

# THE CANADIAN CONSTITUTION NEEDS TO BE AMENDED FOR CANADA TO FULLY EMBRACE MULTICULTURALISM

Written for POL S 225

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**ABSTRACT** Reform is needed in the Canadian Charter of Rights and Freedoms to remove Section 16 that recognizes French and English as the two official languages. This clause is problematic as bilingualism is not consistent with the goals of multiculturalism. I argue first that bilingualism violates Section 15, which guarantees formal and substantive equality, as it creates a cultural and linguistic hierarchy. Secondly, I argue how bilingualism violates Section 2, specifically the freedom to choose the language to express themselves. I counter-argue my position and state that even if Canada removes Section 16, it is not substantial to protect the fundamental rights of marginalized citizens living in Quebec as Quebec can utilize Section 33 to override the Court. I respond to this perspective and conclude that removing Section 16 remains necessary to equalize the judicial powers of provinces and for Canada to advance forward with Indigenous reconciliation.

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## INTRODUCTION

The Constitution Act of 1982 currently serves as the highest legally binding document that upholds Canada's fundamental rights. The Supreme Court has the role to ensure that these rights of individuals and groups are protected. While recognizing the difficulty in amending the Constitution, I argue that reforming the Constitution is necessary for Canada to fully embrace multiculturalism and properly advocate for substantive equality. This reform is needed in the Canadian Charter of Rights and Freedoms to remove Section 16 that recognizes French and English as the two official languages of Canada (Government of Canada 2021). This clause is problematic as bilingualism is not consistent with the goals of multiculturalism. Diverse ethnocultural groups would not be able to fully embrace their identity if there are linguistic barriers that oppresses them and encourages them to assimilate to the recognized culture and languages of Canada. I argue that this topic is relevant as Canada needs to formally recognize the linguistic rights of Canadians for

citizens to fully exercise their fundamental rights guaranteed in the Charter. Furthermore, I argue that Section 16 needs Constitutional reform as the judicial review (Section 24) will not be substantial even if the Supreme Court judges through the lens of multiculturalism. Section 16 needs to be removed so that there is no abuse of the Notwithstanding clause (Section 33) which can override Sections 2 and 15. Therefore, Constitutional reform is necessary to legally protect and recognize the diverse identities present in Canadian society and citizens fundamental rights.

Firstly, the Canadian Constitution needs to be reformed as Section 16, contradicts Section 15 which identifies equality rights of citizens. Section 15 states that everyone is under and equal to law without discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (Government of Canada 2021). Subsection 15.2 permits differential treatment under the

notion that it benefits disadvantaged groups or individuals (Government of Canada 2021). This clause specifically tries to obtain substantive equality as differential treatment recognizes that people have different needs and accommodating these needs is based on the differences of persons and groups. Section 16 violates Section 15 of the Charter, as Section 15 promotes formal equality, and therefore discriminates against non-French speakers. However, bilingualism is justified through subsection 15.2 as it identifies French speakers as disadvantaged. This raises the issue as the Charter does not acknowledge all other linguistic groups that are disadvantaged. While it can be argued that French should still be formally recognized above other languages to protect Quebec's distinct identity as a sovereign nation, this reason cannot justify the lack of recognition of Indigenous languages when they are also sovereign nations.

Section 16 needs to be removed because of the oppression that Indigenous peoples face when negotiating with the government in English or French. The issue arises as Indigenous peoples are forced to communicate in a language that hinders their ability to negotiate in the English legal and legislative system. This occurs as the same word may have different meaning for Indigenous and non-Indigenous peoples (Montminy 1996, 106). For instance, respect and responsibility are understood differently in the Indigenous context compared to how the Western-Canadian culture understands it (Monture-Okane and Patricia A 1991, 356). This puts Indigenous peoples at a disadvantage as they start internalizing and believing that their "interpretations of [their] acts and words will very frequently be wrong" after being forced to say and do things that they would never consider "appropriate" (Ross 1992, 17). Rather than questioning the colonial system that have

exploited their rights and actions, Indigenous peoples start to doubt their practices as "wrong" (Ross 1992, 17).

