

Not Just “Harper’s Rules”:  
The Problem with Responsible Government as Critical Morality

by

Michael Edward Smith  
B.A., University of Western Ontario, 2008

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## **Supervisory Committee**

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## Abstract

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The Canadian constitutional crisis of 2008 triggered a renewed interest in the structure and workings of Canada's institutions of government. Particular controversy was generated by Prime Minister Stephen Harper's assertion that only the political party with the most seats in the House of Commons has the right to form a government and that it is illegitimate for the opposition parties to form a coalition with a legislative majority. Peter Russell terms these contentions "Harper's New Rules", and is one of a large group of scholars who deride the rules as being undemocratic and in violation of the traditional practice of parliamentary democracy and responsible government (which holds that the House of Commons is the final arbiter on the viability of potential governments). This thesis investigates the quick rejection of Harper's Rules and determines that their attempt to enforce a critical moral standard on Harper is problematic because for a constitutional convention to be binding on political actors, it requires a consensus on how a convention promotes constitutional principle— a consensus that does not exist about how a party receives a mandate to govern. Throughout Canada's history with minority government transitions, there has been a subtle discourse that implies many political actors have operated under the norm that the largest party in the House of Commons does indeed have a right to form the government. As well, many of the claims that are made about the democratic origin and purpose of the structure of responsible government are difficult to substantiate and can be challenged. The resulting disagreement makes it difficult to declare a constitutional interpretation to be wrong, given the malleable character of conventions, and that these constitutional disputes can generate into crisis and be exploited for partisan gain. This is the situation the federal party system may soon find itself in, as likely future minority governments will continuously bring the opposing conceptions of a mandate into conflict. This thesis concludes that determining constitutional conventions based on how they defend principle is a hazardous approach because political actors can always frame their actions in the rhetoric of democratic legitimacy, and if the actor can avoid serious political repercussions or find support in the public, then the interpretation becomes viable.

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## Chapter One

### “Harper’s Rules” and the Crisis of 2008

The constitutional crisis of 2008 triggered a renewed interest, in both academic circles and the general public, in the structure and workings of Canada’s institutions of government. At the time, many Canadians were uncertain of the proper way the system should function, and this undoubtedly increased the sense of crisis and polarization. In the wake of the events, it has been argued by some scholars that Canadian democracy will be strengthened by educating citizens on the norms and conventions of our system, thereby enabling them to recognize unconstitutional actions when they transpire.<sup>1</sup> This thesis attempts to contribute to the discussion by acknowledging that agreement on the rules of the Canadian system would undoubtedly be beneficial, but the “correct” constitutional answers may not be as clear-cut as many scholars contend.

This thesis will look at one question that emerged during the crisis: how does a federal political party attain a mandate to form the government? As James Mallory put it, “Since we generally think of elections as settling the issue of who governs, little thought has been given to the questions of constitutional propriety and procedure which now arise (in periods of minority government).”<sup>2</sup> While classical scholarly thought on responsible government focuses on the ability of the House of Commons to create, sustain, bring down, and even replace governments, as well as the prerogative of the Governor General to appoint the Prime Minister, Stephen Harper contended during the crisis that the largest party in the House has been elected by the people to

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<sup>1</sup> Graham White, “The Coalition that Wasn’t: A Lost Reform Opportunity”, *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 154.

<sup>2</sup> James R. Mallory, “The Election and the Constitution”, *Queen’s Quarterly*, 64: 4 (1958), 465.

be the government and cannot be replaced by what he calls a “coalition of the losers,”<sup>3</sup> meaning a collaboration of the other political parties to create a legislative majority. By demonstrating that Harper’s idea cannot be dismissed as easily as most scholars have done, assumptions about the critical workings of responsible government are thrown into question.

Currently, there is a contradiction between how most parliamentary theorists definitively reject the concept of an electoral democratic mandate (meaning the party that secures the most seats has been elected to office by the people) and the characteristics of constitutional conventions. On the one hand, these scholars say the electoral democratic mandate is not a constitutional convention because it is undemocratic because it prevents parties that represent a larger proportion of the population from forming the government, does not fit with the way Canada’s political institutions are supposed to function, and goes against the long tradition of Parliamentary supremacy embedded within responsible government. But on the other hand, constitutional conventions are malleable, and respond to changing societal and political developments. Their identification and authority derive from a consensus among those with an understanding of the system about how a convention defends constitutional principle. Many of these theorists claim that such a consensus exists on how responsible government is to provide for democratic governance. The goal then is to demonstrate that no such consensus exists.

This thesis contends that the exact constitutional conventions that define Canada’s government formation process are unclear, and thus no one understanding can be said to be the definitively “correct” or “appropriate” version. After understanding that conventions can only be said to be binding on political actors if they find widespread agreement on how they protect

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<sup>3</sup> Jonathon Montpetit, “Losers Do Get to Form Coalitions, Prime Minister: Constitutional Experts”, *Winnipeg Free Press*, June 6 2010, <http://www.winnipegfreepress.com/canada/breakingnews/losers-do-get-to-form-coalitions-prime-minister-constitutional-experts-95547644.html> (Accessed June 20 2010).

constitutional principle, we see that there are two competing visions for how a political party comes to power: the traditional belief in responsible government and Parliamentary supremacy (wherein the House of Commons creates, sustains, defeats and replaces governments) and the electoral democratic mandate. There is support for the democratic credentials of both constitutional interpretations, and thus neither can be rejected outright. This is not a new debate either; I intend to demonstrate that it has been present in all of Canada's minority government transitions, but the potential for crisis has been mitigated by other political factors. As Canada enters an era of perpetual minority government, the political context is ripe for this long-simmering debate to throw the system into crisis. It is likely that in the future, single-party minority governments will claim an electoral democratic mandate as they attempt to win the partisan battle between opposition parties trying to use their parliamentary majorities (and using the rhetoric of parliamentary supremacy to support their actions) to discredit the government. Before developing this argument further, I will examine the debate in the context of the crisis of 2008 and probe the general scholarly reaction. This is done to show that many of the claims scholars make about how responsible government provides for democratic governance are problematic, opening the door to disagreement, change, and crisis.

### **The Crisis of 2008 and the Loss of Consensus**

The events of late 2008 represented a legitimate constitutional crisis. Responding to a fiscal update that both refrained from offering any economic stimulus to respond to the 2008 recession and threatened to cut off public funding for political parties, the Liberal and New Democratic Parties, with support from the Bloc Quebecois, signed a coalition accord that called for them to vote no confidence in Prime Minister Stephen Harper's Conservative minority government and replace it without an election. This ignited a firestorm of controversy in the

public, in the media, and in academic circles, as it was the first time opposition parties had signed a formal accord pledging to not only defeat but to replace a sitting government mid-legislative session. Harper, attempting to avoid such a motion, belittled the attempt as an undemocratic grab for power. He sought and was granted prorogation from Governor General Mich elle Jean. This prorogation suspended Parliament until January 2009, during which time the Liberals replaced leader St phane Dion with Michael Ignatieff, who repudiated the accord. The Liberals subsequently supported Harper’s budget and the crisis was resolved.<sup>4</sup>

During this period, public opinion was incredibly divided on the correct course of action. Numerous questions were raised about how our democratic institutions should function: Is it legitimate for a coalition to replace a government without an election? Can the unelected and unaccountable Governor General refuse a request from the Prime Minister? Is it undemocratic for the Prime Minister to suspend Parliament to avoid accountability? It seemed the public did not have clear answers to these questions, and individual opinions were heavily influenced by whatever interpretation would see their preferred outcome emerge. The problem was that the rules governing these aspects of our system are not found anywhere in the written Constitution of Canada, but instead are constitutional conventions. These conventions are unwritten norms and procedures that are supposed to regulate the exercise of political power by state actors. Conventions are intended to keep the legal authority of the government in line with a spirit of constitutionalism that establishes the “ultimate supremacy of the electorate as the true political sovereign of the State.”<sup>5</sup> The problem is that there are many ways to conceptualize the

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<sup>4</sup> Michael Valpy, “The ‘Crisis’: A Narrative”, *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009).

<sup>5</sup> E.C.S. Wade, “Introduction” in A.V. Dicey’s *Introduction to the Study of the Law of the Constitution*, (London: MacMillan & Co. Ltd., 1960), clii.

electorate's supremacy, and the uncertainty of 2008 was caused because there was no consensus within the public on which scenario best represented the will of the people.

The opinions of those in the academic community, with notable exceptions, were much less divided. In the wake of the crisis, a book titled *Parliamentary Democracy in Crisis* was published. It is a collection of chapters by many of the top institutional and constitutional scholars in the country, giving their take on the events, the proper workings of our system, and the ramifications for the future. The general opinion amongst these authors was that Stephen Harper was wrong in his assessment of how a government gains its mandate and in fact, that he deliberately misled the public on the conventions of responsible government in order to invoke the rhetoric of democratic legitimacy to cling to power. Peter Russell identifies "Harper's New Rules,"<sup>6</sup> which he considers to be a definitively incorrect version of parliamentary democracy rife with structural flaws:

- The party that wins the most seats in a general election has a mandate to form the government.
- The leader of that party has been elected Prime Minister.
- It is illegitimate for the government to be replaced without first consulting the public via an election.
- Coalitions that were not presented to the public as viable options are illegitimate.

As Russell contends, "Harper's rules are not consistent with well-established practices of our system of parliamentary government."<sup>7</sup> Donald Desserud says they can be "dismissed immediately,"<sup>8</sup> while C.E.S. Franks says that they are "nonsense"<sup>9</sup>. Scholars like Russell hold to

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<sup>6</sup> Peter H. Russell, "Learning to Live with Minority Parliaments", *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 141.

<sup>7</sup> Ibid. 141.

<sup>8</sup> Donald Desserud, "The Governor General, the Prime Minister, and the Request to Prorogue" *Canadian Political Science Review*, 3:3 (2009), 43.

what David Cameron terms “classical parliamentary theory”:<sup>10</sup> voters do not elect governments but legislators, from which the Governor General selects the Ministry based on who can command the support of a majority of Members of the House of Commons. Once a government has lost that confidence, it is perfectly acceptable for the Governor General to appoint a new Ministry if it is evident it will be able to hold confidence for some time. Implicit in this conception is that the Governor General is an active constitutional arbitrator who can refuse the advice of a Prime Minister if such advice would allow the Prime Minister to avoid the judgment of the House. The clash between Harper’s rules and classical parliamentary theory is the latest example of the tension between conceptions of parliamentary and electoral democracy, on which more will be said momentarily.

*Parliamentary Democracy in Crisis* is an example of “critical morality”, the term Geoffrey Marshall<sup>11</sup> and Andrew Heard use to describe how constitutional conventions bind political actors. According to Heard’s concept of critical morality, the general political community (meaning scholars, judges, and anyone with in-depth knowledge of the system) identify the conventions based upon how they uphold constitutional principles, and then judge actor behaviour against those defined conventions.<sup>12</sup> It differs from positive morality, which contends that conventions are merely whatever actors feel bound to follow, whereas critical morality defines conventions as what actors *should* feel bound to follow if they have correctly interpreted the precedents and constitutional principles governing the system. In *Parliamentary*

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<sup>9</sup> C.E.S. Franks, “To Prorogue or Not to Prorogue?: Did the Governor General Make the Right Decision?” *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 39.

<sup>10</sup> David R. Cameron, “Ultimately, the System Worked”, *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 194.

<sup>11</sup> Geoffrey Marshall, *Constitutional Conventions*, Oxford: Clarendon Press, 1984, 12.

<sup>12</sup> Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford University Press, 1991, 143.

*Democracy in Crisis*,<sup>13</sup> the authors scathingly critiqued Harper's positions, exposing what they perceived to be faulty logic and authoritarian tendencies couched in democratic rhetoric that were clear violations of the principles of responsible government.

And yet, despite this near-unanimous scholarly backlash, the crisis ended in a way that allowed Harper to contend his rules are valid. His position has not been repudiated by political backlash, and the precedent of 2008 will allow future political actors to be proponents of his rules if they can work to their partisan advantage. In the political arena, Harper's rules now appear to be an acceptable interpretation of the Constitution.<sup>14</sup> This speaks to the structural flaw I will be exposing. The central contention of this thesis is that the structure of Canadian responsible government contains institutional deficiencies because the critical morality necessary to truly bind political actors is currently absent, and, even if it were not, it would be unsustainable over time. By the very character of conventions (how they originate, how they change, and how they bind), it is extremely difficult to declare that an interpretation is simply wrong. Scholars are free to point out the logical fallacies of certain interpretations, or claim that an interpretation does not live up to the principles of democratic constitutionalism that conventions are supposed to defend. But saying that an interpretation *should not be* the way the system works is an entirely different animal than saying it *is not* the way it works. This is because critical morality is heavily dependent on consensus.<sup>15</sup> If there is disagreement over the conventions and principles that guide political behaviour, it becomes difficult to sort out who is in the wrong. Scholars like those contributing to *Parliamentary Democracy in Crisis* would

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<sup>13</sup> See Lorraine Weinrib "Prime Minister Harper's Parliamentary 'Time Out': A Constitutional Revolution in the Making?" and Jennifer Smith, "Parliamentary Democracy versus Faux Populist Democracy" in particular.

<sup>14</sup> Much like how scholars note Mackenzie King's 1926 electoral victory served to allow his constitutional interpretation to become valid. See chapter 3 for more of a discussion.

<sup>15</sup> Heard, 1991, 143.

respond by saying their critical morality comes from the classical parliamentary tradition, which has clear, understandable conceptions of democratic accountability and is the system that Canada has used throughout its history. As this thesis will demonstrate, proponents of this school of thought are making claims about the system's coherence that do not have the unanimous support of all historical precedents.

This thesis is not intended to support Stephen Harper's position. That he proposed the constitutional interpretation he did out of blatant self-interest and with little regard to the management of national unity seems a compelling explanation of his behaviour. Evidence for such a view can be found in how he was a proponent of the inverse logic when he left the door open to a potential coalition of his own with the NDP and Bloc Quebecois during his time as Leader of the Opposition.<sup>16</sup> What this thesis is arguing is that the system deserves its own share of the blame for making what Harper did possible. It is so malleable and so dependent on agreement amongst political actors for it to function smoothly that new constitutional interpretations can be proposed, and as long as the actor is able to find some support in the present political context, dismissing it as incompatible with parliamentary theory holds no binding power. Critical morality only binds actors if the backlash holds material consequences that discourage them from stepping out of parliamentary theory's logic of appropriateness. To demonstrate this, I will craft a hypothetical argument for how Harper's Rules defend constitutional principle and defend it against the scholarly critiques that emerged from the crisis.

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<sup>16</sup> Bill Curry, "Opposition warns of showdown: Liberals face early challenge to throne speech", *Calgary Herald*, September 10 2004, A7.

## Harper's Rules: New Understandings of the Supremacy of the Electorate

To begin, Stephen Harper has proposed the convention that the largest party in the House is the only one with the right to hold executive office during the life of a Parliament.<sup>17</sup> Certainly if Canada's constitution was in strict adherence to classical parliamentary theory this would be absurd, as a party does not receive a mandate to govern until it can prove it holds the confidence of the House. But is it truly as unconstitutional as some scholars claim? Edward McWhinney notes that evidence derived from precedents that emerged in the second half of the twentieth century (which will be investigated in chapter three) imply that Canada has a new convention: the largest party in the House has the right to be the *first to attempt* to form a government.<sup>18</sup> Harper's Rules are just a small extension of this principle.

The prevailing theory on conventions is that they outline a scope of appropriate conduct within the political process based on constitutional principle.<sup>19</sup> Given this, it does not appear to be a violation of democratic constitutionalism to insist that the party that gained the largest segment of public support be the only one allowed to access executive power. It is important to remember that Stephen Harper never denied the opposition parties their right to topple the government. What he denied was their ability to take power from the party that had the greatest proportion of public support without first consulting the public. Harper's Rules could be interpreted as Canada's constitutional conventions evolving to incorporate the element of our political culture that has advocated for forms of electoral democracy.

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<sup>17</sup> Russell 2009, 141.

<sup>18</sup> Edward McWhinney, *The Governor General and the Prime Ministers: The Making and Unmaking of Governments*, (Vancouver: Ronsdale Press, 2005), 77.

<sup>19</sup> Heard, 1991, 15.

From this perspective, we have a constitutional convention that means our legislative elections are also implicitly executive elections, with the largest party receiving the right to govern. It is comparable to the logic of the single-member plurality electoral system used in the individual constituency elections, only extended to the entire general election. If that party does not win enough public support to secure a majority in the House, then the opposition parties retain the right to terminate the government's mandate at any time, but it is unconstitutional for those parties to put together a coalition that does not include the party with the most public support (according to this vision of what is democratic). Coalitions are especially disrespectful to the principle that the electorate is sovereign when they are explicitly ruled out during election campaigns, only to reappear once the electorate cannot pass judgment on the idea. Coalitions are only legitimate if they involve the largest party as lead partner using the coalition to shore up a legislative majority; otherwise, they are unconstitutional in that they deny the electorate's top choice in favour of a hybrid that was never presented as an option for the electorate to vote on. These constitutional conventions have moved Canada away from classical parliamentary theory, but it has made our system definitively Canadian. It is an example of what proponents of conventions extol: their ability to change and evolve depending on new conceptions of democracy.<sup>20</sup> Harper's Rules are a synthesis between parliamentary theory and Canada's unique addition of electoral democracy.

If the above can be considered at least a constitutional interpretation that has not been refuted in the political arena, then the next step is examining whether the means Stephen Harper used to defend the electorate's supremacy were themselves constitutional. The most detailed criticism of Harper's request for prorogation comes from Andrew Heard, who argues that the

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<sup>20</sup> R. Bassett, *The Essentials of Parliamentary Democracy*, (London: MacMillan & Co., 1937), 5.

request was unconstitutional because it broke the convention that questions about whether a government has the confidence of the House should be resolved within seven to ten days.<sup>21</sup>

However, he also contends that when some criticize the presence of contradictory precedents as proof there is no clear convention, they are missing that, in some cases, a convention is ignored for the purposes of safeguarding an even more fundamental convention.<sup>22</sup> Given this, the argument could be made that while Harper's request would have been unconstitutional in other circumstances (for instance, if the opposition parties were trying to defeat him and trigger an election), it was tolerable in this circumstance to protect the convention that the electorate's top choice be the one to wield executive power. The electorate is the ultimate political sovereign, not the House, and when the majority of the House decided not to consult the electorate on the shape of the government, it became constitutional to ignore their judgment. Canada's constitutional conventions may be evolving to take into consideration uniquely Canadian conceptions of what it means for the people to be the source of political power.

### **Scholarly Reaction and the Difficulty in Rejecting Interpretations**

It is important to stress again that the above argument was merely hypothetical; it is not being advocated as the correct or as a desirable interpretation of the constitution. This argument is nearly identical to the one Harper himself and his former advisor, political scientist Tom Flanagan, put forward at the time of the crisis.<sup>23</sup> It is used to show that identifying conventions based on how they defend constitutional principle is problematic, because it is easy to craft

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<sup>21</sup> Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?", *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 55.

<sup>22</sup> Andrew Heard, "Recognizing the Variety Among Constitutional Conventions", *Canadian Journal of Political Science*, 22:1 (1989), 75.

<sup>23</sup> Tom Flanagan, "Only Voters have the Right to Decide on the Coalition", *The Globe and Mail*, January 9 2009. <http://www.theglobeandmail.com/news/politics/article963810.ece>. (Accessed June 27 2010).

arguments for how a number of alternative conventions can also defend principle, generating uncertainty. Ultimately, such an approach is based on a subjective concept of democracy and allows political actors to propose interpretations that serve their own interests.

Harper's Rules received harsh criticism from a group of scholars that I loosely term the classical school. It includes many of the contributors to *Parliamentary Democracy in Crisis*, such as Jennifer Smith and Graham White, as well as other scholars such as David E. Smith. I also include some earlier institutional scholars like Eugene Forsey and James Mallory. This is not to say that the views of these scholars are identical, but that they do take a similar approach to the study of institutions. They generally take a structural approach, evaluating the institutions based on what purpose they serve the political system as a whole and often viewing that purpose as the reason for the existence of the institution. This is particularly true with their approach to the House of Commons, as they all look favourably on the democratic accountability that they believe is inherent within responsible government. They are termed "classical" because they take a perspective similar to the early British theorists who first attempted to describe the unwritten workings of the constitution, such as Walter Bagehot and A.V. Dicey. All have made incredibly valuable contributions to the literature. However, their approach can be critiqued for the tendency to describe the evolution and purpose of institutions outside the realities of political contestation.<sup>24</sup> They instead favour a discourse that describes what democratic value an institution can provide, which may miss evidence that suggests institutions evolve not out of a commitment to principle but because segments of society have influenced their development to their benefit. By investigating their reactions to the 2008 crisis, we see that their views on how Canada's institutions promote democratic governance are not without issues, creating space for

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<sup>24</sup> Dennis Pilon, *The Politics of Voting*, (Toronto: Edmond Montgomery Press, 2007), 4.

the disagreement that allows Harper's Rules to remain a viable constitutional interpretation despite their rejection by the classical school.

Scholarly criticism of Harper's Rules can be placed into three interrelated types of reactions, all with the intent of demonstrating why Harper's rules are unconstitutional. All three can be found in *Parliamentary Democracy in Crisis*. First, the rules are said to be undemocratic. Canadians, living in a representative democracy, entrust their elected officials with the responsibility to form an accountable executive. The idea that the Conservative Party has a mandate to govern from the voters is "laughable", because the 2008 election results show us that voter opinion is heavily divided and it is impossible to ascertain a general consensus on the government.<sup>25</sup> Leclair and Gaudreault-DesBiens point out that "we must bear in mind, that in a pluralist society such as ours, it is extremely difficult to isolate...if anything like a univocal will exists at all."<sup>26</sup> Claiming a right to govern when none was granted is undemocratic because it denies the right of the elected Members of the House to come together and form majorities that could claim more democratic legitimacy. And since the Supreme Court (in the *Secession Reference* case<sup>27</sup>) recognizes democracy as a constitutional principle that conventions and provisions must be in accordance with, Harper's rules are unconstitutional.

The problem is that this argument is based upon a subjective notion of democracy. Canada has had a long history of electoral democratic ideals. Electoral democracy, as coined by David E. Smith, is a broad theory of democratic reform that advocates direct connections between the voter and the decision-making power of government: a "philosophy of popular

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<sup>25</sup> White, 158.

<sup>26</sup> Jean Leclair & Jean-François Gaudreault-DesBiens, "Of Representation, Democracy, and Legal Principles: Thinking about the *Impensé*" *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 107.

<sup>27</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

rule.”<sup>28</sup> And while Smith is one of a group of scholars who deride it as an unfair rejection of the democratic credentials of representative democracy, its influence on Canadian political culture cannot be understated. If the constitution is indeed a “living tree” that uses conventions to adapt and evolve to changing conceptions of democracy, then it is difficult to see how Harper’s Rules can be rejected as unconstitutional. Majority governments have been formed with less than 40 per cent of the popular vote in the past, and they have all claimed a mandate with little public outcry. And even if electoral democracy has ironically caused the “presidentialization” of politics by centralizing power in the executive in the name of decentralizing accountability to the electorate,<sup>29</sup> pointing this out has no power unless the public can be convinced of its hazards. Without a firm consensus to support them, scholars are arguing from their own personal understanding of what democracy should be and cannot state that Harper’s Rules are objectively undemocratic. If it is true now that “voters no longer tolerate members of Parliament having the last say on who should head the government,”<sup>30</sup> and that they believe “the electoral vote...should be determinative,”<sup>31</sup> then scholars are in no position to deny the electors their conception of democracy as unconstitutional, given the evolutionary nature of our system.

Second, Harper’s Rules are rejected because of the implications for system stability if they were accepted. They open up the possibility of deadlock and a continuous cycle of elections. Two parties that together form a majority in the House but are forbidden by convention from forming a coalition because neither has a plurality of seats could continuously pass no

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<sup>28</sup> David E. Smith, *The People’s House of Commons: Theories of Democracy in Contention*, Toronto: University of Toronto Press, 2007, 51.

<sup>29</sup> Leclair & Gaudreault-DesBiens, 111.

