Q&A With Dr Dave Guénette: Quebec's Bill 96

In this Q&A session, CCS Summer Student Zachary Fischer talked to Postdoctoral Fellow Dave Guenette (McGill Faculty of Law) about the amendments that Quebec recently made, through the passage of its Bill 96, to Canada's Constitution Act, 1867. Zach also asked Dave about some of the other issues surrounding Bill 96, including the controversy over the Quebec government's use of the notwithstanding clause, and the new law's impact on Indigenous peoples in Quebec.

Part 1: Constitutional Amendment

Q: One of the overlooked aspects of Bill 96 is that it purports to unilaterally alter the *Constitution Act, 1867* by adding two clauses under section 90. What are these clauses and what impact might they have on the Canadian Constitution?

A: That is correct, section 166 of Bill 96 amends the *Constitution Act, 1867* to include two new provisions. The first one, section 90Q.1, states that "Quebecers form a nation," while the second one, section 90Q.2, provides that "French shall be the only official language of Quebec … [and is] the common language of the Quebec nation." When Bill 96 became a law, in June 2022, the *Constitution Act, 1867* was consequently amended.

The Quebec National Assembly takes the power to adopt these new clauses from the constitutional amendment formula of the *Constitution Act, 1982*, and more specifically from its section 45. The latter provides that "the legislature of each province may exclusively make laws amending the constitution of the province." In other words, each province has the power to unilaterally amend its own internal constitution. While this power is to be found in the *Constitution Act* of 1982, it is worth remembering that provinces have had this power since Confederation. Indeed, before patriation in 1982, section 92(1) of the *Constitution Act, 1867* allowed provinces to do the exact same thing.

From a technical perspective — but this is important — the two new clauses (90Q.1 and 90Q.2) of the *Constitution Act, 1867* are included in a new subsection entitled "Fundamental Characteristics of Quebec." Bill 96 added this new subsection to Part V of the *Constitution Act, 1867*, which pertains to "Provincial Constitutions." Otherwise put, Bill 96 added two new clauses to the "Provincial Constitutions" part of the *Constitution Act, 1867*.

Obviously, the specific impact of this constitutional amendment is yet to be known. The courts may eventually rule on the constitutionality of Quebec's initiative, as well as on the scope of the new provisions. That said, it is likely that the main impact will be of a symbolic nature. Recognition of Quebec's distinctiveness in the Canadian Constitution has been a long-standing demand of the province.

Q: There have been differing opinions on whether this amendment is valid under

the amending formula contained in the *Constitution Act, 1982*. What is the Quebec government's rationale for its ability to do this? What is the argument against this amendment's validity?

A: To fully understand this constitutional amendment, I think you have to put it in the context of Canadian constitutional law. The "Canadian Constitution" is a complex object, made up of British and Canadian statutes, conventions, underlying principles, case law, customs, etc. The same can be said of provincial constitutions in Canada, including, of course, the "constitution" of Quebec. Quebec does not have a formal written constitution consolidated into a single document. Parts of the provincial constitution of Quebec are to be found in Canada's constitutional laws, others in provincial statutes, case law, etc. Section 45 of the *Constitution Act, 1982* thus allows Quebec (or any other province for that matter) to amend its internal constitution, regardless of where that constitution's various parts are located. Of course, provinces that do so must still comply with the other procedures of Canada's constitutional amending formula: the 7/50, unanimity, and special arrangements procedures. And this is where it gets complicated (and interesting)!

Indeed, it can be difficult to accurately distinguish what is part of the constitution of a province and what directly affects a province's interests without being part of its internal constitution. Otherwise put, for some issues, it may be difficult to determine whether they fall within the scope of section 45 (the provinces' capacity to unilaterally amend their constitution), or whether they are more appropriately dealt with under the special arrangements (section 43), 7/50 (section 38), or unanimity (section 41) procedures.

To date, the limits of section 45 of the *Constitution Act, 1982* have been little tested by political authorities. But what is known for sure is that, in 1968, the Quebec Legislature used its power to unilaterally amend its internal constitution in order to abolish its second chamber, the Legislative Council, even though the existence of the latter was provided for in the *Constitution Act, 1867* (again, in Part V on provincial constitutions).

Amongst the arguments provided for by those who oppose Quebec's Bill 96 is that, in order to directly amend constitutional laws (such as the 1867 *Act*), it is necessary to use one of the three multilateral amending procedures (7/50, unanimity, or special arrangements). This argument is rather weak, though, as it goes against the 1968 precedent.

Another argument is that the entrenchment of the two new clauses would require a multilateral amendment because they fall within the scope of either the special arrangements formula (which is required for an amendment to any provision that relates to the use of the English or the French language within a province) or the "general" and "residual" 7/50 formula. This is a stronger argument than the previous one, but we will have to wait and see what judges think of its value.

