

**Reining in the Crown's Power on Dissolution: The *Fixed-Term  
Parliaments Act* of the United Kingdom versus The Fixed-Election  
Laws in Canada**

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## Abstract

This paper analyzes the key differences between the powers of the British Crown versus those of the Crown of Canada in order to compare and contrast the fixed-elections laws in Canada (at the federal and provincial levels) with the *Fixed-Term Parliaments Act, 2011* of the United Kingdom. The United Kingdom operates on parliamentary supremacy and an uncodified constitution, and the powers of the British Crown come either from statute or prerogative. The British Parliament can therefore invoke its sovereign right to limit or put into abeyance any prerogative power of the British Crown at will. In contrast, Canada has always operated on a system of constitutional supremacy. Currently, the powers of the Crown of Canada derive from three sources: the provisions of the *Constitution Act, 1867*, the constitutionalized powers entrenched under the *Constitution Act, 1982*, and statute. The first two types of powers enjoy the protection from statutory encroachment under the unanimity formula.

This is precisely why the Canadian fixed-elections laws have deliberately preserved the Crown's power of dissolution and the Prime Minister's (or Premier's) power to advise and receive early dissolution, in contrast to the *Fixed-Term Parliaments Act, 2011*, which put the prerogative of dissolution of the British Crown into abeyance, removed the Queen and Prime Minister from dissolution, and thus truly eliminates the possibility of "snap elections." It concludes that Canadian jurists and scholars have long misapplied the British concept of "prerogative" powers to the Constitution of Canada, that the power of dissolution is not a "prerogative" in Canada, and that only a proper constitutional amendment under section 41(a) of the *Constitution Act, 1982* could eliminate the Crown's power on dissolution (at either the federal level or in a province) as the *Fixed-Term Parliaments Act, 2011* has put the prerogative of dissolution into abeyance in the United Kingdom.

## I: Introduction

The *Fixed-Term Parliaments Act, 2011* of the United Kingdom has put the executive prerogative power of the Crown on dissolution into abeyance and transferred the authority to the legislature such that Parliament dissolves automatically after 5 years, or votes to dissolve itself sooner. This law ensures that the Queen no longer dissolves Parliament on and in accordance with the advice of the Prime Minister. In contrast, the Canadian fixed-election laws, at the federal and provincial levels, all explicitly preserve the Crown's power of dissolution. Prime Minister Harper did not "break his own law" by advising the early dissolution of the 39<sup>th</sup> Parliament in 2008.

The Canadian fixed-election laws do not derogate from the Crown's power of dissolution; only a proper constitutional amendment under section 41(a) could limit or eliminate these and other powers of the Crown. In addition, no statute or constitutional amendment could limit the power of the First Minister to advise dissolution without necessarily also limiting the Governor's power to promulgate that act of the Crown. At most, the Canadian fixed-elections laws attempt to impose a paradoxical "contrived convention" through statute on how the First Minister should use this executive prerogative power, even though statutes do not generate constitutional conventions in that manner.

Furthermore, Canada already has possessed a fixed-election law since Confederation: section 50 of the *Constitution Act, 1867*, which fixes the term of a parliament at five years "subject to be sooner dissolved by the Governor General." Section 4 of the *Constitution Act, 1982* affirms this principle and applies to all provincial legislatures. The Canadian fixed-election laws amount to an attempt to codify the political custom that Prime Ministers seek dissolution every four years under majority parliaments.

The Crown's power of dissolution and the attempts to limit dissolution by statute make a perfect case study on the Constitution of Canada, because dissolution pertains to both the *Constitution Acts* and to the constitutional conventions and principles integral to Responsible Government. The "office of the Queen, Governor General and Lieutenant Governor of a province" of section 41(a) of the *Constitution Act, 1982* has constitutionally entrenched the powers of the Crown through these offices, which includes dissolution and the constitutional conventions that govern the relationship between the Governor and First Minister. Therefore, only an amendment under s.41(a) could eliminate the Crown's power of dissolution and truly remove the "politics" from dissolution. It will also show that Canadian jurists should re-evaluate the nature of the so-called "prerogative" powers of the Crown of Canada because these constitutionalized powers are entrenched under s.41(a) and are therefore not subject to the Parliament of Canada or a provincial legislature alone. There are therefore also not "prerogatives" *per se*. The separation of powers and constitutional supremacy shield the constitutionalized powers of the Crown of Canada from statutory encroachment. (However, this paper does not venture into the discretionary authority of the Governor to reject ministerial advice to dissolve parliament under exceptional circumstances).

