# *Is There a Confidence Convention in Consensus Government?*

**David M. Brock and Alan Cash**

*In the Northwest Territories' consensus system, as in the party system, a government is appointed by the formal executive and members of the executive council are accountable to the House. However, the selection of executive council members in the two systems differs significantly and perhaps consequentially for the confidence convention in responsible government. In this article, born out of a debate between the authors sponsored by the Northwest Territories Regional Group of the Institute of Public Administration of Canada, David M. Brock and Alan Cash explore some of the factors to consider if and when the convention is put to the test in a consensus system. They conclude by noting that with recent changes to the Northwest Territories Act as well as emerging conventions regarding the removal of members of the Executive Council, one may now safely argue that the confidence convention could be applied in the Northwest Territories in a manner similar to the application found in party systems. However, the prerogative of the House, emphasized and codified in consensus government, limits the discretion of the first minister and mitigates the power of the executive.*

Consensus government in the Northwest Territories is to be executed "in accordance with the principles of responsible government and executive accountability."[1] This does not necessarily mean that all elements of responsible government are applied in the same manner as may be in the case in a party system. One area of potential uncertainty is the confidence convention. This convention holds that if the executive no longer has the support of the majority of members of the legislature, the government must either resign or request dissolution and a general election. But, how might this work in the northern system of consensus government?

The interpretation and application of the confidence convention in a Westminster party system is already complicated. We know, generally speaking, the leader of the political party with the most representatives in the legislature is usually called upon by the Crown's representative to form a government. This is based on the likelihood that that same party leader can command the sustained support of a majority of members. However, complications with the confidence convention arise from determining what exactly constitutes a vote of confidence, whether a vote of non-confidence truly signals an inability to govern responsibly, and if a request to prorogue should be granted.

In the northern system of consensus government, where governments are formed and held to account differently, understanding the potential interpretation and application of the confidence convention can be even more disorienting. In the consensus system, as in the party system, a government is appointed by the formal executive and members of the executive council are accountable to the House. However, the selection of executive council members differs significantly and perhaps consequentially. In a party system, the selection of ministers is the prerogative of the Crown acting on the advice of the first minister. In the consensus system, the selection of ministers, including the first minister, is the prerogative of the House. The manner by which the executive council is selected may therefore affect how – and whether – the executive council can be removed en masse, and,

*David M. Brock recently completed a four-year appointment as Chief Electoral Officer, Northwest Territories. Alan Cash is Deputy Secretary to the Cabinet, Government of the Northwest Territories.*

most importantly, if the House can be dissolved and a general election can be held before a fixed date.[2]

Recent changes to the federal *Northwest Territories Act* further complicate the understanding of the confidence convention in consensus government. The rights of the Commissioner enumerated in federal statute expanded in April 2014 to include new powers of appointment and dissolution; the method of selecting who serves on the executive council, as established by territorial statute, remains the same.

The confidence conundrum was the subject of a recent discussion organized by the Northwest Territories Regional Group of the Institute of Public Administration of Canada. We were asked to debate: be it resolved that there is truly a confidence convention in consensus government. Neither that debate nor this paper will conclusively resolve the issue, and the views expressed here are only those of two individuals and not an official position; but, in exploring this issue we help draw out what factors possibly merit attention when sorting through how Canadian conventions of responsible government apply to the northern system of consensus government.

**Responsible Government Comes North, Again**

Territorial governments in Canada are established by federal statute, rather than by constitutional entrenchment. There is no Crown in right of the Northwest Territories. However, over the past 50 years, and especially over the past 15 years, all three territorial governments have attained province-like powers and are generally understood to be self-governing sub-national units.

