Constitutional forum constitutionnel

Quebec Bill 96 — Time For a Primer on Amending the Constitution

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On May 13, 2021, the Government of Quebec introduced Bill 96, "An Act Respecting French, the Official and Common Language of Quebec" in the Quebec National Assembly.[1] Bill 96 is a multi-faceted, and fairly sweeping, modernization of the *Charter of the French Language*, commonly known as Bill 101. It is primarily an attempt to use the power of the state to ensure that French is used more in Quebec, that more Quebecers are educated in French, and that anyone who wants to learn French has access to French lessons.[2] As there is some evidence that French is being used less in Quebec than it has been in recent decades, the government wants to act to make French the "common language of Quebec," as the Bill's title suggests. While a number of the provisions of Bill 96 may violate the rights of the English-language minority in the province, which is a matter that should be of concern to all Canadians and the Government of Canada, I want to address another issue with the constitutionality of Bill 96.

Near the end of the Bill is one section that is important for its mere existence, even if its content is largely symbolic. Section 159 of the Bill would amend the Constitution of Canada to declare that Quebecers form a nation and that French is the only official language, and the common language, of that nation. Specifically, section 159 says:

> The *Constitution Act, 1867* (30 & 31 Victoria, c. 3 (U.K.); 1982, c. 11 (U.K.)) is amended by inserting the following after section 90:

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1 Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Québec, 2021 (first reading 13 May 2021), online: <www.m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-96-42-1.html> [*An Act Respecting French*].

2 Kate McKenna, "Quebec seeks to change Canadian Constitution, make sweeping changes to language laws with new bill", *CBC News* (14 May 2021), online: <www.cbc.ca/news/canada/montreal/quebec-bill-101-language-revamp-1.6023532>.

FUNDAMENTAL CHARACTERISTICS OF QUEBEC

90Q.1. Quebecers form a nation.

90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation.[3]

The first thing that anyone trained in legislative drafting in Canada might note about this is that the first addition of a constitutional provision between sections 90 and 91 of the Constitution would normally be numbered section 90A, as was done when sections 94A, on old age pensions, and 92A, on non-renewable natural resources, forestry resources, and electrical energy, were added to the *Constitution Act, 1867*.[4] Numbering this proposed amendment as section 90Q accordingly breaks with legislative drafting convention for the sake of symbolism.

More important, though, is the question of whether the Quebec government can actually amend the Constitution of Canada through a provision in provincial legislation. The Quebec government claims that it can do so because section 45 of the *Constitution Act, 1982* (one section of Part V of the *Constitution Act, 1982*, which enumerates the Constitution's amendment formula) says that provinces can unilaterally amend their own constitutions.[5] When asked on May 19 if the Quebec National Assembly could do this, Prime Minister Justin Trudeau is reported by CBC to have said that it could, and that "Quebec, effectively, has the right to modify a part of the Constitution."[6] Furthermore, Benoît Pelletier, a lawyer who was Intergovernmental Affairs Minister in the Quebec government of Premier Jean Charest, Conservative leader Erin O'Toole, and NDP leader Jagmeet Singh all agree that Quebec can unilaterally alter the Constitution using section 45.[7] CBC reports that M. Pelletier advised the Quebec government that it could do so because the amendment would not affect federal-provincial relations.[8]

One does not have to ask an existential question such as "Would this amendment affect the division of powers in the Constitution and the conduct of federal-provincial relations?" to answer the question whether Quebec can unilaterally amend the Constitution through provincial legislation. Simply reading the text of the *Constitution Act, 1982*, as well as surveying the history of previous amendments to the Constitution since patriation, provides one with the clear answer that Quebec cannot do so. If Canada is, indeed, a country in which "constitutionalism and the rule of law" is counted as a fundamental constitutional principle, as the Supreme Court told us was the case in the *Reference re Secession of Quebec* (1998),[9] rule number one of constitutional interpretation must be "read the text." Yes, the *British North America Act* (now the *Constitution Act, 1867*) "planted in Canada a living tree capable of growth and expansion within its natural limits," as the British Lord Chancellor, Lord Sankey, so eloquently

3 *An Act respecting French*, *supra* note 1 s 159.

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 94A, 92A, reprinted in RSC 1985, Appendix II, No. 5.