<sup>30</sup> *Ibid.*, 108

<sup>31</sup> *Ibid.*, 107.

confidence in the government, triggering elections.<sup>32</sup> These rules would also force the instrumentalization of the Governor General, stripping from the position any role of constitutional arbitrator or independent judge of the general will that many of the authors argue for.<sup>33</sup> The Governor General would merely be required to appoint the leader of the largest party Prime Minister and then call elections at the Prime Minister's request or when motions of no confidence are passed. A system functioning under Harper's Rules would be unstable and have few accountability measures, making it formally and structurally unsustainable.

Here we see a commitment to structural functionalism that can miss the influence of political realities. Parliamentary theory's commitment to the study of its subject matter from a coherent, smoothly functioning system of representation and accountability is arguably the legacy of Walter Bagehot's *The English Constitution*.<sup>34</sup> Bagehot was the one of the first, and perhaps the most influential, to describe the unwritten nature of the British Constitution as a group of traditions and norms of behaviour that together constitute an exhaustive and coherent structure of governance. His take on the interworkings of the dignified and efficient parts of the system is the basis for classical parliamentary theory. His influence can be felt in the scholarly work on constitutional conventions, when Geoffrey Marshall declares that conventions are a body of morality that have "as their main general aim the efficient working of the machinery of political accountability."<sup>35</sup> In other words, the rules that scholars identify are constitutional by virtue of their ability to make the parliamentary system efficient and coherent.

When we step outside the theoretical and look at parliamentary political practice, we quickly realize that there is nothing forcing the system to be continuously coherent. Politics is

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<sup>32</sup> Russell, 142.

<sup>33</sup> Leclair & Gaudreault-DesBiens, 113.

<sup>34</sup> Walter Bagehot, *The English Constitution*, (London: Kegan Paul, Trench, Trubner & Co., 1905).

<sup>35</sup> Marshall, 210.

not teleological; it has no end point or ideal type that it is subconsciously driving to achieve. The current system has not come about because of a quest for efficient rationality, but is the result of a layering of events whose results are highly determined by political context. This is especially true in a system governed by constitutional convention, whose very nature implies flexibility and the ability to evolve. This evolution does not take place in a theorist's vacuum, but occurs through political developments. Thus, its coherence and stability cannot be guaranteed.

Determining conventions based on what value they bring to the system does not do justice to the historical context that saw most conventions arise not out of a quest to improve democracy, but as a result of political struggles between groups jockeying for power. In fact, Bagehot praised the English Constitution's ability to use the monarchy as a form of distraction so that the "masses" did not trouble those who actually ruled.<sup>36</sup> It is therefore problematic to take Jennifer Smith's approach, when she says that, "there is a reason for every convention, and the reason for responsible government is democracy."<sup>37</sup> To reject an emerging constitutional interpretation as incorrect because it is incomplete or because it does not conform to a functional concept of morality denies conventions their ability to evolve. At the moment, Harper's Rules may be an incomplete system, but the evolutionary process is ongoing. Until the rules have been completed or rejected through the course of political practice, their constitutionality cannot be objectively ruled upon.

These two criticisms are but precursors to a more comprehensive critique of Harper's Rules: that they do not fit with parliamentary theory, the long-established constitutional tradition that Canada has inherited from Britain in the form of the Westminster system of government.

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<sup>36</sup> "It enables our real rulers to change without heedless people knowing it. The masses of Englishmen are not fit for an elective government; if they knew how near they were to it, they would be surprised, and almost tremble." Bagehot, 54.

<sup>37</sup> Jennifer Smith, "Canada's Minority Parliament", *Canadian Politics, 5<sup>th</sup> Edition*, eds. James Bickerton & Alain-G. Gagnon, Toronto: University of Toronto Press, 2009, 139.

David E. Smith dismisses electoral democracy as having “no core” when compared to its parliamentary counterpart.<sup>38</sup> While electoral democracy is an incoherent assortment of populist desires, parliamentary theory has the weight of tradition, precedent and principle behind it. It arose out of the noble, non-revolutionary transition to democracy that took Britain centuries, and is the system that Canada employs today, as expressly stated in the Preamble of the Constitution Act, 1867, that Canada was to be governed by a Constitution “similar in Principle to that of the United Kingdom”. It is inherently democratic (and thus reflects the constitutional principles identified by the Supreme Court) because of the accountability imbedded within responsible government: the government can only continue to wield power as long as it retains the support of a majority of the people’s duly elected representatives.<sup>39</sup> For this reason Harper’s Rules are unconstitutional, because they deny the role attributed to the House in classical parliamentary theory: the ability to form, sustain, terminate, and replace governments as long as it is capable of doing so.

It is this approach to the study of Canadian institutions that I believe should be abandoned. I concur with Leclair and Gaudreault-DesBiens when they say that “the current constitutional framework *and* frame of mind are simply insufficient and too outdated to address adequately the deeper problems evinced by the late 2008 parliamentary crisis.”<sup>40</sup> First and foremost, it assumes far too much democratic intention on the part of the actors who developed responsible government and on those who pursued its exportation to Canada. Modern scholars who defend the status quo of responsible government and look favourably on its history are the heirs to an academic approach that exalted the ability of the institutions to defend a social

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<sup>38</sup> David E. Smith, 51.

<sup>39</sup> Jennifer Smith, “Parliamentary Democracy versus Faux Populist Democracy” in *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, Toronto: University of Toronto Press, 2009, 176.

<sup>40</sup> Leclair & Gaudreault-DesBiens, 106. (Their emphasis but I agree).

hierarchy, like Bagehot did. Removing British political history from this rhetoric reveals that responsible government was more about the rising commercial class wresting control of the institutions of government away from the established nobility than any quest for democracy, a conflict that lasted until the Parliament Act 1911 permanently placed the House of Lords in a subordinate position (itself an act that emerged out of a political conflict, not a formal attempt at improving democracy<sup>41</sup>). The rhetoric of the time demonstrated a belief that wealth and commerce would safeguard liberty, and the commercial class refused to grant suffrage to segments of the population that it was feared would take Britain away from the path of liberalization should they be granted policy influence.<sup>42</sup>

A similar situation occurred in Canadian political history. Responsible government was seen by local elites as an alternative to the excessive democracy of the United States. Rather than being the grand peaceful democratic transition that many hail it as, the movement for responsible government mid-nineteenth century was about local landed interests shoring up control of domestic affairs independent of the wishes of the Colonial Office and the appointed Governor.<sup>43</sup> C.E.S Franks notes that many early Parliamentarians approached Parliament with an executive-centred conception, and were influenced by toryism, which stressed the responsibility the elite had to take the reins of power but look out for the common good.<sup>44</sup> Is the Westminster model compatible with democracy? Of course it is used by dozens of recognized democracies today. But here lies the flaw that is so often revealed in functional logic: just because we use it for democracy today does not mean that was the intention of its creators. The flexibility inherent in

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<sup>41</sup> Asquith's battle with the Lords over the "People's Budget" was the event that triggered the formal reform campaign. See: Geoffrey Lee, *The People's Budget: An Edwardian Tragedy*, (London: Shephard-Walwyn Ltd., 2008).

<sup>42</sup> H.J. Hanham, *The Nineteenth Century Constitution*, (Cambridge: Cambridge University Press, 1969), 8-10.

<sup>43</sup> Peter J. Smith, "The Ideological Origins of Canadian Confederation", *Canadian Journal of Political Science*, 20:1 (1987), 18.

<sup>44</sup> C.E.S. Franks, *The Parliament of Canada*, (Toronto: University of Toronto Press, 1987), 17-18.

the Westminster system allowed it to adapt to changing social conceptions of democracy, something it may once again be doing.

It is precisely because of the approach to governing that Franks identified that parliamentary democracy is often accused of being more concerned with elite accommodation than meaningful democracy, and has led to the public's disenchantment with the principle of representation that fuelled the electoral democratic movement in the first place. This brings me to my next criticism of using classical parliamentary theory as a benchmark to judge Canadian political practice. By doing so, scholars are denying the constitution its evolutionary nature at the same time they are extolling it. The Westminster model has been appropriated by dozens of states, but never in an identical fashion. It is adjusted to fit the needs of a society (or to fit the desires of an advantaged class) and then goes through more change as that state undertakes its political history with the model. To consistently hammer home the idea that in parliamentary systems elections are about electing a legislature which will in turn decide the government denies the Westminster model the ability to synthesize its formal structure with emerging electoral democratic norms that are the results of uniquely Canadian political developments. Political realities like the fact voters cast their ballot on the basis of party or leader or that Canadians, with their history of majority governments, see their elections as definitive are dismissed by classical scholars as perceptions that cloud the voter's ability to comprehend the proper workings of the system.

It is believed that these misperceptions, like the idea that Canadians directly elect the Prime Minister, can be corrected through educational political experiences such as a coalition government.<sup>45</sup> Little weight is given to the idea that electoral democracy is moving Canada's

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<sup>45</sup> White, 159.

Westminster model further away from classical parliamentary theory. Grace Skogstad might respond by saying there are clear limits to how much electoral democracy can be synthesized with the parliamentary model.<sup>46</sup> But as noted earlier, the system's evolution does not need to immediately be coherent or smooth. The principles behind Harper's Rules have not finished integrating themselves into Canada's constitutional fabric, and it is premature to dismiss them before their effects on the system have been identified.

The reluctance of many scholars to recognize deviations from the classical parliamentary model as legitimate is touched on by Jonathon Malloy in his paper "The 'Responsible Government' Approach and its Effect on Legislative Studies."<sup>47</sup> In it, Malloy contends that mainstream institutional thought in Canada is dominated by a reverence for the accountability measures of responsible government, and an unyielding belief in the flexibility of the model to continuously provide for democratic government. Malloy notes that "[traditional scholars'] vehement faith in the flexibility of the Westminster model has, paradoxically, nearly paralyzed the study of Canadian legislatures and their reform."<sup>48</sup> He is particularly critical of the typical defence of the status quo, which holds that changes to the balance of the system's interrelated parts may cause the whole system to degrade in effectiveness, prematurely ending debate on reform proposals.<sup>49</sup> I note his criticisms here to say that while the scholars in *Parliamentary Democracy in Crisis* were quick to denounce Stephen Harper, they were less likely to delve into

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<sup>46</sup> Grace Skogstad, "Western Canada and the 'Illegitimacy' of the Liberal-NDP Coalition Government", in *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, Toronto: University of Toronto Press, 2009, 170.

<sup>47</sup> Jonathon Malloy, "The 'Responsible Government' Approach and its Effect on Legislative Studies", *Parliamentary Perspectives Series*, Canadian Study of Parliament Group, November 2002, [http://www.studyparliament.ca/English/pdf/ongoing/Parliamentary\\_Perspectives\\_5\\_2002\\_Eng.pdf](http://www.studyparliament.ca/English/pdf/ongoing/Parliamentary_Perspectives_5_2002_Eng.pdf), Accessed 27 May 2010.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

how some of the institutional deficiencies of uncodified responsible government were exposed during the crisis.

The final criticism of the traditional scholarly reaction to non-traditional constitutional interpretations is the most novel and will certainly be contentious: assuming that Canada's political experiences with responsible government follows the guidelines set forth in classical parliamentary theory means assuming that political actors have a long history of deferring to the moral code parliamentary theory mandates, when in reality their actions are heavily influenced by what is possible in the political context. As mentioned, the present scholarly consensus on constitutional conventions holds that they constitute a body of critical morality — that they are independently and objectively determined norms and rules that are legally binding on political actors because they are the embodiment of constitutional principles like democracy and the rule of law.<sup>50</sup> What I am arguing in this thesis is that the perceived pattern of adherence to these rules and conventions as they apply to government formation is not out of deference to some overarching recognition of tradition and its inherent democratic value, but rather because of the preponderance of majority government.

This is because in majority situations, parliamentary theory works to the advantage of the largest party in the House. By following its provisions that party rises to power and influence; there is no need to challenge its terms. A defeated government faced with its opposition now constituting an absolute majority in the House will never attempt to stay in power, as such a move lies outside even the most narrow democratic logic of appropriateness and public opinion would force the Governor General to dismiss the Prime Minister. It is the pragmatic politics of democratic transition that influences such decisions, not an explicit recognition of a moral code

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<sup>50</sup> Heard, 143.

of conduct. If we isolate Canada's experiences with minority government, wherein classical parliamentary theory no party receives a mandate to govern until it is known it can receive a support of a majority of MPs, we see that it is positive rather than critical morality that defines the scope of appropriate options for a political situation. Actors do not heed the principled structure imposed by the general political community, but take action based on their own conceptions of what is appropriate, and often based on what will work to their own interests. Since conventions are formed and regulated within the political arena, if that arena adheres to positive morality then it is that type of morality that defines what behaviour is acceptable and what is constitutional. Political actors are themselves constitutional interpreters and develop their own vision for their role in the political process. This is true as long as an interpretation can find some public support allowing it to be argued as in line with democracy and avoid material repercussions. There is even evidence to suggest that while Stephen Harper is undoubtedly the first to put his rules in such an explicit (and blatantly self-interested) fashion, electoral democratic notions of the largest party having a right to govern go further back in Canada's history than many parliamentary scholars acknowledge. Demonstrating this will seriously undermine the traditional narrative that sees parliamentary history as the history of self-limitation.

Before outlining how the subsequent chapters will support this argument, I must answer one question: why construct an argument in defence of Stephen Harper's constitutional proposal and defend it against the criticism of parliamentary scholars? I do so because there is a structural flaw in Canada's political system that needs to be exposed, and to do so requires a different approach to the subject matter. I am trying to demonstrate the difficulty in equating constitutionally acceptable behaviour with morally appropriate behaviour, as many scholars try

to do. Given that conventions are seen as the embodiment of constitutional principles, enforcing a critical moral standard based on a theory that assigns reasons and values to institutions assumes a consensus on the best way to defend those principles that is simply not present in society. The lack of consensus surrounding government mandates allows a scholar or an actor to construct a constitutionally-valid defence of what many consider to be morally objectionable behaviour. This exposes the fact that the conventions scholars identify in their process of defining critical morality are simply too malleable to be defenders of the principles they supposedly embody. Rather than determining conventions based on what they could potentially bring to the system, a better to approach is to analyze how the discourse of democratic legitimacy is appropriated to argue for certain constitutional provisions that benefit certain actors.

Let us, for a moment, bring normative judgment back in and say that what Stephen Harper did was in fact undemocratic. If scholars approach the matter from the perspective that, through his undemocratic actions, Harper broke some unwritten constitutional rules, classical parliamentary theory is placed on a pedestal. Its democratic origins and functions, as well as the righteousness of its tradition, are all assumed in the ways that this analysis has exposed as problematic (and the analysis has only scratched the surface). It denies conventions their evolutionary character (which is seen as fundamental to the Westminster model), ignores the deterioration of the consensus that parliamentary democracy requires, and assumes that Canada has a long history of political actors recognizing and explicitly heeding the conventions as they are defined through the critical morality of parliamentary theory. This last point is the most worrisome, as it allows scholars to gloss over some historical precedents that imply the Canadian system has not been as in line with critical morality as it may seem, and when it has it was

because it made sense for the specific political context, not always a broader recognition of moral limits.

But if we approach the subject matter from the perspective that I implied through my defence of Harper's rules, we see that Harper was not breaking the rules but attempting to *change* them. He was using the lack of consensus around the principle of democracy to put forward a constitutional interpretation that clearly favoured his own partisan interest. And while it may be morally objectionable to some, it does not mean it was unconstitutional because a large segment of the population accepted his position on democratic legitimacy. We see now the structural flaw: without consensus, critical morality is powerless. It is merely one conception of how to constitute democracy, it is based on a theory that makes faulty assumptions, and the material backlash is not strong enough to bind political actors. It cannot definitively dismiss an interpretation as unconstitutional if that interpretation has a large degree of public support, given the malleable character of conventions. And this means that since we currently have no consensus on the best way to constitute democracy, the system is open to exploitation for partisan gain. Scholars need to abandon the functionalism associated with parliamentary theory and examine how Harper's Rules are only the most blatant example of constitutionally appropriate behaviour being determined by political events. I intend to argue that not only has this been the case in Canadian history (although the preponderance of majority governments has hidden the magnitude of the issue), but that as Canada enters its first era of systemic minority government, the chances of another crisis occurring between competing positions on the nature of responsible government is likely.

## Developing the Argument

Much of what has been argued here challenges the orthodox position on responsible government — and, more generally, on constitutional conventions. The point is not to argue that constitutional conventions do not exist, but that sometimes the democratic intent behind them is negligible and their definitiveness and implementation are dependent on a large consensus that recognizes the way in which the convention guards a constitutional principle; a consensus that is sometimes falsely assumed. To make this argument, chapter two will delve into the scholarly literature on constitutional conventions to determine how the unique characteristics of this constitutional structure weaken the arguments of the scholars who are so quick to dismiss Harper's Rules. Beginning with early British theorists such as A.V. Dicey and Sir Ivor Jennings and advancing to more contemporary scholars such as Andrew Heard and Donald Desserd, this chapter will detail prevailing opinion on how conventions are said to come into existence, how they change, and how they are supposed to bind political actors. Particular attention will be paid to how mainstream scholarly opinion transitioned from one that saw conventions inseparable from precedent, to today's theories that hold conventions are imbued with a normative character as defenders of constitutional principle.

This analysis will reveal in greater detail the limits of critical morality as a final arbiter of conventions. With the precedents conflicting and conventions admittedly normative, it is easy to lose the consensus that the general political community needs in order to claim its judgments are definitive. Political context is going to determine what constitutional interpretation wins the day, and since conventions are supposed to change to reflect society's changing beliefs, these interpretations can become constitutional by virtue of their acceptance. The chapter will conclude by briefly introducing some contentious debates surrounding constitutional provisions

and their ability to wreak havoc on the workings of the system, setting the tone for the discussion on the main area of study: the question of legitimate democratic mandates.

In this preliminary critique it was noted that classical parliamentary scholars contend there is a consensus on how a government receives a mandate in a parliamentary system, but that such a claim is based on a misreading of Canada's history with responsible government. An alternative narrative must be presented. This will be accomplished in chapter three through an in-depth examination of the politics surrounding federal government defeats and transitions in periods of minority government. Majority governments give off the impression of strict adherence to parliamentary theory because there is no question as to who should be the government and who controls the House. The election determined everything. But if we isolate the periods of minority government at the federal level, we can draw two key conclusions. First, the historical record shows that rather than being definitively in favour of parliamentary conceptions of a mandate, the precedents are mixed. Elements of parliamentary theory and a subtler version of Harper's Rules can be found alternating throughout Canadian federal political history. There is more to Harper's contention that the largest party in the House has a constitutional right to form the government than is acknowledged. His rules are not one-offs or outliers. There is a large body of precedent and opinion suggesting the issue of a mandate is not straightforward, calling into question assumptions about the rich history of responsible government. There is no consensus in the general political community, and there has not been for some time.

Second, the interpretation that the actors heeded had more to do with the political context of the time than any true belief in constitutional rules or parliamentary tradition that bound their actions. That is not to say they did not subscribe to some idea of right or wrong, but that their

interpretation of what was appropriate was influenced by their sense of the public mood and what actions were possible politically. This is the essence of positive morality. Political actors, faced with the task of placing themselves in the best possible position during periods of minority government, have demonstrated a willingness to embrace constitutional visions outside of the traditional theory. Given that conventions are enforced through the political arena, this analysis should demonstrate the problems in judging constitutionality with classical parliamentary theory as a benchmark.

Chapter four will take this structural deficiency and examine its relevance in the present political context to explain why this issue is only now becoming of serious concern. While I have already noted Canada's prevalence of majority government, and will explain in chapter three the various political contexts that gave some minority governments stability, the factors that are bringing this issue to the surface today need exploring. This chapter will examine how Canada is entering a period of systemic minority government, and the system's adjustment requires answers to questions that either the precedents do not provide answers to or parliamentary theory's explanations are unsatisfactory. Because continuous minority government will eventually lead to conflicts between the executive and the legislature that require definitive answers in order for the system to remain efficient, the lack of consensus is brought to the forefront. And as mentioned earlier, since there is no consensus, the binding power of many conventions is weakened. This allows various constitutional interpretations to be politicized and appropriated for partisan gain. It follows that the more constitutional debates become mainstays of standard political discourse, the more likely political disputes will escalate to constitutional crises.

## Chapter Two

### The Problem with Conventions as Critical Morality

In the introduction, I explored the typical scholarly reaction to Harper's Rules and delved into some of the assumptions that underwrite the traditional approach to the study of responsible government. Specifically, I looked at the tendency to treat Canada's constitutional machinery as being exactly in line with classical parliamentary theory, and the often falsely-assumed consensus regarding how parliamentary theory is supposed to operate and provide for democratic governance. This perspective overlooks historical developments that alter the constitutional conventions away from the classical model, leaving orthodox scholars to argue only what the conventions should be with no binding power to definitively say what they are.

This chapter expands this analysis by reviewing the prevailing theory on constitutional conventions. The goal is to demonstrate that by the very nature of how conventions operate as a constitutional structure, there is the potential for crisis when two opposite conventions lay claim to democratic legitimacy. Sorting out the "correct" one becomes nearly impossible and is left to subjective opinion. Thus, this chapter will look at the ways conventions originate, change, and bind political actors according to the top theorists. Before this, however, it is important to examine exactly how conventions differ from other constitutional structures.

### **What Are Constitutional Conventions?**

A definition of constitutional conventions must note how they differ from other rules and procedures that govern a political system. Geoffrey Marshall and Graeme Moodie provide a solid starting point:

By the conventions of the Constitution, then, we mean certain rules of constitutional behaviour which are considered binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence), nor by the presiding officers in the Houses of Parliament.<sup>51</sup>

This definition has three components parts: conventions outline appropriate behaviour for political and constitutional actors, they do not have legal enforceability, and they are separate from the rules governing Parliamentary procedure. Each requires separate analysis.

Conventions define and regulate acceptable constitutional behaviour. They are, indeed, constitutional in that they are rules whose reasons and terms have implications for the system itself. In this way they are like entrenched constitutional provisions, although they are nowhere to be found in the actual text of the Constitution. While the term was used by nineteenth century British legal scholar A.V. Dicey to describe the exercise of the Crown's reserve powers by the political executive,<sup>52</sup> it has been expanded to encompass many actions and non-actions that have ramifications for the distribution of power. Within this, the actor is compelled by a norm not found in legal documents. Missing from this definition is a reference to how conventions can alter formal constitutional law. As Sir Ivor Jennings colourfully noted, conventions are the flesh for the bones of the constitution.<sup>53</sup> They often involve limiting or qualifying legal power ostensibly for the purposes of providing for a democratic and accountable system of government.

In this respect, conventions are unique to democracies because the stated purpose of conventions is to ensure a spirit of constitutionalism restrains political actors. Because they involve these principles, conventions are considered binding on political actors. Marshall notes two categories of conventions: duty-imposing and right-granting. The first compels an actor to

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<sup>51</sup> Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution*, (London: Hutchinson of London, 1959), 29.

<sup>52</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution, Tenth Edition*, (London: Macmillan & Co., 1960), 24.

<sup>53</sup> Ivor Jennings, *The Law and the Constitution, Fifth Edition*, (London: University of London Press, 1959), 81.

undertake a necessary action or prohibits an action that may be legally possible but viewed as undemocratic. The second grants an actor a right or privilege that the written constitution does not specify, one that is claimed in the name of ensuring the system functions within that spirit of constitutionalism.<sup>54</sup> Yet there are numerous questions that arise when conventions are recognized as being defenders of constitutional principle: How are they “considered binding”? Who determines the appropriate way to defend constitutional principle? How is this conception enforced? We will return to the issues of origins and enforcement momentarily, as they are central to the flaw being exposed in this theory.

Legal enforceability is the most debated facet of conventions. A common stream of scholarly thought, which can be traced back to Dicey, is to stress the clear distinction between entrenched provisions that are subject to judicial review and conventions that emerge from, and are regulated within, the political arena.<sup>55</sup> The basic premise behind this separation is that without a formal statute, the courts have no authority to rule on norms that have informal origins. While support for this interpretation is found from other scholars such as Mallory<sup>56</sup>, Forsey,<sup>57</sup> and Brazier and Robilliard,<sup>58</sup> it has increasingly come under attack. Jennings, and more recently Andrew Heard, notes how conventions are intertwined with the legal constitution. For instance, if a statute referenced a convention (such as any reference to the Cabinet, whose existence is regulated by convention outside formal references to the Privy Council), then judicial review of

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<sup>54</sup> Marshall 1984, 8.

