The Bilateral Amending Formula as a Mechanism for the Entrenchment of Property Rights

Dwight Newman*

Introduction

Moves are once again underway to seek to constitutionally entrench property rights, with discussion occurring on the idea in a variety of contexts. In early 2011, federal Member of Parliament (MP) Scott Reid and Ontario Member of Provincial Parliament (MPP) Randy Hillier announced their intention to introduce private member's bills in their respective legislative assemblies that would entrench property rights.[1] They proposed to do so via the legal mechanism of using the bilateral amending formula in s. 43 of the *Constitution Act, 1982*, which allows for a constitutional amendment "in relation to any provision that applies to one or more, but not all provinces" to be made by just the affected province(s) and Parliament.[2] Thus, if both had been adopted, their bills would have entrenched property rights in Ontario through the addition of a new subsection in the *Canadian Charter of Rights and Freedoms*. Although these particular bills were not introduced or adopted there is every reason to think that efforts to do so will continue.[3]

Having been omitted from the original text of the Charter, and not having made their way into a constitutional amendment, property rights remain outside Canadian constitutional texts. They are present in the *Canadian Bill of Rights*,[4] which remains in force, but this statutory *Bill of Rights* has received little attention and has been of limited effect in the post-Charter era.[5] Property rights did not become part of the main constitutional reform packages of the late 1980s through to the mid-1990s despite a 1988 vote in principle in favour of entrenching them.[6] Therefore, the contemporary proposal to use s. 43 to entrench property rights in the Constitution offers a potentially straightforward democratic route around protracted negotiations and constitutional stalemate.

Though constitutional reform efforts from the late 1980s to the mid-1990s appeared to create barriers to further constitutional modification, a substantial number of constitutional amendments have actually succeeded since that time, during a period that many would have seen as one of stagnation on the constitutional reform front. The potential of s. 43 in this context is beginning to be noticed.

Section 43 has provided a legal route to a number of constitutional amendments since 1982. These include four instances in Newfoundland (three to modify denominational school rights[7] and one to change the name of the province[8]), one in Quebec to end denomi-

national school rights,[9] one in Prince Edward Island to allow a bridge instead of a ferry as its mainland link,[10] and one in New Brunswick to add an entirely new section to the Constitution: s. 16.1 of the *Charter of Rights and Freedoms* now guarantees rights to that province's English and French linguistic communities.[11]

These amendments have, in some instances, been the subject of legal challenge. The result is that we now also have a body of judicial precedents on the use of s. 43. Notably, the uses by Newfoundland and Quebec to modify denominational school rights were permitted at an appellate level,[12] with leave to appeal to the Supreme Court of Canada refused in each instance,[13] despite arguments that they modified the rights and/or mobility of religious minorities in terms going beyond their respective provinces.[14] Supreme Court of Canada obiter on s. 43 has similarly suggested a broad reading of the provision, with Beetz J. having once described it in passing as "a flexible form of constitutional amendment" that was designed to allow particular provinces to develop in diverse ways.[15]

Recent scholarly opinion supports a relatively unrestricted reading of s. 43.[16] At one time, s. 43 was perceived as permitting only the modification of existing Constitutional provisions rather than the creation of anything new,[17] but this position has most recently been rejected.[18] The use of s. 43 to add s. 16.1 to the Charter was a watershed moment, albeit perhaps not yet widely recognized as such.[19] Section 16.1 was an entirely new section and not a modification of existing text.[20] If its introduction was a permissible use of s. 43, and there seem to be no challenges to it, then it appears s. 43 can be used to add an entirely new section to the Charter. Moreover, given the nature of this precedent, s. 43 can be used to add a section to the Charter that relates to fundamental rights even where the protection of those rights will differ from province to province, at least initially and potentially longer-term.[21]