5 Jonathan Monpetit, "Quebec's proposed changes to Constitution seem small, but they could prompt historic makeover", *CBC News* (19 May 2021), online: <www.cbc.ca/news/canada/montreal/quebec-canada-constitution-changes-language-bill-1.6031828>.

6 *Ibid*.

7 *Ibid*.

8 *Ibid*.

9 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, [1998] SCJ No 61 (QL).

put it in *Edwards v Canada*.[10] However, the roots of that living tree lie in our constitutional texts, and so these texts must be the starting point for constitutional interpretation; they cannot simply be ignored if they are politically inconvenient, for that would violate the fundamental constitutional principle of constitutionalism and the rule of law.

If one reads Part V carefully, one notices that section 45 says that "[s]ubject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province."[11] The important point to keep in mind about this provision is that it allows provinces to unilaterally amend only the "constitution *of the province*" (my emphasis). The Quebec government, however, proposes not to amend the constitution of Quebec, but the *Constitution Act, 1867*, which is part of the Constitution of Canada. The difference between the "constitution of the province," with a lower-case "c," and the "Constitution of Canada," with an upper-case "C," is critically important to understanding which constitutional amending procedure governs this proposed amendment. Section 52 of the *Constitution Act, 1982* tells us what the Constitution of Canada is. Specifically, section 52(2) says that:

> The Constitution of Canada includes:
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> (a) the *Canada Act 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[12]

The schedule to the *Constitution Act, 1982*, unsurprisingly, refers to the *British North America Act, 1867* (now the *Constitution Act, 1867*), the very Act that the Quebec government now seeks to amend. Section 52(2), then, makes it clear that the *Constitution Act, 1867* is part of the Constitution of Canada.[13] As this is the case, we must turn back to Part V of the *Constitution Act, 1982* to see what would be required to amend the *Constitution Act, 1867*, as the Quebec government proposes. Turning back to Part V, then, the constitutional amending procedure that is most likely to govern this amendment is not in section 45, but in section 43. Section 43 says:

> An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
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> (a) any alteration to boundaries between provinces, and
> (b) any amendment to any provision that relates to the use of the English or the French language within a province,
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> may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.[14]

The word "only" in section 43 is critical to understanding how the Quebec government's proposed constitutional amendment can be made constitutionally. What the Quebec government proposes to do by adding a new section to the *Constitution Act, 1867* that would only apply in

10 *Edwards* v *Canada (AG)*, [1930] 1 DLR 98 at 106-107, 1929 CanLII 438 (UK JCPC).
11 *Constitution Act, 1982*, s 45, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
12 *Ibid*, s 52(2).
13 *Ibid*.
14 *Ibid*, s 43.

Quebec is to make an amendment to the Constitution of Canada, not the constitution of the province of Quebec. Thus, according to section 43, such an amendment could *only* be made where so authorized by *both* the Quebec National Assembly and the federal Parliament.

This understanding of how our constitutional amending formula works should not come as a surprise to anyone. What Quebec proposes is not the first amendment Canadian governments have made to the Constitution since patriation. Indeed, there have been a total of eleven constitutional amendments since the amending formula in the *Constitution Act, 1982* was put in place, seven of which have been made using the procedure in section 43 (often referred to as the bilateral formula).[15] Some of these seven amendments have been quite minor, such as the amendment to change the name of Newfoundland to Newfoundland and Labrador and amendments to change constitutional guarantees about school governance in particular provinces; nonetheless, because they amended the Constitution of Canada, they had to be done using the section 43 procedure. If even fairly minor amendments required the use of section 43, rather than being able to be done unilaterally by the provinces involved, it should be clear that the constitutional amendment proposed by Quebec's Bill 96 must also be made this way.

The one amendment made under the section 43 procedure that I have not mentioned above provides the closest analogy to the amendment Quebec proposes. After the defeat of the Charlottetown Accord in October 1992, New Brunswick Premier Frank McKenna wanted to add a provision recognizing the equality of the English and French linguistic communities of New Brunswick — a provision which had been part of the Charlottetown Accord package — despite the Accord's defeat. That provision became section 16.1 of the *Constitution Act, 1982* in February 1993, through a bilateral amendment authorized by the Legislative Assembly of New Brunswick and the Senate and House of Commons of Canada.[16]

