In Search of a Quebec Constitution

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This paper ponders the quest for a new Quebec Constitution. It makes some comparisons between Quebec's constitution and those of other provinces and it examines critically a proposed *Quebec Constitution* introduced as a bill in Quebec's National Assembly in 2007.[1] It does so in the context of changing conceptions of constitutions and constitutionalism and infers that the primary purposes of a proposed "new" *Quebec Constitution* are essentially political and symbolic rather than legal. The adoption of the proposed Constitution should not significantly alter Canada's constitutional order under Canadian law. It may have a marginal, if any, effect on Quebec's current constitutional arrangements with Ottawa and the other provinces. On the other hand, if Quebecers embrace such a Constitution, it could lead to two conflicting interpretations of Quebec's fundamental law with no universally accepted and recognized way of settling the issue. The proposed new *Quebec Constitution* could serve, perhaps, as a milestone on the road to an independent Quebec state.

There is substantial consciousness of and contention regarding the Canadian Constitution but little of its provincial counterparts. In the United States, the central elements of the member states' constitutional systems are discrete written constitutions unrelated to the federal constitution. This is not so for Canada's provinces. Canada's federal and provincial constitutions are interconnected and entangled. Documents of various types make up a part of every province's constitution, but the most important parts of those constitutions are unwritten. In Canada, an unwritten and obligatory constitutional rule – the convention of responsible government – has been at the core of provincial constitutions.[2] This is the requirement that the vice-regally-appointed executive retain the confidence of the popularly elected legislature.

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[1] National Assembly, First Session, Thirty-Eighth Legislature, Bill 196, Québec Constitution, presented by Daniel Turp, Member for Mercier (Québec Official Publisher, 2007) available at http://www.assnat.qc.ca/eng/38legislature1/Projets-loi/Publics/07-a196.pdf [Accessed on May 20, 2008].

[2] *O.P.S.E.U. v. Ontario (Attorney General)* [1987] 2 S.C.R. 2.

Conceptualizations of constitutions, democracy, and the principle of constitutionalism are constantly evolving. Canadian constitutions, federal and provincial, have always come from above by some authority granting powers. They have never come from the people, from below, as they have in many of the states of the United States that provide for constitutional amendment by referendum. The Parti Québécois's proposal for a new *Quebec Constitution* continues in the Canadian vein of top-down constitution making; it is to emanate from the National Assembly and is not subject to ratification by a referendum, although the Assembly represents the people. The idea of a new *Quebec constitution* is not exclusively that of the Parti Québécois or even of sovereigntists. Federalist Premier Jean Charest has mused about proposing a Quebec constitution in a future Liberal platform.[3] Mario Dumont, the Leader of the Official Opposition, has added his voice to suggest that such a constitution would serve as a "carte de visite…pour dire aux gens qui vennent se joindre à nous quelles sont les valeurs communes du Québec, les règles de fonctionnement."[4]

Proposals to have Quebec adopt a constitution raises questions: What is Quebec's existant constitution and what legal or political force would its new constitution have? Although very few people are conscious of Quebec's constitution, it has one and it is in many respects typical of other provincial constitutions. A two-decade-old compilation, *Constitutions of Canada*: *Federal and Provincial*, offers 636 pages of constitutional documents, other statute extracts, and titles of statutes for Quebec. It begins with the *Royal Proclamation* of 1763 and includes 20 acts ranging from statutes that deal with Quebec's executive, legislature, and judiciary to acts that govern elections, towns and cities, worship, human and native rights.[5] In volume, this inventory of constitutional and what may be termed quasi-constitutional documents towers over the relatively sparsely worded (967), but elegant and stirringly nationalist, proposed new *Québec Constitution*. The idea of consolidating all of a province's constitutional provisions into one statute has barely been mooted in English Canada [6] and never engaged. A challenge to

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[3] Graeme Hamilton, "Liberals taking act on the road, Planning to lead party in next election, Charest unveils trio of touring committees in hopes of connecting with voters", *Montreal Gazette*, July 7, 2007, p. A11.

[4] Quoted in Martin Pelchat, "Charest: un 'plan d'action' au lieu d'une Constitution québécoise", *Le Soleil*, May 22, 2008, p. 14.

[5] Christian L. Wiktor and Guy Tanguay, eds., *Constitutions of Canada*: *Federal and Provincial* (Dobbs Ferry, N.Y.: Oceana, 1987).

[6] An exception is Margaret A. Banks, *Understanding Canada's Constitution*: *Including Summaries of Some Reports Recommending Changes* (London, ON.: B.S.A.S., 1991), p. 72.

doing so is that no province, including Quebec, has an official position on which of its statutory provisions composes its constitution.[7]

1. Constitutional Conceptions

The essential meaning and colour of the term "constitution" comes from the context in which it is used. A vital component of any constitution deals with the question: who should rule? The concept of "constitution" in the British Westminster system of government, which Canadians asked for and inherited, has grown and expanded since the nineteenth century. In British tradition, the constitution is unwritten and refers to the basic rules, powers, and privileges of a sovereign parliament that is vested with supreme constitutional authority. Thus, parliament is authorized to change the constitution at will. A popularly elected parliament, in this conceptualization, serves as a democratic font and cornerstone because the political executive – which derives its authority from the formal, dignified executive, the Crown – is dependent on maintaining the confidence of the people's House of Commons.[8]

A lingering ambiguity in the term "Constitution of a province" has been at the root of some major constitutional and political issues in Canadian history, and the lack of a firm definition may feed future controversies.[9] The phrase goes undefined in both the *Constitution Act, 1867*[10] and the *Constitution Act, 1982*[11], but Section 5 of the *Colonial Laws Validity Act, 1865*[12] used the term "Constitution of a province" to refer to the powers and procedures of a provincial legislature. Similarly, Section 88 of the *Constitution Act, 1867* used this notion of constitution in its reference to "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick." About a third of the *Constitution Act, 1867* consists of enactments specifically relating to Ontario and Quebec.