Responsible government in the Northwest Territories first emerged in the 19th century, following the sale of lands by the Hudson's Bay Company to the Dominion of Canada in 1869. It was then that a Council of the Northwest Territories was established, comprised of a mix of appointed and elected members. Eventually this mixed composition ceded to a fully-elected Council and system of responsible government in 1897 under the guidance of the first premier of the Northwest Territories, Frederick Haultain.[3]

After the creation of Alberta and Saskatchewan in 1905, responsible government in the Northwest Territories lapsed: for nearly half a century, the territory was administered by bureaucrats in Ottawa; in 1951, the first representative was elected to serve on the territorial Council; by 1960, there was an even number of elected and appointed members; and, finally, in 1975, all members of the territorial Council were elected. It was another 12 years hence, in 1987, when the Commissioner formally ceased being the active chairman of the executive council. Since that time, we in the Northwest Territories, as in all provinces and territories, have distinguished between the formal executive (the Commissioner) and the active political executive (the Cabinet).[4]

The Commissioner, although acting "in a manner similar in practice to that of a provincial Lieutenant Governor," is still the representative of the responsible federal minister.[5] It is also notable that the statutory locution for the territorial legislature – the 'Council' – is a term that endured from shortly after Confederation until this past spring, just three years shy of Canada's sesquicentennial.

Consensus government is the legislative system used in both the Northwest Territories and Nunavut. Characteristics common to consensus government include: no registered political parties, a governing policy mandate set by all elected members, a premier and cabinet elected by fellow members and serving in perpetual minority, no official opposition, a strong role for legislative committees, and a predisposition for civil dialogue.

Territorial political culture, from the early days of settler government through contemporary times, has eschewed party organization. It is commonly held that the consensus system evolved in the North to reflect traditional decision-making structures in aboriginal communities. From an historical perspective, this may be a dubious claim given that northern governance structures were erected well before aboriginal residents were even eligible to vote. More recent scholarship challenges this revisionist claim and asserts that northern institutional design was motivated less by Ottawa's cultural sensitivity and more by the federal government's desire for appointed officials to maintain control over executive decision-making 'out west' and 'up-north'.[6] That said, in contemporary territorial politics, one does see influences of Dene, Inuit, and Métis governance customs.

Even with adaptations to the Westminster system, modern territorial government is generally thought to be responsible government. The executive is drawn from a body of elected officials who advise an appointed governor – in this case, the Commissioner – who is bound by convention to follow advice. However, unlike in the provinces, the Commissioner is not bound to follow the advice of his first minister alone. The most recent letter of instruction from the responsible federal minister to the Commissioner makes clear the requisite sources of advice:


*Courtesy of IPAC-NWT*

**David M. Brock (left) and Alan Cash debate whether the confidence convention can be applied to consensus government in a session sponsored by the Northwest Territories Regional Group of the Institute of Public Administration of Canada.**

> Consistent with Canadian constitutional conventions, you will act by and with the advice of your Premier, Executive Council and Legislative Assembly in all those matters relating to territorial policy, legislation and administrative decisions that fall within the competence of your office. There are only a few instances where your Premier alone has the capacity to provide direction.[7]

What stands apart from Canadian constitutional convention is the numerous sources of advice rendered upon the Commissioner and the relatively limited advisory role for the first minister. Those instances where the 'Premier alone has the capacity to provide direction' are not comprehensively enumerated in letters of instruction nor in statute.[8]

The territorial Commissioner has legitimate advisors in both the executive and legislative branches. This may not actually be as complex or exceptional as it first appears. In numerous respects, the advice rendered upon the Commissioner comes from expected quarters: the executive proposes and the legislature disposes. However, one area of significant difference – and one most germane to our examination of the confidence convention – is how the Commissioner comes to know whom to appoint to the executive council.

In a party system, ministers are appointed by the Crown on recommendation of the first minister. In short, a premier chooses his cabinet. Not so in consensus government. The federal minister makes clear in his letter of instruction that the making of appointments should follow the advice of "the entity authorized to make a recommendation."[9] In accordance with territorial law, the Premier is "chosen" by the Legislative Assembly and any additional member of the executive council is to be "recommended" to the Commissioner by the Legislative Assembly.[10] This method of determining who comprises an executive council is examined below in more detail.

Although territorial premiers are not empowered to decide who will sit with them on the executive council, premiers do hold the prerogative to assign, or refuse to assign, ministerial portfolios to a member of the executive council, thus retaining at least one mechanism that is central to executive power in Westminster government.

