Constitutional Convention and Cabinet Manuals

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The proper functioning of Canada's parliamentary democracy relies on acceptance of our constitutional conventions. Yet, political disagreements among political actors during both the 2008 parliamentary crisis and the 2011 federal election campaign cast serious doubt on such acceptance. This article raises the question: how can our constitutional conventions be clarified to prevent future constitutional crises? Both New Zealand and the United Kingdom have implemented Cabinet Manuals to codify their constitutional conventions in a single document. Drawing on these examples, this paper argues for the adoption of a Canadian Cabinet Manual as a step towards preventing constitutional crisis, while creating an important informational tool for politicians, public servants, and the public alike.

For Canada's parliamentary democracy to function properly, it is integral that key political actors agree on the fundamentals of our constitution. However, with the recent prevalence of minority governments, this agreement has been called into question. During both the December 2008 'parliamentary crisis' and the 2011 federal election campaign, the Conservative Party of Canada, led by Prime Minister Stephen Harper, appeared to hold markedly different views on key constitutional conventions than those espoused by opposition leaders and constitutional experts. This lack of consensus led some to fear that a situation may arise in the near future in which lack of agreement on conventions governing the Governor General's reserve powers could plunge Canada into a serious constitutional crisis.

In order to discuss the lack of consensus on Canada's constitutional conventions and argue why they ought to be codified, it is first necessary to define what conventions are and explain how they fit into our constitutional framework. The difficulty in understanding and interpreting constitutional conventions comes from the fact that they:

> …give guidance but are not absolute clarion calls for one specific course of action. Nor are conventions legally binding like laws. Conventions are flexible and adapt and change over time as circumstances change.[1]

The Canadian constitution is not a single document but comprised of a large number of written texts and a host of unwritten principles and rules that fill out and explain the texts. These unwritten rules are called constitutional conventions, which Andrew Heard defines as "informal rules that bind political actors to behave in a certain way…. These conventions impose obligations because they protect the basic constitutional principles that would be seriously harmed if they were ignored."[2]

For example, conventions establish the existence and function of the Prime Minister and Cabinet, prevent the Governor General from hiring and firing members of the Privy Council at will, require the government to resign or call an election if it loses a clear vote of confidence, and prevent the federal government from disallowing provincial laws. In this sense, "conventions are about defining or restricting the exercise of formal powers that exist in law but are circumscribed in practice."[3]

A key difference between conventions and written elements of our constitution is that conventions cannot be enforced by the courts. The punishment for failing to abide by a convention is, therefore, strictly political with the power for enforcement lying with other institutions of government, such as the Governor General, the Houses of Parliament, or ultimately the electorate. However, it is important to note that

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although courts cannot enforce them, conventions remain vital to questions of constitutionality. In its landmark ruling on the *Patriation Reference, 1981,* the Supreme Court of Canada stated succinctly and unequivocally that "constitutional conventions plus constitutional law equal the total constitution of the country." In the Court's view, an act that violates a convention can correctly be called unconstitutional even though it has no direct legal consequences.

There remains broad agreement on the vast majority of constitutional conventions in Canada today. Logically, "constitutional conventions are only effective as rules of proper conduct when the relevant actors accept that they are bound to observe them."[4] However, as conventions are not comprehensively written down in one place, there is room for disagreement over what is appropriate for a political actor in particular circumstances. This lack of consensus can lead to potential or real parliamentary crises. This is precisely what happened in 2008 and what many feared could happen after the 2011 election campaign when Prime Minister Harper made it clear that he did not agree with certain conventions regarding government formation.

In both cases, he questioned whether it would be legitimate for the Governor General to call on a group of opposition parties to form a government, without first having another election. Most experts argued that such an action would be in line with conventions on confidence and responsible government, and therefore perfectly legitimate.

