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Abstract

This article critically analyzes provincial authority to unilaterally amend the Constitution of Canada. Via an assessment of the purported amendments in Quebec's Bill 96, which would recognize Quebecers as a nation and French as the only language of the province, the article argues that provinces cannot make direct amendments altering, adding, or repealing provisions of the Constitution of Canada. This argument is reflected in the wording of the various constitutional amending procedures, the historical and contemporary constitutional practice, and the underlying purpose of, and fundamental distinction and complex relationship between, the Constitution of Canada as supreme law and the constitution of the province. Notwithstanding this argument, the article also analyzes the specific matters in the Bill 96 provisions and concludes that their addition requires recourse to an amending procedure other than section 45. Adding recognition of Quebecers' status as a nation to the Constitution Act, 1867 exceeds the scope of provincial authority, in part because it would not reflect a statement by Quebec in its own provincial constitution, something it would be free to enact via ordinary legislation. Instead, what Quebec proposes is to confer such recognition by the entire country. The language provision requires recourse to either the bilateral procedure under section 43 or the unanimity procedure of section 41, given the express requirements of those amending procedures. Finally, the unilateral enactment of these amendments would be contrary to the constitutional architecture. The article concludes by briefly examining subsequent provincial attempts to amend the Constitution, finding them equally illegitimate.

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This article critically analyzes provincial authority to unilaterally amend the Constitution of Canada. Via an assessment of the purported amendments in Quebec's Bill 96, which would recognize Quebecers as a nation and French as the only language of the province, the article argues that provinces cannot make *direct* amendments altering, adding, or repealing provisions of the Constitution of Canada. This argument is reflected in the wording of the various constitutional amending procedures, the historical and contemporary constitutional practice, and the underlying purpose of, and fundamental distinction and complex relationship between, the Constitution of Canada as supreme law and the constitution of the province. Notwithstanding this argument, the article also analyzes the specific matters in the Bill 96 provisions and concludes that their addition requires recourse to an amending procedure other than section 45. Adding recognition of Quebecers' status as a nation to the *Constitution Act*, *1867* exceeds the scope of provincial authority, in part because it would not reflect a statement by Quebec in its own provincial constitution, something it would be free to enact via ordinary legislation. Instead, what Quebec proposes is to *confer such recognition by the entire country*. The language provision requires recourse to either the bilateral procedure under section 43 or the unanimity procedure of section 41, given the express requirements of those amending procedures. Finally, the unilateral enactment of these amendments would be contrary to the constitutional architecture. The article concludes by briefly examining subsequent provincial attempts to amend the Constitution, finding them equally illegitimate.

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1. Department of Political Science, University of Waterloo. My thanks to Patrick Baud and Erin Crandall for reading an earlier draft of this paper and providing helpful comments, to Maxime St-Hilaire and Marc-Antoine Gervais for spirited discussions on Twitter, and to the anonymous reviewers for their helpful comments. All remaining errors are my own.

FOUR DECADES AFTER THE ENTRENCHMENT of a domestic amending formula in part five of the *Constitution Act*, *1982* ("1982 Act"),[2] few cases have examined the dividing lines between its various procedures in any significant depth.[3] Within this context, the limits on provincial authority to make amendments under section 45 and the dividing line between the Constitution of Canada and provincial constitutions remain murky. Bill 96, provincial legislation revamping Quebec's language laws, purports to add new provisions to the Constitution of Canada.[4] The Quebec government proposes to add, by way of unilateral amendment under section 45, new provisions to the *Constitution Act*, *1867* ("1867 Act").[5] One provision would simply state that "Quebecers form a nation" and the other that "French shall be the only language of Quebec. It is also the common language of the Quebec Nation."[6] The province purports to have the authority to enact these amendments by asserting that they affect only Quebec and by placing them within part five of the 1867 Act, the "Provincial Constitutions" section.

2. *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*, *1982*].
3. See *Reference Re Supreme Court Act, ss 5, 6*, 2014 SCC 21; *Reference Re Senate Reform*, 2014 SCC 32 [*Senate Reform*].
4. Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021 (assented to 1 June 2022), SQ 2022, c 14 [Bill 96].
5. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act*, *1867*].
6. Bill 96, *supra* note 4, s 159.

In this article, I critically analyze Quebec's authority to unilaterally amend the Constitution of Canada.[7] I conclude that neither of the proposed provisions fall within the amending authority of section 45's unilateral procedure. More fundamentally, I argue that provinces cannot make direct amendments altering, removing, or adding provisions of the Constitution of Canada at all. I set this argument out in Part I. This argument is reflected in the wording of the various constitutional amending procedures, the historical and contemporary constitutional practice, and the underlying purpose of, and the fundamental distinction and relationship between, the Constitution of Canada as supreme law and the constitution of the province. Although parts of provincial constitutions are established by specific provisions of the Constitution of Canada, they primarily consist of ordinary provincial statutory law, common law rules, and unwritten constitutional convention.[8] The "Provincial Constitutions" section of the 1867 Act is not an empty vessel to be filled by provincial legislation that equates that section with the constitution of the province. There is an important distinction between textual amendments to provisions of the Constitution of Canada and the authority of provinces, as provided by the relevant amending procedure, to indirectly alter their content via amendments to the constitution of the province. This distinction is the only way to reconcile the relationship between the Constitution of Canada and provincial constitutions, and the particular status of the various constitutional texts comprising the Constitution of Canada as supreme law. Nonetheless, and noting that existing scholarship and the limited jurisprudence on this question subjects this understanding to contestation, the article turns to other reasons why Quebec does not have the authority to make the proposed amendments.

In Part II, I analyze the specific matters in the proposed provisions and conclude that the addition of either of the proposed provisions requires recourse to an amending procedure other than section 45. Adding recognition of Quebecers' status as a nation to the *Constitution Act, 1867* exceeds the scope of the provincial constitution, in part because it would not reflect a statement by

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7. This article does not engage in an assessment of the normative desirability of including these provisions in the Constitution of Canada. For full disclosure, as it relates to the nation provision, the author believes that a subset of Quebec's population constitutes a nation in the sociological sense. But this cannot apply to the entire population of Quebec, which includes members of various Indigenous nations who cannot plausibly be considered part of a discrete Quebec nation.

8. See Emmanuelle Richez, "The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (University of Toronto Press, 2016) 164 at 164-65 [Macfarlane, *Amendment*].

Quebec in its own provincial constitution, something that it would be free to enact via ordinary legislation. Instead, what Quebec proposes by adding new provisions to the *Constitution Act, 1867* is to *confer such recognition by the entire country*. Moreover, recognition of special status for Quebec formed a part of the intense intergovernmental debates over the Meech Lake and Charlottetown Accords,[9] providing historical evidence that such recognition should be regarded as having potential implications for Canadian federalism and the interpretation of other elements of the constitution, such as the *Canadian Charter of Rights and Freedoms* ("*Charter*").[10] The provision thus requires recourse to the general amending procedure under section 38.

The language provision requires recourse to either the bilateral procedure under section 43 or the unanimity procedure of section 41. The express language of section 43(b) specifies that "any amendment to any provision that relates to the use of the English or the French language within a province" necessitates resolutions by the federal House of Commons and the Senate, in addition to the legislative assembly of the province.[11] Section 41(c) states that the consent of the House, the Senate, and all ten provinces are required for changes affecting the use of the English or French language, subject to section 43.[12] The breadth of the language provision also raises questions about the extent to which it would conflict with other constitutional provisions, including section 133 of the *Constitution Act, 1867*, which guarantees the use of English and French in the Quebec National Assembly, in the translation of laws, and in Quebec courts.[13] The question of whether the provision would directly implicate existing ones might determine whether the proper procedure is the bilateral or unanimity procedure, but it is clear that the Quebec legislature cannot enact the amendment unilaterally.

Finally, the unilateral enactment of these amendments would be contrary to the constitutional architecture. I argue that the proposed amendments need to be read purposively and contextually as part of a sweeping reform bill focusing on language policy. Bill 96 includes provisions not only with serious

9. See Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (University of Toronto Press, 2004) at 133-34, 203.
10. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
11. *Constitution Act, 1982*, *supra* note 2, s 43(b).
12. *Ibid*, s 41(c).
13. *Constitution Act, 1867*, *supra* note 5, s 133.

Charter implications,[14] but with implications for the unwritten constitutional principles—specifically federalism and minority rights—that are part of the constitution's basic structure. Such changes require the consent of the other partners of Confederation.

I conclude with a comment about the politics surrounding the purported amendments in light of two additional provincial attempts at unilateralism that have emerged since Bill 96 passed Quebec's National Assembly, one by Saskatchewan and another by Quebec. These attempts are similarly unconstitutional but were likely spurred by the willingness of the prime minister and other federal leaders to acquiesce to Quebec's unilateralism for fear of political repercussions. Yet the amending formula is a fundamental element of the constitution, one that delegates the constituent power to set or alter the supreme law, the rules of government, and the values of society. The abdication of the prime minister and other elected officials, through their consent to unilateral amendment, does not obviate the essential requirements of the amending formula, which would be violated by unilateralism in the case of these provisions.

I. THE CONSTITUTION OF CANADA AND PROVINCIAL CONSTITUTIONS: FUNDAMENTAL DISTINCTIONS

A. HISTORY AND TEXT

Provincial constitutions are notoriously difficult to define.[15] They have evaded widespread public or scholarly attention, in part because, as with the Constitution of Canada generally, they are not confined to a single document. Unlike the Constitution of Canada, their constituent elements are often not labelled as constitutional at all. Only British Columbia has a document referred to as a constitution.[16] Within the ambit of provincial constitutions are the internal machinery of government and key institutions of a province, including the executive, the legislature, and the electoral system. As noted, some elements of these are reflected in specific provisions of the Constitution of Canada but are also

14. See Jonathan Montpetit, "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> [perma.cc/9FY7-JGWJ].
15. See Justice Malcom Rowe & J Michael Collins, "What Is the Constitution of a Province?" in Christopher Dunn, ed, *Provinces: Canadian Provincial Politics*, 3rd ed (University of Toronto Press, 2016) 297 at 297.
16. See Richez, *supra* note 8.

comprised of ordinary provincial statutes, including quasi-constitutional statutes like the Quebec *Charter of Human Rights and Freedoms*[17] and provincial human rights codes and acts. The unwritten components of the provincial constitution include core conventions like responsible government and many of the related conventions pertaining to the relationship between the practical and formal executive, the operation of the cabinet, and the relationship between cabinet and legislature, among others.[18]

There is thus little doubt that, within these contexts, provinces have considerable authority to implement amendments. They can alter the operation of the legislature, enact electoral reform, reform their bureaucracies, and establish new rights-protecting instruments and institutions. Changes within this general scope are limited by the Constitution of Canada, implying a fundamental distinction between the provincial constitution and the Constitution of Canada. Thus, for example, a change to the core of the convention of responsible government may not be possible for a province to enact unilaterally if it were determined that such a change would affect the office of the lieutenant governor, whose position is entrenched in the national constitution and referred to in the amending formula.[19] Similarly, electoral reform that ran counter to the democratic rights of the Canadian Charter would be impermissible as well.

