

Advice to the Minister of Democratic Reform

Senate Reform, Constitutional Amendments, Fixed Election Dates, and a Cabinet Manual

Bruce M. Hicks*

The Conservative Party of Canada ran in 2006 on an agenda of democratic reform that was to include election dates for the Commons fixed at four years and Senate elections with fixed eight-year terms. After assuming power, its legislation for quadrennial fixed election dates was abrogated within two years of its passage and again two years later. Its Senate reform bills have never gotten beyond second reading and, in most cases, only made it to first. And the prime minister has twice convinced the Governor General to use her reserve powers to protect the government from parliamentary accountability. This paper outlines possible ways to rehabilitate the government's reform agenda.

On February 10, 2012, I met with the Honourable Tim Uppal, Minister of State (Democratic Reform), as part of his outreach to academics with respect to the federal Conservative Government's "Senate reform" legislation.

Currently before the Parliament of Canada is Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867 in respect of Senate Term Limits*.¹ This bill proposes reducing the term of all senators appointed after October 14, 2008, from age seventy-five to a single nine-year term.² Additionally, the bill states that the prime minister "must consider names from the most current list of Senate nominees selected for that province or territory" in recommending to the Governor General appointment to the Senate

from provinces that have enacted legislation as prescribed by the bill and held "consultative" elections.³

The prescribed provincial legislation is contained in a schedule to the bill, and uses multiple-member plurality voting to identify who "wins" the right to be on a list of provincial senatorial nominees. The number of senators on the list, according to the proposed legislation, is up to the provincial government, and once placed on the list these "senators-in-waiting" remain on the list for six years, unless they resign from the list, swear allegiance to a foreign power, are convicted of treason, are adjudicated bankrupt, or are a senator, Member of Parliament (MP), or member of a provincial legislature.⁴

The purpose of this legislation is to make the Senate elected without amending the *Constitution Act, 1867*.

Pursuant to section 42(b) of the *Constitution Act, 1982*, "the method of selecting Senators" can only be altered by a constitutional amendment that has been agreed to by a resolution adopted by both chambers of Parliament and seven provincial legislatures that together represent more than 50 percent of Canada's population (s. 38(1)).⁵

The federal government's claim that this legislation does not change the method of selecting senators rests on the fact that the prime minister is only being instructed to "consider"

the names on this list, leaving the method of appointment the same as it was before the adoption of this law. Currently, the Governor General summons the person to the Senate that has been recommended by the prime minister through an “instrument of advice.”

The precedent for a province holding a vote on a list of potential nominees goes back to the *Meech Lake Constitutional Accord*, which would have amended the Constitution to require the prime minister (PM) to choose nominees to the Senate from a list provided by the relevant province. During the ratification period for this accord, Prime Minister Brian Mulroney had agreed to operate as if the accord was in place. This allowed the Alberta government, long an advocate of an elected Senate, to enact provincial legislation to determine its list through province-wide election and then dare the PM not to appoint the winner.⁶ When the accord was defeated, Mulroney stopped obtaining provincial lists of potential nominees, and Jean Chrétien made a point of publicly rejecting on principle the appointment of any person “elected” in an Alberta senatorial election.⁷

Alberta has continued periodically to hold Senate consultative elections and Prime Minister Harper has chosen the appointees for that province from this list. The hope of the federal government is that more provinces will follow the Alberta example and that this would create sufficient pressure on future prime ministers to respect these elections—and encourage the public in other provinces to demand the same right to elect their senators.

This paper reports the advice and concerns I raised with the Minister. The first section discusses the Senate reform bill and outlines my critiques of the plan contained in that legislation. The following sections detail the four recommendations I made to the Minister on the government’s larger democratic reform agenda.

Critique of the Senate Reform Bill

It is likely that the clever sleight of hand offered by this bill will not survive a constitutional challenge, but the decision to leave the legisla-

tion surrounding the holding of these consultative “elections” to each province is *less* unconstitutional (if such a thing were possible) than previous incarnations of this legislation that would have established a federal election law governing “consultations with electors on their preferences for appointments to the Senate.”⁸

I told the Minister that Quebec will likely challenge the constitutionality of the legislation in court as the political leaders in this province correctly see the Senate’s arrangements as one of the key agreements between the French and the English that made Confederation possible. The statement by Father of Confederation and Ontario Leader George Brown to this effect in the Confederation debates was cited by the Supreme Court in the 1980 reference on the legality of altering the Senate to allow the provinces to appoint half of its members (or alternately allowing for direct election of senators). The citation is as follows:⁹

But the very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step; and, for my part, I am quite willing they should have it. In maintaining the existing sectional boundaries and handing over the control of local matters to local bodies, we recognize, to a certain extent, a diversity of interests; and it is quite natural that the protection for those interests, by equality in the Upper Chamber, should be demanded by the less numerous provinces.

The ruling of the Supreme Court in this case underlies the amending formula adopted in the *Constitution Act, 1982*.

Additionally, Quebec politicians correctly surmise that the creation of elected senators will not just alter the institutional dynamics of Parliament, but will shift political influence in the federation. Senators, elected with mandates from an entire province, will come to rival premiers, who are not directly elected province-wide, in moral suasion and public influence.

The Minister expressed his willingness to show flexibility with the provinces. For example, he has told New Brunswick that the federal government will let it use single-member ridings, rather than a province-wide vote, for its ten Senate positions, so that the Acadians in the north and the English in the south of the province will be represented.

In that spirit, my advice was to let the Quebec National Assembly recommend that province's nominees. This has long been a demand of Quebec's and, I suggested, just might prevent it from launching a court challenge on the constitutionality of the law. [Quebec subsequently filed a reference, on April 30, 2012, with the Court of Appeal of Quebec, challenging the constitutionality of Bill C-7.]