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15 The first amendment was the *Constitution Amendment Proclamation, 1983*, which used the general amendment procedure — the 7/50 rule — to amend section 35 of the *Constitution Act, 1982* in order to protect the rights contained in modern land claims agreements as Aboriginal treaty rights, to ensure that Aboriginal and treaty rights are guaranteed equally to males and females, to guarantee several constitutional conferences on Indigenous issues, and to require constitutional conferences that include Indigenous leaders before the amendment of any constitutional provisions that directly address Indigenous peoples (the *Constitution Amendment Proclamation, 1983*, SI/84-102, (1984) C Gaz II, 2984). Three amendments have been made unilaterally by the federal government, as authorized by section 44 of the *Constitution Act, 1982*, including two amendments in 1985 and 2011 altering the formula for apportioning seats in the House of Commons and one, in 1999, giving the new territory of Nunavut representation in the Senate (the *Constitution Act, 1985 (Representation)*, SC 1986, c 8, Part I; *Fair Representation Act*, SC 2011, c 26, s 2; *Constitution Act, 1999 (Nunavut)*, SC 1998, c 15, Part I). The seven amendments made according to the amending procedure in section 43 are the amendment to change the name of the "Province of Newfoundland" to the "Province of Newfoundland and Labrador" in 2001, the amendment to end the constitutionally guaranteed ferry service to Prince Edward Island, and the four amendments altering the structure of school governance in Newfoundland and Labrador, and Quebec (the *Constitution Amendment, 2001 (Newfoundland and Labrador)*, SI/2001-117, (2001) C Gaz II, Extra No 6; *Constitution Amendment, 1993 (Prince Edward Island)*, SI/45-50, (1994) C Gaz II, 2021; *Constitution Amendment, 1987 (Newfoundland Act)*, SI/88-11, (1988) C Gaz II, 887; *Constitution Amendment, 1997 (Newfoundland Act)*, SI/97-55, (1997); *Constitutional Amendment, 1997 (Quebec)*, SI/91-141; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25, (1998) C Gaz II, Extra No 1).

16 *Constitution Amendment, 1993 (New Brunswick)*, SI/93-54, (1993) C Gaz II, 1588.

Some argued at the time that the New Brunswick linguistic equality amendment, which included a provision affirming the role of the legislature and government of New Brunswick to preserve and promote the equality of the two linguistic communities in the province, would alter the division of powers, and therefore required the use of the general amending procedure and the concurrence of seven provinces representing 50 percent of the total population of all the provinces.[17] To my knowledge, however, no one ever argued that the New Brunswick Legislative Assembly could make this amendment unilaterally, precisely because it was an amendment to the Constitution of Canada. What was the case for New Brunswick's constitutional amendment on linguistic communities in 1993 is, logically, also the case for Quebec's proposed constitutional amendment on language in 2021.

There is also a deeper concern about Quebec's proposed constitutional amendment, a concern that goes to the fundamental principles of our Constitution and, specifically, to the principle of democracy and the principle of constitutionalism and the rule of law. The concern for the preservation of the principle of constitutionalism and the rule of law may have been the cause of the defeat of the 1987 Meech Lake Accord. Constitutional provisions must be presumed to serve a purpose; it is important to the principle of constitutionalism and the rule of law that the words in the Constitution have meaning and have substantive implications for how we operate as a socio-political community. When one reads a constitutional provision that says, "Quebecers form a nation," one is therefore right to ask what effect such a provision would have on the other provisions of the Constitution. Such questions about our understanding of the Constitution of Canada matter to all Canadians, not just to those who live in Quebec, as the controversy over the Meech Lake Accord clearly demonstrated. The fact of the matter is that we do not, and cannot, know what effect such so-called "interpretive provisions" will have on how our courts interpret our Constitution, but we can seek to better understand the range of possible interpretations of such provisions, and the implications of those different possibilities for the operation of our federation, through democratic discourse.