In the context of property rights, the question that arises is what these precedents imply for the proposed use of s. 43 to entrench them in the Charter. To analyze this point, this article first examines the set of contemporary legal barriers to constitutional amendment that makes s. 43 an appealing route in this context. Second, the article considers whether, given the precedents described above, s. 43 provides the possibility of entrenching property rights within a particular province. In doing so, the article argues that such entrenchment is neither legally nor conceptually problematic even though it may result in a regime of provincially differentiated property rights. Third, it considers what becomes possible under s. 43 if property rights are entrenched using this section, or, in other words, considers the question of how far s. 43 would be opened up for other uses by its use in this context. The article ultimately argues that the existing law on s. 43 is ripe for its use to entrench property rights. It also argues that concerns about the consequences of using s. 43 are not new as they have already been raised in the context of other amendments.

Contemporary Legal Barriers to Constitutional Amendment

The constitutional amending formula included in our patriated Constitution after 1982, was not exactly straightforward.[22] However, an accretion of statutory requirements adopted in the context of past constitutional reform efforts since that time has made constitutional amendment even more complex. These complications drive the desire to resort to s. 43. However, the resort to s. 43 is not an answer to every complication.

In 1996, Parliament adopted legislation designed to provide for a type of regional veto on federally proposed constitutional amendments, the *Act Respecting Constitutional Amendments*.[23] The legislation stated that: "[n]o Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 . . . or may express its dissent under subsection 38(3) of that Act," except where the resolution already had majority provincial support and met the regional requirements it established.[24]

The use of s. 43, it bears noting, qualifies for an exception listed in the text of this provision; it would be illogical, after all, to create a regional veto on amendments affecting a single province which could only be achieved under the constitutional text through agreement between that province and Parliament. It also bears noting that because s. 43 is effectively an exception to the regional veto rule, it would not be necessary for the current proposal on property rights to proceed by way of a private member's bill for constitutional amendment as there could be a bilateral constitutional amendment under s. 43 by way of government-sponsored legislation. However, the use of private member's bills could offer a route around the regional veto rules in the *Act Respecting Constitutional Amendment* in other circumstances or might also be used to try to lessen perceived partisan considerations on a proposed amendment.

Other statutory developments concerning constitutional amendment are not as easily addressed by the use of s. 43. For example, Alberta's statutory frameworks now require the use of a referendum prior to any vote in its legislative assembly concerning an amendment to the Constitution of Canada.[25] British Columbia has a similar provision concerning any government resolution to amend the Constitution of Canada,[26] with this language possibly leaving room for a private member's bill to avoid the necessity of a referendum. These statutes could of course be repealed to allow for the introduction of an amendment without a referendum, but this option would run up against the aim of allowing the public a say on constitutional amendments (and desire to break free of elite negotiations on constitutional amendments) that had led to their enactment in the first place.

Constitutional change has become significantly constrained in the context of deeply divided views on both substantive constitutional issues and proper constitutional process.[27] Although s. 43 is not a route around all of the new barriers to constitutional amendment, it does provide an avenue around some such barriers and thus becomes an appealing option for those seeking to pursue a constitutional amendment.

Provincially Differentiated Property Rights

The Reid-Hillier resolution to entrench property rights would add section 7.1(1) to the Charter:

> 7.1 (1) In Ontario, everyone has the right not to be deprived, by any Act of the Legislative Assembly or by any action taken under authority of an Act of the Legislative Assembly, of the title, use, or enjoyment of real property or of any right attached to real property, or of any improvement made to or upon real property, unless made whole by means of full, just and timely financial compensation.[28]

The inclusion of such a section in the Charter would have the effect of providing constitutionalized protection against expropriation of property, but only in the province of Ontario unless other provinces adopted similar amendments. Given the precedent established for the use of s. 43 to add s. 16.1 to the Charter, it appears that there is no line of argument against amendment of the Charter using the bilateral amending formula.[29] Further, as Constitutional amendments altering denominational rights, religious minority rights, and linguistic minority rights have all been permissible under s. 43, it appears the section can certainly be used to amend rights-related provisions. Therefore, it seems there are no legal impediments to the adoption of such a resolution.