Having senators appointed by a province will by no means undermine the legitimacy of the upper chamber. In fact, the Bundesrat model (from Germany) has long been considered by Canadian federal and provincial governments as a useful model for Canada precisely because intrastate institutions are legitimate and even thought necessary in so many federal countries.

Of course, allowing Quebec to appoint its province's senators will not recreate that model, as other provinces will be using election. But as Quebec's twenty-four senators have to come from twenty-four electoral divisions (divisions that only encompass the boundaries of Quebec in 1867), holding elections in the province is not feasible absent a constitutional amendment (even if there was an interest in elections, which there currently is not). Further, Quebec exceptionalism respects the terms of union. And, finally, Quebec is changing, so it is likely that in time there will be pressure from within Quebec to hold elections if every other province is holding elections for its senators.

Realizing that non-Quebeckers, particularly Western Canadians, object to Quebec exceptionalism, the offer for a provincial legislature to recommend names should probably be extended to all provinces. This would strengthen the federal government's claim that this is only about consultation. Provinces would be free to hold consultations, either through their

legislatures or through plebiscite. And the PM would retain the right to choose who to nominate. Otherwise, if the government imposes a singular method of consultation on the provinces, namely the holding of elections using multimember plurality balloting, then this is not about consultation, it is about changing the "method of selection."

The federal government's strategy to transition the upper chamber to election, as I told the Minister, is based on a naive understanding of the way the 17th Amendment to the *Constitution of the United States* unfolded. This amendment made its Senate elected.

The US Constitution provided for the selection of senators by the legislature of each state.¹⁰ There is a belief that once Oregon adopted legislation in 1908 to hold consultative elections, it created a domino effect, with state after state following suit, and then proceeding to ratify the requisite constitutional amendment to make the Senate elected by 1913.

There is no doubt that this did occur and that the change was in response to a populist groundswell in favour of making the upper chamber more directly accountable to the voters. But it was a much longer developmental trajectory that included a breakdown in the previous selection process.

First, calls for direct election began as far back as 1826. Second, the divisions over slavery and states' rights that led to the civil war began to make the selection of senators by state legislature difficult beginning in the 1850s. Divided legislatures resulted in long vacancies as no consensus could emerge as to who the representative of the state should be in Washington. Third, the civil war impacted on Senate appointments, with the union divided between 1861 and 1865. And it eroded support for state influence at the federal level and removed federalism from popular discourse vis-à-vis the role of the Senate. Fourth, senators were being selected by different mechanisms in different states, throwing into doubt the legitimacy of some senators.¹¹ And fifth, political parties had begun to select their nominees for the Senate through primaries. By 1908, ten states were already using primaries to

select their parties' Senate nominees, with the state legislature then voting to decide between the two parties' candidates.¹² The transition to election in these states was virtually no change; and in other states it was a necessary corrective for a system that had serious flaws.

Having said that, it is not unreasonable for the Conservatives to believe that an idea like direct election for Canadian senators will be adopted by province after province, fuelled by popular support. We know definitively that proportional representation was adopted by country after country in Europe due to the temporal popularity of this electoral mechanism.¹³ And during the period of ratification for the *Meech Lake Constitutional Accord*, following the lead of Alberta, the legislature of British Columbia adopted a law to allow for direct election of its nominees, though this act contained a sunset clause and has since lapsed.¹⁴

Keeping in mind that each of the following legislatures has a right-of-centre political party similar to the Conservative Party of Canada in the majority, recently Saskatchewan adopted legislation modelled on the Alberta law;¹⁵ there is a private members' bill in BC that the premier has said she would support to hold Senate elections; a special committee on Senate reform in Manitoba has recommended an electoral process be adopted in that province, provided it is run and paid for by Elections Canada;¹⁶ and the premier of New Brunswick has, as noted above, expressed a willingness to hold elections using single-member constituencies.

What will be key to turning this ideological interest in Senate elections into a popular momentum for reform will be, to begin with, the sort of candidates who run for and get elected in these votes.

Canada's experience prior to Confederation was that it was hard to attract good candidates to run for their elected upper chamber. Upper chamber ridings are bigger than those used for the lower chamber. Responsible government requires that the government be accountable to, and have the confidence of, the lower chamber. So, while senators can be Cabinet ministers, the practice over time has been to only appoint

one senator to Cabinet. People with ambition and talent would and did choose to run in the smaller ridings of the lower chamber that were less expensive to campaign in, easier to represent when elected, and held the possibility for advancement into the ministry.

The proposed bill would allow senators to only serve one nine-year term. In most jurisdictions where the option of holding elections is being contemplated, candidates will have to run a province-wide campaign. Even if a province was to use electoral divisions, only in the case of PEI and New Brunswick would these ridings be the same size as for the House of Commons (they have equal representation in both chambers). In all other provinces, a Senate riding would be dramatically bigger. In the case of Ontario, were the province to use ridings for its senators, a Senate riding would be twenty times the size of a House of Commons riding. And if Ontario did not use ridings but had candidates run province-wide, the candidate would have to run a campaign similar to the provincial premier's campaign, with national media buys and cross-province tours, just to get noticed.

Getting noticed is made all the more challenging because the Senate elections are to be held at the same time as a provincial or municipal election. Obviously, provincial and municipal issues will dominate during these campaigns, so candidates will have to work harder to make voters aware of the Senate election, to inform them of the issues and their positions on the upper chamber and on federal issues. If Senate election campaigns are not big (which means expensive), they will be subsumed by the provincial campaign taking place at the same time.

With no incumbency, there will be little capacity to build party campaign infrastructure for Senate elections and the larger ridings will make it difficult to co-ordinate with the party's provincial riding associations to share theirs. In most provinces, the provincial political parties have no relation to the federal parties. And, of course, if the vote is held at the same time as municipal elections, there are usually no political parties and, if there are, they have no relation to either provincial or federal political parties.