<sup>55</sup> Dicey, 417.

<sup>56</sup> J.R. Mallory, *The Structure of Canadian Government Revised Edition*, (Toronto: Gage Publishing, 1984).

<sup>57</sup> Eugene Forsey, “The Courts and the Conventions of the Constitution”, *University of New Brunswick Law Journal*, 33 (1984), 11-42.

<sup>58</sup> Rodney Brazier and St. J. Robilliard, “Constitutional Conventions: The Supreme Courts’ Views Revisited”, *Public Law*, 28 (1982), 28-34.

that law would include a tacit review of that convention.<sup>59</sup> Support for this interpretation is found in the work of Peter Russell.<sup>60</sup> Luckily, the issue is only of minor importance for this study; we do not have to resolve it in order to press on. Of note is that Heard acknowledges judicial review of a convention would require a clear definition, as well as consensus on its terms.<sup>61</sup> However, consensus is often tough to come by. It will suffice to accept Marshall and Moodie's contention that, in general, the courts cannot enforce convention, although they can note their existence. The *Patriation Reference Case* is the perfect example of this in Canadian history. The Supreme Court could not force Pierre Trudeau to negotiate Patriation with the provinces, but the Court did note that the principles behind federalism should compel the federal government to seek an inter-governmental agreement before proceeding, creating institutional pressure for Trudeau to follow the norm.

To briefly review the final clause in Marshall and Moodie's definition, the rules and traditions dealing with parliamentary procedure are not considered conventions. These are instead referred to as *usages*, and the distinction is drawn regarding their centrality to the constitutional principles underwriting the political system, although not all constitutional theorists recognize the division (Canadian legal scholar Peter Hogg being one who does not<sup>62</sup>). While parliamentary tradition, which has developed over centuries, is followed despite any concrete reference to it in statute, its purpose may be no more than ceremonial. Changes in procedure or ceremonial tradition do not change constitutional principles.<sup>63</sup> From this, it follows

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<sup>59</sup> Heard 1991, 6.

<sup>60</sup> Peter H. Russell, "The Supreme Court's Decision: Bold Statescraft Based on Questionable Jurisprudence", *The Courts and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment*, eds. Peter H. Russell et. al, (Kingston: Institute of Intergovernmental Relations, 1982).

<sup>61</sup> Heard 1989, 79.

<sup>62</sup> Peter Hogg, *Constitutional Law of Canada Student Edition*, (Toronto: Thompson Carswell Ltd., 2007), 21.

<sup>63</sup> Heard 1989, 74.

that the Officers of Parliament do not have the authority to rule on interpretations of conventions. This interpretation posits that conventions exist and can be enforced only in the political arena.

Creating a universally acceptable definition of conventions is near impossible.

Nevertheless, the preceding analysis gives enough of a working definition to move on. Next, there are three issues surrounding the nature of conventions that require further examination to expose the structural flaws this study will be probing. First, how does a convention come into existence? Second, in the absence of any compulsory mechanism, how do conventions bind political actors? And third, if they are binding, how can they be changed? The answers to these questions demonstrate that in the absence of accepted consensus and political events that encourage the reproduction of that consensus, conventions rarely serve their proposed organizational functions, nor do they place an effective check on political power.

### **How do Constitutional Conventions Originate?**

The most definitive method of determining if a convention has come into existence is to see if there is an explicit agreement. Actors can come together and craft agreements that, while legally non-binding, publicly acknowledge that certain powers will be used (or refrained from use) in a new manner to solve some issue with the system. By pledging their commitment to the new provision, actors create a benchmark by which their behaviour can be judged against their words; the precedents they create have the potential to be considered binding on future actors. These explicit agreements can also include newly enacted legislation that was signed in the spirit of creating a new convention, even if the letter of the law does not enshrine the principle concretely. K.C. Wheare points out that the Statute of Westminster does not actually legally bar the British Parliament from passing laws for the Dominions without their consent, but the

convention that emerged from the spirit of the discussions was that this practice should end regardless of whether the text contains legal loopholes.<sup>64</sup>

Yet these explicit agreements that create new conventions without previous experience are rare. For the most part, the conventions that scholars identify emerge out of the practice of parliamentary democracy. When identifying whether a practice qualifies as a convention, scholars begin their analyses by examining Jennings' three-part test for establishment: "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"<sup>65</sup> The initial focus on precedent indicates how fundamental it was to the early canon. Indeed, Eugene Forsey believed that without at least one precedent, there could be no convention.<sup>66</sup> This focus stemmed from an interest in institutional continuity and the traditional common law perspective, which applies previous interpretations of legal issues to future cases. These precedents also needed to be positive precedents, meaning that action is actually undertaken. More contemporary scholars recognize that negative precedents also have the potential to establish a convention, such as when Marshall identifies how the British Parliament does not use its immense legal power in a tyrannical fashion.<sup>67</sup>

While most scholars view precedent as a necessary condition for establishing a convention, very few consider it sufficient. Claiming a convention is part of the constitution simply because it was done in the past and is, therefore, obligatory does nothing to differentiate conventions from usages.<sup>68</sup> Here we skip ahead to the third part of Jennings' test, "is there a

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<sup>64</sup> K.C. Wheare, *Statue of Westminster and Dominion Status*, (Oxford: Oxford University Press, 1938), 154.

<sup>65</sup> Jennings 1959, 136.

<sup>66</sup> Forsey 1984, 34.

<sup>67</sup> Marshall 1984, 9.

<sup>68</sup> Heard 1989, 65.

reason for a rule?” In order for an action to be considered governed by convention, there has to be some sort of logical reason behind the precedents: how does the action contribute to the desired functioning of government? These reasons can either be for ensuring the system is stable or for keeping it in line with the spirit of constitutionalism. It is here that I begin to take issue with the theory on conventions. Trying to pull a reason out of historical events is a dangerous process that has the potential to skew analysis. Evaluating a convention based on how it fits into parliamentary theory and then projecting that purpose onto the reason for its creation risks obfuscating true political motives or events that led to the precedent without any conscious improvement to the system behind it. Such an analysis assumes that the system need always be coherent, and judges constitutional behaviour based upon what is desirable. The fact that a convention could be considered desirable for some reason does not mean that is the reason it is followed. Scholars then claim that a convention is binding on an actor because of what it brings to the system when that was not its purpose. It may even be that a convention originated because of some benefit it provided to those in power, despite any arguments that can be crafted for how it improves democracy. This makes it difficult to construct airtight arguments for constitutionality.

In any event, not all scholars focus on precedent as the key to determining conventions. Andrew Heard is notable for his focus on constitutional principle as the final determinant of conventions. While he believes precedent has value in some situations, it is quite possible that precedents could be misleading because the actors in the precedents were mistaken about the conventions governing their actions. Instead, he sees conventions as openly normative, becoming part of the system because of their ability to embody constitutional principle.<sup>69</sup> While it is

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<sup>69</sup> Heard 1989, 66.

difficult to create an exhaustive list of principles that the Canadian constitution is supposed to protect, the Supreme Court in the *Secession Reference Case* acknowledges democracy, federalism, and the rule of law. Jennings recognizes that the British system is based on being democratic, monarchical, parliamentary, and using a Cabinet system.<sup>70</sup> Conventions are constitutional by virtue of their ability to manifest these principles in the actual workings of the system, and actions can be declared unconstitutional if their implementation would move Canada away from these principles.

How do conventions come into existence if they need not be based in precedent? The normative character of conventions creates problems for Jennings' second question, "did the actors in the precedents believe they were bound by a rule?" Here Jennings is referring to positive morality — the idea that actors are the ones who conceive of their own moral limits. O. Hood Phillips supports actor opinion as a place of origin when he says that conventions are "rules of political practice which are regarded as binding by those to whom they apply."<sup>71</sup> But if conventions are normative in nature and often intended to place limits on actor behaviour, actors cannot be the final constitutional arbitrators because this would allow them to claim all their actions fall in line with the spirit of constitutionalism. For the health of the system, conventions must be determined by the general political community (meaning actors, constitutional authorities, judges, and the concerned public--those whose opinions are based in knowledge of the system) through the process of critical morality.<sup>72</sup> By acknowledging the general political community as a group where conventions can be stated objectively, Heard and others bring the existence of conventions out of the realm of opinion and into the concrete. Conventions exist

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<sup>70</sup> Ivor Jennings, *Cabinet Government, Second Edition* (Cambridge: Cambridge University Press, 1951), 13.

<sup>71</sup> O. Hood Phillips, *Constitutional and Administrative Law, Sixth Edition* (London: Sweet and Maxwell, 1978), 104-105.

<sup>72</sup> Heard 1991, 143.

whether actors recognize their existence or not, and external constitutional authorities can point out when a convention has been broken.

Marshall and Moodie, who acknowledge the value in using principle as a determinant of conventions, point out the possibility of crisis emerging if principles appear to conflict.<sup>73</sup> Heard responds by stressing it is not a simple matter of determining if a practice is important enough to be considered a convention. Parliamentary democracy is a complex system of governance with interconnected parts. It does not make sense to merely divide unwritten practices into conventions and usages because some practices matter more to the health, stability, and democratic function of the system than others. As such, Heard proposes a more detailed classification based on five factors: the importance of the principle behind the rule (which can be determined by measuring how much the workings of the system would change in the absence of the principle), the degree of agreement between political actors and constitutional observers on the principle, the level of agreement on the specific terms of the rule, how close the terms come to embodying the principle, and (although in Heard's opinion to a lesser extent than the others) the support a rule finds in precedent.<sup>74</sup> The purpose of this classification is to determine which convention should prevail in the event of a conflict, and it relates specifically to the Canadian case. His conceptualization is as follows:

- *Fundamental Conventions*: of vital importance to the structure of the constitution; any change in their terms would represent a significant reorientation of the structure of governance.
- *Meso-Conventions*: While their presence is necessary to safeguard vital constitutional principles, their terms are open to a degree of flexibility and/or variation.
- *Semi-Conventions*: While it is expected that they will be observed in the normal course of events, they are not integral to the principles they embody and thus a breach would not be a strike at the system as a whole.

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<sup>73</sup> Marshall and Moodie, 39.

<sup>74</sup> Heard 1989, 68.

- *Infra-Conventions*: The terms and/or principles behind them are not guided by a high enough degree of consensus to serve as rules that should limit political action; they are deeply contested and can be the cause of constitutional disputes.
- *Usages*: Procedures followed out of habit, tradition, or convenience; they are not guarding any constitutional principle.<sup>75</sup>

Heard offers the classification as an answer to those who take the ambiguity surrounding conventions as proof they do not truly exist. He claims that when some criticize the inconsistent application of convention found in precedent, they are missing that a lower order convention has given way in order to safeguard a more important constitutional principle.<sup>76</sup> Precedent is not in itself a place of origin, but rather an example of the level of consensus at a given time, and must always be interpreted in proper context. Moving the focus away from precedent allows the constitution to respond to unanticipated scenarios or those that have no precedent to fall back on, meaning a certain degree of rationality is required to determine a course of action in line with constitutional principle.

However, this focus on consensus and principle is also problematic. First of all, scholars may see vital principles within norms, but that may be a *post hoc* application of purpose to a practice that emerged purely out of political manoeuvring. Just because we can come up with a reason that might make a convention desirable or can see some purpose it may serve, it does not mean it is the reason it came into existence or is followed. I explored the problem with functional thinking in chapter one, and specifically looked at the limitations of studying institutions from the perspective that responsible government was built for democracy. As well, while Heard does acknowledge that his classification is a continuum and that conventions can move up or down based on the level of consensus, his analysis fails to take into account the ramifications for system stability of a structure dependant on agreement. The question must be asked: what

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<sup>75</sup> Ibid., 72-75.

<sup>76</sup> Ibid., 75.

happens when the consensus around a perceived fundamental convention is challenged, turning it into an infra-convention? This question gets at the heart of the matter, namely how conventions are supposed to bind political actors, and how they can be changed despite that binding authority.

### **How do Conventions Bind and Change?**

If we accept that conventions arise out of agreement on principle and not mere adherence to precedent, and that the judiciary can acknowledge conventions but not actually legally enforce them, then the only remaining way for conventions to bind political action is through morality. Actors must police themselves and abstain from behaviour that would violate constitutional principle. It cannot be solely positive morality, however, for positive morality refers only to what actors perceive are the rules binding their actions. This is where the critical morality of the general political community comes in. Again, critical morality refers to how external observers in the general political community can objectively rule a practice to not be in line with constitutional convention by judging if the practice violates constitutional principle.<sup>77</sup> However, the fact that critical morality requires a consensus of subjective opinion in order to be concrete means it serves as a poor mechanism of enforcement.

The issue with critical morality is that it depends on a subjective view of right and wrong. Critical morality requires a high level of agreement among the political community in the present. But does a different interpretation of convention imply that agreement has been lost? As long as an actor can supply an alternative interpretation and get a few members of the political community to support it, then critical morality is lost because it is no longer clear which interpretation is right or wrong. It is easy to conceive of different ways to embody constitutional principle, especially in a country like Canada whose political culture involves a clash between

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<sup>77</sup> Marshal 1984, 12.

representative and electoral democracy. For this reason it is clear that positive morality really rules the day, as critical morality is only effective if it can be mobilized by political forces. This line of reasoning takes us to Jennings' point about how conventions are followed because of the "political difficulties" actors encounter if they breach them.<sup>78</sup> Scholars like Heard are trying to craft arguments that make it possible to identify breaches in convention even if an actor can avoid backlash. But if a "breach" occurs without significant ramifications, it constitutes a loss of consensus around the principles or terms of the convention, making it impossible to definitively declare one interpretation unconstitutional.

The problem lies with equating conventions with proper moral conduct. This is what Marshall introduced when he proposed the notion of critical morality, as he said that "conventions simply spell out the moral duties, rights, and powers of office-holders."<sup>79</sup> He correctly notes how by separating constitutional requirements from moral obligations, the door is open to political actors to ignore their constitutional duties, pursue a different course, and claim moral legitimacy for their actions.<sup>80</sup> While this is true, the problem with saying that constitutional conventions are the same as moral obligations is that they become difficult to define when differing conventions are proposed, both claiming the moral high ground. When the constitutional debate centres on competing versions of morality, resolving it is not as simple as saying one is right and one is wrong.

As noted with Harper's Rules, a successful challenge to what many perceive to be an established practice can create new conventions despite the objections of those in the general political community who disagree but are powerless to stop it. While arguments can be made for

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<sup>78</sup> Jennings 1959, 134.

<sup>79</sup> Marshall 1984, 216.

<sup>80</sup> *Ibid.*, 215.

why an interpretation is not desirable in a normative sense, the actual constitutionality of the interpretation depends only on successful implementation with enough public support to counteract criticism. Jennings says that the only way to punish a government for breaking convention is for “the Opposition to use the action as political ammunition.”<sup>81</sup> But for this to be effective, the public must agree with how the opposition characterizes the situation.

Positive morality also need not always be crass or politically self-serving. It may simply be the case that an actor honestly believes there is a limit on the scope of available actions when scholars would say no limit exists. The point is that it could become constitutional by virtue of its implementation and the amount of pressure that is exerted on future actors to follow the example. This brings us to the question of how conventions change. Nelson Wiseman explains the political processes by which conventions change to reflect changes in society. He says that conventions are:

politically sanctioned via public opinion in election outcomes, media commentary, the behaviour of MPs, and potentially by the governor general. Conventions mirror and evolve with a polity’s culture. They operate, according to the Supreme Court, “in accordance with the prevailing constitutional values or principles of the period.”<sup>82</sup>

This recognition that conventions are subject to the prevailing principles of the period is key, for it means that what members of the general political community perceive to be wrong may actually just be the emergence of a new principle. While supporters of critical morality may believe that having external authorities point out breaches is beneficial, denying political events the right of being the final arbiter of conventions means eliminating the ability of conventions to respond to societal changes. Of course, Wiseman may be overstating how this political sanctioning is a reaction to changes in society, when it could be a political power struggle.

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<sup>81</sup> Jennings 1959, 133.

<sup>82</sup> Nelson Wiseman, *In Search of Canadian Political Culture*, (Vancouver: UBC Press, 2007), 63.

Nevertheless, if we are going to accept that conventions safeguard constitutional principles, we must accept their ability to change to reflect new understandings of those principles. Even if a proposed convention seems politically self-serving, if its democratic credentials find support in the public, that is all that matters. As L.J.M. Cooray notes, “it is not always possible to control the direction of change (of conventions) which will naturally reflect the political and other imperatives of the times.”<sup>83</sup> We see this with Harper’s Rules.

Marshall tries to reconcile critical morality with the ultimate authority of political practice when he says that,

Like rules of linguistic usage, it will be the case that the rules ultimately reflect what people do. In that sense conventions will become in the end whatever politicians think it right to do. But at any one time what politicians in fact do may conflict with and infringe a rule based on existing precedents or agreements.<sup>84</sup>

This seems like a rather irrelevant point to make, because if politicians can simply change or make a new rule through political events, then it hardly seems worth the trouble of saying the original rule was considered binding. This is further proof of the weakness of critical morality as a binding mechanism, for if it is admitted that political practice will ultimately determine the rules, the opinions of external observers can hardly be considered definitive. Peter Russell puts it succinctly when he says, “it is ‘the political actors’ involved in precedents, not professors, who shape constitutional conventions.”<sup>85</sup>

This inherent flexibility — the ability of conventions to adapt to various circumstances, to take context into account and not force action that the community deems inappropriate for a certain situation, and for conventions to change and evolve to reflect new visions of governance without extensive constitutional amendment — is often claimed as the reason for keeping the

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<sup>83</sup> L.J.M. Cooray, *Conventions, the Australian Constitution, and the Future*, (Sydney: Hogbin Poole Ltd., 1979), 174.

<sup>84</sup> Marshall 1984, 217.

<sup>85</sup> Russell 2009, 140.

rules and norms of political practice in the form of conventions.<sup>86</sup> Indeed, when the British North American colonies instituted responsible government in the 1840s, Joseph Howe heralded it as a remarkable achievement that the constitution had not been amended legislatively, but instead through colonial Governors being instructed to choose their advisors from the local legislatures and heed their advice.<sup>87</sup> While this is desirable in theory, applications and evolutions are often more contested than this supposed advantage recognizes.

When there is a lack of consensus regarding the terms or principles guiding a vital convention, the flexibility of conventions often becomes a hindrance to stable government. Without a clear course of action, constitutional interpretations are contested and legitimacy is called into question. The debate is more serious when the action is accused of obfuscating democracy or avoiding accountability. These normative debates can generate constitutional crises. This is especially true when the debate comprises those with new visions of democracy versus those who defend certain conventions as the way parliamentary democracy is “intended” to function. This is exactly the functional claim that Jonathon Malloy takes issue with.<sup>88</sup> Rather than a smooth evolution, proponents of competing interpretations engage in serious debate that throws the system’s operation into question. It follows that without any concrete moral compulsion, political actors can exploit the lack of consensus and advocate for constitutional interpretations that work to their partisan advantage.

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<sup>86</sup> Marshall and Moodie discuss how the fear of losing flexibility through entrenching conventions is overblown, pp. 43.

<sup>87</sup> Jennifer Smith, “Responsible Government and Democracy”, *Taking Stock of 150 Years of Responsible Government in Canada*, eds. F. Leslie Seidle & Louis Massicotte, (Ottawa: Canada Study of Parliament Group, 1998), 19.

<sup>88</sup> Malloy 2002.

## “Fundamentals” and the Loss of Consensus

This theoretical problem must be probed deeper in order to identify what exactly is happening to the Canadian system of government. A possible rebuttal is that the magnitude of the problem has been overstated. Disagreement is natural in a system based on conventions. The value in an unwritten system is that its flexibility allows it to incorporate new conceptions about its terms. Yes, on occasion there will be disagreements and political conflicts surrounding a controversial course of action, but on the whole the system will bring such issues to a close through the normal course of events in a way that respects fundamental principles. This was one of the points behind Heard’s classification of conventions, demonstrating that not all conventions are equal and disputes surrounding lower order conventions are manageable as long as the more fundamental are maintained.<sup>89</sup> Bassett argues that the stability of Britain’s parliamentary system is due to the fact that regardless of the differences political parties have on public policy, they are in agreement on the fundamentals of the process. All sides clearly understand what it means to win and lose the competition for executive office, and respect the outcome.<sup>90</sup>

There are two responses to this criticism. The first is that while ambiguity surrounding meso- and semi-conventions may not immediately lead to — or even guarantee — constitutional crisis, long periods of uncertainty increases the risk that the convention will be called upon to settle a political dispute, and no single definitive answer will be provided. While disputes about the terms and principles may resolve themselves when actors no longer wish to continue them and reach some sort of agreement (or one side is able to manoeuvre its interpretation to victory), these resolutions rarely provide definitive answers that could be applied to future cases. The

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<sup>89</sup> Heard 1989, 77.

<sup>90</sup> Bassett, 127.

potential instability remains beneath the surface, and it only takes one confluence of events to expose the severity of the flaw.

Second, while the normative importance of fundamental conventions may make their continued observance more desirable and a breach of their terms more disruptive than others, there is nothing in their nature that makes them less malleable or less susceptible to political developments. By this I mean what I have been arguing about Harper's Rules: that in the face of changing conceptions of constitutional principle, the terms of the fundamental conventions can be changed if the new interpretations are not rejected by political events. This is precisely what makes it so difficult to definitively reject an interpretation as unconstitutional, given how they can be altered in the name of principle. As Heard points out, conventions should be ranked based on the importance of the principle they embody.<sup>91</sup> If the public accepts that Harper's Rules really do embody democracy, then it is constitutional to allow the rules to supersede Canada's commitment to parliamentary theory. But, in reality, we see that this discourse is often appropriated for partisan gain. Actors can use the lack of legal enforceability to turn the system to partisan advantage, and can create new interpretations in order to prevent critical morality from denouncing their actions. By focusing the study of conventions on constitutional principle, scholars place the blame for undemocratic action on individuals who violate their own conceptions of principle. What they miss are the deficiencies in a structure that allows actors to create ambiguity surrounding the very rules that make the system democratic. Serious problems emerge when it is not just individuals or scholars who debate the terms of conventions, but political parties taking sides on constitutional issues during the normal course of political debate. If this occurs to fundamental conventions, Bassett's consensus is lost, as is the stability.

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<sup>91</sup> Heard 1989, 68.

To support this argument, I want to examine three interrelated constitutional debates that may have developed to full crises within the right political context. They are the debates surrounding caretaker governments, motions of no confidence, and the power of the Governor General to refuse a Prime Minister's request for dissolution or prorogation. These arguments serve as a lead in to the discussion in the next chapter, where the political circumstances have elevated a simmering constitutional debate into a crisis: whether or not the largest party in the House is the only one with the right to form the government.

## **Canada's Unresolved Constitutional Debates**

### *Caretaker Convention*

In parliamentary systems that are more codified, there is a legal requirement that the government of the day formally resign and remain in office only in a caretaker role (meaning Ministers still hold office but the scope of their powers is limited) when the legislature has been dissolved and an election campaign is underway.<sup>92</sup> This is particularly true in systems that require the formal election of the head of government when the newly elected legislature first convenes. In Canada, there is no such legal requirement. The Prime Minister and Cabinet remain in full executive office throughout an election campaign, and (according to parliamentary theory) are only compelled to resign if it is evident they cannot hold the confidence of the legislature that emerges from the election. This does not mean there are no restrictions on the behaviour of the government during this time.

