
Constitutional Conventions and Parliament

by Andrew Heard

There are many of formal rules that govern Parliament. Some are statutory, some common law, and others are found in the Standing Orders of the House of Commons and the Rules of the Senate. But all of these formal rules together, give only a very incomplete picture of how Parliament works and what parliamentarians should or should not do. Constitutional conventions also play an important role in the work of Parliament. This article reviews the nature of constitutional conventions and their relationship with the formal rules of the constitution. It examines a few of the more important conventions including the Governor General's choice of prime minister, the address in reply to the speech from the throne, and the issues of what constitute a matter of confidence.

Conventions do certain things to our formal rules that really make them tolerable. We could scarcely live if we had to abide by all the formal laws and rules that apply. Some laws are simply antiquated, others too broad, and some important matters are not properly covered by formal rules at all. Antiquated rules include the powers of reservation and disallowance. Overly broad legal powers are seen in the Governor General's ability to hire and fire members of the Privy Council at will. Missing completely from formal law are many fundamental aspects of responsible government, including the existence and functions of the Prime Minister and cabinet as well as the requirement that governments resign or call an election if they lose a clear vote of confidence.

Conventions can even directly contradict an antiquated legal rule. Section 56 of the *Constitution Act, 1867* imposes a clear obligation on the Governor General to forward copies of every Act passed by Parliament to the British government. However, this practice was stopped in 1942, and Canadians would no doubt be affronted if the practice started again. There are few such clear contradictions of formal rules, but it is important to understand that they can occur. It is the clearest indication we have of the importance some conventions have in our constitution.

Generally speaking conventions should be distinguished from other formal rules because they are not directly enforced by either the courts or the Speaker. One possible exception is the sub-judice convention, which Speakers have occasionally enforced.¹ Many conventions can, however, be enforced indirectly because even an authoritative description or recognition of the terms of a convention is usually enough to ensure most political actors comply.

If there is a direct conflict between a convention and a formal rule, the courts or the Speaker will enforce the formal rule over the convention. Indeed, as Speaker John Fraser once put it, "The Speaker of the House of Com-

Andrew Heard is an Associate Professor in the Political Science Department at Simon Fraser University. This article is a revised version of an address to the Law and Parliament Conference organized by the Law Clerks of the Senate and the House of Commons and the Continuing Legal Education Committee of the Canadian Bar Association, held in Ottawa on November 22-23, 2004.

mons by tradition does not rule on constitutional matters.”² The duty of the Speaker is to enforce the rules of procedure. For example, Speakers refuse to comment on whether a government defeat is a vote of no-confidence. And the Speaker will not prevent a government from continuing to conduct business after being defeated on a clear vote of confidence.

The interplay between conventions and formal rules is seen every day in Question Period. A convention supporting individual ministerial responsibility requires ministers to answer questions put to them about their own activities and those of their departments. Indeed the existence of Question Period is a defining element of modern parliamentary government. However, speakers’ rulings over the years have both contradicted and narrowed this convention of answerability.

First, successive Speakers’ rulings have reinforced a rule that a minister cannot be required either to give an answer to a question or to give reasons for refusing to answer. Secondly, Speakers have ruled that questions may only be put to ministers about their current portfolio and not about informal responsibilities, such as ‘regional minister’. This rule also means that one cannot question a minister about what he or she did as minister of another department. Furthermore, one cannot ask a question of a minister about one of their predecessor’s activities. And finally, a question may be put to particular minister, but there is nothing to prevent another minister from answering instead.

If these rules were the only ones guiding Question Period it would soon degenerate into simply a hollow list of rhetorical questions. Fortunately, the obligation to provide some answer, however insubstantial, is strong enough that Question Periods play out regularly with a lively give and take. Regardless of the frequent criticisms aimed at the level of questions and answers alike, I believe that over the life of a Parliament Question Period is able to provide an anchoring focus for debating substantive issues and critical political developments. It does so because of the general acceptance of conventions supporting individual ministerial answerability. In short, the conventions allow Question Period to work almost *despite* the formal rules enforced by the Speaker.

Conventions, then, are rules of binding behaviour that are not enforced by either the courts or the speakers our legislatures. Most conventions are unwritten, coming from years of practise – either in doing a certain thing (such as answering questions in the House) or in not doing something (such as Governors General not refusing Bills presented to them for royal assent). However, some conventions have been written down or even have their genesis in a written agreement among political actors.