Having given these brief observations on the limitations of the government's Senate reform strategy, I then turned my attention to recommendations I would make on how to get the government's larger democratic reform plan back on track.

Recommendation #1: Table a Constitutional Amendment Authorizing Federal and Provincial Fixed Election Date Legislation

The constitutional amendment would read as follows:

The *Constitution Act, 1982*, is amended by adding:

4(3). Parliament or a legislative assembly may legislate with respect to its own dissolution, including the establishment of a fixed date for the return of the writs at a general election for its members.¹⁷

Section 4 of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*, currently states:

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Section 4(1) replaced, though did not delete, section 50 of the *Constitution Act, 1867*, which read:

Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Similar provisions with respect to the maximum length of a provincial legislature exist in the provinces' respective constitutions. It is my position that section 50 does not have to be repealed, though there may be others who argue

that this should be done for good measure. The merits of doing so should be weighed against the benefits of a single amendment as will be discussed below.

The five-year constitutional limit on the life of a Parliament has been exceeded only once since Confederation, and that was in 1916 (a time of war). On seven other occasions it was reached and not exceeded, though in 1896, Charles Tupper tried to make a case that since there had been a delay in the return of the writs for one riding, Parliament could last beyond the date set by proclamation for the return of the writs.¹⁸ The more common practice has been to call early elections when the prime minister or premier feels it is most advantageous to his or her political party winning the most seats, or if his or her government has lost a confidence vote.¹⁹

The idea of establishing a fixed election date had long been advocated by Stephen Harper. He introduced Bill C-512 on April 1, 2004, while leader of the opposition, which would have made that change.²⁰ In the 2006 election, the Conservative Party of Canada had as part of its election platform a commitment to establish a fixed election date every four years.

Bill C-16 was introduced into the House of Commons on May 30, 2006. It required that each general election take place on the third Monday in October in the fourth calendar year after the previous election, starting with October 19, 2009. Entitled *An Act to Amend the Canada Elections Act*, it passed both houses and received royal assent on November 6, 2006.²¹

During the debate on this legislation, the prime minister and his then Minister for Democratic Reform Rob Nicholson argued that this law would prevent a prime minister from calling early elections simply because it was advantageous to his or her political party. It was being proposed because it would ensure "greater fairness in elections campaigns, greater transparency and predictability."²²

Support for fixed election dates was not unique to the Conservative Party. Official support came from the Special Joint Committee of

the Senate and the House of Commons on the *Constitution of Canada* that recommended in 1972 that the following provision be placed in the Constitution:

43. Every House of Commons should continue for four years, from the day of the return of the writs for choosing the House and no longer, provided that, and notwithstanding any Royal Prerogative, the Governor General should have the power to dissolve Parliament during that period:
- (1) when the Government is defeated
 - (a) on a motion expressing no confidence in the Government; or
 - (b) on a vote on a specific bill or portion of a bill which the Government has previously declared should be construed as a motion of want of confidence; or
 - (2) when the House of Commons passes a resolution requesting dissolution of Parliament.

The Special Committee on the Reform of the House of Commons²³ argued against fixed election dates. In its 1985 report, it noted that a constitutional amendment would probably be necessary to extinguish the power of the Governor General to dissolve Parliament and it argued that Parliament's ability to vote nonconfidence was key to government accountability. The corollary to which, they concluded, was that fixed election dates would advance the executive's supremacy over Parliament.

Most recently, Aucoin et al. have convincingly argued the opposite: that given the history of snap elections by both Liberal and Conservative PMs and their use of prorogation to prevent Parliament from holding a government to account, fixed election dates could restore Parliament's power over the executive.²⁴ They argue that there should be no early elections. Rather, governments could be removed from office between elections through constructive motions of nonconfidence—where the motion both expresses a lack of confidence in the government and identifies who would have the confidence of the House to form a government. This would force minority governments, they argue, to work with the opposition to enact legislation that was supported by the majority of the people's representatives in the legislature.²⁵ In short, it would return Canada to responsible

parliamentary government.

Bill C-16 left intact the Governor General's capacity to dissolve Parliament early and call a new federal election. Specifically, Bill C-16 contained the following clause:

- 56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

Minister Nicholson argued in the Commons' debates that "the prime minister's prerogative to advise the Governor General on the dissolution of Parliament is retained to allow him or her to advise dissolution in the event of a loss of confidence."²⁶ He claimed that what was being created was a *new* constitutional convention against calling snap elections.

For a constitutional convention, or binding unwritten rule, to exist, Sir Ivor Jennings argued that there needed to be: (a) a precedent; (b) a belief among the constitutional actors that they were bound by the rule; and (c) a [democratic] reason for the rule.²⁷

The power to dissolve Parliament is a reserve power of the Crown. That is because when most of the royal prerogatives were being turned over to individual ministers and to the Cabinet (operating through the Privy Council) by emerging constitutional conventions, there was no democratic argument as to why the PM or Cabinet should have control of the prerogatives that govern Parliament.²⁸ As British Prime Minister Harold Macmillan correctly wrote in his memoirs, a PM has "no right to advise a dissolution" of Parliament to the Queen as this is one of her personal prerogatives.²⁹ Canadian prime ministers are less circumspect and have, since 1957, been delivering their recommendation for the use of the power of dissolution to the Governor General on a document bearing the lofty title, "instrument of advice."

Over time, the PM has been able to gain almost unfettered access to these powers.³⁰ While some argue that the reserve power over dissolution allows for a check on a ruthless prime minister,³¹ most Canadian academics accept the reality that the Queen and the Governor General

in the modern era will never defy a PM, as was the expectation of the Fathers of Confederation.³² It is noteworthy that in Australia, where the same constitutional conventions exist surrounding the reserve powers, governors reserve the right to use these powers in opposition to the advice of their first ministers and to consult widely, including other ministers and leaders of the opposition, before exercising these powers.³³

Since the fixed election date legislation did nothing to limit the Governor General's right to dissolve Parliament or the PM's capacity to recommend dissolution before the end of the four-year period, since Canadian PMs have little or no respect for the office of Governor General, and since Canadian Governors General are not inclined to refuse a request from the PM,³⁴ this bill did not establish a fixed election date. All it did was reduce the constitutional limit for a maximum Parliament from five to four years.

