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# *The Westminster Approach to Prorogation, Dissolution and Fixed Date Elections*

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*The Queen has various reserve powers, or personal prerogatives, including prorogation, dissolution and summoning of parliament, and dismissing and appointing a prime minister. The use of these powers is pursuant to unwritten constitutional conventions and are, in theory, the same for all Commonwealth countries that have retained the Queen as head of state. Yet in practice they operate differently – far more democratically – in England, where the Queen is present, than in Canada, where a governor general has been appointed to represent the Queen and manage these powers on Her behalf. This paper examines the British approach, contrasts it with the Canadian, and shows how Canada could improve its democracy by adopting the British practices.*

All of governance in Britain was originally the product of Royal prerogative. In any monarchical system, the King owns all the land, makes all laws, raises armies to defend the people (and conquer new territories so the wealth of the kingdom grows), enforces laws and metes out justice.

Over time, Parliament extinguished many Royal prerogatives of the English King by enacting laws to authorize or limit His power and the activities of His officials.<sup>1</sup> The Crown accepted these limits on its power over time due to a growing belief, beginning with the English Parliament in the 17<sup>th</sup> century and reaching a legal and popular norm throughout the United Kingdom by the 19<sup>th</sup> century, that democratic principles must inform all aspects of the constitution.

Most of the Royal prerogatives that Parliament did not extinguish have come to be exercised by ministers, collectively or individually. The reason for this devolution rests on the fact that a minister must be a member of Parliament, where he or she can be held to account for the use of these prerogatives.<sup>2</sup>

There are, however, a number of ‘reserve powers’, so named because they were held in reserve and not turned over to ministers, the PM or the cabinet in the era of democratization. Also called ‘personal

prerogatives’, they were left in the hands of the Queen because no democratic case could be made for ministers to have control of these powers and a strong case could be made that if the Cabinet or the Prime Minister had unfettered access to these powers he or they could use them to undermine Parliament’s ability to represent the people and hold the executive branch to account. After all, Parliament has the only body which the people directly elect, the House of Commons; the PM, the Cabinet, the Senate and the courts are all appointed.

The personal prerogatives include: ‘prorogation’, which ends a session of parliament; ‘dissolution’, which ends the parliament altogether thus requiring an election; summoning a new ‘parliament’ or session; and appointing and dismissing a prime minister. Because these powers mediate the relationship between parliament and the government – between the legislative and executive branches – they have been denied to the head of government, the prime minister. That being said, PMs in Canada have long coveted these powers and have occasionally tried, successfully and unsuccessfully, to use them for partisan advantage against Parliament.

In theory the constitutional conventions which govern the use of these powers are identical in each of the Commonwealth countries which still rely on conventions, as they are the personal powers of the Queen. But recent events in Canada have caused many constitutional experts to debate what the conventions are and even to wonder whether the ambiguity

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surrounding conventions has given the Canadian PM a degree of influence that undermines the democratic principles of responsible government. This concern does not exist in England, where recent developments there have caused politicians to work together to reduce ambiguity and to further democratize their parliamentary government.

This paper looks at the British practices and developments, beginning with the most public of the Royal obligations to Parliament, the reading of the Queen's speeches. While these speeches are written by the government, the traditions surrounding these speeches are inextricably tied to the successful exercise of the reserve powers. They symbolize that parliament has been (i) prorogued or dissolved and an election will be held or that it has been then (ii) summoned and a new PM appointed and a government formed (if appropriate).

Following on from the Queen's speeches, the British examples of how they prorogue and dissolve Parliament is discussed, including the 'wash-up' period of a parliament prior to an election and the recent move to fixed election dates. This is then contrasted with the Canadian experience, concluding with possible lessons Canada can take from Britain.

