

Constitutional Aspects

- Which Section of the Canadian Constitution should we use to amend the Constitution? Part V, Section 43 or 45?
- Will Section 38 have an effect (38 (2), 38 (3)) on whichever Section is used?
- There will be a need to have competent constitutional advice, part of the Working Group - Legal.
- It will be important that any amendment or legislation that is proposed and passed must be robust and not subject to challenge in the courts, especially the Supreme Court of Canada - another reason for good legal advice and direction.
- Who can initiate the amendment, the proposal to have an amendment considered? What is the best approach for the federal and provincial legislation - creating it, passing it? Would referendums be needed, advisable?
- Can Section 43 be used if the amendment "could" apply to all provinces and territories or would you then have use 38?
- Who can (must) initiate the amendment?
- The Hudson, PQ Pesticide By-Law case (*Hudson vs Spraytech, 2001*) should be reviewed. Does a subsidiarity approach have merit over a "petition and whine" campaign directed at a miscellaneous collection of politicians across three levels of political parties?

Short Backgrounder on the Canadian Constitution

Amending the Constitution

The pre-1982 system for changing the Canadian constitution was to ask the British Parliament to pass a constitutional amendment. After the constitution was **patriated** - made an entirely Canadian law - a complicated new system for changing the constitution was introduced, known as the **amending formula**. Under this system, (described in **Part V** of the Constitution Act, 1982) there are different rules for passing different kinds of **amendments**.

An amendment that applies only to a single province requires approval from the Canadian Parliament and the governments of any affected provinces. An amendment that affects *all* provinces, by contrast, requires the approval of at least seven of the provincial governments representing at least 50% of the Canadian population (sometimes called the **7-50 formula**). On a handful of really important matters, such as changing the amending formula itself, *unanimous* provincial consent is necessary.

There have been many single-province amendments passed since 1982. Here are some:

- 1987 – Extended education rights to the Pentecostal Church in Newfoundland
- 1993 – Granting equality to New Brunswick's English and French-speaking communities
- 1993 – Approving construction of a bridge linking Prince Edward Island to the mainland
- 1997 – Replacing Quebec's religious school system with a secular one
- 1998 – Replacing Newfoundland's religious school system with a secular one
- 2001 – Changing Newfoundland's name to Newfoundland and Labrador

Role of Provinces

When Canada was founded in 1867, several British colonies agreed to join together to form a single powerful **federation**. As part of the deal, all the governments of the individual colonies - which became known as provinces - were allowed to retain political control over certain local matters, while the national, or federal, government was given control over larger, more complicated national issues. This method of sharing power between multiple levels of government is a philosophy known as **federalism**.

Sections 92 through 95 of the Constitution of Canada spells out what powers belong exclusively to the provinces. Among other things, this includes the power to regulate municipal institutions in the province.

Role of Cities

There is no mention of cities or municipalities in the Canadian Constitution except to give Provinces full power over them.

CONSTITUTION ACT, 1982

PART V - PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

Amendment of provisions relating to one or some but not all provinces

- 43.** An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
- (a) any alteration to boundaries between provinces, and
 - (b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Notes by Alan Kasperski