For example, the Old Dominions owe a great deal of the earlier independence from agreements reached at Imperial Conferences in the 1920s and 1930s. At those Conferences, British ministers agreed to a range of requests from Dominion governments for greater autonomy; after 1930, for example, the British government relinquished to the relevant Dominion government the right to advise the monarch on whom to appoint as Governor General.

Conventions should also be distinguished from mere customs and habits. For example, the notion that new Speakers should be dragged unwillingly to their chair is a custom, not a convention. So was the idea that the Governor General or her Deputy should actually appear in the Senate, along with the assembled Members of the Commons, in order to grant royal assent. Customs and habits are only symbolic traditions or pleasing rituals whose observance or absence has no substantial impact on the operation of constitutional rules and principles. Thus, it is a firm rule of our constitution that Parliament is composed of three elements: the Queen, the House of Commons, and the Senate. But they do not have to be physically together in order for royal assent to be granted. The relatively recent innovation in practice that sees the Governor General granting royal assent in her office has not altered in any negative way the functioning of Parliament or the operation of constitutional processes.

Conventions exist to protect some principal of the constitution that would be negatively impacted.

Two of the most important principles of our constitution are that we have representative democracy and parliamentary responsible government. No explicit rule prevents a Prime Minister from disregarding the unfavourable results of a general election but it was not open to Prime Minister Kim Campbell to insist that the 1993 general elections were simply disappointing and that she would remain in office and hold another election later in the year. Had she done so, the Governor General would have been justified in firing her and appointing Jean Chrétien as Prime Minister.

Important conventions govern the events after general elections. The most important of these concern the Governor General’s possible appointment of a new Prime Minister, and the votes on the Address in Reply to the Speech from the Throne.

The generally accepted formulations are as follows: the incumbent Prime Minister has a right to remain in of-

fice and to meet Parliament if he or she believes they have a reasonable chance to win a majority in a confidence vote. In the case of a majority victory, the option is clear and the Prime Minister simply continues. Where another party wins a majority of seats there is no hope that the incumbent would survive a confidence vote; so, the incumbent must resign and the leader of the winning party appointed as Prime Minister. Where no one party wins a majority then the Prime Minister may choose to resign, as Pierre Trudeau did in 1979.

It is true that in all but one instance of 20th century minority governments at the federal level, the prime minister resigned if another party won a plurality. However, these precedents are not in themselves determinative of a convention that requires a prime minister to resign. Conventions are determined by ascertaining what constitutional principle is involved, what precedents have occurred, as well as the statements of actors and observers concerning those events. A review of comments of actors and academics shows that the preponderance of opinion clearly supports the prime minister's right to meet parliament rather than an obligation to resign if another party wins a plurality.³ Therefore, I believe that Paul Martin was mistaken when he said in 2004 that it made sense for the leader of the party with the most seats to be appointed Prime Minister. It is not an automatic rule that the incumbent should resign if another party wins a plurality. What counts is who is likely to command a majority in a confidence vote in the House of Commons. A Prime Minister may be appointed to office by the Governor General but their *right* to govern in our parliamentary democracy comes from enjoying the confidence of a majority of the elected members of the House. It would be irresponsible, even, for Prime Ministers to resign simply because they finished second in situations where they knew full well that a smaller party was prepared to support them and that they had enough combined seats to create a majority. The Governor is indeed bound to appoint the leader of the largest available party, but only after the incumbent Prime Minister resigns.

It is not a widely appreciated fact that an election is not truly over in our parliamentary system until the vote on the Address in Reply is held.

In exercising a right to remain in office it should be clearly understood that the Prime Minister's right is to meet Parliament, not to govern indefinitely. Here the

Speech from the Throne and, more particularly, the vote on the Address in Reply assumes centre stage.

The Speech from the Throne lays out a broad statement of what the government intends to do. The vote on the Address in Reply is the judgment of the House on whether it has confidence in that government's plans. If an opposition party successfully adds words to the motion that convey a lack of confidence in the government, then the House has spoken and the government must resign. It is then the turn of the leader of the largest remaining party to form a government and try to win a confidence vote.