Q: If the validity of this amendment is upheld or if it is not challenged in court, what impact may this have on other provinces seeking greater provincial autonomy? Is the recognition of Quebec's nationhood a unique case, or would all provinces be able to make similar amendments?

A: I think this is first and foremost a procedural question. The amending formula provides the rules of the game, the procedures to be followed, independently of the political motivations that may accompany a constitutional amendment. This initiative from Quebec will certainly contribute to testing the scope of the provinces' power to unilaterally amend their own internal constitutions, but its impact will greatly depend on how politicians in Quebec and in other provinces decide to use it afterwards. Of course, the possibilities that section 45 of the *Constitution Act, 1982* grants to Quebec are exactly the same for the other provinces.

However, we must keep in mind that this is no magic formula: for instance, a province cannot use this procedure to force another partner to do something or to obtain more autonomy at the expense of another order of government. Section 45 has major limits that are defined by the other amending procedures. And again, within these limits, the provinces obviously enjoy the same prerogatives.

In comparative constitutional law, this power of provinces to unilaterally and directly amend constitutional provisions is a rarity. It is also a reminder of Canadian constitutional history, of the process by which partially self-governing colonies joined to form a new political entity, without wanting to leave behind or give up some of the powers they already possessed.

One thing I find very interesting about this Quebec initiative is that it puts constitutional issues and constitutional amendments back on the agenda. To some extent, the same could be said of the Alberta referendum on equalization. There are many things that are broken in the Canadian Constitution and that deserve to be addressed through attempts at constitutional amendments. Quebec's traditional demands are certainly amongst them, but there is also reconciliation with Indigenous peoples, reform of federal institutions, etc. Hopefully, this constitutional amendment from Quebec can lead to new and constructive constitutional talks.

Part 2: Other Bill 96 Issues

The Notwithstanding Clause

Q: The Quebec government has pre-emptively invoked the notwithstanding clause to shield Bill 96, in its entirety, from certain *Charter* claims (those anchored in section 2 or section 7-15 of the *Charter*). Is this type of pre-emptive, blanket use of the notwithstanding clause valid?

A: With regards to the constitutional validity of such pre-emptive use of the notwithstanding clause, I can hardly see how this could be challenged in any serious way. Whether we like it or not, the notwithstanding clause is part of the *Canadian Charter of Rights and Freedoms*, and its use by public policy-makers is always an option. To suggest otherwise would be to ignore the Supreme Court's jurisprudence, most notably the *Ford* case.

The Canadian *Charter* celebrated its 40th anniversary this year. There are now four decades

of case law and precedents relating to it, with the result that public policy-makers are relatively aware of the limits of what is and is not permitted. Among other things, it is widely known that the notwithstanding clause can be used pre-emptively and that doing so does not require any form of justification. Moreover, it is important to recall that the notwithstanding clause, in its current form, was part of the compromise that made possible the constitutional agreement of November 1981.

Obviously, governments that use the notwithstanding clause (pre-emptively or not) can be criticized in public debates. In turn, they may pay a certain political price for using it. Overriding fundamental rights and freedoms is a major political decision and should be done only when it is an absolute necessity. Nevertheless, it remains the case that there is no serious legal basis for preventing or restricting uses of the notwithstanding clause that are otherwise consistent with the Constitution and constitutional precedents.

Aboriginal Rights

Q: Bill 96 has an impact on many Quebecers, but Indigenous groups have been particularly outspoken in their opposition to the Bill. What are some of the reasons for this opposition, and what legal arguments might Indigenous groups use to challenge Bill 96?

A: One of the main measures proposed by Bill 96 to protect the use of the French language in Quebec relates to the language of instruction in CEGEPs (the academic level in Quebec between high school and university). There are French-language and English-language CEGEPs in Quebec, and Bill 96 provides that now, in English-language CEGEPs, students will have to take and successfully pass three courses of their training (other than second language courses) in French.

My understanding is that this is the main reason for the opposition from Indigenous peoples. They would have wanted to be exempted from this new obligation. Their fear is that this will pose an additional burden on Indigenous students who do not speak French, delaying their graduation or even preventing them from being able to study at university. This obligation to take three courses in French could even — according to some leaders who have gone so far as to speak of “cultural genocide” — force Indigenous students to study outside Quebec.

As for the legal arguments that Indigenous groups could use to challenge Bill 96 and this new obligation, it could be possible for them to argue that Bill 96 violates their Aboriginal rights under section 35 of the *Constitution Act, 1982* — in particular the right to speak their own languages. Furthermore, since Indigenous peoples were not involved in the decision-making process, it could be argued that the duty to consult and accommodate — a duty derived from section 35 of the 1982 *Act* — has not been met (however, the Supreme Court's Mikisew Cree decision probably complicates this claim). Several groups have already indicated their intention to test the validity of these aspects of Bill 96 in court.