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[7] Nelson Wiseman, "Clarifying Provincial Constitutions", *National Journal of Constitutional Law*, vol. 6, no. 2 (1996), p. 269-294.

[8] David E. Smith, *The Invisible Crown*: *The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995), and David E. Smith, *The People's House of Commons*: *Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007).

[9] Margaret A. Banks, "Defining 'Constitution of the province' – The Crux of the Manitoba Language Controversy", *McGill Law Journal*, vol. 31, no. 3 (June 1986), p. 466-479.

[10] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[11] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 reprinted in R.S.C. 1985, Appendix II, no 54.

[12] (U. K), 28 & 29 Vict., c. 63.

The British notion of constitutionalism and parliamentary supremacy as equivalents has not been fully eclipsed in Canada or Quebec notwithstanding the incorporation of the federal principle and a constitutionally entrenched *Canadian Charter of Rights and Freedoms*[13] into the Constitution of Canada. The Supreme Court has determined that parliamentary privileges including a provincial legislature's power to conduct itself as it wishes – part of the unwritten doctrine of parliamentary supremacy – are immune to *Charter* challenges.[14] The Court deemed such privileges and powers part of the Constitution of Canada as defined in Section 52 (2) of the *Constitution Act, 1982* although there is no mention of them there.

Modification of the principle of a single parliament's supremacy came with Canada's adoption of federalism. The federal principle – the idea of jurisdictional powers distributed within a state among different orders of government – runs back to the eighteenth century American Revolution. Canada, with similar geographic challenges to those of the United States and, similarly, as a fusion of a number of distinct colonies of a single imperial power, is one of the world's oldest federations. The decision to embrace a federal system in the 1860's – urged by French Canadians from Canada East (later Quebec) as well by Maritimers[15] – was intended to ensure regional or provincial control over sensitive issues such as education, property and civil rights, culture, and local institutions. Canada's Constitution, therefore, like that of the United States and unlike that of Britain, required the codification of its federal dimensions. The federal principle is no less at the architectural centre of Canada's constitution than the principle of responsible government and, at times, has appeared to have precedence. In the Quebec secession reference case, for example, the Supreme Court identified federalism as one of the four principles "animating the whole of the Constitution" – along with democracy, constitutionalism and the rule of law, and respect for minorities – but it omitted reference to parliamentary supremacy and the principle of responsible government.[16]

In addition to the federal principle, another un-British notion that has come to characterize the Canadian Constitution is that citizens and others have entrenched constitutional rights independent of government. This idea took

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[13] *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [R.S.C. 1985, Appendix II, no 54, s. 52 [hereafter referred to as the *Canadian Charter*].

[14] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. at 319.

[15] P. B. Waite, *The Life and Times of Confederation, 1864-1867*: *Politics, Newspapers, and the Union of British North America* (Toronto: University of Toronto Press, 1962).

[16] *Reference re Secession of Quebec* [1998] 2 S. C. R. at 217.

hold in the twentieth century. A constitution that spells out citizens' rights, in addition to the powers and privileges of state institutions, may have potent symbolic as well as legal weight and give a constitution a charismatic quality. Such constitutions have become badges of nationhood. Canada has moved from the orbit of bifurcated parliamentary supremacy – federal and provincial – to a world of constitutional supremacy where citizens, as well as governments and legislatures, are parties to the Constitution and courts may arbitrate constitutional disputes among them. Both Canada and Quebec have incorporated charters of rights into their constitutions, but a critical difference between them lies in their status. Quebec's *Charter of Human Rights and Freedoms*[17], claims that it "binds the State"[18], but it is an ordinary statute and not constitutionally entrenched, something proposed in the "new" *Québec Constitution*. Currently, the provisions of any other statute may override any part of Quebec's unlike the fenced override power in *Canadian Charter*.

Quebec's government termed the *Canadian Charter* an "imposition on Quebec" and "an attack on duality [reflecting] an inability to accommodate Quebec"[19], but Quebec public opinion has not demonstrated persistent aversion to it. In the aftermath of the Supreme Court of Canada's ruling on the language of commercial signs in Quebec[20], most Quebecers endorsed their government's use of the *Canadian Charter's* "notwithstanding" clause, Section 33, to immunize the offending Quebec legislation. Canadians elsewhere were perturbed and this contributed mightily to the demise of the Meech Lake Accord. The *Canadian Charter* may not enjoy the American Constitution's myth of sanctity nor does it have the status in Quebec that it does in the rest of Canada, but public awareness of it has grown in the province. Mass support for it, in 2002, was reported as being stronger than in any other region of Canada.[21] Among partisan elites, Quebec support for it was exceeded only in Atlantic Canada.[22]

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[17] R.S.Q., c. C-12 [hereafter referred to as the *Quebec Charter*].

[18] *Ibid.*, sections 54 and 52.

[19] Secrétariat aux affaires intergouvernementales canadiennes, Ministère du Conseil exécutif, *Québec's Political and Constitutional Status* (Quebec City: Service des communications of the ministère du Conseil exécutif, 1999), p. 23.

[20] *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. at 712.

[21] Tracy Tyler, "Support for Charter runs strong: Survey – Approval highest in Quebec on 20-year-old rights law", *Toronto Star*, April 12, 2002, *p.* A07.

[22] Richard Vengroff and F. L. Morton, "Regional Perspectives on Canada's Charter of Rights and Freedoms: A Re-examination of Democratic Elitism", *Canadian Journal of Political Science*, vol. 33, no. 2 (June 2000), p. 359-384, at p. 380.