## New Wine for an Old Vessel

Successive letters of instruction from responsible federal ministers to territorial commissioners have made clear that the role of the formal executive

should "continue to evolve in a manner consistent with, and supportive of, responsible government in the Northwest Territories."[11] This policy position was reflected in Parliament's 2014 amendments to the federal *Northwest Territories Act*.[12]

Earlier this year, the federal government devolved greater responsibility for the administration of lands and resources to the territorial government. At the same time, the Act was amended to alter some aspects of the machinery of government. These changes may have direct relevance to whether or not there is a confidence convention in consensus government and, if so, how such a convention might be applied.

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Two changes are worthy of note. First, in accordance with the amended section eight of the *Act*, an executive council with members appointed by the Commissioner is established. Previously, there was an executive, and it was appointed by the Commissioner, but this was only recognized in territorial law; executive powers existed in federal statute only "so far as they [were] applicable to and capable of being exercised."[13] Second, in accordance with the amended Section 11 of the *Act*, it is the Commissioner who now grants dissolution. Previously, dissolution could only be granted by the Governor in Council through a federal order-in-council. These two amendments expressly alter the power of the formal executive in the Northwest Territories.

Each of these two amendments and their relationship to the application of the confidence convention are now examined in turn.

**Appointment and Removal**

The structure of government in the Northwest Territories is such that members of the executive council are expressly appointed by the Commissioner. Yet, members of the executive council, following territorial statute, are 'chosen' or 'recommended,' respectively, by the Legislative Assembly, not the Premier. Moreover, notice of resignation by a member of the executive council is to be conveyed to the Speaker, not the Premier or Commissioner; and, in accordance with territorial law, resignation is effective upon delivery of such a notice.[14] The Commissioner appoints members of the Executive Council, but the lawful removal of a member of the executive council does not require action by either the formal or the political executive.[15] These lines of accountability differ significantly from what one finds in the classical model of responsible government.

This arrangement might suggest a degree of incongruence: members of the Executive Council are appointed by the Commissioner, but cease being a member of that body upon advising the Speaker. How can a political entity hold the power to make an appointment, but not the power to revoke that same appointment? This type of arrangement may be more typical than first perceived. By way of analogy, justices of the Supreme Court of Canada are appointed by the Governor in Council, but may only be removed by the Governor General on address of the Senate and House of Commons.[16] The power of appointment and revocation does not always rest with the same entity. This appointment and removal process accentuates the elevated importance of the House in the consensus system.

In thinking about the application of the confidence convention, it is important to disaggregate between the executive council as a unit and the members who comprise the executive council as individuals. Under territorial law, members of the executive council "hold office during the pleasure of the Legislative Assembly."[17] It is not clear in law exactly how this pleasure is revoked, but it can be.

Under Canadian constitutional convention, if an individual minister has lost the confidence of the legislature, the honourable course would be resignation. This does not always happen. But, whereas, in a party system, if a minister's resignation has been sought by, say, the opposition, the minister might be defended by her party leader and stay on; in the consensus system, a minister whose resignation is actively sought by a majority of legislators can simply be "taken out."[18] There are numerous examples in the history of consensus government where individual ministers have had their pleasure revoked by the House. This, however, is the doctrine of ministerial responsibility, not the confidence convention.

Territorial legislators have never withdrawn the offices of a premier and all ministers simultaneously. They have come close. Such an instance arose in 2009 following allegations of conflict-of-interest on the part of then-Premier Floyd Roland. The House voted on a motion to formally revoke "the pleasure of the Assembly from the appointments of the Premier and all Members of the Executive Council effective Monday, February 9, 2009…." and to affect "that a Premier and Executive Council be chosen without delay and that the Commissioner be notified of the recommended appointments at the earliest opportunity."[19] The motion was defeated, but the confidence convention was tested.

This was the most basic test of the confidence convention: a vote on an unambiguous motion of non-confidence. Even in the consensus system, if such a motion were carried, it would compel the Commissioner to appoint new members to the executive council, upon receipt of advice from the legislature, but would not necessarily result in a general election.

