

PRACTICE NOTES  
NOTES SUR LA PRATIQUE DU DROIT

**Writing the Unwritten:  
The Officialization of Constitutional Convention  
in Canada, the United Kingdom, New Zealand  
and Australia**

*James W.J. Bowden  
Nicholas A. MacDonald*

**ABSTRACT**

This article will examine first the nature of constitutional convention and constitutional principle, and second, examples of officialization of constitutional convention in Canada, the United Kingdom, New Zealand, and Australia. It will focus particularly on the *Manual of Official Procedure of the Government of Canada*, the *British Cabinet Manual* and the *New Zealand Cabinet Manual*. It also describes unsuccessful attempts to codify convention in Canada in 1978 and Australia in 1985. It will conclude that the officialization of constitution conventions into handbooks generally preserves the flexibility of the Westminster system and can serve as educational guidance for the media, parliamentarians, and general public; in contrast, codification would eliminate the politically-enforceable character of convention altogether by converting these *political* rules into justiciable *law*.

**I. INTRODUCTION**

Three successive minority parliaments from 2004 to 2011 altered scholarly outlooks on parliament and tested Canadians' understanding of parliamentary government. The tumultuous minority governments of Prime Ministers Paul Martin and Stephen Harper in the 38th, 39th, and 40th Parliaments demonstrated that in practice, minority parliaments in Canada do not encourage inter-party discussion, power-sharing, and legislative compromise.<sup>1</sup> The brinkmanship and difficulties associated with those minority parliaments arose largely because parliamentarians and the political parties saw them as electoral aberrations in a tradition of single-party majority government. The political actors plainly also did not agree on the interpretations of some basic constitutional conventions on Crown prerogative, the vice-regal reserve powers, and the formation of governments that would have facilitated the practice of minority parliament in Canada. As this paper will show, there

---

<sup>1</sup> For an example of this scholarly optimism, see Peter Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications Ltd., 2011).

are legitimate and healthy differences of interpretation of these conventions within the Westminster parliaments of Canada, the United Kingdom, New Zealand, and Australia. The recent cycle of minority parliaments in Canada thus renewed interest in the creation of written references on the complex constitutional conventions that underpin our system of government in order to ensure that parliamentarians, civil servants, and the general public understand the fundamentals of Westminster parliamentary government. The United Kingdom and New Zealand have created such written references in the form of cabinet manuals, which describe fundamental constitutional conventions and how they might be applied.

Reports from recent academic conferences in Canada have recommended that constitutional conventions be codified into a Canadian cabinet manual along the lines of the New Zealand *Cabinet Manual* and the British *Cabinet Manual*.<sup>2</sup> These conferences have thus far overlooked some important considerations. First, “codification” denotes writing in statutory law or entrenchment in the written constitution, which would remove constitutional conventions from the political realm and render them justiciable in a court of law. The British and New Zealand cabinet manuals are politically enforceable handbooks, not legally enforceable statute. These manuals represent the “officialization”, not codification, of constitutional conventions. The officialization of constitutional conventions refers to the creation of official interpretations of convention endorsed by Cabinet that describe the proper exercise of constitutional authority.<sup>3</sup> These non-justiciable, politically enforceable officializations can take the form of “practitioner’s handbooks”, “cabinet manuals”, “guidelines,” or “directives”, depending upon their target audience and degree of detail. In this paper, the generic “handbook” will refer to all types.

Studies and scholars have overlooked the existence of a comprehensive Canadian document, the *Manual of Official Procedure of the Government of Canada*, which the Privy Council Office (PCO) produced and which Prime Minister Lester B. Pearson endorsed in 1968. The existing Canadian handbook predates the aforementioned Commonwealth handbooks, and describes constitutional conventions in Canada based on relevant historical precedents.<sup>4</sup>

This article will examine the nature of constitutional convention and principle,

---

<sup>2</sup> Public Policy Forum, *Government Formation in An Age of Hung Parliaments: Background Paper*. (Ottawa: Public Policy Forum, February 2011); Public Policy Forum, *Government Formation in Canada: Ottawa Roundtable*. (Ottawa: Public Policy Forum, 21 March 2011); Peter Russell and Cheryl Milne, *Adjusting to a New Era of Minority Government: Report of a Workshop on Constitutional Conventions*. (Toronto: University of Toronto, David Asper Centre for Constitutional Rights, 2011).

<sup>3</sup> Our term “officialization” corresponds to Peter Russell’s “consolidation” of constitutional convention. We believe that Russell’s nomenclature implies an exhaustive list of constitutional convention rather than merely placing disparate sources into one book. Neither a practitioner’s handbook nor a cabinet manual can presume to officialize or document *all* precedents, customs, and conventions. Peter Russell, “The Principles, Rules and Practices of Parliamentary Government: Time for a Written Consolidation,” *Journal of Parliamentary and Political Law* 6, no. 2 (June 2012).

<sup>4</sup> Nicholas A. MacDonald and James W.J. Bowden, “The *Manual of Official Procedure of the Government of Canada: An Exposé*,” *Constitutional Forum* 20, no. 1 (17 October 2011): 33-39.

as well as examples of officialization of constitutional convention in the core Commonwealth, by focusing on the *Manual of Official Procedure of the Government of Canada*, the *British Cabinet Manual*, and the *New Zealand Cabinet Manual*. The subsequent analysis will highlight the portions of the handbooks that pertain to the formation of governments, prorogation and dissolution, the caretaker convention, and the constitutional relationship between the Governor General and the Prime Minister. It will compare and contrast these handbooks that officialize convention with unsuccessful attempts to codify convention in the Australian *Resolutions* of 1985 and the Canadian *Constitutional Amendment Bill* of 1978. It will conclude that the officialization of constitution conventions into handbooks of all types generally preserves the flexibility of the Westminster system and could even serve as educational guidance for the media, parliamentarians, and the general public; in contrast, codification eliminates the politically-enforceable character of convention altogether by converting these political norms into justiciable law.

## II: PUTTING UNWRITTEN PRINCIPLE AND CONVENTION IN WRITING

### 1. ON CONSTITUTIONAL PRINCIPLES AND CONVENTIONS

Constitutional conventions are unwritten, politically enforceable norms. These norms evolve from practices and customs that complement and contextualize laws or the written constitution. Norms imply exceptions, and more broadly allow for exemptions. In practical terms, conventions help decision-makers determine how they should act in any given situation. For this reason, Prime Minister Pearson described the *Manual of Official Procedure of the Government of Canada* as “guidance on the many constitutional and procedural issues on which the Prime Minister, individual ministers or the Government must from time to time exercise discretion and judgement.”<sup>5</sup> Decision-making of a constitutional nature thus amounts to the application of conventions, in other words, to the adaptation and adjustment of precedents and norms to the circumstances of a current situation.<sup>6</sup> A good handbook can facilitate that process by offering descriptive guidance rather than prescriptive rules.

British constitutional scholar Sir Ivor Jennings proposed that a custom or practice exists as a convention if it satisfies three questions: What are the precedents? Did the actors believe they were bound by a rule? Is there a reason for the rule?<sup>7</sup> There may be some limitations to Jennings’s test. For instance, constitutional actors cannot bind themselves to rules or precedents of which they remain ignorant, even

<sup>5</sup> Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada* (Ottawa: 1968) at iii (Henry F Davis and André Millar). Copyright Government of Canada. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

<sup>6</sup> Paul Benoit, conversation with authors, 20 October 2011.

<sup>7</sup> Corbett Haselgrove Spurin, “Chapter 5: Constitutional Conventions” in *Constitutional and Administrative Law* (Corbett Haselgrove Spurin, 2004): 3. <<http://www.nadr.co.uk/articles/published/ConstitutionalLaw/Chapter005Conventions.pdf>>.

if they *should* know of them.<sup>8</sup> For example, during the controversial prorogation of 2008, few parliamentarians, journalists, or even scholars, seemed to be aware that of an important precedent from 1873 with significant parallels to the case in 2008: Sir John A. Macdonald advised prorogation when his government faced an imminent loss of confidence, and Governor General Lord Dufferin carried out his advice.<sup>9</sup> Fewer still seemed to be aware that the *Manual of Official Procedure of the Government of Canada* offered relevant, official guidance on prorogation.

Writing in the immediate aftermath of the King-Byng Affair of 1926, Canadian constitutional scholar Robert MacGregor Dawson offered insight on the proper application of precedent in constitutional decision-making even before Jennings had created his test.

Precedents [. . .] should not be examined one by one, but as a whole; they should be pieced together, so that the complete picture may show the development of government and the direction in which it is moving. An isolated precedent is as misleading as a single piece of evidence in a court of law. [. . .] In short, the way of progress in government lies in following those early examples which are most in sympathy with the new conditions, and disregarding those which are out of harmony with the general trend of development and the genius of the people.<sup>10</sup>

Dawson takes a holistic view of the constitution and emphasizes the use of convention and precedent in making the right decision case by case. He adds: “It is obvious that if precedents were rigidly followed, no change under an unwritten Constitution could ever take place.”<sup>11</sup> Decision-makers should use precedents as guidance in doing the right thing, though “without being bound to them hand and foot.”<sup>12</sup>

More fundamentally, constitutional conventions are the manifestations of constitutional *principles*, which underpin conventions and provide their normative justification.<sup>13</sup> Since constitutional conventions are derived from constitutional principles, a convention may be called into question and need to be re-evaluated or altered when its standard application would no longer conform to its underlying principle and would detract from its normative justification. Conventions can change or be modified relatively quickly and as needed. In contrast, principles gen-

<sup>8</sup> Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications Ltd., 2011): 80.

<sup>9</sup> Nicholas A. MacDonald and James W.J. Bowden, “No Discretion: On Prorogation and the Governor General,” *Canadian Parliamentary Review* 34, no. 1 (Summer 2011): 7-16.

<sup>10</sup> Robert Macgregor Dawson, “The Constitutional Question,” *Dalhousie Review* VI, no. 3 (October 1926): 334.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Brian Slattery, “Why the Governor General Matters,” in *Parliamentary Democracy in Crisis*, edited by Peter Russell and Lorne Sossin (Toronto: University of Toronto, 2009): 85. Slattery argued: “Constitutional principles are norms of a fundamental character that underpin both constitutional laws and constitutional conventions and provide the foundation for the constitution as a whole.”

erally emerge more slowly, in tandem to greater shifts in the constitutional system itself. In British history (which Canada and the other realms inherited), such shifts include *Magna Carta* of 1215, the *Act of Supremacy, 1534*, the English Civil Wars of the 1640s and the regicide of Charles I, the Glorious Revolution and the Constitutional Settlement of 1689, and the Hanoverian Succession of 1714. In Canada, such examples include the Rebellions of 1837, the resultant Durham Report (1838) and the achievement of responsible government in 1848.