A challenge might, of course be raised that property rights are of a different nature than denominational, religious or linguistic minority rights. This distinction would need to be made on the basis that property rights are an inherently general and fundamental right, whereas religious and linguistic minority rights are specific rights grounded in particular political compromises. The distinction would, for two reasons, 'lie poorly in the mouths' of the property rights critics, who might be inclined to attempt it. First, it would give more moral status to property rights than they would presumably prefer to acknowledge. Second, it would be inconsistent with the general trends towards ever-stronger affirmations of linguistic rights as being no different than other human rights with which these same objectors are presumably

already in agreement.[30] Indeed, those who support the use of s. 43 to add s. 16.1 to the Charter cannot easily reject a use of s. 43 to add provincially specific property rights.

Another potential concern about the Reid-Hillier resolution could be that there is something peculiar about provincially differentiated property rights. The wording of the Resolution however, makes the possibility less peculiar than it might otherwise be. Were a resolution on property rights to present itself as a declaration of fundamental rights in general form, the fact that it would exist in only some provinces would have a peculiar dimension, even if it were difficult for some to express that. However, the Reid-Hillier resolution addresses this concern. For example, it provides a specific guarantee against expropriation that would be entrenched in one province and which could potentially expand to others through similar processes. It is also a relatively simple constitutional guarantee which does not appear to differ dramatically from balanced-budget legislation or other matters that may differ from one province to another.

The existence of property rights in some provinces and not in others might well create a competition of sorts between provinces about constitutional rights. For example, those preferring not to have their property expropriated by some future government might deliberately choose to locate property in provinces with this constitutional guarantee rather than in those without it. However, this fact is precisely an example of the well-accepted role of federalism in fostering a set of diverse laboratories for democratic policy.[31] The s. 43 amendment process allows for the diversity of Canadian provinces.[32] The use of s. 43 in the context of an economic right specifically allows for Canadian provinces to adopt diverse economic frameworks as experiments in policy, bringing together rights frameworks and federalism frameworks. The interjurisdictional competition in which they engage may further the development of good economic policy in jurisdictions which might be initially be reluctant to adopt rights policies that later demonstrate advantages.[33] Section 43 appears to be a plausible route forward for such an amendment so long as majorities can be found to support it at both the provincial and federal levels.

Property Rights as Further Section 43 Precedent

If the s. 43 bilateral amending formula can be used for the entrenchment of property rights provisions in the Charter, is there any limit to its use? Does the Charter risk becoming a grocery bag of different provincial policies adopted over time (perhaps most frequently when there are political majorities of shared stripes in a provincial capital and in Ottawa)?

The possibility of extension or over-use of s. 43 should not be underestimated. However, this concern does not arise because of the way in which s.43 would be used to amend the Constitution. In fact the addition of s. 16.1 to the Charter is a clear example of using s.43 to introduce a province-specific section to the Charter. The use of s. 43 to entrench property rights would certainly be an extension of that approach but it is fundamentally no different.

Variation in the Charter's effects from one province to another might strike some as peculiar in the context of an instrument concerned with fundamental rights. However, the Charter was as much about Canada-specific language rights (which are not subject to the notwithstanding clause, for example, giving them a particularly secure role in the Charter) as about universal rights and freedoms. Insofar as it adopted a particular national narrative, the Charter was a political instrument from the outset. On this argument, there is little reason to be concerned about niceties of the symbolic text, since the Charter is not restricted to a limited set of universal human rights but rather already embraces a range of more detailed Canadian-specific rights. The possibility of provincially-differentiated rights is not intrinsically different.

Any amendments made over time through the mechanism of s. 43 will also be constrained in ways other than the need to get support from dual majorities at the federal and provincial levels. One reason is that they are subject to

interjurisdictional competition. With federal consent, it is open to provinces to adopt differentiated rights frameworks. But their choices are in every instance subject to the ordinary constraints of democratic decision-making and to the possibility that particular choices may cause residents to choose to be in some provinces rather than others or that a province's choices may impact on, for instance, economic activity in the province in a way that makes it something it will not choose. Indeed, the possibility of provinces adopting provincially differing rights regimes actually may reaffirm the constitutional text as a subject of ordinary political discussion.

