

Amendment by Stealth of Provincial Constitutions in Canada

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ABSTRACT

The amendment procedure for the Constitution of Canada is one of the most difficult in the world. By contrast, the amendment procedure for the constitutions of Canadian provinces, which requires a simple majority of a provincial legislature, is one of the easiest. Despite these differences, there is mostly a shared silence around federal and provincial constitutional amendments. The source of this silence, however, differs in each case. For the Constitution of Canada, this silence is a product of inaction. By contrast, the silence around formal amendment at the provincial level is not necessarily a product of inaction but rather a lack of recognition. It is a type of constitutional amendment by stealth. This paper considers why amendment by stealth is practiced and argues that provincial amendment culture is critical to understanding reform of provincial constitutions. One of the strengths of formal amendment rules is their ability to distinguish

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constitutional from ordinary law. This distinction flags the potential importance of these proposed changes. By offering no cues to its constitutional nature, amendment by stealth reduces the likelihood that there will be public awareness. Drawing from a number of constitutional amendment frameworks and concepts developed by Richard Albert, this paper argues that greater transparency is required for the amendment of provincial constitutions.

I. INTRODUCTION

The formal amendment procedure for the Constitution of Canada is one of the most difficult in the world. By contrast, the formal amendment procedure for the constitutions of Canadian provinces, which requires a simple majority of a provincial legislature, is one of the easiest. This difference is stark, and the consequences for constitutional amendment in Canada are significant. While there have been calls for constitutional reform since the failures of the Meech Lake and Charlottetown Accords, there appears little appetite for formal amendment of the Constitution of Canada amongst the political elites who are constitutionally empowered to enact change.¹ At the level of the federal political executive, there is largely silence around the constitution where one would expect at least occasional public discourse and debate.

¹ For examples of recent calls for and dismissals of constitutional change, see: Veldon Coburn, “Indigenous people and the Constitution conversation”, *Policy Options* (9 June 2017), online: <policyoptions.irpp.org/magazines/june-2017/indigenous-people-and-the-constitution-conversation> [perma.cc/F7GW-BKAZ]; James Keller, “Alberta to hold referendum on equalization payments, Premier Kenney says”, *The Globe and Mail* (17 June 2020), online: <www.theglobeandmail.com> [perma.cc/C8EC-FQAD]; Le Devoir et La Presse Canadienne, “Couillard lance une offensive constitutionnelle tranquille”, *Le Devoir* (1 June 2017), online: <www.ledevoir.com> [perma.cc/WTV6-D8MA]; Janyce McGregor, “We are not opening the Constitution’: Trudeau pans Quebec’s plans”, *CBC* (1 June 2017), online: <www.cbc.ca/news> [perma.cc/3VEE-9WYU]; Joanna Smith, “AFN wants constitution changed to include indigenous at all first ministers meetings”, *CTV News* (9 December 2016) online: <www.ctvnews.ca> [perma.cc/W4XR-RXSf]; Aaron Wherry, “Senate reform: Stephen Harper decides it’s not worth the effort”, *Maclean’s* (25 April 2014), online: <www.macleans.ca/politics/senate-reform-stephen-harper-decides-its-not-worth-the-effort> [perma.cc/K88Y-K95C].

Yet when comparing the Constitution of Canada to provincial constitutions, the source of these silences is different. For the Constitution of Canada, this silence is a product of inaction, with legislators over the past thirty years shying away from substantive formal reforms.² By contrast, the silence around formal amendment at the provincial level is not necessarily a product of inaction but rather a lack of recognition. Public deliberation on constitutional amendment should be expected and easily identified. However, for Canada's provinces, a type of "constitutional amendment by stealth"³ arguably describes at least some of the practice around constitutional amendment. This is different from the amendment by stealth developed by Richard Albert, which is a type of informal constitutional change that seeks to circumvent formal amendment rules in order to create a convention.⁴ In the case of provincial constitutions, a formal amendment takes place but is not differentiated from the regular legislative process. To be clear, provinces are not breaking the formal rules of constitutional amendment when engaging in this kind of amendment by stealth. Indeed, section 45 of the *Constitution Act, 1982* states clearly that "the legislature of each province may exclusively make laws amending the constitution of the province."⁵ Instead, its stealth comes from its low profile and the ambiguity that surrounds what is and is not part of a province's constitution. While these are different forms of stealth, in both instances, the executive and legislative branches obscure the constitutional nature of the reforms that they seek to implement.

While much ink has been spilt lamenting the lack of action and leadership around reforming the Constitution of Canada, this same critical eye arguably needs to be turned to the provinces and the general

² Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) [Albert, *Constitutional Amendments*]; Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alta L Rev* 85 [Albert, "Difficulty of Constitutional Amendment"]; Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016).

³ Richard Albert, "Constitutional Amendment by Stealth" (2015) 60:4 *McGill LJ* 673 [Albert, "Amendment by Stealth"].

⁴ *Ibid* at 678.

⁵ *Constitution Act, 1982*, s 45, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

lack of recognition that is accorded to reform of provincial constitutions.⁶ This need to better understand the section 45 amendment procedure has become all the more pressing since the Quebec government announced in May 2021 that it intends to amend the Constitution of Canada using section 45 to add clauses saying Quebec is a nation and that its official and common language is French.⁷ The possibility that Quebec may unilaterally amend parts of the Constitution of Canada has, not surprisingly, been received by the public and governments alike with considerable confusion. While this paper does not directly address whether Quebec has the authority to use section 45 as it proposes, it does seek to understand how the ambiguity around provincial constitutions makes such constitutional proposals possible.