The Supreme Court of Canada has identified four constitutional principles, from which constitutional conventions could derive their normative justification: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.<sup>14</sup> For instance, the Supreme Court of Canada has described the principle of democracy:

[T]he democracy principle can be best understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that this principle [of democracy] was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers.<sup>15</sup>

If constitutional conventions are the manifestations of more fundamental, normative constitutional principles like democracy, then the validity or soundness of a convention could be ascertained based on whether it conforms to constitutional principles. Jennings's third question strikes at the heart of the nature of convention and implies that the constitutional convention under consideration should correspond to an underlying normative constitutional principle, and that if it does not, the convention itself should at minimum be called into question and ideally should be altered in order to adapt to changing political circumstances. The viability of the Westminster system depends upon the adaptability of convention and that constitutional conventions continue to serve, rather than contradict, fundamental normative principles such as those which the Supreme Court of Canada has recognized.

The preamble of the *Constitution Act, 1867* incorporates unwritten constitutional conventions into Canada's overall constitution, through the phrase that it is "similar in *Principle* to that of the United Kingdom."<sup>16</sup> The Supreme Court of Canada has described the conventional constitution as an integral component of Canada's constitution and of equal standing to the *Constitution Act, 1867* and the *Constitution Act, 1982*. The Supreme Court has also declared: "constitutional conventions plus constitutional law equal the total constitution of the country."<sup>17</sup> The Supreme Court also declared: "The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the writ-

<sup>14</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217

<sup>15</sup> *Ibid.*

<sup>16</sup> Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [emphasis added]; Reference re Resolution to Amend the Constitution, [1981] S.C.R. 883.

<sup>17</sup> *Ibid.*, 884.

ten constitutional enactment, without more, may be misleading.”<sup>18</sup> While conventions are politically enforceable and therefore not justiciable, the Supreme Court has established that courts can take constitutional conventions into account even if they cannot enforce these conventions:

[W]hile they are not laws, *some conventions may be more important than some laws*. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. [. . .]. That is why it is perfectly appropriate to say that *to violate a convention is to do something which is unconstitutional* although it entails no direct legal consequence [emphasis added].<sup>19</sup>

Unwritten principles and conventions can be more powerful and persuasive than written rules. Codified sets of rules rely upon the coercive force of law; convention encourages good behaviour through self-restraint and a moral obligation to adhere to the constitution. The vitality of a system based on convention depends upon the propagation of such an ethic. Convention thus also acts as a crucial pillar of the edifice of Westminster parliamentarism. Constitutional conventions allow Westminster parliaments to adapt organically when necessary in order to strike an effective balance between continuity and change. This approach to constitutionalism stands in stark contrast to the principles that underpin the American Constitution, which embodies the idea that “Ambition must be made to check ambition,” as James Madison famously described in the *Federalist Papers*.<sup>20</sup> He added:

The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.<sup>21</sup>

The Westminster system trusts that the government restrains itself and requires that parliament will hold it to account when it does not; the American system presumes the self-interest and ambition of the political actors and therefore codifies institutional checks and balances in order to constrain and contain their excesses. Any comparison of these two constitutional systems should take this distinction into account.

## 2. Constitutional Convention and Principle and the Evolution of Parliamentarism

Parliamentarism denotes the institution of parliament (the Crown-in-Parliament and parliamentary government), but it also refers to the history and evolution of the Westminster system over the course of more than 800 years. Indeed, as Ca-

<sup>18</sup> Reference re Secession of Quebec, [1998] S.C.R. supra note 5 at para 32.

<sup>19</sup> Reference re Resolution to Amend the Constitution, [1981] S.C.R. 883-884.

<sup>20</sup> Alexander Hamilton or James Madison, *The Federalist Papers*, No. 51: “The Structure of the Government Must Furnish the Proper Checks and Balances Between Different Departments.” From the New York Packet, Friday, February 8, 1788.

<sup>21</sup> *Ibid.*

nadian constitutional scholar David E. Smith argued, “Parliament was never *de-signed*”; it represents “not a work of construction but an inheritance.”<sup>22</sup> The historical trend from the Constitutional Settlement of 1688 that produced the English *Bill of Rights*, installed King William and Queen Mary as monarchs, and solidified parliamentary sovereignty in the Crown-in-Parliament, shows that Westminster parliamentarism has evolved from representative government to responsible government.<sup>23</sup>

Like Smith, Dawson argued that this evolution from representative to responsible government occurred “not with deliberate intent, but by the painstaking solution of one problem after another as each arose for decision.”<sup>24</sup> Under representative government, the legislature consisted of the people’s elected representatives, but they could not hold the Crown to account directly because the monarch did not appoint Privy Councillors (the cabinet) who always commanded the confidence of the House of Commons.<sup>25</sup> Ministers of the Crown were therefore not accountable to the lower house.

Responsible government would forge an unbreakable link between Parliament and the government by lowering those advising the proper constitutional exercise of authority of the King or Governor into the House of Commons. Ministers of the Crown thus became “responsible for acts of the Crown” and directly responsible to the House of Commons.<sup>26</sup> Under representative government, the prime minister needed to retain the confidence of the Sovereign or governor; under responsible government, the prime minister needed to maintain the confidence of his cabinet and command the confidence of the House.<sup>27</sup>

Responsible government now acts as the keystone in the arch of Westminster parliamentarism and secures the democratic principle.<sup>28</sup> The people elect a House of Commons of their representatives, whose composition in turn determines who forms the government. Responsible government means that the government derives its authority to govern by commanding the confidence of the House of Commons, as an institution. When the House withdraws its confidence, the government falls. The House of Commons is thus the legitimate democratic authority in Canada. The

<sup>22</sup> David E. Smith, *The People’s House of Commons: Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007): 29.

<sup>23</sup> Robert MacGregor Dawson, “Representative and Responsible Government”, Chapter 1 in *The Government of Canada*, 5th Edition (Toronto: University of Toronto Press, 1970): 18.

<sup>24</sup> Robert Macgregor Dawson, “The Constitutional Question,” *Dalhousie Review* VI, no. 3 (October 1926): 333.

<sup>25</sup> Robert MacGregor Dawson, “Representative and Responsible Government”, Chapter 1 in *The Government of Canada*, 5th Edition (Toronto: University of Toronto Press, 1970).

<sup>26</sup> Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916): 102.

<sup>27</sup> David Starkey, *Crown and Country — The Kings and Queens of England: A History* (London: HarperPress), 425.

<sup>28</sup> David E. Smith, *The Republican Option in Canada, Past and Present*, (Toronto: University of Toronto Press, 1999): 60.

written constitution codifies neither responsible government nor its corollary, the confidence convention, nor the fundamental principle of democracy necessary for parliamentary government. As Dawson noted, “[The confidence convention] is denied any explicit description and is found entirely in custom and usage.”<sup>29</sup> Canada has nevertheless benefitted from responsible government since 1848.<sup>30</sup>

### 3. Officialization v. Codification

Officialization refers to the government’s endorsement of a particular interpretation of convention, which it then uses as a point of reference in constitutional and procedural decision-making. The government’s officialization should not be construed as the only possible interpretation or an exhaustive list, particularly because subsequent governments may revise and update it.

Officialization of convention results in a non-justiciable, descriptive handbook that remains open to a degree of interpretation. In contrast, codification implies a rigorous, legal systemization that would remove conventions from the political realm and render their codified forms justiciable in courts of law.<sup>31</sup> A “codified convention” thus becomes law, at which point it ceases to be a convention altogether.

Reference handbooks serve to exert moral suasion and encourage the good behaviour and self-restraint of political actors. The conversion of conventions into statutory or constitutional law would coerce adherence to constitutional principles and parliamentary government by the force of law and move issues from the political to legal realm, from parliament and the electorate to the courts. The “codification of convention” would therefore allow the courts to encroach upon the sovereignty of the Crown-in-Parliament and in some respects threaten responsible government. Conventions would cease to develop organically to the extent that they become law.

The amendment of a justiciable act of parliament or the constitution itself would also prove more onerous and time-consuming than agreeing to alter a convention or updating a politically enforceable reference handbook, which can be reviewed periodically and updated as needed based on new precedents and practices. In addition, codification must logically establish a more exhaustive list than an officialized handbook would contain, precisely because any contingency not codified would necessarily become subject to new conventions that develop in order to fill the gaps in the codified system. This inevitable outcome exposes the flaw of codification: a codified system can never be whole because it cannot anticipate all possibilities. It therefore remains at least a step behind a conventional constitution.

Neither a practitioner’s handbook nor a cabinet manual can presume to assemble an exhaustive list of *all* precedents, customs, and conventions that have evolved

<sup>29</sup> R. MacGregor Dawson, *The Government of Canada*, 5th Edition (Toronto: University of Toronto Press, 1970): 18.

<sup>30</sup> Peter J. Boyce, *The Queen’s Other Realms: The Crown and Its Legacy in Australia, Canada, and New Zealand*. (Annandale, NSW: The Federation Press, 2008): 5.

<sup>31</sup> Some scholars have used “codification” too broadly and failed to distinguish between writing down or officialization as reference and “codification” as systemization or systemic change.

over the course of more than 800 years, from *Magna Carta* to the present. An official handbook therefore cannot “consolidate” the conventional constitution, steeped in history and still evolving, into one whole.<sup>32</sup>

#### 4. Types of Handbooks

Officialized handbooks can take a myriad of formats, depending upon their intended audience, how authoritative they are intended to be, and level of detail that they provide. The *Manual of Official Procedure of the Government of Canada* and the British *Precedent Book* were designed as “practitioner’s handbooks”, intended for senior civil servants who advise Cabinet and work with the machinery of government, or possibly for the prime minister and cabinet ministers themselves.<sup>33</sup> These practitioner’s handbooks compile historical precedents and provide justifications in a more exhaustive, detailed format and are overall quite technical and lengthy. Their sheer bulk and technical nature, however, make them inaccessible to a general audience who seek only a cursory overview of responsible parliamentary government. In contrast, “cabinet manuals” like the British *Cabinet Manual* and the New Zealand *Cabinet Manual* are presented in shorter, more accessible formats, describing the general principles and constitutional conventions of the parliamentary system and the basic roles and functions of its main components, rather than listing historical precedents that justify current positions. Lastly, “guidelines”, which sometimes act as veritable directives, provide brief statements of particular conventions on a specific topic or instructions on the exercise of a particular function, generally omitting both historical precedents and broad descriptions of principle. These handbooks cannot possibly be exhaustive, but they should be instructive and include all relevant descriptions that help decision-makers exercise their discretion wisely.

### III. THE MANUAL OF OFFICIAL PROCEDURE OF THE GOVERNMENT OF CANADA

In 1968, the Privy Council Office produced the *Manual of Official Procedure of the Government of Canada* at the direction of Prime Minister Lester B. Pearson. The Privy Council Office committed these customs and constitutional conventions to paper in a practitioner’s handbook, designed for “decision makers” in government, rather than for a general audience. Prime Minister Pearson explained its structure in the forward:

The Manual examines the principal elements of government, states the legal position in given situations, and identifies the considerations relevant to decision and discretion in particular circumstances. Precedents are described and evolution outlined. Administrative procedures are defined and represen-

<sup>32</sup> Peter Russell, “The Principles, Rules and Practices of Parliamentary Government: Time for a Written Consolidation,” *Journal of Parliamentary and Political Law* 6, no. 2 (June 2012): forthcoming. Peter Russell also eschews codification, but refers to the cabinet manuals as a “consolidation” of convention that would amalgamate “this scattered, heterogeneous collection of principles, rules and practices.”