Furthermore, Chief John Snow raises the reality that Indigenous peoples face when trying to obtain recognition for their rights in the Constitution. He states that "pursuing rights in the English legal and legislative system" has put Indigenous Peoples at a disadvantage as they "sometimes cannot find English words equivalent to Indian words" when they are "accustomed to talking about our rights in our own language with elders" (Boldt et al 2013, 387). This exemplifies how Section 16, that only recognizes French and English, discriminates against a historically disadvantaged group. This in return creates a hierarchy and division for first- and second-class citizens (Haque 2014, 123). First class being English or French speakers and second class those who did not benefit from legalization of the two languages. This not only discriminates against other language groups from non-recognition of their identity but also continue to "reinstall the hierarchy of difference" (Haque 2014, 124) by legitimizing the superiority of French and English above other languages. This hierarchy does not align with Section 15 or 15.2 as it discriminates against Indigenous peoples who have been historically disadvantaged. Therefore, bilingualism violates Section 15 because it perpetuates cultural and linguistic hierarchy. This imbalance is created through discriminating and prioritizing French and English above other historically disadvantaged linguistic groups.

Secondly, the Constitution needs to be reformed to remove Section 16 as it contradicts Section 2, which describes fundamental freedoms and freedom of expression. To understand how Section 16 violates Section 2, it is necessary to explore a previous Supreme Court's ruling of Quebec's Bill 101 (Ford v. Quebec). In this case, the Court ruled against French-only signs as the Court stated that French-only signs violate the notion of freedom

of expression as this statement includes the “freedom to choose the language to express them” (Dyck and Cochrane 2021, 459). This ruling supports the understanding that Canadians should be guaranteed by law to be able to freely choose the language to express ideas. This completely contradicts Section 16 that prioritizes and legitimizes French and English as the two official languages and other ethnocultural groups are forced to express ideas in French or English in order to be recognized by Canadian society.

Additionally, it can be oppressive for other linguistic groups if they are forced to express themselves in a society that does not accommodate people's ability to express themselves. The experiences of underground Traditional Chinese Medicine (TCM) practitioners in Ontario support this view (Ijaz and Nadine and Boon 2018, 371). The importance of practicing TCM stems from the practice being deeply rooted in Chinese culture and history. While there are professional regulations by governments, many TCM practitioners are forced to illegally operate because of language barriers which restrict their abilities to obtain proper licensing (Ijaz and Nadine and Boon 2018, 386). A TCM practitioner explains that “So many qualified people who don’t speak very good English do not go register or cannot go register because they could not pass the test. They feel insulted because they’re being discriminated [against]...” (Ijaz and Nadine and Boon 2018, 388). Many practitioners that are well qualified, with years of experience, are forced to operate underground and disguise their authentic identity because they are not able to pass the test (Jurisprudence and Safety Test) that recognizes their abilities and experiences (Ijaz and Nadine and Boon 2018, 373).

More importantly, this is problematic as the test does not achieve its purpose of distinguishing

those who are qualified and skilled to those who are not. Rather, it distinguishes fluent English and French TCM practitioners from non-fluent practitioners. When language is the only barrier that distinguishes them from any other qualified practitioners, it puts non-French or English speakers at a disadvantage from being able to fully express their identities through traditional cultural practices. Section 16 also violates the Supreme Court ruling that states citizens should be guaranteed by law to be able to “choose the language to freely express” themselves (Dyck and Cochrane 2021, 459). Therefore, Section 16 legitimizes the oppressive experiences that TCM practitioners face as they are not able to express themselves and even feel “discriminated against” because they are forced to express themselves in French and English to be recognized by others in the multicultural Canadian society (Ijaz and Nadine and Boon 2018, 388).

