

**CONSTITUTIONAL CHANGE WITHOUT
CONSTITUTIONAL AMENDMENT**

A REVIEW OF

***CONSTITUTIONAL PARIAH: REFERENCE RE SENATE REFORM AND THE
FUTURE OF PARLIAMENT*, EMMETT MACFARLANE (VANCOUVER: UBC PRESS, 2021)**

If there is a better book on the challenges of constitutional change in Canada, I have yet to see it. Emmett Macfarlane's masterwork on the constitutional politics of Senate renewal — *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* — exposes the great paradox of constitutional reform in Canada: the Canadian Constitution is today virtually unamendable, but it evolves constantly in both its form and content.¹ Here is the puzzle: how can our constitution be simultaneously frozen and ever-changing? This outstanding book illustrates the complex and fascinating dynamics behind an essential feature of Canadian constitutionalism: the political reality of constitutional change without constitutional amendment.

In this review essay prepared at the invitation of the *Alberta Law Review*, I identify several of Macfarlane's major contributions in this book and then situate the importance of his study to our understanding of the Canadian Constitution and the theory of constitutional amendment. What results, I hope, is not only a strong endorsement of this excellent book but moreover an invitation to law and political science scholars in Canada to join the theoretically rich discussion of real-time practical relevance that Macfarlane has initiated to the enormous benefit of the field of public law.

The hydraulics theory of constitutional reform has been influential in the United States but it applies just as well in Canada. Like the Constitution of the United States, the Canadian Constitution is extraordinarily rigid. As a result, modern constitutional amendment efforts in both countries have failed more often than they have succeeded.² When a constitution is difficult to amend — so difficult that it becomes effectively impossible to amend — the hydraulics theory predicts that those impulses and energies for constitutional reform will be

¹ There have been 11 constitutional amendments using Canada's homegrown amendment procedures, which were created at Patriation in 1982. The Constitutional Law Group, *Canadian Constitutional Law*, 5th ed (Toronto: Emond, 2016) at 26:25–26:26. Today, it is virtually impossible to use two of these procedures—the multilateral or unanimity procedures of constitutional amendment—but the other three procedures are more readily useable, though they cannot be used to make changes of national scope and effect. For a discussion of each of these procedures and their relative difficulty, Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) at 107–10.

² There have been thousands of constitutional amendment proposals in the United States but only 27 have been successful. Kathleen M Sullivan, "Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever" (1996) 17:3 *Cardozo L Rev* 691 at 692. In Canada, the two most recent efforts at major constitutional reform both failed dramatically. James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 107–31. One of these two constitutions may well be the world's most difficult to amend. See generally Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 *Alta L Rev* 85 (quantifying comparative amendment difficulty in Canada).

redirected elsewhere through channels other than amendment.³ In other words, when political pressure builds in favour of constitutional reform, the outcome is ordinarily to amend the constitution. But when the path to amendment is blocked, the intensifying pressure for change will find alternative routes for relief, culminating either in some irregular form of constitutional modification or in an altogether new constitution.

We have seen this hydraulics theory in action in both countries.

In the United States, the extreme difficulty of constitutional amendment has pushed reforms “off the books,” driving political actors to update the constitution without recourse to the procedures of constitutional amendment.⁴ Today, the primary battleground for constitutional change is no longer amendment. It is the confirmation process for justices of the Supreme Court.⁵ The Court has the power to change the constitution with only a simple majority vote of five to four. That degree of judicial agreement is much easier to cobble together than what is required for an amendment: approval by two-thirds supermajority agreement in both houses of Congress followed by ratification by three-quarters supermajority of the 50 states.⁶ Constitutional change also happens in the national legislature with the creation of “super-statutes.”⁷ These are regular statutes passed by simple legislative majorities but are nonetheless treated by political actors, and often by courts, as higher law.

In Canada, too, the difficulty of constitutional amendment has redirected much of the country’s reform projects away from the amendment process and onto other platforms of constitutional contestation. As Allan Hutchinson has shown, courts today “have become the preferred site for effecting important changes in the constitutional order.”⁸ And much like amendment difficulty has driven political actors in the United States to pass ordinary statutes they expect will operate at the level of constitutional law, the same is true in Canada. The *Canadian Bill of Rights* of 1960 was a simple statute enacted in Parliament but for which the government of the day had high hopes as a constitution-level constraint on political actors.⁹ The government conceded that it would have been “impossible” to pass the Bill of Rights as a constitutional amendment that could regulate the conduct of both federal and provincial actors.¹⁰ Still, hoping that the statute would be treated as higher law, the Minister of Justice of the day declared that “[t]his bill of rights, although a statute of the [parliament] of Canada and not an amendment to the British North America Act, will be of equal force and effect as part of the constitution of Canada.”¹¹ Looking back, the Bill of Rights never exerted constitutional effect nor achieved constitutional status. But the key point is that political

³ Heather K Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*” (2007) 55:4 Drake L Rev 925 at 927.

