Amending Formula

This article was written by a law student for the general public.

A constitution includes the most fundamental values of a nation. Those values should be protected. One of the ways that a constitution is protected is by making it hard to change. If it was easy to change, the government could change the constitution when it wanted to act unconstitutionally.

However, a constitution should not be too difficult to change. Values change over time. Some things may not be as important as they once were, and other things that were not important may have become fundamental. A constitution should be able to respond and incorporate changes in keeping with the times.

A good constitution needs to find the right balance. It should not be too easy or too hard to change. When Canada's Constitution was being updated in 1981-82, the people who were suggesting changes had to think about this balance. Before 1982, Canada could only change its Constitution by asking the British Parliament to do it. In order to "patriate" the Constitution, that is, to bring it home, Canada needed a way to change the Constitution on its own. It needed a formula or a way to make changes to its Constitution that would be acceptable to Britain and to the federal and provincial governments. By creating an acceptable amending formula, Canada would no longer need to rely on Britain.

The drafters of Canada's revised Constitution created the amending formula. The amending formula comprise a series of procedures that are listed in sections 38 to 49 of the *Constitution Act, 1982*.[1] Creating the formula was not easy because all of the provinces wanted to make sure they got a say if and when the Constitution was to be changed.

In all, there are five different procedures for changing different aspects of constitutional law in Canada. These procedures are as follows.

The General Procedure

The general procedure is the standard way to change the Constitution. Unless the Constitution says that another formula must be used, the general formula is needed. The general formula is also needed for specific changes listed under section 42,[2] like changing what powers Senators have and how they are selected. This formula would also be used to establish new provinces.

To change the Constitution using the general formula, the change needs to be approved by 1) the House of Commons, 2) the Senate, and 3) a minimum number of provincial legislatures. There must be at least seven provinces that approve the change, representing at least 50% of the population of all the provinces combined. This is often called the 7/50 rule. This means that provinces with large populations will typically need to approve a change in order for the amendment to succeed. However, the change cannot happen

without some support from provinces with smaller populations.

The Unanimity Procedure

Some things were thought to be so important to Canada that they could only be changed by having all of the provincial governments and the federal government give their consent. Section 41 describes the types of changes that need agreement from all governments.[3] This includes changing the role of the King or Queen, changing the use of English or French in Canada, or changing the amending procedures themselves. Because all governments need to agree on these issues to change them, it is very unlikely that these changes will ever be made.

Other Procedures

The other three amending procedures are used to make changes to the Constitution that do not affect all provinces. Typically, only the governments that are affected by the change need to agree. For example, if it is a change to a provincial constitution, only that province needs to agree to the change. If it is a change to how the federal government works, the federal Parliament alone can make that change. If it is a change that affects two or more provinces, like changing provincial boundaries, only those provinces and the federal Parliament need to agree.

Amendments since 1982

So far there has been very little use of the more arduous amending procedures in Canada (the general and unanimity procedures). There was one successful use of the general formula in 1983 to make some additions to the Aboriginal rights section of the Constitution. There were also two famous attempts to change the Constitution that failed: the Meech Lake Accord in 1987-1990 and the Charlottetown Accord in 1992. Both attempts proposed a number of changes to the Constitution that were negotiated by Canadian leaders. However, when it came time to ratify the proposed changes, both initiatives fell short.

None of the amending procedures require direct approval by the people of Canada. Some governments think that it is not a good idea to change the Constitution without having a public vote or referendum on it. Alberta[4] and BC[5] have now passed laws that require that a referendum must be held before they approve a change to the Constitution. Additionally, the federal government has a law called *An Act respecting Constitutional Amendments*, which requires support from Ontario, Quebec, BC, at least two of the Atlantic provinces, and at least two of the Prairie provinces before the federal government can propose an amendment.[6] These laws add an extra step needed before the Constitution is changed, which may make it even harder to change the Constitution.

Although there is a lot of debate about changing Canada’s Constitution, it is important to understand how it can be completed. So far, changing the Constitution has been very

difficult. Whether there will be more changes in the future remains to be seen. For now, Canada's amending formula has made sure that the Constitution is well protected.

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[1] http://www.canlii.org/en/ca/const/const1982.html#sec38

[2] http://www.canlii.org/en/ca/const/const1982.html#sec42

[3] http://www.canlii.org/en/ca/const/const1982.html#sec41

[4] Constitutional Referendum Act, RSA 2000, c C-25, http://canlii.ca/en/ab/laws/stat/rsa-2000-c-c-25

[5] Constitutional Amendment Approval Act, RSBC 1996, c 67, http://canlii.ca/en/bc/laws/stat/rsbc-1996-c-67

[6] An Act respecting Constitutional Amendments, SC 1996, c 1, http://canlii.ca/en/ca/laws/stat/sc-1996-c-1.