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<sup>92</sup> The Republic of Ireland is one example. See: Constitution of Ireland, Article 28.11

The existence and strength of a caretaker convention has been the subject of academic debate for decades.<sup>93</sup> It came to prominence during the 1993 election campaign, when the Kim Campbell government sold Terminals 1 and 2 of Toronto Pearson Airport to the private sector. As the Liberals won a majority in that election and formed a new government, they wondered if the previous administration had broken convention by making a serious policy decision during the campaign. The debate involves the question of what legitimacy a government has to make decision when there is no Parliament to scrutinize its actions and there is the potential for a change in government. What John Wilson colloquially terms the “conventional wisdom” on the matter says that the government is bound by convention to limit its actions if, after an election, the government cannot say for certain it will have the support of the new House of Commons.<sup>94</sup> The government should ensure that the day-to-day necessities of administering the state’s affairs are taken care of, but substantive decisions of policy should be left until the make-up of the next legislature is known and the government can assess its chances of continuing to hold confidence. This conception, however, does not have unanimous support. While there is consensus that some type of restriction should be placed on caretaker governments to ensure executive power is exercised in a legitimate fashion, the actual terms of that convention are up for debate, making it a meso-convention.

Andrew Heard draws a distinction between election campaigns that the Prime Minister triggered by requesting dissolution and those that are thrust upon the government because of a defeat on a confidence motion. The logic of responsible government dictates that the government

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<sup>93</sup> John Wilson, “Constitutional Conventions and Election Campaigns: The Status of the Caretaker Convention”, *Canadian Parliamentary Review*, 18:4 (1995), <http://www2.parl.gc.ca/Sites/LOP/Infoparl/english/issue.asp?param=155&art=1057> (Accessed April 10 2010).

<sup>94</sup> *Ibid.*

of the day has the authority to govern as long as it has not lost the confidence of the House or has been firmly repudiated in an election. While the government should be wary of the exercise of power in the latter situation, it still holds legitimacy until the electorate says otherwise in the former.<sup>95</sup> The only restriction is that no decision should be made that the next Parliament could not undo, such as appointments to the Senate or the judiciary.

Wilson challenges this separation on practical grounds by noting that regardless of how the election was triggered, the House is no longer available to perform its democratic functions. Appealing to a well-established practice in the Privy Council's Office that states all requests for policy implementation during election campaigns be carefully evaluated and ensured to be the express wishes of the Prime Minister, Wilson concludes that governments have a moral responsibility to refrain from making any intensive decisions while campaigning. Governments should recognize that without Parliament to hold them accountable, operating outside of a caretaker role would be tantamount to exploiting the legal power the executive power has in parliamentary systems, the same power that responsible government is supposed to keep in check.<sup>96</sup> This is especially true in the modern era of opinion polling, when governments have a sense ahead of time of their re-election chances. A government that can reasonably conclude defeat is on the horizon should be extra cautious in exercising its power.

These are, of course, arguments for critical morality. They attempt to construct a theoretical vision of what the rules should or need to be to keep the practice of government in line with the principles of the constitution. Wilson sees the broader need for democratic accountability creating a larger moral responsibility than Heard would recognize the nature of

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<sup>95</sup> Andrew Heard "Constitutional Conventions and Election Campaigns", *Canadian Parliamentary Review*, 18:3 (1995), <http://www2.parl.gc.ca/Sites/LOP/Infoparl/english/issue.asp?param=154&art=1048> (Accessed April 10 2010).

<sup>96</sup> Wilson 1995.

responsible government requires. But what will be their effect in the political arena? A government's position on decision making during campaigns will depend on numerous contextual factors, and will likely depend on a calculation between how important it is the decision be made soon and if it can weather any potential political backlash. This debate over the convention's terms gives a government some constitutional cover should it choose to act. A government that dissolved the legislature itself can state that it is still in office legitimately and by the principles of responsible government can exercise the Crown's prerogatives, even if polling data shows an undecided electorate and the opposition parties bemoan the undemocratic use of power. Critical morality is unable to determine if this action was wrong; it will only be decided if the opposition parties can mobilize public opinion to their cause.

#### *Confidence of the House*

The so-called "golden rule" of responsible government is that the government of the day must continue to carry the confidence of a majority of the elected members of the House of Commons in order to have the legitimacy to govern.<sup>97</sup> While no one debates this concept, there is considerable debate over what specific motions would constitute a vote of no confidence in the government, as well as what a government must do once it has lost the confidence of the House. Geoffrey Marshall points out the confusion in his tongue-in-cheek take on the convention: "The Government resigns when it loses the confidence of the House of Commons (except when it remains in office)."<sup>98</sup> This ambiguity over terms places the confidence convention in the meso-convention category, despite the fact it is intended to guard a fundamental principle.

One of the main issues with determining exactly how loss of confidence is expressed is that parliamentary practice on the subject has gone through incredible transformations. Sir John

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<sup>97</sup> Russell 2009, 137.

<sup>98</sup> Marshall 1984, 54.

A. Macdonald's first government (1867-1873) experienced numerous defeats in an era when party discipline was much weaker compared to today.<sup>99</sup> These votes were simply ignored with little question of constitutional propriety. Donald Desserud points out that the notion governments must survive every single confidence vote is a relatively new convention. Early British theory and practice viewed convention as more of a continuum, and implied that the government must prove over a series of votes it can push an agenda through the House.<sup>100</sup> In Canada, with its early history with majority government and emerging system of party discipline, institutional scholars like R.M. Dawson started contending that any defeat on any government sponsored motion or bill would constitute a loss of confidence.<sup>101</sup> With the increase in minority government in the 1960s, this all or nothing mentality was loosened through political practice as minority governments began to ignore defeats on bills and motions in order to avoid continuous elections. The Paul Martin minority government lost 40 votes itself before it was finally defeated on the first expressly worded motion of no confidence in Canadian history.<sup>102</sup>

There is no exact definition of what constitutes a vote of no confidence, but Heard does lay out three broad categories that seem to encompass the general principle: any vote the government deems to be a confidence test ahead of time, votes on the broad direction of government policy (Address in Reply, Budget, etc...), and clearly worded opposition motions.<sup>103</sup>

The problem is that many of these concepts can get obscured in the detail of parliamentary

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<sup>99</sup> Eugene Forsey, "Government Defeats in the House of Commons, 1867-1873", *Canadian Journal of Economics and Political Science*, 29:3 (1963), 364-367.

<sup>100</sup> Donald Desserud, "The Confidence Convention under the Canadian Parliamentary System", *Parliamentary Perspectives Series, Canadian Study of Parliament Group*, 7 (2006), [http://www.studyparliament.ca/English/pdf/ongoing/Parliamentary\\_Perspectives\\_7\\_2006\\_Eng.pdf](http://www.studyparliament.ca/English/pdf/ongoing/Parliamentary_Perspectives_7_2006_Eng.pdf) (Accessed April 12 2010).

<sup>101</sup> R. MacGregor Dawson, *The Government of Canada*, (Toronto: University of Toronto Press, 1948), 202.

<sup>102</sup> Andrew Heard, "Just What is a Vote of Confidence? The Curious Case of May 10, 2005", *Canadian Journal of Political Science*, 40:2 (2007), 396.

<sup>103</sup> *Ibid.*, 397-398.

procedure, as was the case on May 10, 2005, when an opposition motion passed that called on the Standing House Committee of Finance to recommend in its next report that the government resign. The opposition parties treated this as a vote of no confidence, as the House had expressed its belief that the government should resign. This view is supported by Heard, who points out it should not matter that it was a procedural motion. The principle is that the elected members of the legislature express their view in the government.<sup>104</sup>

The government took the position that it was not a vote of no confidence, but simply an instruction to a committee. It would not mean no confidence until the committee actually adopted the motion's recommendation and the House itself voted to adopt the report. Desserud supports this by pointing out the continuous nature of confidence, and how even if it did raise questions about whether or not the government could continue to pursue its agenda, it did not definitively answer it in the negative. This motion was not enough of an indication to bind the government into either resigning or requesting dissolution.<sup>105</sup> Both Desserud and Heard agree that a consensus emerged that held the question of confidence should be resolved quickly, as it was when the government survived votes on budgetary matters on May 19.

Theoretical interpretations aside, it is clear what happened from a political perspective. The Liberal government believed it could ignore such a motion and constructed an institutional justification for doing so. When the opposition parties proved willing and able to prevent Parliament from conducting any business over the next few days, the Liberals acknowledged the issue had to be resolved, but held their ground and forced the opposition parties to accept waiting until the budgetary motions came to a vote. They were able to survive by negotiating a compromise with the NDP and inducing Conservative MP Belinda Stronach to join the Cabinet.

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<sup>104</sup> Ibid., 410.

<sup>105</sup> Desserud 2006.

There is very little here that demonstrates a respect for the principle of confidence; it was rather a scene of political posturing by both sides in an effort to achieve a desired outcome.

What does this mean for critical morality? The fact that politicians admit the government has to maintain the confidence of the House has little binding power if the actual conditions over how such confidence is lost are disputed. Desserud acknowledges the need for an independent, neutral body to determine when confidence is lost, as it is extremely unlikely the Governor General will step in and exercise the reserve powers.<sup>106</sup> So while Norman Ward may be mistaken when he says that “it is not easy to generalize about what a vote of confidence really is, beyond what a government may say it is,”<sup>107</sup> he is not off by much. A better assessment may be that a vote of no confidence is one that the government cannot muster enough political capital to ignore. The lack of consensus on the terms of critical morality for confidence represents a significant unresolved issue in the Canadian system. Gary Levy has recently noted that the principle has been abused by political leaders for sometime, including Stephen Harper declaring many votes to be confidence measures when they otherwise would not be in an attempt to intimidate the opposition parties away from defeating them.<sup>108</sup> If the confidence of the House is supposed to be the foundation for democratic accountability, it will need some adjustment before it can serve that role adequately.

### *The Powers of Dissolution and Prorogation*

The role and powers of the Governor General are incredibly contentious and have inspired debate in academic circles and the general public since the King-Byng Affair. As is well

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<sup>106</sup> Ibid.

<sup>107</sup> Norman Ward, Dawson's *The Government of Canada, Sixth Edition*, (Toronto: University of Toronto Press, 1987), 145.

<sup>108</sup> Gary Levy, “A Crisis not Made in a Day”, *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009), 19.

known, the office of the Governor General is granted an immense amount of legal power by the Letters Patent and the Constitution Act, 1867. Perhaps no other component piece of the system is as governed by convention as the relationship between the Governor General, the Prime Minister, and Parliament — to the extent that any scenario involving the Governor General generates controversy. While no one seriously argues for the Governor General’s prerogative to refuse Royal Assent to legislation, for instance, questions remain over requests from the Prime Minister to dissolve or prorogue Parliament. Alderman and Cross point to the confusion when they say, “the circumstances in which the sovereign would be prepared to imperil his or her impartial position by refusing the advice of the Prime Minister are so speculative as hardly to warrant modifying the general proposition that dissolution is at the discretion of the Prime Minister.”<sup>109</sup> With the advent of consecutive minority governments, however, it is most surely warranted. The potential for crisis inspired Eugene Forsey to conduct a study of dissolution precedents in Canada and the rest of the Commonwealth in an effort to pin down exactly what the conventions are.<sup>110</sup> His study, while influential, failed to end the debate.

Marshall notes that opinion regarding the powers of the Governor General (Marshall writes about the Queen, but the connections are obvious) tend to fall on a spectrum. At one end, there is the opinion that the Governor General can act as a steward not just of the Constitution but of the nation’s affairs, and if the he or she believes the government is taking a perilous course of action, he or she can dismiss the government and either invite a new Ministry that might maintain confidence or dissolve the legislature and ask the electorate’s opinion. The other extreme, which Marshall terms the “automatic theory,” holds that the Governor General is bound

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<sup>109</sup> R.K. Alderman and J.A. Cross, “The Prime Minister and the Decision to Dissolve”, *Parliamentary Affairs*, 28:4 (1975), 387.

<sup>110</sup> Eugene Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, (Toronto: Oxford University Press, 1943).

by convention to follow the will of the sitting Prime Minister regardless of the advice. The Governor General is only a ceremonial relic of the system's British history, and since the Prime Minister is responsible to the House and the electorate for the exercise of the reserve powers, the Governor General should not hinder him or her in their use.<sup>111</sup>

While these two conceptions do not find expression in mainstream scholarly thought, versions of these views do. Heard contends that a fundamental convention of the Constitution is that the Governor General must act on all *constitutionally valid* advice. If the Prime Minister's advice would breach other conventions or seems to be in opposition to constitutional principle, the Governor General is free to show agency and refuse the request.<sup>112</sup> While there is an immense body of British scholarship in support of this idea,<sup>113</sup> there does seem to be a bit of contention around it. Other scholars, like Franks,<sup>114</sup> Desserud,<sup>115</sup> and British scholar Rodney Brazier<sup>116</sup> contend that only in extreme circumstances should the Governor General refuse advice. Because of the position's unelected nature, the Governor General does not have a "political mandate"<sup>117</sup> and should act only if the alternative could produce dire consequences, regardless of the strict constitutionality of the situation. The Prime Minister will have to take responsibility and answer to the electorate for his or her use of the Royal Prerogative. Of course, what exactly is meant by extreme circumstances is undefined. There is also the issue of whether

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<sup>111</sup> Marshall 1984, 19-21.

<sup>112</sup> Heard 2009, 52.

<sup>113</sup> For example see: Harold J. Laski, *Parliamentary Government in England* (London: Henderson and Spalding, 1948) and Vernon Bogdanor, *The Monarchy and the Constitution* (London: Clarendon Press, 1997).

<sup>114</sup> Franks 2009, 34.

<sup>115</sup> Desserud 2009, 41.

<sup>116</sup> Rodney Brazier, "The Monarchy" in *The British Constitution in the Twentieth Century*, ed. Vernon Bogdanor, (Oxford: Oxford University Press, 2007), 71.

<sup>117</sup> Desserud 2009, 48.

a loss of confidence in the government frees the Governor General from following advice, but confusion surrounding what constitutes confidence complicates that discussion.<sup>118</sup>

Many of the arguments in favour of the Governor General taking an active role in the system stress the need for a neutral, constitutional arbitrator to limit abuses of executive power by the Prime Minister. An incumbent Prime Minister who can no longer command the confidence of the House could simply call continuous elections if the automatic theory is accepted. Expanding the role of the Governor General would appear to keep the office in line with the principle of democracy. Indeed, many of the contributors to *Parliamentary Democracy in Crisis* propose an expansion of the role of the Governor General as a solution to the problems exposed by the crisis of 2008.<sup>119</sup> The problem, as I noted in chapter one, is that many of these arguments appear to confuse a discussion between what the constitutional conventions *are*, and what they *should be*. Forsey notes the difference between reality and desire, “If the election of 1926 really did destroy the reserve power to refuse dissolution in Canada (which I deny), then we had better consider reviving it, if necessary by amending the British North America Act.”<sup>120</sup> While we can come up with beneficial reasons to have an active Governor General, that has no binding force when powerful Prime Ministers can impose their will and shape the conventions to their own advantage.<sup>121</sup> The public does not easily accept the idea that an active Governor General could improve democracy, and of course, a Prime Minister can use the unelected nature

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<sup>118</sup> Marshall 1984, 41.

<sup>119</sup> See Heard 2009, Leclair & Gaudreault-DesBiens, Lorne Sossin and Adam Dodek, “When Silence Isn’t Golden: Constitutional Conventions, Constitutional Culture and the Governor General”, and Brian Slattery, “Why the Governor General Matters”, *Parliamentary Democracy in Crisis*, *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin, (Toronto: University of Toronto Press, 2009).

<sup>120</sup> Eugene Forsey, “The Problem of ‘Minority’ Government in Canada”, *Canadian Journal of Economics and Political Science*, 30:1 (1964), 8.

<sup>121</sup> Desserud 2009, 48.

of the office to rally public opinion against the Governor General if he or she refuses a request, much like Mackenzie King did.

The debate between the two positions on the powers of the Governor General found expression through the crisis of 2008 and the discussion of whether or not Governor General Michaëlle Jean was right in granting prorogation to Stephen Harper. Heard contends that as Harper was breaking convention by not allowing the House to quickly resolve issues of confidence, Jean should have used her prerogative power to protect constitutional principle and say no to Harper.<sup>122</sup> But Desserud, stressing the difference between the finality of dissolution and the temporary nature of prorogation, does not believe that the circumstances were dire enough to warrant a refusal. Prorogation would be a test to see if the proposed coalition could stick together and defend itself to public criticism for a month, and if it could survive it would be able to proceed with its plan in January 2009.<sup>123</sup> Franks points out the unstable nature of the coalition and Liberal leader Stéphane Dion's lack of popularity as factors that should have made the Governor General question whether the proposed new government was strong enough to validate the refusal.<sup>124</sup> According to this point of view, the fact that the coalition did break apart over the prorogation period and the Harper government subsequently survived confidence votes on its budget was proof enough that prorogation was the correct course of action.

Regardless of these opinions, the lack of consensus emerging from the general political community meant that there was no critical morality to bind the Prime Minister or the Governor General. The political specifics as identified by Franks were the greatest factor influencing the result of the situation, irrespective of the constitutional positions of the participants. The problem

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<sup>122</sup> Heard 2009, 60.

<sup>123</sup> Desserud 2009, 46.

<sup>124</sup> Franks 2009, 37-39.

of course is that if constitutional interpretations are not repudiated by the course of political events, they may be seen to be legitimate positions. The hypothetical argument I offered in chapter one is a viable interpretation. It follows that political actors can manipulate the process to their advantage if they can propose a constitutional interpretation with some level of support. Both Heard and Desserud acknowledge that if Jean had denied Harper, it is likely Harper would have continued to extol the democratic right of his government and assaulted the office of the Governor General around some conception of the automatic theory, deepening the crisis.<sup>125</sup> All because, by the very nature of the conventions governing the process, there was no consensus present to firmly denounce Harper's constitutional view and organize political pressure against him or mobilize an effective institutional response. To many people, his actions were undemocratic. But because it was not a high level of consensus, it is not clear if his view is unconstitutional. Many of these issues are affected by how a government claims a mandate, the main focus of this thesis.

## **Conclusion**

This chapter explored the problems of viewing constitutional conventions as a moral code identified and forced upon political actors by external observers. Given that nothing can change political practice being the final authority on conventions, the benefit of the critical morality approach is limited to contributing to the discourse reasons why an action may not be desirable. It stops short of definitively stating what the conventions are. As long as an actor can claim that his or her action is done in the name of democracy, and can find some support for that claim, all criticisms are just opinions. Those opinions only bind if they can mobilize political forces against the actor. Consensus is easy to disrupt in the right context.

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<sup>125</sup> Heard 2009, 57; Desserud 2009, 47.

The previous two chapters each had one major criticism of the scholarly reaction to Harper's Rules. In the introduction, the critique centred on the tendency to assume the history of political practice has been one of deference to classical parliamentary theory, and that Harper's Rules are unquestionably undemocratic. Historical evidence disputes these claims. This chapter's criticism regarded scholars often assuming a consensus on how perceived conventions defend democracy, when that consensus is absent in reality. It is time now to centre the discussion back onto democratic mandates and examine how both criticisms ring true when we explore Canada's history with minority government. This examination aims to prove that while the House's prerogative to determine the government is considered a fundamental convention by most scholars, it has operated more like an infra-convention in political practice, ready to cause crisis in the right circumstances.

## Chapter Three

### Canada's History with Minority Government Formation

Following the events of 2008, many scholars (like those contributing to *Parliamentary Democracy in Crisis*) opposed a number of Stephen Harper's claims about the proper workings of our system. Of particular distaste was his claim of a mandate, insisting that he and the Conservative Party had been elected by the people and that it was undemocratic for the Liberal-NDP coalition to take power without an election. Aside from logical issues, such as the fact that the Conservative Party had neither a majority of votes in the last election nor a majority of seats in the House of Commons, scholars derided his misleading characterization of parliamentary elections. They stressed that the only position to which Stephen Harper was elected was MP for Calgary Southwest, that in our elections we only elect a legislature, and that Harper only became Prime Minister through his ability to form a government that could command the confidence of the House, not from any electoral mandate. Indeed, Peter Russell, referencing how Israel once experimented with directly electing the Prime Minister, says "if Harper is interested in having Canada try Israel's aborted experiment, he should go about building support for the appropriate constitutional amendments. In the meantime, he should not mislead Canadians into believing that Canada already has a system of directly electing its prime minister."<sup>126</sup> Russell's thoughts are reflective of the general scholarly sentiment.

This argument is once again a form of critical morality. Relying on the principles of democracy and responsible government that the Canadian constitution is supposed to embody, these scholars are declaring Harper's Rules to be unconstitutional because they pose too much of a deviation from the accountability measures imbedded within classical parliamentary theory. In

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<sup>126</sup> Russell 2009, 142.

the previous two chapters, some potential flaws in the critical morality approach to constitutional conventions were exposed, particularly the need for widespread consensus on a convention's terms and reasons in order for it to truly bind political actors. In the absence of consensus, particularly when a debate emerges over the best way to embody a constitutional principle, it becomes impossible to definitively state one interpretation is right or wrong. A lack of consensus relegates all arguments to a position of only being able to say what the conventions *should be* in terms of a functional conception of what is desirable. Without the strong binding force that emerges from consensus, political actors are free to create constitutional interpretations that benefit their position as long as they find some support in the general political community. I will now demonstrate the existence of such a lack of consensus in practice.

This chapter will investigate Canada's history with government transition during periods of minority government. Its purpose is to determine if there is any evidence to suggest that a lack of consensus has existed for some time regarding how a government obtains its mandate, or if Harper's Rules really do pose a full deviation from the "well-established practices of our system of parliamentary government."<sup>127</sup> Using previous scholarly analysis, transcripts from Parliamentary debates, and newspaper reports from the time periods in question, the details of each post-election situation will be examined to determine if any version of Harper's Rules may have been affecting the political parties' approach to government formation. Indeed, Edward McWhinney argues that our minority government precedents have created a convention that the largest party in the House should at least have the first attempt at forming a government.<sup>128</sup> And Ian Stewart, although stressing that the constitutionality of such a norm is debatable, argues the

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<sup>127</sup> Ibid., 141.

<sup>128</sup> McWhinney, 77.

idea that the largest party in the House should form the government has influenced political actors' vision of appropriate options for some time.<sup>129</sup>

Before getting to the heart of the matter, I wish to pre-emptively respond to a potential criticism, namely the problems with using precedents to determine conventions as explored by Heard and others. Precedents do not cover situations that have no counterpart in historical practice, and a precedent may often be one of an actor getting a convention wrong. This would be a valid criticism if the goal was to demonstrate definitively that constitutional convention allows the largest party in the House a right to govern. It is not. Rather, the goal is to demonstrate that a lack of consensus on what it means for a government to gain a mandate has existed for some time. It is not the events themselves, but the opinions of the actors involved in them, that are important. In reality, no one conception of how a mandate is gained can be said to be the correct one. When it is demonstrated that classical parliamentary theorists do not have the support of the consensus they often claim, and that their claims of the continuity of tradition are faulty, we see that their swift denunciations of Harper's rules are only functional arguments based on their own conceptions of how parliamentary theory provides for democratic and accountable government — conceptions that are problematic themselves. They can only say that Harper's Rules are undesirable, not unconstitutional, a structural flaw that allows political actors to alter the scope of constitutionally acceptable behaviour for partisan gain.

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<sup>129</sup> Ian Stewart, "Of Customs and Coalitions: the Formation of Canadian Federal Parliamentary Alliances", *Canadian Journal of Political Science*, 13:3 (1980), 454.

## Canada's (unofficial) 1<sup>st</sup> Minority Government

*2<sup>nd</sup> Parliament (1873): LIB-CON: 99, LIB: 95, INDEPENDENT: 6*<sup>130</sup>

Canada's 2<sup>nd</sup> Parliament is usually left off the list of minority governments for two reasons: First, enough of the independent MPs ended up caucusing with John A. Macdonald's Liberal-Conservatives to give him a working majority. Second, this occurred in an age before extreme party discipline, wherein Macdonald was often able to woo enough Liberals to support his bills, and on a few occasions, enough members of his own party joined with the Liberals to defeat government-sponsored motions. This had even happened a few times in the 1<sup>st</sup> Parliament, where Macdonald held a substantial majority.<sup>131</sup> Strict ideas about the confidence of the House had not yet become part of Parliamentary practice; parties were more like "loose agglomerations" than cohesive units.<sup>132</sup> I briefly include it here for the unique example of government transition that it provides, as it emphasizes how much the concept of appropriate transition has evolved in Canada.