In *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Albert offers a rich and important comparative analysis of the rules of constitutional amendment by asking, “What is an amendment and under what conditions should we recognize its validity?”⁸ This paper seeks to build on Albert’s contributions to the study of constitutional change by directing this question to provincial constitutions and the issue of constitutional amendment by stealth. One of the strengths of formal amendment rules is their ability to distinguish constitutional from ordinary law.⁹ This distinction flags to political actors and the public alike the potential importance of these proposed changes. It should seem to go

⁶ Notably, there is a small body of research focused on provincial constitutions. See Gerald Baier, “Canada: Federal and Sub-national Constitutional Practices” in Michael Burgess & G Alan Tarr, eds, *Constitutional Dynamics in Federal Systems: Sub-national Perspectives* (Montreal: McGill-Queen’s University Press, 2012) at 174; Warren J Newman, “Constitutional Amendment by Legislation” in Macfarlane, *supra* note 2 at 105; Emmanuelle Richez, “The Possibilities and Limits of Provincial Constitution-Making Power: The Case of Quebec” in Macfarlane, *supra* note 2 at 164; Campbell Sharman, “The Strange Case of a Provincial Constitution: The British Columbia Constitution Act” (1984) 17:1 Can J Pol Sci 87; G Alan Tarr, “Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism” (2009) 40:4 Rutgers LJ 767; Nelson Wiseman, “Clarifying Provincial Constitutions” (1996) 6 NJCL 269.

⁷ Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021 (first reading 13 May 2021).

⁸ Albert, *Constitutional Amendments*, *supra* note 2 at 1.

⁹ András Sajó, *Limiting Government: An Introduction to Constitutionalism*, English ed forward by Stephen Holmes (Budapest: Central European University Press, 1999).

without saying, but the amendment process for Canada's provincial constitutions will make it apparent that it cannot: a proposed constitutional amendment should be proposed as a constitutional amendment.

Why would provincial governments obscure constitutional amendment in this way? This paper posits two tentative explanations: (1) that when proposing a change to a province's constitution, legislators are unaware or unsure that it is, in fact, a constitutional amendment and therefore treat it as a regular legislative reform; or (2) that when proposing a change to a province's constitution, legislators are aware that it is an amendment, but proceed strategically without acknowledging it as such. This paper does not attempt to demonstrate that one explanation is more likely than the other. The point is that both are plausible and, just as importantly, both are problematic.

In order to build the case for these two explanations and for why greater attention to provincial constitutions is needed, this paper proceeds as follows. In order to understand how constitutional amendment by stealth is possible, the second section investigates the components that make up a provincial constitution. Because identifying an exhaustive list of the components of provincial constitutions is not feasible, the question of what is or is not a constitutional amendment is necessarily complicated. This leads into section three, which explores the formal amendment procedure for provincial constitutions under section 45 of the *Constitution Act, 1982*. Because section 45 does not require provinces to explicitly acknowledge its use, amendment by stealth is actually a natural byproduct of the formal procedure. This leads to the question of how a constitutional amendment can be identified at all. In section four, Richard Albert's four models for codifying constitutional amendments are introduced and compared against the practices of constitutional reform by the provinces.¹⁰ An alternative to amendment by stealth, where provinces acknowledge the use of section 45 as part of their statutory enactment, is also presented in this section. The final section introduces the importance of constitutional amendment culture for understanding why amendment by stealth remains standard provincial practice and considers the two tentative explanations for why amendment by stealth occurs. This section also emphasizes that while amendment by stealth technically follows the

¹⁰ Albert, *Constitutional Amendments*, *supra* note 2 at 229–38.

procedures laid out in section 45, it is nonetheless problematic as it means that governments are less likely to be held accountable for constitutional change and important public debate around amending the constitution is less likely to occur. This is especially concerning given that, as in the United Kingdom, provincial constitutions function as political constitutions. Rather than practicing constitutional amendment by stealth, this paper calls for transparency and argues that provinces should explicitly acknowledge in a bill when an amendment is being enacted using section 45. While this will require the provinces to navigate the murky and politically challenging waters of provincial constitutionalism, it is arguably a needed action for the democratic health of the provinces.

II. IDENTIFYING PROVINCIAL CONSTITUTIONS

Before the argument that Canadian provinces engage in a kind of constitutional amendment by stealth can be made, we first need to understand what a provincial constitution is. This, in fact, is not a straightforward endeavor, which is a key reason why constitutional amendment by stealth is possible.

A constitution can be, but does not need to be, contained in a single document called the constitution. There is very little that is singular about provincial constitutions in Canada. Provincial constitutions are found in multiple sources, including portions of the Constitution of Canada, ordinary provincial legislation, common law, and the unwritten constitutional conventions typical of Westminster-style governing. With the exception of British Columbia, which is the only province that has a written document titled a constitution,¹¹ the contents of provincial constitutions are not exhaustively listed or defined. In Quebec, there have been a number of proposals considered by the province's National Assembly focused on the creation of a provincial constitution, but none have passed.¹² More recently, the Fair Deal Panel, which was commissioned in 2019 by the Government of Alberta to make a recommendation on how the province can "secure a fair deal for Alberta,"¹³ pointed to the creation of a formal written constitution as a

¹¹ *Constitution Act*, RSC 1979, c 62.

¹² Richez, *supra* note 6.

¹³ Alberta, Fair Deal Panel, *Report to Government* (Edmonton: Treasury Board and

means to “affirm their [Albertans’] identity and value.”¹⁴ Even British Columbia’s *Constitution Act* does not contain the entirety of the province’s constitution and what may be missing from the Act is not necessarily clear.¹⁵ Trying to categorize these multiple sources is a necessary, though ultimately fraught, process for identifying provincial constitutions.

Arguably most fundamental to provincial constitutions is their unwritten nature. Provincial constitutions are closely fashioned on the unwritten constitutions of the British model, with much of what makes up a provincial constitution not entrenched and thus harder to recognize as constitutional. For example, the principle of responsible government, which is at the centre of the Westminster parliamentary system, is a fundamental part of provincial constitutions.¹⁶

Provincial statutes that are fundamental to the functioning of government are also generally considered part of provincial constitutions;¹⁷ though, what statutes are fundamental and therefore part of a provincial constitution is hard to discern. In one effort to classify provincial constitutional documents, Christian Wiktor and Guy Tanguay proposed ten categories and identified provincial statutes that make up hundreds of pages when combined.¹⁸ Despite this ambiguity, there does seem to be some consensus on certain statutes being part of a province’s constitution, including the rules of a province’s electoral system, legislative processes, executive governance, judicature acts, and human rights codes.¹⁹ However, even this consensus may go beyond the positions of the provinces themselves. In 1992, political scientist Nelson Wiseman sent requests to

Finance, 2020) at 9.