Quebec's Bill 96 purports to add two new provisions to the *Constitution Act, 1867* as follows:

> 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:
>
> "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."[20]

The government of Quebec contends that it has the authority to enact these amendments in legislation via the unilateral amending procedure in part

17. CQLR C-12.
18. See Rowe & Collins, *supra* note 15 at 300.
19. This illustrates that in some instances, as with respect to the office of the lieutenant governor, there is overlap between the Constitution of Canada and the constitution of the province, as will be discussed below. For a short analysis of the distinction between the constitution of the province and the Constitution of Canada that generally accords with this analysis, see Ian Peach, "Quebec Bill 96: Time for a Primer on Amending the Constitution" (2021) 30 Const Forum Const 1.
20. Bill 96, *supra* note 4, s 159.

by suggesting that adding them to the "Provincial Constitutions" section of the *Constitution Act*, *1867* is equivalent to an amendment to the constitution of the province.[21] The government also points out that in 1968, Quebec was able to abolish the upper house of its legislature, the Legislative Council, which was established in that part of the 1867 Act and which is referred to in sections 71–79. Quebec effected this change by using section 92(1) of the *Constitution Act*, *1867*, the predecessor unilateral amending provision to the current section 45 procedure. As discussed in more detail below, section 92(1) never provided for direct amendment to the text of the *Constitution Act*, *1867* (then the *British North America Act*, *1867* ("*BNA Act*")), which was an Imperial statute, subject only to amendment by the Parliament of the United Kingdom.

In what follows, I argue that the "Provincial Constitutions" section of the *Constitution Act*, *1867*, while necessary to establish elements of the constitution of the province, does not allow provinces to make direct amendments in this sense to the text of the Constitution of Canada. This is made clear by the history and text of the amending formula, including the nature of the previous provincial amending procedure in section 92(1), and historical and contemporary constitutional practice. I will address these points in turn.

The relationship between the Constitution of Canada and the provincial constitutions as it pertains to the amending formula itself adds considerable uncertainty to the scope and limits of section 45's unilateral procedure. Canada's amending formula is complex, containing five distinct procedures, including the general procedure of section 38, requiring resolutions of the House, the Senate, and at least seven provinces representing at least 50 per cent of the population;[22] section 41, the unanimity procedure, specifying a set of matters requiring the

21. The government was reportedly advised by constitutional scholar Benoît Pelletier on the use of section 45. See Montpetit, *supra* note 14. See also Benoît Pelletier, "La loi no 96, une loi novatrice," *Le Devoir* (2 July 2022), online: <www.ledevoir.com/opinion/idees/729207/idees-la-loi-no96-une-loi-novatrice> [perma.cc/R3QL-8AFF].

22. See *Constitution Act*, *1982*, *supra* note 2, s 38. Section 38 states:

> (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada 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.

approval of the House, the Senate, and all ten provincial legislative assemblies;[23] section 42, which is not a distinct procedure, identifying a set of specific matters for which the general amending procedure must be used;[24] section 43, applying to matters affecting one or more, but not all, provinces, including alterations to provincial borders and amendments to any provision that relates to the use of the English or the French language within a province;[25] section 44, permitting Parliament to make changes to the Constitution of Canada affecting the executive,

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23. *Ibid*, s 41. Section 41 states:

> 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:
>
> (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
>
> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
>
> (c) subject to section 43, the use of the English or the French language;
>
> (d) the composition of the Supreme Court of Canada; and
>
> (e) an amendment to this Part.

24. *Ibid*, s 42. Section 42 states:

> (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
>
> (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
>
> (b) the powers of the Senate and the method of selecting Senators;
>
> (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators; (d) subject to paragraph 41
>
> (d), the Supreme Court of Canada;
>
> (e) the extension of existing provinces into the territories; and
>
> (f) notwithstanding any other law or practice, the establishment of new provinces.

25. *Ibid*, s 43. Section 43 states:

> An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
>
> (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,
>
> 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.

House of Commons, and Senate;[26] and section 45, permitting provinces to make changes affecting the constitution of the province.[27] Section 47 reduces the Senate's role to a suspensive veto of 180 days as it relates to sections 38, 41, 42, or 43 if the House of Commons votes to approve a resolution a second time after that period elapses.[28]

The text of each amending procedure refers specifically to amendments to the "Constitution of Canada" except for section 45, which does not refer to the Constitution of Canada but instead to "the constitution of the province."[29] This distinction has an important consequence reflected in existing constitutional practice: Neither section 45 nor its predecessor, section 92(1), has ever been used to directly alter existing provisions or add new ones to the text of the various acts comprising the national constitution. This includes the provincial legislative enactment abolishing Quebec's Legislative Council in 1968.[30] That act did not purport to amend or repeal the relevant sections of the *BNA Act.* Instead, it made changes to the provincial *Legislature Act* and a host of other provincial statutes.[31] The result was not a direct repeal of the relevant constitutional provisions but to render those referring to the Legislative Council effectively spent. According to the Department of Justice Canada:

> *An Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9, provided that the Legislature for Quebec shall consist of the Lieutenant Governor and the National Assembly of Quebec, and repealed the provisions of the *Legislature Act*, R.S.Q. 1964, c. 6, relating to the Legislative Council of Quebec. Now covered by the *National Assembly Act*, R.S.Q. c. A-23.1. Sections 72 to 79 following are therefore completely spent.[32]

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26. *Ibid*, s 44. Section 44 states:

    > Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

27. *Ibid*, s 45. Section 45 states:

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

28. *Ibid*, s 47.
29. *Ibid*, s 45.
30. See *An Act respecting the Legislative Council of Quebec*, SQ 1968, c 9.
31. *Legislature Act*, RSQ 1964, c 6, as repealed by *Legislature Act*, RSQ c L-1. The provisions of the *Legislature Act* are now covered by the *Act respecting the National Assembly*. CQLR A-23.1.
32. *Constitution Act*, *1867*, *supra* note 5, n 35.

It is noteworthy that Quebec's own recent consolidation of the 1867 and 1982 Acts takes a similar position, explicitly stating that section 71, establishing the Legislative Council as part of the legislature, and the remaining sections were not directly amended by the 1968 legislation.[33] This distinction is important. It reflects the fact that the references to elements of the provincial constitutions in the national constitution ought not to be equated with the provincial constitutions themselves, which exist, for the purposes of amendment, as wholly subject to ordinary provincial legislation.

How, then, was it possible for Quebec to have abolished the Legislative Council in this manner in 1968? Central to this understanding of how section 45 operates is the wording of its predecessor instrument, section 92(1) of the *Constitution Act*, *1867* (then the *BNA Act*), which section 45 effectively replaced in general scope and application. Section 92(1) provided for "[t]he Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of the Lieutenant Governor."[34] This wording, particularly "notwithstanding anything in this Act," would be unnecessary if the amending power being granted to provinces was such that they could directly amend the national constitutional text. The wording also reflects the placement of section 92(1) within section 92, the "Exclusive Powers of Provincial Legislatures" section of the division of powers. Recall that the *BNA Act* "contained no express general procedure for the amendment of its provisions. A change to the text or the substance of this constitutional statute required

33. See Quebec, Secrétariat du Québec aux relations canadiennes, *Codification administrative de la Loi Constitutionelle de 1867 et du Canada Act 1982* (Government of Quebec, 2021) at 29 [*Codification administrative*]. However, the Quebec consolidation does make the claim, not recognized by Justice Canada, that an 1882 Act, the *Act respecting the orator of the legislative council*, "formally repealed and replaced" section 77 of the *BNA Act* (*ibid* at 139). See *Act respecting the orator of the legislative council*, SQ 1882, c 3. However, this claim does not hold up, as it seems to rely on provision 8 of that statute, which simply states, "The constitution of the Province of Quebec is amended in the sense of this act and every statutory enactment, contrary thereto, is repealed." *Ibid*, s 8. The legislation makes no specific reference to the *BNA Act* or to section 77. A similar claim is made with respect to the amendment of section 63, as regards the portion relating to Quebec and the appointment of the "Executive Council" in the 1882 *Act concerning the Executive Council*. *Codification administrative*, *ibid* at 131. See *Act concerning the Executive Council*, SQ 1882, c 2. Section 5 of that Act states, "All contrary constitutional provisions are amended in the sense of this act, and all statutory provisions contrary to this act are repealed." *Ibid*, s 5. It is possible that the claim simply reflects the "indirect" amendment of the provision, as the consolidation itself shows the text unaltered from the original in contrast to listing section 77 as "Repealed." *Codification administrative*, *ibid* at 27, 29.

34. *Constitution Act*, *1867*, *supra* note 5, s 92(1).

resort to the Parliament of the United Kingdom."[35] As Warren J. Newman notes, section 92(1) allowed amendments to the constitution of the province that "in their effect, amount to alterations to provisions" of part five of the *BNA Act*, but none of them "purported expressly to amend sections of Part V in terms; rather, the words of those sections remain unchanged and unrepealed."[36]

This is in contrast to section 91(1), which was a later provision, added in 1949, that allowed the federal Parliament to make amendments to the "Constitution of Canada" without needing to make such requests to the UK Parliament. The phrase "Constitution of Canada," appearing nowhere else in the 1867 Act, would come to be defined narrowly by the Supreme Court of Canada ("SCC") as not permitting amendments to the whole of the *BNA Act* but only those matters of interest to the federal government.[37] Moreover, as Warren Newman notes, "the Supreme Court confirmed that section 45 of the Constitution Act, 1982 has essentially the same scope as its predecessor" in the 2014 *Reference re Senate Reform*.[38] This is reflected, as noted above, in the distinct wording of section 45, which, unlike the other amending procedures, does not refer to amendments to the "Constitution of Canada," whose definition was changed in 1982 with the entrenchment of section 52.[39]

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35. Warren J Newman, "Defining the 'Constitution of Canada' Since 1982: The Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act*, *1982*" (2003) 22 SCLR (2d) 423 at 436 [W Newman, "Defining the Constitution"].
36. *Ibid* at 440.
37. See *Re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 71 [*Upper House Reference*]. The Court's narrow definition of the term "Constitution of Canada" contrasts with its broader statement five years earlier in *Jones v AG of New Brunswick*. [1975] 2 SCR 182 at 196. The definition provided by section 52 of the *Constitution Act*, *1982* subsequently overtakes either formulation.
38. "Constitutional Amendment by Legislation" in Macfarlane, *Amendment*, *supra* note 8, 105 at 115 [W Newman, "Constitutional Amendment"], citing *Senate Reform*, *supra* note 3.
39. See *Constitution Act*, *1982*, *supra* note 2, s 52. Section 52 reads:

> (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
> (2) The Constitution of Canada includes
>
> (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).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Competing conceptions of the status of, and distinction between, the Constitution of Canada and provincial constitutions plague existing scholarship. Some of this stems from the unusual, undefined, and largely unwritten nature of provincial constitutions, which makes Canada "rather unusual compared to other federal states around the world."[40] The gradual development of provincial constitutions, some of which predate Confederation and the 1867 Act (with exceptions including Alberta and Saskatchewan), complicated matters immensely. One fundamental question, explored by Peter Price, is whether provincial constitutions "continue to form independent constitutions of these provinces, or were they superseded by the Canadian constitution?"[41] The dominant view within early constitutional scholarship was that "pre-Confederation constitutions continued to operate in Canada as the bases of provincial constitutions," with some asserting they were unaffected by the *BNA Act* or simply existed in parallel with the federal constitution.[42] One example of this reflected in the constitutional text is section 88 of the *BNA Act* with respect to Nova Scotia and New Brunswick and is discussed in Part I(C), below.[43] There were centralists who took the view that the federal constitution amounted to a clean slate,[44] and in the modern period this came to be regarded as a more mainstream view.[45] This development has led to a focus on the written constitution of 1867 as the "primary focal point for describing constitutionalism in Canada," and the "implication was that the political structures of provinces were to be understood through the written words of the Canadian constitution."[46]

The notion that the Constitution of Canada comprises the provincial constitutions is as inaccurate as it is ahistorical. As Campbell Sharman writes, the 1867 Act "says very little about most of the significant matters of