I will now counter-argue the previous perspective and state that removing Section 16 of the Constitution does not change the current Canadian society or increase protection of rights of Canadians in Quebec. Even if the Canadian Constitution is reformed to accommodate for other ethnocultural groups, removing Section 16 does not protect marginalized citizens living in Quebec. Provinces, like Quebec, can continue to resist differential treatment by using Section 33 (Notwithstanding clause) that permits the legislation to overturn the rulings of the Supreme Court. Section 33 allows the provincial government, or the legislation to override rights in Section 2 and Sections 5 through 15 for 5 consecutive years (Kahana 2001, 255-291). As discussed previously, Section 2 guarantees fundamental freedoms while Section 15 grants equality rights. This means that even if Section 16 of the Charter is

removed from the Constitution, the hierarchy of culture and language, and discrimination of other ethnocultural groups will persist in Quebec.

The results of the *Ford v. Quebec* case further emphasize this view. As mentioned before, the Supreme Court ruled against French-only language signs as it violated Section 2. Soon after this ruling, Premier Bourassa formulated Bill 178 that was a “hastily drafted piece of legislation” (Yalden 1989, 973-994). This was an amended version of the rejected Bill 101, with the addition of Section 33, that would protect provincial interests before the Courts (Yalden 1989, 973-994). Even though the Court ruled against Bill 101 as it violated Section 2, Quebec was able to easily override the Court’s ruling with the similar bill through the notwithstanding clause. This means that even with the removal of Section 16, Sections 2 and 15 can still be violated.

Furthermore, Quebec has used the Notwithstanding clause to ban public workers from wearing religious symbols outlined in the *Laicity Act 2019* (The Canadian Broadcasting Corporation 2021). This completely neglects the religious minority groups that are required to wear their religious clothing as dictated by their given religious doctrines. Especially with a steady increase of visible minorities immigrating to Quebec, non-recognition of differences perpetuates oppression of minority groups (National Household Survey 2014, 4). While non-recognition of religious wear will not be solved through removing Section 16, it displays the abuse of power Quebec is granted through the Notwithstanding clause, and how this can be exercised to neglect other fundamental rights granted in the Charter. Therefore, removing Section 16 to promote multiculturalism is not enough and would rather increase Quebec nationalism as Quebec would

continue to use Section 33 to protect its distinct society.

I respond to this argument and state that even if Quebec can use Section 33 to override the Court, the Constitution needs to be amended to remove Section 16 to equalize the powers of legislation between provinces and properly embrace multiculturalism. While Quebec, like all provinces, is permitted to use Section 33, this power is not equal between provinces because of Section 16. Section 16 specifically promotes and recognizes French and English as the two official languages of Canada, while also Section 16.1 recognizes the French language in New Brunswick (Government of Canada, 2021). Interestingly, a province is not permitted to use Section 33 to override Section 16 and remove bilingualism in their province. This is problematic in a multicultural setting, especially when French speakers are concentrated in Quebec and New Brunswick compared to other provinces (Statistics Canada 2018). This raises the question of whether Quebec and New Brunswick are unequally benefiting from Section 16 as their major or minor spoken language (French) is recognized and legally binding to the Constitution. This creates an imbalance of legislation power of provinces as Quebec and New Brunswick would not need to use the notwithstanding clause to override Section 16 as their province benefits unequally from it. While other provinces do not have a choice to override bilingualism even if they wanted to.

If the Constitution is going to apply equally to every province, then a province should not be guaranteed more rights or recognition compared to another. If this is the case, provinces should be able to use the Notwithstanding clause to override the Section in order to protect their own citizens. If provinces can override Section 16 to embrace other languages, then there is equal judicial opportunity and rights between the provinces.

But this is not the case with Section 16 which is why it is problematic and causes an imbalance of jurisdictional power of provinces as other provinces do not equally benefit from Section 16. Even if we expand and state that Section 16 benefits all French speakers in Canada regardless of which province, this unequally privileges the French against other ethno-cultural groups.

## CONCLUSION

In conclusion, I argue that Section 16 needs to be removed to end the oppression of

marginalized and disadvantaged groups in Canada. As described, Indigenous peoples and Chinese practitioners are at a disadvantage as they are not able to freely express their authentic identities because their languages are not recognized as equally valuable in the Constitution (Taylor 1994, 25). Therefore, amending the Constitution to remove Section 16 not only is necessary to eliminate hierarchy of culture and language to fully embrace multiculturalism, but also necessary in recognizing Indigenous peoples as sovereign nations in Canada.

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