On September 7, 2008, the prime minister issued an instrument of advice to have the Governor General call an early election in violation of the law the PM had convinced Parliament to enact two years earlier.³⁵ His obvious hope was that he would win a majority of the seats in the House of Commons, something Canadian voters denied him at the time, though would deliver to him two years later when he called another election short of the four-year requirement.

Democracy Watch took the government to court. It argued not that the law was broken but rather that a constitutional convention had been broken, citing the comments of the PM and his Minister for Democratic Reform about the creation of a new convention. As the Supreme Court noted in *Re: Resolution to amend the Constitution 1981* and again in *Re: Objection by Quebec to a resolution to amend the Constitution 1982*, it is up to the Governor General, Parliament, or the Canadian people to enforce constitutional conventions as the Court cannot.³⁶ This point was made by the Federal Court of Canada in this case as well.³⁷

But the Federal Court of Canada went further. It applied the Jennings test and said a convention did not exist as there had been no precedent and, in spite of what was said in Parliament

and how the PM and party leaders had voted, the "relevant political actors" had not reached a consensus on such a convention.³⁸ As for who the actors are when it comes to the power of dissolution, the Court showed a misunderstanding of the reserve powers by saying that the PM and the Governor General must agree to be bound and are the only relevant actors as "the leaders of the political parties have no power, be it conventional or legal, to dissolve Parliament."³⁹ NB: The PM does not have this power either.

This decision was appealed, with the appeal court upholding the decision by declining to "make a declaration that there is a new constitutional convention that limits the ability of the Prime Minister to advise the Governor General in these circumstances."⁴⁰

This ruling casts into doubt not only the validity of the federal fixed election date law but similar legislation in the eight provinces that have enacted such laws as outlined in Table 1. While in each of these provinces there has been a precedent, which meets the first test of Jennings, these laws equally have clauses saving the lieutenant governors' reserve powers, meaning that a premier could "advise" an early election call and the lieutenant governor could accept such a recommendation. As the only constraint is convention, if such advice was properly framed (e.g., that the legislature had become dysfunctional, the claim Harper used to justify both of his early dissolutions), breaking these provincial statutes may not have any political consequences for a premier.⁴¹ It certainly would not have any legal consequence as conventions are unenforceable by the courts.

A strong case can therefore be made for a constitutional amendment establishing the right of all legislatures to (re-)enact fixed election date legislation. Such an amendment would require unanimity if one takes the position that this is altering the office of the Governor General.⁴² This is not a position I share. The form of amendment I am proposing is about legislative capacity to regulate dissolution and not about extinguishing regal or vice-regal power (dissolution would still be effected by the Crown). Only seven provinces, representing 50 percent of the population, would be needed to make

Table 1
Provincial Fixed Election Date Laws

Province	Fixed Date (Every Four Years)	Adopted	First Used
British Columbia	Second Tuesday in May	2001	2005
Ontario	First Thursday in October	2004	2007
Newfoundland and Labrador	Second Tuesday in October	2004	2007
New Brunswick	Fourth Monday in September	2007	2010
Prince Edward Island	First Monday in November	2008†	2011
Saskatchewan	First Monday in November	2008	2011
Manitoba	First Tuesday in October	2008	2011
Alberta	Between March 1 and May 31	2011	2012

†Originally, the PEI legislation adopted in 2007 set the date at the second Monday in May, though no election was held under this law that was altered the following year.

such an amendment. With eight provinces having fixed election laws that are now in question, this threshold could easily be met.

Constitutional amendment has been largely taken off the table—except if it affects only one province—following the defeat of the omnibus amendments of the *Meech Lake* and *Charlottetown* constitutional accords. But making a *single* amendment that is in the interests of Parliament and eight provinces may be doable. And if such an amendment were to be adopted, this may have the consequence of opening the door to other amendments in the future. It makes no sense for a country to have no capacity to amend its constitutional law, which is the current situation in Canada. The precedent of tackling specific constitutional problems with a measured response, rather than massive amendment packages that take the country to the brink, would be set.

Of course, the elephant in the room is Quebec. It is one of the two provinces that does not have a law regarding fixed election dates. At the time I met with the Minister of Democratic Reform, Premier Jean Charest was still in office and he had publicly rejected the idea of fixed election dates for Quebec. But this was in response

to, the weekend before, the Parti Québécois (PQ) adopting a series of resolutions for its election platform that, among other things, would see the establishment of fixed election dates for Quebec, and its leader and now premier, Pauline Marois, had been calling on Charest to introduce such a law all that week. I pointed out this fact to the Minister and that public opinion polls at the time were already predicting that the PQ would form the next government in Quebec. During the general election campaign that later unfolded, the leader of the Coalition Avenir Québec (CAQ), François Legault, also unveiled an election platform that contained a commitment to fixed election dates. And, of course, the PQ went on to form the government and is now in a position to introduce fixed election date legislation.

If the PQ and CAQ, which together now hold the majority of seats in Quebec's National Assembly, can be convinced this amendment is necessary to properly implement their own campaign promises of fixed election dates, which it is, their support for such a constitutional amendment may be obtainable.