40. Peter Price, "Provincializing Constitutions: History, Narrative, and the Disappearance of Canada's Provincial Constitutions" (2017) 9 Perspectives on Federalism 31 at 36.
41. *Ibid* at 40.
42. *Ibid* at 41. See generally John George Bourinot, "Federal Government in Canada" (1889) 9 Can LT 217; WHP Clement, *The Law of the Canadian Constitution* (Carswell, 1892); DA O'Sullivan, *Government in Canada* (Carswell, 1887); The Honourable Justice TJJ Loranger, *Letters Upon the Interpretation of the Federal Constitution Known as the British North America Act (1867)* ("Morning Chronicle" Office, 1884).
43. The SCC has avoided an authoritative determination about whether the provincial constitutions of those two provinces are part of the Constitution of Canada.
44. See Price, *supra* note 40 at 44-45. See also E Douglas Armour, Book Review of *The Law of the Canadian Constitution* by WHP Clement, (1892) 12 Can LT 298 at 301.
45. See Arthur RM Lower, *Colony to Nation: A History of Canada* (Longmans, 1964); FR Scott, "The British North America (No. 2) Act, 1949" (1950) 8 UTLJ 201.
46. Price, *supra* note 40 at 49.

governmental structure and operation at the provincial level. These fall within the ambit of provincial constitutions."[47] He argues that "provincial constitutions may be defined negatively as being those constitutional matters not dealt with authoritatively in the *BNA Act*."[48] The national constitution simply provides a structure in which parts of the provincial constitutions are located and expressly entrenches certain features, most prominently the lieutenant governor.[49]

Thus, according to some scholars, section 45—by virtue of operating via ordinary legislation and despite its presence in the amending formula—is properly understood as simply conferring jurisdiction over provincial *matters* and not, as might otherwise be suggested, delegating the power to amend the supreme law of Canada properly understood.[50]

A potential complicating factor remains in the form of section 52(2) of the *Constitution Act*, *1982*, which defines the "Constitution of Canada" as including the acts and orders referred to in the schedule of section 53. Among these acts are ones pertaining to elements of provincial constitutions, including the *Manitoba Act*, *1870*, an order admitting British Columbia into the Union in 1871, *The Alberta Act*, *1905*, and *The Saskatchewan Act*, *1905*, all of the statutes being of the federal Parliament.[51] Critics of the argument that I have developed thus far might now say, "See? These various acts, clearly part of the constitution of the province, are also part of the 'Constitution of Canada.' It is therefore clear that provinces can make direct amendments to the latter."[52] This would be too quick.

It is important to note that many of the provisions in the acts and orders in question specifically contemplate becoming spent or subject to implied repeal. They are *establishing provisions*, and they are not written in such a manner as to be

47. "The Strange Case of a Provincial Constitution: The British Columbia *Constitution Act*" (1984) 17 Can J Political Science 87 at 88.
48. *Ibid* at 90.
49. *Ibid.*
50. See Maxime St-Hilaire, Patrick F Baud & Elena S Drouin, "The Constitution of Canada as Supreme Law: A New Definition" (2019) 28 Const Forum Const 7 at 9. The authors use this context to argue that we should discard the "document list approach" to defining the supreme law of the constitution as reflected in section 52(2) of the *Constitution Act*, *1982* and develop an alternative method to identifying supreme law and amendment of the Constitution of Canada (*ibid* at 7). My argument thus differs from theirs in fundamental ways.
51. *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba*, *1870*, SC 1870 (33 Vict), c 3; *British Columbia Terms of Union* (Order of Her Majesty in Council admitting British Columbia into the Union, 16 May 1871); *The Alberta Act*, *1905*, SC 1905 (4-5 Edw VII), c 3 [*Alberta Act*]; *The Saskatchewan Act*, *1905*, SC 1905 (4-5 Edw VII), c 42.
52. There are various formulations on the relationship.

subject to direct amendment by provincial legislatures but as enabling provinces to enact ordinary legislation to effect changes to their internal provincial constitutions. For example, the *Alberta Act*, *1905* contains many clauses that establish key features of the executive or legislature, including appointments to the cabinet, the location of the capital, and the composition of the legislature, all of which are set out with the expectation of future change via language such as "[u]ntil the said Legislature otherwise provides."[53] Scholars have advanced a number of formulations to describe the relationship between the Constitution of Canada and provincial constitutions. Benoît Pelletier describes it as follows:

> Notons au passage qu'en matière de modification constitutionnelle, il est tout à fait approprié de faire des distinctions entre les trois concepts suivants: la «Constitution du Canada» ou «Constitution canadienne», la «constitution fédérale», et la «constitution provinciale» ou «constitution de la province». Le premier de ces concepts renvoie au paragraphe 52(3) de la loi de 1982, lequel offre une définition de la «Constitution du Canada» qui, comme nous l'avons vu ci-dessus, s'applique aux articles 38, 41, 42, 43 et 44 de la loi de 1982 et n'est pas exhaustive. Le second concept, soit la «constitution fédérale», traduit l'idée selon laquelle il existe des normes constitutionnelles qui ne concernent que l'ordre fédéral de gouvernement. Ces normes, liées à la régie interne des institutions fédérales, sont celles qui sont couvertes par l'article 44 de la loi de 1982. Ces dernières font donc à la fois partie de la «Constitution du Canada» et de la «constitution fédérale». Il faut toutefois éviter de confondre ces deux concepts, puisque l'expression «Constitution du Canada» ou «Constitution canadienne» est beaucoup plus large que l'expression «constitution fédérale». Enfin, le troisième concept, soit celui de la «constitution provinciale» ou «constitution de la province», vise, certes, la partie V (articles 58 à 90) de la loi de 1867, mais aussi les différentes mesures adoptées par les provinces en vertu de l'article 45 de la loi de 1982, et ce, que ces mesures fassent ou non partie de la «Constitution du Canada».[54]

Note here that Pelletier recognizes two things consistent with the preceding argument: first, that the Constitution of Canada is distinct from the constitution of the province; second, that the former applies to all of the amending procedures but for section 45, to which the latter applies. Yet he also seems to suggest that not all parts of the relevant acts referred to in the section 53 schedule comprise the "Constitution of Canada" as implied by the section 52(2) definition. Thus, certain parts are the "federal constitution" and within the purview of Parliament under the section 44 procedure, and certain parts, including part five of the 1867 Act, are the provincial constitution. His final qualifier, "que ces mesures

53. *Alberta Act*, *supra* note 51, ss 8-9, 11, 13-15.
54. "La modification et la réforme de la Constitution canadienne" (2017) 47 RGD 459 at 476, n 59.

fassent ou non partie de la 'Constitution du Canada'" further clouds the initial distinctions he draws.

By contrast, Maxime St-Hilaire and Patrick F. Baud contend that neither section 44 nor 45 allow Parliament or provincial legislatures to alter the supreme law of the constitution.[55] Their argument has implications for the status of constitutional provisions that might be directly or indirectly "amended" under the two unilateral provisions. According to St-Hilaire and Baud:

> [L]ike their predecessor provisions sections 91(1) and 92(1) of the British North America Act, 1867, they confer on Parliament and the provincial legislatures the exclusive authority to make laws concerning certain subject matters: "the executive government of Canada" and the Senate and the House of Commons and "the constitution of the province", respectively. Just as other grants of jurisdiction to Parliament and the provincial legislatures, sections 44 and 45 of the Constitution Act, 1982 allow, in other words, for the making of ordinary law. Since ordinary law inconsistent with supreme law is invalid, supreme law cannot be altered by ordinary law. It follows that any provision that can be altered by ordinary law must itself be ordinary, rather than supreme, in nature.[56]

Because certain provisions of the *Constitution Act, 1867* are subject to indirect change by ordinary legislation, the authors argue, they should not be regarded as part of the "supreme law" of the constitution. This is an interesting, perhaps radical, view. The challenge is that it does not seem to accord with the definition of the Constitution of Canada in section 52. Their formulation also misses a fundamental difference between sections 91(1) and 92(1) (and therefore sections 44 and 45). In contrast to section 92(1), section 91(1) permitted "specific modifications to the text" of the *BNA Act*, as Warren Newman notes, and the five amendments made under section 91(1) prior to 1982 reflected this fact.[57]

After 1982, given the section 52 definition of the Constitution of Canada, it becomes important to recognize a fundamental distinction between whether an amendment is "entrenched," at least in the sense that it requires more than an ordinary legislative enactment to change (which legislative enactments made under section 44 or 45 cannot be) and "supreme law" as part of the Constitution of Canada (which amendments under section 44 are, and section 45 are not), which take precedence over ordinary statutes. On top of this distinction, and as will be seen later in this analysis, there are also specific instances of overlap between the Constitution of Canada and those provisions of the constitutional

55. See "Legal Roadblocks to Proposals for a Quebec Constitution" in Richard Albert & Léonid Sirota, eds, *A Written Constitution for Quebec?* (Queen's University Press, 2023) 59.
56. *Ibid* at 64.
57. "Defining the Constitution," *supra* note 35 at 459.

acts referring to the constitution of the province due to their entrenchment (such as section 133, as discussed in Part II(B), below). The remaining provisions that establish or refer to limited parts of the provinces, themselves part of the Constitution of Canada, are thus subject only to indirect amendment or implied repeal by virtue of section 45.[58]

These distinctions also have implications for the relationship between section 45 and the bilateral procedure of section 43. Peter W. Hogg offered two ways of construing that relationship. The first option would be to see section 45 "as applying to an amendment of the 'constitution of the province' only when the provision to be amended is not to be found in any of the instruments comprising the Constitution of Canada."[59] Section 43 would then apply to any direct amendments to provisions in the Constitution of Canada. The second option, favoured by Hogg, is "that s. 45 should be read as extending to the amendment of those provisions of the Constitution of Canada which can also be characterized as part of the constitution of the province."[60] Section 43 would apply to provisions if they were deemed not part of the constitution of the province. Warren Newman raises important questions about this:

> Would not a good reason to prefer the narrower scope for section 45 – at least for the adherents of the view that the "constitution of the province" is never part of the "Constitution of Canada" – be simply the pursuit of consistency and coherency? In other words, if the "constitution of the province" is independent of the "Constitution of Canada," then how can a law amending the constitution of a province under section 45 be directed to the amendment of a provision of the Constitution of Canada?[61]

Newman raises the point that section 45 could simply continue to carry the work performed by section 92(1), including the sort of indirect amendments affecting matters established or referred to in the various provisions of the 1867 Act.

As we shall see, the jurisprudence on this point is murky. In practice, something between these two formulations, and closer to the one that I have outlined, has predominated. The broader conclusion to make from this discussion is that the diversity of scholarly opinion over how to understand the dividing line between the constitution of the province and the Constitution of Canada speaks to its enormous complexity.

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58. Jurisprudence further complicating all of this is discussed below.
59. *Constitutional Law of Canada* (Carswell, 2002) (2002 student edition) at 90.
60. *Ibid*.
61. "Defining the Constitution," *supra* note 35 at 487.

Nonetheless, the formulation that I advance here is straightforward and has the benefit of according with both text and history. Provinces never had authority to directly amend the various national constitutional acts. The *BNA Act*, as an Imperial statute, could only be directly amended by the Parliament of the United Kingdom (at least until the inclusion of section 91(1) in 1949). By convention, such amendments would come by way of a joint resolution by the federal House and the Senate. The provinces could not make such requests, and when they tried, they were rebuffed.[62] Instead, section 92(1) gave provincial legislatures a *legislative* power to "amend the internal constitution of the province."[63] Section 92(1) essentially operated to empower provinces over matters relating to the internal machinery of government of a province, just as the rest of section 92 empowered them to legislate in regard to matters under provincial jurisdiction as set out in the division of powers. Thus, provinces could legislate *in relation* to provisions of the *BNA Act* but could not directly alter them. Just as jurisdiction over a head of power does not extend to the authority to amend that head of power, the power to amend the constitution of the province does not extend to the authority to amend relevant establishing provisions in the Constitution of Canada, let alone to add new ones.