<sup>33</sup> Paul Benoit, discussion with authors, 10 June 2011.

tative documents are included as sources or examples.<sup>34</sup>

At the time of its production, no other Commonwealth country had produced a handbook on conventions of the *Manual*'s breadth and depth — a staggering 1,500 pages over two volumes. Pearson expected that it would be expanded and updated “to cover additional areas of interest and new practices arising from changes in law and custom.”<sup>35</sup> Internal documents indicate that the *Manual* represented the culmination of four years of research, but the Privy Council Office never updated it; they also show that officials had created rudimentary French version but never finalized it. The Privy Council Office originally created one hundred copies of the *Manual*, classified them as “restricted”, and loaned them to the offices of each minister and deputy minister (not to the individuals), as well as to the Governor General, Chief Justice, the Governor General’s Secretary, and the Executive Secretary to the Supreme Court. Government House even forwarded a copy to Buckingham Palace.

The *Manual* covers an array of topics under broad headings, including: Cabinet, Elections, Government, the Privy Council, the Governor General, Lieutenant Governors, the House of Commons, the Senate, Judges, Lieutenant-Governors, Ministers, Parliament, Prime Minister, and the Sovereign. Each main topic is broken down into five categories: a general “position”, the “background” on relevant historical precedents and case studies, any “procedure” required or “ceremony” involved, and instructions to consult the *Appendices* (volume 2) for templates and examples. While sources have noted that the Privy Council Office today considers the *Manual* dated in its interpretation of some conventions, it is still consulted from time to time as a reference. Professor Robert Hazell, Director of the Constitution Unit at the University College London, speculated that the sheer bulk of the *Manual* may explain why it did not undergo subsequent revisions and updates.<sup>36</sup> Notable Canadian scholars, including Professors Peter Russell and P. Rand Dyck have also supported this theory.<sup>37</sup>

## 1. On the Formation of Governments

The *Manual* sets out some guidelines on the governor general’s choice of prime minister.

1. The Prime Minister is chosen by the Governor General when the position becomes vacant. Convention dictates that if a party has a majority in the House of Commons its leader must be selected. If there is no majority party the Governor General seeks the leader of the party able to command support from a majority in the House.

---

<sup>34</sup> Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada* (Ottawa: 1968) at iii (Henry F Davis and André Millar). Copyright Government of Canada. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

<sup>35</sup> *Ibid.*

<sup>36</sup> Robert Hazell, CBE, e-mail to authors, 30 May 2011.

<sup>37</sup> Rand Dyck, correspondence with authors, 25 May 2011; Peter Russell, discussion with authors, 1 June 2011.

2. In Canada the Governor General is bound by convention to accept the leader selected by the party and does not make his own choice from amongst the members.<sup>38</sup>

This endorses the Westminster tradition that the party leader, as opposed to a prominent member of cabinet or shadow cabinet, becomes prime minister. This section also states that once the prime minister's government has lost the confidence of the House and he has tendered his resignation, the governor general does not necessarily have to act on the prime minister's advice. After losing the confidence of the House, the prime minister could only advise that the governor general appoint a new prime minister whose government could likely command the confidence of the House and then tender his resignation, or advise dissolution and fresh elections. In the event of a minority parliament, the leader of the party that can command the confidence of the House becomes prime minister. This implies either the appointment of a single-party minority government, or of a coalition government, because the party that wins the plurality of seats would not necessarily form a government capable of commanding the confidence of the House. The *Manual* supports the notion that the governor general must retain confidence in his prime minister, which in turn implies that the prime minister would need to resign if the governor general rejected his advice.

1. The discretion of the Governor General in selecting a Prime Minister is exercised within the limits of his position as representative of a constitutional monarch. He is looking for a Prime Minister who will be supported by a majority in the House of Commons and whose advice he will accept as long as he retains his confidence. [. . .].<sup>39</sup>

The leader of the party or coalition of parties that can command the confidence of the House does not become prime minister until the governor general formally appoints him.<sup>40</sup> If an election does not produce a parliamentary majority, the incumbent prime minister may choose to meet the House and test whether his government can command the confidence of the new parliament, though often in Canada the incumbent prime ministers have chosen to resign rather than test the confidence of the House after their parties have lost their parliamentary pluralities.<sup>41</sup> Louis St. Laurent in 1957 and Paul Martin in 2006 resigned under those circumstances; Mackenzie King, who opted to test the confidence of the House after the election of 1925, provides a notable exception.<sup>42</sup>

<sup>38</sup> Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 145. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516. The *Manual* provided the following citation for the quote: "W. Ivor Jennings, *Cabinet Government*, 1st edition (Cambridge, 1947), p. 35."

<sup>39</sup> *Ibid.*, 146. The *Manual* provided the following citation for the quote: "*Can. H. Of C. Debates*, June 30, 1926, p. 5217."

<sup>40</sup> *Ibid.*, 447.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, 448.

## 2. On Prorogation and Dissolution

The conventions for the summoning, proroguing, and dissolving of parliament are found in the sections on both the governor general and on parliament. With respect to the reserve powers, the *Manual* makes a distinction between summoning and prorogation on the one hand and dissolution on the other. It also implies that if a governor general rejects a prime minister's advice to dissolve, the prime minister would have to resign.

1. The Governor General takes the operative steps, on the advice of the Prime Minister, to summon, prorogue and dissolve Parliament.
2. The Governor General accepts the Prime Minister's advice on summoning and proroguing Parliament.
3. On dissolution the Governor General retains a degree of discretion and is entitled to satisfy himself that dissolution recommended by the Prime Minister is justified under Canadian constitutional practice. A decision by the Governor General not to accept the advice to dissolve Parliament would, however, amount to a withdrawal of his confidence in the Prime Minister and could involve immediate and serious problems, as was demonstrated in 1926.<sup>43</sup>

In order to illustrate this distinction between summoning and prorogation versus dissolution, the *Manual* provides a brief analysis of the Macdonald-Dufferin prorogation of 1873 and the King-Byng Affair of 1926.

1. The Governor General does not retain any discretion in the matter of summoning or proroguing Parliament, but acts directly on the advice of the Prime Minister. This was not always so. In 1873 the Governor General, [Dufferin], met with the Privy Council to lay before the Government '...the terms on which he would accede to a prorogation of Parliament. . .', but this is now of historic interest only.<sup>44</sup>
2. In regard to dissolution the preponderant constitutional opinion appears to be that in certain circumstances the Governor General still retains some discretion, even after the 1926 crisis. Those events did not eliminate the Governor General's discretionary right to decline the advice to dissolve but served to bring out the extremely limited circumstances in which the possibility of declining the advice of the Prime Minister could be entertained.<sup>45</sup>

The *Manual* minimizes the role of the governor general with respect to the summoning, proroguing, and dissolving parliament, and instead puts the responsibility and accountability for these decisions on the prime minister, whom parliament or the electorate ultimately must judge. In 1968, the Government of Canada concluded that the governor general possessed no discretion on summoning and proroguing parliament, and only in "extremely limited circumstances" could he reject a prime minister's advice to dissolve. The *Manual* interprets the King-Byng Affair as a significant point of reference for the limited circumstances in which the governor general can exercise the reserve powers. Of the Canadian scholarship of

<sup>43</sup> *Ibid.*, 149.

<sup>44</sup> The citation in the original text read: J.R. Mallory, "Cabinets and Councils in Canada", *Public Law* (Autumn 1957), pp. 231-251.

<sup>45</sup> *Ibid.*, 150.

the era, the *Manual* seems to draw more from Robert MacGregor Dawson's position that the governor general may reject the prime minister's advice only under a strict interpretation of "the most exceptional circumstances",<sup>46</sup> rather than from Eugene Forsey's broader interpretation of the appropriate application of the vice-regal reserve power as "the last bulwark against prime ministerial absolutism."<sup>47</sup>

The chapter on parliament covers prorogation and dissolution in relation to the role of the prime minister, who alone advises the governor general on these matters. The *Manual* reaffirms that the governor general must carry out the prime minister's advice to prorogue and adds that the prime minister need not consult the opposition before advising prorogation.

The decision to prorogue is the Prime Minister's. Usually there is consideration by Cabinet. It is not the custom to discuss the intention with opposition leaders as is done for adjournment, although a special parliamentary situation might lead to consultation.<sup>48</sup>

In addition to the written constitutional requirement that parliament meet at least once annually, the *Manual* establishes the standard length of the intersession at renewable, 40-day intervals and instructs that parliament be "summoned *pro forma* to meet on a stated date at the termination of that period."<sup>49</sup> The prime minister and governor general must agree upon the duration of the intersession because "it is custom for Parliament to be on summons and therefore it is always prorogued to a certain stated date."<sup>50</sup>

The governor general can reject advice to dissolve under "those rare and almost indefinable circumstances when it is necessary for the protection of the constitution", or when an alternative government that could command the confidence of a majority of the House of Commons exists.<sup>51</sup> However, the *Manual* does not specify whether the age of the parliament should factor into the governor general's discretion. Recent scholarship seems to place the threshold somewhere in the range of six to twelve months; some scholars seem to consider twelve months long enough, while former Governor General Adrienne Clarkson has indicated that six months would have sufficed in the 38th Parliament.<sup>52</sup>

The *Manual* rules out all independent and unilateral vice-regal dissolution, de-

<sup>46</sup> Robert MacGregor Dawson, *The Government of Canada*, 5th Edition (Toronto: University of Toronto Press, 1970): 161.

<sup>47</sup> Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford University Press, 1968): 259.

<sup>48</sup> Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 401. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 408-409.

<sup>52</sup> Bruce Hicks, "Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule," *Constitutional Forum constitutionnel* 18, no. 1 (2009): 55-67; Gary Levy, "A Crisis Not Made In A Day", in *Parliamentary Democ-*

claring that “The advice to dissolve is the prerogative of the Prime Minister.”<sup>53</sup> Finally, it acknowledges that scholars had not reached a consensus in 1968 on the circumstances in which the reserve power would apply to advice to dissolve.