¹⁴ *Ibid* at 49. See also Richard Albert, “A constitution to call Alberta’s own”, *National Post* (23 September 2020), online: <nationalpost.com/opinion/richard-albert-a-constitution-to-call-albertas-own> [perma.cc/5HRE-9ZY].

¹⁵ To what extent British Columbia’s *Constitution Act* is a helpful consolidation of what would otherwise be disparate statutes may be questioned. One scholar has referred to the act as “obtuse to the point of being eccentric.” See Sharman, *supra* note 6 at 91.

¹⁶ *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 at para 85 [OPSEU].

¹⁷ Richez, *supra* note 6 at 165.

¹⁸ Christian L Wiktor & Guy Tanguay, eds, *Constitutions of Canada: Federal and Provincial* (Dobbs Ferry, NY: Oceana, 1987).

¹⁹ See Baier, *supra* note 6; OPSEU, *supra* note 16 at para 83; Richez, *supra* note 6 at 165; Maxime St-Hilaire, “The Codification of Human Rights in Canada” (2012) 42:3 RDUS 505; Wiktor & Tanguay, *supra* note 18.

the ten provincial Deputy Attorneys-General/Deputy Justice Ministers and asked what documents their departments considered to be part of their provincial constitutions.²⁰ Six provinces responded (Nova Scotia, New Brunswick, Quebec, Manitoba, Alberta, and British Columbia), and according to Wiseman, “[w]hat the respondents shared was an inability and unwillingness to be definitive. They were not sure where their provincial constitutions began and ended.”²¹

The ambiguity that surrounds the statutory components of provincial constitutions is not necessarily a failure of effort by provincial governments. There are arguably benefits to leaving a constitution underdefined. If a constitution’s role is, at least in part, to constrain the powers of government, then ambiguity around what is or is not in a constitution may actually help to facilitate the consolidation of power in the political executive. The concentration of power in Canada’s political executive (prime minister/premier and Cabinet) is well-known and documented;²² however, despite the bulk of this scholarly attention being focused on the federal government, it is likely the provinces that have most fully seized the powers of executive government.²³ By minimizing the likelihood of rigorous public debate, constitutional amendment by stealth is a tool that can help facilitate this concentration of power.

The relationship between provincial constitutions and the Constitution of Canada further complicates the process of identifying provincial constitutions. The *Constitution Act, 1982* defines the Constitution of Canada but leaves the constitutions of the provinces undefined, while simultaneously, certain provisions are part of both the Constitution of Canada and a provincial constitution.²⁴ For example, the *Canadian Charter of Rights and Freedoms* has some direct applicability to the

²⁰ Wiseman, *supra* note 6.

²¹ *Ibid* at 288.

²² See Alex Marland, *Whipped: Party Discipline in Canada* (Vancouver: UBC Press, 2020); Donald J Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Graham White, *Cabinets and First Ministers* (Vancouver: UBC Press, 2005); Eoin O’Malley, “The Power of Prime Ministers: Results of an Expert Survey” (2007) 28:1 *Intl Pol Sci Rev* 7.

²³ Paul EJ Thomas & JP Lewis, “Executive Creep in Canadian Provincial Legislatures” (2019) 52:2 *Can J Pol Sci* 363.

²⁴ Wiseman, *supra* note 6 at 283.

provinces. Democratic rights in sections 3–5 set out the right to vote, the terms of legislatures, and the requirement that legislatures sit at least once per year. The rights in sections 3–5 apply to the federal Parliament as well as to the provincial legislatures.

Electoral laws help to illustrate the tensions that this overlap between the Constitution of Canada and provincial constitutions create. All provinces have some kind of election act that establishes the key institutions and procedures of their electoral system. This statutory document is one we can confidently say is part of a province's constitution and that changes to a provincial election act constitute amendments to a province's constitution. What happens, then, when a component of an election act, which is part of a province's constitution, appears to be in conflict with the democratic rights protected in the *Charter*? In the 1986 Supreme Court of British Columbia case *Dixon v. BC (AG)*,²⁵ the BC government contended that revisions to its electoral laws were not susceptible to judicial review on the basis of the *Charter* because the province's constitution is included in section 52 of the *Constitution Act, 1982*.²⁶ The Court ruled that while the provincial legislature had the authority to amend British Columbia's *Constitution Act*, its provisions were not part of the Constitution of Canada and therefore had to conform with the *Charter*. In other words, the Court established that the *Charter* is paramount to a key component of provincial constitutions, provincial election acts. In *MacLean v. Nova Scotia (Attorney General)* (1987),²⁷ which dealt with an attempt by the Nova Scotia Legislature to limit the eligibility of those who could serve as members of the Legislative Assembly, the Nova Scotia Supreme Court similarly ruled that the province's

²⁵ [1986] 31 DLR (4th) 546, 7 BCLR (2d) 174 [*Dixon*].

²⁶ *Constitution Act, 1982*, *supra* note 5. Section 52 sets out the supremacy of the Constitution of Canada and states:

52(1) The Constitution of Canada 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.

52(2) The Constitution of Canada includes:

(a) the Canada Act 1982, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

²⁷ [1987] NSJ No 2 at 5, 35 DLR 4th 306 [*MacLean*].

constitution is not included in section 52 and therefore the *Charter* has paramountcy.²⁸ This creates a complicated dynamic for provincial constitutions where parts of the Constitution of Canada are also part of provincial constitutions, and some of these components, like sections 3–5 of the *Charter*, have paramountcy over other components of provincial constitutions, like election laws. The relationship between these constitutions is both hierarchal and overlapping.²⁹

III. AMENDING PROVINCIAL CONSTITUTIONS

An exhaustive list of the components of provincial constitutions cannot be conclusively identified. The previous section explained why this is the case and outlined the general features of provincial constitutions and the complexities that come along with their mixed design. From here, we can consider the amendment of provincial constitutions and how amendment by stealth is possible.