This is why Quebec and other provinces were free to abolish the upper chamber of their legislatures, rendering constitutional provisions referring to them effectively spent or repealed by implication.[64] Indeed, in 1894 the Nova Scotia Legislative Assembly, frustrated by failed attempts to abolish its Legislative Council by simple act, passed an address to the Queen (with supplementary addresses to the lieutenant governor and governor general) to request that the United Kingdom pass legislation directly effecting the abolition.[65] The British Government "replied that an amending Act would be 'inexpedient,' since the provincial Legislature already had the power to alter the Constitution of the province."[66] This rejection was thus based on the distinction between the power to directly amend provisions of the 1867 Act and the power of provinces to amend the matters referred to by those provisions as legislative amendments to the constitution of the province. Recall again that this legislative power provided for amendments to provincial constitutions "notwithstanding anything in" the

62. See Eugene A Forsey, "Provincial Requests for Amendments to the B.N.A. Act" (1966) 12 McGill LJ 397.
63. W Newman, "Constitutional Amendment," *supra* note 38 at 114.
64. See also *Montplaisir c Québec (Procureur Général)*, 1996 CarswellQue 661 (WL Can) (Sup Ct); *R v Somers* (1997), 3 WWR 107 (Man QB).
65. See Forsey, *supra* note 62 at 398.
66. *Ibid* at 398.

BNA Act itself rather than empowering them to make amendments *to* those elements of the *BNA Act*.

This is also reflected in constitutional practice since 1982, to which I now turn.

B. CONSTITUTIONAL PRACTICE

No province has ever directly amended the text of the Constitution of Canada. This is because, as explored in the previous section, provinces lack that authority. Yet where it was impossible to assert such authority under section 92(1) in the pre-1982 period, it is now, as Bill 96 demonstrates, something that a province is willing to attempt to assert under section 45. It is not merely the text and history behind the relevant provisions at stake that speaks against this, but four decades of established practice under the 1982 amending formula as well.

The vast majority of amendments to the internal machinery of the provinces, which constitute amendments to the provincial constitution, are enacted via legislation that makes no specific reference to section 45 or to constitutional amendment at all. These include statutory changes to primary legislation setting out, for example, the rules of the legislature.[67] Occasionally provinces enact legislation specifying that they are, indeed, amending the provincial constitution or employing section 45, although examples are quite rare.[68] One example of provincial legislation purporting to affect the application of a provision of the Constitution of Canada is section 3(2) of the *Legislative Assembly Act* of Alberta, which declares that "[s]ection 4(2) of the *Canadian Charter of Rights and Freedoms* does not apply in relation to the Legislative Assembly of Alberta."[69] Section 4(2) of the *Charter* is an exception to section 4(1), which places a maximum ceiling of five years on the duration of the life of a legislature.[70] Section 4(2) allows for the continuation of a legislature in time of real or apprehended war, invasion, or insurrection, provided that such continuation is not opposed by the vote of

67. See *e.g. Legislative Assembly Amendment Act (Member Changing Parties)*, SM 2018, c 3. This statute repeals a provision requiring members who quit their party caucus to sit as independents.
68. Erin Crandall identifies two instances, both of which declare their use of section 45 in the legislative preamble: one in Nova Scotia and one in Alberta. See *Act Respecting Reasonable Limits for Membership in the House of Assembly*, SNS 1986, c 104; *Constitution of Alberta Amendment Act, 1990*, SA 1990, c C-22.2; Erin Crandall, "Amendment by Stealth of Provincial Constitutions in Canada" (2022) 45 Man LJ 173. To this I would add an Ontario statute recognizing the previous re-enactment of a section (by a section now repealed) constituting a 1999 amendment to the provincial constitution. See *Legislative Assembly Act*, RSO 1990, c L10, s 55(2).
69. RSA 2000, c L-9.
70. *Charter*, *supra* note 10, s 4(1).

more than one-third of the members.[71] Nonetheless, Alberta's legislation does not present itself as a direct amendment to the text of the *Charter*. The provision simply reflects a decision of the legislature to bind itself against exercising the option to extend its own duration in times of emergency.[72]

Bill 96 thus stands as the first legislative assertion that a province can unilaterally and directly alter the text of the Constitution of Canada, specifically by adding new provisions. This is despite the fact that direct amendments to the Constitution of Canada, including the various acts and orders referred to in section 52 of the 1982 Act, have always required recourse to one of the other amending procedures.

There have been thirteen amendments to the Constitution of Canada under the 1982 amending formula. Parliament has, under section 44, modified the formula for apportioning seats in the House of Commons three times (in 1985, 2011, and 2022) and granted Nunavut representation in the Senate.[73] The general amending procedure under section 38 has been used but once, in 1983, in order to make modest but substantive amendments to Aboriginal and treaty rights in section 25 of the *Charter* and section 35 of the *Constitution Act*, *1982*.[74] The remaining eight amendments were made under section 43's bilateral procedure. Each of these amendments affected only one province, and some are especially pertinent to the present analysis.

Three amendments under section 43 implicated education in Newfoundland, which was one of the items reflected in the terms of Newfoundland's entry to Confederation.[75] Educational rights were extended to the Pentecostal Church in Newfoundland in 1987, with two subsequent amendments, one in 1997 allowing the province to create a secular school system to replace the church-based system and one in 1998 ending denominational quotas for religion classes.[76] Along

71. *Ibid*, s 4(2).
72. There may still be some question about its constitutionality, but since a future legislature can theoretically repeal this provision and thus exercise the option under section 4(2) of the *Charter*, it may not raise serious issues.
73. *Representation Act*, *1985*, SC 1986, c 8; *Constitution Act*, *1999 (Nunavut)*, SC 1998, c 15; *Fair Representation Act*, *2011*, SC 2011, c 26; *Preserving Provincial Representation in the House of Commons Act, 2022*, SC 2022, c 6.
74. *Constitution Amendment Proclamation*, *1983*, SI/84-102, (1984) C Gaz II, 2984.
75. *Constitution Amendment*, *1987 (Newfoundland Act)*, SI/88-11, (1988) C Gaz II, 887 [*Amendment*, *1987*]; *Constitution Amendment*, *1997 (Newfoundland Act)*, SI/97-55, (1997) C Gaz II, Extra No 4 [*Amendment*, *1997*]; *Constitution Amendment*, *1998 (Newfoundland Act)*, SI/98-25, (1998) C Gaz II, Extra No 1 [*Amendment*, *1998*].
76. *Amendment*, *1987*, *supra* note 75; *Amendment*, *1997*, *supra* note 75; *Amendment*, *1998*, *supra* note 75.

similar lines, a 1997 amendment permitted Quebec to replace denominational school boards with ones organized on linguistic lines.[77] A 1993 amendment allowing for a fixed link bridge to replace ferry services to Prince Edward Island altered the terms of the province's joining the union, thus implicating an obligation of the federal government.[78] A 2022 amendment removed a historic tax exemption for the Canadian Pacific Railway from the *Saskatchewan Act*.[79] Each of these six amendments under section 43 had direct and obvious relevance to Confederation-style bargains of the Constitution of Canada.

The remaining two amendments involve matters that only implicate individual provinces, but because they called for direct textual amendments *to* the Constitution of Canada, they could not be enacted unilaterally under section 45. In 1993, section 16.1 was added to the *Charter* and reads as follows:

> 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.[80]

Note that nothing prevented New Brunswick from enacting an ordinary statute guaranteeing such rights under its provincial constitution by using section 45. Recourse to section 43 was required, however, for entrenching such rights in the text of the *Charter*. Moreover, this is not because this particular provision implicated section 43(b), which refers to amendments relating to the *use* of the English or the French language. The equality of status between linguistic communities and the specific educational and cultural rights reflected in the provision do not fall within the ambit of section 43(b). Instead, in order to enact these rights in the Constitution of Canada—in order to reflect them in the text

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77. It is worth noting that the preamble to the resolution passed by the Quebec National Assembly for the *Constitutional Amendment, 1997 (Quebec)* includes the statement, "Whereas such amendment in no way constitutes recognition by the National Assembly of the *Constitution Act, 1982*, which was adopted without its consent." See Quebec, National Assembly, *Votes and Proceedings*, 35-2, No 88 (15 April 1997) at 1000-1001. The irony, of course, was that Quebec was nonetheless compelled to adhere to the amending formula in that constitutional document.
78. *Constitution Amendment, 1993 (Prince Edward Island)*, SI/94-45, (1994) C Gaz II, 2021.
79. *Constitution Amendment, 2022 (Saskatchewan Act)*, SI/2022-25, (2022) C Gaz II, Extra No 3.
80. *Charter*, *supra* note 10, s 16.1. See *Constitution Amendment, 1993 (New Brunswick)*, SI/93-54, (1993) C Gaz II, 1588.

of the national constitution and to entrench them against unilateral repeal by a future provincial legislature—section 43 was required.

This example also goes to a core issue that, on its own, implicates the validity of the Bill 96 amendment provisions. Provincial constitutions, and amendments to them, are subject to the *Charter*.[81] By contrast, textual provisions of the Constitution of Canada are not, on the principle that one part of the Constitution of Canada cannot invalidate another part.[82] The inclusion of a new textual provision into the *Constitution Act*, *1867* is not simply an amendment of the provincial constitution; it is an attempt to amend the Constitution of Canada, the purpose of which, Quebec's Minister of Justice has suggested, is to influence the interpretation and application of the *Charter*.[83] This exceeds the scope of section 45. The proposed Bill 96 amendments are not merely an amendment to the constitution of the province but an attempt to insert new provisions into the supreme law of Canada.

In 2001, section 43 was used to change the name of Newfoundland to Newfoundland and Labrador in the text of the *Newfoundland Act* (formerly the *British North America Act*, *1949*).[84] There can be little question that the name of a province is anything but a matter belonging to the authority of the constitution of that province. Indeed, the name "Newfoundland and Labrador" was widely in use within provincial documents before the amendment was enacted. While the *Newfoundland Act* exists to give effect to the terms of union agreed to between Canada and Newfoundland, changing Newfoundland's name has no effect on the substantive obligations implicating Canada in the Act. Yet because the *Newfoundland Act* is among the acts listed as part of the Constitution of Canada in section 52 of the 1982 Act, amendments to its text required recourse to section 43. This relates to the purpose of the amendment, which, in the words of the Member of Parliament from Labrador at the time, was to confer recognition of Labrador in the name by the Constitution of Canada, and indeed, by the country as a whole: "We as a parliament recognized Quebec's distinct character

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81. See *MacLean v Attorney General of Nova Scotia* (1987), 35 DLR (4th) 306 (NS Sup Ct) [*MacLean*].
82. See *Adler v Ontario*, [1996] 3 SCR 609.
83. For comments made by Quebec's Minister of Justice as referred to in the discussion below, see Marco Bélair-Cirino, "Modifier la Constitution aura aussi une portée juridique, plaide Jolin-Barrette," *Le Devoir* (22 May 2021), online: <www.ledevoir.com/politique/quebec/603773/reforme-de-la-loi-101-une-bombe-a-fragmentation-ou-un-petard-mouille> [perma.cc/L7DG-KZJJ].
84. *Newfoundland Act* (UK), 1949, 12 & 13 Geo VI, c 22. See *Constitution Amendment*, *2001 (Newfoundland and Labrador)*, SI/2001-117, (2001) C Gaz II, Extra No 6.

in 1995 through a resolution and we recognized New Brunswick's bilingual character in 1993 through a constitutional amendment, and so today we are recognizing the dual geography and dual nature of Canada's newest province."[85] This is precisely the sort of recognition that Quebec seeks with respect to its proposed amendments.