The Conventions at Stake

Canada's parliamentary democracy is based on responsible government which is a one-rule system. "The rule is that the government must have the confidence of the elected House of Commons."[5] This principle allows the Cabinet to make decisions on behalf of the Crown. In other words, despite the vast legal powers vested in the Crown and the Governor General, they will only be exercised on the advice of ministers who command the confidence of the House of Commons. This principle has enjoyed support from political leaders since the founding of Canada.[6]

However, there are key exceptions to this convention as the Governor General still retains reserve or prerogative powers where he or she may act on his or her own discretion and even refuse a request of the Prime Minister. An important example of this power is the generally accepted constitutionality of the Governor General to refuse the request for a fresh election if a government loses confidence in the early months of a new Parliament, particularly if an alternative government could function. Former Governor General Adrienne Clarkson even wrote in her memoirs that she was prepared to refuse a request for dissolution for at least six months following the 2004 election.

The chronology of the so-called "coalition crisis" of December 2008 has been well documented and does not need to be repeated in detail here.[7] In essence, after winning a strengthened minority government in the 2008 federal election, Stephen Harper reached out to his opponents with a throne speech marked by a cooperative tone. A month later, however, the Conservatives presented a fiscal update that provided no economic stimulus spending while simultaneously proposing to eliminate public subsidies of political parties – a move that would have been particularly detrimental to opposition parties. In a rapid turn of events, the three opposition parties signed a formal accord indicating that a Liberal-NDP coalition with Bloc support could form a new government. Stephen Harper then called on Governor General Michaëlle Jean to prorogue parliament, and she acceded to his request. In the interim, Michael Ignatieff became Liberal leader and supported the Conservative budget when Parliament resumed in January 2009, allowing the Harper Government to survive.

Serious disagreement on constitutional conventions emerged with the Prime Minister's vitriolic reaction to the possibility of a coalition government. Shortly after the coalition agreement was signed, Mr. Harper declared that, "The opposition has every right to defeat the government, but Stéphane Dion does not have the right to take power without an election…. Canada's government should be decided by Canadians, not backroom deals. It should be your choice – not theirs."[8] Mr. Harper sharpened his attack less than a week later when speaking to supporters at a Conservative Christmas Party event: "We will use all legal means to resist this undemocratic seizure of power…. My friends, such an illegitimate government would be a catastrophe for our democracy, our unity and our economy, especially at a time of global instability."[9] Mr. Harper seemed to be arguing that the House of Commons could dismiss a government, but could not replace it from its own ranks, without a new election.

Days later, one of Mr. Harper's key ministers, John Baird, made a statement in an interview with CBC, which is particularly illuminating in terms of how the Conservatives diverged from common wisdom on the role of the Governor General:

> What we want to do is basically take a timeout and go over the heads of the Members of Parliament, go over the heads [*sic.*] frankly of the Governor General, go right to the Canadian

> people. They're speaking up loudly right across this country in a way I've never seen…. But you know what I'm saying is we're going over the heads of the politicians and the Governor General directly to the Canadian people. We live in a democracy. They're the ones that rule.[10]

By proposing to ignore the will of the House of Commons and that of the Governor General, Mr. Baird seemed to be arguing against the core function of responsible government itself.

The Conservatives also gained support for their claims in a now oft-cited opinion piece by political scientist Tom Flanagan, published in the *Globe and Mail*. He used the theory and language of constitutional convention to argue that the formation of a coalition without approval from the electorate would be nothing short of undemocratic. In his words:

> The most important decision in modern politics is choosing the executive of the national government, and democracy in the 21st century means the voters must have a meaningful voice in that decision. Our machinery for choosing the executive is not prescribed by legislative or constitutional text; rather, it consists of constitutional conventions – past precedents followed in the light of present exigencies. The Supreme Court has said it will expound these conventions but will not try to enforce them. The virtue of relying on conventions is that they can evolve over time, like common law, and can be adapted to the new realities of the democratic age…. How, then, should Michaëlle Jean decide if the government is defeated over the budget? Arguably, a new election would be called for, even though it would only be five months after the last election. Gross violations of democratic principles would be involved in handing government over to the coalition without getting approval from voters.[11]

Here again, the democratic nature of responsible government was being called into question in favour of a more direct linkage between individual voters and government formation.