A conceptualization of constitutionalism that has gained force with the growth of the populist democratic impulse is that the public ought to provide an *imprimatur* of legitimacy to a new or substantially revised constitution via a referendum. British Columbia and Alberta have statutes requiring a referendum as a precondition of their legislatures' approving amendments to the Constitution of Canada and Saskatchewanians voted in a plebiscite asking for such a statute.[23] Notwithstanding the absence of a provision for referenda in the *Constitution Act, 1982*, the 1992 referenda on the Charlottetown Accord reflected the international trend toward seeking popular consent for mega-constitutional change. The referenda pointed to Quebec's particularity because, although the question put was the same across Canada, Quebec's Chief Electoral Officer conducted Quebec's referendum under Quebec law (including voter eligibility being limited to those resident in the province for six months). Meanwhile, the referendum in the rest of Canada proceeded under the federal Chief Electoral Officer and its quite separate and different electoral law (and with no such residency requirement). Quebec is the only province that has held referenda, in 1980 and 1995, on changing its status in Confederation, another example of its exceptionalism.

An approach to constitutionalism that focuses solely on the written letter of the law is universally understood to be overly technical and narrow. A constitution is more than that: it may also be embellished, modified, and elaborated upon by legal arguments, doctrines, court judgments, parliamentary rules, executive decrees, customs, and conventions. In Canada, the written elements of federal and provincial constitutions include a mixture of British as well as federal and provincial statutes and orders-in-council. The essence of a constitution, however, is both none of these and more than these. It is a product of a collective imagination and dwells in the world of presuppositions. A constitution's pith may be said to be the public's and the courts' images of it. "The image" of a constitution, writes William Conklin, "rebounds off the text."[24] Provincial constitutions, like that of Quebec's at present, barely dwell in the inchoate conscious world; they rouse little interest, let alone passion. They are "an often-forgotten subject"[25] partly because they are not easily organized or orderly. The idea of a provincial

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[23] *Constitutional Amendment Approval Referendum Act*, R.S.B.C. 1996, c. 67; *Constitutional Referendum Act*, R.S.A. 2000 c. C-25; Saskatchewan, *Report of the Chief Electoral Officer* (1992), p. 85.

[24] William E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989), p. 3.

[25] Ronald I. Cheffins, and Patricia A. Johnson, *The Revised Canadian Constitution* (Toronto: University of Toronto Press, 1989).

constitution has poor circulation because of its obscure, imprecise boundaries. This may change soon however.

The project for a new *Québec Constitution* may come to be seen as an antecedent to the establishment of an independent Quebec state. The project's objective is to establish a higher basic law, a supreme statute that would constrain and check the will of transient partisan governments that may command a simple majority in the legislature. Such a Constitution could be wielded as an instrument of public education in affirming and entrenching, as it does, the supremacy of parts of both Quebec's *Charter of Human Rights and Freedoms* and its *Charter of the French Language*[26]. As well, it could contribute to gaining external, as well as internal legitimacy, for a sovereign, independent Quebec regime once it emerges. The formulation of a distinctive *Québec Constitution* is consistent with Quebec's Cartesian legal traditions as reflected in its civil code, which contrasts with English Canada's common law tradition. Historically, English Canadians, in the British tradition, have leaned toward constitutional evolution via "muddling through" while Quebecers, including arch-federalists like Pierre Trudeau, have demonstrated a penchant for codification.

The proposed new *Québec Constitution*'s function is essentially emblematic, a concrete symbol of an abstract idea. It may not replace Quebec's existing constitutional infrastructure, but would simply augment it so long as Quebec remains a province. Like parliament's 2006 motion that recognized the *Québécois* as a nation and the National Assembly's 2003 declaration that Quebecers constitute a nation, it may have little impact on Canada's institutional arrangements. Quebec will continue to engage in federal-provincial negotiations, inter-provincial discussions, and in the Council of the Federation. Indeed, Quebec provided the Council's title, a title consistent with provincial autonomy, and it chaired the Council's launch and offered Quebec City as the initial site for its secretariat.[27] Adoption of the proposed Constitution would signify, yet again, Quebec's distinctiveness.

2. Comparative Provincial Perspectives

Quebec's original constitution after the Conquest came in the Commission and Instructions issued in the form of Letters Patent by the British Crown to Governor James Murray in 1763. Similar instruments were issued to the

[26] R.S.Q, c. C-11.

[27] Rhéal Seguin, "Charest's Quebec includes Ottawa", *Globe and Mail*, July 21, 2003, p. A5.

Governors of Nova Scotia, Prince Edward Island, and New Brunswick.[28] The *Quebec Act*[29] of 1774 superceded the Quebec Governor's charge. Politically, the *Act* is noteworthy for the liberties it granted to Catholics; legally it is notable as being the first Canadian constitutional document based on British statutory authority rather than royal prerogative. The *Constitutional Act, 1791* – dividing Quebec into Lower and Upper Canada and the *Act of Union, 1840* reuniting them as the Province of Canada – followed in this statutory vein.[30]

"Provincial Constitutions" is the title of Part V of the *Constitution Act 1867*, composing Sections 58-90. The *Manitoba Act, 1870*, the *Saskatchewan Act, 1905*, and the *Alberta Act, 1905* appear in the Schedule to the *Constitution Act, 1982*, and are those provinces' foundational constitutional documents as well as being part of the Constitution of Canada. In contrast, pre-Confederation constitutional documents like the *Quebec Act*, and the "instruments" granted to Quebec's and the Maritimes' early governors are absent, although New Brunswick's Department of Justice has referred to the first colonial Governor's Commission and Instructions of 1784 as part of the province's constitution.[31]

The power to change a provincial constitution was the very first power assigned exclusively to provincial legislatures in Section 92 (1) of the *Constitution Act, 1867*. This was, according to Lord Carnarvon who piloted the act at Westminster as Under-Secretary of State for the Colonies, "in conformity with all recent colonial legislation".[32] That section was simultaneously repealed and reinserted as Section 45 of the *Constitution Act, 1982*. One difference is that the original reference to a provincial "Constitution" is now lowercased to "constitution". Another difference is that this power originally appeared in Part VI of the *Constitution Act, 1867* titled "Distribution of Legislative Powers", and under Section 92's rubric "Exclusive Powers of Provincial Legislatures". It is now located in Part V of the *Constitution Act, 1982* titled "Procedure for Amending Constitution of Canada". Such relocation and re-titling implies that an amendment to a provincial constitution, such as the proposed *Québec Constitution*, is an amendment to the Constitution of Canada. This might turn out to be of some significance in future developments.

