Provincial Constitutions: What Are They and How Do We Amend Them?

On May 13th, 2021, Quebec introduced Bill 96, *An Act Respecting French, the Official and Common Language of Quebec*.[1] Among other things, Bill 96 attempts to add two clauses to the *Constitution Act, 1867*. The first clause would declare that "Quebecers form a nation."[2] The second states that French is Quebec's official language, and "the common language of the Quebec nation."[3] To make these changes, Quebec is relying on the amendment procedure set out in section 45 of the *Constitution Act, 1982*. Section 45 sets out the following unilateral amendment procedure: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province."[4] Whether Quebec can validly make these changes using section 45 is uncertain and has experts across Canada divided. This is an unprecedented issue, as no province has ever attempted to make changes to a *federal* constitutional law — in this case, the *Constitution Act, 1867* — using section 45.

This article analyzes whether Quebec can use section 45 to enact Bill 96's proposed changes. First, it explains what a provincial constitution is. Second, it reviews the section 45 amendment procedure. Finally, it looks at some of the different scholarly perspectives on whether an amendment to a federal law (and a *Constitution Act* in particular) can constitute an amendment to a provincial constitution.

Provincial Constitutions Exist, But They Are Mostly Unwritten and Uncodified

There is one mention of the phrase "constitution of the province" in Canada's Constitution, that being in section 45 of the *Constitution Act, 1982*. However, this term remains undefined. So, what is a provincial constitution?

Provincial constitutions are largely unwritten, but they do also have written components.[5] These written parts are uncodified, meaning that they are not collated in a single constitutional text. This makes it difficult to determine every single written source which is part of a provincial constitution.

The written elements of provincial constitutions include "statutory rules, common law rules, and constitutionally entrenched rules."[6] They include provincial laws that set out the rules for provincial electoral systems, legislative processes, and governance by the executive branch.[7] They also include parts of the *federal* Constitution.[8] For example, sections 91 to 95 of the *Constitution Act, 1867* set out provincial jurisdiction,[9] sections 96 to 100 create the framework for provincial courts,[10] and Part 5 sets out the Crown's role in provincial governance.[11]

The unwritten nature of provincial constitutions is modelled after the British system, under which significant and important parts of the constitution are unwritten and instead defined by conventions.[12] Constitutional conventions are unwritten rules that govern matters that are not dealt with explicitly in the written constitution.[13] Conventions are not enforceable by courts as they are not laws, but exist in the "political realm."[14] The "most fundamental convention of provincial constitutions" is the principle of responsible government.[15] Additional conventions that are part of provincial constitutions in Canada relate to the premier's and provincial cabinet's powers.[16]

Section 45: The Amending Procedure for Provincial Constitutions

Part V of the *Constitution Act, 1982* sets out different procedures for amending Canada's Constitution. Each procedure applies to "different subjects" and establishes different requirements for the amendment to be approved.[17] Section 45 sets out a unilateral amendment procedure that permits provincial legislatures to amend the "constitution of the province."[18] The only requirement, or qualifier, is that this amendment procedure is subject to section 41 of the *Constitution Act, 1982*. Section 41 requires the unanimous consent of both houses of Parliament and all 10 provincial legislatures for amendments relating to specific subjects, including the "composition of the Supreme Court of Canada," the amendment procedures in Part V of the *Constitution Act, 1982*, and "the use of the English or the French Language."[19] Essentially, the reference to section 41 in section 45 functions as a filter, ensuring that provinces cannot unilaterally pass provincial constitutional amendments on certain subjects of special national importance.

While there is limited case law on section 45 itself, legal scholars suggest that the case law that applied to the now-repealed section 92(1) of the *Constitution Act, 1867* also applies to section 45.[20] Section 45 of the newer, 1982 *Constitution Act* repealed and replaced the original amendment procedure for provincial constitutions (found in section 92(1) of the 1867 *Act*). Some scholars reason that case law on the old procedure, since it deals with the same subject matter, should be applied to the new one. In a 1987 decision, *Ontario (Attorney General) v OPSEU*, the Supreme Court of Canada provided commentary on the old section 92(1) procedure. First and foremost, an amendment of a provincial constitution is achieved, the Court said, through the enactment of "an ordinary law or statute of the provincial legislature."[21] An enactment is considered an amendment to a provincial constitution:

when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1), such as the office of Lieutenant-Governor and, presumably and *a fortiori*, the office of the Queen who is represented by the Lieutenant-Governor.[22]

Looking at section 45, there is no explicit requirement for any special level of majority support for the proposed amendment to pass. However, it does, at a minimum, require the passing of a law in a provincial legislature, thereby implying that a majority of legislators

must necessarily consent to the amendment.[23]

Can Quebec Use Section 45 to Amend the *Constitution Act, 1867*?

