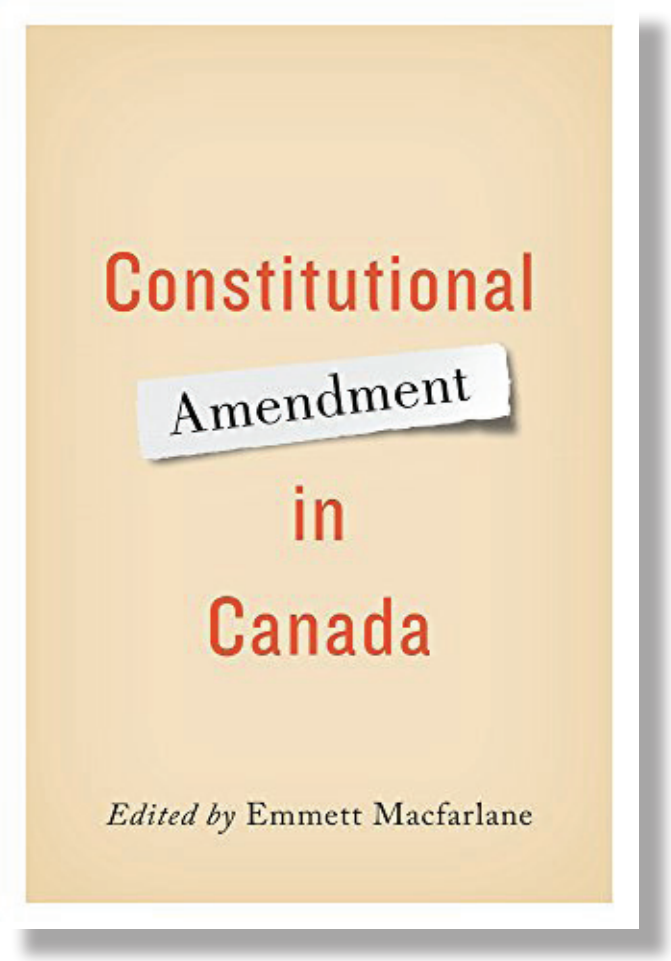
Parliamentary Bookshelf: Reviews

Constitutional Amendment in Canada, Emmett Macfarlane, ed., University of Toronto Press, Toronto, 2016, 337 pp.



Canada has a very complex system of amending its formal, written Constitution. This collection of essays edited by Emmett Macfarlane is a welcome guide to its intricacies.

Is the complexity of our amending system an instance of Canadian exceptionalism? None of the authors take up that question. My own hunch is that the complexity of the so-called amending "formula" reflects the centrality of accommodation in Canada's constitutional culture. "Striking a balance," the key phrase in Macfarlane's introduction, captures the idea. Nadia Verrelli's opening chapter tells us how the formula evolved over a 115-year journey to the final set of rules that were adopted in the *Constitution Act, 1982*, the amendment to the Constitution that achieved patriation.

The constitutional amending formula is set out in Part V of the *Constitution Act*, 1982. It begins with the "general procedure," requiring resolutions of both houses of Parliament and resolutions of the legislative assemblies of at least two-thirds of the provinces (seven of 10) that have at least 50 per cent of the population. Once the requisite number of resolutions has been secured, the amendment is effected by a proclamation issued by the Governor-General.

That seems simple enough, until you look at the conditions attached to the general procedure. A dissenting province can opt out of an amendment made under the general procedure if it reduces its powers, rights or privileges. If the amendment is in the fields of education or culture, the province opting out is entitled to fiscal compensation. Another section of the formula lists changes to federal institutions and the structure of the federation, including the addition of new provinces, to which the opt-out does not apply.

The general procedure that was the focus of much constitutional bargaining over many years has been used only once. That was the *Constitutional Amendment Proclamation, 1983* which made two additions to the recognition of aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, one to confirm that land claims agreements are treaties and another to ensure that the constitutionally protected rights of Aboriginal peoples apply equally to men and women. Only Quebec did not support the amendment. But it did not (and probably could not) opt out.

The formula sets out four other ways of amending the Constitution besides the general procedure. One is the unanimity rule that singles out a few matters that require supporting resolutions from all the provinces. The list includes the amending formula itself, the "offices" of the Queen, the Governor General and the provincial Lieutenant Governors, the rule guaranteeing small provinces that their MPs in the House of Commons will never be less than the number of Senate seats, and the composition of the Supreme Court of Canada. Needless to say, there has been no use of the unanimity rule.

Finally we come to the three parts of the amending formula (sections 43, 44, and 45) that have been the basis of nearly all the constitutional amending action that has taken place since Patriation. The exceptions to the general procedure have indeed become the rule. Section 43 provides for amendments of the Constitution of Canada applying to one or more province but not all provinces and can be made by Parliament and the legislatures of the provinces involved, section 44 amendments in relation to the House of Commons, the Senate and "the executive government of Canada" can be made simply though federal legislation, and section 45 that similarly empowers provinces to make laws amending the constitution of the province. The account and analysis of these kinds of amendments in various chapters of the Macfarlane book are an important contribution to constitutional scholarship.

Dwight Newman refers to section 43 as the "bilateral amending formula." The seven times it has been used so far have all been bilateral – Parliament and one province passing the necessary resolutions. The big use has been for Newfoundland and Labrador – three times for changes in the denominational school section of its terms of union with Canada and once to add Labrador to the province's official name. New Brunswick used it to insert in the *Charter of Rights and Freedoms* equality of status of its English and French linguistic communities. Prince Edward Island used it to replace a ferry service with a bridge as its constitutionally-mandated mainland link. Quebec used it to terminate its constitutionally guaranteed denominational schools so that it could organize schools on a linguistic basis. Newman points to its potential to enable a conservative province to have constitutionally entrenched property rights or a progressive province to better protect Aboriginal rights.

As Warren Newman points out, Amendments made under sections 44 and 45 are effected by ordinary legislation, not legislatures' resolutions followed by a proclamation. The reason for this is that these sections of the amending formula replace sections 91(1) and 92(1)(1) in the division of powers section of the Constitution. Section 44 has been used to make two changes to section 51 governing representation in the House of Commons and to give Nunavut a Senator. He also notes how Parliament's peace, order and good government power has been used to add many organic, semi-constitutional statutes, such as the *Multiculturalism Act* and *The Clarity Act* to the law of the constitution. Emmanuelle Richez is the only author to focus on provincial constitutions, noting the growing interest of provinces, particularly Quebec, in consolidating existing constitutional rules in one coherent document.

A number of contributors to the volume are far too gloomy about the prospects of developing Canada's constitutional system by informal means – organic statutes and constitutional conventions. They seem to be spooked out by the essay the Supreme Court of Canada wrote on the amending formula in the *Senate Reference.* Admittedly, the "architecture of the constitution" phrase the Court used in that decision was less than clear. But I do not think it at all likely that the Court would strike down modifications in constitutional conventions such as those structuring the advice on which prime ministers base their selection of vice-regal office holders, Senators and Supreme Court justices.

Neither the contributors to this volume nor the Supreme Court of Canada make the distinction between our capital "C" Constitution to which the amending formula applies and other rules, principles and practices of our small "c" constitutional system. That distinction is crucial to appreciating the capacity of Canada's constitution to evolve and adapt. That said, *Constitutional Amendment in Canada* provides interesting food for thought on the limits of constitutional growth through formal Constitutional amendment.

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