

CONFIDENTIAL INFORMATION OR ADVICE

Brief Overview

Depending on the nature of constitutional amendments sought by the City, different amending procedures could apply. The two most likely amending formulas that might be used in order to enshrine City of Toronto authorities in the Canadian Constitution (often called “Charter City” powers), are: the general formula (s. 38 of the Constitution Act, 1982) or specific formula (s. 43 of the Constitution Act, 1982). Unless a proposed amendment engages one of the listed matters in section 41, the unanimity procedure set out in that section is unlikely to be required for a constitutional amendment giving constitutional recognition to the City of Toronto.

Amendments that only require the specific formula set out in section 43 are the most likely to succeed because they require only the consent of the Senate, House of Commons and affected provinces (arguably only Ontario in this case). Consequently, if the City requests a constitutional amendment, it should ensure that any amendments requested are framed so as not to engage the general or unanimity amending procedures. The views of the Government of Canada, the Province of Ontario and potentially any other province that believes it is impacted will need to be considered because the extent of the proposed amendments will be in the control of those governments.

It is difficult to determine the appropriate amending formula without knowing the exact nature of the amendments the City would request. To assist, I am including information about amendments that could be requested and my conclusion on the type of amending procedure that is likely to be required.

Potential Amendments that could be achieved with the general amending procedure requiring the consent of the Senate, House of Commons and seven of the ten provinces representing at least fifty percent of the Canadian population

The general amending formula contained in section 38 of the Constitution Act, 1982 requires the consent of the Senate, House of Commons and seven of the ten provinces representing at least fifty percent of the Canadian population in order to pass the amendment, making the success of any amendment requiring this formula to be more onerous than an amendment requiring the specific amending formula. I outline a few examples, where a proposed recognition of certain City of Toronto authorities could require this amending formula.

1. Recognition as a province

Section 42 of the Constitution Act, 1982 indicates that the general amending formula is required for the establishment of a new province. Therefore, if the proposed amendments amount to the creation of a sovereign province, the section 38 general amending formula must be used. This does not appear to be the intent of the creation of a Charter City, where the City of Toronto would attain some autonomy over certain matters but may continue to be governed by a provincial framework like COTA.

2. Amendment to s. 92 or another section of the constitution that applies to all provinces

Any proposal to amend a provision in the Constitution applicable to all provinces must be made using the general amending formula in s. 38. Again, whether a proposed amendment affects all provinces largely depends on the scale and scope of the proposed amendments to the Constitution.

For example, recognizing and enshrining City of Toronto authority over certain specified matters could require or result in an amendment to section 92(8) of the Constitution Act, 1867, which recognizes provincial authority over “Municipal Institutions in the Province”.

Since section 92(8) addresses the authority of all provinces over all municipalities, an amendment to this section could require the use of the general amending procedure in section 38 of the Constitution Act, 1982. However, as discussed below, if the amendment is specific only to reducing Ontario’s authority over Toronto, the amendment is arguably not one that applies to all provinces even if it is added to section 92(8) of the Constitution Act, 1867.

Potential amendments that could be achieved with the specific amending procedure requiring the consent of the Senate, House of Commons and the Province of Ontario

Again, more information is needed on the scope of the amendments that might be requested, but the City could request amendments that only require the section 43 amendment procedure.

A requested amendment could result in the creation of a new provision in the Constitution that is only about City of Toronto autonomy in certain specified areas. As such an amendment would only impact Ontario it would engage the specific amending formula in section 43 requiring consent from the Province of Ontario, the Senate and the House of Commons. As noted above, care would need to be taken to avoid types of amendments that could require the use of the more onerous general amending procedure in section 38.

I would also highlight that the risk in attempting to seek an amendment is that other municipalities are likely to want to make similar requests. It would be difficult to contain the amending process to the specific amending procedure of section 43 if the proposal became that municipalities in general should receive the same constitutional status as the City of Toronto is considering.