Experts are divided on whether the proposed addition of two clauses to the *Constitution Act, 1867* can validly be done using the section 45 amendment procedure. Unfortunately, previous uses of section 45 provide little guidance, as there have only been a few occasions when a provincial law has explicitly referenced it.[24] For example, Alberta expressly relied on section 45 when developing a land-based governance model for Métis settlements within the province in 1990.[25] However, the crucial difference between this use of section 45, and the use now proposed by Quebec, is that Alberta did not modify or add clauses to a piece of federal legislation. Moreover, Quebec's proposed amendments are not just to any federal law, but to the *Constitution Act, 1867*, which is identified in the *Constitution Act, 1982* as part of the Constitution *of Canada*.[26] As such, Quebec's attempt to use section 45 is strikingly different from previous uses.

Where Does the Federal Government Stand?

When asked if Quebec could add clauses to the *Constitution Act, 1867*, Prime Minister Justin Trudeau responded that permission from the other provinces or the federal government is not needed.[27] In his comments, Trudeau said "Quebec, effectively, has the right to modify a part of the Constitution."[28] Shortly after Trudeau's comments on the matter, all major political party leaders at the federal level agreed that Quebec is able to make these proposed changes via section 45.

While federal leaders' reasons for taking this position are unclear, one factor may be that there is nothing *that* controversial about the substance of the proposed changes. In fact, in 2006, Parliament under the Harper government already passed a House of Commons motion recognizing Quebec's status as a nation.[29] However, it is important to note that this House of Commons motion is symbolic and non-binding. As such, this motion is very different from a constitutional amendment, because constitutional law is not only binding, but is "supreme" as well, ie the highest form of law in the Canadian legal system.

On the other hand, the support from Trudeau and other political party leaders, despite the legal and constitutional questions surrounding Bill 96's proposed changes, may be a product of political calculation rather than legal or otherwise substantive analysis.[30] On this point, Ian Peach suggests that federal party leaders are supporting these amendments "in the hope that agreeing with the Quebec government will allow them to win more House of Commons seats in Quebec in the upcoming federal election."[31]

Whatever the motivations of federal leaders, their comments and opinions do not bring us any closer to answering the real question surrounding the Bill 96 changes: the question of how these two proposed clauses can be *legally* added into the *Constitution Act, 1867*. On that matter, commentary from legal experts can help clarify whether the Quebec government is correct to assert that section 45 can be used.

What Do the Experts Say?

Among the first to comment on the matter, Emmett Macfarlane stated that Quebec cannot unilaterally insert the proposed clauses into Canada's Constitution using section 45.[32] Macfarlane commented: "[The provisions] run afoul of the Constitution's amending formula and are thus *ultra vires* (beyond the authority of) the Quebec National Assembly."[33] He reasoned that recognizing Quebec as a nation in the *Constitution Act, 1867* extends beyond the boundaries of a provincial constitutional change for the purpose of the amending procedure in section 45.[34] Further, Macfarlane notes that the provisions "would confer new, unprecedented recognition of a social fact by the Canadian Constitution."[35] This amendment does not go towards "the operation of an organ of the government of the province,"[36] in the words of the Supreme Court; instead it "imposes recognition of a contested fact on the rest of the federation."[37]

Stéphanie Chouinard, on the other hand, partially agrees with the Quebec government, but adds a layer of nuance. Chouinard commented that "the first part of this proposal could most likely be adopted unilaterally by Quebec, but the second may require federal approval."[38] The requirement of federal approval is laid out under section 43 of the 1982 *Constitution Act*, and is applicable to amendments that "relate … to the use of the English or the French language in a province."

In contrast with both Macfarlane and Chouinard, Benoît Pelletier, a former minister for intergovernmental affairs in Quebec, fully supports the Quebec government's claim that it can use section 45 for both proposed amendments.[39] In short, Pelletier believes that the proposed amendments only modify the constitution of Quebec and do not touch upon or alter federal-provincial relations, another province's affairs, or the structure of Canadian federalism.[40] He accordingly reasons that both provisions are fully within the scope of section 45.

Where Do Canadians Stand?

Within Canada, the general public is also divided. The National Post reports that "a large majority of Quebecers support the right of provinces to unilaterally amend parts of the Constitution, whereas a similar majority of Canadians outside Quebec reject the proposal."[41] The results of a recent poll showed that 62% of Quebecers supported the use of section 45 to amend parts of the Constitution that applied to the province specifically, while 64% of Canadians living outside of Quebec disagreed.[42] The last time Canada has seen a division such as this was arguably in the years leading up to and surrounding the 1995 referendum on Quebec sovereignty, which was partly motivated by Canada's failure to constitutionalize Quebec's distinct status — as Bill 96 now tries to do — via the Meech Lake and Charlottetown Accords.[43]

Conclusion: Where Are We Now?

