# The Constitutional Amendments in Quebec's Bill 96: Whose Consent is Needed?

On May 13th, 2021, the Quebec government introduced Bill 96, "An Act respecting French, the official and common language of Québec" in the Quebec National Assembly.[1] Bill 96 seeks to update the *Charter of the French Language* (also known as "Bill 101")[2] and "affirm that the only official language of Québec is French [and] that French is the common language of the Québec nation."[3] Bill 96 is receiving significant attention amongst constitutional scholars for article 159, which seeks to amend section 90 of the *Constitution Act, 1867* — one of the key texts of the Canadian Constitution — by inserting the following provisions:[4]

> *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.[5]*

Constitutional scholars are divided on whether Quebec's National Assembly may unilaterally amend the *Constitution Act, 1867* in this way. Part V of the *Constitution Act, 1982* sets out five rules that governments must follow to pass constitutional amendments, where the applicable rule depends on the subject matter of the proposed amendment.[6] This article refers to these rules collectively as the Constitution's "amending formula" and to each separate rule as an "amendment procedure."

This article highlights some of the leading thoughts on which amendment procedure should apply to the Bill 96 amendments and why. In particular, the article focuses on the following three amendment procedures:[7]

- **Section 45**: "Amendments by provincial legislatures" to the constitution of the province;[8]
- **Section 43**: "[A]mendment[s] to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces," including amendments concerning "the use of the English or the French language within a province,"[9] and;
- **Section 38**: Amendments under the "[g]eneral procedure for amending [the] Constitution of Canada."[10]

**Section 45: Amendments by Provincial Legislatures**

> *Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.[11]*

Section 45 allows for the amendment of a provincial constitution by that province's legislature, acting alone. This is the least onerous amendment procedure under the 1982 *Constitution Act*'s amending formula.[12] The Quebec government intends to enact the proposed constitutional amendments in Bill 96 unilaterally, using the section 45 amendment procedure. Its leading argument for invoking section 45 is that the proposed provisions amend Quebec's provincial constitution, not the Constitution of Canada. However, there has been disagreement on three issues that are essential to this claim: (1) how to define the constitution of a province; (2) whether the proposed amendments alter the Constitution of Canada or just the constitution of the province of Quebec; and (3) whether the proposed provisions are purely symbolic, or "engage … the interests of the [other] provinces by changing the fundamental nature"[13] of the Canadian federation and, hence, the Constitution of Canada.[14]

The following are some of the arguments that have been made in favour of the Quebec government's claim that it can unilaterally amend the *Constitution Act, 1867* using section 45:

- Minister Simon Jolin-Barrette in Le Devoir: Quebec may amend section 90 because it falls under Part V of the *Constitution Act, 1867* on "Provincial Constitutions" and therefore "belongs" to Quebec.[15] In other words, section 90 of the *Constitution Act, 1867* is part of the constitution of the province of Quebec.
- Professor Patrick Taillon in Le Devoir: Quebec may alter the text of the Constitution that applies to Quebec, and so may define itself as "a member state of the federation" rather than one of the "provinces" of the "dominion."[16]
- Benoît Pelletier in Le Devoir: Neither provision "touch[es]" either the federal aspect, federal-provincial relations, any other province, or the structure of Canadian federalism.[17]
- Allan Rock and Glenn O'Farrell in The Globe and Mail: Applying section 45 is beneficial from a policy perspective because it would show that the Constitution can adapt to the reality on the ground and that Canadian governments "can accommodate the aspirations of … [their] partners."[18]

On the other hand, these are some of the arguments against Quebec's claim that it can use

section 45 to enact the proposed changes:

- Ian Peach in the Constitutional Forum: According to the Constitution's written text, any amendment to the *Constitution Act, 1867* is an amendment to the "Constitution of Canada" because section 52(2) of the *Constitution Act, 1982* provides that the "Constitution of Canada" includes the *Constitution Act, 1867*.[19]
- Professor Eric Adams in CBC News and on Twitter: Provincial constitutions are not distinct entities, but are rather "like nesting dolls" that form "part of the larger structure of the Constitution of Canada."[20] The heading of Part V of the *Constitution Act, 1867* ("Provincial Constitutions") does not mean that what follows is the constitution of the provinces, but rather that it contains some elements of those constitutions.[21]
- Julius Grey in The Lawyer's Daily: The provisions amount to Quebec seeking "sovereignty by the back door."[22] If that "is the goal of the Quebec government, it should state it frankly and openly."[23]

**Section 43: Amendment of Provisions Relating to Some but not All Provinces**

> *An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including*
>
> *…*
>
> *(b) any amendment to any provision that relates to the use of the English or the French language within a province,*
>
> *may be made … 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.[24]*