However, Professor Flanagan was nearly alone among Canada's academic community in supporting this view. In an open letter, a group of 39 leading legal and political experts outlined the nature of responsible government and the legitimacy of the Governor General's reserve powers. They concluded their argument by writing:

> It is our opinion that in the event of a non-confidence vote or a request for dissolution of Parliament after only 13 sitting days of the House of Commons, the Governor General would be well-advised to call the leader of the opposition to attempt to form a government. This would be most appropriate in the circumstances where that leader has already gathered the assurance that he would enjoy the support of a majority of votes on any issue of confidence for the next year or so. The principle of democracy would be protected in so far as the new government would enjoy the support of a majority of the elected officials. This would ensure the stability of our political system.[12]

Other academics were even more forceful with their condemnation arguing that the Conservatives "…betray an abysmally inaccurate view of fundamental constitutional realities,"[13] and that "…Prime Minister Stephen Harper has undermined the right conduct of parliamentary democracy."[14] Clearly, Messrs. Harper and Flanagan's perspective differed dramatically from the view held by a majority of Canadian constitutional experts.

While expert opinion seemed nearly united on these particular circumstances, the views of Professor Flanagan and Prime Minister Harper gained traction because the conventions surrounding prorogation, dissolution, and government formation are far from clear or indisputable. In a recent book on democratic reform Professors Peter Aucoin, Mark D. Jarvis, and Lori Turnbull note that it is impossible to predict what might happen if a government were to lose confidence in the House of Commons shortly after an election because, "there is no Canadian rule, no agreed upon Canadian convention, and therefore no convention. There is no definitive guidance from any Canadian source."[15] As such, they argue that while the crisis in December 2008 brought many problems to the surface, it "…solved none of them. There is now undoubtedly even more uncertainty, disagreement, and confusion in Canada regarding the meaning and requirements of our constitutional conventions."[16]

It is due to this fundamental problem that a codification of our conventions is necessary to maintain the integrity of our democracy. Before turning to how this codification may be accomplished, however, this paper will outline how "uncertainty, disagreement, and confusion" about constitutional conventions was deepened during the 2011 federal election campaign.

The debate began in earnest just before the writ was dropped. The day before the vote of non-confidence, Government House Leader John Baird responded to a question from Liberal Deputy Leader Ralph Goodale by saying:

> One of the most fundamental traditions in Canada and one of the most fundamental parts of our liberal democracy is that the person with the most votes wins. The Liberal Party is showing outrageous contempt for Canadian voters by saying that it does not matter which government they elect because it will form a

> coalition with the NDP and the Bloc Québécois and make reckless decisions from an unstable government.[17]

Here, Mr. Baird was characterizing a direct link between voters and government formation as a "fundamental tradition" of Canadian democracy. However, contrast his statement with that of political scientist Lawrence Leduc:

> To argue that a coalition government is somehow illegitimate, or that members of certain parties in Parliament should have no voice in its formation or survival, is simply to deny the reality of our current politics, or even to subvert the fundamental principles of parliamentary democracy.[18]

These two quotations explicitly highlight that clear disagreement on fundamental constitutional conventions was once again at play in 2011.

Stephen Harper put forth his view during two of the most-observed media events of the campaign. The first was the English leaders' debate, watched by almost four million Canadians. Nearly half way through the debate Mr. Harper said:

> But our position is very clear. The party that wins the most seats forms the government; that's how our democracy is supposed to work. If we form a Conservative minority, I would be honoured once again to govern Canadians. If we do not win the election, the Conservative party will not govern this country. Mr. Ignatieff will not make that commitment; he will say that...he's willing to accept a mandate from the other parties to govern. The party that wins the election has to govern. Otherwise we will have a party dedicated to the break up of the country deciding who can or cannot form the government.[19]

The second instance was in an interview with CBC's chief correspondent Peter Mansbridge who attempted to have Mr. Harper acknowledge the constitutional legitimacy of a group of opposition parties creating a coalition to form a government. However, Mr. Harper once again refused to accept that possibility saying:

> My view is that the people of Canada expect the party that wins the election to govern the country…And I think that anything else the people will not buy." Later in the interview he said, "I think if the other guys win, they get a shot at government and I don't think you challenge that unless you're prepared to go back to the people.[20]

It is important to note, here, that Michael Ignatieff, the Leader of the Official Opposition, likely contributed to the confusion and disagreement about conventions during his own interview with Peter Mansbridge. In some areas Mr. Ignatieff was on the mark, identifying, for example, coalitions as constitutionally legitimate. He also argued – correctly – that if Stephen Harper were to win another minority government the Harper Government could be legitimately defeated in the House of Commons and it would then be up to the Governor General to call on the Liberals or another party to attempt to form a government.