6. Dissolution leads to a general election with the consequent interruption of the routine of government. So the basic argument is that in certain circumstances the Governor General need not accept the advice if a general election would not be in the public interest. This implies that an alternative Government could be formed which could command a majority in the House of Commons so that the government of the country can be continued without resort to an election, and that no new major issues of national policy has arisen which should be put before the electorate.<sup>54</sup>

This passage intriguingly suggests that when parliament has strayed too far from public opinion on significant policy issues, it could be dissolved in order to allow the voters to elect a new parliament more in line with their views. This interpretation may have been drawn from English constitutionalist A.V. Dicey, who described the electorate as the “true political sovereign” and therefore argued that dissolutions are “allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.”<sup>55</sup>

### 3. The Principle of Restraint

While the New Zealand sources and some Canadian scholars refer to the “caretaker convention”, Canadian and British sources refer to the principle of restraint. This principle recognizes that the government restrains itself to making decisions only on necessary and urgent matters during an election and during the short period after the election until the next government takes office. This convention on the restraint of government business exists because parliament does not exist after dissolution and during the writ period; the people’s representatives no longer hold office and thus cannot hold the government to account on its expenditures.<sup>56</sup>

---

*racy in Crisis*, ed. Peter Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009): 19.

53 Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 408. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

54 *Ibid.*, 408-409.

55 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan & Co. Ltd., 1965): 432-433.

56 Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 89-90. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516; Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election*. (Ottawa: Her Majesty the Queen in Right of Canada, 2008): 1.

The *Manual* outlined this convention, perhaps more accurately, as “Restrains on Business which may be transacted by Governments in Certain Circumstances.” It puts the onus on the government to restrain itself, recognizing that parliament cannot do so, though acknowledging that some former Canadian prime ministers exercised less restraint than others.<sup>57</sup>

1. [...] The extent of these restraints varies according to the situation and to the disposition of the Government to recognize them.
2. The possibility of restraint only arises if the continuation of confidence in the Government is called into question. A defeat in the House preceding dissolution or a defeat at the polls would be the usual causes of restraint.
3. The restraint has been recognized as applying to important policy decisions and appointments of permanence and importance. Urgent and routine matters necessary for the conduct of government are not affected.<sup>58</sup>

In 2008, the Privy Council Office established the *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election*, which expresses the principle of restraint more forcefully:

[D]uring an election, a government should restrict itself — in matters of policy, expenditure and appointments — to activity that is: a) routine, or b) non-controversial, or c) urgent and in the public interest, or d) reversible by a new government without undue cost or disruption, or e) agreed to by the Opposition (in those cases where consultation is appropriate).<sup>59</sup>

The principle of restraint exists in the absence of any formalized, *legal* limitations on the government’s power during the writ period. While the government possesses full legal powers and authorities during the writ period, it exercises self-restraint and limits itself to the routine and necessary because the House of Commons cannot fulfill its core function of holding the government to account and of securitizing spending during the writ period.

#### IV. ACCOUNTABLE GOVERNMENT: A GUIDE FOR MINISTERS

In addition to the *Manual of Official Procedure of the Government of Canada*, the Privy Council Office has produced several sets of guidelines that seemed designed primarily to instruct officeholders on their function and how to act in order to promote the overall accountability of the government. This list includes the following: *Accountable Government: A Guide for Ministers and Ministers of State* (2008 and 2011), *Guidance for Deputy Ministers* (2003), *Accounting Officers: Guidance on Roles, Responsibilities and Appearances Before Parliamentary Committees* (2007) and *Guidelines on the Conduct of Ministers, Secretaries of State, Ex-*

<sup>57</sup> Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 89-90. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

<sup>58</sup> *Ibid.*

<sup>59</sup> Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election*. (Ottawa: Her Majesty the Queen in Right of Canada, 2008): 1.

*empt Staff and Public Servants During An Election* (2008).<sup>60</sup> Taken together, these separate sets of guidelines touch on some of the same topics as the British and New Zealand cabinet manuals; generally, these documents aim to promote the individual accountability of specific office-holders rather than to describe or officialize constitutional conventions in general, as a cabinet manual would.

The 2011 edition of *Accountable Government* focuses primarily on the conventions of individual and collective ministerial responsibility and the conduct of cabinet business rather than providing a broader description of constitutional conventions or explaining historical precedents.<sup>61</sup> It also includes guidance for parliamentary secretaries. Despite some assertions, *Accountable Government* does not codify convention; it does, however, form an official interpretation of individual and collective ministerial responsibility in the format of directives or instructions. *Accountable Government* prescribes a few available options in lieu of describing a broad array of possible courses of action based on relevant historical precedents on the exercise of convention, as found in the *Manual of Official Procedure of the Government of Canada*.

In the context of guidelines, the Privy Council Office published in 1993 a reference paper originally submitted in 1977 to the Lambert Commission on Financial Management and Accountability.<sup>62</sup> *Responsibility in the Constitution* describes the historical origins of representative and responsible government from the 17th century onward in the United Kingdom before Confederation and in Canada after Confederation.

## V. THE CONSTITUTIONAL AMENDMENT BILL OF 1978: CANADA'S CAUTIONARY TALE AGAINST CODIFICATION

After several unsuccessful attempts to patriate and create an indigenous amending formula for the Constitution of Canada, the Trudeau government introduced the *Constitutional Amendment Bill* in June 1978. Seeking to patriate the constitution and create an amending formula in the wake of the failure of the Victoria Charter earlier in the decade, this bill now lives on only in the annals of libraries. The second Trudeau government did not succeed in patriating the constitution and creating an amending formula until 1982. Like the Australian *Resolutions of the Australian Constitutional Convention* described later, the *Constitutional Amendment Bill* would have codified some constitutional conventions, including those relating to the governor general's reserve powers, the formation of governments, and the confidence convention. It thus provides an instructive insight into the detrimental and corrosive effect that codification can exact on a constitutional system.

---

<sup>60</sup> Canada. Privy Council Office, *Guidance for Deputy Ministers*. (Ottawa, Her Majesty the Queen in Right of Canada, 2003); Canada. Privy Council Office, *Accounting Officers: Guidance on Roles, Responsibilities and Appearances Before Parliamentary Committees* (Ottawa: Her Majesty the Queen in Right of Canada, 2007)

<sup>61</sup> Canada. Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State*. (Ottawa, Her Majesty the Queen in Right of Canada, 2011): 44, 50.

<sup>62</sup> Canada. Privy Council Office, "Responsibility in the Constitution." < <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table-eng.htm> > [Accessed 15 June 2011].

The bill would have formally renamed the Privy Council the “Council of State of Canada” and would have codified the main function of cabinet and into the confidence convention: the government must command the confidence of the House of Commons, but not that of the Senate (which incidentally would also have been reformed into the “House of the Federation”).

53.(1) The Cabinet has the management and direction of the government of Canada and is responsible to the House of Commons of Canada for its management and direction thereof.<sup>63</sup>

Like the Australian *Resolutions*, this bill would have codified how the governor general and prime minister must respond to a loss of confidence. Unlike the Australian *Resolutions*, it would also have codified the governor general’s reserve power to reject the prime minister’s advice to dissolve without explicitly defining the circumstances under which the governor general could legitimately exercise that discretionary authority. This ambiguity would almost invariably have forced the courts to intervene if a constitutional crisis like the King-Byng Affair had occurred under this codified constitution. The codification of the Crown prerogative on dissolution in the written constitution would necessarily have limited it and would potentially have made it justiciable.

53.(2) In the event that the Cabinet is unable to command the confidence of the House of Commons in its management and direction of the government of Canada, the Prime Minister shall forthwith so inform the Governor General of Canada and as soon as possible thereafter tender to the Governor General his or her advice on

(a) whether Parliament should on that account be dissolved [ . . . ] or

(b) if the dissolution of Parliament on that account is not advised by the Prime Minister or is refused by the Governor General, whether the Prime Minister should be invited to form another administration, or whether the resignation of the Prime Minister and the other members of the Cabinet should be accepted to permit some person other than himself or herself to be called upon by the Governor General to form the administration for the time being of Canada.<sup>64</sup>

53.(3) In the event of any dispute arising as to whether the Cabinet commands or is unable to command the confidence of the House of Commons in its management or direction of the government of Canada, the matter shall be decided by the House of Commons, whose decision thereupon shall be conclusive.<sup>65</sup>

This dense wording would have codified ambiguity and reduced the constitutional relationship between the governor general and prime minister to “a matter of formal compliance.”<sup>66</sup> For instance, the phrase “for the time being” might have meant that the new government formed within the same parliament would have acted as a caretaker government, under the principle of restrained describe above, and subse-

<sup>63</sup> Canada. Privy Council Office, *The Constitutional Amendment Bill*. (Ottawa: Her Majesty the Queen in Right of Canada, 1978): 19.

<sup>64</sup> *Ibid.*, 19-20.

<sup>65</sup> *Ibid.*, 20.

<sup>66</sup> Paul Benoit, correspondence with authors, 30 May 2012.

quently would have been obliged to advise early dissolution. This codified constitution would probably have forced the government to face the House as soon as possible if its ability to command the confidence of the House were ever in doubt, but it does not specify an acceptable timeline of delay.

This codified constitution would also have codified two options for a prime minister whose government lost the confidence of House of Commons: first, to advise dissolution, which does conform the traditional Canadian practice, and second, to resign and advise that the governor general appoint a new prime minister and government from within the same parliament. This constitution would have codified the governor general's reserve power to refuse dissolution; the wording implies that the governor general's rejection of advice to dissolve either would force the prime minister to resign on his own account, or the governor general would formally dismiss him, and thus the entire government.

## VI. CABINET MANUAL: A GUIDE TO LAWS, CONVENTIONS, AND RULES ON THE OPERATION OF GOVERNMENT

The Cabinet Office of the United Kingdom released the first edition of the *Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* in October 2011. The first edition resulted from the publication in December 2010 of the draft cabinet manual, which the Brown government originally authorized in anticipation of a hung parliament, and the Cameron government's extensive consultation with parliament. This *Cabinet Manual* follows a 2009 study entitled *Making Minority Parliament Work: Hung Parliaments and the Challenges for Westminster and Whitehall*, which examined recent minority parliaments in Canada, New Zealand, and Scotland and the lessons that the Parliament of the United Kingdom could draw from each.<sup>67</sup>

British Cabinet Secretary Sir Gus O'Donnell has vigorously promoted the *Cabinet Manual* and envisions that it will "help the public better understand how [the United Kingdom's] democracy works".<sup>68</sup> The *Cabinet Manual* will "guide, not direct" because it is not justiciable and will provide "a high-level summary rather than an exhaustive description".<sup>69</sup> The document is designed to "reflect an agreed position on important constitutional conventions."<sup>70</sup> O'Donnell contributed the preface to the 1st edition and stated clearly that this *Cabinet Manual* serves as the

<sup>67</sup> Robert Hazell et al. *Making Minority Parliament Work: Hung Parliaments and the Challenges for Westminster and Whitehall*. (London: University College London, Institute on Government, the Constitution Unit, 2009).

<sup>68</sup> Sir Gus O'Donnell, "The New Cabinet Manual," Address to the Institute for Government, London, United Kingdom, (24 February 2011) <http://www.ucl.ac.uk/constitution-unit/events/public-seminars-10-11/cabinet-manual> (Accessed on 29 May 2011).

<sup>69</sup> *Ibid.*

<sup>70</sup> United Kingdom. Cabinet Office, *The Cabinet Manual — Draft: A Guide to Laws, Conventions and the Rules on the Operations of Government*. (London: Crown Copyright, December 2010): 6.