The entrenchment of Canada's constitutional amendment formula in the *Constitution Act, 1982* was not easily achieved and had by almost any standard of measure a long gestation period. For over one hundred years, Canada did not have a domestic amendment formula and relied on the approval of the United Kingdom to amend its constitution.³⁰ The multi-track amendment formula that is now found in Part V of the *Constitution Act, 1982* is a complex one;³¹ however, for the amendment of provincial constitutions, what appears in Part V is essentially a continuation of the amendment formula originally followed by the provinces under the *British*

²⁸ To muddy the waters even further, some provincial constitutional documents are part of the Constitution of Canada as defined by section 52, including the *Manitoba Act*, the *Saskatchewan Act*, and the *Alberta Act*. However, these provinces' election acts, which are parts of their provincial constitutions, are subject to the *Charter*. See Wiseman, *supra* note 6 at 287.

²⁹ On a related question of what constitutes "supreme law" under the Constitution of Canada, see Maxime St-Hilaire, Patrick F Baud & Elena S Drouin, "The Constitution of Canada as Supreme Law: A New Definition" (2019) 28:1 *Const Forum Const* 7.

³⁰ Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 27; Nadia Verrelli, "Searching for an Amending Formula: The 115-Year Journey" in Macfarlane, *supra* note 2 at 19.

³¹ See Albert, "Difficulty of Constitutional Amendment", *supra* note 2; Albert, *Constitutional Amendments*, *supra* note 2.

North America Act, 1867 (BNA Act, later renamed the *Constitution Act, 1867*). Class 1 of section 92 of the BNA Act authorized the legislature of each province to make laws amending “the Constitution of the Province, except as regards the Office of the Lieutenant Governor.”³² This was repealed by the schedule to the *Constitution Act, 1982* and replaced by section 45, which notes, “Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”³³ In the *Senate Reference (2014)*,³⁴ the Supreme Court was asked to clarify the powers of the federal and provincial legislatures to unilaterally amend the Constitution of Canada and provincial constitutions via sections 44 and 45.³⁵ The Court confirmed that these sections fulfill the same basic functions as sections 91(1) and 92(1) of the *Constitution Act, 1867*.³⁶ Importantly, the Court ruled that the federal and provincial legislatures have the ability to unilaterally amend certain aspects of the Constitution “that relate to their own level of government, but which do not engage the interests of the other level of government.”³⁷ How the “interests of the other level of government” should be interpreted is not necessarily clear, and so here again, we can see how Canada’s constitutions and their amendment formulae blur and overlap.

The procedure by which amendments are enacted via section 45 is important to emphasize as it creates the conditions for amendment by

³² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

³³ *Constitution Act, 1982*, *supra* note 5. Section 41 sets out conditions under which the unanimous consent of the Senate, House of Commons, and legislative assembly of each province is required for a constitutional amendment to be implemented. For the purposes of section 45, this means that any changes to the office of a province’s Lieutenant Governor must follow the procedures set out in section 41. This is consistent with the amendment formula for provincial constitutions set out in the *BNA Act, 1867*.

³⁴ *Reference re Senate Reform*, 2014 SCC 32 [*Re Senate Reform*].

³⁵ *Ibid* at paras 45–46. Section 44 of the *Constitution Act, 1867* empowers Parliament to make unilateral amendments to the Constitution of Canada. It states: “Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.”

³⁶ *Ibid* at para 46.

³⁷ *Ibid* at para 48. For further background on the jurisprudence regarding sections 44 and 45, see Newman, *supra* note 6.

stealth. As noted by Warren J. Newman, all multilateral procedures found in Part V of the *Constitution Act, 1982* proceed by way of authorizing resolutions of the federal houses of Parliament and the provincial legislative assemblies, followed by the proclamation of an amendment to the Constitution of Canada.³⁸ By contrast, amendments enacted unilaterally under sections 44 and 45 are statutory enactments by the Parliament of Canada and provincial legislatures, rather than parliamentary resolutions passed by the federal parliamentary chambers and provincial assemblies. This means that amendments to a province's constitution proceed by way of ordinary provincial statute. Because of this, no kind of distinctive cue that can identify the process or the content of a provincial constitutional amendment is required. Thus, not only do provinces have constitutions that are difficult to identify, their amendment is designed to go unnoticed. It is amendment by stealth.

An exhaustive list of amendments to provincial constitutions is infeasible; however, we can nonetheless be confident that amendment by stealth is not just a theory, but an actual practice. Changes to provincial election acts, like the introduction of fixed election dates,³⁹ balanced budget laws, which constrain the fiscal discretion of legislatures,⁴⁰ changes to human-rights codes, and legislation banning floor crossing, which limits the powers of elected members,⁴¹ are all recent legislative actions that can be categorized with reasonable confidence as amendments to provincial constitutions. Moreover, all modifications to British Columbia's *Constitution Act* are clearly amendments to a province's constitution. Thus, while we cannot identify all amendments to provincial constitutions, we can nonetheless be confident that amendment by stealth is a regular occurrence.

³⁸ Newman, *ibid* at 105.

³⁹ Christopher Alcantara & Jason Roy, "Reforming election dates in Canada: Towards an explanatory framework" (2014) 57:2 *Can Pub Admin* 256.

⁴⁰ Lisa C Philipps, "The Rise of Balanced Budget Laws in Canada: Legislating Fiscal (Ir)Responsibility" (1996) 34:4 *Osgoode Hall LJ* 681.

⁴¹ Jason Markusoff, "Is a ban on floor-crossing politicians unconstitutional?", *Maclean's* (24 August 2017), online: <www.macleans.ca> [perma.cc/RL37-T8D6].