However, there is greater ambiguity about other applications of the confidence convention. In sworn testimony, also in 2009, Tim Mercer, Clerk of the Legislative Assembly, stated:

> We've come fairly close to there being cases where some of the similar things that would normally be considered an expression of loss of confidence happened. For example, if the minister of finance was to introduce a budget bill, and the budget bill was defeated, there is a general understanding that that would be an expression of loss of confidence. It's never been tested in our system. I think until such time that it has been tested and the House develops conventions around that; there is uncertainty as to how the confidence convention would be exercised in our system of government.[20]

It is important to parse these insightful comments. The Clerk did not dismiss the existence of the convention, but simply expressed uncertainty about its application. One might then draw parallels with instances in other Westminster legislatures where the government has lost votes, but not necessarily confidence. Heard reminds us that governments in Canada and the United Kingdom "suffered a number of legislative defeats over the years, most recently since the early 1970s, without treating them as losses of confidence."[21]

In either a party system or a consensus system, it is less about winning or losing specific votes, and more about the ability of the executive to command a sustained majority in the legislature and thus continue to govern. Consistent with this reasoning, the Federal Court of Canada found: "A government losing the confidence of the House of Commons is an event that does not have a strict definition and often requires the judgment of the [first minister]."[22] In the consensus system, it requires, not the judgment of the first minister, but rather the judgment of the House.

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It is clear that the House has sufficient power to withdraw its pleasure from the previously appointed government, and advise the Commissioner on its choice of a new premier and executive council. The more complex and contested aspect of the confidence convention is early dissolution.

**Dissolution**

The Commissioner now holds the power to dissolve the Legislative Assembly and order the issue of the writs for a general election. Consistent with Canadian constitutional convention and letters of instruction, a Commissioner could only do so following the advice of the appropriate entity.

There is no evidence or logic to suggest that, in the consensus system, the first minister is the appropriate entity to request dissolution. In previous election years, it has been the Speaker who has requested dissolution, to the Governor in Council, following resolution by the Legislative Assembly. It also then follows that the prerogative to request dissolution does not rest with either the Premier or the Speaker. This leaves the Legislative Assembly as the appropriate entity to advise the Commissioner to dissolve the Assembly and order the Chief Electoral Officer to issue writs of election for all districts.

In order for dissolution to happen earlier than a fixed date, the Legislative Assembly would have to advise the Commissioner as such and do so

seemingly in contravention of its own legislation.[23] This is perhaps not so far-fetched. The House of Commons and several provincial legislatures with fixed date elections have gone early to the polls.[24] In those governmental systems, despite the introduction of fixed date elections, the powers of the Governor General and Lieutenant Governors, respectively, are unaltered, and explicitly preserve the discretion and power to dissolve the legislature.[25]

Analogous language is found in territorial statute. On the matter of an assembly's duration, the relative provision in the *Legislative Assembly and Executive Council Act* begins conditionally: "Subject to the power of the Commissioner to dissolve the Legislative Assembly under subsection 11(1) of the Northwest Territories Act…" This, we argue, affords an assembly the right and the power to seek early dissolution.

The power of dissolution is preserved for good reason. In the case of an ungovernable assembly, where no government, however comprised, could command sustained confidence and pass legislation, it would be in the best interest of the people to go to the polls. In the case of an assembly that ignored the fixed date and sat for longer than the maximum duration of an assembly, it would be in the best interest of the people for the Governor in Council to instruct the Commissioner to use his power to dissolve.[26]

Whereas some may see the power of dissolution and its application as an abuse of executive authority over democratic process, preserving the power of the formal executive to dissolve an assembly actually protects responsible government by ensuring that, under extraordinary circumstances, decisions about representation inevitably go back to the people.

## Conclusion

The confidence convention is the foundation of responsible government.[27] The evolution of responsible government in the Northwest Territories is reflected in changes over time to legislation, systems of representation, machinery of government, jurisdiction, and procedure.

Even so, institutions require time to implement practical tests in order to better understand how generally accepted conventions are appropriately applied. The application of conventions is further complicated when there is also uncertainty elsewhere, as there is with the confidence convention, and when institutions of government are designed to reflect cultures both foreign and indigenous, as is the case in the Northwest Territories.

There has been legitimate uncertainty as to whether and how the confidence convention applies in the northern system of consensus government. Absent clear autonomous powers to appoint members to the Executive Council and dissolve the legislature, as was the case in the Northwest Territories before April 1, 2014, it is understandable why the convention may have been deemed wholly inapplicable.