### **United Kingdom Conventions**

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In England there are two 'Queen's speeches' in every session of a parliament. They were both originally delivered by Her Majesty sitting on the Throne in the House of Lords at the Palace of Westminster, home of the British Parliament. In Canada, where the Queen is not present, they came to be known as the 'Speeches from the Throne' and were originally both delivered by the governor general in the federal Senate. While the Queen's representative reads them, they have also been read by the King or Queen when present in Canada.

The first 'Speech from the Throne' opens a session of parliament. In it the Queen or governor general lays out the cause for summoning a parliament. It is a blue print for what the government of the day intends to place before the legislature.

Queen Elizabeth II has personally read the speech from the throne opening sessions of the Canadian Parliament in 1957 and in 1977.

The second 'Queen's Speech' ends a session of parliament. It was the way prorogation is supposed to be accomplished. The speech reported on the legislature's accomplishments and then prorogued the parliament. No proclamation was needed as this speech was sufficient to end the session.

In 1939, it had been agreed that King George VI would read the speech from the throne proroguing the Canadian Parliament, but the legislative agenda was not sufficiently advanced, so he only gave Royal Assent to bills.

Pre-Confederation, a legislative assembly in British North American provinces would run for four years. There would be four sessions in each parliament. A session would run for several months. The day it would end and start would be up to the governor, on the recommendation of the Cabinet, but the variation between lengths of each session was minimal as the practice was to prorogue the session after only a few months to allow legislators to return to their ridings and manage their farms and businesses.

The last time a monarch delivered her own speech at the moment of prorogation in the United Kingdom was Queen Victoria in 1854. Her decision to absent herself from the prorogation ceremony the following year was due to the Peelite Whigs losing the confidence of the Commons over its handling of the Crimean War; and her lack of affection for the Liberal government of Lord Palmerston, who she was forced to make her prime minister. So reluctant to have Palmerston as PM was Victoria that she exhausted all other options for government formation before she called on the former foreign minister.<sup>3</sup>

Since 1855, the Queen has appointed a person by commission under the great seal to read the 'Queen's Speech' at the end of each session. If there are any bills awaiting Royal Assent, a clause is put in the commission authorizing it to be signified.<sup>4</sup> At the end of the speech, the Queen's representative prorogues the U.K. Parliament to the date named in the commission.

It is customary for a parliament to be always on summons, so Parliament must be prorogued to a specific date, even if there is no intention of convening it on that day. Historically, if no date for meeting is selected, it was customary to prorogue it *pro forma* for 40 days. The period of prorogation could be extended by proclamations for periods of 40 days. The 40 day custom is based on the *Magna Carta* of King John, which agreed to give a minimum of 40 days' notice for the summoning of Parliament. In 1867, the British Parliament set the prorogation period by which the Queen can extend prorogation through proclamation at 14 days.<sup>5</sup> This was changed to 20 days in 1918.<sup>6</sup> The 40 day *pro forma* custom remains the practice in Canada.

Prorogation ends a session of Parliament, but dissolution is the ending of the parliament itself so as to hold a new general election and ask the people to

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return a new Parliament. Up until 2011, in the United Kingdom, the prime minister recommended to (never advised) the Queen that Parliament be dissolved on some future day, usually a week after he visited Her Majesty at Buckingham Palace.<sup>7</sup> This was to allow the Parliament to deal with whatever significant matters were still before the two chambers. This is referred to as the 'wash-up' period.<sup>8</sup>

While Bills can be carried forward from one session to the next, this cannot happen between parliaments. The 'wash-up' period provides the opportunity to finish passage of legislation which has wide support, and often leads to Constructive compromise. Further, as Parliament will not be sitting for some time, there are some matters that should be dealt with by Parliament in anticipation of an election. The most important of these is any outstanding estimates which should be approved by the legislature rather than some mechanism of the executive branch, like a Royal warrant. A small Appropriations Bill may even be put before Parliament during this period so as to finance the ongoing operations of government during the election. These are non-controversial and worked on collegially by all MPs after agreement by the house leaders and whips. In the United Kingdom there are strict constraints on what the government and individual ministers can do during an election, but Parliament still insists on retaining control over the nation's finances.