In the autumn of 1873, Macdonald's government found itself embroiled in the Pacific Scandal, when the Liberal-Conservative Party was found to have accepted bribes in exchange for government contracts to build the Canadian Pacific Railway. On November 5<sup>th</sup>, when it appeared that enough Lib-Con backbenchers would side with a Liberal motion to bring down the government, Macdonald did something unthinkable today: he announced his resignation before the vote was taken, and that Liberal Leader Alexander Mackenzie would be called to form a

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<sup>130</sup> Please note: all party standings reflect actual election results and do not take into account changes in regards to death, resignation, by-elections or floor-crossing that occur over the life of a Parliament.

<sup>131</sup> Forsey 1963, 364-367.

<sup>132</sup> Dennis Pilon, "Explaining Voter System Reform in Canada, 1874-1960", *Journal of Canadian Studies*, 40:3 (2006), 138.

government.<sup>133</sup> The House had not yet passed no confidence in his government, and if it had, the option to request dissolution was available. Of note here is that many parliamentary theorists argue that governments, having been defeated in the House, have the right to appeal to the electorate one time before resigning if there is no other government capable of carrying on.<sup>134</sup> Mackenzie had not received a mandate from either the electorate or the House, but had still taken office on the understanding that this was in preparation for an election. On November 7<sup>th</sup>, the same day Mackenzie was sworn into office, the House was prorogued.<sup>135</sup> The 2<sup>nd</sup> Parliament would not meet again, and was dissolved in preparation for the January 1874 election, which returned the first Liberal majority government.

### **Mackenzie King, Meighen, and “the Crisis”**

*14<sup>th</sup> Parliament (1922-1925): LIB: 116 PRO: 64 CON: 50 LABOUR: 3 IND: 2*

Arthur Meighen became Prime Minister on July 10<sup>th</sup>, 1920, after securing the support of the Unionist government’s caucus upon the retirement of Sir Robert Borden.<sup>136</sup> On the day before he took office, *The Globe* noted that his government would be one “not of the people’s will” as he was not promising an immediate election.<sup>137</sup> This tag would follow him as he remained in office for over a year, finally scheduling an election for December 6<sup>th</sup>, 1921. That election would be a crushing defeat for Meighen. Despite running under the party name National Liberal and Conservative Party in an attempt to keep the wartime Unionist coalition together,

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<sup>133</sup> “Defeat of the Government”, *The Globe*, November 6 1873, <http://heritage.theglobeandmail.com> (Accessed on May 23 2010).

<sup>134</sup> B.S. Markesinis, *The Theory and Practice of Dissolution of Parliament: a Comparative Study with Special Reference to the United Kingdom and Greek Experience*, (Cambridge: Cambridge University Press, 1972).

<sup>135</sup> “The New Ministry” *The Globe*, November 8 1873, <http://heritage.theglobeandmail.com> (Accessed on May 27 2010).

<sup>136</sup> John English, *Arthur Meighen*, (Don Mills: Fitzhenry and Whiteside Ltd., 1977), 28.

<sup>137</sup> “Humpty Dumpty Ministry Clings to Ledge of Wall, Trying to Put off Tumble”, *The Globe*, July 9 1920, <http://heritage.theglobeandmail.com> (Accessed May 27 2010).

Meighen's party was reduced to third party standing and he lost his own seat in Portage La Prairie. On the day after the election, *The Globe* portrayed it as the defeat of a man who "sought to govern Canada without the consent of the electors of the Dominion," declared that this election would bring the return of "constitutional government," and went even so far as to say that "autocracy crumbles."<sup>138</sup> While *The Globe* may be guilty of exaggerating voter perception of the Meighen government, this is proof that electoral democratic notions of a mandate were present in public discourse as far back as 1921.

With such a clear defeat, Meighen knew there was no hope of carrying on and announced he would resign as soon as Liberal leader William Lyon Mackenzie King was capable of forming a government. That Mackenzie King would be able to do so was not in doubt, as the Liberals had finished only two seats shy of a majority. Mackenzie King even invited Progressive Party leader Thomas Crerar to join his Cabinet, but Crerar refused, citing the wish of the Progressives to retain an independent identity.<sup>139</sup> While the Progressives were the second largest party, they refused to accept the label of Official Opposition because of their opposition to the traditional practices of parliamentary government. This would be the last time before 1993 that a party other than the Liberals or Conservatives made up the second largest faction in the House. Nevertheless, Mackenzie King had no trouble pushing an agenda through the House, as he was often able to secure the support of some Progressive Members, whose party did not adhere to any type of strict party discipline. Over the course of the 14<sup>th</sup> Parliament, King's Liberals went back and forth across the majority line due to by-election victories and resignations. This allowed the 14<sup>th</sup> Parliament to last until 1925, when Mackenzie King requested dissolution.

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<sup>138</sup> "Liberals have Clear Majority in New Commons", *The Globe*, December 7 1921, <http://heritage.theglobeandmail.com> (Accessed May 27 2010).

<sup>139</sup> R. MacGregor Dawson, *William Lyon Mackenzie King: A Political Biography*, (Toronto: University of Toronto Press, 1958), 363.

*15<sup>th</sup> Parliament (1926): CON: 116 LIB: 99 PRO: 24 LABOUR: 3 IND: 3*

The King-Byng affair has been referred to as a “mythic event”<sup>140</sup> in Canadian history, as the narrative involves themes of power, struggle, and emerging Canadian independence. The popular issue of British involvement in Canadian affairs aside, the events have always been fascinating for constitutional scholars due to the numerous questions that surround the proper exercise of the powers of the Crown. Issues such as the constitutionality of Mackenzie King’s request for dissolution have been discussed in depth by scholars for decades (particularly by Eugene Forsey<sup>141</sup>), and I have already commented briefly on these constitutional issues in chapter two. I will say little more on them unless it is necessary when discussing the main point, except that those debates are other examples of the weakness of critical morality. This examination of the events will focus squarely on the question of who was perceived to have a mandate to govern, and how the ambiguity surrounding that idea contributed to the crisis.

By all accounts, Mackenzie King was surprised by the results of the October 29<sup>th</sup>, 1925, election. He had been confident that the Liberals would be returned with a majority. Instead, they found themselves reduced to the second party in Parliament and Mackenzie King lost his seat in North York.<sup>142</sup> When it became clear that Meighen and the Conservatives would make up the largest bloc in the House but that no one would command a majority, there was incredible speculation on what would happen next. Meighen, for his part, remained quiet. He said he would make no comment until Mackenzie King had decided on a course of action and did not publicly

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<sup>140</sup> Peter Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy*, (Canada: Edmond Montgomery Press, 2008), 21.

<sup>141</sup> Forsey 1943.

<sup>142</sup> H. Blair Neatby, *William Lyon Mackenzie King: The Lonely Heights*, (Toronto: University of Toronto Press, 1963), 74.

call for the government to resign. *The Globe* reported that “the best constitutional authorities consulted yesterday conceded that the result did not enforce Premier King to resign, and that he would be justified in meeting the new Parliament and letting the assembled representatives decide the Government.”<sup>143</sup> Mackenzie King himself stated that he would make no decision until he discussed the matter with Governor General Byng, which he did multiple times over the next few days.

These meetings with Byng set the grounds for the crisis that would emerge the next year. In these meetings, Mackenzie King laid out his case. He believed that there were a majority of voters in Canada who supported the low-tariff economic policy that the Liberals and Progressives agreed upon, and for that reason the pro-tariff Meighen would be unable to sustain a government in the House. If, when Parliament convened, King was unable to command a majority, that would be proof no one could and he might then request dissolution.<sup>144</sup> Byng’s famed view was that by securing the largest amount of seats, the Conservatives had won the election and the “dignified” course of action would be for Mackenzie King to resign. This is an important point to emphasize, because scholars such as Forsey have praised Byng’s later refusal to dissolve as a defence of Parliament’s right to decide the government. What we must remember is his decision was influenced by his own perception that Meighen had won the election, a very electoral democratic approach to the problem. Mackenzie King admitted to considering resigning but privately noted that he would do so only so that when Meighen was subsequently defeated in the House, he himself could return to office and govern without accusations of impropriety.<sup>145</sup>

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<sup>143</sup> “Conservatives Secure Largest Group in Parliament”, *The Globe*, October 30 1921, <http://heritage.theglobeandmail.com> (Accessed May 27 2010).

<sup>144</sup> Neatby, 79.

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

However, Mackenzie King decided to remain in office and attempt to win the support of the Progressives.<sup>146</sup>

J.E. Esbrey notes the peculiarities in Mackenzie King's personality, namely his tendency to interpret events as being in support of his own undertakings. His belief that the election was not a repudiation of himself but of Meighen, and that to abandon the Liberal Party and the people of Canada during this time of challenge would be to avoid his responsibilities, gave his conscience moral cover for actions others have perceived to be crass political opportunism.<sup>147</sup>

Mackenzie King believed that the Progressives, whose numbers had been reduced to one third of what they were in 1921, would be desperate to avoid another election and would continue to support the Liberals in the House. He also wanted to stay in office so that he could propose popular policies that would give the Liberals an advantage in the election campaign he assumed would be coming within a year, as well as keep control over the election machinery.<sup>148</sup> Implicit in this was his belief that he would be entitled to another dissolution if his government was defeated. Byng, of course, rejected this view, and by all accounts told Mackenzie King that he would not be granted dissolution until Meighen had a chance to govern.<sup>149</sup> Byng believed Mackenzie King was not looking out for the best interests of Canada, and was disappointed in his decision to stay on.

We see here that the basis for the King-Byng Affair is found in the early disagreement the two had over how a government gains a mandate. Byng's perception that Meighen had won the election led to his disapproval of Mackenzie King exploiting the political and constitutional

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<sup>146</sup> Ibid., 82.

<sup>147</sup> J.E. Esbrey, "Personality and Politics: A New Look at the King-Byng Dispute", *Canadian Journal of Political Science*, 6:1 (1973), 47.

<sup>148</sup> Neatby, 82.

<sup>149</sup> Jeffery Williams, *Byng of Vimy: General and Governor-General*, (London: Leo Cooper, 1983), 315.

options available to him. After Mackenzie King announced he would test his luck with Parliament, Meighen went on the offensive. The following are excerpts from the statement Meighen released to the press on November 5<sup>th</sup>:

The Premier's statement, stripped of its sophistry, is merely an announcement of his determination to 'hang on' in defiance of a heavily adverse verdict from the people of Canada...Mr. King is now merely the leader of a minority group. There has never been a case in Canada...where the leader of a minority group has waited for the calling of Parliament or has refused to resign immediately once the will of the people be known...Mr. [E.C.] Drury, in 1923 announced and announced properly that if another party were returned larger than his own...it would be his constitutional duty to resign in favour of the leader of that party...The Premier himself and eight of his Ministers have been rejected. The popular majority against his government is overwhelming. To cling to power under such circumstances is usurpation of power and contempt for the popular will.<sup>150</sup>

On top of this, Meighen called Mackenzie King's right to govern into question by noting that the Progressives and their leader Robert Forke had not promised to support the Liberals. Many Progressive candidates had campaigned heavily against Liberal policies during the election, and this should be reason enough for Mackenzie King to resign. This means that Meighen attacked Mackenzie King's right to govern on both electoral and parliamentary democratic grounds. Mackenzie King responded by issuing statements that explained how allowing Parliament to decide was the only way to determine the will of the people, and he would accept its verdict.<sup>151</sup> The Liberals went to the House and won support from the Progressives when the new Parliament convened in January 1926, although by incredibly slim margins. The first no confidence motion proposed by Meighen was phrased with electoral democratic terminology, but also claimed that what Mackenzie King was doing was unconstitutional:

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<sup>150</sup> "Usurpation of Power is Charged by Meighen Against King Cabinet", *The Globe*, November 6 1925, <http://heritage.theglobeandmail.com> (Accessed May 27 2010).

<sup>151</sup> Neatby, 86.

In the late general election the candidates of his Excellency's then advisors, at whose instance the appeal to the country was made, were defeated in a large majority of the constituencies... That the party represented in the last Parliament by his Majesty's Opposition secured in the said election by far the largest support in the popular vote and has substantially the largest number of any party in the present House of Commons. That those who now assume to his Excellency's advisors have among them no Prime Minister with a seat in either House of Parliament; and under such circumstances are not competent to act as, or to become... the Government, or to address Parliament through his Excellency, and their attempted continuance in office is a violation of the principles and practice of British constitutional government.<sup>152</sup>

Having been vindicated in his attempt to stay in power, Mackenzie King announced that his powers as Prime Minister were not limited in any way by the type of mandate his government carried.<sup>153</sup> This brings us to the true crisis that occurred that summer.

As mentioned, most academic discussions surrounding the King-Byng Affair revolve around whether or not Mackenzie King's request for dissolution was unconstitutional. I will not engage this question, as there are many scholarly assessments of the arguments for and against, except to place it firmly in the debate around government mandates and what can be done with them. This debate is at the centre of the events when, in June 1926, Mackenzie King's government was about to lose the confidence of the House. His legislative alliance with the Progressives dissolved when evidence was uncovered of bribery and smuggling in the Department of Customs and Excise. With a no-confidence motion tabled, Mackenzie King sought to pre-empt the vote and request dissolution from Byng. He of course refused, citing his belief that Meighen should be given an opportunity to carry on the business of the House. To Byng, Meighen, by virtue of leading the largest bloc of seats, had a right to an opportunity.<sup>154</sup>

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<sup>152</sup> "The Meighen Amendment", *The Globe*, January 15 1926, <http://heritage.theglobeandmail.com> (Accessed May 27 2010)

<sup>153</sup> "Meighen Fails By 3 Votes to Vanquish Government", *The Globe and Mail*, January 15 1926, <http://heritage.theglobeandmail.com> (Accessed May 27 2010).

<sup>154</sup> Williams, 318.

Mackenzie King saw things differently and would later deny that he had ever agreed to resign before advising dissolution.<sup>155</sup>

Mackenzie King's stated interpretation, as expressed through his personal correspondence with Byng, was that while his own government could no longer carry on, he could not imagine any scenario in which Meighen could do the same.<sup>156</sup> As such, he was not able to formally advise Byng to call upon Meighen. Without such formal advice, the Governor General could not independently call on Meighen, thus making the House unworkable and leaving dissolution as the only option. Eugene Forsey is incredibly critical of this view. It essentially gives the Prime Minister the right to name his or her successor and is one way of instrumentalizing the Governor General.<sup>157</sup> Byng disagreed with Mackenzie King, and responded by saying the House should determine the viability of the Meighen government. Mackenzie King resigned following the refusal, and Meighen was sworn back into office on June 29<sup>th</sup>. Despite early indications that the Progressives would at least allow the Conservatives to finish the business of that session of Parliament (critical budget bills had not yet been passed), a procedural error, coupled with Mackenzie King assaulting the constitutionality of the government, saw Meighen lose a supply motion by one vote.<sup>158</sup> This seemed to vindicate King's position on Meighen's viability. Meighen then requested dissolution from Byng (itself a contentious act whose constitutionality has been debated), which was granted.

How does Mackenzie King's position contribute to the debate surrounding government mandates? Despite the fact that he used options available under classical parliamentary theory to

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<sup>155</sup> Canada, *House of Commons Debates*, 1926 pp. 438-439.

<sup>156</sup> Lord Byng to Mackenzie King, June 29 1926, cited in *The King-Byng Affair, 1926*, ed. Roger Graham, (Toronto: The Copp Clark Publishing Company, 1967).

<sup>157</sup> Eugene Forsey, "Mr. King and Parliamentary Government", *The Canadian Journal of Economics and Political Science*, 17: 4 (1952), 452.

<sup>158</sup> English, 44.

stay in power, his theory has a particular electoral democratic element to it. In a House of Commons speech in 1923, Mackenzie King said:

the practice has prevailed that a ministry must be supported by the people's representatives or else go back to the people... The idea that the ministry should be in any way restricted in its appeal to the people at any time is the very antithesis of democracy. The whole effort manifest in the evolution of government has been to bring the ministry to the point where, if for any reason whatever it ceases to hold the confidence of parliament, it will be obliged to go to the people.<sup>159</sup>

Aside from what it means in terms of a government's right to dissolve Parliament, this doctrine says that a Ministry wins support from the people, not from the House. In Mackenzie King's view, his government was not defeated in the 1925 election. He continued to govern, and in 1926, "when Parliament ceased to be in a position to make a satisfactory decision"<sup>160</sup> about his right to govern, he had the right to ask the people again. Mackenzie King's theory boiled down to the idea that unless another party was given a clear majority over his, he had a right to continuously consult both the House and the electorate on his right to govern without resigning. As Forsey points out, Mackenzie King's various theories over the course of his run in Canadian politics were often incoherent and alternated between popular and parliamentary sources of authority whenever they suited him.<sup>161</sup> While Mackenzie King's conception of parliamentary government may indeed be undesirable and not in line with the accountability measures of responsible government, many scholars have pointed out that his subsequent electoral victory allowed his actions to avoid repudiation. The precedents derived from these actions have affected Canadian parliamentary practice to an immeasurable degree.<sup>162</sup> The precedents set by Mackenzie

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<sup>159</sup> Canada, House of Commons Debates, 1923, pp. 217, 220-21

<sup>160</sup> R. MacGregor Dawson, *Constitutional Issues in Canada*, (Oxford University Press: New York, 1933), 88-89.

<sup>161</sup> Forsey 1952, 464.

<sup>162</sup> *Ibid*, 451.

King are the source for many of the constitutional debates that weaken the ability of critical morality to bind political actors.

*16<sup>th</sup> Parliament (1926-1930): LIB: 117 CON: 91 PRO: 11 UFA: 11 LIB-PRO: 8 IND/OTHER: 8*

Very little needs to be said on the mandate issue of the 16<sup>th</sup> Parliament. Despite being a minority Parliament, the numbers and political context ensured that only Mackenzie King would be capable of forming a government. In the 1926 campaign, Mackenzie King successfully deflected attention away from the customs scandal and focused it on the constitutional crisis. He claimed that Meighen had challenged “the supremacy of Parliament, the rights, the dignities, [and] the existence of Parliament”<sup>163</sup> by taking office when it was clear he would be unable to carry on. As well, despite the fact that Mackenzie King had been the one who asked Byng to seek advice from the Dominion Office (which Byng refused to do), he characterized Byng’s refusal to dissolve as an undemocratic interference in Canadian affairs by the British.<sup>164</sup> This characterization would be highly influential on the subsequent negotiations to change the nature of Dominion status. Meighen once again lost his own seat in Parliament, and with so many small parties in the House, the political manoeuvring necessary to win support in the House would have been next to impossible. Mackenzie King’s Liberals, on the other hand, were only a few seats short of a majority, and could count on the support of the Liberal-Progressives to put them over the top. The Liberal-Progressives were a breakaway group of Progressives who agreed to caucus with the Liberals in exchange for the Liberals not running candidates in their ridings.<sup>165</sup> Meighen announced his intention to resign two days after the election, and Mackenzie King once

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<sup>163</sup> Dawson, 89-90

<sup>164</sup> Williams, 321.

<sup>165</sup> Neatby, 172.

again became Prime Minister. This working majority allowed the 16<sup>th</sup> Parliament to last until it was dissolved in 1930.

## **Diefenbaker and Pearson**

*23<sup>rd</sup> Parliament (1957-1958): PC: 112 LIB: 105 CCF: 25 SC: 19 OTHER: 4*

Once again, the Liberals had gone into an election campaign expecting a victory. Indeed, the general feeling from the Liberal camp was that newly elected PC leader John Diefenbaker was no match for Prime Minister Louis St. Laurent, who would be returned comfortably in the 1957 election.<sup>166</sup> But as the results of the June 10<sup>th</sup> election came in, it became clear that Diefenbaker's PCs had squeaked out a narrow plurality over the Liberals. The media quickly recalled the precedent of the King-Byng Affair, and it was acknowledged that St. Laurent did have the choice to face the new House.<sup>167</sup> It seemed, however, that the prospect never appealed to St. Laurent. On election night, when it was obvious that there would be no majority but the Liberals might still retain a plurality, St. Laurent was said to have remarked, "I hope they get at least one more seat than we do so we can get out of this appalling situation."<sup>168</sup>

Nevertheless, St. Laurent refused to make a public announcement until he had a chance to speak with his cabinet and with Diefenbaker. Diefenbaker responded by saying the election could only be interpreted as a rejection of the Liberal government.<sup>169</sup> Before St. Laurent and Diefenbaker could meet, Social Credit leader Solon Low announced the party would support the PCs when Parliament met, giving Diefenbaker the stated support of just shy of a majority of

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<sup>166</sup> Peter Stursberg, *Diefenbaker: Leadership Gains 1956-62*, (Toronto: University of Toronto Press, 1975), 58.

<sup>167</sup> "St. Laurent Confronted by 2 Possible Choices", *The Globe and Mail*, June 12 1957, <http://heritage.theglobeandmail.com> (Accessed May 28 2010).

<sup>168</sup> Stursberg, 59.

<sup>169</sup> John G. Diefenbaker, *One Canada: Memoirs of the Right Honourable John G. Diefenbaker*, Toronto: MacMillan of Canada, 1976, 2.

MPs.<sup>170</sup> St. Laurent decided to wait until the delayed armed services vote came in to see if the results might change. The Liberals ended up picking up one more seat, but the context had not changed. St. Laurent announced his resignation on June 17<sup>th</sup>, and Diefenbaker was called to form a government.

In 1992, when St. Laurent's Cabinet papers were unsealed, it was revealed that his decision to resign was heavily influenced by a radio interview given by James Mallory, in which Mallory said that an attempt by St. Laurent to stay on would generate a constitutional crisis.<sup>171</sup> It is clear from Mallory's writings that he believed that a government receives its mandate from the House, and he was a vocal proponent of the right of the Governor General to make the choice of Prime Minister without having to consider any binding advice.<sup>172</sup> But Mallory also knew that such an action would generate controversy and it would be difficult to find legitimacy in the political context because St. Laurent would have to work out deals with both the CCF and Social Credit to stay in power.<sup>173</sup> In any event, it is clear that St. Laurent dreaded trying to work through a minority government situation, but also that "it is reasonable to assume that Louis St. Laurent and his ministers would have held on if the slim majority had been in their favour."<sup>174</sup> The 23<sup>rd</sup> Parliament only lasted until February 1958, when Diefenbaker dissolved the House in an attempt to capitalize on his emerging popularity. The 1958 election returned the PCs with the largest parliamentary majority Canada had seen at the time.

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<sup>170</sup> Clark Davey, "PC Leader has Sacred Support", *The Globe and Mail*, June 14 1957, <http://heritage.theglobeandmail.com> (Accessed May 28 2010).

<sup>171</sup> M.J. Stone, "Professor Played a Role in defeat of St. Laurent Government," *The Globe and Mail*, August 15 2003.

<sup>172</sup> J.R. Mallory, *The Structure of Canadian Government Revised Edition*, Toronto: Gage Publishing, 1984, 83.

<sup>173</sup> Mallory 1958, 472.

<sup>174</sup> Pierre Sevigny, *This Game of Politics*, (Toronto: McClelland and Stewart, 1970), 70.

25<sup>th</sup> Parliament (1962-1963): PC: 117 LIB: 100 SC: 30 NDP: 19

There was no doubt who would form the government following the June 18<sup>th</sup>, 1962 election, but there was some doubt as to how long the new Parliament would last. As soon as it was known that the PCs had seen their immense majority turned into a mere plurality, Diefenbaker announced his intention to stay on: “On the basis of national returns, we are still the government.”<sup>175</sup> After determining a course of action with his caucus, Liberal leader Lester Pearson announced his intention to vote to bring the government down, not in an attempt to form an alternative administration, but merely to trigger another election before the year was out.<sup>176</sup> The balance of power was held by Social Credit and its leader, Robert Thompson. Thompson announced it would be inappropriate to trigger another election so soon, and would support the government only until enough time had passed for another election to be held the following year.<sup>177</sup> When the Speech from the Throne was read in Parliament in September, Social Credit briefly reconsidered its stance and publicly threatened to join with the Liberals in bringing down the government.<sup>178</sup> They backed down from this threat a few days later and supported Diefenbaker into the new year. It is important to note that the opposition parties did not consider combining to form a new administration (at least publicly). They were willing to defeat the government (the Liberals were even willing to trigger a second election), but the prospect of replacing it never arose.