⁴ Stephen M Griffin, “The Nominee Is ... Article V” (1995) Const Commentary 171 at 172.

⁵ Bruce A Ackerman, “Transformative Appointments” (1988) 101:6 Harv L Rev 1164.

⁶ US Const, Art V.

⁷ William N Eskridge Jr & John Ferejohn, “Super-Statutes” (2001) 50:5 Duke LJ 1215.

⁸ Allan C Hutchinson, “Constitutional Change and Constitutional Amendment: A Canadian Conundrum” in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abingdon, UK: Routledge, 2013) 51 at 57.

⁹ *Canadian Bill of Rights*, SC 1960, c 44.

¹⁰ Bill C-79, *Measure Providing for Recognition and Protection of Human Rights and Fundamental Freedoms*, 2nd reading, *House of Commons Debates*, 24-3, No 6 (7 July 1960) at 5886 (Hon ED Fulton (Minister of Justice)).

¹¹ *Ibid* at 5886.

actors at the time tried to pass a constitution-level reform using sub-constitutional means because of the practical impossibility of constitutional amendment.

There are modern illustrations of the hydraulic theory of constitutional reform in Canada. One example involves the constitutional veto that Quebec had long demanded from Canada as part of negotiations for constitutional peace between the province and the country. Quebec had been denied the power to veto constitutional amendments in the 1982 Patriation package. And although veto power had later finally been offered to Quebec in both the 1987 Meech Lake Accord and the 1992 Charlottetown Accord, each of these two mega-constitutional packages of reforms failed to pass through Canada's amendment labyrinth. A short while later, when Quebec announced that it would hold a provincial referendum on whether to secede from Canada, federalists were justifiably worried that Quebecers would express their disappointment by voting to leave Canada. But the prime minister of the day had a plan to entice voters to choose Canada over independence: he promised at last to give Quebec its veto if the province voted to reject secession.¹²

How could the prime minister give Quebec a constitutional veto? After all, giving Quebec this veto power required a constitutional amendment, and the country was not about to embark on a fourth major effort at constitutional reform since 1982. When the Quebec referendum votes had been tabulated and the no vote declared victorious, the prime minister used his parliamentary majority to enact a statute giving Quebec the constitutional veto it had wanted and been promised.¹³ The veto took the form of the Regional Veto Law, just an ordinary statute passed by a simple majority. In the end, the prime minister made good on his promise by finding a non-constitutional path to push forward a constitution-level reform that would have been impossible to achieve using the procedures of constitutional amendment—the same ones the prime minister had seen fail more than once before.

This Regional Veto Law is the second-best modern example of the hydraulic theory of constitutional reform in Canada. The very best example appears in Macfarlane's superb book.

Macfarlane reminds us that there were calls to reform the Senate of Canada almost as soon as the country began its grand constitutional experiment in 1867.¹⁴ The House of Commons debated Senate reform early into Confederation, and the discussion later expanded to include provincial representatives in intergovernmental conferences.¹⁵ There were proposals to create provincial elections for senators, to limit senatorial terms, and to abolish the institution

¹² Robert A Young, "Jean Chrétien's Québec Legacy: Coasting then Stickhandling Hard" (2004) 9:1 Rev Const Stud 31 at 38.

¹³ *An Act Respecting Constitutional Amendments*, SC 1996, c 1.

¹⁴ Emmett Macfarlane, *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* (Vancouver: UBC Press, 2021) at 35.