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[28] John E. Read, "The Early Provincial Constitutions", *Canadian Bar Review*, vol. 26, no. 4 (1948), p. 621-37.

[29] 14 Geo. III, c. 83.

[30] 32 Geo. III, c. 31, and 3-4 Vict., c. 35.

[31] Paul M. Breton, Deputy Minister of Justice, New Brunswick, to author, January 3, 1993.

[32] Quoted in Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950), p. 36.

Two examples of Quebec having changed its provincial constitution are the renaming of its Legislative Assembly as the National Assembly and the abolition of its upper house, or Legislative Council, in 1968. Four other provinces with upper chambers had similarly abolished theirs in earlier decades. The breadth and scope of provincial constitutions, and the latitude provinces have in changing them, are blurry because the concepts of "provincial constitution" and provincial government itself have become more wide-ranging and elastic over time. A province may or may not refer to Section 45 when it changes its constitution. Nova Scotia explicitly cited it in an act to expel a member of its legislative assembly.[33] The proposed *Québec Constitution* does not. An example of a provincial statute explicitly asserting its constitutional status in its title is British Columbia's fixed election date law.[34] While the span of provincial constitutions is uncertain, the *Canadian Charter of Rights* limit their depth and Section 45 may not be used to effect unilateral provincial secession.

It was once erroneously believed by some that provincial constitutions "are entirely outside the British North America Act."[35] This is no longer the case. Parts of provincial constitutions are inextricably intermingled with the Canadian Constitution. Section 133 of the *Constitution Act, 1867* that deals with the use of English and French in Quebec's and Ottawa's legislative records and courts, for example, is part of both the Quebec and Canadian constitutions. Similarly, Section 23 of the *Manitoba Act, 1870* [36] – providing similar guarantees for English and French – is part of both the Canadian and Manitoba provincial constitutions. The Supreme Court however, in a twinned ruling in 1979, determined that these provisions are *not* a part of the "Constitution of a province" as referred to in Section 92 (1) of the *Constitution Act, 1867*. Rather, they are part of the "Constitution of Canada and of Quebec [and Manitoba] in an indivisible sense."[37] Sections 134 through 144 of the *Constitution Act, 1867* refer specifically to Quebec and Ontario and to no other province. Quebec's exceptionalism in the *Constitution Act, 1867* is most noteworthy in Section 94, now a dead letter but symbolically freighted for it points to Quebec's special status. It envisages the possibility of uniform laws for Ontario, New Brunswick, and Prince

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[33] *An Act Respecting Reasonable Limits for Membership in the House of Assembly*, S.N.S. 1986, c. 104.

[34] *Constitution (Fixed Election Dates) Amendment Act, 2001*, S.B.C. 2001, c. 36.

[35] C. A. Stuart, "Our Constitution Outside of the British North America Act", *Canadian Bar Review*, vol. 3, no. 2 (1925), p. 69-79 at p. 73.

[36] 33 Victoria, c. 3 (Canada).

[37] *Blaikie v. Quebec (Attorney General)*, [1979] 2 S.C.R. 1016, and *Forest v. Manitoba*, [1979] 2 S.C.R. 1032.

Edward Island – the three English-speaking provinces at Confederation – but not for Quebec.

Other sections of the *Constitution Act, 1867* also specifically mention Quebec, but the only section of the *Constitution Act, 1982* that does so is Section 59. It refers to the Constitution's Section 23 (1) (a) provision for minority language educational rights and requires that Quebec's legislative assembly issue a proclamation – something that it has not done – before the Section's commencement. This reminds us that Quebec's National Assembly has not acknowledged the political legitimacy of the *Constitution Act, 1982*. Nevertheless, it has abided by it. It may be noteworthy that although the assembly's name was changed to the National Assembly, Section 59 continues to refer to it by its generic name. It does so too for the other provinces, some of which designate their legislatures as the House of Assembly or the Provincial Parliament.

Provincial legislatures are designated as supreme in their areas of jurisdiction, but provincial constitutions were diminished in status after the *Charter*'s debut. Shortly before it appeared, for example, the Supreme Court cited provincial electoral laws as an example of a provincial constitution's components.[38] Since then, however, those laws and others related to civil rights and freedoms in the provinces – assigned to the provincial legislatures in 1867 in Section 92 (13) – have become susceptible to judicial review pursuant to the *Charter*.[39]

Quebec has recently become somewhat of an exception to the lack of provincial constitutional consciousness because of decidedly activist, distinctive efforts to develop a national constitution for a potentially independent Quebec state. There is no equivalent in any other province, for example, of Daniel Turp's *Nous, peuple du Québec*: *un projet de constitution du Québec*[40] nor is there anything akin to his Bill 196 in the National Assembly introduced in 2007 and titled *Québec Constitution*.[41] Nor has there been any talk in other provinces of creating a formdddd of citizenship independent and separate from Canadian citizenship as Parti Québécois leader

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[38] *Manitoba (Attorney General) v. Canada (Attorney General),* [1981] 1 S.C.R. 753.

[39] For example, *Dixon v. British Columbia (Attorney General),* 1986, 7 B.C.L.R. (2d) 174 at 186 on electoral law, and *Vriend v. Alberta (A.G.)* [1998] 1 S.C.R. at 493.

[40] Daniel Turp, *Nous, peuple du Québec*: *un projet de constitution du Québec* (Québec, QC.: Éditions du Québécois, 2005). See also Daniel Turp, *L'avant-projet de loi sur souveraineté du Québec* (Cowansville, QC.: Éditions Yvon Blais, 1995), Chapter 3.

[41] *Supra* note 1.