Historical and contemporary practice make it clear that provinces are not free to unilaterally amend the text of the Constitution of Canada and that this is meaningfully distinct from the sort of indirect amendments effected to do things like abolish the upper houses of provincial legislatures. There is not one instance of a province having enacted a direct amendment to the Constitution of Canada, and the use of section 43 until this point affirms that it is required for such textual changes even when they concern matters that are, fundamentally, internal to the constitution of a province. This is not because provinces lack the amending authority to enact similar measures in provincial legislation. Newfoundland and Labrador, for example, was free to have its new name reflected in provincial statutes and reflected in all other orders, regulations, and provincial institutions. Yet to have such a change explicitly reflected as supreme law in the Constitution of Canada is distinct from a change to the provincial constitution, as our constitutional practice until now reflects.

C. JURISPRUDENCE

The courts have struggled with, and at times openly avoided, defining the precise parameters of provincial constitutions and their relationship to and within the Constitution of Canada for the purposes of amendment. Generally speaking, the constitution of a province is not regarded as part of the Constitution of Canada.[86] Stephen A. Scott argues that provincial constitutions ought to be regarded as part of the Constitution of Canada for the purposes of part five, or the result would be that the multilateral amending procedures would be "excluded from effecting amendments to matters contemplated by section 45."[87] This is based on the inclusion of the word "exclusively" in the text of section 45 (as well as 44), but

85. *House of Commons Debates*, 37-1, No 105 (30 October 2001) at 6698 (Lawrence O'Brien).
86. See Adam Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the Constitution Act, 1982" in Macfarlane, *Amendment*, *supra* note 8, 42 at 51.
87. "The Canadian Constitutional Amendment Process" (1982) 45 Law & Contemp Probs 249 at 280.

Scott acknowledges that it would be unlikely to have any practical significance.[88] The jurisprudence concerning specific provisions appearing in the national constitutional acts that pertain to provincial constitutions is complicated and, at times, unclear.

In the pre-1982 case *Attorney General of Quebec v Blaikie* ("*Blaikie*"),[89] the Court, writing unanimously as "The Court," determined that provisions of Quebec's *Charter of the French Language* were *ultra vires* the authority of the province because they violated section 133 of the *BNA Act*. This section guarantees the use of English or French in the Quebec legislature, in its records and journals, and in all or any of the courts of Quebec. Citing *Fielding v Thomas*,[90] which concerned the privileges and immunities of members of the Nova Scotia legislature and which upheld legislation affecting them as *intra vires* under section 92(1), the Court recognized that section 92(1) may encompass matters beyond the "Provincial Constitutions" section of the *BNA Act*, particularly those that "bore on the operation of an organ of the government of the Province."[91] Yet the fact that section 92(1) may apply to "other matters not expressly covered by the *British North America Act* but implicit in the Constitution of the Province" did not, in the Court's view, make section 133 unilaterally amendable: "Indeed, the argument goes too far because, as pressed, it would permit amendment of the catalogue of legislative powers in the succeeding catalogue of classes of subjects in s. 92 and this was not suggested."[92] The Court endorsed the view of the trial judge that "s. 133 is not part of the Constitution of the Province within s. 92(1) but is rather part of the Constitution of Canada and of Quebec in an indivisible sense."[93]

The Court in *Blaikie* thus speaks to a direct conflict between a provincial law and a provision of the Constitution of Canada. Its invocation of the "indivisibility" of the Constitution of Canada and the constitution of Quebec, with respect to at least certain sections, is far from clarifying and has largely left constitutional

88. *Ibid*. The inclusion of the word "exclusively" would not likely have any practical significance, given that use of the dissent procedure allows for provincial opt-out under section 38 for matters affecting legislative powers and privileges, and any amendment enacted under the unanimity procedure of section 41 would require the consent of each provincial legislative assembly anyway.
89. [1979] 2 SCR 1016 [*Blaikie*].
90. 1896 CarswellNS 108 (WL Can) (PC).
91. *Blaikie*, *supra* note 89 at 1024.
92. *Ibid* at 1024-25.
93. *Ibid* at 1025.

scholars, including those who write textbooks of constitutional law, perplexed, left only to remark on the complexity of the Court's formulation.[94]

In the related case *Attorney General of Manitoba v Forest*, the Court, again unanimously, found Manitoba language legislation inoperative to the extent that it violated section 23 of the *Manitoba Act*, *1870*, which protected the use of English and French in the legislature.[95] The Court drew a direct parallel to section 133 and noted that given its conclusions in *Blaikie*, "it is unnecessary to dwell upon the reasons for which [s. 133] is not to be considered as part of 'the Constitution of the Province' within the meaning of s. 92(1)."[96] It is worth noting that the *Manitoba Act*, *1870* is a statute of the federal Parliament, and its validity was retrospectively recognized by the passage by the UK Parliament of the *Constitution Act*, *1871*.[97] This added context prompted the Court to expand on the relationship of the *Manitoba Act* to the constitution of the province:

> Although, in a certain way, the whole *Manitoba Act* may be said to be the constitution of the Province, it is apparent that the amending power conferred by s. 92(1) cannot have been intended to apply to the whole of this statute any more than all the provisions of the *BNA Act* touching upon the constitution of the provinces in this wide sense can be said to be subject to it.[98]

Moreover, the Court noted:

> If *The Manitoba Act* is to be taken as the constitution of Manitoba for the purpose of its Legislature's amending power, where will one find the power to amend *notwithstanding this statute*? If the reliance is put on the "notwithstanding" in the *B.N.A. Act* it must be observed that it refers to "*this Act*." Therefore in order to claim some authority under that provision Manitoba must take it as it is and accept that it refers only to such provision as would fall within its scope if included in the *B.N.A. Act*. … If, on the other hand, *The Manitoba Act* is taken by itself it must be observed that this is a federal statute which means that, unless otherwise provided, it is subject to amendment by the Parliament and no other. It is, however, otherwise provided in s. 6 of the *British North America Act, 1871*. This section denies any amending power to the federal Parliament and the only amending power it allows to the Legislature of Manitoba is "to alter from time to time the provisions of any law respecting the qualifications of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province."

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94. Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution* (LexisNexis, 2013) at 34, n 83.
95. [1979] 2 SCR 1032 [*Forest*].
96. *Ibid* at 1036.
97. See *British North America Act 1871* (UK), 34 & 35 Vict, c 28.
98. *Forest*, *supra* note 95 at 1038.

> It is unnecessary to consider in the present case whether this enactment implies a restriction of the amending power derived from s. 92(1) by virtue of s. 2 of *The Manitoba Act*. It is enough to note that on any view it certainly cannot result in Manitoba's Legislature having towards s. 23 of *The Manitoba Act* an amending power which Quebec does not have towards s. 133.[99]

Although this clarifies to some extent the limitations of section 92(1) as an amending power, and the scope of the constitution of the province, the Court does not fully elaborate on the relationship between the Constitution of Canada and the provincial constitution.

The post-1982 cases analyzing provincial constitutions provide clarity in some areas but less in others. In *OPSEU v Ontario (Attorney General)* ("*OPSEU*"), which involved Ontario legislation prohibiting public servants from engaging in certain political activities, Justice Beetz, writing for the majority, draws on *Blaikie* to elaborate on the scope of section 92(1) (the relevant provision when the restrictions were first enacted).[100] Justice Beetz's description of the various parts of the constitution of the province as a mix of statutory law, common law, and constitutional conventions accords with the definition provided earlier in this analysis.[101] According to Justice Beetz, legislation implicating "provisions relating to the constitution of the federal state, considered as a whole, or essential to the implementation of the federal principle, are beyond the reach of the amending power bestowed upon the province by s. 92(1)."[102] Similarly, those provisions of the 1867 Act that "constituted a fundamental term or condition of the union formed in 1867" are beyond the reach of the constitution of the province.[103] Justice Beetz thus refines *Blaikie* further; where *Blaikie* endorsed the view that section 92(1) extended to matters beyond the scope of the "Provincial Constitutions" section of the 1867 Act, *OPSEU* specifies areas where the "federal" elements of the Constitution of Canada put matters beyond the reach of provincial unilateral amendment.

In the 1993 case *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* ("*New Brunswick Broadcasting*"), the Court dealt with whether the privileges of a provincial legislative assembly were part of the Constitution of Canada.[104] This question emanated from a *Charter* claim pertaining to news media access to film proceedings of the Nova Scotia Legislative Assembly. The

99. *Ibid* at 1039 [emphasis in original].
100. [1987] 2 SCR 2.
101. *Ibid* at 37-38.
102. *Ibid* at 39.
103. *Ibid* at 40.
104. [1993] 1 SCR 319 [*New Brunswick Broadcasting*].

complicated decision was the product of five separate sets of reasons (only one a dissent). A majority of the Court determined that the privileges of the legislative assemblies enjoy constitutional status via the preamble to the *Constitution Act*, *1867* and avoided determining whether the constitution of Nova Scotia was entrenched in the Constitution of Canada via section 52(2) of the *Constitution Act*, *1982*.

Chief Justice Lamer raised a caution against the idea that Nova Scotia's provincial constitution was entrenched via section 88 of the 1867 Act. Section 88 establishes that the "Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act."[105] Chief Justice Lamer notes that "the continuance of a provincial constitution as contemplated by s. 88 is something quite different from giving it status as part of the Constitution of Canada."[106] He cited two lower court decisions that held that certain provincial constitutions were not part of the Constitution of Canada for the purposes of section 52(2). In *Dixon v BC (AG)*, the trial judge stated that

> [g]reat difficulty may be encountered if the Constitution Act of British Columbia is read into the Constitution of Canada for, if it becomes part of the supreme law and thus inviolable even by the *Charter*, then it is arguably entrenched and could only be altered by the combined efforts of Parliament and the legislature pursuant to s. 43.[107]

The trial judge in *MacLean v Nova Scotia* endorsed this conclusion with respect to the Constitution of Nova Scotia.[108]

Justice McLachlin (as she then was) asserted that the question of whether the Constitution of Nova Scotia was part of the Constitution of Canada was "beside the point" because the "inherent privileges can enjoy constitutional status regardless of whether there exists a power to legislate in respect of privilege in the provincial constitution."[109] Nonetheless, Justice McLachlin noted that she "would also be concerned about a reading of the word 'continue' in s. 88 of the *Constitution Act*, *1867* as 'be entrenched'; since this section concerns only the provincial constitutions of Nova Scotia and New Brunswick, such a reading would raise questions regarding the other provincial constitutions."[110] Justice McLachlin thus seems to suggest that the relationship between provincial constitutions and

105. *Constitution Act*, *1867*, *supra* note 5, s 88.
106. *New Brunswick Broadcasting*, *supra* note 104 at 353.
107. *Dixon v BC (AG)*, 1986 CanLII 770 (BC Sup Ct) at para 38.
108. *MacLean*, *supra* note 81.
109. *New Brunswick Broadcasting*, *supra* note 104 at 374.
110. *Ibid.*

whether they are a part of the Constitution of Canada, or at least "entrenched" within, remains an entirely unsettled question from the perspective of the SCC.