*government's* reference, not parliament's.<sup>71</sup> Like Prime Minister Pearson, he also made clear that the *Cabinet Manual* will need to be updated in order to take into account "the evolution of conventions or changes to the internal procedures of government", confirming that "the practices and processes it describes will evolve over time."<sup>72</sup> That the Cabinet Office labelled this publication the 1st Edition demonstrates a clear intention to update it as needed.

The British Cabinet Secretary clarified that "the Cabinet Manual records rules and practices, but is not intended to be the source of any rule."<sup>73</sup> The introduction takes pains to emphasize that this *Cabinet Manual* does not codify the British constitution (which consists of important statutes, "the Royal Prerogative", judicial decisions, conventions, and European and international law) but merely describes some of its parts, prescribing only when practices emanate from statute and providing appropriate references.<sup>74</sup> Prime Minister David Cameron contributed a foreword in which he emphasizes that the *Cabinet Manual* will "ensur[e] that the workings of government are far more open and accountable."<sup>75</sup> The foreword indicates cabinet's tacit endorsement and the officialization of this particular interpretation of convention.

The first edition contains 107 pages and covers much of the same information as the New Zealand *Cabinet Manual*. The *Cabinet Manual* now prefaces each chapter with a cover page that summarizes the key point, and the contents are laid out in numbered paragraphs, similar to the format of a Memorandum to Cabinet. Sources that support the document's contents are also cited at the end of each chapter. The New Zealand *Cabinet Manual* provided the inspiration for the overall format, contents, and level of detail of this 1st Edition of the British *Cabinet Manual*. It focuses more on descriptions of current practice and usage, while *Manual of Official Procedure of the Government of Canada* also lists historical precedents and reasons for conventions.

## 1. On the Formation of Governments and Dissolution

The passage of the *Fixed-Term Parliaments Act* has fundamentally altered the British constitution by eliminating altogether the Crown prerogative on dissolution, whereby the prime minister has traditionally advised the Queen when to dissolve parliament. Curiously, however, the *Act* contains a non-derogation clause that preserves the Queen's power to prorogue on the advice of the prime minister. It also appears to preserve but circumscribe the Crown prerogative on summoning parliament.<sup>76</sup> While the prime minister used to advise the Queen to dissolve parliament

<sup>71</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): iv.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, 2-3.

<sup>75</sup> *Ibid.*, iii.

<sup>76</sup> United Kingdom. Parliament of the United Kingdom, *Fixed-Term Parliaments Act* (London: Crown Copyright, 2011). Section 6 paragraph 1 stipulates that "This Act does not affect Her Majesty's power to prorogue Parliament."

sometime within its constitutional limit of five years, this law now ensures that parliament dissolves automatically, without prime ministerial or regal intervention, “17 working days before the next election,”<sup>77</sup> which occurs “the first Thursday in May five years after the day on which Parliament was elected.”<sup>78</sup> The first fixed-election is thus scheduled to occur in May 2015. Upon dissolution, Her Majesty-in-Council issues a proclamation for the summoning of the new parliament, ideally twelve days after the election.<sup>79</sup> If the government loses the confidence of the House of Commons “on a motion that ‘this House has no confidence in Her Majesty’s Government’”, the House of Commons can either propose an alternative government within fourteen days, or the government can try to regain the confidence of the House.<sup>80</sup> If parliament fails to fulfill either of those options, then it dissolves automatically in order to break the impasse.<sup>81</sup> In addition, two-thirds of MPs can effect an early dissolution by passing a motion ‘that there shall be an early Parliamentary general election.’<sup>82</sup> This revolutionary law has eliminated the Crown prerogative on dissolution and ensured that either the effluxion of time dissolves parliament, or that parliament dissolves itself. In Canada, only an amendment to Section 41 (a) of the *Constitution Act, 1982*, which requires the unanimous consent of the federal parliament and all provincial legislatures, could eliminate the Crown prerogatives on prorogation and dissolution and vest them in the House of Commons.

The *Fixed-Term Parliaments Bill* became law between the publication of the draft in December 2010 and the release of the 1st Edition in October 2011, so the two contain significant differences on dissolution and the confidence convention, which this analysis will highlight because the British practice up to 2011 remains relevant as a standard of historical comparison in the core Commonwealth. Prior to the passage of the *Fixed-Term Parliaments Act*, the House of Commons could pronounce its confidence in the government in three ways:

[A] vote on a motion ‘that this House has no confidence in Her Majesty’s Government’.

[. . .] By convention, the Government will make parliamentary time available for a debate on a no-confidence motion tabled by the Opposition at an early opportunity.

A vote on a matter which the Government has publicly declared that it regards as a matter of confidence;

A vote on any matter which is so fundamental to the Government’s position that its rejection by the House [. . .] constitutes a fatal objection to the Gov-

<sup>77</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 13.

<sup>78</sup> *Ibid.*, 16.

<sup>79</sup> *Ibid.*, 13.

<sup>80</sup> *Ibid.*, 15-16.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, 16.

ernment's continuation in office.<sup>83</sup>

Votes on the Address in Reply to the Queen's Speech were considered the government's first vote of confidence in the parliamentary session.<sup>84</sup> The 1st Edition of the British *Cabinet Manual* makes very clear that "commanding the confidence of the House is not the same as having a majority or winning every vote."<sup>85</sup>

The draft stated that if a prime minister's government loses the confidence of the House "during the life of a Parliament", the prime minister can choose one of two options: he should first "tender the Government's resignation, unless circumstances allow him or her to opt instead to request dissolution. If it is clear who should form an alternative administration, such a resignation should take effect immediately."<sup>86</sup> The life of the government being tied to the tenure of the prime minister in these situations, "If the Prime Minister resigns, the Sovereign will invite the person who it appears is most likely to be able to command the confidence of the House to serve as Prime Minister and form a government."<sup>87</sup> The draft thus suggests early dissolution as the second option, whereas in Canada, early dissolution has usually been the norm and first consideration in the event that a government loses the confidence of the House. Presumably, the criteria allowing early dissolution refer to the formation of a new coalition government or governing coalition that could command the confidence of a hung parliament.

However, the draft also elaborated on early dissolution and adopted a conception of the appropriate use of the reserve power similar to that of Dawson's conception of "most exceptional circumstances." It also views the reserve powers as a last resort, or a response to a prime minister who did not allow parliament to determine other options for the formation of a new government.

At present, the Prime Minister may request that the Sovereign dissolve Parliament so that an early election takes place. The Sovereign is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the exercise of the reserve powers to refuse it, for example when such a request is made very soon after a previous election. In those circumstances, the Sovereign would normally wish to know before granting a second dissolution that those involved in the political process had ascertained that there was no potential government that would likely command the confidence of the House.<sup>88</sup>

The 1st Edition of *Cabinet Manual* defines the duties of the prime minister and sovereign in these "very limited circumstances" and recognizes that the application of the reserve powers should remain a last resort because such a drastic intervention

<sup>83</sup> United Kingdom. Cabinet Office, *The Cabinet Manual — Draft: A Guide to Laws, Conventions and the Rules on the Operations of Government*. (London: Crown Copyright, December 2010): 24.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 25.

<sup>86</sup> *Ibid.*, 28.

<sup>87</sup> *Ibid.*, 25.

<sup>88</sup> *Ibid.*, 28-29.

into the political process breaks with the Sovereign's traditional neutrality.

Although they have not been exercised in modern times, the Sovereign retains reserve powers to dismiss the Prime Minister or make a personal choice of successor, and to withhold consent to a request for dissolution. However, there is a duty on the Prime Minister to act in a way that prevents the Sovereign [from] being drawn into political controversy by having to exercise those reserve powers.<sup>89</sup>

Historically, the Sovereign has made use of reserve powers to dismiss a Prime Minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign.<sup>90</sup>

The *Cabinet Manual* describes the limitations of the Sovereign's power in a constitutional monarchy, implies that the reserve powers have inherently become more limited over time, and confirms that the Sovereign must normally follow her Ministers' advice.

The scope of the Royal Prerogative power, which is the residual power inherent in the Sovereign, has evolved over time. Originally the Royal Prerogative would only have been exercised by the reigning Sovereign. However, ministers now exercise the bulk of the prerogative powers, either in their own right or through the advice that they provide to the Sovereign, which she is constitutionally bound to follow. The Sovereign is, however, entitled to be informed and consulted, and to advise, encourage and warn Ministers.<sup>91</sup>

This last sentence draws from Walter Bagehot's famous doctrine of the three rights of the sovereign: "[T]he sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, and the right to warn. A king of great sense and sagacity would want no others."<sup>92</sup>

Prorogation does not figure prominently in the 1st Edition, probably because it has rarely become the subject of political controversy in the United Kingdom. "Prorogation brings a parliamentary session to an end. It is the Sovereign who prorogues Parliament on the advice on his or her ministers."<sup>93</sup> While neither the Draft nor the 1st Edition explain under what circumstances the Sovereign could reject advice to dissolve, the 1st Edition of the *Cabinet Manual* does not elaborate on any circumstances in which the Sovereign could refuse prorogation. The *Cabinet Manual* affirms that the Sovereign summons, and prorogues Parliament and grants Royal Assent.<sup>94</sup>

<sup>89</sup> *Ibid.*, 29.

<sup>90</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 14.

<sup>91</sup> *Ibid.*, 8.

<sup>92</sup> Walter Bagehot, *The English Constitution*, 2nd Ed. (1873): 85. <http://socserv.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf>

<sup>93</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 16.

<sup>94</sup> *Ibid.* 13, 16.

The British *Cabinet Manual* also supports the principle that the Sovereign should not become involved in political, partisan matters that the House of Commons must sort out for itself:

[T]he Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons.<sup>95</sup>

The *Cabinet Manual* takes into account both majority and minority parliaments with respect to the formation of governments and adopts a different set of language for each case. When an election yields a majority parliament that results in the loss of the government's majority, "the incumbent Prime Minister and government will immediately resign and the Sovereign will invite the leader of the party that has won the election to form a government [emphasis added]."<sup>96</sup> Like the *Manual of Official Procedure of the Government of Canada*, the British *Cabinet Manual* affirms that in the event of a minority parliament, the incumbent government may stay on and attempt to command the confidence of a majority of the new House of Commons, and "the incumbent Government remains in office unless and until the Prime Minister tenders his resignation and the Government's resignation to the Sovereign."<sup>97</sup> If his or her government cannot cobble together enough support in the new parliament, then the prime minister must resign. Her Majesty's Government can take one of three forms in a minority parliament: "a single-party minority government", a "formal inter-party agreement", or a "formal coalition government."<sup>98</sup> Overall, the British *Cabinet Manual* puts the onus of government formation and dealing with losses of confidence on the cabinet and parliamentarians. The Queen only figures into the process in order to appoint the government that the House of Commons will support.