Pauline Marois has done with her introduction of Bill 195, *Québec Identity Act*, to establish a Quebec citizenship.[42]

These projects have a pedigree. In 1985, a committee headed by Jacques-Yvan Morin, one time Leader of the Opposition and PQ deputy premier, presented a draft of a *Constitution du Québec*[43] and, in 2006, the Mouvement Démocratie et Citoyenneté du Québec, produced *Éléments essentials pour une Constitution pour le Québec d'aujourd'hui.* [44] The Parti Québécois government in 1994 tabled a bill proposing a constitution for a sovereign Quebec that would come into force following a successful referendum. It proposed a Charter of Rights that included guarantees for anglophones, recognition of the right to Aboriginal self-government, and the devolution of some powers and fiscal resources to municipal governments.[45] The intention of the Turp and Marois bills of 2007, unlike their 1994 forerunner, is to establish a new *Quebec Constitution* and citizenship before a referendum is held on the sovereignty issue itself. The Parti Québécois sees the adoption of a new, self-proclaimed Quebec Constitution as a "gesture of national governance."[46]

Only British Columbia has a constitutional document explicitly sporting the "Constitution" label. Shortly before its admission to Confederation, its colonial legislature enacted a *Constitution Act, 1871*. It predated B.C.'s attainment of responsible government and its design and purpose was quite unlike the proposed Quebec project. Many of its original provisions constituted "a random collection of miscellaneous sections."[47] Revised over the years, it retains some eccentricities, including a section that deals with the use of government vehicles by cabinet ministers. In contrast to the proposed

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[42] National Assembly, First Session, Thirty-Eighth Legislature, Bill 195, Québec Identity Act, presented by Pauline Marois, Member for Charlevoix (Québec Official Publisher, 2007). http://www.assnat.qc.ca/eng/38legislature1/Projets-loi/Publics/07-a195.pdf [Accessed May, 21, 2008].

[43] Ébauche d'un projet de Constitution du Québec, May 21, 1985. Reproduced in Association québécoise de droit constitutionnel, Troisième congrès québécois de droit constitutionnel, Document 1, "Documents", Université Laval, Québec (May 23, 2008) p. 12-17.

[44] Mouvement Démocratie et Citoyenneté du Québec, *Éléments essentiels pour une Constitution pour le Québec d'aujourd'hui*, June 18, 2006. Reproduced in Association québécoise de droit constitutionnel, Troisième congrès québécois de droit constitutionnel, Document 2, "Documents", Université Laval, Québec (May 23, 2008) p. 18-19.

[45] Text of the draft bill is in the *Globe and Mail*, Dec. 7, 1994, p. A4.

[46] Philip Authier and Marianne White, "The big stall: PQ 'under renovation'", *Montreal Gazette*, March 6, 2008, p. A1.

[47] Campbell Sharman, "The Strange Case of a Provincial Constitution: The British Columbia *Constitution Act*", *Canadian Journal of Political Science*, vol. 17, no. 1 (1984), p. 87-108, at p. 91.

Quebec Constitution, it deals almost exclusively with the machinery of government and MLAs' privileges. Its equivalents are similar provisions in the Legislative Assembly and Executive Council Acts of the other provinces. Quebec's correspondent acts are the *Loi sur l'Assemblée nationale*[48] and the *Loi sur l'Exécutif*.[49] A striking feature of B.C.'s *Constitution Act* is that it declares itself subject to the *Constitution Act, 1867* but it is silent about its relationship to the *Constitution Act, 1982*.[50] The proposed *Quebec Constitution* makes no explicit reference to either.

The use of a referendum to trigger major constitutional revision has only one precedent in Canada. That distinction lies with Newfoundland. The preamble to the Schedule in the *Newfoundland Act, 1949* refers to Newfoundland's 1948 referendum on entering Canada. A parallel between Newfoundland and Quebec is their jettisoning, coincidentally within a month of one another in 1997-98, their constitutional provisions for religious schools systems.[51] They both proceeded by employing Section 43 of the amending formula in the *Constitution Act, 1982* which requires the concurrence of some, but not all, of the provincial legislatures and parliament. They went about it in quite different ways, however, and they stirred quite different public reactions. In Newfoundland, the issue was highly divisive and only resolved after two referenda and court challenges. In Quebec in contrast, the National Assembly unanimously endorsed the conversion of its Catholic and Protestant school boards into English- and French-language boards; this measure enjoyed broad public support and engendered very little controversy.

In Quebec, the use of a referendum to trigger a fundamental constitutional upheaval, such as secession, appears to be taking on the status of an obligatory convention. No other province has considered secession (with the brief exceptions of New Brunswick and Nova Scotia shortly after Confederation) and provincial uses of referenda have varied dependent on an issue's level of public controversy. With broad public support, for example, Newfoundland changed its name to Newfoundland and Labrador in 2001 with no thought to a referendum.[52] On the other hand, Prince Edward Islanders

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[48] L.R.Q. c. A-23.1.

[49] L.R.Q. c. E-18.

[50] (R.S.B.C. 1996), c. 66.

[51] SI/97-141, *Constitution Amendment Act, 1997 (Quebec)*, and SI 98-25, *Constitution Amendment, 1997 (Newfoundland Act).* See Bernard W. Funston and Eugene Meehan, eds., *Canadian Constitutional Documents Consolidated*, 2nd ed. (Toronto: Thomson Carswell, 2008, p. 424-7.