For his part, Justice La Forest briefly emphasizes the continuity of the pre-Confederation colonial constitutions within the *Constitution Act*, *1867* to note that the "new legislative bodies created by that Act and subsequent constitutional instruments over the years are governed by the same principle," but he does not address the question of entrenchment.[111] Justice La Forest's remark thus raises the question of whether it would be coherent to treat the constitutional status of the provincial constitutions that predate Confederation and those that were created or established later differently. If the provincial constitutions of Nova Scotia and New Brunswick are not "entrenched" but merely reflected in section 88, this would support regarding the establishing provisions of the other provincial constitutions in the various constitutional acts as having similar constitutional status. At the same time, there is little question that provisions like section 88 are themselves "supreme law" under section 52, which would go to a distinction between the notion of entrenched versus supreme law, with the former reflecting provisions that cannot be altered unilaterally via ordinary legislation and the latter reflecting the fact that constitutional law enjoys a status superior to ordinary law. However, as seen below, the justices do not necessarily use "entrenched" merely to reflect whether a provision can be subject to legislative (unilateral) amendment, but as synonymous with supreme law under section 52.

Justice Sopinka suggests, in contrast to his colleagues, that it would be "unusual that the framers of the *Constitution Act*, *1867* intended to entrench certain privileges by a general reference in the preamble but not as the constitution of the province as a whole, which is specifically continued in force by s. 88 of that Act."[112] He notes that

> [a]s a result, contrary to *Fielding v Thomas*, these privileges would arguably not be subject to provincial legislation and any change would require an amendment to the Constitution of Canada pursuant to s.43, or indeed s. 38, of the *Constitution Act*, *1982*. Except for these privileges, the rest of the constitution of the province would remain subject to provincial legislation.[113]

What these disparate comments have in common is the notion that whatever is in the Constitution of Canada is beyond the legislative power of provinces to amend unilaterally, much like *Blaikie*'s conclusion that section 133 was "indivisibly" part of both the Constitution of Canada and the Constitution of

111. *Ibid* at 368.
112. *Ibid* at 396.
113. *Ibid.*

Quebec. So how does one reconcile these statements with the power of Quebec to abolish its upper chamber despite its seeming entrenchment in the 1867 Act? One way to reconcile these strands of thought is the distinction between direct amendment of the Constitution of Canada and the authority of provinces to amend "matters" relating to their provincial constitutions, as already noted. Section 88 refers to the continued existence of the constitutions of New Brunswick and Nova Scotia. Those constitutions are not, at this point, recognized by the Court as an entrenched part of the "Constitution of Canada" but for the textual reference of section 88, which therefore neither *comprises* those provincial constitutions nor is itself subject to direct unilateral amendment. In order to ensure the equality of status between provinces, the other provisions of the "Provincial Constitutions" section of the 1867 Act as well as the various establishing acts of the section 53 schedule should also be regarded as just that—establishing provisions that refer to parts of the provincial constitutions and whose matters, if not overlapping in a way that implicates federal authority or a bargain of Confederation, can be subject to indirect amendment only by way of legislation. The result is that provinces can make amendments to their internal machinery of government—within the confines of the sort of constitutional limits noted by Justice Beetz in *OPSEU* and as reflected in the amending formula—and those changes can even render establishing provisions in the Constitution of Canada effectively spent or impliedly repealed, but they cannot directly amend the constitutional text because *the provisions themselves* are part of the Constitution of Canada.[114]

One case that further complicates this assessment is Justice Major's majority reasons in *Re Eurig Estate*.[115] This case rejects a 1978 majority opinion in *Reference re Agricultural Products Marketing Act* that sections 53 and 54 of the 1867 Act, mandating that tax bills originate in the House of Commons and setting out the conditions for their proposal, were not entrenched and could be indirectly amended through inconsistent legislation.[116] Justice Major holds that these sections are entrenched, at least as "a constitutional imperative that is enforceable by the courts."[117] In other words, they are part of the supreme law of the Constitution of Canada. He continues that a provincial use of section 45, as a result of the supremacy clause in section 52(1) of the *Constitution Act*, *1982*, "effectively requires any provincial legislation that seeks to amend the constitution

114. See also *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at paras 82-84.
115. [1998] 2 SCR 565 [*Eurig Estate*].
116. [1978] 2 SCR 1198 at 1257-58.
117. *Eurig Estate*, *supra* note 115 at para 34.

of the province to do so *expressly*."[118] As already noted, provinces routinely effect changes to their provincial constitutions without such express acknowledgment. It is possible that Justice Major's rule applies to amendments that affect entrenched provisions like section 53, and that is the conclusion drawn by Warren Newman elsewhere.[119] But the implication cannot be that the provinces can amend section 53 itself, a provision that explicitly refers only to the federal House of Commons and that applies to provinces only by virtue of section 90. Rather, they can render its application to provinces inoperative through an express amendment to the provincial constitution. In fact, on the dissenting opinion's more narrow view of the scope and purpose of section 53, provinces have already effected this change when they abolished their upper houses.

The jurisprudence, overall, is not particularly clarifying. Many of the preceding comments were made in *obiter*. Nonetheless, they generally support, at least implicitly, the formulation that I have articulated thus far.

D. CONCLUDING THOUGHTS ON THE NATURE OF THE CONSTITUTION OF CANADA AND PROVINCIAL CONSTITUTIONAL AMENDMENT

The argument presented above may not convince those readers who do not see a distinction between direct and indirect amendment of the provisions of the 1867 Act or any of the acts listed in Schedule 53 of the *Constitution Act, 1982*. My position assumes that all provisions within the relevant constitution acts are part of the supreme law of the Constitution of Canada, as consistent with sections 52(1) and 52(2). Unless one adopts the perspective that certain provisions within those Acts are *not* part of the supreme law—and hence, not part of the Constitution of Canada—it is difficult to reconcile the text of the various amending procedures referred to in 52(3) and that comprise part five of the 1982 Act, and the history of constitutional practice around amendment in Canada, with the idea that provinces can make amendments that expressly alter the text of the national constitution.

The alternative view of the supreme law of the constitution advanced by St-Hilaire and Baud suggests not only that the provinces are not amending the Constitution of Canada when they make amendments affecting these provisions, but that Parliament is not making amendments to supreme law either, despite its express authority to do so under section 44. This has the effect of relegating certain

118. *Ibid* at para 35 [emphasis in original].
119. "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007) 37 SCLR (2d) 383 at 391.

provisions of the 1867 Act "ordinary law" rather than constitutional law in this sense. Moreover, St-Hilaire has applied this conception to Bill 96 to argue that

> [e]n réalité, le Québec n'est pas en « passe » de modifier la « constitution canadienne » au sens de « Constitution du Canada », au sens de « loi suprême » du pays, au sens de l'article 52(1) de la *Loi constitutionnelle de 1982*, bref, au vrai et plein sens juridique du mot, mais la seule « constitution de la province » au sens de l'article 45 de cette dernière loi constitutionnelle (et de l'ancien article 92(1) de la *Loi constitutionnelle de 1867*).[120]

In St-Hilaire's view, "real" amendments to the supreme law of the Constitution of Canada can be brought into effect only by the proclamation of the Governor General, as reflected in the amending procedures of sections 38, 41, and 43. This is contrary to the more conventional understanding of the amending formula as offering two distinct methods of amendment, one through resolutions and proclamations, and the other through legislation.[121] This in turn leads him to conclude that because the amending authority is fragmented, there can never be recasting or consolidation of our main constitutional laws. This runs counter to the dominant understanding of integrative codification of amendment in Canada as described by Richard Albert, perhaps the leading scholar of comparative constitutional amendment in the world, who writes of the Canadian process when amendments are made: "[T]he constitution records the change directly in the text of the act or order, accompanied by an explanatory footnote indicating what in the original constitutional item was changed, and when the change was made."[122] It is true that the administrative codifications of the various constitution acts are unofficial. Yet in practice the integration of amendments happens in precisely this manner, in an authoritative way, as recognized by courts.[123] This formal codification is made—indeed, has been made—with respect to any amendment to the Constitution of Canada under the various procedures of the formula,

120. Maxime St-Hilaire, "Projet de loi no 96: 'passe du coyote' ou piaillement du troglodyte mignon?" (29 May 2021), online (blog): *Blogue à qui de droit* <blogueaquidedroit.ca/2021/05/29/projet-de-loi-no-96-passe-du-coyote-ou-piaillement-du-troglodyte-mignon> [perma.cc/PU8J-SK3N].
121. See W Newman, "Constitutional Amendment," *supra* note 38 at 105.
122. *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, 2019) at 247.
123. For a discussion of changes to the text in relation to section 44 amendments, see *Campbell v Canada (Attorney General)* (1988), 49 DLR (4th) 321 (BCCA). See also *Alani v Canada (Prime Minister)*, 2015 FC 649 at para 21.

including section 44 amendments via legislation passed by Parliament,[124] but never by provincial legislatures under section 45. This is precisely because they are only empowered to make amendments to the constitution of the province, not to the Constitution of Canada.

As for Bill 96, the result under St-Hilaire's formulation is either that Quebec is not actually amending the 1867 Act despite the bill's explicitly stated intent to do so, or that what it is amending is merely ordinary law despite the fact that new provisions would be inserted into the 1867 Act. In my view, this is an unsatisfactory formulation which, if followed, would shatter the various constitution acts, rendering many provisions, if not entire acts, no longer part of the Constitution of Canada as constitutional law, despite their express inclusion in section 52. It also runs contrary to the supremacy clause of the 1982 Act and to the text and structure of the amending formula itself. The more coherent view, and one that is consistent with constitutional text and practice, is to recognize that section 45 allows for amendments to the constitution of the province that can indirectly amend the matters within these establishing provisions—so long as those matters are not subject to another amending procedure. The result is that provinces cannot unilaterally add new provisions to any of the acts comprising the Constitution of Canada.

If readers thus far are not quite convinced that provinces cannot amend, directly, provisions of the Constitution of Canada, this does not end the analysis of Bill 96 in that context. In the next section, I turn to the scope of the proposed provisions in order to explain why they are beyond the authority provided for by section 45.

II. SCOPE OF THE NATION AND LANGUAGE PROVISIONS IN BILL 96

A. THE NATION PROVISION

Bill 96 purports to add a provision to the *Constitution Act, 1867* stating that "Quebecers form a nation." The scope of section 45 permits provinces to make amendments to the constitution of the province. There is little question that the Quebec National Assembly is free to enact legislation or pass a resolution recognizing that Quebecers form a nation. The statement, on its own, does

124. For further analysis of how section 44 can only be read this way by virtue of its express relation to the section 52 supremacy clause, see Sarah E Hamill, "The Meta-Constitution: Amendment, Recognition, and the Continuing Puzzle of Supreme Law in Canada" (2016) 16 OUCLJ 28 at 44.

not explicitly confer specific rights or limit those of others in a way that would obviously conflict with the *Charter* or other provisions of the Constitution of Canada. Nor would an ordinary statutory provision that recognizes the status of Quebecers as a nation appear to implicate the division of powers.

The question of whether section 45 permits Quebec to add the provision to the 1867 Act, however, is a different matter. The intent of the Quebec government, indeed the intent of the legislation, is to *confer such recognition by* the Constitution of Canada. This is reflected in the statements by Quebec's Minister of Justice, Simon Jolin-Barrette, to the effect that the provision would have constitutional—that is, legal and jurisprudential—significance. The Minister's statement that "[l]es dispositions de la Constitution s'interprètent les unes par rapport aux autres et chacune des dispositions constitutionnelles a le même niveau à l'intérieur de la Constitution" reflects the intent to influence the interpretation of other elements of the national constitution.[125] Jolin-Barrette further stated that "[i]l est possible que le gouvernement québécois, la nation québécoise puisse utiliser ces dispositions-là pour affirmer sa spécificité dans l'environnement canadien; ses 'valeurs sociales distinctes.'"[126]

To the extent that the provision could be used to inform interpretation of the *Charter* or influence the balancing act that courts sometimes undertake when applying section 1, the *Charter*'s reasonable limits clause, the provision itself is beyond the scope of section 45. The purpose of the provision should be read in the full context of Bill 96, a sweeping overhaul of Quebec's language policy and one with obvious implications for *Charter* rights, such that the bill invokes section 33, the *Charter*'s notwithstanding clause, to immunize certain provisions from particular sections of the *Charter*'s application. The *Charter* was designed as a nationalizing instrument, and implications for its interpretation are implications for the entire country.

