Exposing a Bad Trick: Why Quebec's Bill 96 Cannot Amend the Canadian Constitution

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On May 13, 2021, Bill 96, *An Act respecting French, the official and common language of Québec*, was unanimously voted for (with zero abstention) at its first reading after being tabled by Simon Jolin-Barrette, the Quebec Minister Responsible for the French Language.[1] It was then the subject of "special consultations" and public hearings held by the Committee on Culture and Education of the "National Assembly" (*i.e.*, Quebec's legislative assembly) from September 21 to October 7. The bill was reinstated on October 20, which was the day after the opening of the following session.

Within civil society, the Bill has been met with opposition, mostly from the Quebec English community, grouped in the Quebec Community Group Network ("QCGN"), and whose vocal members include lawyers and law professors (and even a law dean) making picturesque extra-legal arguments. The QCGN indeed held its own, and rather folkloric, "parallel hearings", where it was reportedly said the bill will "bring death" and be enforced by a Gestapo-like police.[2] Some lawyer impressed his audience with the result of its own personal historical research suggesting French was not New France's official language.[3] By comparison, readers will find this short (and positive constitutional law-focused) article boring.

Section 159 of Bill 96 seeks to amend the *Constitution Act, 1867*[4] by introducing the following:

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[1] Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess., 42nd Leg., Quebec, 2021, s. 159.

[2] Émilie Dubreuil, "Le projet de loi 96 réveille de vieilles inquiétudes chez les Anglo-Québécois" (September 19, 2021), *Radio-Canada*, online: <htthttps://ici.radio-canada.ca/nouvelle/1825322/pl-96-anglos-quebec-emilie-dubreuil>.

[3] Émilie Dubreuil, "Le projet de loi 96 réveille de vieilles inquiétudes chez les Anglo-Québécois" (September 19, 2021), *Radio-Canada*, online: <htthttps://ici.radio-canada.ca/nouvelle/1825322/pl-96-anglos-quebec-emilie-dubreuil>.

[4] *Constitution Act, 1867*, 30 & 31 Vict., c. 3 [hereinafter "1867 Act"].

> FUNDAMENTAL CHARACTERISTICS OF QUEBEC
> 90Q.1. Quebecers form a nation.
> 90Q.2. French is the only official language of Québec. It is also the common language of the Quebec nation.[5]

This scheme has been referred to as a "find" and a "coyote's trick".[6] But what is it really? Three clarifications must be made.

First, Quebec is not passing an amendment to the "Canadian Constitution" in the sense of the "Constitution of Canada", meaning the "supreme law" of the land pursuant to section 52(1) of the *Constitution Act, 1982*.[7] It is merely amending the "constitution of the province" pursuant to section 45 of the same act.[8] As Patrick Baud, Elena Sophie Drouin and I have claimed:

> We can . . . define the content of the supreme law of Canada as being composed of all the "written" law [that is, the legal provisions] whose amendment, repeal or enactment now (and since April 17, 1982) fall under the constituent competency that is established by the true and variable constitutional amendment procedure established by the CA 1982. [T]his procedure is mostly provided for in Part V of the CA 1982, but includes section 35.1, which is in Part II of the CA 1982, and excludes sections 44 and 45, which are in Part V.[9]

Indeed, perforce, it is the very existence of amendment rules that allow for the formal (though not substantive) distinction of constitutional from ordinary legal rules. These rules necessarily are distinct from, are more demanding than, the procedure which governs the enactment of ordinary laws by a regular (and permanent) legislature. Unlike most other sections contained in Part V of the 1982 Act, sections 44 and 45 do not provide, or participate in the provision of, a special, constraining, or *ad hoc* procedure. Instead, they simply confer jurisdiction to those regular legislators (*i.e.*, the federal Parliament and the provincial legislatures).

Second, it would also be a mistake to confuse the legal effects of an amendment with its placement. Most of the time, an amendment alters, and thus has effects upon, a legal text in which it is not formally located. For an amendment lies in the amending instrument, save a legal (and thus formal and official) consolidation of the amended text. This is why the placement of an amendment must never be confused

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[5] Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess., 42nd Leg., Quebec, 2021, s. 159.

[6] Michel David, "La passe du coyote", *Le Devoir* (May 27, 2021), online: <https://www.ledevoir.com/opinion/chroniques/604856/la-passe-du-coyote>.

[7] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1) [hereinafter "1982 Act"].

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

[9] Maxime St-Hilaire, Patrick F. Baud & Elena S. Drouin, "The Constitution of Canada as Supreme Law: A New Definition" (2019) 28:1 Const. Forum const. 7, at 11.

with how an *administrative* consolidation reads.[10] An amendment that has been incorporated into the amended text by way of a merely administrative consolidation (for example, by the federal Ministry of Justice consolidating Canada's two main Constitution Acts) does not alter the *locus* of the amendment, which remains the amending instrument. Only a formally legal (and thus official) consolidation can do so.

