this question, clearly because it was of the view that it would be overstepping the bounds of its adjudicative role within the constitutional framework of our democratic form of government and so as to take into account and abide by the principle of the separation of powers. In doing so, the Supreme Court exercised judicial restraint, evidently because it wished to avoid the risk of a misunderstanding and because, in the abstract, the answer would be speculative. The Supreme Court stated that the failure to undertake such negotiations, in accordance with the constitutional principles it had defined, could certainly have an impact on international recognition of a sovereign Quebec, which is primarily a matter of international politics, but it gave no opinion as to what would happen in the event of a breakdown in negotiations.
110. It is therefore not appropriate for the Court to add to the Supreme Court of Canada's remarks on these issues, as the Attorney General of Canada asks us to do.
111. That having been said, one cannot exclude the possibility that the *Act respecting the prerogatives of Québec* may one day be invoked for purposes of a unilateral declaration of independence or for other purposes that are inconsistent with the current Canadian constitutional framework. Although the trial judge's analysis led her to conclude that this would not be the case, with all due respect, this, too, is a hypothesis on her part which does not fully consider the context within which the *Act* was enacted, that is, following a referendum on Quebec's independence, the Supreme Court's advisory opinion in the *Secession Reference* and Parliament's enactment of the *Clarity Act*.
112. It is reasonable to conclude from the context as a whole that at least one of the important considerations having led to the enactment of the *Act respecting the prerogatives of Québec* is the possibility of a unilateral declaration of independence by Quebec's National Assembly, particularly in the event of a breakdown in potential future constitutional negotiations leading to secession. Section 13 of the *Act*, in particular, is not merely a [TRANSLATION] "repetition", as the trial judge concluded. It is, rather, an indication of the National Assembly's firm desire to have the last word, both legally and politically, on the right "of the Quebec people to determine its own future". In order to be consistent with the Supreme Court's remarks, summarized hereinabove, with respect to a unilateral declaration of secession and the potential impact of a refusal to negotiate or a breakdown in negotiations following a referendum on Quebec's future within Canada, the Court must tread carefully.
113. The trial judge's declaration in paragraph [603] of her judgment – one that she indicated was made for greater certainty – in which she stated that the impugned sections of the *Act* comply with the Canadian Constitution and the *Canadian Charter*, results from her other conclusions [which are found in the core of her reasons] to the effect that the question of a unilateral secession or a failure to comply with

the parameters established by the Supreme Court in the Secession Reference is not at issue in the dispute, because, in her view, the Act is merely [TRANSLATION] “an expression of Quebec’s internal sovereignty”. The Attorney General of Quebec reiterated these parameters in his appeal brief, arguing that the Act [TRANSLATION] “rather, codifies, in a single document, fundamental rights and prerogatives of the Quebec people and the Quebec State that have always formed an integral part of its democratic system, the whole within the Canadian constitutional framework”. Within the scope of these parameters, one can reasonably conclude that the impugned provisions of the *Act respecting the prerogatives of Québec* are not unconstitutional.

114. The judicial declaration set out in paragraph [603] of the judgment, however, does not add anything insofar as the *Act respecting the prerogatives of Québec* is invoked by the National Assembly or the Government of Quebec solely within the context of Quebec’s internal sovereignty, as the judge concluded and as the Attorney General of Quebec maintains. That having been said, the judge did not exclude the possibility that the Act might, one day, be invoked for other purposes, but, based on her reading of the *Secession Reference*, she stated that such an occurrence would be a non-justiciable political event. In this context, the judicial declaration set out in paragraph [603] could be understood as a judicial endorsement of the Act being invoked for other purposes. Indeed, this is what prompted the Attorney General of Canada to ask for additional judicial declarations in order to formally define the legal effect of the trial judgment.

115. The parameters established by the trial judge in order to draw her conclusions – which were clearly driven by the Attorney General of Quebec’s argumentation strategy in this case – must not prevent a judicial re-examination of the issue if the provisions of the *Act respecting the prerogatives of Québec* were to be invoked in order to, in fact, address much more than Quebec’s internal constitution within the Canadian confederation. This would be a significant change in circumstances which the judge did not take into account in her judgment. Thus, although the courts must reconcile the *Clarity Act* and the *Act respecting the prerogatives of Québec* with one another, because they are both part of the positive law of Quebec, circumstances could arise where such reconciliation is impossible.