This comparison of the Canadian fixed elections laws (of the federal and provincial levels) to the British *Fixed-Term Parliaments Act, 2011* highlights important differences between the British and Canadian constitutions. This paper will compare and contrast the Canadian and British

constitutions in order to expose the different approaches taken in the British and Canadian fixed-elections laws. Where the British law put the prerogative of dissolution into abeyance, the Canadian laws deliberately preserve the Crown's power of dissolution in order to avoid the radioactive concept of "opening the Constitution" of Canada; the Canadian laws have therefore preserved the status quo. Ultimately, it will show why Prime Minister Harper broke neither law nor convention by advising the early dissolution of the 39<sup>th</sup> Parliament in 2008.

## **II: How the Different Sets of Powers of the British Crown and of the Crown of Canada Affect Dissolution**

### **1. "Prerogative" in the United Kingdom and in Canada**

The literature gives varying definitions of the "prerogative" powers of the Crown.<sup>1</sup> However, these definitions only provide an accurate description of "prerogative" in the United Kingdom and show that Canadian jurists and scholars ought to re-examine the nature of the powers of the Crown of Canada.

In his *magnum opus* on Canadian constitutional law, Peter Hogg defines the prerogative as "the powers and privileges accorded by the common law to the Crown. [...] The prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent."<sup>2</sup> While the courts acknowledge the existence and determine the limit of a prerogative, the courts do not "accord" or confer these prerogatives on the Crown; they simply "declare what the royal prerogative is."<sup>3</sup> The common law has "allowed" rather than "created" prerogatives.<sup>4</sup> The prerogative powers of the Crown ultimately precede the judge-made common law and spring from "political custom and the practical power of the King."<sup>5</sup> The Crown *qua* Crown inherently possesses prerogative powers.

British constitutional historian A.V. Dicey, writing in the late 19<sup>th</sup> century, defined the prerogative powers as "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown."<sup>6</sup> He added that the prerogative refers to "every act which the executive government can lawfully do without the authority of an act of parliament."<sup>7</sup> Dicey's definition provides a "purely descriptive and retrospective" definition of prerogative. In addition, defining the scope of the prerogatives of the British Crown engages politics as much as law and depends heavily on whether one supports constitutional monarchy or a republic.<sup>8</sup> Dicey's Dictum also gives the false impression of the prerogative powers of the Crown as an anachronism or an historical relic of a bygone era, when they in fact remain "potent" and provide most the executive powers of the British government.<sup>9</sup>

### **2. Powers of the Crown in the United Kingdom**

Scholars and jurists alike should recognize that the United Kingdom and Canada have diverged significantly on some key constitutional questions. In the United Kingdom, the powers of the Crown come from two sources: prerogative and statute.<sup>10</sup> Since the United Kingdom does not operate under an entrenched, codified constitution, its Parliament can limit, alter, abridge, or put into abeyance, or restore any prerogative power of the Crown at will and replace it with statutory authority. Conversely, if the British Parliament repeals a statute that put a prerogative into

abeyance, the prerogative re-emerges – as the history of the prerogative of dissolution shows.<sup>11</sup> *Halsbury's Laws* states that the prerogative will re-emerge after Parliament repeals the statute that put it into abeyance if “it is a major government attribute” – and the power to dissolve Parliament certainly meets that description.<sup>12</sup> The British Parliament therefore possesses an unfettered power to determine via statute the scope of the prerogative powers of the Crown. This is not the case in Canada.

### 3. Three Types of Powers of the Crown in Canada

The powers of the Crown of the United Kingdom come either from prerogative or from statute. However, the powers of the Crown of Canada fall under *three* categories:

1. the “constitutionalized powers” (for want of a better term), whose existence the common law acknowledges, which are listed in but are not limited to the *Letters Patent constituting the Office of Governor General*, and which are exercised pursuant to the constitutional conventions of Responsible Government;
2. the powers that the *Constitution Acts* and their schedule confer upon or declares to be continued to be vested in the Crown; and
3. the litany of statutory powers that various acts of parliament delegated to the Governor General or the Governor-in-Council.<sup>13</sup>