## 2. The Principle of Restraint

The document describes "restrictions on government activity" rather than the "caretaker convention" of the New Zealand *Cabinet Manual*. This definition corresponds closely to that contained in the *Guidelines of the Conduct of Ministers* of the Government of Canada. These restrictions mean that

[G]overnments are expected to observe discretion in initiating any new action of a continuing or long-term character in the run-up to an election, immediately afterwards if the result is unclear, and following the loss of a vote of confidence. In all three circumstances, essential business must be allowed to continue.<sup>99</sup>

The British *Cabinet Manual* describes a procedure that bears a remarkable resem-

---

<sup>95</sup> *Ibid.*, 14.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, 15.

<sup>99</sup> *Ibid.*, 17.

blance to that contained in the Canadian *Guidelines*.

Ministers continue in office and it is customary for them to observe discretion in initiating any action of a8 continuing or long-term character. This means the deferral of activity such as: tasking or announcing major policy decisions; entering into large/contentious procurement contracts or significant long-term commitments; and making some senior public appointments and approving Senior Civil Service appointments, provided that such postponement would not be detrimental to the national interest or wasteful of public money. If decisions cannot wait they may be handled by temporary arrangements or following relevant consultation with the Opposition.<sup>100</sup>

Like the Canadian *Guidelines*, this description recognizes that the government retains discretion in the exercise of these “restrictions on government activity”, and that the national interest and wise spending of public money prevails. The Canadian and British guidelines both suggest consultation with the opposition if the government so desires.

### 3. The Precedent Book

The United Kingdom also possesses an older practitioner’s handbook, the *Precedent Book*, which compiles explanations of historical precedents and cases on topics, such as “Cabinet”, “Ministers”, “Documents”, and “Relations with Buckingham Palace.”<sup>101</sup> Like the *Manual of Official Procedure of the Government of Canada*, it describes historical precedents and rationales in more detail than the British and New Zealand *Cabinet Manuals* and likely served as a reference primarily for senior civil servants. The Cabinet Office released the 1954 version to the National Archives in 2006 and will consider making later editions of the *Precedent Book* public, as per the recommendation of the House of Lords Constitution Committee.<sup>102</sup>

## VII. New Zealand Cabinet Manual

The New Zealand Department of the Prime Minister and Cabinet produced the first edition of the *New Zealand Cabinet Manual* in 1979.<sup>103</sup> The *Cabinet Manual* began as an internal document, but the government made subsequent editions public in preparation for the transition from single-member plurality to mixed-member proportional in 1996. The new electoral system almost inevitably yields minority

<sup>100</sup> *Ibid.*

<sup>101</sup> We would like to thank Dr. Ben Yong of the Constitution Unit of the University College London for having brought the *Precedent Book*, and its similarities to the *Manual of Official Procedure of the Government of Canada*, to our attention in our correspondence.

<sup>102</sup> United Kingdom. Cabinet Office, *Government Response to the House of Lords Constitution Committee, Political and Constitutional Reform Committee and Public Administration Select Committee on the Cabinet Manual Committee Reports of Sessions 2010-12*. (London: Crown Copyright, October 2011): 19.

<sup>103</sup> Rebecca Kitteridge, “The Cabinet Manual: Evolution With Time,” Paper presented by Rebecca Kitteridge, Deputy Secretary of the Cabinet, 18th Annual Public Law Forum, 20-21 March 2006.

parliaments and coalition governments, which necessitated a greater understanding of and agreement on convention. The *Cabinet Manual* is now the best known and most entrenched cabinet manual in the core Commonwealth and served as a reference for the creation of its new British counterpart.

On its eighth edition as of 2008, the New Zealand *Cabinet Manual* stands at 180 pages and presents succinct descriptions of the machinery of government on a range of issues like the formation of governments, the governor general's reserve powers, and the caretaker convention. It does not, however, delve into historical precedents or justifications for convention like the *Manual of Official Procedure of the Government of Canada*.

In contrast to broader descriptions of the operation of government in the New Zealand *Cabinet Manual*, the "CabGuide: Guide to Cabinet and Cabinet Committee Processes" functions more like an electronic practitioner's handbook limited to the preparation of cabinet documents. It offers detail on the technical workings of cabinet and "sets out advice to public servants on the procedures and operation of the New Zealand Cabinet, Cabinet committees and Executive Council" and "complements procedural information in the *Cabinet Manual*."<sup>104</sup>

### 1. On the Formation of Governments

Like the British equivalent, the New Zealand *Cabinet Manual* seeks to preserve the neutrality and impartiality of the Office of Governor-General by elevating the Governor-General as far as possible above partisan politics.<sup>105</sup> Therefore, elected parliamentarians must form a government that can command the confidence of the House of Representatives, and the governor general then "accepts the political decision" of the choice of prime minister and formally appoints the government.<sup>106</sup> The governor general may "ascertain where the confidence of the House lies, based on the parties' public statements" but cannot implicate himself in the inter-party negotiations.<sup>107</sup>

This New Zealand manual also includes clear guidelines on the appropriate response to a government that loses the confidence of the House of Representatives during the life of the parliament, or what it calls "mid-term transitions." The first section carries the title of "mid-term change of prime minister with no change of government," which suggests that unlike in Canada, where the prime minister's resignation automatically entails the resignation of the entire ministry, the prime minister of New Zealand can resign without automatically bringing about the resignation of his entire cabinet.<sup>108</sup> In that situation, the governor general maintains his political neutrality by "accept[ing] the outcome of the political process by which an

<sup>104</sup> New Zealand. Cabinet Office, Department of the Prime Minister and Cabinet. "CabGuide: Guide to Cabinet and Cabinet Committee Processes." <<http://cabguide.cabinetoffice.govt.nz/>> [Accessed 6 July 2011].

<sup>105</sup> New Zealand. Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*. (Wellington, Her Majesty the Queen in Right of New Zealand, 2008): 8.

<sup>106</sup> *Ibid.*, 81.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, 83.

individual is identified as the leader of the government.”<sup>109</sup>

The New Zealand *Cabinet Manual* also clearly intends that a “mid-term change of government” means that the prime minister would first look to resign, and second consider advising early dissolution.

[W]hen the loss of confidence is clear, the Prime Minister will, in accordance with convention, advise that the administration will resign. In this situation: (a) a new administration may be appointed from within the existing Parliament [. . .] or (b) an election may be called.<sup>110</sup>

The calling of an election would essentially *require* that an incumbent government become a caretaker government even before the dissolution. The prime minister can only opt for early dissolution as the *second* option in response to a loss of confidence of the House. If the prime minister advises early dissolution, “the Governor-General will act on the advice as long as the government *appears to have* the confidence of the House and the Prime Minister maintains support as the leader of the government[emphasis added].”<sup>111</sup> These two criteria probably aim to ensure that the prime minister does not advise dissolution either in order to pre-empt a loss of confidence, or in order to undermine potential opposition or dissent from within the cabinet within a coalition government.

## 2. On the Reserve Powers

The New Zealand *Cabinet Manual* offers only a brief description of the reserve powers, stating that:

By convention, the Governor-General acts on the advice of the Prime Minister as long as the government commands the confidence of the House. [. . .]

In only a very few cases may the Governor-General exercise a degree of personal discretion, under what are known as the ‘reserve powers’. Even then, convention usually dictates what decision should be taken.<sup>112</sup>

In the section on the formation of governments, it states: “The Governor-General has the formal power to dissolve, prorogue [. . .], and summon Parliament. [. . .] By convention, the Governor-General exercises this power on the advice of the Prime Minister, the Governor-General’s principle adviser.”<sup>113</sup>

## 3. The Caretaker Convention

The Canadian and British handbooks acknowledge the use of the term “caretaker convention” but eschew it in favour of “restraints” or “restrictions” on the government’s activity; they also suggest the application of this principle to a narrower timeframe than does the New Zealand *Cabinet Manual*. Successive governments of New Zealand have bound themselves to follow the caretaker convention

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, 84.

<sup>112</sup> *Ibid.*, 9.

<sup>113</sup> *Ibid.*, 75.

after a general election (before the appointment of a new government) and when the government has lost the confidence of the House of Representatives.<sup>114</sup> However, the government normally “chooses to restrict” its activity up to three months before the governor general issues the writs of election.<sup>115</sup> Parliament must be summoned within six weeks after a general election, so the Government of New Zealand could potentially operate under the caretaker convention for up to four months - far longer than the Canadian and British guidelines suggest - which appears significant given that the New Zealand House of Representatives operates on a constitutional fixed-term of three years.<sup>116</sup>

The New Zealand *Cabinet Manual* also defines two “arms” of the caretaker convention: a more limited application for a “clear outcome” after an election, and a broader application in the event of an “unclear outcome.”<sup>117</sup> Overall, the New Zealand *Cabinet Manual* provides so much detail on the caretaker convention that it virtually prescribes and therefore limits the government’s discretion rather than providing a description of how the government may exercise its discretion.

### VIII. THE RESOLUTIONS OF THE AUSTRALIAN CONSTITUTIONAL CONVENTION OF 1985: A FAILED EXPERIMENT IN TRUE CODIFICATION

In the 1970s and 1980s, Australia held a series of constitutional congresses geared toward amending its constitution. The *Resolutions of the Australian Constitutional Convention* of 1985 would have “recognized and declared” a series of constitutional conventions on the relationship between the governor general, prime minister, and parliament and codified them into the written constitution of Australia.<sup>118</sup> However, the Parliament of Australia never formally adopted them, and the people of Australia never ratified them into Australia’s written constitution through referendum.<sup>119</sup> These eighteen *Resolutions* serve as one of the few experiments in true codification in the core Commonwealth and now reside in the dustbin of history alongside the Trudeau government’s failed codification of 1978. These *Resolutions* would have codified Walter Bagehot’s three rights of the sovereign, a fundamental aspect of the relationship between the governor general and the prime minister:

In the exercise of his constitutional powers and responsibilities, the Governor-General always has the right to be consulted, to encourage and to warn

---

<sup>114</sup> *Ibid.*, 78.

<sup>115</sup> *Ibid.*, 76-77.

<sup>116</sup> *Ibid.*, 82.

<sup>117</sup> *Ibid.*, 78.

<sup>118</sup> C.J.G. Sampford, “Recognize and Declare’: An Australian Experiment in Codifying Constitutional Conventions,” *Oxford Journal of Legal Studies* 7, no. 3 (1987): 369-420; Peter H. Russell, “The 2008 Constitutional Crisis: The Need for Agreement on Fundamental Conventions of Parliamentary Democracy,” *National Journal of Constitutional Law* (2009-2010): 5.

<sup>119</sup> Peter J. Boyce, *The Queen’s Other Realms: The Crown and Its Legacy in Australia, Canada, and New Zealand*. (Annandale, NSW: The Federation Press, 2008): 60.

in respect of Ministerial advice given to him.<sup>120</sup>

This amendment would potentially have allowed the courts to intervene into the constitutional relationship between the governor general and prime minister and would have fundamentally altered crown prerogative.