This amendment also puts the fundamental constitutional principle of democracy at risk. The Constitution of Canada is the Constitution that we all, by which I mean all Canadians, share. It is important to the principle of democracy that those who we elect to represent us have a role to play in the amendment of the Constitution that governs us. Our constitutional amending formula recognizes this. Certainly, some amendments to our Constitution will only affect those in some provinces; the drafters of section 43 struck an appropriate balance between efficiency and democracy in designing an amending procedure for these sorts of constitutional amendments. It would make no sense to engage the legislative assemblies of provinces on whom a constitutional amendment would have no effect in debating the merits of that amendment; that is why section 43 only requires the legislative assemblies of "those provinces to which the amendment applies" to approve the amendment.[18] On the other hand, even these are amendments to our shared Constitution, so the elected representatives of all of us must have a role in considering them. Section 43 ensures that this is the case, and that the principle of democracy is thus adequately protected, by requiring a resolution of the House of

17 See e.g. the Statement of Claim of Deborah Coyne in the Federal Court, Trial Division, *Coyne* v *Canada (GG)*, (15 February 1993), FCC File No T-31-93, online (pdf): <www.deborahcoyne.ca/wp-content/uploads/2019/07/1.-D-Coyne-Statement-of-Claim-February-15-1993.pdf>.

18 *Constitution Act, 1982*, *supra* note 11, s 43.

Commons — a chamber democratically elected by all of us — to amend the Constitution of Canada in this way.

We, as citizens, and our Members of Parliament, as our representatives, must have a chance to seriously debate the risks of having the interpretive provision that the Quebec government proposes inserted in the *Constitution Act, 1867*, especially as the provision is drafted with such general wording that it could be interpreted by the courts in ways that are impossible to predict, and therefore cannot be democratically sanctioned, in advance. At heart, this is why it is so important to use the section 43 procedure to add Quebec's proposed constitutional amendment to the Constitution of Canada, rather than allowing Quebec to amend the constitutional text that we all share. It would be no more consistent with our underlying constitutional principles for the Quebec National Assembly, acting alone, to be able to make the proposed amendments to the *Constitution Act, 1867* than for Quebec to unilaterally secede from the federation without engaging its partners in the federation, which the Supreme Court of Canada held in the *Reference re Secession of Quebec* would be unconstitutional.[19]

A further issue that we need to consider is that, if a province, acting alone, can amend the *Constitution Act, 1867* and if Quebec does so by inserting section 90Q, why would all of the other provinces not also insert their interpretive provisions into the Constitution. Imagine that, in addition to a new section 90Q for Quebec, the *Constitution Act, 1867* was also saddled with sections 90A (from the Alberta Legislature), 90B (from the British Columbia Legislature), 90M (from the Manitoba Legislature), 90NB (from the New Brunswick Legislature), 90NL (from the Newfoundland and Labrador House of Assembly), 90NS (from the Nova Scotia Legislature), 90O (from the Ontario Provincial Parliament), 90P (from the Prince Edward Island Legislature), and 90S (from the Saskatchewan Legislature). What would be the implications of such a raft of "interpretive clauses" inserted by all of the provinces unilaterally as amendments to the Constitution of Canada?

I see two implications. First, the insertion of numerous interpretive clauses, each expressing what the provincial governments of the day think makes their province unique within the federation, would likely so water down the effect of section 90Q as to make it meaningless. Second, these interpretive clauses would risk making a coherent, consistent interpretation of the Constitution by the courts impossible unless the courts decided that incoherence is inconsistent with the architecture of the Constitution and therefore treated all of these interpretive clauses as purely meaningless symbolism. Of course, it is imaginable that the Prime Minister and the Government of Canada might argue that, since Quebec is a nation and the other provinces are not, only Quebec can unilaterally amend the *Constitution Act, 1867*. Such a response from the federal government, while imaginable, could generate a wave of disaffection with the federation, and in particular a wave of Western separatism, that would have to potential to destroy the country. Such a result would make a mockery of the Supreme Court of Canada's careful decision in the *Reference re Secession of Quebec*.

Prime Minister Trudeau, and all of our federal party leaders, are suggesting that it is constitutionally possible and acceptable for Quebec to unilaterally amend the *Constitution Act, 1867* via section 45 of the *Constitution Act, 1982*. They are doing this, it appears, in the hope

19 *Reference re Secession of Quebec*, *supra* note 9 at paras 84-95.

that agreeing with the Quebec government will allow them to win more House of Commons seats in Quebec in the upcoming federal election. Their behaviour suggests, to me at least, that they think that their duty to preserve and protect the fundamental principles of our Constitution — a duty that they are under as political leaders elected to the House of Commons under our Constitution — is a choice, and can be abandoned when it is politically inconvenient for them. It is not a choice, though; it is a duty that they are constitutionally obligated to fulfil.