Section 43 may well provide a means around certain constitutional impasses and, indeed, a means of entrenching a neglected right to property. The real test of the use of s. 43 is whether provincial and federal political majorities find the intended use an appropriate constitutional modification. In the very hour when many have given up on the hope of constitutional amendment in Canada, prospects for new constitutional amendments in a different form are to found within Canadian federalism.

Notes

* Professor of Law, University of Saskatchewan.
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1 Tasha Kheiriddin, "Will Property Rights Finally Get Charter Protection?" *National Post* (24 February 2011) online: National Post < http://www.nationalpost.com>; "Protection of Property is a Basic Right," *National Post* (25 February 2011) online: Canadians for Property Rights < http://ourcharter.ca>.

2 *Constitution Act 1982*, (UK), 1982, c11, s 43.

3 Hillier introduced the motion again in the Ontario legislature as recently as May 2012: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl, 1st Sess, No 53 (15 May 2012) at 1510 (Randy Hillier). Discussion of furthering such bills continues in pertinent political and think-tank contexts. Others have thought of other options as well. For example, at one of Saskatchewan's political party conventions in 2012, there was some discussion of the idea of entrenching property rights into provincial human rights legislation; although expansion of provincial human rights legislation does not always appeal to everyone today and obviously would also not have full constitutional effect.

4 *Canadian Bill of Rights,* SC 1960, c 44.

5 See *Authorson (Litigation Guardian of) v Canada (Attorney General)*, 2003 SCC 39, 175 OAC 363, 227 DLR (4th) 385, 2003 CarswellOnt 2773 (WL Can). (The Court minimizes the role of *Canadian Bill of Rights* property rights in the context of veterans' litigation in the post-*Charter* era.)

6 *House of Commons Debates*, 33rd Parl., 2nd Sess. (2 May 1988) at 15044.

7 Constitution Amendment Proclamation, 1987 (Newfoundland Act), (1988) C Gaz II, 887; Constitutional Amendment, 1997 (Newfoundland Act), (1997) C Gaz II, 1527 (published as an extra on 2 May 1997); Constitutional Amendment, 1997 (Newfoundland Act), (1998) C Gaz II, 337 (published as an extra on 14 January 1998).

8 Constitutional Amendment, 2001 (Newfoundland and Labrador), (2001) C Gaz II, 2899 (published as an extra on 6 December 2001).

9 Constitutional Amendment, 1997 (Quebec), (1998) C Gaz II, 308 (published as an extra on 22 December 2001).

10 Constitution Amendment, 1993 (Prince Edward Island), (1994) C Gaz II, 2021.

11 Constitutional Amendment Proclamation, 1993 (New Brunswick Act), (1993) C Gaz II, 1588.

12 *Hogan v Newfoundland,* 2000 NFCA 12 [*Hogan*], 183 DLR (4th) 225, 72 CRR (2d) 1, leave to appeal to SCC refused, [2000] SCCA No 191; *Potter c Québec (Procureur général)*, [2001] RJQ 2823, JE 2001-2166, 2001 CarswellQue 2773 (WL Can), leave to appeal to SCC refused, [2002] CSCR no 13.

13 *Ibid.*

14 *Hogan*, *ibid* at para 82; *Potter, ibid.* at paras 47-51 (also rejecting arguments that religious minority school rights could not be altered under s. 43 due to historic bargaining among a number of provinces).

15 *Association of Parents for Fairness in Education, Grand Falls District 50 Branch v Société des acadiens du Nouveau-Brunswick et al*, [1986] 1 SCR 549 at 579, 27 DLR (4th) 406, 69 NBR (2d) 271.