However, Mr. Ignatieff also said "The party that comes out with the most seats gets to form a government and then they go to the House of Commons and they seek the confidence of the House. It's the two-stage process. That's the way the system has always worked."[21]

Although the party that wins the most seats does tend to form the government in Canada, the reality is that the government that was in office before the election remains in office on the day after the election whether or not it wins the most seats. That government must formally resign or be defeated in the House of Commons before the Governor General would come into play to ask another party to form a government.

So, in perhaps their most important interviews in the campaign, both Stephen Harper and Michael Ignatieff failed to display a full and accurate understanding of Canada's constitutional conventions.

Implications

What happens when key political actors – the Prime Minister and the Leader of the Official Opposition first among them – do not agree on constitutional conventions surrounding the reserve powers of the Governor General or the suitability of a coalition of opposition parties coming together to form the government? The only precedent for such situation is the King-Byng affair of 1926. At the time, Lord Byng refused Prime Minister King's request for dissolution because King was facing a vote of non-confidence in the House. King then resigned, forcing Byng to call on Arthur Meighen, the leader of the opposition, to form a government. Although Meighen accepted, he quickly lost confidence himself, and King used the whole affair to his advantage in the ensuing election campaign. Ultimately, "King won the election, and the office of the governor general suffered."[22]

Like Lord Byng, a Governor General faced with Harper's request would have been left with two choices: (1) plunging Canada into yet another election while setting a precedent against the use of the reserve powers or (2) calling for an opposition leader to form a government that would quickly be attacked as illegitimate. With either decision, he or she would have been seen as wrong by one side of political opinion.

Regardless of one's view on the Governor General's reserve powers, it can surely be agreed that the office is placed in an impossible situation if key political actors are working under different assumptions on what role it must play. The Governor General has been described as a "referee who ensures that the major players are on the field and that the most basic rules of the game are obeyed."[23] However, this role becomes untenable if the captains of the opposing teams do not agree on the fundamental rules of the game. In short, "the lack of clarity surrounding the constitutional rules and conventions on which the Governor General must base her decisions risks creating a perception of arbitrariness."[24]

Lorraine Weinrib has argued:

> Harper's actions have demonstrated the weaknesses of our constitutional framework. This framework is informal, resting on principles and practices inherited from the United Kingdom. It depends on the sense of responsibility and the self-restraint of those who exercise political power.[25]

What buttresses, then, can we build around our constitutional framework to reduce the chances of future parliamentary crises? Can the rules be codified outside of heated partisan debate, so that all players and observers can be on the same page?

Solutions

One solution would be to amend our constitution to clarify the fundamental principles of Canadian governance and incorporate them into a written constitution. This route was attempted in 1978 by Pierre Trudeau when his government introduced its *Constitutional Amendment Bill* (Bill C-60). Among other things, the Bill outlined when the Governor General could properly exercise his or her reserve powers. However, the Supreme Court ruled that elements of the Bill required provincial consent and the Bill never passed.

More recently Professors Aucoin, Jarvis, and Turnbull have proposed limited and targeted constitutional amendments dealing only with election dates, prorogation, dissolution, and the confidence convention. Such a proposal has merit and deserves serious consideration. However, as any student of Canadian politics knows, few tasks could be more challenging for a federal government than amending the constitution. Furthermore codifying constitutional conventions in law would make change over time exceedingly difficult. Indeed, "…the utility of conventions is precisely their flexibility and adaptability to changing circumstances."[26] For these reasons, adding constitutional conventions to our written constitution would be not only exceedingly difficult, but unadvisable. In the absence of a constitutional amendment a Cabinet Manual would be a positive (if not sufficient) step towards generating clarity on our conventions.