IV. FINDING CONSTITUTIONAL AMENDMENTS

It is helpful to place the codification of amendments to provincial constitutions within a larger comparative framework. Richard Albert has proposed four models for codifying constitutional amendments: the appendative model, the integrative model, the invisible model, and the disaggregative model.⁴² With the appendative model, amendments are directly incorporated sequentially to the end of the text, like the Constitution of the United States, whereas with the integrative model, amendments are incorporated directly into the master text of the original constitution, as is done with the Indian Constitution. Third is the invisible model, where the constitution does not indicate where an amendment has been codified, as is the case with the Irish Constitution. Finally, there is the disaggregative model, which is a form of codification common to uncodified constitutions that situate their constitutive rules and principles in different sites of constitutional importance and combines features of the other three models. Albert uses the British Constitution as his key example of the disaggregative model where, “[c]hanges of constitutional importance do not appear in a single codified constitutional document, nor are they necessarily always formalized in a text, for instance in the case of changes to and by constitutional convention.”⁴³ While in name the invisible model sounds closer to the amendment by stealth discussed in this paper, it is the disaggregative model that best fits Canada’s provinces.

For Albert, “none of these four models of amendment codification reflects an optimal design for recording constitution-level changes,”⁴⁴ and each certainly gives rise to its own challenges. For the disaggregative model, a major challenge is identifying when constitutional amendment takes place given the disaggregative nature of constitutional change, with modifications coming in the form of unwritten constitutional norms and statutory law. Albert rightly notes that significant changes in constitutional norms or parliamentary law “have the same functional effect as a formal amendment insofar as they modify the rules of law... that political actors

⁴² Albert, *Constitutional Amendments*, *supra* note 2 at 230.

⁴³ *Ibid* at 234.

⁴⁴ *Ibid* at 230.

and the people recognize as valid.”⁴⁵ This naturally raises a critical question for the proper functioning of the disaggregative model of constitutional amendment: what if “political actors and the people” are unable to recognize that a constitutional amendment has taken place?

For the portions of a provincial constitution where section 45 applies, a provincial legislature, like the UK Parliament, enjoys legislative supremacy. And like in the UK, it is a province’s political executive who in practice controls legislative activity and is the key political beneficiary of legislative supremacy. This power is obviously not absolute. Legislatures are constrained in their exercise of power by strong political forces, which John AG Griffiths has termed the political constitution.⁴⁶ Elaborating on this concept, Dawn Oliver explains that the political constitution is still regulated by law, but that:

the exercise of many legal powers is legitimated or constrained by politics, that extensive areas of the system are not governed by law in the positivist sense at all, but by politics, its processes, its values, its conventions and the de facto relationships between politicians, political parties and the people.⁴⁷

Thus political accountability becomes essential to the functioning of the political constitution in a democratic regime.⁴⁸ In theory, this should be possible through such mechanisms as responsible government and ministerial responsibility. However, as is well-documented in Canada, the centralization of power in the political executive has left these traditional parliamentary mechanisms of political accountability in a weakened, arguably almost ineffectual, state.⁴⁹ At the federal level, this has been balanced to some degree by a largely written, entrenched constitution. And while the *Charter* applies to both federal and provincial levels of

⁴⁵ *Ibid* at 235.

⁴⁶ JAG Griffiths, “The Political Constitution” (1979) 42:1 Mod L Rev 1.

⁴⁷ Dawn Oliver, “The United Kingdom” in Dawn Oliver & Carlo Fusaro, eds, *How Constitutions Change: A Comparative Study* (Oxford, UK: Hart Publishing, 2011) 329 at 332–33.

⁴⁸ For a review of the scholarship that has developed around the political constitution and the role of political accountability, see Graham Gee & Grégoire CN Webber, “What Is a Political Constitution?” (2010) 30:2 Oxford J Legal Stud 273.

⁴⁹ See Marland, *supra* note 22; Savoie, *supra* note 22; Thomas & Lewis, *supra* note 23; White, *supra* note 22.

government, this still leaves considerable political space for provincial governments to exercise legislative supremacy.

To be clear, the position taken in this paper is not that section 45 by its design somehow negates the political accountability needed for the political constitution to function; however, when amendment by stealth is the standard, it makes political accountability less likely to be achieved in practice. If political actors and citizens are unable to recognize a change to a feature of provincial governance as a constitutional amendment, the opportunities and likelihood that a government will be held accountable for its actions are diminished.

This may prompt the question, what is the alternative? It is worth noting that while section 45 does not require a provincial legislature to do more than pass an ordinary provincial statute, nothing precludes a province from explicitly amending its constitution pursuant to Section 45. There are at least three examples of this being done: Nova Scotia⁵⁰ in 1986, Alberta⁵¹ in 1990,⁵² and Quebec in 2021.⁵³ In the first two cases, the provinces used the preambles of their bills to note that section 45 of the *Constitution Act, 1982* empowers the legislature to make laws amending the constitution of the province. Alberta went one step further, actually naming the bill the *Constitution of Alberta Amendment Act*.

In the Nova Scotia case, the legislature passed the *Act Respecting Reasonable Limits for Membership in the House of Assembly*, which amended the *House of Assembly Act*⁵⁴ so that a person convicted of an indictable offence punishable by imprisonment for a maximum of more than five years would be ineligible to serve as a member of the House for five years from the date of conviction or until the sentence had been served if longer than five years. This amendment to the *House of Assembly Act* came in response to the actions of a Member of the Legislative Assembly who had been convicted of forgery related to travel and living expenses he had

⁵⁰ *Act Respecting Reasonable Limits for Membership in the House of Assembly*, SNS 1986, c 104.

⁵¹ *Constitution of Alberta Amendment Act, 1990*, SA 1990, c C-22.2.

⁵² These first two instances were identified by Nelson Wiseman. See Wiseman, *supra* note 6 at 280. Using the online search tools available from the websites of the provincial legislatures, it was confirmed by the author that there have been no other instances of section 45 being used by either Nova Scotia or Alberta up to July 2020.

⁵³ Bill 96, *supra* note 7.