Following the 1985 Ontario election in which his Conservative government was reduced to a plurality, Premier Frank Miller mistakenly believed that he had a right to an election after losing the confidence vote on the Throne Speech. However, the Liberals and NDP had signed a written agreement in which they gave mutual pledges that would allow David Peterson to govern for two years with the support of the NDP. The Lieutenant Governor quite properly appointed Peterson as the new Premier. The Liberals then went on to win an ensuing confidence vote.

It is axiomatic to parliamentary government that the cabinet must enjoy the confidence of the majority of elected members of the legislature. Consequently, the House has not just a right but a duty to express its confidence, or lack of it, in the government in office after an election. The newly elected members decide who has a right to govern through the life of that Parliament and this decision is first expressed in the vote on the Address in Reply. An incumbent Prime Minister has the right to meet Parliament after a minority election, and the Governor General has the duty to appoint another if the incumbent resigns for whatever reason. However, it is the House of Commons that decides who may actually govern.

In this light, the vote on the throne speech is vital in minority government situations, and the failure to hold one is a serious constitutional error. Votes on the throne speech have usually been taken for granted. But, the mention of them in the procedural rules does not mean that they will actually happen. For example, Nova Scotia has had two minority governments in the past 6 years (Liberal in 1998 and the other Conservative in 2003) and in both cases a Premier was reduced from a majority situation to a minority. As was their right the incumbents chose to remain in office. In both instances the Lieutenant Governor delivered a Throne Speech and a debate in reply ensued, but in neither case was a vote actually held. This was possible because, the Government House Leader is in control of when motions shall be put on the

order paper. He simply chose not to put the motion for a vote down on the order paper; it simply never came up. This tactic also conveniently suited one the opposition parties on each occasion as well, as they did not have to publicly support the government until the Budget was presented.

These precedents are, in my view, unfortunate examples of the weakness of constitutional conventions – the lack of enforcement mechanisms to ensure compliance with many conventions. They are also doubly unfortunate given that they occurred in the same legislature which first won responsible government in any of the British colonies. After the 1838 election Joseph Howe moved a motion of no confidence in the Governor's Executive Council after his party won a majority. A vote was held on the motion and it passed. The subsequent resignation of the Council, and the appointment of Howe and his colleagues, marked the first time in the empire that a Governor tacitly acknowledged that his Council should hold the confidence of the elected Assembly.

These discussions also reveal that there are different classes of convention. Some suffer from ambiguity in the details of what should or should not be done. Others are occasionally breached without a major problem arising. But some are always followed because significant troubles would result from even one breach. The key to knowing that a convention is at work is to consider the consequences if there were no rule. In the Nova Scotian examples, the governments were able to get away with not holding a vote on the throne Speech because another party holding the balance of power tacitly acquiesced for its own reasons. However, if no votes were ever taken on the Throne Speech, there would be no sure way of settling who has the right to govern in a minority situation. As electoral reform becomes more popular in Canada and minority governments may become more frequent it is all the more important for Canadians to realize the crucial role of the vote on the Address in Reply.

After the right to govern is settled by the vote on the Address in Reply, what other votes might constitute a

loss of confidence becomes paramount. Fortunately we have moved from the position of the mid 20th century in Canada, where for a while governments behaved as if every vote was a vote of confidence. Contemporary Canadian views are more in keeping with those in other experienced parliamentary systems in the Commonwealth. Confidence votes include:

- A clearly worded motion of no confidence or condemnation
- The defeat of the government's motion on the Address in Reply, as this is a repudiation of the government's general set of proposed policies.
- The defeat of the main budget motions as this is a rejection of the government's financial plans
- Any motion that the government has stated to be as a matter of confidence

Other defeats of major government policy proposals may raise the question of confidence but they do not in themselves demonstrate a loss of confidence. It is always open for a Prime Minister to either carry on regardless or to settle the matter with a subsequent motion of confidence.

Other constitutional conventions cover many aspects of parliamentary life. The inclusion or exclusion of ministers and parliamentary secretaries from committees, the Speaker's reliance on party lists of Members to be recognized in Question Period and debates, and party discipline are just a few examples. As Sir Ivor Jennings once wrote, conventions "provide the flesh which clothes the dry bones of the law."

Notes

1. See Robert Marleau and Camille Monpetit, *House of Commons Procedure and Practice*, Ottawa: House of Commons, 2000, pp. 534-6.
2. House of Commons, *Debates*, July 11, 1988, p. 17384.
3. See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford University Press Canada, 1991, p. 23.