The problem would be that, due to the events surrounding patriation in 1982, most

Quebec politicians are reluctant on principle to amend a Constitution they consider an affront to Quebec. But there is a precedent. The *Constitution Amendment, 1997 (Quebec)* was adopted by the National Assembly of Quebec to replace denominational school boards with linguistic boards. The resolution included the following statement in its preamble: “Whereas such amendment in no way constitutes recognition by the National Assembly of the *Constitution Act, 1982*, which was adopted without its consent.” So it is possible for the National Assembly to support a constitutional amendment; and this was done under a PQ government headed by Lucien Bouchard (though he took every opportunity to rail against the process at the time).

This does not open the Constitution to future amendment, but it does offer the possibility for future change, and that has benefits that go well beyond fixed election dates. But even if it does not, as Aucoin et al. aptly show, genuine fixed election dates have the potential to restore some of the principles of responsible government.⁴³

Recommendation #2: Adopt the Fixed Election Date Legislation Enacted by the UK Parliament

So, with or without a constitutional amendment, what should be the rules surrounding fixed election dates? I believe the British legislation best reflects the principles of responsible parliamentary government (and on this point I depart from Aucoin et al.⁴⁴).

Fixed election dates for United Kingdom (UK) general elections was a commitment contained in the Conservative-Liberal Democrat coalition agreement signed in 2010. Following this coalition government taking office, legislation was adopted by the UK Parliament setting an election every five years starting on May 7, 2015.⁴⁵ The only change to this law the opposition Labour and Scottish National parties proposed when it came before Parliament was to set the fixed-term at four years, which was not agreed to by the Conservative and Liberal Democrat MPs.⁴⁶

Under this law, there are only two mecha-

nisms by which an election can be called before five years and that is either the passage by the House of Commons of a motion, “[T]hat this House has no confidence in Her Majesty’s Government”; or if two-thirds of the MPs approve a motion stating, “[T]hat there shall be an early parliamentary general election.”

Should the House of Commons adopt a motion, “That this House has no confidence in His or Her Majesty’s Government,” it does not automatically result in an election. There are fourteen days for the parliamentary parties to try to find an alternative government (or presumably for the government to convince the Commons to restore its confidence). The new government then must get the House to adopt a motion stating, “[T]hat this House has confidence in Her Majesty’s Government.” If, after this fourteen-day “government formation” period, no one is able to put together a government that can obtain the confidence of the House, then Parliament is automatically dissolved.

While the act sets the day for voting as the first Thursday in May every five years after May 7, 2015, the Queen-in-Council can delay the election for up to two months. The Cabinet has to give a reason for the delay and both chambers have to agree. An example for why such a delay might occur was the outbreak of foot-and-mouth disease, which delayed the 2001 general election by a month. Parliament automatically dissolves seventeen working days before Election Day (which is the campaign period set by law in the UK).

In the UK, the Queen’s power to dissolve Parliament has been extinguished with her Majesty’s consent. While a constitutional amendment would be necessary to extinguish in Canada the royal prerogative of dissolution, the Governor General’s access to it could be eliminated by an amendment to the Letters’ Patent of 1947.⁴⁷ There is precedent for this. When the Governor General appoints a deputy, the commission does not include the power of dissolution. This would not prevent a prime minister going to the Queen and asking her for dissolution, but the optics of such a move would likely incur political consequences—the sort of consequences that are supposed to enforce

conventions—and there is reason to believe the Queen would refuse the PM given the elimination of the personal prerogative of dissolution in the U.K. given the elimination of the personal prerogative of dissolution in the U.K.

Recommendation #3: If Canada Is to Have a Public Cabinet Manual, It Should Be Based on the UK Version and Adopted Using Their Process

The idea of a publicly available Cabinet Manual, which has been used in the UK and New Zealand to clarify unwritten constitutional conventions, has been gaining support here in Canada.⁴⁸ Beginning with a workshop organized by University of Toronto Professor Emeritus Peter Russell at a public policy forum in February 2011, there has been a co-ordinated push by some academics to have a Cabinet Manual published by the Privy Council Office (PCO) in Ottawa.⁴⁹ This is a dangerous idea that could have constitutional consequences.

There already exists in Canada the equivalent of a Cabinet Manual. Only one version has been made public, the 1987 version. If that manual is any example, it is designed by the Privy Council Office (PCO) at the direction of the Prime Minister's Office (PMO) to extend the PM's control over the personal prerogatives, as evidenced by its stating such things as "Prorogation of Parliament is an exercise of the royal prerogative . . . The decision to prorogue is the Prime Minister's."⁵⁰ This is simply not correct; though I am sure it is believed to be true in the executive branch and this view would not likely have been altered by the events of 2008.

The principle lesson from the UK has to be about process!⁵¹ Though the second lesson should be about content, as the UK document has at its core the principles of enhancing the role of Parliament and responsible government, and of protecting the monarch and her powers from being compromised by politicians' partisan machinations to obtain and hold onto power.

As for process, while the Cabinet Manual is drafted by the Cabinet Office based on its understanding of unwritten constitutional

conventions, both houses of Parliament hold hearings on it, and make recommendations for its amendment. It is then adopted by the Queen-in-Council. This makes it binding on the executive branch.

Having Parliament (the legislative branch) and the Cabinet (the executive branch) agree on what should be contained in the Cabinet Manual can be used to ensure the concurrence of all constitutional actors when it comes to constitutional conventions. This could be useful with respect to the personal prerogatives as these are not powers of the executive branch but rather powers of the Queen that govern Parliament and thus mediate the relations between the two branches. But it equally could be used to misrepresent conventions and thus alter them in the process, which is why process and content are so important.

Having said that, the Cabinet Manual does not codify constitutional convention; the powers of dissolution and prorogation remain the personal prerogatives of the Queen. The Cabinet Manual guides only the executive branch, namely the PM, ministers, and senior public servants in their behaviour. The process of publishing this document and obtaining input from Parliament ensures transparency in the way the executive branch operates and makes it more accountable to Parliament.