[52] SI/2001-117-6 December 2001. See Funston and Meehan, eds, *op. cit.*, *Constitution Amendment, 2001 (Newfoundland and Labrador)*, p. 434-5.

voted decisively in a referendum in favour of a bridge linking them to the Canadian mainland. This led to a 1993 constitutional amendment that absolved the federal government from its obligation, contained in P.E.I.'s *Terms of Union* of 1873, to provide daily ferry service to the Island.[53] Manitoba decided to forego a referendum in 1983 when it moved to change the constitutional status of the French language in the province. Amidst much controversy, however, thirty municipalities including Winnipeg – which contained over half the province's population – held plebiscites on the issue even though the issue was beyond their jurisdiction. About three-quarters of voters rejected the proposal and, politically, this compelled Manitoba's government to abandon its effort.[54]

Although B.C. and Alberta have statutes that require a referendum before their provincial legislatures will consider the ratification of an amendment to the Constitution of Canada, neither province nor any other, however, has an act requiring a referendum to change its provincial constitution. Alberta does not have a *Constitution Act* as does B.C., but it has a *Constitution of Alberta Amendment Act*.[55] However, it deals exclusively with nothing other than the province's Métis settlement lands. Alberta's Director of Constitutional Law in the Department of Attorney General did not include it in a list of 23 acts that, in his opinion, might be included in his province's constitution.[56] This confirms the imprecise character of provincial constitutions and compromises a grasp of them.

A challenge to precision in providing a list of provincial constitutional documents is the possibility of litigation on the question of what constitutes part of a provincial constitution. This feeds authorities' unwillingness and inability to provide definitive opinions on the scope of their provincial constitutions. As Quebec's Associate Deputy Minister of Justice put it: "[Q]ue pour ne pas préjuger de positions que pourraient ultérieurement prendre le procureur général du Québec devant les tribunaux dans certains litiges constitutionnels, il nous est difficile d'adopter une position précise."[57] No

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[53] SI/94-50, *Constitution Amendment, 1993 (Prince Edward Island)*, in Funston and Meehan, eds, *op. cit.*, p. 418-9.

[54] Nelson Wiseman "The Questionable Relevance of the Constitution in Advancing Minority Language Rights in Manitoba", *Canadian Journal of Political Science*, vol. 25, no. 4, p. 697-721, at p.717, and Raymond M. Hébert, *Manitoba's French-Language Crisis*: *A Cautionary Tale* (Montreal & Kingston, 2004, p.140.

[55] *Constitution of Alberta Amendment Act, 1990*, R.S.A. 2000, c. 24.

[56] Nolan D. Steed, Director of Constitutional Law Department of Attorney General, Alberta, to author, December 3, 1992.

[57] Jean-K. Samson, Le sous-ministre associé, Ministère de la Justice, Québec, to author, December 10, 1992.

province has a formal position on what documents constitute its provincial constitution.

3. Bill 196: Quebec's Proposed Constitution

Bill 196, *Québec Constitution*, conveys some common features of a modern national constitution. Its language is rousing and clear but its legal and political implications are cloudy. It provides for the establishment of a Quebec citizenship and makes amendments to it subject to a super majority of two-thirds of the National Assembly's members. It acknowledges Quebec's existing limitations by asserting Quebec's sovereignty only "in areas under its jurisdiction by law and according to constitutional conventions." The bill also asserts Quebec's inalienable right to determine its legal status. This is partially consistent with the Supreme Court's opinion that the will of Quebecers, as expressed in a referendum with a clear question and a clear majority, must be respected. However, the Court also opined that before Quebec's severance from Canada, it must negotiate the conditions of its secession with its federal and other provincial partners.[58]

Bill 196 declares, "This Constitution prevails over any rule of Québec law that is inconsistent with its provisions", and leaves the organization and operation of Quebec's government and its National Assembly to other statutory instruments. It designates the prime minister of Quebec as head of the government and chair of the Executive Council. It fixes the National Assembly's size at its present number of 125, but makes no mention of the Lieutenant Governor's position, an integral part of a provincial legislature's constitution.[59] As with language rights guarantees, the *Constitution Act, 1982* exempts the office of Lieutenant Governor from a province's unilateral power to change its constitution.

In contrast to the PQ's 1994 outline for a Quebec Constitution – launched as part of the party's 1995-referendum strategy – Bill 196 does not explicitly "recognize the right of Aboriginal nations to self-government on lands over which they have full ownership." Nor does it "guarantee the English-speaking community that its identity and institutions will be preserved."[60] Another way in which it differs from the 1994 proposal is that it does not refer to a "decentralization of specific powers to local and regional authorities together

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[58] *Reference re Secession of Quebec* [1998] 2 S.C.R.

[59] *Reference re the Initiative and Referendum Act* [1919] A.C. 935, and *Gallant v. The King* [1949] 2 D.L.R. 425 (P.E.I. S.C.).

[60] Text of the draft bill is in the *Globe and Mail*, Dec. 7, 1994, p. A4.

with sufficient fiscal and financial resources for their exercise." In not acknowledging local authorities at all, Bill 196 appears decidedly centralist and centripetal. Bill 196 also differs from its 1994 forerunner in not proposing to make the Quebec Court of Appeal the court of highest jurisdiction until the establishment of a new Quebec Supreme Court.

Bill 196 is peculiar in that it refers to "constitutional conventions" – those vitally important rules that represent "the marriage of law and politics".[61] It is decidedly in the British tradition of constitutionalism to acknowledge the constitutional force of unwritten conventions, but to assert their status in a written constitution is strikingly un-British. In this, Bill 196 is another example of trying to engineer "The Successful Combination of French Culture and British Institutions" – the title of a study of Quebec's National Assembly.[62] There is a precedent for referring to a convention in a provincial constitutional document: British Columbia's original pre-Confederation *Constitution Act* did so in its preamble with its reference to "responsible government" until its excision in 1888. An example of a unique Quebec constitutional custom that has arisen is that the Speech from the Throne – read by the Governor-General in Ottawa and the Lieutenant- Governors in the other provinces at the beginning of each new parliamentary session – has been replaced by an inaugural address by the Premier. There is no prohibition keeping Quebec from putting in statutory form the conventions that have guided it, but Bill 196 opts not to; it only asserts them.