The governments of both New Zealand and the United Kingdom have each introduced a Cabinet Manual – New Zealand in the late 1970s and the UK in 2009. In both contexts, the documents have been useful for a multitude of reasons. There are three key strengths of a Cabinet Manual:

- it would allow for codification of constitutional conventions without making them law,
- it would clarify key conventions to help prevent a constitutional crisis following the election of a minority government, and
- it would be relatively simple to implement – at least from a logistical perspective.

The purpose of a Cabinet Manual is eloquently described in the preface of the New Zealand version:[27]

> Successive governments have recognized the need for guidance to provide the basis on which they will conduct themselves while in office. The *Cabinet Manual* fulfills this need. The endorsement of the *Cabinet Manual* is an item on the agenda of the first Cabinet meeting of a new government, to provide for the orderly re-commencement of the business of government…. It is like a dictionary: it is authoritative, but essentially recording the current state of the constitutional and administrative language. Thus the content of the *Cabinet Manual* represents an orderly and continuous development of the conventions and procedures of executive government.

The first strength of the Cabinet Manual is that it provides an "authoritative" account of constitutional conventions while avoiding the difficulty and undesirability of codifying them in law. Conventions are still able to change and adapt to new political realities, but they change through the more open and publicly available form of the Cabinet Manual.

Second, Cabinet Manuals from both countries explicitly lay out what is expected of leaders in the event of the election of a minority parliament. In order to appreciate fully the effectiveness of the Manuals in this regard, it is necessary, here, to quote them at length. The New Zealand Manual states that:

> 6.39 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).

It goes on to declare that:

> 6.57. In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government […]
>
> 6.58 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention.[…] The Governor-General would expect a caretaker Prime Minister to consult other parties on a decision to advise the calling of an early election, as the decision is a significant one…. It is the responsibility of the members of Parliament to resolve matters so that the Governor-General is not required to consider dissolving Parliament and calling an election without ministerial advice.

The UK Cabinet Manual[28] expresses a similar sentiment:

> 46. Governments hold office unless and until they resign. If the Prime Minister resigns, the Sovereign will invite the person who it appears is most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government. It is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly who that person should be. At the time of his or her resignation, the incumbent Prime Minister may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place.

Later, the UK document also speaks to a Prime Minister's request for dissolution shortly after an election:

> 58. At present, the Prime Minister may request that the Sovereign dissolves [*sic.*] Parliament so that an early election takes place. The Sovereign is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the exercise of the reserve power to refuse it, for example when such a request is made very soon after a previous dissolution. In those circumstances, the Sovereign would normally wish to know before granting a second dissolution that those involved in the political process had ascertained that there was no alternative potential government that would be likely to command the confidence of the House of Commons.

These guidelines became extremely important in New Zealand after the country adopted the Mixed-Member Plurality electoral system, which usually produces minority parliaments. Despite there not being a single party majority since 1996, "no New Zealand Governor-General has had to exercise any of the other reserve powers to intervene in the day-to-day politics of the moment."[29] Instead, political parties have learned successfully to negotiate coalition agreements and communicate to the Governor General which leader is capable of maintaining confidence in the House of Commons.

In the United Kingdom, the likely possibility of a hung parliament was the very reason that spurred on the development of their Cabinet Manual. When their 2010 election produced a minority parliament, the Cabinet Manual was cited as a significant reason for the successful negotiation of a coalition between the Conservatives and the Liberal Democrats.[30] Indeed, it clearly illustrated the constitutional legitimacy of such an arrangement.

If a similar codification of constitutional conventions had existed in Canada in recent years, it is hard to imagine how Prime Minister Harper could have claimed that a coalition of opposition parties was illegitimate. Moreover, it would have placed the onus on him and the opposition leaders to provide clear public declarations on who enjoyed the confidence of the House of Commons so that the Governor General would not be forced into the middle of a political debate.

