

Preface and Issue Overview

D A R C Y L . M A C P H E R S O N *

In this edition of the Manitoba Law Journal, we are pleased to publish a series of papers that were in earlier forms, presented at a conference at the University of Texas at Austin. The papers discuss an important area of law that does not seem to get all that much attention – the law of constitutional amendment.

In Emmett MacFarlane’s contribution (“The Unconstitutionality of Unconstitutional Constitutional Amendments”), the author takes a hard look at the idea that uncodified rules could prevent an amendment to the constitution on substantive grounds that are not dictated by the text of the constitution itself. MacFarlane refers to this as “uncodified unamendability” of the constitution. In MacFarlane’s view, while other countries (notably India, among a limited number of others) have sometimes found grounds outside the constitution to invalidate constitutional amendments, Canada’s constitution seems to leave little room for such an approach. Canada appears to have created a complete code for amendments to its constitution. MacFarlane also takes aim some of the academic writing with respect to uncodified grounds upon which a court could, theoretically at least, find means by which it could invalidate a constitutional amendment that follows the procedural steps required for such an amendment to be valid, finding what he views as some errors in the logic of proponents of this uncodified unamendability. I found this contribution to be very interesting, because it explains that the two cases¹ where one could make an argument that the Supreme Court of Canada might have implicitly accepted the potential existence of uncodified

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¹ See *Reference re Secession of Quebec*, [1998] 2 SCR 217, and *Reference re Senate Reform*, 2014 SCC 32

grounds on which it could invalidate potential constitutional amendments. In an interesting (albeit brief) argument in Part IV.B of his paper, MacFarlane makes what for me is a convincing argument that these cases do not in fact represent even and implicit recognition or acceptance of uncodified unamendability. Of course, the one question that MacFarlane (or any other commentator, for that matter) cannot answer is whether the Supreme Court of Canada at some point in the future might take a different view of a different constitutional amendment.

The contribution of Bryan P. Schwartz (“Failed Amendments”) takes a significantly different approach. Schwartz acknowledges that it is quite difficult to formally amend the written constitution. He even goes so far as to suggest that in some ways, the jurisprudence of Supreme Court of Canada has made formal amendment even more difficult than the words of the constitution might otherwise be thought to suggest. In other ways, however, the interpretive choice and other devices used by the justices of the nation’s highest court have elevated some non-constitutional elements (like human rights legislation² and languages legislation³) to quasi-constitutional status. Other areas have been affected by federal-provincial agreements or other pronouncements. International documents can similarly affect constitutional interpretation.⁴ Even failed constitutional-reform attempts (like the Meech Lake⁵ and Charlottetown⁶ Accords) can form part of the Court’s reasoning in subsequent constitutional cases.

In Erin Crandall’s contribution, (“Amendment by Stealth of Provincial Constitutions in Canada”), the author tackles an issue that has received even less notice than issues of amendment revolving around the

² See, for example, *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566

³ See, for example, *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 535, [2002] 2 SCR 773

⁴ See, for example, *Newsun Resources Ltd. v. Araya*, 2020 SCC 5, *per* Justice Abella, for the majority.

⁵ 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].

⁶ *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].

constitution of Canada, that is, the way in which the constitutions of each of the provinces are amended. There are many interesting points that Crandall raises about this topic. To me, three of the most interesting are the following. First, it is not always clear what is part of the provincial constitution. Second, there is jurisprudence that says that laws which would appear to be part of the provincial is nonetheless subject to the *Canadian Charter of Rights and Freedoms*,⁷ meaning that the federal constitution is paramount over not only provincial law (no surprise there), it can invalidate parts of the provincial constitutions. Third, since the provincial constitutions can be changed by a provincial statute, and the provincial constitutions are not discussed very much, changes to these constitutions receive scant attention. Crandall points to recent changes to constitutional documents in the provinces to show that the process could, and should be made more transparent by at least forcing legislatures to acknowledge the source of the provincial authority to make alterations of laws that form part of the constitutional structure of the province, namely, according to Crandall, s. 45 of the *Constitution Act, 1982*.⁸ Crandall provides an thought-provoking analysis of an area of law that, despite studying law for over a quarter-century, I personally never knew existed.

The contribution of Jamie Cameron (“Canada’s Amendment Rules: A Window into the Soul of a Constitution: Review Essay ~ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*”) was very much focused on the contribution of Richard Albert to the scholarship of constitutional amendment. While other authors certainly mean reference to the work of Professor Albert as being highly influential, Cameron's contribution engages directly with Professor Albert's book.⁹ Much of this extended review essay or abashedly agrees with most, if not all, of the central theses put forward in the book. In my view, a good book review should want to engage the reader sufficiently with the subject-matter of the book being reviewed the reader might reasonably be expected to want to read the book, without making the

⁷ Part I of the *Constitution Act, 1982*, being Schedule “B” to the *Canada Act, 1982* (UK), c 11.

⁸ This is found in Part V of the *Constitution Act, 1982*, *ibid*.