Constitutional scholars and lawyers disagree on how to interpret this provision. Some argue that section 43 is engaged when the Constitution of Canada itself is amended — not a provincial constitution — and that amendment applies to one or more, but not all, provinces.[25] Others suggest that section 43 is engaged when an amendment to either the Constitution of Canada or a provincial constitution affects or amends a "special arrangement" in the Constitution of Canada — including the use of the English or French language within a province — regardless of which vehicle is used to make that amendment.[26]

In theory, section 43 makes it somewhat more efficient to amend the Constitution of Canada when the amendment only affects one or some but not all of the provinces because it does

not require the consent of provinces for whom the amendment does not apply.[27] At the same time, section 43 ensures that all Canadians are represented — via the involvement of federal institutions — in the process of amending the Constitution of Canada, even if not all provinces take part in the process.[28] In this regard, section 43 allows members of parliament to examine the amendment on behalf of all Canadians to better understand its broader implications, including its effect on the rest of the Constitution.[29] Pan-Canadian representation is important because the Constitution belongs to all Canadian citizens, and it is a fundamental constitutional principle of democracy that all Canadians are represented in the process of amending it.[30]

The following source argues that both of Quebec's proposed additions to the *Constitution Act, 1867* — 90Q.1 (the nationhood provision) and 90Q.2 (the language provision) — amend the Constitution of Canada, but that the amendments only affect the province of Quebec, and therefore only require the consent of the federal Parliament and the Quebec National Assembly:

- Ian Peach in the Constitutional Forum: Peach cautions that both the provisions themselves and the precedent of Quebec unilaterally amending the Constitution risks altering how the courts interpret the Constitution of Canada.[31] This may or may not affect which amendment procedure applies.

The following sources consider whether the language provision (90Q.2) affects the Constitution of Canada, and therefore requires, at a minimum, authorization by the federal Parliament as well as the Quebec National Assembly:

- Professor Eroll Mendez on CBC Power and Politics: The French language provision and the rest of Bill 96 could remove the rights of English-speakers and change the use of the English and French languages within Quebec, which engages section 43(b).[32]
- However, Patricia Hughes in Slaw suggests that, since the French language provision "does not directly amend … any of the … explicit language provisions in the [C]onstitution," section 43 might not apply.[33]

**Section 38 (1): General Procedure for Amending the Constitution of Canada**

An amendment to the Constitution of Canada may be made … where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.[34]

Professor Richard Albert assessed this amendment procedure as the fourth-most difficult to use in the world.[35] For Albert, this is not necessarily a good thing. In his view, a constitution should be sufficiently entrenched to preserve the fundamental values upon which a society is based. However, it should not be so difficult to amend that it "privileges the status quo and reinforces the values and vision of those whose voice prevailed in creating the constitution."[36]

The section 38 amendment procedure is also known as the "7/50 formula" or the "general amending procedure." The Supreme Court of Canada referred to this procedure as "represent[ing] the balance deemed appropriate by the [constitutional] framers … for most constitutional amendments," while the other amending procedures are "exceptions to the general rule."[37] This suggests that section 38 is a big bucket that captures most constitutional amendments and should be interpreted broadly, while the remaining procedures cover the exceptions and should therefore be interpreted narrowly.

A number of scholars have argued that, insofar as no other amendment procedure is obviously applicable, one or both of the Bill 96 changes should be placed in the "big bucket" of the general amending procedure under section 38:

- Professor Emmett Macfarlane in Policy Options: Quebec's proposed amendments concern matters that have been subject to intense national debate throughout Canada's constitutional history.[38] In particular, unilaterally amending the Constitution to recognize Quebec nationhood would "impose … recognition of a contested fact on the rest of the federation,"[39] and should therefore require the use of section 38.
- Patricia Hughes in Slaw and Professor Eroll Mendez on CBC Power and Politics: The nationhood provision could distort the equal partnership amongst provinces and the federal government.[40] It could be used to argue that Quebec has special rights over other provinces — "the devil is in the details."[41] If the provision "effectively redesigns the basic jurisdictional structure of the confederation," section 38 would be required.[42]
- Patricia Hughes in Slaw: The French language provision could be contrary to section 23 of the *Charter*, which protects minority language educational rights,[43] or section 133 of the *Constitution Act, 1867*, which provides that "[e]ither the English or French Language may be used by any Person in the Debates … of the Legislature of Quebec."[44] Because the French language provision affects explicit constitutional protections, section 38 is the appropriate pathway for adding it to the Constitution.[45]

**Conclusion**

It is not clear which amending procedure must be used for Quebec to insert the nationhood and French language provisions into the *Constitution Act, 1867*. Much of the debate is about defining key terms such as "constitution of the province," understanding the purpose of the proposed provisions in the context of Bill 96 and other provincial legislation, and examining the effects of elevating these provisions to constitutional status. The Quebec government is preparing to conduct public hearings on Bill 96, to begin September 21st, 2021,[46] so some of the answers could be forthcoming. In the meantime, the recent commentary from constitutional experts provides insight into the key considerations that ought to inform how the proposed amendments are dealt with.