As the Cabinet Manual has the capacity to reflect new constitutional conventions, it can impact on their emergence. That is why in New Zealand the preservers of this manual are quick to caution about including conventions for which there is insufficient concurrence. The analogy of the *Complete Oxford English Dictionary* has been used: new words are added in subsequent editions but only once these words have reached a level of acceptance.⁵² As they emerge, they are placed on slips for inclusion in the next edition. When a critical mass is reached, a new edition is produced. So, too, with the Cabinet Manual; it will always lag behind reporting constitutional conventions.

The current UK manual was submitted to the British Parliament in December 2010. It was studied by the Political and Constitutional Re-

form Committee, the House of Lords Constitution Committee, and the Public Administration Select Committee. Their reports were considered and responded to by Cabinet. This formal consultation process with respect to the Cabinet Manual mirrors the one put in place by Labour Prime Minister Gordon Brown in February 2010 for one proposed chapter for the manual, the one outlining government formation.

The stated purpose for establishing this process, in addition to meeting the Labour government's commitment to advance transparency, was to protect the Queen from being dragged into partisan politics and to ensure a civilized and orderly transfer of power should the Labour government not have the confidence of the new Parliament as chosen by the voters in that election.

The chapter of the manual prepared under the direction of Prime Minister Brown included a provision whereby, at the direction of the prime minister and through the Cabinet secretary who is responsible for the civil service, the advice of the relevant government departments could be made available to all political parties following the election. This includes the evaluation of proposed programs and must "be focused and provided on an equal basis to all the parties involved, including the party that was currently in government."⁵³ This would allow the parties' leadership to cost out proposed programs and policies as they explored different alternatives as to who should form a government.

This was not designed to create a coalition government, though that was a distinct eventuality. This process was thought to be equally important for a party that wanted to form a minority government, as it would need to develop a legislative program that would have the support of members of other political parties and independents.⁵⁴

All party leaders publicly committed to keeping the Queen out of the partisan machinations surrounding government formation, though she is to be kept briefed on all negotiations by all parties, as asking a person to become prime minister and to form a government in her name is still one of her personal prerogatives.

Since the 2010 election did not result in a single party having a majority of seats in the British House of Commons, various government configurations were explored by the leaders of the larger political parties and, in a very quick period of time, a coalition government was formed between the Liberal Democrats and the Conservatives. Their written agreement included a legislative program that was acceptable to both political parties, and even included elements supported by all political parties, as the dialogue between the various parties had identified a number of common policy positions. Due to the support of the civil service, this legislative program was on solid financial and economic footing from the start.

Thus, Labour Prime Minister Gordon Brown set a precedent. But a convention that future PMs must provide civil service support for government formation would be too broad a characterization of that precedent. So the new Cabinet Manual states that a PM *may* instruct the civil service, through the Cabinet secretary, to provide impartial advice to the leadership of the other political parties to explore government formation in a Parliament where no party has a majority of seats in the Commons. Given the precedent, perhaps with time, a convention will emerge that the PM will always offer political parties civil service expertise in a hung Parliament. But in the meantime, the convention the PM and Cabinet as constitutional actors agree to be bound by with respect to government formation is publicly understood and available to all in the Cabinet Manual.

One of the items included in the Cabinet Manual is the restrictions on what a "caretaker government" can do during the election. Pursuant to this manual, in or around dissolution, the Cabinet Office publishes guidance on what are the acceptable activities for the government while Parliament is dissolved. The PM writes to all ministers issuing similar instructions. This caretaker government does not take or announce major policy decisions. This includes entering into large or contentious procurement contracts. Government departments are also forbidden from undertaking significant long-term commitments unless the postponement

would be detrimental to the national interest or wasteful of public money. In those instances, if decisions cannot wait, they are handled through temporary arrangements or following consultation with the leadership of the other political parties.⁵⁵

Clearly, the UK manual, especially if the UK's fixed election law were adopted for Canada, would be a worthwhile addition to executive governance in Canada. A flawed manual would be discredited. As the manual has the potential to further the government's democratic reform agenda (e.g., it could be used down the road to identify any constitutional convention that emerges with respect to the PM making appointments to the Senate), it would be counterproductive to try to use such a document for short-term partisan purposes and willfully misrepresent constitutional conventions, as the PM has been doing in public speeches.⁵⁶

Conclusion

This paper reflects the comments made to the Minister of Democratic Reform, though the arguments behind the critique, advice, and recommendations have been expanded here for the purposes of academic discourse.

When it comes to the constitutionality of Bill C-7, the government's proposed Senate reform legislation, this paper reflects the limited advice on the constitutionality of this legislation, which was not a subject on which the Minister was seeking advice. Bill C-7 offends the constitutional amendment requirements less than the previous incarnations that would have established a federal election law for these consultations. Allowing the Quebec National Assembly (and other provincial legislatures) to organize their own consultations, including legislative hearings or a vote in the national assembly, so as to recommend nominees would (i) possibly have convinced Quebec not to challenge the legislation; (ii) buttressed the claim that the exercise is about consultation and not a prescription for a new method of selection, namely election; and (iii) may have even resulted in the long term in Senate elections in Quebec, if Quebecers themselves demand the right

to directly vote on their senators, a possibility in a province that has led the country in direct democracy.

The ruling by the Federal Court in *Conacher v. Canada* with respect to fixed election dates offers a unique opportunity to try a single constitutional amendment and thus set the precedent for how amendments should be undertaken and to show that they are indeed possible. It has thrown eight provinces' laws that set fixed election dates into question, and two of the largest parliamentary parties in Quebec, one of which is now the government, have promised to enact equally flawed fixed election date legislation.