After the 'wash-up' period, Royal Assent is given to this legislation and the representative of the Queen delivers the Speech from the Throne outlining the government's accomplishments, and then prorogues the session. The Queen dissolves the Parliament on the date previously announced.

During the election period, the existing government continues in office as a 'caretaker government', and the restrictions on what it can do are outlined in the Cabinet Manual. 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 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.<sup>9</sup>

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. This process is important because constitutional conventions, which are what govern the personal prerogatives on prorogation and dissolution, must meet a three step test that was first identified by Sir Ivor Jennings: (i) there must be a precedent, (ii) all constitutional actors must believe they are bound by the convention and (iii) there must be a [democratic] reason for the convention.<sup>10</sup> Having Parliament (the legislative branch) and the Cabinet (the executive branch) agree on what should be contained in the Cabinet Manual helps to ensure the concurrence of all constitutional actors – this is particularly important with respect to the personal prerogatives as these are not powers of the executive branch, but rather powers of the Queen that govern both Parliament and the Cabinet, and thus mediate the relations between the two branches.

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 the Civil Service in their behaviour. The process of publishing this document and obtaining input from Parliament ensures transparency in the way the executive branch operates.

Yet the Cabinet Manual does offer an opportunity to begin to codify conventions. It can (i) establish new precedents and (ii) bind the PM and Cabinet to these precedents, two of the requirements in the formation of constitutional conventions. Assuming the procedures identified in the Cabinet Manual meet the third test of having a democratic reason for being put in place, this document can even help form new conventions.

A draft of the current Manual was submitted to the British Parliament in December 2010. It was studied by the Political and Constitutional Reform Committee, the House of Lords Constitution Committee and the Public Administration Select Committee. Their reports were considered and responded to by the Cabinet, which then adopted the revised Manual in October of 2011. 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, in anticipation of an election which the polls predicted would result in no one party winning a majority of seats in the British House of Commons.

The stated purpose for establishing this process, in addition to meeting the Labour government's

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commitment to advance transparency, was to protect the Queen from being dragged into partisan politics by ensuring a civilized and orderly transfer of power should no one political party have the confidence of the new parliament as chosen by the voters in that election.

The British Cabinet 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 advice 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”.<sup>11</sup> This advice allows 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 possibility. It was 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.<sup>12</sup> Most importantly, this was designed to keep the Queen out of the partisan machinations surrounding government formation – She is to be kept out of all negotiations to preserve the dignity of the office, though She is to be kept briefed on all negotiations 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 all of the political parties and, in a very quick period of time, a coalition government was formed between the Liberals 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, which is remarkable coming so soon after the divisiveness of an election. Due to the support of the civil service, this legislative program was on solid financial and economic footing from the start.

Thus, Labour PM Gordon Brown set a precedent. The Conservative PM who replaced Brown, David Cameron, did not believe that the civil service should automatically give advice to opposition parties after an election, so the new Cabinet Manual identifies

this precedent as 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 publically understood and available to all in the Cabinet Manual.

A period and mechanism for government formation is also central to the U.K. Parliament’s decision to move to fixed election dates, a commitment that was part of the Conservative-Liberal Democrat coalition agreement. Legislation has since been adopted setting an election every five years starting on May 7, 2015.<sup>13</sup> This was one such item that all political parties had supported, so when the legislation came before Parliament the only change the opposition Labour and Scottish National parties proposed was changing the fixed-term from five years to four.