Note also that the second provision that Bill 96 seeks to insert into the 1867 Act is expressly tied to the first. The second provision reads, "French shall be the only official language of Quebec. It is also the common language of the Quebec nation."[127] The language provision is thus intended to be read in direct relation to the nation provision. The nation provision is thus inextricably tied to the objectives concerning language policy.

More fundamentally, the nation provision has obvious implications for Canadian federalism and for Canada's national identity. The so-called

125. Bélair-Cirino, *supra* note 83.
126. *Ibid*.
127. Bill 96, *supra* note 4, s 159.

mega-constitutional intergovernmental rounds of negotiation following the 1982 patriation process, resulting in the Meech Lake Accord and Charlottetown Accord, were significant, complex, and highly contested attempts to reach new agreements about the overall status of the constitution. Constitutional recognition of Quebec's special status, in the form of a proposed "distinct society" provision, was central to these negotiations.[128] Indeed, a core condition of Quebec's involvement in post-1982 constitutional negotiations was that "the Canadian constitution will explicitly recognize the unique character of Quebec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism."[129] Since then, successive Quebec governments view constitutional recognition of Quebec's distinctiveness as a necessary condition that must be fulfilled before the province will consider negotiations on constitutional reform.[130]

As Peter H. Russell famously relays in his classic text, *Constitutional Odyssey*, much of the debate over a distinct society provision concerned its wording and whether it would have interpretive force that might influence the interpretation and application of components of the constitution like the *Charter*. Throughout the negotiations of Meech Lake, as Russell tells it, "[a] clause which, from the beginning, no one really understood" was debated, amended, and contested, in part because its legal implications were so uncertain.[131] What is clear is that many of the other partners to Confederation were deeply concerned and hostile to the idea that such a provision might threaten the integrity of national instruments like the *Charter* such that they sought protection for its primacy in different formulations of the text.

Ultimately, both accords failed. The Meech Lake and Charlottetown packages were each complex and included many different reforms, such that it is impossible to point to any one matter as a sole explanation for their failure. Each package was subject to a single amending process requiring the section 41 amending procedure, even though certain elements of each could no doubt have been passed under the general amending procedure of section 38. What is important to note is that the question of constitutional recognition of distinct status for Quebec was deeply controversial and no doubt played a part in the

128. Russell, *supra* note 9 at 133-34, 203.
129. *Ibid* at 134.
130. See Emmett Macfarlane, "The Future of Constitutional Change in Canada: Examining Our Legal, Political, and Jurisprudential Straitjacket" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (University of Toronto Press, 2019) 60 at 72.
131. *Supra* note 9 at 140.

rejection of the Charlottetown Accord in parts of Canada during the national referendum on that package.

The nation provision in Bill 96 obviously differs in wording from the distinct society-style provisions in the two failed accords, but it is a form of special recognition akin to those clauses and should be regarded as having important implications for the vision it promotes of Canadian federalism, even if, and despite the preceding argument, it is only treated as having a merely "symbolic" effect. The central difference between an ordinary legislative enactment and one that purports to make an addition to the 1867 Act is that the latter is properly regarded as an attempt to *confer* recognition of the special status of Quebec *on behalf of the rest of the country*. As a result, even if the provision is merely symbolic, such that it does not directly implicate or modify the interpretation or application of other relevant provisions of the Constitution of Canada, it is nonetheless beyond the scope of section 45. Nor can the nation provision be dismissed as simply constituting a statement of sociological and societal fact. The idea that all Quebecers form a nation is deeply contested, especially given the presence of Indigenous peoples in Quebec and the various nations—from Cree to Inuit to Mohawk, among others—to which they belong.

Scholarly analysis of the inclusion of distinct society or nation provisions in the constitution have properly focused on whether such amendments would necessitate recourse to the general amending procedure under section 38 or the bilateral procedure under section 43.[132] David Cameron and Jacqueline Krikorian, in an analysis of using section 43 to entrench French as the predominant language of the province, suggest that while the bilateral procedure could be used to include the phrases "Québécois nation" and "distinct society," they are probably best left out of their proposal, noting that "one of the main reasons that the Meech Lake and Charlottetown Accords were so strongly contested was not simply the fact that the amendments required the consent of other provinces but also that each purported to declare something about the country as a whole."[133] The authors thus preferred to limit their own proposal to one focused on language and culture such that it "makes no attempt to capture a Canadian vision and situate Quebec

132. See David R Cameron & Jacqueline D Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Amendment Process" (2008) 58 UTLJ 389; Dwight Newman, "Understanding the Section 43 Bilateral Amending Formula" in Macfarlane, *Amendment*, *supra* note 8, 147 at 154-58.
133. Cameron & Krikorian, *supra* note 132 at 417-18.

within it; rather, it identifies one vital element in Quebec's existing laws and complex reality and offers that element a degree of constitutional recognition."[134]

Dwight Newman is more skeptical about whether section 43 could be used to include a distinct society-style provision, noting that it reflects "a larger constitutional statement" than the insertion of province-specific rights in the *Charter* or the ending of denominational schools within a province.[135] He writes that where

> the formal legal effects of an amendment are confined to one province, that presumptively puts it within the scope of section 43, but there is arguably an exception for an amendment that nonetheless fundamentally alters the country as a whole through further-reaching effects – even at some level of holistic constitutional interpretation – that affect the country more generally.[136]

I do not intend to assert definitively whether the nation provision proposed by Bill 96 requires recourse to the general or bilateral procedure. On the one hand, the full scope of section 43 remains murky. On the other, there are strong arguments for the position that the other provinces ought to have a say about the inclusion of such a provision to the extent that it reflects a statement about Canada, Canadian federalism, and how its multinational aspects should be understood. What is clear from the foregoing analysis, however, is that it is not a provision that can be added via the unilateral procedure of section 45.

B. THE LANGUAGE PROVISION

The Quebec National Assembly cannot use section 45 to insert into the 1867 Act a provision stating that "French shall be the only official language of Quebec. It is also the common language of the Quebec nation."[137] In important ways, the obstacles here are much more straightforward than with respect to the nation provision. This is because provisions in other procedures of the amending formula explicitly prevent the use of section 45 in the context of amendments affecting the use of the English or French language. Section 41(c), part of the unanimity procedure, states that amendments to the Constitution of Canada in relation to "the use of the English or French language" require resolutions of the Senate and House of Commons and of the legislative assembly of each province.[138] Importantly, section 41(c) is subject to section 43. Section 43(b) specifies that the

134. *Ibid* at 418.
135. See D Newman, *supra* note 132 at 155.
136. *Ibid.*
137. Bill 96, *supra* note 4, s 159.
138. *Constitution Act, 1982*, *supra* note 2, s 41(c).

bilateral procedure is required for "any amendment to any provision that relates to the use of the English or the French language within a province."[139]

The relationship between sections 41(c) and 43(b) suggests that the latter would apply with respect to the language provision in Bill 96, given its specific application to Quebec. Yet this is complicated by section 133 of the *Constitution Act, 1867*, discussed in relation to *Blaikie* above. As Emmanuelle Richez writes, because section 133 is a limit on section 45, any amendment affecting section 133 would require the unanimity rule as per section 41(c).[140] The unqualified nature of the proposed language provision would seem to conflict with section 133's requirement for the use of English and French in the National Assembly, in legislation, and in the courts. The Quebec government might assert that its proposed provision is intended to be symbolic and does not purport to alter the section 133 obligations. Or it might advance the argument, put forward by others, that a proposed bilateral amendment need not conform to other existing constitutional measures.[141] Without any qualifying language in the proposed provision, this issue would be left to judicial interpretation.

What is nonetheless clear is that the provision—even if "symbolic"—directly touches upon the use of the English and French language and cannot be enacted under section 45. It is also arguably the case that the express reference to the "Quebec nation" within the language provision links the two provisions together such that both must be enacted under the same amending procedure, assuming they are not modified from their presented form. Thus, depending on which of the relevant procedures applies based on the foregoing analysis, that might mean section 41(c), section 38, or section 43.

C. THE CONSTITUTIONAL ARCHITECTURE

The SCC's most comprehensive account of the various amending procedures emanates from its 2014 opinion in *Reference re Senate Reform*.[142] There, the Court adopted an expansive understanding of the Constitution of Canada, where

139. *Ibid*, s 43(b).

140. See Richez, *supra* note 8 at 167.

141. Cameron & Krikorian, *supra* note 132 at 417-19. This assertion is made in the context of proposals that might conflict with the *Charter*. New Brunswick's bilateral amendment to the *Charter* make clear such amendments are possible so long as they fit section 43's requirement of only affecting that province. But it is arguably less clear that Quebec could introduce a broad provision that, on its face, conflicts with section 133, given that the latter implicates a Confederation bargain concerning minority rights at both the federal level and within Quebec.

142. *Supra* note 3.

it noted that the documents listed in the Schedule to the 1982 Act were not exhaustive and that "the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture."[143] This view is consistent with previous decisions that the privileges of the houses of Parliament and the provincial legislative assemblies comprise part of the constitution, decided in *New Brunswick Broadcasting*, and that other unwritten constitutional principles, elaborated most notably in *Reference re Quebec Secession*,[144] comprise part of the Constitution of Canada as well. The architecture concept itself has caused some confusion and has been subject to criticism for its amorphous nature and for raising questions about what other elements of the broader political constitution, such as constitutional conventions, might somehow be implicated by amendment to the Constitution of Canada.[145]

On sections 44 and 45, the Court affirms that these provisions "fulfill the same basic function as ss. 91(1) and 92(2) of the *Constitution Act*, *1867*," which "granted the federal and provincial governments the power to amend their respective constitutions, provided that the amendments did not engage the interests of the other level of government."[146] Citing the *Upper House Reference*,[147] the Court noted:

> section 91(1) did not give Parliament the power to unilaterally make constitutional changes such as the abolition of the Senate or the modification of the Senate's essential features, since these changes engaged the interests of the provinces as well as those of the federal government…Likewise, s. 92(1) allowed the provincial legislatures to enact amendments only in relation to "the operation of an organ of the government of the province, provided it is not otherwise entrenched as being

143. *Ibid* at para 27.
144. [1998] 2 SCR 217 [*Re Secession*].
145. See *e.g.* Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Amendment from the Senate Reform Reference" (2014) 67 SCLR (2d) 221; Michael Pal, "Constitutional Amendment After the Senate Reference and the Prospects for Electoral Reform" (2016) 76 SCLR (2d) 377; Hamill, *supra* note 124; Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68 UTLJ 661; Léonid Sirota, "Immuring Dicey's Ghost: The *Senate Reform Reference* and Constitutional Conventions" (2020) 51 Ottawa L Rev 313; Emmett Macfarlane, *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* (UBC Press, 2021); Emmett Macfarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" (2022) 55 Can J Political Science 322.
146. *Senate Reform*, *supra* note 3 at paras 46-47.
147. *Supra* note 37.

> indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union."[148]

This basic principle applies to sections 44 and 45, as successors to those provisions.[149] As it pertained to the proposed reforms to the Senate at stake in *Reference re Senate Reform*—consultative elections and term limits for senators—the Court determined that Parliament could not unilaterally enact them in part because such changes would alter the constitutional structure by transforming the role of the Senate.