On May 13th, 2021, Quebec tabled Bill 96, *An Act Respecting French, the Official and Common Language of Quebec*. Bill 96 proposes to unilaterally insert two clauses into the

Constitution Act, 1867. The first declares that "Quebecers form a nation." The second states that French is the official language in Quebec, and the "common language of the Quebec nation." In response to these changes, the federal government and all major federal political party leaders have effectively given Quebec the green light to move forward with this amendment using the amending procedure found in section 45 of the *Constitution Act, 1982*. Section 45 permits provinces to unilaterally amend their provincial constitutions. Despite the supportive responses from Parliament, legal experts disagree sharply on whether Quebec can validly use section 45 to make these proposed amendments. As things stand, this uncertainty about the law will remain unless the Supreme Court of Canada has an opportunity to authoritatively rule on the matter through a reference question.

Further Reading:

- Erin Crandall – "What is a provincial constitution and how do we amend it?"
- Emmett Macfarlane – "Quebec's attempt to unilaterally amend the Canadian Constitution won't fly"
- Stéphanie Chouinard: Legault's Language Bill – "A Third Way Between Sovereigntists and Federalists"
- Marco Bélair-Cirino – "Le Québec francophone dans la Constitution Canadienne, sans demander de permission"

[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: <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-96-42-1.html> .

[2] *Ibid*, s 159.

[3] *Ibid*, s 159.

[4] *Constitution Act, 1982*, s 45, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 .

[5] *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2, 1987 CanLII 71 at para 85 .

[6] Emmanuelle Richez, "The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 164 at 164 [Richez].

[7] *Ibid* at 165.

[8] *Ibid*.

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid* at 164.

[13] Stephen Azzi, "Constitution of Canada" (last modified 24 April 2020), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/constitution>.

[14] *Ibid*.

[15] Richez, *supra* note 6 at 164-65.

[16] *Ibid*.

[17] *Ibid*.

[18] *Constitution Act, 1982*, *supra* note 4, s 45.

[19] *Ibid*, s 41.

[20] Richez, *supra* note 6 at 166.

[21] *OPSEU*, *supra* note 5 at para 82.

[22] *Ibid* at para 90.

[23] Richez, *supra* note 6 at 170.

[24] Erin Crandall, "What is a Provincial Constitution and How Do We Amend It?" (May 28 2021), online: *Policy Options* <https://policyoptions.irpp.org/magazines/may-2021/what-is-a-provincial-constitution-and-how-do-we-amend-it/>.

[25] *Ibid*. See also *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24, Preamble.

[26] Ian Peach, "Quebec Bill 96 – Time for a Primer on Amending the Constitution" (2021) 30:3 Const Forum 1 at 3 [Peach].

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

[28] *Ibid*.

[29] "House passes motion recognizing Quebecois as nation" (27 November 2006), online: *CBC News* <www.cbc.ca/news/canada/house-passes-motion-recognizing-quebecois-as-nation-1.574359>.

[30] Peach, *supra* note 26 at 6-7.

[31] *Ibid* at 7.

[32] 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/> [Macfarlane].

[33] *Ibid*.

[34] *Ibid*.

[35] *Ibid*.

[36] *OPSEU*, *supra* note 5 at para 90.

[37] Macfarlane, *supra* note 32.

[38] Stéphanie Chouinard, "Legault's Language Bill – A Third Way Between Sovereigntists and Federalists" (14 May 2021), online: *Policy Magazine* <https://www.policymagazine.ca/legaults-language-bill-a-third-way-between-sovereignists-and-federalists/>.

[39] Marco Bélair-Cirino, "Le Québec francophone dans la Constitution canadienne, sans demander de permission" (13 May 2021), online: *Le Devoir* <www.ledevoir.com/politique/quebec/600956/le-quebec-francophone-dans-la-constitution> [translated by author].

[40] *Ibid*.

[41] Christopher Nardi, "Quebecers and the rest of Canada deeply divided on Quebec's proposal to modify Constitution: poll" (29 May 2021), online: *National Post* <https://nationalpost.com/news/politics/quebecers-and-the-rest-of-canada-deeply-divided-on-quebecs-proposal-to-modify-constitution-poll>.

[42] *Ibid*.

[43] See "Looking back at the 1995 Quebec referendum" (30 October 2020), online: *Global News* <https://globalnews.ca/video/7433833/looking-back-at-the-1995-quebec-referendum>.