Under this law, there are only two mechanisms by which an election can be called before five years and that is either: the passage by the House of Commons of a motion “That this House has no confidence in Her Majesty’s Government”; or if 2/3rds of the MPs approve a motion stating “That 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. The government has 14 days to try to undo the motion of non-confidence by getting the House to adopt a second motion stating “That this House has confidence in Her Majesty’s Government”, and equally any other political party can try to get the support of the House for it forming a government and passing a similar motion. If after this 14 day “government formation” period, no one is able to put together a government that can obtain the confidence of the House, then Parliament is 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. This allows for flexibility, including accommodating the ‘wash-up’ period and the prorogation ceremony in advance of dissolution. Parliament automatically dissolves 17 working days before Election Day (which is the campaign period set by law in the U.K.).

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Historically, Parliament was summoned by a proclamation issued by the Queen-in-council on the first Wednesday after the election. In 2007, the Select Committee on the Modernisation of the House of Commons recommended that Parliament be summoned 12 days after the election and this was the case in 2010. This allows for a 'government formation' period in the event of a 'hung parliament' (i.e. no one political party has a majority of the Commons' seats).

The civility with which the processes surrounding dissolution and prorogation occur in the U.K. stand in stark contrast to the way these prerogatives have been handled by PMs in Canada.

### Canadian Practices

Canada's history surrounding the reserve powers is a story of repeated political machination as PMs have over time tried to get these powers for themselves and use them to avoid accountability to Parliament.

For example, the *Constitution Act 1867* fixes the maximum life of a federal parliament at five years following the return of the writs of election. Yet in 1896, Prime Minister 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. He only backed down when it became clear the legislation he was trying to force through Parliament before the election would be constitutionally challenged in the courts.

In 2006, the Conservative Party led by Stephen Harper implemented its election promise to have fixed elections set at four years, but included a clause that stated: "Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion."<sup>14</sup> On September 7, 2008, the Prime Minister issued an "instrument of advice" to have the governor general call an early election, and the governor general accepted.

The "instrument of advice" is itself an attempt by Canadian Prime Ministers to exert control over the personal prerogatives of the governor general. Where British PMs are careful to say they do not advise the Queen on the use of her reserve powers, only make recommendations, in 1957 the Canadian PM began the practice of not consulting Cabinet on the merits of 'calling' an election, but rather sending an "instrument of advice" personally to the GG. One of the reasons the British are reluctant to call it advice, is that advice from a minister must be taken by the monarch or it is incumbent on the minister (or prime minister) to resign. So the Canadian change, coming as it did as 22 years of unbroken Liberal rule were fast coming to an

end, was part of the PM's attempt to hold onto power, though its appeal has meant that each subsequent PM has continued the tradition.

Stephen Harper's decision to issue an instrument of advice to the GG that the fixed election law be over-ridden was challenged in the federal court, and appealed to the federal court of appeal.<sup>15</sup> The courts ruled that this law did not establish a new constitutional convention, even though it was the PM's own fixed election law and it had been given Royal assent. Additionally, they ruled that no legislation could prevent the PM giving the governor general 'advice' on dissolving Parliament, and bizarrely added that, pursuant to the Jennings test, the PM and the Governor General were the only two relevant constitutional actors when it came to the dissolution of parliament.

Canada's greatest controversy surrounding dissolution occurred in 1926. The Liberals under William Lyon Mackenzie King received fewer seats than the Conservatives in the election (King even lost his own seat), but he continued to govern with the support of the Progressive Party. A scandal made the Progressive support evaporate and, facing a motion of censure, King asked that Parliament be dissolved and a new election held. Governor General Lord Byng refused so King resigned (but only after trying everything he could to pressure the Governor General to give in). The new Conservative PM Arthur Meighen was unable to get the support of the Progressives once he broke with the practice of having Cabinet Ministers resign their Commons seats and stand for re-election in a by-election. King made the governor general an election issue and was re-elected.

Canada's first controversy surrounding prorogation occurred in 1873. Sir John A. Macdonald wanted to prorogue Parliament so as to stop the work of the committee looking into the Canadian Pacific Scandal. The Governor General, Lord Dufferin, attended the Cabinet meeting where prorogation was to be discussed in person and consented to only a ten week prorogation along with the appointment of a Royal Commission of Inquiry into the Canadian Pacific Railway which would report to Parliament after the ten weeks, which it did and Macdonald was censured and had to resign.