The proposed amendments in Bill 96 arguably implicate the constitutional architecture. Recognizing Quebec as a nation in the national constitutional text goes to the heart of the federal principle. Even if framed as a mere declaratory or symbolic provision, it has implications for the federal identity of the country and for conceptions of Canada as a multinational federation. Nor should it be regarded as merely the constitutional recognition of an uncontested social fact. The reality of Quebec's distinctiveness cannot be denied, but the particular characterization of Quebec as a nation, and the wording used, matters. It has implications for how the federal principle is understood and how the country as a whole is conceived.

The proposed provision also has implications for another unwritten constitutional principle: the rights of minorities. The nation provision is a statement on the total category of "Quebecers." Granting constitutional recognition of nationhood to a subunit of the federation, itself inhabited by a number of different Indigenous nations, carries with it normative weight. The constitutional architecture as currently constructed reflects Canada's multinational character. Section 35 of the *Constitution Act, 1982* recognizes Aboriginal and treaty rights. The treaty relationships—now commonly referred to as nation-to-nation relationships—form a fundamental part of the constitutional structure. The nation motion as currently formulated in Bill 96 purports to include members of those Indigenous nations within Quebec as belonging to a larger "national" entity to which they may or may not belong. Even if only in symbolic terms (although it is important to reiterate that it is impossible to know how these provisions may ultimately be interpreted or what substantive weight courts might endow them with), the nation provision arguably rebalances or alters the constitutional structure as it pertains to Canada's multinational identity.

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148. *Senate Reform*, *supra* note 3 at para 47, citing *Upper House Reference*, *supra* note 37 at 74-75.
149. *Senate Reform*, *supra* note 3 at para 48.

A similar argument could be made about the proposed language provision. The provision, in its broad and absolute wording, implicates a foundational Confederation bargain that guarantees a minimum core of protection for the English language in Quebec, predominately in the form of section 133 of the 1867 Act, but also as reflected in the *Charter*, such as section 23's minority language education rights. The Court describes federalism as "the political mechanism by which diversity could be reconciled with unity."[150] This extends beyond the mere existence of a division of powers as "a central organizational theme of our Constitution" but, "of equal importance, federalism is a political and legal response to underlying social and political realities."[151] The discrete provisions designed to protect minorities *within* the subunits of the federation are a fundamental part of the architecture. Thus, while the "principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province,"[152] the "protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation."[153]

The provisions in Bill 96 do not necessarily, on their face, pose a threat to the federal principle generally or to the rights of minorities in Quebec specifically. Yet, as noted in the previous section, the explicitly stated objective of the Quebec government to gain greater *constitutional* autonomy to assert language policy and to influence the interpretation and application of *Charter* rights cannot be ignored in the context of the structural analysis promoted by the Court's invocation of the architecture concept.[154] It is an express attempt to rebalance how these unwritten constitutional principles work together or are balanced within the constitutional structure, and as such are not provisions that a province is able to insert unilaterally into the Constitution of Canada. My claim here is not that the amending provisions of Bill 96 are unconstitutional by virtue of the unwritten constitutional principles or the broader "architecture" concept itself,[155] but that these inform a proper assessment of which amending procedures can be validly used. The use of section 45 renders these provisions of Bill 96 unconstitutional.

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150. *Re Secession*, *supra* note 144 at para 43.
151. *Ibid* at para 57.
152. *Ibid* at para 59.
153. *Ibid* at para 81.
154. See Bélair-Cirino, *supra* note 83.
155. A majority of the SCC recently held that statutes cannot be invalidated solely on the basis of unwritten principles. See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 84-85.

III. CONCLUSION: POLITICS AND SUBSEQUENT PROVINCIAL ATTEMPTS TO UNILATERALLY AMEND THE CONSTITUTION OF CANADA

The argument in Part I advances the claim that provinces cannot make unilateral amendments to the text of the Constitution of Canada. This understanding reconciles the text and history of section 45's predecessor provision, section 92(1) of the *BNA Act*, and is most consistent with the express wording of section 45 vis-à-vis the other amending procedures in part five of the *Constitution Act, 1982* and the definition of the Constitution of Canada in section 52. Moreover, it also reflects constitutional practice surrounding the amendment of provincial constitutions in relation to the relevant constitution acts before and after 1982. Yet regardless of the efficacy of this broader contribution, the amendments proposed in Quebec's Bill 96 nonetheless exceed the scope of section 45, as explored in Part II. The proposed provisions can only be enacted via the bilateral procedure or one of the multilateral procedures. This is a result of the clear text of the amending formula's various provisions, the purpose and scope of the Bill 96 provisions, and the SCC's approach to the constitutional architecture as it relates to amendments to the constitution's basic structure.

It is troubling, then, that the prime minister and, indeed, each of the federal party leaders, were apparently unwilling to defend adherence to the constitutional amending formula, instead publicly suggesting that Quebec could proceed with such an amendment.[156] As the comprehensive set of instructions for who gets to write the rules of the constitution, there is arguably no more fundamental a rule of law question for a constitutional democracy than this one. The political incentives here are obvious. With a federal election ever looming and with Quebec seats representing nearly one-quarter of the total in the House of Commons, the desire to avoid alienating Quebec is overriding. Yet it is not justifiable. Elected representatives have a responsibility to uphold the constitution, even in the context of politically sensitive matters.

Nor is the prime minister's justification for Quebec's unilateral action, premised in part on the fact that the federal government has "already… recognized" Quebec as a nation,[157] satisfactory. The parliamentary motion

156. See Ian Bailey & Les Perreaux, "Ottawa Supports Quebec Constitutional Challenge on Language Reform, Trudeau Says," *The Globe and Mail* (19 May 2021), online: <www.theglobeandmail.com/politics/article-ottawa-supports-quebec-language-reform-trudeau-says> [perma.cc/63DX-PCW3].

157. *Ibid.*

approved in 2006, which states "[t]hat this House recognize[s] that the Québécois form a nation within a united Canada"[158] is worded differently than the proposed provision in Bill 96 and may differ in content depending on how one understands who comprises the "Québécois." More importantly, the motion has no constitutional import. It is not a statement of law, let alone constitutional law, and does not obviate the need for a constitutional amendment to adhere to the amending formula's requirements. If federal elected representatives are supportive of Quebec's purported amendments as a matter of substance, then they should pursue a legitimate amendment by way of the bilateral or multilateral procedures, depending on which are deemed necessary. Instead, it appears that the constitutional validity of Quebec's proposed amendment will ultimately rest with the courts. Until such time, the Bill 96 provisions should be viewed as having dubious constitutional legitimacy.

It is of some concern that the apparent federal apathy towards Bill 96 has arguably emboldened provincial governments to pursue further unilateral amendments to the Constitution of Canada. In November 2022, the Government of Saskatchewan introduced *The Saskatchewan First Act*, legislation designed to assert the province's exclusive jurisdiction. Among its provisions, it purports to amend both the *Constitution Act, 1867* and the *Saskatchewan Act* by adding the following:

> 90S.1 (1) Saskatchewan has autonomy with respect to all of the matters falling under its exclusive legislative jurisdiction pursuant to this Act.
>
> (2) Saskatchewan is and always has been dependent on agriculture, and on the development of its non-renewable natural resources, forestry resources and electrical energy generation and production.
>
> (3) Saskatchewan's ability to control the development of its non-renewable natural resources, its forestry resources and its electrical energy generation and production is critical to the future well-being and prosperity of Saskatchewan and its people.[159]

In the context of the 1867 Act, these provisions would be placed within the "Provincial Constitutions" section as section 90S.1, immediately following the provisions purportedly added by Quebec's Bill 96. However, for the reasons explored above, this legislation, if enacted, would be unconstitutional. The provisions themselves may reflect symbolic statements, but they seek to confer

158. CBC News, "House Passes Motion Recognizing Quebecois as Nation," *CBC News* (27 November 2006), online: <www.cbc.ca/news/canada/house-passes-motion-recognizing-quebecois-as-nation-1.574359> [perma.cc/UVQ7-GPXY].

159. Bill 88, *The Saskatchewan First Act*, 3rd Sess, 29th Leg, Saskatchewan, 2022, cl 2(5) (second reading 28 November 2022).

recognition of contested facts on behalf of the entire country. The Provincial Constitutions section is not an empty vessel to be filled with unilateral provincial statements, even if they are largely vacuous platitudes with little legal import (though Saskatchewan's provisions, like Quebec's, may be a naked attempt to influence future jurisprudence, in this case pertaining to the division of powers).

Quebec's Bill 4, introduced just a month later and passed by the National Assembly in mere days, is perhaps a more interesting attempt at unilateral amendment.[160] Bill 4 was introduced following a refusal of a handful of members to take the oath required by section 128 of the 1867 Act.[161] Bill 4 simply purports to insert in section 128 the following provision: "Section 128 does not apply to Quebec."[162] What is interesting here is that section 128 is not in the Provincial Constitutions section of the 1867 Act, but in the Miscellaneous Provisions section (along with section 133, described above). The provincial government thus seems to have abandoned the rationale that somehow the Provincial Constitutions section could be equated with the constitution of the province. Instead, the justification appears to be that the oath of the legislative assembly is inherently a part of the provincial constitution. This is a dubious assertion given that section 128 stands as an explicit constitutional requirement and is a singular clause applying to all provincial legislative assemblies and the two houses of Parliament. Even the wording of the oath, as part of a schedule in the 1867 Act, forms an explicit part of the constitutional requirement. As an oath to the monarch, the constitutional requirement symbolizes fidelity to the Crown of Canada as the state (not to the monarch in his personal capacity) or to the Canadian form of

160. See Bill 4, *An Act to recognize the oath provided in the Act respecting the National Assembly as the sole oath required in order to sit in the Assembly*, 1st Sess, 43rd Leg, Quebec, 2022 (assented to 9 December 2022), SQ 2022, c 30.

161. See Laura Marchand, "PQ Denied Entry to Quebec's National Assembly after Refusing to Swear Oath to King," *CBC News* (1 December 2022), online: <www.cbc.ca/news/canada/montreal/pq-denied-entry-1.6670622> [perma.cc/A9VW-GWBF].

162. Bill 4, *supra* note 160. See also *Constitution Act*, *1867*, *supra* note 5, s 128. Section 128 reads:

> Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

government and related unwritten constitutional principles like democracy.[163] As a shared obligation, it reflects the unity of Canada embodied by the Crown and can only be properly interpreted as a constitutional requirement that extends beyond a matter of exclusive concern to a provincial constitution.

If Bill 96 and these other attempts at unilateral provincial amendment of the Constitution of Canada are permitted to stand, we open the door to an increasingly incoherent written constitution, filled with provisions that seek to alter judicial interpretation of its various pillars—from the *Charter* to the division of powers—and no doubt eventually run into each other in increasingly incoherent, if not outright contradictory, ways. Instead of a body of supreme law, we would be left with a litany of unilateral and asymmetrical caveats, a cacophony of symbolic grievances, and a series of trite entries added to or altered at the whim of the various subunits of Confederation. Such a development is contrary to the text and purpose of the amending formula, the history and contemporary practice of amendment, and the very basis of a national constitution comprised of supreme law.

163. Courts have recognized that an oath to the monarch is not properly interpreted as an oath to the King in his personal capacity but that "the reference to the [King] is symbolic of our form of government and the unwritten constitutional principle of democracy." *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at para 6. *McAteer* involved a *Charter* challenge to the Canadian citizenship oath, but in speaking to the meaning of the oath the court drew directly on the oath as required by section 128 of the *Constitution Act, 1867*.