⁵⁴ RSNS 1986, c 1 s 22(1) (1992 Supp).

claimed in conjunction with his duties as an elected member. The Act was enacted on October 30, 1986, and the House of Assembly expelled the member on the same day.⁵⁵ The expelled member challenged the Act on constitutional grounds, arguing that the limitations placed on eligibility to serve as a member of the House infringed sections 3, 7, 11, and 15(1) of the *Charter*. The decision of the Supreme Court of Nova Scotia in *MacLean v. Nova Scotia (Attorney General)* (1987), which was discussed earlier in this paper, ruled in favour of the plaintiff and affirmed that amendments to a province's constitution cannot violate democratic rights (sections 3-5) as set out in the *Charter*.⁵⁶

In the Alberta case, the *Constitution of Alberta Amendment Act* was part of a larger legislative package that initiated the development of a new land-based governance model for Métis settlements and was the first time that a Canadian government had granted Métis people ownership over lands on a collective basis. This agreement between the Federation of Métis Settlement Associations and the provincial government was also notable because it had to this point generally been the federal government that entered into agreements with Indigenous peoples pursuant to section 91(24) of the *Constitution Act, 1867*, which grants legislative authority over "Indians, and Lands reserved for the Indians" to the Parliament of Canada.⁵⁷

As of this paper's writing, Quebec's Bill 96, which seeks to amend the *Constitution Act, 1867*, has only received first reading and is a more complicated example given that it is unclear whether the proposed modifications, recognizing Quebec as a nation and French as the official and common language of the province, can proceed under section 45 or if a multilateral procedure, such as sections 43 or 41, is required. Like the other examples, Quebec is asserting its constitutional authority to amend its provincial constitution; however, because the proposed site of these amendments is different, the *Constitution Act, 1867* rather than a provincial statute, an additional layer of uncertainty around the appropriate use of section 45 is at play. While elements of the *Constitution Act, 1867* can be properly understood as features of provincial

⁵⁵ *MacLean*, *supra* note 27 at 2.

⁵⁶ *Ibid* at 5.

⁵⁷ *Constitution Act, 1867*, *supra* note 32, s 91(24).

constitutions, it is not clear whether section 45 can be used to modify the *Constitution Act, 1867*, which is also clearly a component of the Constitution of Canada. That said, early responses from the Liberal government of Prime Minister Justin Trudeau indicate a willingness for these unilateral constitutional amendments to proceed.⁵⁸

With all of these examples, the possible conflict between the provincial constitutions and the Constitution of Canada is apparent. For Nova Scotia, the amendment to the *House of Assembly Act* was immediately challenged on *Charter* grounds, with the court eventually striking down the offending provisions of the *Act* and ruling that sections 3–5 of the *Charter* have paramountcy over the provincial constitution. In the Alberta case, the province was enacting an unprecedented constitutional initiative on a matter that is generally the purview of the federal government. For Quebec, its proposal to amend the *Constitution Act, 1867* lays bare the ambiguity around what is a provincial constitution and how it can be formally amended. In all these instances, the amendment bill was high profile and appeared ripe for constitutional challenge, something later realized for the Nova Scotia case and will almost certainly be the case for Quebec's Bill 96, if it passes. These appear unique instances of amendment to provincial constitutions where the explicit reference to section 45 is intended to signal the importance and constitutional status of the bills. For Quebec, the necessity of using section 45 is even more apparent given that an amendment to the *Constitution Act, 1867* would otherwise have to proceed by one of the multilateral amendment procedures set out in Part V of the *Constitution Act, 1982*. The provincial governments had clear political incentives to make the constitutional status of the bills explicit in anticipation of a possible legal challenge. This is not an unprecedented strategy. The use of a bill's preamble as a strategic legal tool in instances where a bill is considered constitutionally vulnerable has been employed by the federal government in relation to *Charter* challenges.⁵⁹

⁵⁸ Erin Crandall, "What is a provincial constitution and how do we amend it?", *Policy Options* (28 May 2021), online: <policyoptions.irpp.org/magazines/may-2021/what-is-a-provincial-constitution-and-how-do-we-amend-it> [perma.cc/FEG7-4MMD].

⁵⁹ Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002).

V. PROVINCIAL AMENDMENT CULTURE AND AMENDMENT BY STEALTH

With the difficulties of identifying amendments under the disaggregative model, the role of the political constitution, and these examples of the explicit use of section 45 now set out, we can turn to the question of why provinces may choose to engage in constitutional amendment by stealth. The simplest answer to this question is because they can. To amend a province's constitution, section 45 of the *Constitution Act, 1982* does not require a provincial legislature to do more than pass a regular legislative statute. No visible cue of a bill's constitutional nature is required, though there is nothing preventing a province from making its use of section 45 transparent, and indeed on at least three occasions a province has done so.

The simplest answer is often the correct one, and the formal amendment rules set out in section 45 are an important part of this answer, but they are arguably not the complete answer. In *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (2019), Albert offers a compelling argument for why constitutional culture is essential for understanding the function and role of a constitution's amendment formula and uses the Constitution of Canada to illustrate how a constitution's formal amendment rules cannot by themselves explain the rigidity or flexibility of an amendment formula.⁶⁰

Albert proposes three ways by which amendment culture can affect formal amendment in a given jurisdiction. It can: accelerate, redirect, and incapacitate.⁶¹ First, an amendment culture can accelerate reform so that constitutional amendment is achieved comparatively easily and reflects acceptance of formal amendment as an appropriate vehicle of constitutional change, such as in some African countries and some states

⁶⁰ Albert, *Constitutional Amendments*, *supra* note 2 at 105–18. Other scholars have also pointed to the importance of constitutional culture for understanding constitutional amendment in Canada. See Jamie Cameron, “Legality, Legitimacy and Constitutional Amendment in Canada” (2016) Osgoode Legal Studies Research Paper Series No 175; Kate Glover, “Complexity and the Amending Formula” (2015) 24:2 Const Forum Const 9.