There had always been a Speech from the Throne proroguing Parliament at the end of every sessions and immediately before dissolution. Given his fight with the governor general over dissolution during the King-Byng Thing, Mackenzie King ended the practice of a speech from the throne proroguing Parliament prior to dissolution. This was an attempt to reduce the

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independence of the governor general with respect to dissolution, as it is easier for a PM to pressure a governor general in private to sign proclamations proroguing and dissolving parliament, than it is to ask a governor general to read a speech proroguing parliament in the Senate so as to call a snap election). Since doing away with a prorogation ceremony prior to elections, snap elections have been called by Diefenbaker in 1958, Pearson in 1965, Trudeau in 1968, Chrétien in 1997 and 2000, and Stephen Harper in 2008.

Mackenzie King again altered the prorogation ceremony in 1939. The first governor general appointed following the *Statute of Westminster 1931* was Lord Tweedsmuir. He was appointed on the recommendation of the Conservative government of R.B. Bennett. When Parliament was to be prorogued in 1939, Mackenzie King was back in power and he decided to take advantage of the fact that Tweedsmuir was away from Ottawa to have the deputy to the governor general, the Chief Justice of the Supreme Court, preside over the prorogation ceremony. The following year, the Governor General was present in Ottawa, but when he offered to preside over the ceremony he was told that the Chief Justice was again to preside over the prorogation ceremony. The deputy to the governor general continued to deliver the speech from the throne at prorogation until 1983, when the government of Pierre Elliot Trudeau did away with this practice.<sup>16</sup>

Since doing away with the ceremony altogether, prorogation has been used to avoid an Auditor General's report into the sponsorship scandal by Jean Chrétien in 2003. And Stephen Harper used prorogation two times controversially, the first in 2008, to avoid a defeat on a motion of non-confidence that would have brought down his Government in favour of a Liberal-NDP Coalition Government, and again in 2009 to avoid a parliamentary inquiry into the government's handling of Afghan detainees.

Prime Ministers offer their 'advice' on prorogation informally. When the Conservatives replaced the Liberals as government in 1957, it was raised at Cabinet whether prorogation should have a formal mechanism by which the Cabinet could consider and convey a recommendation to prorogue Parliament, but Prime Minister Diefenbaker insisted that it remain an informal mechanism in the hands of the PM. While in 2008, the PM attended Rideau Hall in person and Governor General Michaëlle Jean obtained outside constitutional advice during the two-and-a-half hours it took the PM to convince her Parliament should be prorogued to avoid a motion of non-confidence, in

2009 the PM made the request over the telephone. Some Canadian prime ministers have even had their staff convey the message, though these were instances where prorogation was not being used to silence Parliament but simply a routine ending of one session and the start of another.

There is no 'wash-up' period before dissolving a Parliament in Canada. Rather, the executive branch has had Parliament adopt as part of the *Financial Administration Act*, authority for the executive branch to make charges not authorized by Parliament on the Consolidated Revenue Fund through a governor general's special warrant. These are only supposed to be used if Parliament is not in session and only if the President of the Treasury Board asserts that an expenditure is "urgently required for the public good". This is how money is spent during elections and it has also been used twice to avoid the summoning of a Parliament that has not been dissolved. The most controversial of these was in 1988, when Brian Mulroney's government chose to have Parliament meet following the election only for two weeks in December (to ratify the Free Trade Agreement) and then prorogued Parliament, governing until April 1989 through special warrants.

As for government formation in Canada, the strict convention of a government having the right to remain in office, regardless of the election outcome, and see if it can get the confidence of the House of Commons, has been the practice in Canada. That is how Mackenzie King was able to stay in power in 1926. This has led to the leader of political parties that win more seats than the other parties, but not a majority of seats in the Commons, trying to govern without any formal support from the opposition parties. Occasionally, minority governments have attempted to negotiate with other parties for long term support, but the recent Canadian practice has been to use brinksmanship to intimidate the opposition into backing down from its challenge to government legislation in a divided parliament.

