

Provincial Constitutions in Canada

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For the students of comparative federalism, Canada is an anomaly. Canadian provinces are arguably stronger (both politically and jurisdictionally) than their counterparts in all other federal democracies. Yet, unlike the latter, no Canadian province, save one, has a written constitution. Even the one—British Columbia’s—is only a statute, and so can be quickly amended by the normal legislative process.

The source of this anomaly can be traced to Canada’s heritage as a former British colony and the British tradition of an “unwritten constitution.” In 1867 at the time of Confederation, each of the original four colonies had their own “unwritten constitutions”—a combination of British and colonial statutes, Royal Proclamations and Charters, custom and convention—and these were duly noted and respected in the British North America (BNA) Act of 1867. Sections 58-90 of the BNA Act address the subject of “Provincial Constitutions,” but with the exception of the executive office of the Lieutenant Governor (the Queen’s Representative), the provinces were given complete authority to amend their constitutions as they see fit. Under this authority, for example, several provinces unilaterally abolished the upper chambers of their legislatures. The provinces’ “exclusive” authority over their respective constitutions (save the office of the Lieutenant Governor) was re-affirmed in s. 45 of the Constitution Act, 1982.¹

Notwithstanding such authority, all provinces, save British Columbia, have chosen to adhere to the British practice of an “unwritten constitution,” or, to use more contemporary terminology, a “flexible” rather than a “rigid” constitution. This means that any attempt to “define” a province’s constitution produces a lengthy list of statutes, orders-in-council, the rules of order and procedure of the legislatures, and constitutional conventions. For example, the Alberta Attorney-General’s office, when asked to identify the written documents that are included in the “constitution of Alberta,” replied that there was “no listing or definitive statement” but identified 23 Acts which might be included.² The author cautioned that this list did not preclude other acts and added that the Departmental Acts and the Rules of the Legislature might well be included as well. And this is only for the “written” portion of the Alberta’s constitution.

The predictable result has been that provincial constitutions are barely acknowledged in either the practice or the theory of Canadian politics. As Wiseman (270) has recently observed, “Provincial constitutions barely dwell in the world of the [Canadian]

subconscious. They are too opaque, oblique, and inchoate to rouse much interest, let alone passion.”

The absence of provincial constitutions in Canada (like the absence of a democratically elected and effective Senate) distinguishes Canada from other mature federal democracies. In the majority of mature federal countries,³ the sub-units (states/cantons/lande) have their own written constitutions. The six Australian states also have their own written constitutions, but they are not entrenched. Even most of the newer federal states⁴ have more developed provincial constitutions than Canada. Canada shares with India the dubious honour of being one of the only two mature federal democracies with no sub-national constitutional systems. This omission reflects mid-Nineteenth Century British parliamentary and imperial practice, and the centralist and anti-democratic biases of the two nations’ original constitution writers. It is not by coincidence that India and Canada are also the only two English-speaking federations in which state/provincial judges are appointed by the federal government.⁵ Both practices are outdated relics of nineteenth century British imperial rule that have no place in modern democratic federations.

Both Quebec and more recently Alberta have shown interest in developing modern, democratic provincial constitutions. Quebec nationalists and sovereignists (Morin) have discussed the idea of a Quebec constitution for several decades.⁶ In the run up to the 2003 Quebec election, all three major political parties endorsed the idea of a provincial constitution. The Action Démocratique du Québec (ADQ) proposed “La Charte du Québec” that would serve as “une document de base... la loi des lois de notre communauté politique” and would affirm “la liberté politique de Québec,” including the right to self-determination.⁷ In February, 2003, an “Estates General” was convened by the Parti Québécois government to discuss and recommend constitutional changes for Quebec. 82 percent of the delegates voted in support of a “une réforme qui mène à une constitution québécoise.” The April, 2003 Quebec election was won by the Liberal Party of Quebec (PLQ), which has initiated a commission to propose a new electoral system to replace the existing first-past-the-post system, one of the other propositions that was endorsed (90%) at the Estates General in February. To the best of my knowledge, the PLQ has not yet indicated its intentions with respect to a new provincial constitution.