Whether or not an amendment is attempted or achieved, the fixed election date legislation based on the law adopted by the United Kingdom would be preferable for Canada than the current legislation. The Westminster model of responsible parliamentary government is about electing representatives and then their working as an electoral college to choose a government and hold it to account. They should be able to replace a government mid-term once it loses parliamentary confidence. This happens in other countries, like Australia and New Zealand, but not in Canada, even though the constitutional conventions surrounding confidence are shared. The UK fixed election law respects this principle and forces parties to consider alternative configurations following a defeat on a confidence matter before triggering a new election. And it prevents a government from manufacturing its own demise, while still allowing for Parliament to cause an early election if two-thirds of the MPs believe that this is in the country's best interest.

Adopting a public Cabinet Manual, as advocated by a number of Canadian academics following the debate over the 2008 prorogation of Parliament, is a risky proposition, based on the current government's misleading partisan framing of conventions and the likelihood that the PMO and PCO would be minimalist (or worse) in their interpretation of conventions. But it equally has the potential to be a constructive document, as it has been in New Zealand and the United Kingdom. The lesson from the

UK, which in one edition of the manual has produced a document widely respected and thought to advance British democracy, is that process and content are equally important.

In other countries, governments have shown their commitment to democratic reform and have delivered on it. These ideas offer the opportunity for the federal Conservative government to honour its 2006 promise and deliver similarly.

Notes

- * Dr. Hicks is a visiting SSHRC fellow at the Bell Chair for the Study of Canadian Parliamentary Democracy at Carleton University.
- 1 This bill combines two previously proposed bills, C-10 and S-8; the former, introduced in the Commons in 2010, governed the holding of provincial votes on Senate appointments and the latter, introduced in the Senate the same year, would have reduced senators' terms to eight years; Bill C-10, *An Act to Amend the Constitution Act, 1867 (Senate Term Limits)*, 3rd Sess, 40th Parl, 2010; Bill S-8, *An Act Respecting the Selection of Senators*, 3rd Sess, 40th Parl 2010.
- 2 Bill C-7, *An Act Respecting the Selection of Senators and Amending the Constitution Act, 1967 in respect of Senate Term Limits*, 1st Session, 41st Parl, 2011 cl 4(1).
- 3 *Ibid* cl 3.
- 4 As this list of ineligibility expands on the limitations in the *Constitution Act, 1867* as to eligibility to be a senator, presumably someone eliminated from the list would have grounds to challenge the provincial legislation.
- 5 The Senate's failure to adopt such a resolution can be over-ridden by the House of Commons 180 days from the Commons first adopting its resolution in support of the amendment.
- 6 Stanley Waters, a Reform Party candidate, won the Senate "election" in 1989 and, under pressure from the Reform Party and the Alberta Progressive Conservative government, Mulroney finally agreed to summon him to the Senate in 1990.
- 7 Bert Brown had won the 1998 senatorial "election" but would be passed over when Paul Martin filled vacancies from Alberta and would only be summoned to the Senate in 2007 under Harper, having won a second, 2004, senatorial "election." Under the Alberta legislation, the number of people who win a place on the list is based on likely

- vacancies during a provincial legislative term.
- 8 That proposed legislation was introduced as C-43 in 2006 and C-20 in 2008. In each of these incarnations, the prescribed electoral system was single transferable balloting, which is what is used in Australia for its Senate elections. Additionally during this period, amendments to the Constitution were introduced to reduce the term of a senator to one term of eight years in bills S-4 in 2007, C-19 in the second session of Parliament begun also in 2007, and S-7 in 2009. The reason for originally proposing two separate bills, begun in different chambers of Parliament, was to buttress the federal government's claim that altering the tenure of a senator was (i) not tied to holding elections, but was simply (ii) meritorious in its own right and (iii) not a substantive change to the body since these long terms maintained its ability to be a chamber of "sober second thought," so (iv) was within the federal Parliament's jurisdiction for constitutional amendment without provincial concurrence pursuant to section 44. Bill C-43, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 1st Sess, 39th Parl, 2006; Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess, 39th Parl, 2008; Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2007; Bill C-19, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 2nd Sess, 39th Parl, 2007; Bill S-7, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 2nd Sess, 40th Parl, 2009; *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s44.
- 9 *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, at 67, 102 DLR (3d) 1, 30 NR 271, 1979 CarswellNat 643 (WL Can).
- 10 US Const art I, § 3.
- 11 In 1866, Congress moved to fix this problem by adopting regulations for how and when senators were to be elected by a legislature. This improved things but deadlock in state legislatures continued to result in vacancies.
- 12 By 1908, ten states were using the primary.
- 13 André Blais, Agnieszka Dobrzynska and Indridi H Indridason, "To Adopt or Not to Adopt Proportional Representation: The Politics of Institutional Choice", (2004) 35:1 *British Journal of Political Science* 182.
- 14 *Senatorial Selection Act* SBC 1990, cl70.
- 15 *Senate Nominee Election Act*, SS 2009, c S-46.003 (Not proclaimed into force at the time of writing).