⁶¹ Albert, *Constitutional Amendments*, *supra* note 2 at 111.

in the United States of America.⁶² The second effect of amendment culture is to redirect constitutional change toward other forms of change, which suggests a culture that is reluctant to engage in the formal amendment process, such as in Japan.⁶³ The third amendment culture, incapacitation, is one where political and cultural concerns combine with codified rules to create an even higher bar for formal constitutional amendment that in practice makes it nearly impossible to achieve change through the formal amendment formula.⁶⁴

It will come as no surprise to anyone with a passing knowledge of Canada's constitutional history that its amendment culture is one of incapacitation. For constitutional amendments that require the general amendment procedure set out in section 38,⁶⁵ or the unanimity procedure in section 41 of the *Constitution Act, 1982*,⁶⁶ change has proven almost

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Constitution Act, 1982*, *supra* note 5, s 38. Section 38 is the general amending procedure for the Constitution of Canada and is often referred to informally as the 7/50 rule. It states:

38(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

⁶⁶ *Ibid.*, s 41. Section 41 sets out under what conditions unanimity of the Senate, House of Commons, and Parliamentary Assemblies of all provinces is required to amend the Constitution of Canada. It states:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(c) subject to section 43, the use of the English or the French language;

unattainable. A simple reading of these sections will reveal that they contain rigid amendment procedures, but they have been rendered even more onerous as a result of judicial interpretation, statutory enactment, and constitutional convention.⁶⁷ These additional demands are built into a political history of dramatic amendment failures that have helped to entrench this constitutional culture of incapacitation. By Albert's account, "Constitutional reform today in Canada requires constitutional actors to perform impossible heroics in order to overcome decades of high-stakes amendment failures."⁶⁸ It is not just that the amendment of the Constitution of Canada is difficult because it has a difficult amendment formula. It is difficult to amend because the culture that has developed around constitutional amendment is now one where legislators strategically avoid the exercise of formal constitutional amendment altogether.

The question of provincial amendment culture is a fascinating and complex one because it is manifold, tiered, and obscured. First, there is almost certainly no singular provincial amendment culture. While there are likely to be overlapping attitudes and strategies amongst the provinces that are a result of a shared amendment formula and history, the diversity of political, cultural, and linguistic interests across the provinces means that amendment cultures will vary. One need only look at the constitutional efforts of Quebec to see how this must be the case.⁶⁹ Second, because the Constitution of Canada is also an important feature of provincial constitutions and that provinces are key players in the formal amendment of the Constitution of Canada, the amendment culture of the Constitution of Canada is necessarily entwined with the amendment cultures of the provinces. Finally, when we consider that the formal amendment procedure for the constitutions of Canada's provinces requires only a simple majority of a provincial legislature, any barriers to constitutional change for provincial constitutions are not procedural, but political. Amendment culture, then, is arguably a critical factor for

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

⁶⁷ Albert, "Difficulty of Constitutional Amendment", *supra* note 2 at 87.

⁶⁸ Albert, *Constitutional Amendments*, *supra* note 2 at 117.

⁶⁹ See Richez, *supra* note 6; Nelson Wiseman, "The Quest for a Quebec Constitution" (2010) 40:1 *Am Rev Can Stud* 56.

understanding why provinces engage in constitutional amendment by stealth.

It is difficult to assess the amendment culture at the provincial level for the simple fact that the obscuring of constitutional amendments makes it unclear how frequently provincial constitutions are amended. None of Albert's constitutional amendment cultures appear to lend themselves easily to a case where constitutional amendment takes place without formal acknowledgment. While it seems reasonable to anticipate that provincial amendment culture will share features of the acceleration type and that it does not suffer under the same incapacitation experienced by the Constitution of Canada, incapacitation may nonetheless play an important role. The provinces' propensity to obscure constitutional amendment may be, in part, a spillover effect of Canada's overriding amendment culture of incapacitation. Provinces are, after all, deeply entwined in the Constitution of Canada's amendment procedure. The Meech Lake⁷⁰ and Charlottetown Accords⁷¹ were joint constitutional efforts of the federal and provincial governments, and their defeats delivered significant political costs to both levels of government. Provincial political actors with even a basic understanding of the constitutional incapacitation experienced at the national level are likely to be weary of introducing procedures, even informal ones, that invite the same type of political discord to their province. In other words, Canada's amendment culture of incapacitation has conceivably increased the incentives to minimize the role of constitutional amendment at the provincial level. Path dependency may also help to explain amendment culture at the provincial level.⁷² Given that some variation of section 45 has been in

⁷⁰ Meeting of the First Ministers on the Constitution, *The 1987 Constitutional Accord* (Ottawa: 3 June 1987), Schedule, proposed *Constitution Amendment, 1987*, clause 1 [Meech Lake Accord].

⁷¹ *Consensus Report on the Constitution: Final Text*, Charlottetown (28 August 1992), online (pdf): <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document27_en.pdf> [perma.cc/48CX-GCAW] [Charlottetown Accord].

⁷² Path dependency is an organizing concept that can be used to label a certain type of temporal process. According to Adrian Kay, "[a] process is path dependent if initial moves in one direction elicit further moves in that same direction; in other words, the order in which things happen affects how they happen; the trajectory of change up to a certain point *constrains* the trajectory after that point." See Adrian Kay, "A Critique

place since 1867, there is likely nothing novel about amendment by stealth as a constitutional practice except for the name it is being assigned in this paper.

Returning to our earlier question, beyond the fact that they can, why would provincial governments engage in amendment by stealth? This paper posits two tentative explanations: (1) when proposing a change to a province's constitution, legislators may be unaware or unsure that the change is, in fact, a constitutional amendment and therefore treat it as a regular legislative reform; and (2) when proposing a change to a province's constitution, legislators may be aware that it is an amendment, but proceed strategically without acknowledging it as such. The first explanation assumes a simple lack of knowledge that, while an undesirable state of affairs, would not be especially surprising given the lack of clarity around provincial constitutions. The second explanation assumes a basic awareness of constitutional amendment on the part of legislators and fits with the types of incentives and motivations around constitutional amendment considered in this paper. In particular, the obscuring of constitutional amendment helps to avoid the potential messiness of constitutional politics given political actors' weariness in regard to amendment of the Constitution of Canada. It also allows a provincial government to avoid the challenging task of actually delineating what is or is not contained in its province's constitution, an exercise that would undoubtedly be contentious and require expending political capital that it would likely prefer to use on other projects. Altogether, constitutional amendment by stealth serves the interests of the political executive and the concentration of its power.