⁹ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019)

reader of the review feel as though the review is provided all the necessary elements of the book without having to actually read it. For me, Cameron achieves this balance very nicely. Constitutional law is far from my own area of research. Nonetheless, many of the contributions in this issue of the *Manitoba Law Journal* have convinced me that even if it is far from my area of interest, Professor Albert's book may be well worth a read, because fundamentally, constitutional amendment seems to be a place where law and politics intersect in a very meaningful and important way.

Whatever the problems with our constitution, our changing world may soon demand changes to our constitution to meet the challenges that lie ahead. If we have learned nothing else from the COVID-19 pandemic, and regardless of political stripe or view, the last 24 months should convince us all that the future may look very, very different than what we might have reasonably expected only three years ago. The faster the pace of change, the more likely that amendment to the constitution may be politically and legally necessary to meet the challenges of the future. This is not to suggest that I have a crystal ball of any sort. Rather, if someone had told me in the beginning of 2020 that I would be teaching from home for two full academic years, I would have told them that they had no idea what they were talking about. Will these big changes necessitate constitutional reform? As both Albert and Cameron point out, a constitution must be sufficiently rigid to maintain legitimacy, and yet flexible enough to respond to the problems of the day. As many of the contributions in this issue have made clear, there may be an excess of rigidity in the Canadian constitution as it is currently interpreted, both in its text, and in certain judicially-created extra-textual doctrines that have been applied in cases of constitutional amendment. Whether constitutional amendment is in fact necessary to add more flexibility into the mix (or whether it can or should be achieved through other means) seems to be an open question. I do not have answers to these questions, but from Cameron's essay, it is clear that Albert has thought a great deal about these issues, and has developed an impressive framework to resolve some, if not most (both mine and those of others), of the questions around constitutional amendment.

Cameron, herself a veteran of both the Meech Lake Charlottetown Accords, managed to use her essay to get me interested in a book that, prior to reading her commentary, would not even have been on my radar screen. She also has me asking questions for myself, like those in

the previous paragraph, that without her commentary and that of others contained in this volume, I never would have thought to ask. In short, if I engage as much with the book as I did with the commentary, the commentary will have done me a favour. This, for me, suggests that Cameron's contribution is a very good review essay.

While the contribution of Warren J. Newman ("Canadian Constitutional Reform in Comparative Perspective: Some Reflections Occasioned by Richard Albert's Global Work on Constitutional Amendments") also reviews the Albert book, and is itself quite laudatory of its content, Newman asks certain questions that would seem to imply that in Newman's view, there may be some areas in the book that can be legitimately challenged and further discussed. For example, in Part III of his essay, Newman contends that one of the issues with Albert's analysis may be that Albert expects that all rules for constitutional amendment should be written and codified. Newman contends that this is very similar to our American neighbours. This, Newman contends, may not give sufficient weight to our British roots, considering that our constitution is supposed to be based on that of the United Kingdom. If that be so, it is then more explicable that our constitution is not simply found in written documents, but in multiple places including the written *Constitution Acts*. Nonetheless, what are the things that Newman does point out near the end of his essay is that there are situations when we would be better served with a more codified version of our own constitution.

Given how laudatory parts of the Newman contribution are, I take these questions and issues to be and attempt to engage in the very conversation in which Albert's book says that it wants to engage with others: what are the proper rules of constitutional amendment? just as with the Cameron contribution described above, the disagreements that Newman raises do not detract, for me at least, from a desire to read the Albert book. Rather, it shows that engagement with the book will provide a rich source of debate, not only for the experts in issues of constitutional amendment, but that I as a non-expert can understand and appreciate both Albert's contributions, on the one hand, and the disagreements that may result from those contentions, on the other. Again, reading the Newman contribution within a few days of the Cameron contribution actually enhanced my appreciation for the work done by Albert.

The most critical analysis of Albert's monograph comes from Maxime St-Hilaire, in his contribution ("Richard Albert v. the Venice

Commission on Constitutional Amendments and the Rule of Law: A Systematic and Critical Comparison”). It is undoubtedly the most technical of the reviews of Albert's work, and at times, seems to take Albert to task for what the author sees as inconsistencies in Albert's work. Albert was not alone as a source of critique here. St-Hilaire also considers in detail the report of the Venice Commission under the auspices of the Council of European for similar review and detailed, incisive commentary. The author uses both of these works to compare and contrast the strengths and weaknesses of each approach. Though St-Hilaire does not expressly pick a winner in this comparison, I take the view that there are many areas where Albert's work is thought to be superior to its European counterpart.

For those who are already well-versed in the intricacies of rules of constitutional amendment, the commentary offered by St-Hilaire will undoubtedly provide much substance for discussions of the particular issues that the critiques of St-Hilaire raise. For a legally-trained neophyte to these issues, like myself, however, the detailed critiques of both the work of Albert and a European commission that considered similar issues has shown me that there is much detail that I would have to learn to be anything more than what I am now, that is, an interested, if only superficially-informed observer of the detailed work of others. It is clear, however, that those who are genuinely engaged in the area are left with a rich and fertile area of research for the coming years and decades. From the commentary on Albert's work provided in this volume, it is equally clear that Albert has gained the respect of his peers, and his likely to be a leader in this important area of legal research for at least the foreseeable future.