116. For the reasons set out earlier, it is not appropriate, in the context of this appeal, for the Court to make the judicial declarations suggested by the Attorney General of Canada, particularly since the Supreme Court of Canada has already opined on this matter: the secession of Quebec cannot be considered lawful if it is accomplished unilaterally, that is to say, without constitutionally principled negotiations. This being the case, it was also unnecessary for the judge to make the declaration she did in paragraph [603], thereby opening the door to the criticism levelled by the Attorney General of Canada regarding the potential use of the Act’s provisions for purposes not contemplated in the judgment’s reasons.

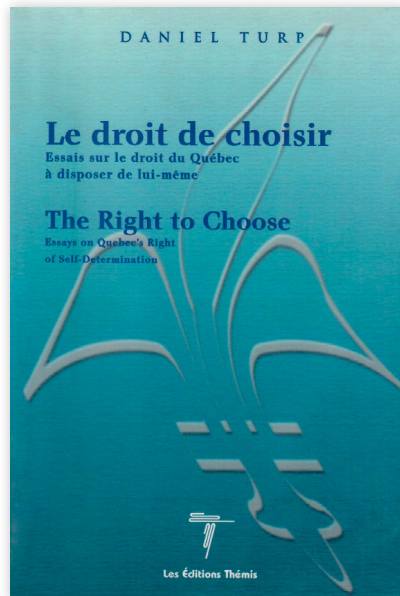
117. There is no need to declare that the provisions of the *Act respecting the prerogatives of Québec* are invalid. However, one cannot conceive of all the circumstances in which this Act could be invoked and it is possible that, in some contexts, its provisions may be inapplicable or

inoperative from the standpoint of Canadian domestic law. It is not for this Court to speculate on these contexts or even to determine whether, in such a case, there would be a justiciable issue. Given the duty of judicial restraint, this Court must limit the adjudication of the dispute to the dismissal of the appellant's judicial proceedings, and nothing more. Consequently, the *Act respecting the prerogatives of Québec* continues to be in force and have effect without, however, it being possible to rely on the doctrine of *stare decisis* if, some day, its provisions are invoked in a context other than those contemplated by the trial judge.

CONCLUSION

118. For these reasons, I propose that the Court confirm paragraph [602] of the trial judgment's conclusions and thereby confirm the dismissal of the appellant's proceedings seeking a declaratory judgment.
119. However, it is appropriate to strike paragraph [603] of the trial judgment's conclusions which, [TRANSLATION] "for greater certainty", formally declares the validity of the impugned sections.
120. Given the nature of the dispute, the trial judge did not see fit to order the payment of legal costs. I would do the same on appeal.

NOTES ABOUT THE AUTHOR



Daniel Turp is Professor Emeritus at the Faculty of Law of the Université de Montréal. He also holds the status of associate professor and continues to supervise doctoral theses. He has taught public international law, international and constitutional law of fundamental rights and advanced constitutional law. He has also been a visiting professor at several Quebec, Canadian and European universities and at the International Institute of Human Rights in Strasbourg.

Daniel Turp is a graduate of the University of Montréal, the University of Cambridge and holds a doctorate from the Université de droit, d'économie et de sciences sociales de Paris [Paris II] (*summa cum laude*). He is the first Quebecer to have obtained the prestigious Diploma from The Hague Academy of International Law where he was also Director of Studies and Visiting Professor.

He is President of the Institut de recherche sur l'autodétermination des peuples et les indépendances

nationales [Institute for Research on Self-Determination of Peoples and National Independence] [IRAI]. He is also President of the Association Québécoise de droit constitutionnel [Quebec Association of Constitutional Law] [AQDC], of the Board of Directors of the Société Québécoise de droit international [Quebec Society of International Law] and of the Orientation Council of the Réseau francophone de droit international [Francophone Network of International Law] [RFDI]. He is a member of the Scientific Advisory Council of the Coppieters Foundation of the European Free Alliance.

He was a member of Parliament and represented the Bloc Québécois in the House of Commons of Canada from 1997 to 2000 and of the Parti Québécois in the National Assembly of Quebec from 2003 to 2008. He is the founder of the Intellectuals for Sovereignty [IPSO] and was its first secretary general. He is also a founding member of the Coalition pour une République du Québec [COREQ].

“This project/event received financial support from the European Parliament. The contents of the project/event are the sole responsibility of the author, and the European Parliament cannot be held responsible for any use which may be made of the information contained therein.”





European
Free
Alliance