There has been no experience at the federal-level in Canada with coalition governments, and since 2008, Prime Minister Harper has repeatedly argued that they are not legitimate unless the political parties told Canadians that they would form a coalition during the election. He has also argued that only the party that has the most seats can form a government since it 'won' the election, rejecting outright the principle and conventions on government formation. While visitors in England, where there is a coalition government, Harper told the press in the presence of coalition leader and PM David Cameron, that the only reason the

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Conservative Leader had the right to form a coalition majority with the Liberal Democrats was because he had 'won' the election by getting the most seats of any political party.

### Lessons for Canada

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So what are the lessons Canada should take from the Parliament at Westminster?

Let's start with the danger of taking the wrong lesson. Beginning with a workshop organized by Professor Peter Russell at the Public Policy Forum in February 2011, there has been a co-ordinated push by some academics to have a Cabinet Manual similar to the British one published by the Privy Council Office in Ottawa.<sup>17</sup> This is a dangerously simplistic lesson.

The British Cabinet Manual contributed to their democratic process due to the public review and coordinated input by both houses of the U.K. Parliament, and the government of Labour PM Gordon Brown setting the precedent of being willing to work with all political parties to find a fair and democratic method for resolving government formation in what had already become clear was going to be a 'hung parliament'. I have argued how there are temporal, cultural and political differences between Britain and Canada, including the relationship between the British people and British politicians with their Queen, that have put the personal prerogatives at risk of being misused by PMs in Canada.<sup>18</sup> Because of these differences, it is unlikely that a Cabinet Manual would be produced by the Privy Council Office and approved by the Cabinet that fairly represents Canada's constitutional conventions, let alone attempts to improve upon the Westminster model by proposing improvements for their operation with the goal of protecting the office of the governor general and advancing parliamentary control over government formation – the cornerstones of responsible parliamentary government in a constitutional monarchy.

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 simply a further attempt by the PMO/PCO to extend the PM's control over the personal prerogatives, as evidenced by its stating that while "Prorogation of Parliament is an exercise of the royal prerogative... The decision to prorogue is the Prime Minister's".<sup>19</sup> This is simply not correct.

The British Cabinet Manual improved their democracy in the first instance because of the PM and the other party leaders' committing to the tenets of their democracy – that a government must be formed that can get the support of the Commons. This is not

a principle that the Canadian PM is committed to, as evidenced by repeated attacks on the idea of coalition government and his claim that a party that gets the most seats in an election has the right to govern. In the second instance the British Cabinet Manual worked due to the public review prior to ratification process, whereby both chambers of Parliament held public hearings and obtained input by constitutional experts and civil servants. Absent these two important dimensions, a Cabinet Manual could actually damage Canada's democracy as a PM, unrestrained by the other constitutional actors, attempts to write the constitutional conventions himself.

Since the prorogation of Parliament in 2008, there have been a number of proposals advanced so as to prevent the misuse of the governor general's personal prerogatives by prime ministers and give Parliament more protection, influence or recourse. These range from a proposed constitutional amendment requiring a 2/3rds vote of Parliament to prorogue with constitutionally fixed four year elections<sup>20</sup>, to the issuing of written decisions by the governor general that could be subsequently examined and corrected in Parliament<sup>21</sup> to the adoption of an apolitical decision rule similar to that which the speaker uses when casting a tie breaking vote in the Commons.<sup>22</sup> Perhaps the simplest mechanism to make prorogation less partisan would be simply to restore the speech from the Throne and prorogation ceremony presided over by the governor general.