- 16 Manitoba, Legislative Assembly, Special Committee on Senate Reform, *Report of the Special Committee on Senate Reform*, (9 November 2009) (Chair: Erna Braun).
- 17 The choice of using 50A is based on the established Canadian and British practice of adding an amendment to the article in the constitution act(s) that it is meant to modify. The location of this clause is not important, with the one exception that this clause should not be an amendment to the *Constitution Act, 1982*, 41(a), as that would have the consequence of implying that 41(a) was designed to protect all royal prerogatives from legislative restriction, and that is not a position I support.
- 18 He backed down when it became clear the legislation he was trying to get through Parliament would be constitutionally challenged in the courts.
- 19 Confidence votes are any legislation deemed by the prime minister as being a matter of confidence, a motion of nonconfidence, or a vote on the Speech from the Throne or on a money bill.
- 20 Bill C-512, *An Act to provide fixed dates for the election of members to the House of Commons and to amend the Constitution Act, 1867*, 3rd Sess, 37th Parl, 2004.
- 21 *An Act to Amend the Canada Elections Act*, SC 2007, c 10.
- 22 *House of Commons Debates*, 39th Parl, 1st Sess, no 47 (September 18 2006) at 1210 (Hon Rob Nicholson).
- 23 This is commonly referred to as the McGrath Committee after its chair, Progressive Conservative MP James McGrath.
- 24 Peter Aucoin et al, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011).
- 25 Governments formed by the leader of a political party which has a majority of seats in the Commons are assumed to have the Parliament's confidence.
- 26 *House of Commons Debates*, 39th Parl, 1st Sess, No 47 (18 September 2006) at 1215 (Hon Rob Nicholson).
- 27 Sir Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1960). Andrew Heard argues that a convention can be established prior to the first precedent by the constitutional actors reaching an explicit agreement that a convention exists, in *Canadian constitutional conventions: The marriage of law and politics* (Toronto: Oxford University Press, 1991).
- 28 See Bruce M Hicks, "The Crown's 'Democratic' Reserve Powers", (2010) 44:2 *Journal of Canadian Studies* 5.
- 29 See Harold Macmillan, *Riding the Storm, 1956-1959* (London: Macmillan, 1971).
- 30 See Bruce M Hicks, "British and Canadian Experience with the Royal Prerogative", (2010) 33:2 *Canadian Parliamentary Review* 18; Bruce M Hicks, "The reserve power as a safeguard for democracy, and other lies my forefathers told me", (2009) 25 *Inroads* 60.
- 31 See Eugene Alfred Forsey, *The Royal Power of Dissolution in the British Commonwealth* (Toronto: Oxford University Press, 1943).
- 32 This has been most compellingly exemplified by Mollie Dunsmuir, Canada, Parliamentary Research Branch "The Senate: Appointments under section 26 of the Constitution Act, 1867" BP-244E (Ottawa: Library of Parliament, 1990).
- 33 See Bruce M Hicks, "Coalition Governments to Parliamentary Privileges: Lessons in Democracy from Australia", (2012) 35:3 *Canadian Parliamentary Review* 20.
- 34 *Supra* note 22.
- 35 In Canada, PMs insist they have the right to advise, not simply recommend, dissolution of Parliament, thus the lofty title for what is no more than a letter.
- 36 In fact, it is unique to Canada in the British system of common law that constitutional conventions are even considered and that is because our federal and provincial legislation establishing final courts of appeal allow for references direct from the government, an artifact of the French Napoleonic system that in France has led to an actual constitutional court.
- 37 *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 11, [2010] 3 FCR 411, 202 CRR (2d) 136.
- 38 With respect to the "explicit agreement" test, the Court said that there was no evidence, irrespective of the legislation and what was said in Parliament, that the prime minister and the Governor General, as the only relevant actors, had agreed to the creation of a new convention.
- 39 *Supra* note 37 at para 46.
- 40 *Connacher v Canada (Prime Minister)*, 2010 FCA 131, 212 CRR (2d) 114, 320 DLR (4th) 530, leave to appeal to SCC refused, 33848 (September 20, 2010).
- 41 Prime ministers and premiers have long framed their early election calls in terms of a need for a mandate on an issue or a legislature that has become dysfunctional (this is how Harper justified breaking his own election law, with no political consequence).

- 42 *Constitution Act, 1982*, s 41(a), being Schedule B
to the *Canada Act 1982* (UK), 1982, c 11.
- 43 *Supra* note 24.
- 44 *Ibid.*
- 45 *Fixed-term Parliaments Act 2011* (UK) c 14.
- 46 This Act requires that the PM strike a committee
in 2020, of which the majority must be MPs, to
review how the act has operated and if it should
be amended, so its term and mechanisms could
be changed.
- 47 See Letters Patent (1947) C Gaz, 1, art VI “And
we do further authorize and empower Our
Governor General to exercise all powers lawfully
belonging to Us in respect of summoning, pro-
roguing or dissolving the Parliament of Canada.”
- 48 Australia also has publicly available Cabinet and
Executive Council handbooks, but these do not
discuss the reserve powers; *Supra* note 33.
- 49 See e.g., Fraser Harland, “Constitutional Conven-
tion and Cabinet Manuals”, (2011) 34:2 *Canadian
Parliamentary Review* 25.
- 50 Canada, Privy Council Office, *Manual of Official
Procedure of the Government of Canada* (Ottawa:
1987) at 401.
- 51 Bruce M. Hicks, “The Westminster Approach
to Prorogation, Dissolution and Fixed-Election
Dates” (2012), 35:2 *Canadian Parliamentary
Review* 20.
- 52 Rebecca Kitteridge, “The Cabinet Manual: Evolu-
tion with Time” (Paper delivered at the 8th An-
nual Public Law Forum, March 20 2006), online:
New Zealand Department of the Prime Minister
and Cabinet <<http://www.dpmc.govt.nz/>>.
- 53 UK, *Draft Chapter 6: Elections and Government
formation*, (London: Cabinet Office, 2010), art
2.14, online: Cabinet Office <[http://www.cabinet-
office.gov.uk](http://www.cabinet-
office.gov.uk)>.
- 54 Minority governments are those where the Cabi-
net is taken from one political party that does
not have a majority of seats in the Commons but
can obtain the support of the Commons to be the
government. This support may be given on an
issue-by-issue basis or through a formal agree-
ment with the leadership of another political
party for a fixed period of time.
- 55 UK *Cabinet Manual* (London: Cabinet Office,
2011), art 2.29, online: Cabinet Office <[http://
www.cabinetoffice.gov.uk](http://
www.cabinetoffice.gov.uk)>.
- 56 For example, when standing next to British
Prime Minister David Cameron in London, the
PM told the press that only Cameron could have
formed a coalition government because he had
the right to govern, having won the most seats
in the 2010 election—something that is not only
false but disrespects the work done by the British

Parliament to inform people about the constitu-
tional conventions.