Moreover, there can be no official consolidation of Canada's major constitutional legislation (originally enacted as British imperial statutes) as the power to amend them is fragmented. No coordination of the various amending powers involved — such as what is contemplated at section 55 of the 1982 Act for the enactment of a French version of "portions" of our constitution, for instance[11] — can substitute itself to this legal constitutional consolidation authority our country is lacking. The official update of the entire *Constitution Act, 1867*, for instance, would require, on the one hand, proclamations taken under section 38, 41, 42 and 43 of the *Constitution Act, 1982*, and, on the other hand, both federal and provincial legislative provisions enacted under sections 44 and 45 of that latter Act. Indeed, there is no extant single amending power with the authority to officially consolidate (in one single document) the *Constitution Act, 1867*. When the 1867 Act is amended by proclamation of the Governor General (pursuant to sections 38, 41, 42 or 43 of the 1982 Act, which provide for true amendment of supreme constitutional law) then the amendment is formally and officially found in the proclamation itself.[12] When an amendment to that same Act is conversely made by way of federal statute under section 44, or of provincial statute under section 45, of the *Constitution Act, 1982*, the amendment is found in the amending federal or provincial statute.[13]

Hence, not only is it untrue that Quebec is about to amend the supra-legislative "Canadian Constitution," but the amendments it claims it can make to the 1867 Act would only be found in its own provincial (and formally ordinary) legislation.

Third, the Quebec legislature may not make French the sole official language in the province. There is little doubt that, by virtue of section 45 of the 1982 Act, the Quebec legislature has the competence to amend the "constitution of the prov-

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[10] I submit elsewhere that this is a mistake both Richard Albert and the Supreme Court of Canada make: see Maxime St-Hilaire, "Richard Albert v The Venice Commission on Constitutional Amendments and the Rule of Law: A Systematic and Critical Comparison" (2022) 45:1 Man. L.J., forthcoming.

[11] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 55.

[12] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 38, 41, 42, 43.

[13] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 44, 45.

ince".[14] As Patrick Baud and I suggest elsewhere:

> The legislature's power under s 45 is similarly limited by the rest of the Constitution. To our mind, s 45 consists of the power to make laws in relation to the provincial executive and legislature. But it does not extend to the offices of the Queen, the Governor General and the lieutenant governor of the province, whose continued existence and role is guaranteed, absent constitutional amendment [by virtue of s 41(*a*) of the *Constitution Act, 1982*]. Nor does it extend to the judiciary, which, to the extent its existence, independence and jurisdiction is not constitutionally protected, is the subject of a distinct head of power [provided for at 92(14), 96-100 of the *Constitution Act, 1867*]. Nor does s 45 concern municipal institutions, which are covered by a distinct head of power [provided for at ss 92(8) of the *Constitution Act, 1867*]. Nor, finally, does it encompass the creation of "quasi-constitutional" rights, which are best understood as incidental to each of the legislature's substantive heads of power.[15]

But this formally ordinary legislative competence over the province's executive and legislative powers can in no way conflict with the "Constitution of Canada" as "supreme law". The latter is our common and formally supra-legislative constitution as referenced in section 52(1) of the 1982 Act, a provision that renders "any law that is inconsistent" with it "of no force or effect".[16] This is why Bill 96's attempt to make French the sole official language of the province is unconstitutional: it would constitute an amendment to Canada's supreme law — the true meaning of "the Constitution of Canada" — and thus run afoul of the amendment process required by section 52(3)[17] and specified by sections 41 and 43 of the 1982 Act, the latter two of which provide:

> 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
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> . . .
>
> (c) subject to section 43, the use of the English or the French language[.]
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> 43. 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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[14] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 45.

[15] Maxime St-Hilaire & Patrick F. Baud, "Legal roadblocks for a Quebec constitution" in Richard Albert & Leonid Sirota, eds., *Does Quebec Need a Written Constitution?* (Montreal-Kingston: McGill-Queen's University Press, 2022), forthcoming.

[16] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1). The Supreme Court of Canada has held this phrase to mean "invalid": see *Reference re Manitoba Language Rights*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.).

[17] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(3).

. . .

> (b) any amendment to any provision that relates to the use of the English or the French language within a province, 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.[18]

In other words, changing the relative status of the French and English languages in a province constitutes an amendment to the Constitution of Canada. Such amendment demands not only the mobilization of the legislature of that province and the federal Parliament, but a special procedure involving that province's legislative assembly, the House of Commons and the Senate, culminating in a "proclamation issued by the Governor General under the Great Seal of Canada".[19] Even through its own legislature, Quebec is plainly not permitted to pursue such constitutional amendment alone.