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<sup>175</sup> “PCs 117, Liberals 96; Minority Rule Planned”, *The Globe and Mail*, June 19 1962, <http://heritage.theglobeandmail.com> (Accessed May 28 2010)

<sup>176</sup> “Liberals left Alone in Bid to Topple PM” *The Globe and Mail*, September 27 1962, <http://heritage.theglobeandmail.com> (Accessed May 28 2010)

<sup>177</sup> Ibid.

<sup>178</sup> Langevin Coté, “Revamped Economy Promised; Speech May Unite Opposition”, *The Globe and Mail*, September 28 1962, <http://heritage.theglobeandmail.com> (Accessed May 28 2010)

The government's popularity continued to decline around perceived mismanagement of issues such as unemployment and national defence, so much so that by February 1963, Social Credit was ready to stop propping up the government. Thompson introduced a no-confidence motion that the Liberals and NDP supported, and the government fell.<sup>179</sup> There was speculation that the caucus might again try to replace Diefenbaker as PC leader for the election campaign, but he hung on and fought his last campaign as Prime Minister.

*26<sup>th</sup> Parliament (1963-1965): LIB: 129 CON: 95 SC: 24 NDP: 17*

Despite winning 41% of the vote in the April 8<sup>th</sup>, 1963 election— usually enough for a majority government — Pearson and the Liberals ended up a few seats short. However, this was the first election in which the New Democratic Party had the ability to put the Liberals over the top. During the campaign, NDP leader Tommy Douglas said, “we have the responsibility to support whichever of the other parties has the larger number.”<sup>180</sup> *Globe and Mail* reporter Bruce MacDonald, reflecting on a rumour that Diefenbaker intended to try his luck with Parliament, remarked, “the esoteric realm of constitutional practice would justify going before Parliament for a final judgment on the fate of his Ministry, but hard, practical politics might dictate that such a course could be disastrous.”<sup>181</sup> While Douglas and Robert Thompson both declared that the responsible thing for Diefenbaker to do would be to resign, neither would commit their parties to toppling the PCs if they attempted to stay on. Diefenbaker decided to take a few days and consult with his Cabinet.

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<sup>179</sup> Stanley Westhall, “Government Falls”, *The Globe and Mail*, February 6 1963, <http://heritage.theglobeandmail.com> (Accessed May 28 2010)

<sup>180</sup> Edwin Bowell, “PM Believed Ready to Resign”, *The Globe and Mail*, April 10 1963, <http://heritage.theglobeandmail.com> (Accessed May 29 2010)

<sup>181</sup> Bruce MacDonald, “Douglas Key Figure in Liberals Future”, *The Globe and Mail*, April 10 1963, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

Any hope that Diefenbaker had of facing Parliament ended on April 12<sup>th</sup>, when six Social Credit MPs broke party solidarity and announced that they would support Pearson when Parliament resumed. In their statement, which was condemned by Social Credit's leadership group, the MPs said, "A Government, in our view, has no democratic right to stay in power if another Government can be formed by a party supported by a larger part of the electorate."<sup>182</sup> These votes would be enough for Pearson to bring down Diefenbaker's government. Diefenbaker formally resigned and Pearson was sworn in ten days later.

While the Pearson era is known for its co-operation between the Liberals and the NDP, it was actually Tommy Douglas who tried to bring down the Pearson government when Parliament first met. Douglas introduced a motion condemning the government for its attempts to have NATO's nuclear missiles placed on Canadian soil, but the government survived the motion with support from Social Credit.<sup>183</sup> The 26<sup>th</sup> Parliament lasted until September 1965, when Pearson had it prematurely dissolved in a quest for a majority government. The opposition parties criticized this decision and claimed Pearson was trying to avoid the accountability of the House.

*27<sup>th</sup> Parliament (1966-1968): LIB: 131 PC: 98 NDP: 21 RC: 9 SC: 5 IND: 1*

The 1965 election changed the party standings very little, as the Liberals, PCs, and NDP all picked up seats at the expense of the Social Credit movement, which was now divided into separate French and English Canada parties. Pearson came just short in his quest for a majority. As election results came in, Diefenbaker, still PC leader, announced that his party would be ready to form the government if Pearson proved unable or unwilling to carry on in a minority fashion. Diefenbaker argued that, with Pearson having already called one early election in the

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<sup>182</sup> Patrick Nicholson, *Vision and Indecision*, (Don Mills: Longmans Canada, 1968), 278.

<sup>183</sup> "Government Survives NDP Challenge 124-113", *The Globe and Mail*, May 22 1963, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

quest for a majority and failed, he would not be entitled to another.<sup>184</sup> If Pearson could not make minority government work for the full length of Parliament, he should be given the chance before the Governor General agrees to any request for dissolution. A few days later, Diefenbaker increased his rhetoric by stating his intention to bring down the government and actively seek to form an administration with the support of the smaller parties. Of course, this would require a parliamentary solution, as Pearson would not consider resigning prematurely with a large lead in seat count.

When Parliament met in January 1966, the Liberals faced a PC-NDP-Real Creditiste attempt to bring down the government. Together the three parties proposed a motion to amend the Speech from the Throne to include an increase to the monthly old age pension, which if passed would have constituted a loss of confidence. Pearson's government survived with support from five Social Credit MPs and one NDP MP who broke ranks. In answering why he voted to sustain the government, the NDP MP said that he believed the people had returned a Liberal administration and it should have the opportunity to present a legislative agenda, saving the public from another quick election.<sup>185</sup> Pearson had threatened dissolution if the motion had passed, which triggered debate over the constitutionality of that potential request. If the motion had carried and Pearson had followed through on his threat, it would have resulted in a situation similar to the King-Byng Affair, where the Governor General would have had to make a decision. Pearson would go on to forge a legislative alliance with the NDP on issues such as universal healthcare. The 27<sup>th</sup> Parliament continued until Pierre Trudeau succeeded Pearson as Liberal leader and Prime Minister and had it dissolved to seek his own mandate.

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<sup>184</sup> Anthony Westell, "PC Chief Waiting in the Wings", *The Globe and Mail*, November 10 1965, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

<sup>185</sup> "Government Saved from Defeat with Support from Socreds, NDPers", *The Globe and Mail*, January 26 1966, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

## The Trudeau Years

29<sup>th</sup> Parliament (1973-1974): LIB: 109 PC: 107 NDP: 31 SC: 15 IND: 2

The election of October 30<sup>th</sup>, 1972, was the closest the two major parties have ever come to a tie. After winning a large majority in the 1968 election, a slumping economy and a poorly run campaign brought the Trudeau era to the verge of collapse. In the first few days following the election, it appeared as if the PCs and their leader Robert Stanfield would be the ones to hold the slight plurality in Parliament. Stanfield immediately called on Trudeau to resign, claiming that he had lost the confidence of the Canadian people.<sup>186</sup> Some Liberal MPs called on Trudeau to resign as leader. However, with recounts being done in key ridings, Trudeau announced his decision to stay on and meet Parliament, saying, “Under the Canadian Constitution the Government is responsible to Parliament...The continued existence of my Government will therefore depend on the will of the House of Commons.”<sup>187</sup> These recounts would eventually give the Liberals the plurality.

The NDP was in a position to give either party a working majority. Leader David Lewis stated that his party was prepared to support whichever party showed up to Parliament as the government as long as it introduced measures to tackle some of the NDP’s key policy concerns.<sup>188</sup> However, many NDP staffers privately expressed scepticism at the notion that the PCs would ever be willing to make concessions.<sup>189</sup> After Trudeau announced he would stay on, Lewis released a list of priorities that included increasing old-age pension and lowering the cost

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<sup>186</sup> “Stanfield Urges Trudeau to Resign”, *The Globe and Mail*, November 1 1972, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

<sup>187</sup> Stanley McDowell, Clair Balfour and Terrace Willis, “Trudeau to Stay on as PM”, *The Globe and Mail*, November 3 1972, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

<sup>188</sup> “Lewis sets terms for Liberal survival in new Parliament”, *The Globe and Mail*, November 3 1972, <http://heritage.theglobeandmail.com> (Accessed May 29 2010).

<sup>189</sup> Stewart, 470.

of living. While the public position was that there would be no negotiations and that the NDP would wait and see what the Liberals proposed in the budget before giving them support, it was revealed later that secret talks had taken place between Liberal House Leader Allan MacEachen and NDP House Leader Stanley Knowles. These talks centred on what the Liberal budget would have to include in order to gain the support of the NDP.<sup>190</sup> This support allowed Trudeau to survive tests of confidence when Parliament convened in January 1973, but ended in May 1974, when the NDP joined with the PCs to vote against Trudeau's budget and trigger another election.

Ian Stewart's case study on the 1972 election demonstrates that electoral democratic notions of a government mandate seriously influenced the decision making of the political actors involved. As Stewart notes,

In the first few days after the election, there was some disagreement within the Liberal party over whether the government should resign in favour of the Conservatives. But one Liberal observed that "as soon as it became clear that we still had a plurality of seats, there was little dispute over the decision to carry on," and a second government member noted that "it would have been highly improper for the Liberals to abandon power while still holding the largest number of seats."<sup>191</sup>

While Stewart is right to suggest that this may be a post-hoc rationalization to the fact they kept power, he presents evidence that "a surprising number of New Democrats declared that their party's decision to maintain the Trudeau government in office was influenced by the Liberals' numerical superiority in the House of Commons."<sup>192</sup> He quotes an NDP caucus member as saying,

In our system, the winners are supposed to form the government... If Trudeau had had less seats than Stanfield, he might still have hung on. But he would have been in trouble with the public who would have felt that Trudeau should accept his repudiation and step down. They would have put great pressure on us to let Stanfield have a go at it. Even

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<sup>190</sup> Ibid., 472.

<sup>191</sup> Ibid., 473.

<sup>192</sup> Ibid., 473.

though there were goodies in the Liberal Throne Speech, we might have been obliged to give the Conservatives a crack at governing.<sup>193</sup>

This is evidence that the precedent set through the actions of St. Laurent and Diefenbaker had begun to crystallize into a norm that political actors felt bound their actions, one of the central aspects in determining the emergence of a new convention.

*31<sup>st</sup> Parliament (1979): PC: 136 LIB: 114 NDP: 26 SC: 6*

The 1979 election saw Joe Clark's PCs secure a plurality over Trudeau's Liberals in Parliament. Despite campaigning on his platform of constitutional reform, Trudeau's message did not resonate west of Ontario, where the Liberals won only three seats. In his election night speech, Trudeau admitted defeat and acknowledged he would resign once Clark was able to form a government.<sup>194</sup> This was the first time that an incumbent Prime Minister announced his resignation on the day of the election once it became clear he no longer had a plurality of seats in a minority Parliament. On all other occasions the Prime Minister had taken a few days to consult with Cabinet and consider his options. The numbers did not support an effort by Trudeau to remain in power. Even if he had managed to win the support of Ed Broadbent's NDP, that would not be enough for a working majority. Clark only needed to win the support of the six Social Credit members to retain confidence in the House.

Once Trudeau signalled that he would resign, Clark began using bold rhetoric. He announced that this election gave him a mandate to govern, and that he would act as if he had a majority and would make no deals with any parties to secure his government's survival.<sup>195</sup> Social Credit did end up supporting Clark on early tests of confidence, such as issues surrounding

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<sup>193</sup> Ibid., 473.

<sup>194</sup> Jeffrey Simpson, "Trudeau Concedes Win to Clark", *The Globe and Mail*, May 23 1979, <http://heritage.theglobeandmail.com> (Accessed May 30 1979).

<sup>195</sup> "No Deals Planned as Clark Prepares for June 4 Takeover", *The Globe and Mail*, May 24 1979, <http://heritage.theglobeandmail.com> (Accessed May 30 2010).

continued federal involvement in Petro-Canada. But when Clark's first budget contained a 5.5 cents/litre tax on gasoline, the Social Credit MPs refused to support it and abstained from voting. Together, the Liberals and the NDP brought down the Clark government in December 1979.<sup>196</sup> The quick election convinced Trudeau, who had resigned as Liberal leader in the fall, to lead the party in one more election. He became Prime Minister once again with a majority in the 1980 election.

## The Current Era

*38<sup>th</sup> Parliament (2004-2005): LIB: 135 CON: 99 BQ: 54 NDP: 19 IND: 1*

When Paul Martin took over the Liberal leadership from Jean Chretien in December 2003, it was widely expected that he would lead them to a fourth consecutive majority government. However, through a combination of the emerging sponsorship scandal and the union of the PCs and Canadian Alliance into the Conservative Party of Canada, the Liberals saw their numbers reduced to a plurality. An interesting exchange took place during the campaign. When asked by the press if the largest party in the House should always form the government, Martin replied, "that depends on the circumstances... We've all seen combinations and permutations where these things have happened differently."<sup>197</sup>

In response, Conservative Party leader Stephen Harper went on the attack, saying that the Liberals would "do anything to stay in power." As this had the potential to hurt the Liberal campaign, Martin was forced to go on the defensive. The next day he said that "it's a common-sense proposition that the party that has the most seats is the party that certainly ought to form

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<sup>196</sup> Jeffrey Simpson and Robert Sheppard, "Tories Fall, 139-133", December 14 1979, <http://heritage.theglobeandmail.com> (Accessed May 30 2010).

<sup>197</sup> Campbell Clark and Brian Langhi, "Party with Most Seats will Govern, Martin says", *The Globe and Mail*, June 24 2004, <http://heritage.theglobeandmail.com> (Accessed May 30 2010).

the government.”<sup>198</sup> The backlash Martin faced over his initial comments means it can be argued that this norm is integrated into political discourse. Martin was able to form a minority government (after the election he stated that he believed “minority governments have mandates”)<sup>199</sup> that survived a series of confidence votes, including the memorable incident where his government survived with the support of Independent MP Chuck Cadman, until it fell in November 2005.

*39<sup>th</sup> Parliament (2006-2008): CON: 124 LIB: 103 BQ: 51 NDP: 29 IND: 1*

The transition surrounding the 39<sup>th</sup> Parliament may be the most straightforward of all. After seeing their numbers drop in two straight elections and with the party mired in scandal, Paul Martin announced his resignation as both Prime Minister and Liberal leader on the night of the January 23<sup>rd</sup>, 2006 election. There was no consultation with Cabinet regarding a course of action, as it was incredibly unlikely Martin would have been able to continue to govern. Such a prospect would have required the support of the Bloc Quebecois, who had campaigned heavily on Liberal corruption. Stephen Harper became Prime Minister and led his government through the 39<sup>th</sup> Parliament until it was prematurely dissolved in September 2008 as Harper went in search of a majority. He was returned with only a strengthened minority, setting the stage for the constitutional crisis of that winter, which I discussed in chapter one.

## **Analysis**

What lessons can we take from these precedents? First and foremost, there has definitely been an undercurrent of political discourse that stresses the largest party’s right to form a government for quite some time. Arthur Meighen’s 1925 statement is eerily similar in sentiment

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<sup>198</sup> Ibid.

<sup>199</sup> Anne Dawson and Sean Gordon, “Martin rules out Coalition as Harper rethinks future”, *Calgary Herald*, June 30 2004, A1.

to the rhetoric Stephen Harper professed in 2008. Meighen, St. Laurent, Pearson, Clark, Martin, Harper and some minor party leaders have all at least alluded to the idea that the largest party should govern. But so what? All of their comments need to be taken with political context into account. Obviously a party that has the most seats but faces the possibility of being denied the chance to govern will attempt to mobilize public opinion against such a manoeuvre and deride its legitimacy. Indeed, when Mackenzie King announced he would stay on in 1925, he wrote to a colleague that “the only weapon the Conservative party can possibly use effectively against our party or myself at the present moment, is that of usurpation of power-hanging on to office.”<sup>200</sup> That is just standard political posturing. So then this history might be critiqued by saying their opinions cannot be taken into account when discussing the actual constitutional provisions of responsible government.

It also could be argued that in most of the situations where the incumbent resigned after losing a plurality, the political climate at the time was not conducive to forming a legislative alliance that would allow them to carry on. It was not until 1979 that prime ministers began resigning on the day they realized they lost their plurality (and it has only happened twice). Prior to that, they took a few days to consider their options before resigning. Just because they chose to resign does not mean the other options can be ruled unconstitutional. It was more the realities of the situations that led to this idea that the largest party should govern.

I can respond to these criticisms by drawing attention to the precedents where actors followed the norm even if it would mean a loss of power or some other undesirable action. The pervasiveness of this line of thought means it cannot be discounted as simply wrong; these are not isolated cases but a clear persistence of an alternative concept of a mandate. It has altered

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<sup>200</sup> Neatby, 86.

actors' perceptions of what is appropriate and places the mandate debate solidly in the infra-convention category. There is clear evidence that the norm, and the public's expectations that it be followed, influenced the incumbents' decision to resign and coloured their interpretation of the political context. Having your party finish second when it went into the campaign in first place is very symbolic, and the discourse often revolves around how the governing party has fallen from the good graces of the public. A loss of moral legitimacy in the eyes of the public is a heavy burden to carry when trying to continue to govern. Kaare Strom refers to this phenomenon as "electoral responsiveness": there is a connection between electoral success in the eyes of the public and government formation.<sup>201</sup> What it means to finish second shapes what governments feel is appropriate, contributing to the establishment of the norm.

This also challenges any idea that the history of responsible government in Canada has been one of disciplined recognition of the tradition of parliamentary theory. Even Mackenzie King in 1925, which is the example that should validate parliamentary theory, uses electoral rhetoric to legitimize his attempt to stay in power. Both Mackenzie King and Meighen attempted to make the case that they had been elected. As well, Byng's decision to allow Parliament to decide was influenced by the perception that Meighen should at least have a chance by virtue of having the greatest amount of public support. It is not clearly evident that Byng's actions can be taken as a full defence of Parliament's right to replace a government because he did not believe Mackenzie King should have carried on in the first place. These examples of government transition are best explained by understanding the practical considerations of party politics, and how political actors frame the debate to their advantage. Much of the perceived deference to the House's ability to sustain the government can be attributed to Ian Stewart's observation that

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<sup>201</sup> Kaare Strom, *Minority Government and Majority Rule*, (Canada: Cambridge University Press, 1990), 73.

minor parties are likely to support whatever government shows up to the start of the Parliamentary session out of fear of triggering an election and having the public blame them for it.<sup>202</sup> There is no tradition here, and very little acknowledgement of the role of the institution. This undermines the appeal to parliamentary theory.

This brings us back to the theory of constitutional conventions. Just because a practice is followed, does not mean it has constitutional ramifications. Norms and usages can be followed simply out of tradition or because political forces find reasons for doing so. But constitutional conventions have a normative nature; they are supposed to defend constitutional principles and ensure that democratic accountability is respected.<sup>203</sup> There has to be an important reason for accepting a practice as obligatory for the sake of the system itself. For instance, one of Harper's rules as identified by Russell is that formal coalitions, unless presented to the public as options, are illegitimate.<sup>204</sup> But the federal party system's reluctance to form coalitions did not come from any denunciation of what they bring to democracy. In fact, Mackenzie King offered the Progressives a coalition in 1921, and Trudeau offered Ed Broadbent's NDP a coalition in 1980, despite already having a majority.<sup>205</sup> But minor federal parties have often felt the need to protect their distinctive identities and advocate for policy solutions without getting tainted by the perils of executive office; they wanted to remain pure, so to speak<sup>206</sup>, as well as disincentives created by the single-member plurality electoral system. That does not make it a constitutional convention, and if the circumstances ever changed wherein two parties were prepared to form a coalition, it is hard to point to anything in precedent that would bar such action

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<sup>202</sup> Stewart, 455.

<sup>203</sup> Heard 1989, 66.

<sup>204</sup> Russell 2009, 141.

<sup>205</sup> Pierre Elliot Trudeau, *Memoirs*, (Canada: McClelland & Stewart, 1993), 272.

<sup>206</sup> Stewart, 453.

However, there appears to be a stronger argument for the mandate of the largest party. This is because of the aforementioned discourse on what is democratic and what respects the will of the voters. Even if much of it is just political posturing, exploiting these conflicting notions of democracy allows political actors to portray these events as conflicts between the will of the people and desperate, undemocratic governments. The debate takes on a normative dimension about what is right and wrong, and goes back much further than Stephen Harper's use of it. The open questioning of legitimacy when the Liberal-NDP coalition tried to come to power, or even when Paul Martin merely suggested he would stay on, is enough to suggest the public sees such actions as undemocratic. So, the argument could be made by proponents of the electoral mandate that it is a convention because it has followed precedent, finds support both in the public and political arena, and is intended to protect the principle of democracy by ensuring the electorate's top choice wields executive power.

Of course, many scholars disagree and say that parliamentary systems are democratic because the government is created by and accountable to the legislature, regardless of strict party standing. Ian Stewart says that politicians have a moral — but not constitutional — obligation to follow the norm.<sup>207</sup> But the prevailing theory on conventions is that they are supposed to be a body of morality; there is not supposed to be a differentiation. According to this logic, if it is indeed a moral imperative, then it has to have some constitutional ramifications. As the evidence in this chapter suggests, consensus on this issue has been lacking for some time. Without consensus, the critical morality these scholars try to impose on the political system is powerless. Their interpretation is only one version of how the Canadian Constitution should embody democracy. And without any version of critical morality, be it parliamentary or electoral,

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<sup>207</sup> Ibid., 454.

political actors can exploit divisions and try to manufacture new constitutional interpretations to their benefit. I mentioned that it is tough to create an argument to ban coalitions because it is difficult to come up with a reason based on principle for doing so. But Harper did exactly that by drawing a connection to this idea that the largest party (being elected by the people) should govern. The Conservatives had an electoral mandate to govern, and the coalition was a threat to the will of the people.

The mandate issue is fundamental to a democratic system, because political power must be exercised with legitimacy. With the mandate issue currently an infra-convention, instability can permeate the system in the right political context. Claiming an electoral mandate gives the government room for a wide variety of moves and limits the ways the opposition can keep it accountable. A large part of the operation of a political system follows from how a government claims its right to govern, and despite the objection of most of the Canadian scholarly community, the debate surrounding how a government should get its mandate has influenced a number of political transitions. But then the question arises: why now? Despite this undercurrent of disagreement around what is democratic, Canada has a history of stable government transitions. What in the current political context makes crisis more likely than in the past? This is the subject of the next chapter, which examines how systemic minority government leads to conflicts between the executive and the legislature, expanding the lack of consensus regarding the fundamental conventions of the system. At the end of chapter two, I examined some possible problems that could arise from a variety of unresolved infra-conventions. The mandate debate differs only in that the centrality of the convention to the entire operation of the system makes a potential crisis much more debilitating.

## Chapter Four

### The Lack of Consensus in the Current Political Context

The previous three chapters, taken together, constitute the main argument of this thesis. By looking at the scholarly literature on constitutional conventions, we see that they are not neutral but are said to embody a normative democratic principle. The conventions that are recognized by most scholars are said to be constitutional because of a consensus within the general political community on how they embody those same principles; the community uses this consensus to generate a code of critical morality that is supposed to bind political actors. However, looking into Canada's experience with minority government reveals a long-standing debate between classical parliamentary and electoral democratic conceptions of how a government receives a mandate. Rather than falling into Heard's fundamental conventions category, the rules of government formation are infra-conventions; neither interpretation can effectively bind political actors. By exposing this lack of consensus, we see that many of the claims made by classical scholars surrounding the proper workings of the system are only functional in nature and are deferential to the "tradition" that backs their ideas (which I have shown lacks historical substance). They may decry the ramifications of what it will mean to adopt a convention, such as the largest party having a right to govern, but that does not mean such a convention is unconstitutional — if it finds enough support for its democratic integrity.

This chapter serves to complement the previous three by engaging the question: why does what, in the past, could generously be described as a mild undercurrent of political debate now find itself threatening the stability of the Canadian system? The claim has been made throughout this thesis that with no consensus surrounding this issue, the opportunity is there for political actors to manipulate the debate and advocate for constitutional interpretations that work to their

advantage This will be explained further when I examine what happens when continuous minority parliaments breed conflict between the executive and the legislature, and how the side that can mobilize public support to its constitutional interpretation will gain the advantage.