### 1. On The Formation of Governments

With the Constitutional Crisis of 1975 still relatively fresh in their minds, the delegates who drafted these *Resolutions* articulated a limited view of the Governor General's powers, notwithstanding their assertion that they had failed to codify the vice-regal reserve powers.<sup>121</sup> However, the phrase "in [the governor general's] opinion" would probably have been interpreted as a codification of a limited vice-regal discretion. In general, these *Resolutions* seem to presume majority parliaments, given that minority parliaments occur so rarely in Australia. They differentiate between a mid-parliamentary resignation and resignation after taking into account the results of the election.

A. The basic principle is that the Ministry has the confidence of the House of Representatives.

B. Following a general election in which the Government is defeated, the Governor-General, having taken the advice of the outgoing Prime Minister as to the person who the outgoing Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

C. If the Prime Minister resigns, the Governor-General, having taken the advice of the resigning Prime Minister as to the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form a Ministry that has the confidence of the House of Representatives.

D. If the Prime Minister dies in office, the Governor-General, having taken the advice of the next most senior Minister as to the person who that Minister believes can form a Ministry that has the confidence of the House of Representatives, appoints as Prime Minister the person who, in his opinion, can form such a Ministry.<sup>122</sup>

### 2. On Prorogation and Dissolution

While none of these resolutions specifies the circumstances under which the governor general could dismiss the prime minister, those on prorogation and dissolution would have created the framework for a limited use of the vice-regal reserve

<sup>120</sup> Australia. Constitutional Convention. *Resolutions Adopted at the Australian Constitutional Convention, Parliament House, Brisbane, 29 July to 1 August 1985*. (Canberra: Queen's Printer of Australia, 1985): 9.

<sup>121</sup> Australia. Constitutional Convention. *Resolutions Adopted at the Australian Constitutional Convention, Parliament House, Brisbane, 29 July to 1 August 1985*. (Canberra: Queen's Printer of Australia, 1985).

<sup>122</sup> *Ibid.*, 7-8.

powers. If the prime minister were to advise dissolution while his government retains the confidence of the House, the governor general would have been obliged to carry out the advice, according to Resolution J. However, if the government were to lose the confidence of the House of Representatives, the prime minister would have been required to either advise dissolution, or to resign and advise that the opposition form a new ministry within the same parliament. Resolutions E and F would have required that the governor general carry out whichever option that the prime minister advised. This constitution would have placed the onus of these decisions on the prime minister and would therefore have effectively eliminated vice-regal discretion on dissolution. Overall, these *Resolutions* would have vested the primary constitutional responsibility in the prime minister, and ultimately in the House of Representatives, rather than in the governor general. The prime minister would have been required to make the political judgement on whether to resign or advise a dissolution; this constitutional requirement might have allowed the courts to adjudicate on a personal political judgement of the prime minister if another party had lodged a complaint regarding his decision to dissolve instead of resigning or vice versa. Under such circumstances, the courts could not hold the prime minister to account without encroaching upon the sovereignty of parliament and without effectively nullifying the confidence convention.

E. In following a defeat in the House of Representatives, the Prime Minister, acting in accordance with Practice F, advises the Governor-General to dissolve the House of Representatives or to send for the person who the Prime Minister believes can form a Ministry that has the confidence of the House of Representatives, the Governor-General acts on the advice.

F. In advising the Governor-General for the purpose of Practice E, the Prime Minister acts in accordance with the basic principle that the Ministry should have the confidence of the House of Representatives and if, in his opinion, there is another person who can form a Ministry which has the confidence of the House of Representatives, he advises the Governor-General to send for that person.

I. The Governor-General dissolves the House of Representatives only on the advice of the Prime Ministers.

J. When a Prime Minister who retains the confidence of the House of Representatives advises a dissolution of the House of Representatives, the Governor-General acts upon that advice.<sup>123</sup>

Probably because of the Constitutional Crisis of 1975, which involved the Senate's refusal to pass supply, resolutions M and O would have mandated that the prime minister advise prorogation or dissolution of the House of Representatives only if both houses of parliament had already passed the minimum supply necessary to cover the intersession or the writ period. Resolution N would have ensured that the governor general retained no reserve powers on the summoning and proroguing of parliament, just as the *Manual of Official Procedure of the Government of Canada* suggests.

M. In advising a dissolution, the Prime Minister must be in a position to assure the Governor-General that the government has been granted suffi-

---

<sup>123</sup> *Ibid.*, 8.

cient funds by the Parliament to enable the work of the administration to be carried on through the election period or that such funds will be granted before the dissolution.

N. Subject to the requirements of the Constitution as to the sittings of Parliament, the Governor-General acts on prime ministerial advice in exercising his powers to summon and prorogue Parliament.

O. In advising a prorogation, the Prime Minister must be in a position to assure the Governor-General that the government has been granted sufficient funds by the Parliament to enable the work of the administration to be carried on through the period of prorogation or that such funds will be granted before the prorogation.<sup>124</sup>

### 3. On the “Caretaker Convention” in the Cabinet Handbook

Australia also produced an officialization in the form of a small cabinet manual at 40 pages in length. In 1983, the Department of the Prime Minister and Cabinet of Australia first produced the *Cabinet Handbook*, which focuses on descriptions of the conventions and practices relating to collective and individual ministerial responsibility. Now on its 6th edition, it is available online. One of its appendices contains a series of ten paragraphs on what it calls the “caretaker convention,” like the New Zealand *Cabinet Manual*. The *Cabinet Handbook* includes much of the same material as the *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During an Election*, but it uses the terminology of the New Zealand *Cabinet Manual*.

Successive governments have accepted that special arrangements apply in the period immediately before an election for the House of Representatives, in recognition of the considerations that:

- (a) with the dissolution of the House of Representatives, there is no popular Chamber to which the executive government can be responsible; and
- (b) every general election brings with it the possibility of a change of government.

The formal period for which the caretaker conventions operate dates from the dissolution of the House of Representatives until the election result is clear or, in the event of a change of government, until the new government is appointed. However, it is also accepted that some care should be exercised in the period between the announcement of the election and the dissolution.<sup>125</sup>

## IX. COMPARING INTERPRETATIONS IN THE CORE COMMONWEALTH

The *Manual of Official Procedure of the Government of Canada*, the *British Cabinet Manual: A Guide to Laws, Conventions, and Rules on the Operations of Government* and the *New Zealand Cabinet Manual* present different interpretations of some issues because they reflect the divergent and distinct evolution and practice

<sup>124</sup> *Ibid.*

<sup>125</sup> Australia. Cabinet Secretariat, Department of the Prime Minister and Cabinet. *Cabinet Handbook*, 6th Edition. (Canberra: Commonwealth of Australia, 2009): 33.

of Westminster parliamentarism in the three countries. Canadian minority parliaments have always yielded single-party minority governments; until recently, the Canadian electorate might have expected this arrangement as a matter of course.<sup>126</sup> In contrast, New Zealand's House of Representatives now yields minority parliaments and coalition governments as the norm. British parliamentarians seem to favour the relative stability of coalition government or an inter-party governing coalition to single-party minority government.<sup>127</sup>

### 1. The Reserve Powers and the Caretaker Convention

The analyses of each of the handbooks show that some important differences have arisen with respect to dissolution and the principle of restraint. The British *Fixed-Term Parliaments Act* has eliminated the Crown prerogative on dissolution and transferred that authority to parliament. The British *Cabinet Manual* officializes Bagehot's famous "Three Rights of the Sovereign" and cautions that a controversial application of the reserve powers to appoint or dismiss a prime minister can "undermine" the Sovereign.<sup>128</sup> For instance, the Governor General of Australia's dismissal of the prime minister in 1975 arguably did bring the Crown into disrepute. The Canadian *Manual* suggests that the governor general no longer possesses any discretion to invoke the reserve powers on summoning and proroguing parliament but retains "a degree of discretion" on dissolution.<sup>129</sup> Finally, the New Zealand *Cabinet Manual* limits itself to the general statement that "in only a very few cases may the Governor-General exercise a degree of personal discretion"<sup>130</sup> but never specifies those "very few cases" and how the reserve powers apply to the appointment or dismissal of the prime minister, or to dissolution or prorogation.

The *Manual of Official Procedure of the Government of Canada, Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* and the British *Cabinet Manual* officialize similar sets of rules

<sup>126</sup> Canadians have returned 11 minority parliaments since Confederation. The 14th, 15th, 23rd, 25th, 26th, 27th, 29th, 31st, 38th, 39th, and 40th were all minority parliaments, and all of them supported single-party minority governments rather than coalition governments. Peter Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Publications Ltd., 2011): 62-63.

<sup>127</sup> J.R. Mallory, "Cabinets and Councils in Canada," *Public Law* (Autumn 1957): 231-251; Vernon Bogdanor, *The Coalition and the Constitution*. (Oxford: Hart Publishing, 2011).

<sup>128</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 8, 14.

<sup>129</sup> Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 149. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

<sup>130</sup> New Zealand. Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*. (Wellington, Her Majesty the Queen in Right of New Zealand, 2008): 9.

by limiting the application of the principle of restraint to a narrow timeframe relative to the New Zealand *Cabinet Manual*. The *Guidelines* suggest that the restraints or restrictions on government activity apply when “the government has lost a vote of confidence in the House or whether the Prime Minister has asked for dissolution on his own initiative.”<sup>131</sup> As the full title suggests, these guidelines are geared toward managing the government’s activity during an election, but acknowledge that the caretaker convention applies, if necessary, after the election until the appointment of the next government.<sup>132</sup> The British *Cabinet Manual* also suggests that the government restrain its activity after losing a vote of confidence and immediately before the election during the “wash up” phase, during the election, and after the election until the Queen appoints the new government.<sup>133</sup> The New Zealand *Cabinet Manual* expresses the same rationale for the use of the caretaker convention in those three phases, but extends the pre-writ restrictions on government activity to three months prior to dissolution.<sup>134</sup> In a House of Representatives with a maximum duration of 3 years, the New Zealand conventions place a proportionately greater restriction on government activity than do the Canadian and British handbooks.

## 2. Prime Ministerial Succession

These handbooks also demonstrate divergence and mutually exclusive practices with respect to prime ministerial succession. The *Manual of Official Procedure of the Government of Canada* and the “Guide to Canadian Ministries Since Confederation” clearly state that the resignation of the prime minister automatically and necessarily brings about the resignation of the other ministers of the Crown, in other words, the entire government. The latter document explains why Canada has had 41 Parliaments but only 28 Ministries, or governments.

The Government is identified with the Prime Minister and cannot exist without him. He alone is responsible for recommending who will be appointed ministers. He can recommend their replacement or dismissal and he can bring about the resignation of the whole Government by his own resignation.<sup>135</sup>

The life of each ministry is dependent on the tenure of its Prime Minister.

<sup>131</sup> Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election*. (Ottawa: Her Majesty the Queen in Right of Canada, 2008): 1.

<sup>132</sup> *Ibid.*

<sup>133</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 17.