Further reading from the Centre for Constitutional Studies:

- Amending Formula: Overview of the purpose and structure of the amending formula.
- Reference re Senate Reform (2014): The Supreme Court Clarifies the Senate Reform Process: The Supreme Court of Canada's interpretation of the amending formula, which arose from the Harper government's attempt to make changes to the Senate.
- Fulton-Favreau: Failed attempt to negotiate a new amending formula in the 1960s.
- Meech Lake Accord: Failed (i.e. unratified) constitutional agreement in 1987 following Quebec's refusal to agree to the *Canada Act, 1982* (and by extension the *Constitution Act, 1982*). Quebec's status as a "distinct society" within Canada and language rights were central issues.
- Beaudoin-Edwards Committee: Committee established in 1991 to examine the amending formula and recommend alternatives.
- Beaudoin-Dobbie Committee: Committee established in 1991 to consult with Canadians on possible changes to the Constitution of Canada.
- Plan A and Plan B: Federal initiatives to address Quebec's status as a "distinct society" and language rights following the 1995 Quebec sovereignty referendum.

[1] Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, 2021 (first reading 13 May 2021) [Bill 96].

[2] *Charter of the French language*, CQLR c C-11 (adopted in 1977, last updated 18 March 2021).

[3] Bill 96, *supra* note 1 at Explanatory Notes.

[4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

[5] Bill 96, *supra* note 1 art 159 .

[6] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ss 38, 41, and 43-45 . See also Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 247-250 [Albert, "Amendment Rules"].

[7] Section 41 will not be addressed because there is general consensus that neither provision falls within the scope of the listed matters that require unanimous provincial and federal consent (see e.g. Emmett Macfarlane, "Quebec's attempt to unilaterally amend the Canadian Constitution won't fly" (14 May 2021), online: *Policy Options* <https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/> ["Mcfarlane"]). Section 44 will not be addressed because this procedure applies only to amendments made by Parliament "in relation to the executive government of Canada or the Senate and House of Commons" (*Constitution Act, 1982*, *supra* note 6, s 44).

[8] *Constitution Act, 1982*, *supra* note 6, s 45.

[9] *Ibid*, s 43.

[10] *Ibid*, s 38.

[11] *Ibid*, s 45 (emphasis added). "Amendment by unanimous consent" provides an exhaustive list of matters that require the consent of Parliament and all legislatures to amend (*Constitution Act, 1982*, *supra* note 6 at s 41).

[12] See Albert, "Amendment Rules," *supra* note 6 at 249.

[13] *Reference re Senate Reform*, 2014 SCC 32 (CanLII) at paras 77-78 .

[14] See e.g. Patricia Hughes, "How Far Can We Go Before the Constitutional Bargain Is Undermined?" (1 June 2021), online (blog): *Slaw* <http://www.slaw.ca/2021/06/01/how-far-can-we-go-before-the-constitutional-bargain-is-undermined/> ["Hughes"]. Hughes asks: "Which part of the constitutional amending procedure applies? What do those provisions mean? What are the ramifications for the spirit or architecture of the constitutional bargain? Do sections 90Q.1 and/or 90Q.2 amend the Constitution of Canada? Or … do they amend only the Constitution of Quebec?"

[15] Marco Bélair-Cirino, "Le Québec francophone dans la Constitution canadienne, sans demander de permission" (13 May 2021), online: *Le Devoir* <https://www.ledevoir.com/politique/quebec/600956/le-quebec-francophone-dans-la-constitution> (translated by author) ["Bélair-Cirino"]. See also Maxime St-Hilaire, "Quebec's Bill 96 is an Unconstitutional Attempt to Amend the Constitution of Canada" (8 June 2021), online: *Advocates for the Rule of Law*

<http://www.ruleoflaw.ca/quebecs-bill-96-is-an-unconstitutional-attempt-to-amend-the-constitution-of-canada/>.

[16] Patrick Taillon, "La langue de la loi" (18 January 2021), online: *Le Devoir* <https://www.ledevoir.com/opinion/idees/593465/langue-francaise-la-langue-de-la-loi> (translated by author). See also Taillon quoted in Bélair-Cirino, *supra* note 15 and St-Hilaire, *supra* note 15.

[17] Bélair-Cirino, *supra* note 15 (echoing the language in the *Constitution Act, 1982*, *supra* note 4, s 43 and the Supreme Court of Canada in *Reference re Senate Reform*, *supra* note 13 at paras 25-27).