Finally, the experience of New Zealand and the UK suggests that implementing a Cabinet Manual in Canada would be logistically simple, particularly when compared to a constitutional amendment. There would be two key stages to this process: drafting and approval. The drafting stage would require the Prime Minister to call upon the Clerk of the Privy Council to begin a draft of Canada's Cabinet Manual. The Privy Council Office (PCO) is the logical choice for this task because it is the most analogous Canadian institution to the United Kingdom Cabinet Office and the New Zealand Cabinet Office, which authored their countries' Cabinet Manuals.

Within PCO, the Machinery of Government Secretariat is charged with providing the government advice on transitions from government to government, ethics and accountability issues (consistent with Westminster-style government), and the role of the Crown, the Governor General, and the House of Commons. In 2006, Prime Minister Stephen Harper had this Secretariat prepare a document called *Accountable Government: A Guide for Ministers and Ministers of State*. This guide essentially sets out the duties and

responsibilities of the Prime Minister and Ministers including ministerial relations with Parliament and ministerial responsibility and accountability. It is important to note that some of the sections covered in this document are also enumerated in the Cabinet Manuals from New Zealand and the UK. Conspicuously missing from it, however, are sections that detail government formation and the Governor General's reserve powers. Nonetheless, the document's very existence highlights that PCO has the resources to create a document like the Cabinet Manual and likely could, if given the instruction from the Prime Minister, create a comprehensive Canadian Cabinet Manual that would properly detail our constitutional conventions and the functioning of cabinet government, in a single document.

Upon completion of the draft, the approval stage would open the document up to several groups for commentary. Perhaps most importantly, a parliamentary committee would scrutinize the draft. It would also be made widely available to the public so that everyone from concerned citizens to constitutional experts could submit comments. These comments would then be considered in the writing of a final draft. This final document would remain publicly available, allowing not only politicians, but civil servants, journalists, and interested citizens to read and understand the principles of our parliamentary democracy. Ultimately, it would be only Cabinet that could grant final approval of the Manual and approve future versions. After the election of each parliament, Canada's Cabinet Manual would be approved at the first meeting of the new Cabinet.

Some commentators may suggest that even though a Cabinet Manual may be logistically simple to implement, it would be much more difficult politically. Without a clear political benefit, there may not be a good reason for Prime Minister Stephen Harper (or any Prime Minister for that matter) to call for the implementation of a Cabinet Manual in Canada. Although this argument is valid, it also misses the point. The aim of this paper is to demonstrate the importance and viability of a Canadian Cabinet Manual. Like any political reform, however, the ultimate decision to undertake such action remains in the hands of the political leaders of the day.

Other critics may say that the Cabinet Manual cannot stop parliamentary crises, that its existence would not prevent the Prime Minister from challenging, manipulating, or ignoring constitutional conventions if he wished to do so. They will argue that our system works right now so we need not do anything to change it. The Cabinet Manual is no panacea. Like conventions it is not legally binding – and intentionally so – to allow it to shift with changing laws and political principles. However, when there is a lack of agreement on the fundamentals of our politics, something needs to change. If the status quo is indefensible and constitutional change is difficult and undesirable, the Cabinet Manual represents a viable middle ground. It creates an additional layer of prudence and transparency and a further protection for our constitution.

This paper has focused on only a small part of the Cabinet Manuals of New Zealand and the United Kingdom. They also cover the role of ministers and their relationship with the civil service, the caretaker convention, and cabinet decision-making. Both the potential benefit of outlining such principles in the Canadian context, and whether government documents like *Accountable Government* have already adequately done so, certainly deserve further consideration. However, the sections that cover government formation and the role of the Governor General alone are enough to warrant a definitive need for a Cabinet Manual in Canada.

In 1913, British Prime Minister Herbert Asquith wrote to George V insisting on the importance of the Crown being removed from political fights. Without such caution, he warned, "…it is no exaggeration to say that the Crown would become the football of contending factions. This is a constitutional catastrophe which it is the duty of every wise statesman to do the utmost in his power to avert."[31] The implementation of a Canadian Cabinet Manual would be a small, but important step towards averting such catastrophe. This solution does not require constitutional amendment, nor does it eliminate the flexibility of constitutional conventions. It would, however, allow our conventions to be codified outside of heated political debate and they would then be made available to all interested parties. We should expect no less from our elected officials.

Notes

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