<sup>134</sup> New Zealand. Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*. (Wellington, Her Majesty the Queen in Right of New Zealand, 2008): 82.

<sup>135</sup> Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada*, Henry F. Davis and André Millar. (Ottawa, Government of Canada, 1968): 463. Reproduced with the permission of the Minister of Public Works and Government Services Canada (2011). Source: Library and Archives Canada/National Archives of Canada, Subject files, vol. 516.

[. . .] The last day of a ministry is determined by the date the Prime Minister died or the Governor General accepted his or her resignation.<sup>136</sup>

In contrast, the New Zealand *Cabinet Manual* has officialized the opposite conclusion. One of its subheadings reads “Mid-term change of Prime Minister with no change of government.”<sup>137</sup> Based on the passages under that sub-heading, the New Zealanders seem to interpret government as “party in power” or “the senior party in the coalition government,” perhaps because their mixed-member proportional electoral system places so much emphasis on party. The New Zealand *Cabinet Manual* also acknowledges and limits the Governor-General’s reserve power in appointing a new prime minister and places the emphasis on the party.

A change of Prime Minister may occur because the incumbent Prime Minister resigns, or as a result of the retirement, incapacity, or death of the incumbent Prime Minister. In appointing a new Prime Minister, by convention the Governor-General accepts the outcome of the political process by which an individual is identified as the leader of the government.<sup>138</sup>

The Australian *Resolutions* would have codified a hybridized approach that differentiated between the death of the prime minister in office and the defeat of the government in a general election and the subsequent resignation of the prime minister.

The resignation of a Prime Minister following a general election in which the government is defeated or following a defeat in the House of Representatives terminates the commissions of all other Ministers, but the death of a Prime Minister or his resignation in other circumstances does not automatically terminate the commissions of the other Ministers.<sup>139</sup>

The British *Cabinet Manual* concurs with the New Zealand practice: the prime minister may either tender his personal resignation or that of the government as a whole.<sup>140</sup> This case study on prime ministerial succession shows why precedents in one Commonwealth realm may not be persuasive or applicable in the others because of the divergent constitutional interpretation and practice that has arisen since the *Statute of Westminster, 1931* established the Crowns of Canada, Australia, and New Zealand as separate legal entities.

## X. CONCLUSION

It is possible that the series of minority parliaments in Canada from 1957 to

<sup>136</sup> Canada. Privy Council Office, “Guide to Canadian Ministries Since Confederation.” <<http://www.pco-bcp.gc.ca/mgm/index.asp?lang=eng#LIFE>> [Accessed 24 October 2011].

<sup>137</sup> New Zealand. Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*. (Wellington, Her Majesty the Queen in Right of New Zealand, 2008): 83.

<sup>138</sup> *Ibid.*

<sup>139</sup> Australia. Constitutional Convention, *Resolutions Adopted at the Australian Constitutional Convention, Parliament House, Brisbane, 29 July to 1 August 1985*. (Canberra: Queen’s Printer of Australia, 1985).

<sup>140</sup> United Kingdom. Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government*. 1st Edition. (London: Crown Copyright, October 2011): 14-15.

1968 convinced senior government officials that officializing constitutional conventions in a practitioner's handbook would facilitate broader understanding of the principles and conventions inherent in the Canadian constitution. Similarly, the series of minority parliaments between 2004 and 2011 and the political instability that they produced shifted scholarly attention toward basic conventions governing the formation of governments, the governor general's reserve power, and the proposal to officialize conventions in a new cabinet manual based on those of the United Kingdom and New Zealand. However, these proposals overlooked the existence of the *Manual of Official Procedure of the Government of Canada*.

As in Canada, initiatives in the core Commonwealth seem to derive from constitutional crises, controversies, or transitions. New Zealand revised and made its *Cabinet Manual* public during the transition toward a new mixed-member proportional system for the election of 1996. The United Kingdom developed its draft *Cabinet Manual: A Guide to Laws, Conventions, and the Rules on the Operation of Government* in anticipation of a hung parliament, which did indeed come to pass. Australia experimented with true codification largely in reaction to the Constitutional Crisis of 1975, the implications of an elective Senate on responsible government and what constituted the legitimate exercise of the Governor-General's reserve power to dismiss a prime minister.<sup>141</sup> Canada also experimented with codification after the failure of the Victoria Charter.

That the 41st Parliament produced a majority government does not absolve constitutional scholars from devoting serious attention to omnipresent, though often latent, constitutional issues. Future elections will yield minority parliaments and therefore the potential for coalition governments. In anticipation of minority parliaments in the coming years, some Canadian scholars have promoted a potential new Canadian cabinet manual as an educational tool.<sup>142</sup> Perhaps a widely distributed Canadian cabinet manual could also fill the gap in parliament's institutional memory that comes from its high rate of turnover of parliamentarians.<sup>143</sup>

As Sir Gus O'Donnell has noted, cabinet manuals, as with any non-justiciable interpretive references, are not designed to prescribe specific solutions to future and unknowable constitutional crises, which by their nature arise suddenly and result from differing interpretations of convention. Nor are they designed to serve as exhaustive lists.<sup>144</sup> Handbooks instead serve as guidelines and statements of general principles that can exert moral suasion on political actors and clarify their roles.

---

<sup>141</sup> C.J.G. Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions," *Oxford Journal of Legal Studies* 7, no. 3 (1987): 369-420.

<sup>142</sup> Peter Russell, "The Principles, Rules and Practices of Parliamentary Government: Time for a Written Consolidation," *Journal of Parliamentary and Political Law* 6, no. 2 (June 2012).

<sup>143</sup> Ned Franks, "The Election Period, The Post-Election Period, and the Caretaker Conventions in Canada: Two Tables and Some Comments," (unpublished manuscript, 1 June 2011). Professor Ned Franks has shown that the parliaments between 1945 and 2011 saw an average of new MPs of 36.9%; in the 35th Parliament elected in 1993, 72.2% of MPs were new, and many post-war parliaments yielded turnover of 40%.

<sup>144</sup> Sir Gus O'Donnell, "The New Cabinet Manual," Address to the Institute for Government, London, United Kingdom, (24 February 2011)

Non-justiciable officializations of the conventional constitution serve as guides but are not arbiters. Ultimately, elected officials must sort out disagreements over different interpretations of convention amongst themselves, and the electorate will judge their decisions. A politically enforceable officialized handbook could reinforce the efficacy of the conventional constitution by encouraging constitutional actors to better understand their responsibilities. In turn, the public might better understand when and how to hold their elected representatives to account, and the media could report more accurately on constitutional matters, particularly those that arise during minority parliaments.

In order to ensure the ongoing political enforceability of the framework, each new government must also endorse, and, if necessary, propose changes to, officializations in order to effectively bind itself to the document.<sup>145</sup> New Zealand's experience shows that handbooks become effective mechanisms of accountability over time, provided that a government makes the document readily available in the public domain and that the government binds itself to its contents. Some observers have promoted the creation of a "private-sector" manual that scholars would write without the government's endorsement.<sup>146</sup> Such a document would be more didactic than effective because the government would not consider it binding, and it would serve only to confuse scholars and the general public.

In 1990, Eugene Forsey took his last stance against the codification of constitutional conventions in the aftermath of the Australian *Resolutions* and vigorously defended the Westminster tradition of unwritten constitutional conventions:

Conventions are essentially, and intensely, practical. They rest ultimately on common sense. They are, accordingly, flexible, adaptable. To embody them in an ordinary law is to ossify them. To embody them in a written Constitution is to petrify them.<sup>147</sup>

Codification does not merely "ossify" or "petrify" politically enforceable constitutional convention - it eliminates the constitutional character of convention altogether. The "codification of convention" presents a paradox and an inherent contradiction in terms, because political enforceability and legal enforceability are mutually exclusive: the former relies on parliament and the electorate, but the latter relies on the courts. The electorate can hold governments to account, but they cannot throw out of office a court with whose decisions they disagree.

Conventions of non-constitutional character can exist within a codified, systematized constitutional order, like the American system. But in such a case, these conventions become merely "customs" and "practices" and are not politically en-

---

<http://www.ucl.ac.uk/constitution-unit/events/public-seminars-10-11/cabinet-manual> (Accessed on 29 May 2011).

<sup>145</sup> *Ibid.*

<sup>146</sup> W.T. Stanbury, "Time to Codify the Unwritten Constitutional Conventions, Start with a 'Private-Sector Manual,'" *The Hill Times* (6 June 2011). <http://hilltimes.com/columns/2011/06/06/time-to-codify-the-unwritten-constitutional-conventions-start-with-a-private-sector/26399> [Accessed 20 October 2011].

<sup>147</sup> Eugene Forsey, "The Present Position of the Reserve Powers of the Crown" in *Evatt and Forsey on the Reserve Powers* (Sydney: Legal Books, 1990): xc.

forceable.<sup>148</sup> Under such a system, only the courts or a formal constitutional amendment provide the only means of enforceability. For instance, Americans regarded the two-term presidency as a convention after President Washington, the American Cincinnatus, set the precedent for the voluntary relinquishing of power. President F.D. Roosevelt violated this convention by seeking third and fourth terms. In the absence of responsible government and a mechanism of political enforceability, Congress and the states adopted the only recourse: they passed a constitutional amendment that codified the old custom and formally limited each president to two terms.<sup>149</sup> A similar system of retroactive and delayed enforceability would await any Commonwealth Realm that codified the conventional constitution into a written constitution.

Practitioner's handbooks, cabinet manuals, and guidelines can be updated over time so that they continue to provide authoritative *descriptions* of practice, while allowing custom and convention to develop and evolve as necessary. They are not mutually exclusive, but complementary, because they target different audiences for different purposes. The governments of New Zealand and of the United Kingdom possess both types of officialized handbooks. Despite the difference in intended audience, the *Manual of Official Procedure of the Government of Canada* set the precedent in formatting, layout, tradition of a foreword by the prime minister, and general content for the subsequent officialized handbooks of all types in the core Commonwealth; it also predates the more famous *New Zealand Cabinet Manual* by eleven years and deserves to be recognized as the first of its kind. For all these reasons, its historical and constitutional contributions cannot be ignored. The *Manual of Official Procedure of the Government of Canada* serves as the ideal format for a practitioner's handbook: thorough historical analysis, sound interpretation of constitutional precedent and principle, and reasonable descriptions and recommendations that guide modern constitutional practice.

---

<sup>148</sup> David S. Jones and T.K.K. Iyer, "The Nature of Political Conventions in a Written Constitutional Order: A Comparative Perspective," *Governance: An International Journal of Policy and Administration* 2, no. 4 (October 1989): 405-423.

<sup>149</sup> United States, Library of Congress. "Presidential and Vice Presidential Terms and Tenure," Thomas H. Neale. (Washington, D.C.: Congressional Research Service, 23 August 2004): 1. "From 1789 through 1940, chief executives adhered to a self-imposed limit of two terms. That precedent was broken by President Franklin D. Roosevelt, who was elected four times (1932, 1936, 1940, and 1944)."