In Alberta, citizens unhappy with their province’s treatment by the Federal government have advocated a provincial constitution as part of a package of “home rule” reforms to strengthen the political autonomy of the province.⁸ In response, the Government of Alberta struck a legislative committee to consult with Albertans on “How to strengthen Alberta’s role in Confederation.”⁹ The committee’s report is due out in June, 2004. One of the committee’s options is to recommend a new provincial constitution to coincide with the province’s Centennial celebration in 2005. (Morton)

Should it choose, each Canadian province possesses the constitutional authority to create and entrench a provincial constitution.¹⁰ Under section 45 of the 1982 Constitution Act,¹¹ any province can proceed unilaterally with respect to its own provincial constitution.¹²

However, an amending formula that requires special legislative majorities and/or popular ratification by way of referendum (i.e. “entrenchment”) raises the issue of a present government attempting to bind the policy discretion of a future government. This is considered impermissible under the British parliamentary system. However, reasonable “manner and form” limitations have always been permitted, and the adoption of the Charter of Rights in 1982 marks Canada’s departure from and modification of Dicey’s classical model of parliamentary supremacy. If entrenched constitutional limitations are now permitted in Canada’s national constitution, there is no longer a principled reason why they cannot be included in provincial constitutions.¹³

My own view, which is based on informal consultations with several of Canada’s most respected constitutional experts, is that this potential objection can be easily met by ensuring that any new entrenched provincial constitutional limitation is first approved by the same higher threshold that it seeks to impose on future legislatures. This adoption procedure would satisfy the “manner and form” requirements that are part of Canada’s parliamentary tradition and replicate the manner in which the Charter of Rights was adopted in 1982.¹⁴

For this same reason, unilateral entrenchment would not trigger the only other limitation that constrains the provincial amending power. According to Wiseman (285), section 45 does not permit “a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.”

Neither entrenched rights nor a super-majoritarian amending formula are foreign to Canada. Nor is the use of popular referenda to approve or disapprove proposals to amend the constitution.¹⁵ Quebec or Alberta would just be doing what Ottawa has already done.

There is, however, a potential downside to provincial constitution making in Canada. To take Quebec as an example, if the purpose is to strengthen provincial self-government and democratic accountability WITHIN the province, adopting an entrenched constitution could end up having the opposite effect. Under Canada’s current legal system, the final authority for interpreting a Quebec (or any other province’s) Constitution would be the Supreme Court of Canada—only three of whose nine judges are from Quebec. Judges on the Supreme Court are appointed unilaterally by the Prime Minister of Canada, without consultation with provincial governments or even parliamentary hearings. To a large degree, these appointees have shared the Liberal Party’s viewpoint on the nature of Confederation and issues of national unity.

The situation would be worse for a province like Alberta, for which there is no guarantee of an Alberta judge on the Supreme Court. An initiative designed to increase self-government for Albertans could end up undermining democratic autonomy if the final word on their constitution’s meaning rests with nine non-Alberta judges in Ottawa. Even allowing the provincial Court of Appeals to serve as the final interpreter—the practice in the 50 U.S. states--would be problematic, since its members too are all appointed by Ottawa.

There are several strategies to mitigate this problem. One would be to include a “notwithstanding” clause similar to the existing clause in the federal Charter of Rights.¹⁶ Another would be to make all judicial interpretations “advisory” only—not binding—on the government. This is the approach recently adopted in Great Britain, and it leaves the final decision with the elected government. Still another possibility would be to adopt the European approach to enforcing constitutional limitations—a separate, quasi-judicial “Constitutional Council” with a privative clause that precludes review by the ordinary courts.¹⁷ Longer term solutions involving constitutional amendments (and thus the consent of the Federal government and six other provinces) include transferring the power to appoint provincial superior court judges to the provinces and conferring exclusive final jurisdiction over provincial constitutions to provincial courts of appeal.

To conclude, provincial constitutions in Canada are relatively underdeveloped and unimportant compared to practices in other federal states. While constitutionally each province has the legal authority to enact an entrenched constitution of its own, none has yet done so. This inaction is partly explained by the legitimate fear that judicial interpretation of a provincial constitution by federally appointed judges would decrease not increase the province’s democratic autonomy. There are several institutional options that could mitigate this risk. It is safe to predict that these would be employed by either Alberta or Quebec, only two provinces that have shown any recent interest in modernizing their provincial constitutions.

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¹ S.45: “Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.” (Section 41 exempts the office of the Lieutenant-Governor from this power.)