This chapter is broken into four themes. The first looks at the current Canadian party system and concludes that Canadians can expect minority government to continue into the future. Additionally, based on the composition of the party system and the influence of other institutional and contextual factors, the coalition options are quite limited, meaning the government will not be able to control a majority in the legislature and will inevitably conflict with it. The second section looks at the institutional side, including the various tools used in this conflict. Some of the other areas that lack critical morality, which I identified in chapter two, such as the confidence convention and the role of the Governor General, are brought into play.

Debates surrounding the appropriate use of these tools stem directly from the larger debate on where a government gets its mandate and how it turns standard political conflicts into questions of constitutional propriety, which is hardly sustainable over time. These points will be supplemented with examples from recent parliamentary events. The third section will deal with the political support bases that make such exploitation of the debate possible. A constitutional interpretation cannot challenge a prevailing consensus unless it finds support in the public. This section will briefly cover how many Canadians look derisively upon parliamentary manoeuvres, and how that can be harnessed into support for the rights of the “democratically elected” government. That moderate level of support is what allows the electoral democratic version of responsible government to remain viable, even if scholars point out how, in reality, it decreases democratic governance. These three areas compose a perfect storm that threatens to keep the Canadian system in a period of uncertainty for the foreseeable future. The final section will look

at the pros and cons of codifying the government formation process to see if it has the potential to limit the identified flaws.

## The Federal Party System

The Canadian Parliament has been in a minority position since 2004, and polling data suggests that it is likely to remain in one after the next election. The likelihood of continuous minority government is the reason behind Peter Russell's plea for Canadians to learn to live with it.<sup>208</sup> But what makes its continuation so likely? For the answer, we must look to the realities of the party system and how they intertwine with the distorted reality caused by the electoral method. The regional nature of party support limits the likelihood that one party can win enough seats across the country to put a majority together.<sup>209</sup>

The first obstacle to majority formation is the existence of the Bloc Québécois (BQ). In the 2008 election, the BQ took 49 of Quebec's 75 seats. This is 65% (16% nationally) of the seats, won with a mere 38% (10% nationally) of votes<sup>210</sup>, some of the clearest evidence of the single-member plurality electoral system's poor vote-to-seat transfer. Since its first electoral contest in 1993, the Bloc has ranged from 38 seats to 54, receiving an average of around 1.5 million votes.<sup>211</sup> Critics of the party and its mission have long predicted its eventual withering, only to see the party subsequently rebound. The BQ sees itself as an important voice for Quebec that can force changes to government policy by withholding or granting the government its support in minority situations. It is unique to Canada in that it is admittedly not running to form a

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<sup>208</sup> Russell 2009.

<sup>209</sup> Pilon 2007, 46.

<sup>210</sup> "Canada Votes 2008", *Canadian Broadcasting Corporation*, October 15 2008, <http://www.cbc.ca/news/canadavotes/> (Accessed June 26 2010).

<sup>211</sup> Elections Canada, *Report(s) of the Chief Electoral Officer of Canada*, 1993, 1997, 2000, 2004, 2006, 2008, <http://www.elections.ca/intro.asp?section=pas&document=index&lang=e> (Accessed June 26 2010).

government. As long as their plurality continues to secure a majority of Quebec's seats, and recent opinion polling suggests their support has increased at the expense of the Conservatives<sup>212</sup>, a large number of seats are no longer in play that once helped Liberals like Mackenzie King and Conservatives like Brian Mulroney secure majorities.

Out west, the domination by the Conservative Party and its previous incarnations is well known. In 2008, the party won 71 of the 92 seats in Western Canada, including losing only one each in Saskatchewan and Alberta.<sup>213</sup> While in many ridings, the Conservative candidate did win more than 50%, only in rare occasions did the margin of victory approach the 77% that the seat total implies is the level of support found in the region. This support is incredibly entrenched and unlikely to change, especially since the Conservatives are known informally as the party of the west. Going back to the period of protest embodied by the Reform Party, the general conservative movement is viewed by many to be the sole defender of western interests for reasons of past marginalization that have been written on extensively.<sup>214</sup> The point is that the perceived symbiosis between the west and the Conservative Party (a connection that was amplified and exaggerated through years of the west being the only place to elect a large number of Reform/Alliance/Conservative MPs despite support elsewhere<sup>215</sup>) means it will be incredibly difficult for any other party to make a breakthrough in the region in a quest for a majority government.

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<sup>212</sup> Jane Taber, "Conservatives would lose 23 seats in election: poll", *The Globe and Mail*, June 10 2010, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/conservatives-would-lose-23-seats-in-election-poll/article1599088/?cid=art-rail-bureaublog> (Accessed June 10 2010).

<sup>213</sup> "Canada Votes 2008".

<sup>214</sup> Shawn Henry, "Revisiting Western Alienation: Towards a Better Understanding of Political Alienation and Political Behaviour in Western Canada", *Regionalism and Party Politics in Canada*, eds. Lisa Young and Keith Archer, (Don Mills: Oxford University Press, 2002), 77-78.

<sup>215</sup> Pilon 2007, 36.

Of course, neither the BQ nor the domination of the west by the Conservatives' predecessors prevented the Liberal Party from winning three straight majorities in 1993, 1997, and 2000. This was because of the Liberals' "solid centre" of Ontario, where, for example, they won 101 of 103 seats in the 1997 election. Add to that a moderate level of support in Quebec, Atlantic Canada, and British Columbia, and the Liberals pieced together some very non-representative majority governments.<sup>216</sup> The destruction of the solid centre is the main reason minority governments seem likely to continue. In 2008, the Conservatives won 51 of Ontario's seats, compared to 38 for the Liberals.<sup>217</sup> However, while Conservative victories constituted a near sweep of rural and suburban Ontario, they made no headway into urban centres like Toronto. Urban centres constitute the final hurdle blocking the Conservatives from winning a majority, as they have no MPs from seat-rich Toronto, Montreal, or Vancouver.

For its part, the Liberal Party has seen its representation dwindle to Toronto and Montreal, with a patchwork of support in Atlantic Canada and other cities across Canada. It is likely that the Liberals will eventually resurge in Ontario. While the Conservatives did increase their seat and vote percentage counts in 2008 to overtake the Liberals (compared to 2006), the number of total votes cast for the Conservatives decreased. The other statistics rose because the Liberal total vote decreased even more, a staggering drop of nearly 900,000 votes between 2006 and 2008.<sup>218</sup> Many of the Liberal supporters who stayed home (and we know they did, because total voter turnout dropped between the 2006 and 2008 elections) in 2008 were from Ontario<sup>219</sup>;

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<sup>216</sup> Joseph Wearing, "Has Ontario become the Liberal Party's 'Solid Centre'?", *Regionalism and Party Politics in Canada*, eds. Lisa Young and Keith Archer, (Don Mills: Oxford University Press, 2002), 159.

<sup>217</sup> "Canada Votes 2008".

<sup>218</sup> Franks 2009, 39.

<sup>219</sup> Liberal Party vote in Ontario- 2006: 2,260,024; 2008: 1,741,370; Difference: -518,654. The Conservative Party's vote in Ontario only rose by 34,207, while support for the NDP also dropped. Source: Canada Votes 2006 and 2008, Canadian Broadcasting Corporation.

if they were motivated to return the Liberals seat count could increase. However, it is extremely unlikely that they would be able to return to the days of sweeping the province en route to a majority. In the Chretien era, the Liberals benefitted from a split on the right between Reform/Canadian Alliance and the Progressive Conservatives; a split ended by their 2003 merger.

On the other side, the NDP also enjoys urban success, making it unlikely that the Conservatives will make an urban breakthrough. In 2008, the NDP found support in areas of high industrialization such as Hamilton and Windsor, and impoverished urban areas like East Vancouver. They also completed a near sweep of Northern Ontario — an area with an economy devoted to resource extraction with a large labour population.<sup>220</sup> While at different points throughout its history the NDP has seen its seat count decimated, it has rebounded in periods when voter trust in the two main parties (particularly the Liberals) declines. As a party that attempts to advance the interests of social movements that rarely make up majorities in specific geographical areas, the SMP system underrepresents the broad level of support the NDP enjoys across the country.<sup>221</sup> Into this equation we must also throw the emergence of the Green Party, the only one of the top five parties to see its vote total increase from 2006 to 2008.<sup>222</sup> As the Greens get closer to winning their first seat, they have the potential to fragment the party system further, although the possibility also exists that they could inadvertently contribute to a Conservative majority by draining votes from left-of-centre parties.

The fact that most of the parties find themselves with a plurality of support in certain geographic areas increases the likelihood that general elections will produce Parliaments with a

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<sup>220</sup> Canada Votes 2008.

<sup>221</sup> Pilon 2007, 36.

<sup>222</sup> Canada Votes 2006 and 2008.

large number of parties with sizeable caucuses, thus increasing the likelihood of minority government. Indeed, opinion polling over the last year shows voter support to have entrenched itself. The Conservatives have trouble cracking the 35% barrier, while the Liberals consistently garner somewhere in the high-20% range.<sup>223</sup> While simple polling cannot be trusted to be an exact reflection of what an election result would look like, the continuous reproduction of the same results stresses how difficult it has become for a party to get to the 40% line that constitutes the beginning of majority government territory. It is possible that the Conservatives could squeeze out a majority in the next election, but doing so would require some movement in either urban centres or Quebec, which appears to be unlikely at the moment.

An intriguing reality of the Canadian party system is the few natural opportunities that exist for coalitions or long-term parliamentary alliances. The BQ, with the stated goal of Quebec sovereignty, will never become a full partner in a coalition government. As they consistently have the third most seats in the House, their openness to a coalition would increase the available options significantly, but it will not come to pass. They have proven willing to commit to looser legislative alliances, but such agreements have the potential to be politically toxic, as demonstrated by Stephen Harper's successful demonization of the Bloc's involvement in the 2008 coalition attempt.<sup>224</sup> The Conservative Party and its predecessors have shown an incredible unwillingness to form loose alliances, even when there are ideologically similar partners available (see Joe Clark and Social Credit). Ian Stewart makes reference to the Conservative tendency to govern as if they had a majority and see if the legislature will accept their

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<sup>223</sup> EKOS Politics, "Federal Voter Intention", June 24 2010, <http://www.cbc.ca/news/pdf/ekos-federal-vote-intention-fullreport-100624.pdf> (Accessed June 26 2010).

<sup>224</sup> Valpy, 14-15.

unadulterated policies.<sup>225</sup> This leaves the Liberals and the NDP as the only combination with any real potential, as they have demonstrated a willingness to bridge the ideological gap. In May and June 2010, after the British general election resulted in a coalition government, many prominent Liberals and journalists began discussing publicly the notion of a Liberal-NDP coalition, or even a merger. In response, Harper renewed the very rhetoric whose validity has been the subject of this thesis by stating that “losers can’t form coalitions.”<sup>226</sup> When the political atmosphere is hostile to the constitutionality of coalitions (and not necessarily incorrectly, as I have laboured to say), the likelihood that actors will engage in the private negotiations and public debate that lead to them is low. The revelation that the Liberals and the NDP were possibly holding merger talks led to quick denunciations by the respective party leaders.<sup>227</sup> So not only will we continue to have minority parliaments, it is likely they will feature single-party governments. Given this, why does it necessarily mean that the conflict between parliamentary and electoral conceptions of democratic mandates will present problems for the stability of the Canadian system?

As Peter Russell notes, the mere existence of a minority Parliament does not lead to instability. Rather, what has created much of the charged partisanship is that the major parties operate under the impression that a majority can be achieved.<sup>228</sup> When we look back at the history of minority governments, we see that many saw their parliamentary term ended early by a Prime Minister in a quest for a majority. It is hard to exaggerate this fact, as it has a direct impact on the goals of political parties during periods of minority government, as well as the methods

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<sup>225</sup> Stewart, 456.

<sup>226</sup> Jonathon Montpetit, “‘Losers’ Do Get to Form Coalitions, Prime Minister: Constitutional Experts”, *Winnipeg Free Press*, June 6 2010, <http://www.winnipegfreepress.com/canada/breakingnews/losers-do-get-to-form-coalitions-prime-minister-constitutional-experts-95547644.html> (Accessed June 20 2010).

<sup>227</sup> “Liberals, NDP Insiders Talk Merger”, *CBC News*, June 9 2010, <http://www.cbc.ca/politics/story/2010/06/08/liberal-ndp-new-party.html> (Accessed June 26 2010).

<sup>228</sup> Russell 2008, 83.

actors use to achieve those goals. Undoubtedly, changing the electoral system to a method of proportional representation would alleviate some of this tension, as it would alter actors' perception of what is possible via elections, as well as encourage coalition formation.<sup>229</sup> Barring that reform, the prospect of a majority will continue to command the focus of the Conservatives and Liberals. The focus turns to portraying the opposition parties as uncooperative obstacles to the government's policy agenda, with little incentive to form lasting co-operative relationships with other parties. Combine this with the fact that for much of Canada's history, the smaller political parties have been hesitant to commit to close alliances. Strom notes that smaller parties across parliamentary democracies will often find themselves in positions where they can gain policy influence and electoral benefit by remaining outside of the executive, a claim that Canada's history supported until the recent willingness of the NDP to forge a coalition.<sup>230</sup>

When single-party governments get stuck in a minority position — as it appears the Harper government is now — conflicts between the government and the opposition-controlled legislature are bound to occur. Donald Savoie famously writes on how power and decision-making has concentrated in the executive, and how in majority governments the House of Commons operates as an extension of the government.<sup>231</sup> This centralization does not evaporate in periods of minority government, but opposition parties do try to challenge it. Both sides use the tools available to them. Governments, through control of the public service, implement much of their agenda out of the view of Parliament. Meanwhile, the opposition parties use the arms of Parliament to try to expose or play up government corruption or incompetence. This constant conflict tends to peak in “showdowns” — events or issues where the strength of each side is put

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<sup>229</sup> Pilon 2007, 65.

<sup>230</sup> Strom, 44.

<sup>231</sup> Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom*, (Toronto: University of Toronto Press, 2008).

to the test in an effort to get the other side to back down and admit weakness. During these showdowns, both government and opposition offer reasons why their view of the institutional workings is correct. As these showdowns tend to involve issues of accountability and democracy, the parliamentary vs. electoral dialogue comes into play. Governments claim that they have a mandate from the people (no matter what the numbers suggest), while the opposition parties refer to the supposed historical supremacy of Parliament, which is problematic when most of that history is based on the myth that legislatures operate independently from majority governments.

This is where the problems I have explored in the last few chapters come in. As neither interpretation is definitively right or wrong, there is no easy solution to these conflicts. The sides remain in perpetual tension, exchanging victories dependent on the context and the amount of public support they can find for their constitutional interpretations. The parliamentary-electoral debate, which has existed under the surface for some time, now finds political resonance as parties invoke its terms as part of a campaign to win public support for their position in the conflict that perpetual minority government inevitably leads to. As it cannot easily be resolved, the system's ability to perform decreases, generating crisis. To explain how this happens, we must now turn to investigating the various ways the parliamentary-electoral debate manifests itself in the workings of minority parliament.

### **The Tools of Parliament: Who has the Right?**

As in other Westminster systems, the Prime Minister of Canada exercises much of the legal authority that is nominally invested in the Governor General. The reason for this, according to the formal theory on responsible government, is that the Prime Minister and the Government are legitimated by having the confidence of the elected Members of the House, and are

responsible to the House for the exercise of those powers. Despite the fact that it is the Prime Minister exercising the authority, the accountability requirements make Parliament supreme.<sup>232</sup>

While this is all very good in theory, the political realities of minority government cause problems for this clear delineation of authority. It is important to note that the style of confidence of the House the government enjoys differs between majority and minority situations.

In times of majority government, the confidence of the House is straightforward, real, and obvious. By invoking party discipline, a Prime Minister can expect to win any vote he or she desires. This is somewhat true in times of coalition government or concrete legislative alliances, although the Prime Minister always runs the risk of alienating the partner party and having the agreement collapse early. The point is that there is no conflict surrounding the exercise of the prerogative powers because the House will always support the decision of the Prime Minister (barring an unlikely backbench revolt). But in single-party minority situations, confidence is very different. It is not an ever-present truth of Parliament, but is more “survivalist” in nature. It is forced to present itself during votes, but then disappears as the opposition parties return to their task of critiquing and disagreeing with the government. There are going to be times when the opposition parties do not support a decision taken by the government, but may not hold the government to account for it for fear of triggering an election. This problem is compounded by the ambiguity surrounding what constitutes a vote of no confidence.

The Prime Minister gets to exercise the reserve powers, but only because in theory he or she has the support of the House. In minority situations, however, that support is not always present. So what happens when the government uses the powers in a way that the House disapproves of? The two sides attempt to spin the issue based on constitutional interpretations

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<sup>232</sup> David E. Smith, *The Invisible Crown: The First Principle of Canadian Government*, (Toronto: University of Toronto Press, 1995), 65.

that support their various claims. The government claims that it is the government, it is elected, and that it is the right of the government to discharge the privileges of the executive as it sees fit. David E. Smith attributes this attitude to the fact that legally, executive power is bestowed on the government from above by the Crown; the House of Commons keeps the government accountable but is not itself the origin of executive power.<sup>233</sup> There is no legal differentiation between the two types of confidence; as long as the government has not explicitly lost confidence, it can exercise the reserve powers even if it does not necessarily have legislative support for its actions. The opposition parties, for their part, rely on notions of Parliamentary supremacy. They contend that the principles and traditions of the Westminster system hold that those powers should only be exercised in accordance with the wishes of the House.<sup>234</sup> This is just a variation of the democratic mandate debate used to legitimize the positions of the two sides in other aspects of the executive-legislative conflict. It has been ever present in the relationship between the Harper government and the opposition parties. Some key examples are the fixed-election legislation, the 2009 prorogation, and the controversy surrounding the Afghan detainee documents.

In 2007, the Conservative government secured passage of Bill C-16, An Act to Amend the Canada Elections Act. This bill fixed the date of elections to a Monday in October, beginning in 2009 and occurring every four years after that. At the time, the government claimed this would be part of its commitment to democratic renewal, and that this legislation would take away the ability of the Prime Minister to call snap elections, long seen as an unfair advantage held by the government over the opposition parties. However, an important clause in the act stated, “Nothing in this section affects the powers of the Governor General, including the power to dissolve

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<sup>233</sup> Ibid., 71.

<sup>234</sup> Ibid., 72.

Parliament at the Governor General's discretion."<sup>235</sup> It was unclear what exactly the legislation would accomplish. Critics assailed the legislation for infringing on the rights of the House of Commons to pass no confidence in the government. The Act essentially implied that Parliament, and by extension the government, are elected to fixed terms, limiting the ability of responsible government to keep the government of the day accountable.<sup>236</sup> The government's stated interpretation of the law was that Parliament would remain in session as long as the government continued to hold the confidence of the House.<sup>237</sup> This solved none of the ambiguity surrounding what would happen if the Prime Minister advised the Governor General for dissolution before the fixed date, or if the opposition parties wished to topple and replace the government without an election.

Another criticism of the bill was that it would not stop any government from gaining an election early if it wanted to. It could simply use parliamentary manoeuvres to engineer its own defeat, then head into an election campaign blaming the opposition for terminating Parliament before the government could complete its work.<sup>238</sup> Indeed, that is what it seemed the Conservatives were trying to do throughout 2007 and 2008 when they designated a large amount of votes to be confidence measures, forcing the Liberals to abstain to avoid an election. Harper finally had enough by the fall of 2008, when he announced that the House had become "dysfunctional"<sup>239</sup> and had lost confidence in his government. He was granted dissolution for an October 2008 election, one year earlier than planned. While Harper may not have broken the specific terms of the legislation, he was widely criticized for breaking the unwritten intent. Many

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<sup>235</sup> Canada, House of Commons, *An Act to Amend the Canada Elections Act*, May 7 2007.

<sup>236</sup> Jennifer Smith 2009a, 179.

<sup>237</sup> Levy, 23.

<sup>238</sup> Russell 2008, 138.

<sup>239</sup> Jennifer Smith 2009a, 179.

of his critics contended that the legislation meant the creation of a new convention, limiting the power of the Prime Minister to ever call a snap election.

Here, we see the parliamentary-electoral debate play out. On the parliamentary side, the legislation's stated intent was to put the rights of the other parties in the House above the rights of the Prime Minister. The reason the Prime Minister gets to recommend dissolution is because of the legitimacy granted by the confidence of the House. In majority situations, it is not a problem because the Prime Minister can expect the House to support his decision. But when the Prime Minister cannot count on constant support, when confidence is of the survivalist type, dissolving the House early can generate accusations of undemocratic behaviour.<sup>240</sup> This legislation should have brought the power to dissolve in line with the supremacy of the House, and some even argued that this freed the Governor General from having to heed Harper's advice. There was no consensus surrounding this new convention, however.

From the electoral point of view, the government is elected and by virtue of that election, it can exercise the reserve powers as it sees fit. Recall Mackenzie King's speech to the House in 1923: "The idea that the ministry should be in any way restricted in its appeal to the people at any time is the very antithesis of democracy."<sup>241</sup> The opposition parties were not creating an atmosphere conducive to the proper governing of the country, and legislation or not the ministry needed an election to gain a renewed mandate for its agenda. Harper's view was not repudiated during the election, as he was returned with an increased plurality. The fixed-election case is an example of the struggle between the legislature and executive for final control of the reserve powers.

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<sup>240</sup> Indeed, the early election calls by Diefenbaker and Pearson in their quest by majorities were slammed by the opposition and constitutional authorities for not showing respect to the House.

<sup>241</sup> Canada, House of Commons Debates, 1923, pp. 217, 220-21.

An even more tension-filled example of the debate trickling into the workings of Parliament was the December 2009 prorogation of Parliament. At the time, the government was under fire from testimony by Richard Colvin, a diplomat who alleged the government was aware that Afghan detainees captured by Canadian forces were handed over to the Afghan police with knowledge they would be tortured.<sup>242</sup> The prorogation, which was ostensibly for the purposes of allowing the government to renew its legislative agenda and allow the country to focus on the 2010 Vancouver Olympic Winter Games, terminated the ability of the Commons Special Committee on Afghanistan to subpoena witnesses and hear testimony.<sup>243</sup> This created quite a backlash, as protests were held across Canada demanding MPs be allowed to return to work. Again, the rhetoric of the opposition parties centred on Harper denying the House its right to hold the government to account, accusing him of being despotic. The Conservatives tried to stress that prorogation was routine and rode out the public backlash until the Olympics took up the bulk of media coverage. The Conservatives also used the prorogation to appoint new Senators, giving them a plurality of seats in the Senate and control of Senate committees when Parliament reconvened.<sup>244</sup> This was one step in Harper's quest for Senate reform, but would also take away much of the opposition parties' ability to obstruct the government's agenda.

In this case, the minority executive found itself in conflict with the House and used prorogation as a tool to battle it. Despite the fact that according to parliamentary logic, the reason the Prime Minister has access to the prerogative powers is because he or she is the choice of the House to lead the government, the power was used explicitly against the wishes of a majority of

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<sup>242</sup> "Colvin says he sent torture reports to Minister's office", *CBC News*, November 25 2009, <http://www.cbc.ca/canada/toronto/story/2009/11/25/colvin-harris-decima-poll.html> (Accessed June 26 2010).

<sup>243</sup> "PM Shuts Down Parliament until March", *CBC News*, December 30 2009, <http://www.cbc.ca/canada/montreal/story/2009/12/30/parliament-prorogation-harper.html> (Accessed June 26 2010).

<sup>244</sup> "Harper names 5 to Senate", *CBC News*, January 29 2010, <http://www.cbc.ca/politics/story/2010/01/29/senate-appointments.html> (Accessed June 26 2010).

MPs. But according to electoral logic, the government has the right to reformulate its legislative agenda. During the prorogation period, the Conservatives stressed that they would be taking their message of economic recovery to the people, implying that is who this government is accountable to.