¹⁵ Michael Crommelin, "Senate Reform: Is the Game Worth the Candle?" (1989) 23:2 UBC L Rev 197 at 197; Senator Serge Joyal, "Reflections on the Path to Senate Reform" (1999) 22:3 Can Parliamentary Rev 2 at 2.

altogether.¹⁶ Macfarlane specifies the intricate details just as effectively as he identifies the wide patterns in the many discussions on Senate reform in the years between Confederation and Patriation and through the failed efforts to amend the Constitution in relation to the Senate in the Meech Lake and Charlottetown Accords.¹⁷ Although political actors devoted substantial energies to negotiating Senate reform, they suffered dramatic disappointments at every turn. So much so that by the beginning of the twenty-first century, not much about the Senate had changed.¹⁸ The Senate failed to inspire confidence as a result. As an organ of governance, it was ineffective. As a voice for provincial interests, it was inadequate. And as a symbol of the richness of Canada and the diversity of its peoples, it left many Canadians dissatisfied with its representative function. Macfarlane's account of generations of Senate reform efforts sets the stage for the chapters to come.

Enter Prime Minister Stephen Harper. In the mid-2000s, his new federal Conservative government undertook another round of Senate reform. But there was a big difference between the Harper proposals and the failed attempts at constitutional reform in the 1980s and 1990s. This time, as Macfarlane explains, Senate reform would proceed as a single-subject amendment achieved by unilateral federal action, in contrast to the earlier mega-constitutional proposals that included Senate reform as part of a multi-subject package of constitutional amendments.¹⁹ It was not clear, however, that the Harper government could lawfully proceed in this streamlined fashion. Political actors triggered the Supreme Court reference process to resolve the constitutional questions prompted by these latest Senate reform proposals, which included changes to the way senators would be selected, to the length of term they would serve, and to the institution itself.²⁰

A mix of legislative analysis and political context, this discussion in Macfarlane's book is comprehensive yet concise.

The Court's answers in the *Reference* broke new ground on Senate reform and on constitutional reform more generally. Macfarlane deconstructs every part of the Court's reasons in relation to what he regards as the Court's unsatisfactory exposition of the roles of the Senate and the Court's overreliance on the organizing logic of the concept of "constitutional architecture."²¹ These two themes serve as backdrops as Macfarlane examines the Court's conclusions on the main proposed reforms: consultative elections, term limits, property qualifications, and Senate abolition.²² He ultimately concludes that the Court created deep ambiguity and uncertainty where it could have quite readily, in his view, resolved the questions presented to it with more careful and conspicuous discussion of the codified rules of constitutional amendment in Part V of the *Constitution Act, 1982*.²³ His meticulous analysis is well worth reading, both by scholars seeking an introduction to the *Reference re Senate Reform*,²⁴ and those already intimately familiar with its jurisprudential resolution.

¹⁶ Macfarlane, *supra* note 14.

¹⁷ *Ibid* at 36–56.

¹⁸ There was one change of some significance: as of 1965, Senators had to retire by age 75. *Constitution Act, 1965*, SC 1965, c 4, s 29(2).

¹⁹ Macfarlane, *supra* note 14 at 57.

²⁰ *Ibid* at 68–75.

²¹ *Ibid* at 76–81.

²² *Ibid* at 81–96.

²³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²⁴ 2014 SCC 32 [*Reference*].

There are two big takeaways from the *Reference*. First, the Court advised that the reforms proposed by the Harper government were not achievable using the federal unilateral amendment procedure. Second, the Court advised that any future Senate reform that impacts the architecture of the Constitution will have to proceed through one of the multilateral amendment procedures involving both federal and provincial actors. In light of the Court's decision, virtually everyone came to the conclusion that Senate reform was now officially done. The Court had reminded us that Senate reform is possible only through the same mega-constitutional amendment packages that had failed catastrophically in the 1980s and 1990s. It appeared that there was no way around the requirement of formal multilateral amendment for Senate reform. Or so many thought.

We now come back to the hydraulics theory of constitutional reform. Shortly after the Court issued the *Reference* in 2014, the new federal Liberal government came into power in 2015 and quickly turned its attention to delivering on its campaign pledge to create a new senatorial appointments process that would be non-partisan and merit-based. But the challenge was clear: how to renew the Senate without getting entangled in the morass of constitutional reform that the Court had determined would require a constitutional amendment? The answer was constitutionally quite clever: the federal Liberal government changed the operation of the Constitution without engaging the procedures of constitutional amendment, specifically by making a policy-level adjustment to how Senators are selected. The outcome of this policy-change — a sub-constitutional reform to the Constitution of Canada — is one of the most important non-judicial institutional reforms in Canada since Patriation in 1982. In other words, it is colossal. Time will reveal the full extent of the impact of the change — especially if a future opposition government chooses to follow the new policy of senatorial selection — but its impact has already been felt. The federal Liberal government's reform of the senatorial appointments process is the best evidence of the innovation we see in Canada when it comes to constitutional change without constitutional amendment.