² These included the Alberta Bill of Rights, the Auditor General Act, the Regulations Act, the Languages Act, the Ombudsman Act, the Electoral Finances and Contribution Act, and the Justices of the Peace Act. (Wiseman, 289)

³ United States, Switzerland, Austria, Germany; the four South American federations—Argentina, Brazil, Venezuela, and Mexico; and most recently Ethiopia. In the past decade Italy and Spain, while not technically federal states, have devolved significant powers to regional governments, which have in turn adopted constitution-like documents for governance.

⁴ Spain, Russia, South Africa, Bosnia and Herzegovina.

⁵ Austria and Venezuela are two other federations in which this anti-federal practice occurs. In Venezuela, it reflects the centralist bias of South American political development.

⁶ “Une constitution du Québec,” Michel Venne, *Le Devoir*, April 3, 2000. “Quebec needs its own constitution,” Joséée Legault, *The Montreal Gazette*, April 8, 2000.

⁷ “L’ADQ propose d’adopter une Charte du Québec,” *Le Devoir*, June 1, 2001.

⁸ See www.albertaresidentsleague.com and www.citizenscentre.ca.

⁹ “Seeking to address Alberta’s anger,” *The Globe and Mail*, March 8, 2004.

¹⁰ Wiseman (279) seems to imply that the only way a province can place an “entrenched” constitutional limitation on itself is through amending the Constitution of Canada, by using the s.43 bilateral amending procedure with Ottawa. This may be true under the constitutional status quo, but would no longer be the case once a province had a properly entrenched constitution of its own. For the reasons that follow, a province would not need to “get Ottawa’s permission” to entrench a constitution of its own.

¹¹ See fn. 1.

¹² As Wiseman (282) observes, “Provincial constitutions—with the exception of the federal principle and parts of the Charter—are what provincial legislatures say they are.”

¹³ Alberta has in fact bound future legislatures in its Constitution of Alberta Amendment Act, 1990, which deals with Métis settlements and stipulates that its amendment or repeal “may be passed by the Legislative Assembly only after a plebiscite of settlement members.” Similarly, Alberta’s Constitutional Referendum Act, 1992, requires a referendum before ratification “of a possible change to the Constitution of Canada” and further declares the result “is binding on the Government of Alberta.”

¹⁴ According to Canada’s leading constitutional expert, Peter Hogg, while a statutory manner and form requirement can be repealed by the normal legislative process, “direct repeal can be guarded against by entrenching the entrenching provisions, i.e., by stipulating that the new manner and form procedure is also applicable to the repeal or amendment of the entrenching provision itself.” On the other hand, Hogg states that a present legislature may not bind a future legislature with respect to the “substance” of policy. This includes “an ostensibly procedural requirement that is virtually impossible of fulfillment, such as approval by eighty percent of the voters in a referendum.” What is not clear is at what point does “entrenching the entrenching procedure” become “an ostensibly procedural requirement that virtually impossible of fulfillment”? Suffice it to note here that at a certain point manner and form requirements that are themselves entrenched become indistinguishable from a formally entrenched constitutional amending formula such as apply to the Constitution of Canada and the Charter of Rights (since 1982) or the Constitution of the United States. Is a Canadian province allowed to create unilaterally this kind of entrenched constitutional instrument? There is a persuasive but not conclusive case that it does..

¹⁵ Both the Federal government and several provinces used the referendum procedure to decide the fate of the 1992 Charlottetown Accord, a mind-boggling collection of constitutional amendments that was decisively rejected by the voters. Quebec, Alberta and British Columbia all have statutory requirements that proposed amendments to the federal constitution be first approved by the people in a referendum. Quebec has twice used the referendum process to vote on a proposal to secede from Canada, in 1980 and again in 1995. In its 1998 ruling in the Quebec Secession Reference, the Supreme Court of Canada conferred constitutional legitimacy on the use of referenda by declaring that they embodied the unwritten constitutional principle of democracy.

¹⁶ Section 33 of the 1982 Charter of Rights reads: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7-15 of this Charter.” The Federal government has not yet used the “notwithstanding” clause, but it has been used 16 times by provincial governments.

¹⁷ A province’s authority for creating what in effect what be a specialized administrative law court can be found in part in their plenary power to “exclusively make laws amending the constitution of the province” and in part in the federal analogy. Just as Ottawa has created a separate system of federal courts to

administer federal administrative and public law, so a province could create a separate system of provincial courts to administer provincial administrative and public law.