Having a prorogation ceremony does not guarantee that a governor general would never be asked to use his powers to advantage a political party over the majority in the Commons. But if the government had to write a speech from the throne highlighting its accomplishments in that session and ask the GG to read it, it would make the governor general and the PM both reflect on the optics of the requested prorogation and defend it in the Speech from the Throne. At the very least, it would make prorogation non-instantaneous, as a speech would have to be written and the ceremony would be arranged.

Eliminating the provision in the *Financial Administrative Act* that allows for special warrants to authorize charges on the consolidated revenue fund and, instead, adopting the practice of requesting dissolution a week or more in advance to allow for a 'wash-up' period would also be a constructive change that would restore some civility to Parliament. It may also help avoid snap elections.

There are a number of lessons that can be learned from Britain. It is important we learn the right ones –

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ones that are likely to improve not diminish Canadian parliamentary democracy.

## Notes

- 1 Absent a preamble, in the U.K., all laws begin: "BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—"; and in Canada, federal laws begin: "Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"
- 2 The convention is that they must be a member of either chamber (the Commons or Senate) at the time of appointment or become a member of a chamber of Parliament within a reasonably short period. Australia and New Zealand have moved away from conventions and have codified rules to govern a number of the personal prerogatives (extinguishing them in the process). In Australia, a minister has three months to be elected to the legislature (both their chambers are elected) or resign (*Commonwealth of Australia Act*, s.64). In New Zealand, a minister must be a member of the legislature, but if defeated in a general election, is given 40 days to try to win a seat in a by-election or resign (*Constitution Act 1986*).
- 3 Following the resignation of Lord Aberdeen as prime minister, Queen Victoria called on Lord Derby, then Lord Lansdowne and Lord Russell before inviting Palmerston to Buckingham Palace on February 4, 1855.
- 4 Royal Assent is given before the speech is read.
- 5 *Prorogation Act, 1867*.
- 6 *Representation of the People Act, 1918*.
- 7 This distinction was made by former British Prime Minister Harold Macmillan, *Riding the Storm, 1956-1959* (London: Macmillan, 1971).
- 8 It is possible to dissolve Parliament without a 'wash-up' period. In 1924, Conservative Stanley Baldwin asked the King to dissolve Parliament immediately and hold the third election in only two years. This election gave him a majority in the Commons.
- 9 *Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (London: Cabinet Office, 2011), article 2.29.
- 10 Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1959). This test was accepted by the Supreme Court of Canada in *Re: Resolution to amend the Constitution 1981*, 888; and *Re: Objection by Quebec to a resolution to amend the Constitution 1982*, 802-818.
- 11 *Cabinet Manual*, article 2.14.
- 12 Minority governments are those where the cabinet 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 agreement with the leadership of another political party for a fixed period of time.
- 13 *Fixed-term Parliaments Act, 2011* SUK 2011, C. 14. The 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.
- 14 *An Act to amend the Canada Elections Act (SC 2007, c. 10)*, s.56.1(1).
- 15 *Conacher v. Canada (Prime Minister)* 2009 FC 920 and 2010 FCA 131.
- 16 The one exception to a Speech from the Throne at prorogation was in 1911, when the Senate was adjourned. Parliament was prorogued by proclamation, and it was then dissolved by a second proclamation and a federal election held.
- 17 For e.g., Fraser Harland, "Constitutional Convention and Cabinet Manuals", *Canadian Parliamentary Review*, Vol. 34, No. 4, pp 25-32 (2011).
- 18 Bruce M. Hicks, 2010. "British and Canadian Experience with the Royal Prerogative", *Canadian Parliamentary Review*, Vol. 33, No. 2, pp 18-24 (2010).
- 19 *Manual of Official Procedure of the Government of Canada* (Ottawa: Privy Council Office, 1987), p.401, articles 2 & 3.
- 20 Peter Aucoin, Mark D. Jarvis and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publication, 2011).
- 21 Bruce M. Hicks, "Lies my Fathers of Confederation told me", *Inroads* Vol. 25, pp 60-69 (2009).
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