Indeed, the formal constitutional status of English and French in Quebec is set out in section 133 of the 1867 Act, which guarantees linguistic equality within the legislature, official legislative records and in all judicial proceedings:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
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> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[20]

A language could hardly be made any more "official" than this.[21]

Some may retort that the Quebec legislature is only intending to "declare" the official status of the French language in that province, and does not seek to regulate its "use". The answer to this objection is that an ordinary legislator — for example, in the exercise of the jurisdiction provided by section 45 of the 1982 Act — may not, under the pretext of "declaratory" provisions, appropriate the incidental symbolic effects of constitutional law in order to divert these same provisions.

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[18] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 41, 43.

[19] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 41, 43, 47. Note that the involvement of the Senate is optional by virtue of s. 47.

[20] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 133.

[21] On the specific scope of this constitutional provision, see *Quebec (Attorney General) v. Blaikie*, [1979] S.C.J. No. 85, [1979] 2 S.C.R. 1016 (S.C.C.) and *Quebec (Attorney General) v. Blaikie*, [1981] S.C.J. No. 30, [1981] 1 S.C.R. 312 (S.C.C.). See also *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460 (S.C.C.).

The principle of constitutionalism, reiterated and confirmed by section 52(1) of the 1982 Act, holds that an ordinary statute cannot subvert the incidental effects of supreme constitutional law.[22] Exceptions to this principle must be explicitly provided for by a constitutional provision (as section 1 of the 1982 Act does[23]) or admitted according to a jurisprudential test (such as that in *R. v. Sparrow*, relating to the constitutional rights of Aboriginal peoples guaranteed by section 35 of the 1982 Act;[24] or those relating to the resolution of disputes over the federative allocation of legislative powers[25]). Apart from these exceptions, it must be remembered that the provisions of the supreme law (including their relationship to the validity of ordinary laws) must be interpreted in an "architectural", functionalist or teleological manner, in the light of their respective and proper purpose within a coherent whole.

The word "use" in section 43(b) of the 1982 Act should therefore not be interpreted so literally and narrowly such that section 159 of Bill 96 is treated as a mere "declaration" of a single official language.[26] In *Reference re Supreme Court Act, ss. 5 and 6*, a majority of the Supreme Court of Canada emphasized that even an ostensibly declaratory provision may be found to be inconsistent with the Constitution of Canada if its purpose or effect is to amend the latter outside of applicable amending procedures.[27] The clear function of section 43(b) is to ensure that linguistic amendments in a province: first, receive the assent of at least the House of Commons as a federal parliamentary house; and second, are made

[22] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).

[23] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1.

[24] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.); *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.

[25] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.); *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5 (S.C.C.); *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.); *Rogers Communications Inc. v. Châteauguay (City)*, [2016] S.C.J. No. 23, 2016 SCC 23 (S.C.C.); *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 (S.C.C.); *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, 2010 SCC 38 (S.C.C.); *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, 2010 SCC 39 (S.C.C.); *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.).

[26] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 43(b); Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess., 42nd Leg., Quebec, 2021, s. 159 (reinstated on October 20, 2021).

[27] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, at para. 106 (S.C.C.).

pursuant to a special formal procedure that involves the Governor General.[28]

Portraying section 159 of Bill 96 as merely declaratory does not alter the fact that both its purpose and effect mark an attempt to amend the Constitution of Canada (namely, in relation to the use of French and English in the province of Quebec) while circumventing the amending procedure set forth in section 43(b).[29] Any such attempt is contrary to section 52(3) of the 1982 Act and invalid under section 52(1) of that same Act.[30]

At any rate, there is nothing merely symbolic in Bill 96's intent and expected effects, since section 5 of the legislation proposes to add the following section 7.1 to the *Charter of the French Language*:[31]

> 7.1. In the case of a discrepancy between the French and English versions of a statute, regulation or other act referred to in paragraph 1 or 2 of section 7 that cannot be properly resolved using the ordinary rules of interpretation, the French text shall prevail.[32]

This would be patently unconstitutional. In *Doré v. Verdun (City)*, the Supreme Court of Canada confirmed that section 7(3) of the *Charter of the French Language* — which provides that the French and English versions of Quebec statutes "are equally authoritative" — was "in accordance with section 133 of the *Constitution Act, 1867* which requires that the statutes of the legislature of Quebec be enacted in both official languages and that both versions be equally authoritative and have the same status".[33] Bill 96's proposed addition to the *Charter of the French Language* would undermine that equality of status and thus constitute an amendment to the Constitution of Canada — an amendment that the legislature of Quebec has no authority to enact.

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[28] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 43(b).

[29] Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess., 42nd Leg., Quebec, 2021, s. 5 (re-instated on 20 October 2021); *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 43(b).

[30] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(3), 52(1).

[31] *Charter of the French Language*, CQLR, c. C-11.

[32] Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess., 42nd Leg., Quebec, 2021, s. 5 (reinstated on October 20, 2021).

[33] *Doré v. Verdun (City)*, [1997] S.C.J. No. 69, [1997] 2 S.C.R. 862 (S.C.C.), citing *Charter of the French Language*, CQLR, c. C-11, s. 7(3).