References to constitutional conventions in a legal document raise the question of their justiciability. Constitutional conventions, by their nature, are legally unenforceable political obligations. Two *Québécois* scholars have depicted them as bilateral or multilateral contracts and ententes among the relevant actors.[63] A. V. Dicey enjoined that conventions are better left to students of politics and political practitioners than to law professors.[64] Courts have occasionally referred to conventions – a notable case being the *Patriation Reference* and its assertion that "some conventions may be more

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[61] Andrew Heard, *Canadian Constitutional Conventions*: *The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

[62] Louis Massicotte, "The Successful Combination of French Culture and British Institutions", in Gary Levy and Graham White, eds., *Provincial and Territorial Legislatures in Canada* (Toronto: University of Toronto Press, 1989), p. 68-89.

[63] Henri Brun and Guy Tremblay, *Droit constitutionel* (Cowansville, QC.: Éditions Yvon Blais, 1982), p. 47.

[64] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), p. 31.

important than some laws."[65] Courts, however, have not treated them as they have statute or common law. Eugene Forsey observed after that ruling, "The courts have not, nor should they have, the right to decide what the conventions of the Constitution are. If they attempt to do so, the decision has no force at all, legal or other."[66]

Nevertheless, conventions may in the future become more of an issue in Canadian constitutional theory as more parties seek to resolve political disputes by way of legal solutions.[67] Quebec, in a reference case, asked the Quebec Court of Appeal and then the Supreme Court of Canada whether the 1982 amendments to the Canadian Constitution made without its consent were "unconstitutional in the conventional sense", but the Court disagreed with Quebec's position.[68] The Court's answer, had it found in Quebec's favour, would have had no legal consequences but such a ruling would have been an explosively potent weapon in Quebec's assault on the political legitimacy of Constitution's patriation.

Bill 196's constitutional amendment formula – requiring a two-thirds majority of the National Assembly – contradicts the old convention that a legislature cannot bind itself or a future legislature. Does this mean that a simple majority in the National Assembly, current or future, could revise or revoke such a constitution despite the two-thirds requirement? Not necessarily; an evolving consensus among constitutional authorities is that special majority and other rules, particularly concerning human and minority rights, may indeed be legally binding. This is still, however, a disputable notion and not free from doubt.[69]

A striking feature of Bill 196 is its claim to supremacy "over any rule of Québec law that is inconsistent with its provisions." This parallels Section 52 of the *Constitution Act, 1982* that declares it 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." Unlike that document's Section 24, however, the proposed *Quebec Constitution* offers no explicit

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[65] *Manitoba (Attorney General) v. Canada (Attorney General)*, [1981] 1 S.C.R. at 883.

[66] Eugene A. Forsey, "The Courts and the Conventions of the Constitution", *University of New Brunswick Law Journal*, vol. 33 (1984), p. 13.

[67] Peter H. Russell, "The Supreme Court and Federal Provincial Relations: The Political Use of Legal Resources", *Canadian Public Policy*, vol. 11, no. 2 (1985), p.161-170.

[68] *Re*: *Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 S.C.R. at 793.

[69] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, vol. 1 (Toronto: Thomson Carswell, 2007), 12.3b. See also Jeffrey Goldsworthy, *The Sovereignty of Parliament*: *History and Philosophy* (Oxford: Clarendon Press, 1999), p. 14-6 and 259.

justiciable remedy. It implies a remedy, however, with the declaration that sections of Quebec's *Charter of Rights and Freedoms* and the *Charter of the French Language* must be interpreted and applied, presumably by the courts, with due regard to Quebec's heritage and the secularity of its public institutions. This formulation is arresting because of Quebec's pronounced religious heritage. As for the secularity of Quebec's institutions, the National Assembly has a crucifix hanging above its Speaker's chair and the PQ, along with the other parties in the National Assembly, voted unanimously to maintain it.

If the proposed *Québec Constitution* were deemed part of the broader Canadian Constitution as defined by Section 52, and implied by the title of Part V of the *Constitution Act, 1982*, its provisions would still be subject to challenge. Each constitutional provision, according to the courts, must be read in light of the Constitution's other provisions.[70] If the proposed *Québec Constitution* were deemed paramount to other Quebec laws, this would not necessarily render it superior to those elements of the *Constitution Act* determined by the Supreme Court as "indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union."[71] Nor would it make it superior to parts of the *Constitution Act, 1982* such as Section 23's provisions for minority language education rights. The Supreme Court relied on that Section to trump a part of the *Charter of the French Language*[72] that Bill 196 declares as "integral" to Quebec's Constitution.

The *Canadian Charter*'s Section 3, "democratic rights", limits Quebec's maneuverability in any new constitution. Bill 196, for example, does not refer to electoral laws beyond acknowledging that "Members of the National Assembly are elected as provided for by law", but the ability to change those laws and the National Assembly's control over its operations has been compromised. Quebec, for example, cannot circumvent the requirement that the National Assembly meet at least once annually. Nor can the Assembly unilaterally extend its life beyond five years whereas, before the *Charter*, Quebec and the other provinces – at different times – extended their legislatures' lives from the maximum four years provided for in the *Constitution Act, 1867*, to five years. (The Ontario legislature, in the 1940s, extended its life to six years). Nor can Quebec disqualify Canadian citizens

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[70] *Reference re Roman Catholic Separate High Schools Funding* (1986), 25 D.L.R. (4th) 1 at 54, 13 O.A.C. 241, affirmed [1987] 1 S.C.R. 1148.

[71] *O.P.S.E.U. v. Ontario (Attorney General)* [1987] 2 S.C.R. 2.

[72] *AG of Quebec v. Association of Quebec Protestant School Boards* [1984] 2 S. C. R. 66.

from their right to vote in its elections as it could have before 1982. Quebec is free, however, to change some rules of its electoral system (e.g., to adopt proportional representation as the Parti Québécois proposed in the 1970s but did not implement). It could create a second and even third chamber, provide for the direct election of the premier, and possibly, deviate in other ways from the British Westminster model of responsible government.