Readers should do themselves the favour of consulting Macfarlane's book for both the granular details, and the larger significance of the new senatorial appointments process. Macfarlane's account of this sub-constitutional reform — its genesis, its development, its implementation, and its effects — is the very best one publicly available.²⁵ He reports on his discussions with the players involved, he identifies the political pressures at play, and he appraises the process used to renovate the ancient institution that had resisted reforms on a similar scale for generations before. What quickly becomes apparent is just how well the old line about necessity and invention applies to Senate reform in Canada: the federal Liberal government had made a pledge and wanted to keep it both for its own sake and for the sake of good governance in the country. But faced with a constitution that was virtually unamendable on Senate reform, the federal Liberal government redirected its reform energies through new and ingenious channels to achieve by sub-constitutional means what it could not achieve by constitutional amendment. This is the portrait Macfarlane paints in this exceptional book, full of bright and colourful strokes of precise legal doctrine, well-informed political analysis, and rich constitutional and historical context.

²⁵ Macfarlane, *supra* note 14 at 99–136.

The study of constitutional change has flourished in recent generations as countries around the world have experimented with new modalities of constitutional reform. New additions to the toolkit of constitutional change include unamendability, quasi-constitutional statutes and the doctrine of unconstitutional constitutional amendment. These new devices have generated intriguing new questions about enduring principles that have long been at the heart of our understanding of constitutionalism, including democracy, the rule of law, and human rights. And as scholars have sought to answer these new questions, they have discovered a new world of possibilities not only about how constitutions change but also about how they should.

Until recently, there has been relatively little scholarly interest in the modern study of constitutional change in Canada. Of course, Canadian public law scholars were fully engaged in questions of constitutional reform during Patriation and its aftermath. But attention turned elsewhere shortly thereafter, no doubt because of amendment-fatigue across the entire country and also because political actors made the carefully calculated choice to deprioritize constitutional reform and instead to find sub-constitutional avenues to keep the Constitution current. All along, however, there was movement occurring beneath the surface of Canada's codified constitution.

When the Supreme Court issued its reasons in the *Reference*, few Canadian scholars were better prepared to situate its significance than Macfarlane. A political scientist with sophisticated knowledge of the rules and jurisprudence of Canadian constitutional law, Macfarlane had by then produced a marvelous study of the forces behind the growth of judicial power in Canada,²⁶ and he had written about the use and design of Canada's constitutional amendment procedures.²⁷ Any lawyer could have understood the outcome of the Court's *Reference*, but understanding its implications would require a multifaceted familiarity with the Court's institutional authority, the intricate construction of the Constitution's amendment procedures, and the constitutional politics of Canada's modern amendment failures. Macfarlane has this broader view. His expertise in public law—informed by perspectives attuned to both law and political science—gives him a high perch from which to evaluate the Court's *Reference*, allowing him to see what many others cannot. This book is Macfarlane at his scholarly best, showing us what he sees, guiding readers through the Court's complex ruling, contextualizing how political actors responded, and assessing what the *Reference* entails for the future of constitutional reform.

For me, Macfarlane's book confirms what I have long believed to be true about the forces of constitutional change: there is no better jurisdiction than Canada to study the subject. When combined with our unique constitutional form, our escalating structure of constitutional amendment — five procedures in total — maps onto the major political fault lines of federalism and regionalism as well as the modern imperative of reconciliation to

²⁶ Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).

²⁷ See e.g. Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Buffalo: University of Toronto Press, 2016); Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883.

raise the most interesting and important questions in constitutional reform in any jurisdiction in the world.

There remains much to learn still about constitutional reform in Canada. The time is ripe for new ideas from voices old and new to help break through the barriers standing in the way of constitutional amendment on urgent calls to action on institutional modernization, strengthening the federation, and Indigenous rights and recognition. We can certainly continue down the path of informal constitutional change without constitutional amendment. But we have constitutional amendment procedures for a reason, and we should use them when possible. The question is how. I encourage scholars to enter the conversation on the possibilities and limits of Senate Reform that Macfarlane has initiated with this dazzling book and to join the broader discussion on constitutional reform in Canada from perspectives in law, political science, and beyond.

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