With recent changes to the *Northwest Territories Act*, as well as emerging conventions regarding the removal of members of the Executive Council, one may now safely argue that the confidence convention could be applied in the Northwest Territories in a manner similar to the application found in party systems. However, the prerogative of the House, emphasized and codified in consensus government, limits the discretion of the first minister and mitigates the power of the executive so routinely criticized in other legislatures in Canada.

## Notes

1 John Duncan. Letter from the Minister of Indian Affairs and Northern Development to George Tuccaro, Commissioner, October 6, 2010 p. 1.

2 The first general election held in the Northwest Territories in accordance with fixed date legislation was in October 2007.

3 Lewis Herbert Thomas. *The Struggle for Responsible Government in the North-West Territories: 1870 – 1897*, Toronto: University of Toronto Press, 1956.

4 Mark O. Dickerson. *Whose North? Political Change, Political Development, and Self-Government in the Northwest Territories*, Vancouver: UBC Press, 1992.

5 Duncan, op. cit., p. 2.

6 Ailsa Henderson, *Nunavut: Rethinking Political Culture*, Vancouver: UBC Press, 2007, chapter 5; Jerald Sabin, "Contested Colonialism: Responsible Government and Political Development in Yukon," *Canadian Journal of Political Science*, forthcoming, 2014.

7 Duncan, op. cit., p. 1.

8 This appears in keeping with Canadian traditions of responsible government (see: David E. Smith. *The Invisible Crown: The First Principle of Canadian Government*, Toronto: University of Toronto Press, 1991); although, more recently, some scholars have argued that these relationships should be codified (see: Peter Aucoin, et al. *Democratizing the Constitution: Reforming Responsible Government*, Toronto: Emond Montgomery, 2011).

9 Duncan, op. cit., p. 2.

10 *Legislative Assembly and Executive Council Act*, SNWT 1999, c.22, s.61(1) (hereafter, the '*LAEC Act*').

11 Duncan, op. cit., p. 2. Letters of instruction to previous Commissioners convey the same message.

12 *Northwest Territories Act*, SC 2014, c. 2.

13 *Northwest Territories Act*, RSC 1985, c. N-27, s. 6.

14 It is interesting that prior to 2011 there was no provision for a member to resign; see, SNWT 2011, c.11, which came into force on October 3, 2011 (polling day for the general election).

15 However, government records indicate that in 2001 (Groenewegen) and 2008 (Yakeleya), the Commissioner did issue an order of revocation acting on the advice of the Legislative Assembly and referencing the *LAEC Act*.

16 *Supreme Court Act*, RSC 1985, c. S-26, ss. 4(2) & 9.

17 *LAEC Act*, op cit., s. 61(2).

18 Graham White. *Cabinets and First Ministers*, Vancouver: UBC Press, 2005, p. 61.

19 Jane Groenewegen, MLA (Hay River South). Motion 8-16(3): Revocation of Appointments of the Premier and Executive Council, Legislative Assembly of the Northwest Territories.

20 Ted Hughes. *Disposition Report of Sole Adjudicator*, TB 35-16(4), October 30, 2009, p. 10.

21 Andrew Heard. *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford University Press, 1991, p. 69.

22 *Conacher v. Canada (Prime Minister)*, 2009 FC 920, [2010] 3 F.C.R. 411, at 59; also see Donald Desserud. "The Confidence Convention under the Canadian Parliamentary System," *Parliamentary Perspectives* #7, Canadian Study of Parliament Group, 2006, pp. 13 – 14.

23 Fixed-date elections are established by *LAEC Act*, op. cit., s. 3, and *Elections and Plebiscites Act*, SNWT 2006, c. 15, s. 39(5).

24 For example, the federal general election in 2011 was held prior to a fixed date; and several provincial legislatures, during periods of minority government, have held general elections before a fixed date.

25 *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, [2011] 4 F.C.R. 22.

26 The concept of a rogue legislature is raised in: Doug Stolz. "Fixed Date Elections, Parliamentary Dissolutions and the Court," *Canadian Parliamentary Review*, 33:1, 2010, pp. 15-20.

27 Heard, op. cit., at 68; Eugene Forsey. "The Question of Confidence in Responsible Government," in Christian Leuprecht and Peter H. Russell (eds.), *Essential Readings in Canadian Constitutional Politics*. Toronto: University of Toronto Press, 2011, p. 33.