[18] Allan Rock and Glenn O'Farrell, "Quebec's Bill 96 has its merits, notwithstanding one big flaw" (9 June 2021), online: *The Globe and Mail* <https://www.theglobeandmail.com/opinion/article-quebecs-bill-96-has-its-merits-notwithstanding-one-big-flaw/>. See also Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 McGill LJ 673 [Albert, "Amendment by Stealth"].

[19] Ian Peach, "Quebec Bill 96 — Time For a Primer on Amending the Constitution" (2021) 30:3 Constitutional Forum / Forum constitutionnel 1 at 3 ["Peach"].

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

[21] Eric Adams, "I think the confusion stems from the heading of Part V of the Constitution Act, 1867: 'Provincial Constitutions'. The provisions that follow contain some elements of provincial constitutions, but this section is not, itself, the Constitutions of the various provinces" (28 May 2021 at 11:29), online: *Twitter* <https://twitter.com/ericadams99/status/1398330636276932610?s=10>.

[22] Julius Grey, "Bill 96: The perils of 'pensée unique'" (Lexus Nexus: 26 May 2021), online: *The Lawyer's Daily* <https://www.thelawyersdaily.ca/articles/26971> ["Grey"]. See also Albert, "Amendment by Stealth," *supra* note 18 and Peach, *supra* note 19 at 5.

[23] Grey, *supra* note 22.

[24] *Constitution Act, 1867*, *supra* note 4 (emphasis added).

[25] See e.g. Peach, *supra* note 19 at 3-4.

[26] See e.g. CBC Power and Politics, "Could Quebec unilaterally change parts of the Constitution?" (19 May 2021), online: *YouTube* <https://www.youtube.com/watch?v=ZTfYJ-nlY5A> (Eroll Mendez) ["CBC Power and Politics"]; and Hughes, *supra* note 14.

[27] See Peach, *supra* note 19 at 5.

[28] *Constitution Act, 1982*, *supra* note 6 at s 43 (amendments that include "(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" requires parliamentary consent and the consent of "each province to which the amendment applies"). See also Peach, *supra* note 19 at 5.

[29] See Peach, *supra* note 19 at 5.

[30] *Ibid* at 5-6.

[31] *Ibid*.

[32] CBC Power and Politics, *supra* note 26. See also Joel Goldenberg "Trudeau's Bill C-32 declares French as Quebec's official language" (16 June 2021), online: *The Suburban* <https://www.thesuburban.com/news/city_news/trudeaus-bill-c-32-declares-french-as-quebecs-official-language/article_73b1d6bf-bf0d-53c3-b2b4-6b2c08420590.html>.

[33] Hughes, *supra* note 14.

[34] *Constitution Act, 1982*, *supra* note 6, s 38 (emphasis added).

[35] See Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta LRev 85 at 93 (citing Donald S Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006 at 169).

[36] *Ibid* at 106.

[37] *Reference re Senate Reform*, *supra* note 13 at para 36.

[38] Macfarlane, *supra* note 7.

[39] *Ibid* (echoing the Supreme Court of Canada in *Reference Re Senate Reform*, *supra* note 13 at paras 77-78).

[40] Hughes, *supra* note 14.

[41] CBC Power and Politics, *supra* note 26. See also Deepak Awasti, "Trudeau wrong in interpretation of Bill 96 Constitutional amendment powers", (26 May 2021), online: *The Suburban* <https://www.thesuburban.com/opinion/letters_to_editor/trudeau-wrong-in-interpretation-of-bill-96-constitutional-amendment-powers/article_0d6fec82-c5c5-5f64-8b92-ef2da8a6654b.html>.

[42] Hughes, *supra* note 14 (Hughes notes that, alternatively, Quebec could view the nationhood provision as a "pact between two peoples" that does not affect the other provinces, and therefore only engages section 43).

[43] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*,

being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[44] *Constitution Act, 1867*, *supra* note 4 at s 133 (Hughes, *supra* note 14 notes that a violation of section 133 could be interpreted narrowly to affect only Parliament and Quebec, but not the rest of Canada).

[45] Hughes, *supra* note 14 (Hughes also uses this argument to suggest that unanimous consent could be required under section 41 of the *Constitution Act, 1982*, although this is unlikely. If the courts find that the French language provision violates the Constitution so broadly as to affect all provinces of Canada, unanimous consent may be required).

[46] "Public hearings for Quebec's French language law bill to begin Sept. 21" (29 June 2021), online: *Montreal Gazette* <https://montrealgazette.com/news/quebec/public-hearings-for-quebecs-french-language-law-bill-to-begin-sept-21>.