The preamble to the proposed *Québec Constitution* reasserts the National Assembly's 2003 declaration that Quebecers form a nation. A 1985 National Assembly motion likewise assigned the status of "nation" to 11 aboriginal groups in the province, including the Inuit, Mohawk, Cree, Algonquin, and Naskapi.[73] It is apparent in the proposed Constitution, however, that Quebecers are not a nation *comme les autres* because the aboriginal nations are depicted merely as "present in Quebec" whereas Quebecers "form" a nation. This raises the question of how many nations are there in Quebec and Canada. The preamble also refers to Quebec's "distinctive characteristics and a deep-rooted historical continuity", as well as Quebec's "inalienable right" to "determine its legal status", but it contains no similar acknowledgement of aboriginal nations' rights although the 1985 National Assembly motion acknowledged their autonomy. The *Québec Fundamental Rights Act* of 2001 leaves it to the Quebec government, not First Nations governments, to foster the development and improvement of aboriginal socio-economic and cultural conditions.[74]

The prospects of Bill 196 are obviously bleak as long as the Parti Québécois occupies the opposition benches in the National Assembly. On the other hand, the other parties have indicated that they are not categorically opposed to adopting a Quebec Constitution. The Parti Québécois' introduction of one in Bill 196 puts pressure on the regime to respond. Moreover, the prospects of another PQ government are bright since it has governed for parts of every decade since the 1970s and the PQ has vowed in convention that adopting a new Quebec Constitution is first on its list of what the next Parti Québécois government would do.[75]

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[73] "Motion recognizing Aboriginal Rights", March 20, 1985, reprinted in *Les fondements de la politique du gouvernement du Québec en matière autochtone*, Québec, Ministère du Conseil exécutif, 1988.

[74] *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*. R.S.Q., chapter E-20.2 [hereafter referred to as the *Québec Fundamental Rights Act*].

[75] Kevin Dougherty, "National conversation' is whispered down to 'debate", *Montreal Gazette*, March 16, 2008, p. A6.

There are of course potential obstacles to the bill within Quebec public opinion. Most Quebecers currently exhibit little interest in constitutional politics and constitution-making. Opposition to the project might be anticipated from Quebec's minorities. Neither the First Nations nor the Inuit – recognized as "nations" in the bill's preamble – nor the English-language community, have welcomed it. The *Montreal Gazette* – Quebec's daily English-language newspaper and an approximate facsimile of English Quebecers' community opinion – has ridiculed and dismissed the proposed constitution as "absurd" and "surreal".[76] The *Gazette* would like it to be seen as proffering hazy rhetorical formulae that build a constitutional castle in the sky.

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The proposal for a *Québec Constitution* is the simultaneous expression of an idea and an emotion; it is a product of the heart as well as the mind. If adopted, however, its legal implications are problematic. With the rousing and stirring declarations of such a Constitution, it may serve as a nationalist rallying point, an emblem of Quebec's distinctiveness in Canada, its *statut particulier*. The American Declaration of Independence and others have demonstrated that nationalist declarations may contribute mightily to creating new realities. If adopted, a new Quebec Constitution could be taken forward into Quebec's future history with its effects to be determined by Quebecers, by what they think about and do with it. Just as the bold flourish, "We the people" begins and animates the United States' Constitution, Quebec's proposed Constitution begins with "We, the people of Québec." Such a declaration, if congruent with public opinion, could enliven and inspire an independent Quebec nation-state.

Nevertheless, Bill 196's proposal for a new *Quebec Constitution* has not yet stirred the emotions that the high politics of mega-constitutional change did during the Canadian Constitution's patriation in 1981 and the Meech Lake and Charlottetown Accord imbroglios a decade later. It has not and cannot do so because the Parti Québécois is not yet in a position to implement it. Perhaps the proposed constitution's implicit objective – to take a step toward Quebec becoming an independent member state of the community of nations – will be achieved the way Canada achieved its independence, gradually, through a series of iterative milestones.

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[76] Editorial, "A Surreal Proposal", *Montreal Gazette*, October 20, 2007, p. B6.

The Canadian of Canada is sufficiently elastic to tolerate and incorporate such a *Québec Constitution* insofar as it does not conflict with Canada's federal and rights-based constitutional order. There is no prospect of Ottawa disallowing it (as it might very well have disallowed the change of title of Quebec's Legislative Assembly to National Assembly in an earlier era). Notwithstanding its multiple references to Quebec as a nation, Quebec's proposed new Constitution would remain in law a provincial constitution, but it would be distinctive as the only one that sports national characteristics.

Daniel Turp, the bill's sponsor, once described the "distinct society" clause in the failed Meech Lake Accord as "primarily symbolic". Its legal impact, he opined, appeared "very limited".[77] The same may be said of the proposed *Québec Constitution* so long as Quebec remains a province. It would be another statute that could be classified, along with many other Quebec statutes, as part of Quebec's provincial constitution, although it might achieve paramountcy over the others. That will not shield it from constitutional court challenges based on the federal principle or the *Canadian Charter of Rights and Freedoms*. It is a symbolic formulation and affirmation of the Quebec nation. It offers, therefore, more in the way of political initiative than the technical legal plumbing that sovereignty and independence require. It contributes to providing the political, legal, intellectual, and emotional infrastructure for a broader national independence project.

In a possible future clash of conceptualizations of Quebec's constitution, older precedents and court rulings might not be able to hold sway. The language of M. Turp's and Mme. Marois's bills ramps up the issue of Quebec's constitution to the level of national identity. The passage of a *Québec Constitution* as proposed by M. Turp could be a small step leading to a tipping point that produces a quantum leap, legally and politically, to a substantially new context. It might come to be seen as one of the stages in Quebec's evolution to the status of a sovereign state. Perhaps.

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[77] "Québec's Democratic Right to Self-determination: A Critical and Legal Reflection", in Daniel Turp, *Le droit de choisir*: *Essais sur le droit du Québec à disposer de lui-même / The Right to Choose ; Essays on Québec's Right of Self-Determination* (Montreal: Éditions Thémis, 2001), p. 505-29, at p. 527.