16 See, e.g., David R Cameron & Jacqueline D Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58 UTLJ 389 at 407–411 (referring to the absence of require-

ments on the use of s. 43); Benoît Pelletier, "Les modalités de la modification de la Constitution du Canada" (1999) 33 RJT 1 (referring to the enormous potential of the provision to develop different constitutional arrangements for different provinces); Kathy Brock, "Diversity Within Unity: Constitutional Amendments Under Section 43" (1997) 20 Canadian Parliamentary Review 23 at 24 (referring to its possibilities for provincial diversity).

17 See e.g. Jacques-Yvan Morin & J Woehrling, *Les constitutions du Canada et du Québec*, 3d ed (Montréal: Thémis, 1994) at 516; H Brun & G Tremblay, *Droit constitutionnel*, 2d ed (Cowansville: Yvon Blais, 1990) at 228.

18 See, e.g., Pelletier, *supra* note 16 at 236; Cameron & Krikorian, *supra* note 16 at 407–411.

19 See André Tremblay, *Droit constitutionnel: Principes* (Montréal: Éditions Thémis, 1993) at 41 (implying that the addition of s. 16.1 means the requirements must be flexible). Scholars who have continued affirming restrictions on s. 43 have done so without referring to its use for the implementation of s. 16.1: see, e.g., Jean-Pierre Proulx & José Woehrling, "La restructuration du système scolaire québécois et la modification de l'article 93 de la Loi constitutionelle du 1867" (1997) 31 RJT 399 at 484–93.

20 See Pelletier, *supra* note 16 at 238 (rejecting an awkward argument that it was somehow only a modification of text).

21 It bears noting that this use stretches some of the expectations of the joint committee of the Senate and House of Commons chaired by Gérald Beaudoin leading up to Charlottetown, which was skeptical of the use of s. 43 "to grant an asymmetric legislative status to any one province": Parliament, Special Joint Committee of the Senate and the House of Commons, *The Process For Amending the Constitution of Canada*, (20 June 1991) at 28.

22 The amending formula is in ss. 38 through 45 of the *Constitution Act, 1982*, and it contains several different formulae for different types of constitutional amendments. For amendments to the Constitution of Canada, the general amending formula requires the support of the federal Parliament as well as of the legislative assemblies of seven provinces with a combined majority of the population. However, certain types of amendments require unanimous support from the provinces. Large-scale constitutional reform packages will typically engage both of these formulae, with the effective result of requiring unanimous support. That said, there are also additional rules in ss. 44 and 45 for certain changes that can be made unilaterally by the federal government or a provincial government.

23 *An Act Respecting Constitutional Amendments*, SC 1996, c 1.

24 *Ibid*, s 1(1). The legislation provides that there must be support from a majority of the provinces that must include Quebec, Ontario, British Columbia, at least two of the prairie provinces comprising at least 50% of the region's population, and at least two of the Atlantic provinces comprising at least 50% of the region's population.

25 *Constitutional Referendum Act*, RSA 2000, c C-25, s 2(1).

26 *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1.

27 See, e.g., Michael Lsztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail" (1994) 27 Cdn J Pol Sci 747. See also Tim Swartz & Andrew Heard, "The Regional Veto Formula and Its Effect on Canada's Constitutional Amendment Process" (1997) 30 Cdn J Pol Sci 339.

28 See, e.g., Ontario, Legislative Assembly, *Order Paper*, 40th Parl, 1st Sess, No 90 (15 October 2012).

29 Someone might have otherwise tried to argue that the Charter is a national symbol and that it therefore cannot vary from province to province.

30 See, e.g., *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, 181 DLR (4th) 1, 70 CRR (2d) 1 (affirming throughout that language rights must be given purposive and liberal interpretations on the basis that they are no different than other human rights).

31 See *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) for Brandeis's famous description of federalism as enabling the states as "laboratories of democracy," a concept certainly also accepted in Canada.

32 See, e.g., Brock, *supra* note 16.

33 Interjurisdictional competition is, of course, not lacking in complexities. For a widely-cited discussion, see Wallace E Oates, "An Essay on Fiscal Federalism" (1999) 37 J Econ Lit 1120.