Once Parliament reconvened, NDP Leader Jack Layton introduced a motion to limit non-House sanctioned prorogation to seven days in an attempt to firmly plant the power to prorogue in line with the supremacy of the House.<sup>245</sup> Anything longer and the Prime Minister would have to win the support of a majority of MPs. The motion carried with support from the Liberals and the BQ. The Conservatives said they would ignore it and consider it unconstitutional and non-binding. This motion sets the stage for another crisis. As the House has asserted its authority to be the final arbiter of when it sits, it challenges the view that the government, by virtue of being elected, gets to exercise the prerogative powers as it sees fit. These clashes only happen because the ambiguity surrounding legitimacy is politicized in the conflict between a minority government trying to operate with a mandate independent of the House and the opposition parties doing what they can to discredit the government.

The inquiry into the Afghan detainee issue resumed once the House reconvened, and it quickly led to another “showdown.” The MPs sitting on the Special Committee wanted the government to release a series of documents that contained information on which military personnel, public service employees, and government officials were aware that transferred prisoners would be tortured.<sup>246</sup> The government, citing national security concerns, would only release some of the documents (many of those heavily redacted), despite the House passing an

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<sup>245</sup> New Democratic Party, “Layton proposes limit to prorogation” March 16 2009, <http://www.ndp.ca/press/layton-proposes-limits-to-prorogation> (Accessed June 26 2010).

<sup>246</sup> Canadian Press, “Tories table another huge batch of Afghan detainee documents”, *The Globe and Mail*, <http://www.theglobeandmail.com/news/politics/tories-table-another-huge-batch-of-afghan-detainee-documents/article1519935/protected/> (Accessed June 27 2010).

order compelling production. The opposition parties once again condemned the government for not honouring the rights of Parliament and of trying to hide information that shows the government to be at fault, while the Conservatives derided the opposition for playing politics with the military and for asking the government to abandon its responsibilities to the nation.<sup>247</sup> Eventually Speaker Peter Milliken was asked to rule on whether or not the Committee members had a right to the documents.

Turning to the Speaker is an interesting development, because Speaker rulings are the closest thing to judicial enforcement that many of these unwritten principles are able to receive. It is important to note that the Speaker is not empowered to decide on his own if the government is in contempt of Parliament, as the Speaker cannot make binding judgments on constitutional principle. Instead, asking him to rule creates an institutional entry point for the parliamentary theory that traditional scholars use when crafting the critical morality for their preferred constitutional interpretation. The binding power of parliamentary theory is increased through its formal introduction into the political event. In his ruling, Speaker Milliken referenced many texts on Parliamentary procedure, all commenting on the unassailable right of the House to any documents it demands. However, he also noted that the House has a responsibility to work with the government when matters of national security are at stake.<sup>248</sup> Milliken sent the conflict back to the political arena and gave the sides two weeks to hammer out an agreement before he would allow motions of contempt to be introduced (which would likely lead to an election if passed). Even after the ruling, Harper continued to argue that the government had legal commitments to keep the information confidential. All the parties did eventually commit to a resolution allowing

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<sup>247</sup> Ibid.

<sup>248</sup> Peter Milliken, "Provision of Information to Special Committee on the Canadian Mission in Afghanistan--Speaker's Ruling", Canada, House of Commons Debates (Hansard), April 27 2010, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4470112#T1505> (Accessed June 27 2010).

a select group of MPs to be cleared to review the documents.<sup>249</sup> The Speaker's ruling gave the opposition parties some leverage in the executive-legislature conflict. This resolution allowed both sides to avoid an election while not having their own positions on the matter totally repudiated.

These three incidents demonstrate the executive-legislature conflict filtering into the normal course of politics, placing an immense amount of stress on the ability of the institutions to manufacture legitimate decisions. The positions Harper took in these situations are the natural positions to take if one presents oneself as the democratically elected leader of the country with a mandate to govern. As damaging as these showdowns are, they are minor compared to the blow the system took in 2008, when the very heart of the conflict was exposed: where does a government receive the right to govern? Continuously having these debates is unsustainable, and we cannot rule out the possibility that the Liberals and the NDP will try the coalition again even if the Conservatives retain a plurality in the next election. No matter the outcome of that looming crisis, if it happens it will surely polarize the electorate.

Many have placed the blame for these events squarely on Stephen Harper and his governing style, and his general contempt for any oversight of his government's actions.<sup>250</sup> Of course this is a large part of it, as it is his choice to pursue many of these actions. But even if Harper were removed as Prime Minister, it is doubtful that the conflict would subside, given the political context I outlined above. Many of Harper's harshest critics also hold to notions of Parliamentary supremacy, and critique him for stepping out of the long-held traditions of parliamentary government. However, despite all of Harper's anti-parliamentary manoeuvres, the

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<sup>249</sup> Jane Taber, "Liberals hail deal, dismiss NDP objections as 'horsefeathers'", *The Globe and Mail*, June 15 2010, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/liberals-hail-detainee-deal-dismiss-ndp-objections-as-horsefeathers/article1604640/> (Accessed June 27 2010).

<sup>250</sup> Weinrib, 69.

Conservative party still leads the most recent opinion polls, and most experts predict another election will return a Conservative plurality. The final piece in understanding this new political reality is to explain why a large segment of the electorate is willing to accept Harper's Rules and their ramifications for the democratic process.

### **Political Parties and Public Support**

The scholars who reject Harper's rules as incorrect and deliberately misleading characterizations of the system are the same who use their work to extol the democratic credentials of representative parliamentary government. Graham White refers to himself as an "unabashed fan"<sup>251</sup> of the system. It is this sentiment that leads these scholars to the view that one of the major problems with public participation today is that the public does not understand exactly how responsible government is providing for meaningful democracy. But there is another school of thought that exposes holes in responsible government's representative and responsive abilities, and investigates the reasons behind the public's diminishing deference towards our institutions. Lisa Young summarizes the attitudes of this school:

The institutions of responsible government are less appropriate to contemporary Canadian society than they were to the social structures of 1848. The modern Canadian electorate is increasingly unwilling to accept a politics in which important decisions are made behind closed doors and a political elite that appears unresponsive to citizens' views and dismissive of their deliberative capacities. Popular discontent in the contemporary era focuses not so much on questions of governance, but rather on issues of representativeness, responsiveness, and accountability of elected representatives. In the eyes of significant segments of the electorate, responsible government stands in the way of representative government.<sup>252</sup>

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<sup>251</sup> White, 153.

<sup>252</sup> Lisa Young, "Value Clash: Parliament and Citizens 150 Years After Responsible Government", *Taking Stock of 150 Years of Responsible Government in Canada*, eds. F. Leslie Seidle and Louis Massicotte, (Ottawa: Canadian Study of Parliament Group, 1998), 105.

The passions that Young refers to here fuel calls for the implementation of electoral democracy and radical reform. This sentiment is clearly expressed through reform proposals like the elected Senate, recall, and citizen initiative. But there is more to it than just concrete proposals. The general sentiment implies that citizens view a heavily active Parliament with suspicion, and since a large part of the electorate will always disagree with some decisions taken by elected officials, the notion that Parliament is not operating in line with the will of the people is perpetuated. It is not surprising that citizens are sceptical of a process whereby the actual government of the state is decided behind close doors, especially when they are not used to such a process and they already have a poor view of elected officials. From this perspective, the vote should be definitive; anything else is just elites aiming to disenfranchise the plurality.

Of course, there are limits to this line of reasoning. Up to this point, I have deliberately avoided discussing provincial level experience with government formation. This was mainly for reasons of practicality, but also because I believe that the federal party system is a unique entity. It is entirely possible for norms and conventions to develop at that level that are not found at the provincial level. It is important to note them here, however, because the provincial experience with coalition government weakens the argument that citizens are unwilling to accept governments formed after an election.<sup>253</sup> These include the 1985 Ontario precedent, when the Liberals and the NDP signed a governing accord to push out the Progressive Conservatives, despite the fact that the PCs had the larger number of seats (although the Liberal Party did have a small plurality in votes). The Liberals were subsequently vindicated in this manoeuvre, winning a majority government in 1987. While these experiences are significant, to treat them as

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<sup>253</sup> Skogstad, 168.

devastating to the electoral conceptions of a mandate at the federal level ignores how the regionalization of political culture finds expression through the party system.

Bassett argues that what made British parliamentary democracy so stable was that regardless of the policy differences between the two main parties, they were both in agreement on how legitimate decisions should be reached.<sup>254</sup> This stability may be breaking in Canada. When we look at the public's disillusionment with representative institutions and how that translated into the push for electoral democracy, we have to place it in the context of Western Canada and the quest for influence. The popularity of the Reform Party and its electoral platform were directly connected to the rising levels of disillusionment Western Canadians felt with the government in Ottawa.<sup>255</sup> With the Conservative Party the direct successor of that movement, it undoubtedly reflects some of those populist desires, such as Harper's push for an elected Senate. This base of support is more likely to view the Conservatives' subsequent pluralities as electoral victories for Western Canada and view attempts to replace it as undemocratic.<sup>256</sup> The fact that the Conservative Party's core base is already sensitive to electoral democracy makes it easier for Harper to condemn the replacement attempts.

This suggests that the executive-legislative conflict will be more potent in times of a Conservative single-party minority government. This is consistent with some of the other evidence, such as the lack of an easy legislative alliance for the Conservatives and their historical tendency to not compromise their policy initiatives. However, we cannot discount the fact that a Liberal government trapped in a minority position would take advantage of the ambiguity surrounding mandates as well. If we recall, Paul Martin tried to strengthen the legitimacy of his

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<sup>254</sup> Bassett, 127.

<sup>255</sup> David Laycock, "Making Sense of Reform as a Western Party", *Regionalism and Party Politics in Canada*, eds. Lisa Young and Keith Archer, (Don Mills: Oxford University Press, 2002), 130.

<sup>256</sup> Skogstad, 169.

minority government by claiming a mandate.<sup>257</sup> While the conflict may reduce in severity because the Liberals take a pragmatic approach to working with other parties, and the odds of a united Conservative-NDP coalition would be low, there would undoubtedly be situations wherein the opposition parties would unite to challenge the government on the legitimate use of its powers, possibly triggering an election.

The point is that it is not political suicide for the government to operate as if it had a mandate from the people and to deride the House for obstructionist partisanship. In times of systemic minority government, this becomes an important strategy for a party wanting to implement its policy agenda, thus explaining why Canada's ambiguity surrounding government mandates has become politicized. The government does not even have to convince a majority of voters. With the SMP system, the government will just need to maintain the support of enough voters to ensure re-election. There will always be a base of voters who will support a party for what it stands for, regardless of the means it uses to accomplish that. While scholars may condemn what this means for our democracy, and claim it does not fit the practice of parliamentary government, neither historical precedent nor public opinion supports the overwhelming consensus they claim.

### **Codification: A Solution?**

It is clear that it is dangerous for such a vital piece of institutional mechanics to be left to such a malleable constitutional structure as conventions. It is far too easy for political actors to disrupt the consensus surrounding the conventions for partisan gain by couching their reasons in the rhetoric of democratic legitimacy. Perhaps it is time to consider ways the conventions can be

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<sup>257</sup> Anne Dawson and Sean Gordon, "Martin rules out Coalition as Harper rethinks future", *Calgary Herald*, June 30 2004, A1.

codified and entrenched to put them past the ability of political actors to exploit the ambiguity. I am not the first to make this call; even some of the contributors to *Parliamentary Democracy in Crisis* have begun to discuss the wisdom of such a move. Leclair and Gaudreault-DesBiens state that “if we agree that formal law cannot solve everything, we also think that informal law or normative political precedents may sometimes prove insufficient or useless, particularly if they become ossified and impervious to crucial societal shifts.”<sup>258</sup> Russell puts it more in the form of a plea:

This situation suggests to me that the time has come to bring those spooky unwritten constitutional conventions down from the attic of our collective memory and try to see if we can pin them down in a manner that is politically consensual and popularly accessible. I do not know how or even whether this can be done. But I am convinced that those of us who share my concern should begin to explore the possibilities.<sup>259</sup>

This focus on popular accessibility is imperative; codification cannot merely be putting classical parliamentary theory onto paper. Any attempt to reshape responsible government is going to meet with demands for increased citizen involvement and Canadians may even want to see their votes transfer more directly to government formation in spite of the warnings parliamentary theorists raise. Most importantly, there needs to be an agreement across political parties that whatever is entrenched is fair, neutral, and will be followed. This is easier said than done, especially considering the political posturing that went on in previous attempts at mega-constitutional politics. That is not to say constitutional amendment is the only way to entrench the conventions; standard legislation and changes to the standing orders of the House have also been proposed as less drastic alternatives.<sup>260</sup>

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<sup>258</sup> Leclair and Gaudreault-DesBiens, 118.

<sup>259</sup> Russell, 148.

<sup>260</sup> Andrew Heard, “Give the House the Authority”, *The Globe and Mail*, January 10 2010, <http://www.theglobeandmail.com/news/opinions/give-the-house-the-authority/article1426031/> (Accessed June 15 2010).

If scholars insist that having the House of Commons be the place where governments are formed, sustained, defeated and replaced is the best way to provide for meaningful democracy, they should join the discussion by proposing reforms that entrench this principle. Some examples that could be considered are:

- The formal resignation of the government during an election campaign, and its operation in a purely caretaker form.
- The election of the Prime Minister at the start of a new Parliament, with the Governor General bound to appoint the winner.
- A clearer delineation of the Governor General's powers: what can be done on his or her own and what can only be done only on the binding advice of the Prime Minister. This may even include the House having to approve the Prime Minister's nominee before he or she advises the Queen in order to reduce the image that the Governor General is the tool of the Prime Minister.
- A constructive vote of no confidence: opposition parties passing no confidence in the government must also inform the Governor General that they are prepared to take over.

These examples are all in place in other parliamentary systems around the world. The hope is that they would encourage coalition formation and cement the legislature as the ultimate political authority. A clear understanding of these rules makes it unlikely, although not impossible, that electoral democratic conventions would place expectations on government formation.

Of course, formal entrenchment will not solve everything. Marshall and Moodie present an accurate account of the benefits and limitations of codification. They note that the presence of a law does not prevent the later emergence of a new convention altering that law, and that entrenchment will not stop political actors and others from twisting the words in the law to create a preferable meaning.<sup>261</sup> However, they also say that a clearly-worded law may raise the credibility level of a convention so as to encourage political actors to follow it, and that in some cases judicial oversight may prove an able method of resolving crisis.<sup>262</sup> The point of entrenchment would not be to end debate on a convention permanently, but to give the system

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<sup>261</sup> Marshall and Moodie, 43.

<sup>262</sup> *Ibid.*, 44.

some stability if the debate emerges again in the future. Debating the merits of a law does not produce instability as long as the actors obey the system until it is changed. There is so much tension surrounding the terms of responsible government right now because the debate is not just about what they should be; it is about what they are. Giving the courts the power to enforce the legal requirements for government formation would at least provide that stability. We see in the *Patriation Reference Case* and Peter Milliken's ruling on the Afghan detainee scandal that constitutional conventions have more moral force when they are recognized by a nominally independent arbitrator. There has been quite a bit of scholarly criticism surrounding Australia's purely non-legal, political attempt at codification at the 1983 Australian Constitutional Convention.<sup>263</sup> It is argued that the informal document that emerged from this process only further complicated the conventions because many were adopted despite disagreement and some conflicted with long term practices.<sup>264</sup> It can be assumed that formal codification with institutional review would limit some of these flaws.

Critics of codification fear that the flexibility of the Westminster system will be lost, a fear that Marshall and Moodie rightly dismiss.<sup>265</sup> Once written down, there will always be a process by which the law can be changed. At least with a formal act, there is a legitimate source of authority that the general political community can point to when enforcing their critical moral code. Andrew Heard, for his part, says that the best candidates for codification are the fundamental conventions, the ones with a high degree of consensus on their terms and

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<sup>263</sup> Geoffrey Marshall, "The Constitution: Its Theory and Interpretation", *The British Constitution in the Twentieth Century*, ed. Vernon Bogdanor, (Oxford: Oxford University Press, 2007), 41.

<sup>264</sup> C.J.G. Sampford, "'Recognize and Declare': An Australian Experiment in Codifying Constitutional Conventions", *Oxford Journal of Legal Studies* 7:3 (1987), 372.

<sup>265</sup> Marshall and Moodie, 43.

principles.<sup>266</sup> While those with a high level of agreement may be the easiest to codify, they are not the ones who need it the most. Rather, it is the infra-conventions, the ones with a high degree of disagreement, that would benefit from an attempt at entrenchment. When conventions are unclear and highly politicized, the formal process of codification is the only way to manufacture a new consensus.

## **Conclusion**

It is clear that the current party system pushes the probability of future minority government to a near certainty. Not only that, but its unique lack of obvious partnerships and the tantalizing prospect of a quick turnaround to a majority limit the incentives to forge coalitions. We have already seen how the issue of where a government gets a mandate is not as matter-of-fact as many parliamentary theorists would believe; now we see how that ambiguity trickles down into the actual workings of Parliament and is politicized for partisan gain. This ultimate question of how much of its legitimacy the government owes to the support it finds in the House is challenging the ability of our institutions to manufacture legitimate decisions. The big question going forward is how long can this disagreement place stress on the system before something gives.

In June 2010, EKOS Research released a poll claiming that an election held then would see the Conservatives lose 20 seats with the other three major parties all making gains.<sup>267</sup> This would leave the Conservatives with a plurality, albeit a smaller one similar to their standing after the 2006 election. While a lot may happen between this poll and the next election, this is an indication that we may at some point produce a Parliament wherein no single party would be

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<sup>266</sup> Heard 1989, 77.

<sup>267</sup> EKOS Politics, "Federal Voter Intention", June 24 2010.

able to find Parliamentary support for a policy agenda. It may very well happen that the only possible government that is able to form in a future Parliament would be a Liberal-NDP coalition, supported by the Bloc — even if the Conservatives had the most seats. In Russell’s words it would be “foolish” to limit our options regarding government formation with such a fragmented electorate.<sup>268</sup> The continued instability in the institutions could eventually force a coalition solution. This would be dependent on the Liberals resolving their identity crisis and embracing the coalition concept wholeheartedly, something they never did even when Stéphane Dion committed the party to it. But if this alliance did try to take office again, it would be met full force with the electoral democratic conception of a mandate. The parties would have to overcome the norms and infra-conventions that go further back into Canada’s history than most scholars give credit for. They would also have to weather the backlash, as the Conservative Party would politicize those same norms and use them in an attempt to once again mobilize public opinion against the coalition. With the rules of government formation so vital to the functioning of a stable democracy, it seems hazardous to wait while our party system combines with our malleable institutional structure to generate another crisis. Before that happens, perhaps the time has come to discuss ways to put these rules outside the ability of political actors to exploit the disagreement and establish exactly how Canadians want their votes to translate into a government.

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<sup>268</sup> Russell 2009, 147.

## Conclusion

A clear, recognized, and legitimate process for determining how the votes cast in an election translate into a government is one of the hallmarks of a stable democracy. Without an agreed upon process, a government's claim to a mandate can be challenged, thereby bringing controversy to the exercise of executive power. This is the situation Canada currently finds itself in. The events of 2008 only brought to the surface a deep-seated debate on the norms and conventions of government formation. The continued politicization of this debate threatens to keep the Canadian political system in a heightened state of tension and crisis.

Has the largest party in the House of Commons, by virtue of being the largest, been elected to executive office? That is the central question behind this debate, but the answer has ramifications for the entire system. From the interaction between the Prime Minister and the Governor General to the ability of the House to hold the government to account, the perception that the largest party has been directly elected throws into question more of the conventions that make up classical parliamentary theory. It becomes difficult to determine the correct course of action when the debate centres on what is appropriate for a democratic system. As long as both sides can claim to be representing the will of the people, no one view gets repudiated and the Constitution becomes riddled with uncertainty.

The scholars that condemned Harper's Rules approached the subject from the perspective that the principles behind traditional notions of responsible government are inherently democratic and could objectively be considered part of Canada's constitutional structure. But that narrative of long-established tradition and the smooth evolution to democracy is incredibly problematic and often dismisses many of the criticisms of representative government as the

public's lack of understanding. This approach glosses over or discounts evidence that suggests the Canadian system is not perfectly in line with parliamentary theory, but has embraced new practices through its own political history. The government formation process is one example of this. Looking back on Canada's history of minority government, we see a steady stream of discourse that suggests political actors have both advocated for and felt bound by electoral democratic notions of a mandate. Harper's Rules are not one-offs or outliers, but only the most politically explosive manifestation of an idea that has existed in our institutions for some time. Rather than falling under the fundamental heading of Heard's classification of conventions, the competing visions of a government's mandate are two sides of an infra-convention, an incredible blow to the coherence of the system.

Despite the historical support for a variation of Harper's Rules, an argument could be made that those are only examples of political actors misunderstanding the conventions. Regardless of precedent, Canada uses a parliamentary system, and in a parliamentary system democratic accountability is entrusted to the legislature. This easy dismissal of Harper's Rules is problematic, however, because of the challenge they make to the imagined consensus on the best way to promote democracy. In order for a constitutional convention to be properly defined and implemented, there must be consensus within the general political community on how the convention embodies a constitutional principle. It is only through the creation of a critical moral code that a convention can be said to be binding. The problem with this approach is that it is easy to lose this consensus through political events.

Neither the actors in the historical examples I presented nor Harper's own defence of his actions treated the largest party's right to govern as a neutral piece of institutional machinery, but rather as a rule intended to safeguard the verdict of the electorate from desperate politicians. It

was a rule that came attached with reasons why it was good for democracy. Not everyone agreed with those reasons, but some did — enough to expose the supposed consensus as faulty. The course of action these scholars viewed to be appropriate was their own opinion on how democracy should be advanced, and could not be considered binding on political actors. Marshall may say that conventions are in themselves a body of morality,<sup>269</sup> but in the case of government formation in Canada, it is uncertain on whom the moral obligation falls.

While this disagreement was rather harmless in the past due to the predominance of majority government and the rarity of multiple government formation attempts in a life of a minority Parliament, it is poised to wreak further havoc on the system as Canada enters a period of continuous minority government. It is when the debate is politicized during the conflict between a minority government and the opposition-controlled legislature that it poses the greatest threat to the system, as both sides search to legitimize their partisan actions. Proportional representation may reduce the severity of the stress over the long term as the reaction against coalitions gives way to political necessity. However, it does not guarantee that Harper's Rules will disappear completely and we may see an expectation that the largest party be the centre of any coalition formation. As Russell points out, "the lack of political consensus on fundamental principles of our constitution poses a serious threat to the stability of our parliamentary democracy. It means the principal players in our constitutional politics do not agree on fundamental rules of the game."<sup>270</sup> We may now need to explore ways of manufacturing a new consensus.

If any reform like proportional representation or codification is going to be attempted, however, it most likely going to be politically motivated rather than an honest quest for

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<sup>269</sup> Marshall 1984, 11.

<sup>270</sup> Russell 2009, 148.

improvements to the system. The fact is that the two main political parties find the confusing notion of a mandate a valuable tool for advancing their agenda without compromise when they have come up short in a quest for a majority. The most likely event is for a Liberal-NDP coalition to form immediately following an election and for it to usher in some reforms to counter act the Conservatives' claim to legitimacy. But as mentioned, such an event would require the Liberal Party to abandon its commitment to pursuing a majority, at least temporarily.

In any event, the main lesson to take from this thesis is that claims about the proper workings of parliamentary institutions should not be taken for granted. They are often based on the coherent and exhaustive theory on parliamentary democracy, which does not always reflect how the system has evolved through practice. Subsequently, many scholars argue that what they think the rules should be is in fact what the rules are, a mistake that assumes a consensus on the democratic credentials of responsible government. This thesis looked at one issue of recent debate and used the theory on conventions to expose how the easy rejection of a different interpretation is problematic. Scholars cannot be so definitive in claiming that the largest party in the House does not have an automatic right to form the government. Rather than being clear and real but misunderstood, constitutional conventions can easily lose their authoritativeness through the application of conflicting conventions in political practice. Future scholarly research may benefit by moving away from recognizing conventions based on some democratic benefit, instead looking at how they are shaped through a history of the political process and how their original "intent" often advantaged some actors to the detriment of others. As Canada goes forward into a period likely fraught with minority government, it may be beneficial to start a dialogue on how the principle of democratic accountability can be forced on political actors outside appeals to tradition or informal morality.

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