This paper does not attempt to show that one explanation is more likely than another. And, in fact, they are not mutually exclusive. Both are plausible and, more importantly, both are problematic. An easy amendment formula that requires no special identification, combined with the unwritten nature of provincial constitutions, allows legislators to obscure constitutional amendment, a type of amendment by stealth. It means that governments are less likely to be held accountable for constitutional change and public discourse around constitutional amendment is less likely to happen, weakening democratic engagement.

of the Use of Path Dependency in Policy Studies" (2005) 83:3 Pub Admin 553 at 553 [emphasis in original].

Some readers may think this concern over a lack of transparency is much ado about nothing. Certainly, not all amendments to a province's constitution will be politically important or particularly contentious. Moreover, one might reasonably anticipate that bills that are politically important or contentious, regardless of whether they propose to amend a province's constitution, will be scrutinized by members of the legislature, as well as the media, which will in turn bring public attention to the proposed measures. It is certainly the case that every legislative session will likely see a few major bills reach the public's attention. However, the realities of contemporary Canadian politics, with strict party discipline,⁷³ the use of omnibus bills,⁷⁴ and decreasing media coverage, especially at the local level,⁷⁵ mean that the ability of the public and even legislators themselves to scrutinize a government's legislative agenda is not particularly impressive. This is especially problematic given that, like in the UK, provincial constitutions function as political constitutions. If practices that minimize transparency and accountability, like amendment by stealth, are part of the norm of provincial governance, then the ability of the political constitution to function as a check on power will necessarily be weaker.

It might be argued that an easy amendment formula is desirable when compared to the incapacitation that has accompanied the Constitution of Canada's amendment formula. However, an amendment formula can be both easy and transparent. It is the fact that provinces are able to disengage from the politics of constitutional amendment by making the nature of the proposed amendment hidden that is most concerning. Reasonable people can disagree over whether amending the constitution should be difficult or easy, but there appears little reason to dispute that the process should be transparent.

Admittedly, constitutional amendment by stealth is unlikely to cease as a practice without some sort of powerful political event capable of

⁷³ Jean-François Godbout, *Lost on Division: Party Unity in the Canadian Parliament* (Toronto: University of Toronto Press, 2020); Marland, *supra* note 22.

⁷⁴ Adam M Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2016) 48:1 *Ottawa L Rev* 1; Louis Massicotte, "Omnibus Bills in Theory and Practice" (2013) 36:1 *Can Parl Rev* 14.

⁷⁵ April Lindgren, Jon Corbett & Jaigris Hodson, "Canada's local news 'poverty'", *Policy Options* (23 January 2017), online: <policyoptions.irpp.org/magazines/january-2017/canadas-local-news-poverty> [perma.cc/H5WQ-YX3N].

disrupting provincial amendment culture. This does not mean that the problems of amendment by stealth should somehow be considered less concerning or that other ways forward should not be imagined. Arguably, Canadian provinces do not need a more difficult amendment formula, nor would they ever be likely to agree to one. What is needed is a more transparent amendment formula. Though the unwritten nature of provincial constitutions means that not all changes to a provincial constitution can be formally acknowledged, many can. Rather than amendment by stealth, it should be standard practice for bills that seek to amend statutory components of a provincial constitution to explicitly acknowledge their engagement of section 45, as was done in the noted examples of Alberta, Nova Scotia, and Quebec. This would require provinces to think carefully about what is or is not part of their constitutions, but this is something that should be thought about carefully in any case.⁷⁶ This would not require a formal amendment to section 45, but rather a change in practice and commitment by the provinces. Provincial constitutional amendment culture would need to change, but the argument here is that change is needed.

VI. CONCLUSION

By any measure, provincial constitutions receive little attention. This is politically consequential. Provinces in Canada are powerful political entities, and much of what governments do in Canada is enacted by them. Amendment by stealth facilitates the concentration of this power in the political executive and decreases opportunities for political accountability. The study of provincial constitutional amendment offers not only a useful case for understanding the practice and effects of constitutional amendment culture, but also important insights into the practices of constitutional politics in Canada.

Building on the work of Richard Albert, this paper has termed the provincial practice of constitutional amendment under section 45 of the

⁷⁶ The United Kingdom's experience in codifying portions of its constitution may offer helpful insights for provinces looking to identify and navigate their provincial constitutions, for example, the House of Lords Select Committee on the Constitution. See Jack Simson Caird, Robert Hazell & Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (London, UK: The Constitution Unit, University College London, 2014).

Constitution Act, 1982 as amendment by stealth. The argument here is that amendment by stealth is problematic, and greater transparency in the amendment of provincial constitutions is needed. As has been shown, part of the challenge of understanding this practice of amendment by stealth is that it is obscured by design. How then can we go about identifying and analyzing amendment by stealth of provincial constitutions, and through this better understand provincial amendment culture? This paper has only scratched the surface, and more research is needed. There are a number of ways to move forward. First, more analysis of the amendment of acts that are part of a provincial constitution is needed. While it is not always clear what acts are part of a province's constitution, even an incomplete list would be informative. Amendments to these acts could be analyzed over a specified period of time and could include review of debates in the legislature, committee review, and textual analysis of the bill itself in order to determine how, if at all, the proposed change to the act was framed and understood as a constitutional amendment. A second possible approach for the study of amendment by stealth is to analyze court cases in which a part of a province's constitution faces constitutional challenges. These types of court decisions provide a unique opportunity to see how governments and courts understand a province's constitution. While Quebec's Bill 96 is still in its early stages, if it passes into law and a constitutional challenge ensues, this will undoubtedly be a key case for understanding the parameters of provincial constitutional amendment. Such studies would contribute to a better understanding of provincial amendment practice and may help to build an empirical case for why change is needed.