The first two categories fall under the Constitution of Canada pursuant to s.52 (2) of the *Constitution Act, 1982*. These constitutionalized powers of the Crown are also protected from statutory encroachment under s.41 (a) of the *Constitution Act, 1982*, which stipulates that only a constitutional amendment authorized by the House of Commons, Senate, and the ten provincial legislative assemblies can alter “the office of the Queen, the Governor General and the Lieutenant Governor of a province.” They could derive from both constitutionalized types of powers of the Crown because both sections 24 and 50 of the *Constitution Act, 1867* and part 6 of the *Letters Patent Constituting the Office of Governor General* confer upon the Governor General these executive powers. In contrast, the Parliament of Canada alone may confer (and subsequently limit, amend, or repeal) additional delegated statutory powers on the Crown of Canada, which then remain outside the Constitution of Canada. For instance, this category of delegated statutory power would include Special Warrants. Similarly, the provincial legislatures may confer – and later amend or abolish – such statutory powers upon the Crown in right of that province, as represented by the Lieutenant Governor of the province, independent of the Constitution.

Several important judicial rulings support that three types of powers of the Crown exist in Canada and that since Patriation, s. 52(2) of the *Constitution Act, 1982* “includes” both the constitutionalized prerogative powers and the powers contained in the *Constitution Acts* and makes them subject to amendment pursuant to s.41 (a). The first case emanated from Manitoba’s direct democracy bill on initiatives and referendums. The bill would have allowed the electorate to approve money bills into law without the assent of the Lieutenant Governor, which would have violated the *British North America Act* by by-passing both the royal recommendation – a key principle of Responsible Government – and the requirement that the Lieutenant Governor must give Royal Assent before a bill becomes law.<sup>14</sup> In the *Re Initiative and Referendum Act*, the Judicial Committee of the Privy Council (JCPC) held that “‘the office of Lieutenant-Governor’ (s.92 (1) of the *British North America Act*) excludes the making of a law which

abrogates any power which the Crown possesses through the Lieutenant-Governor who directly represents the Crown.”<sup>15</sup> The JCPC further ruled:

Further, the power to amend the constitution given by s.92, head 1, expressly excepts ‘the office of Lieutenant-Governor.’ Section 7 of the proposed Act [...] dispensed with the assent of the Lieutenant-Governor provided by ss. 58 and 90 of that Act. [...] The proposed Act also violated the provisions of s. 54 (in conjunction with s. 90) as to money bills.<sup>16</sup>

The JCPC concluded that s.92 (“office of the Lieutenant-Governor”) of the *British North America Act, 1867* meant that the provincial legislature could not “abrog[ate] any power which the Crown possesses” and thus declared the *Referendum and Initiative Act ultra vires* to the extent that it “purported to alter the position of the Lieutenant-Governor”.<sup>17</sup>

That part of section 92 of the *British North America Act, 1867* became s.41 (a) of the *Constitution Act, 1982*. In 1985, the Supreme Court of Canada upheld the JCPC’s interpretation that “[office of] the Lieutenant Governor of a province” protects the constitutional powers of the Lieutenant-Governor in *Re Manitoba Language Rights*:

Finally, the effort to give legal force and effect to a mere translation of an Act through certification and deposit with the Clerk of the House must fail as an unconstitutional attempt to interfere with the powers of the Lieutenant-Governor. Royal assent is required of all enactments. Section 4(1) purports to do away with royal assent for the translations of Acts, while giving the translations the full force of law. This scheme is clearly ultra vires the province under s. 41(a) of the Constitution Act, 1982. See *In re Initiative and Referendum Act*, [1919] A.C. 935 (P.C.)<sup>18</sup>

The Supreme Court has taken the position that the “office of Queen, Governor General and Lieutenant Governor of a Province” includes the *powers* of the Crown. Minister Nicholson and Warren Newman have also argued that “office” includes the “powers,” “functions,” “prerogatives,” and “status” of the Crown of Canada.<sup>19</sup>

#### **4. The Entrenchment of the Powers of the Crown and the Separation of Powers**

The *Constitution Act, 1867* codified most of the prerogative powers of the Crown and subjected them to *constitutional* supremacy, while the prerogative powers of the Crown of the United Kingdom remain subject to the supremacy of the British *Parliament*. Moreover, if “prerogatives” refer to the powers that the courts have recognized as belonging to the Crown at common law, then various powers of the Crown of Canada – including prorogation and dissolution – could not properly be called prerogatives. Whether jurists and scholars refer to these powers as “prerogative” or by another name, they undoubtedly form part of the Constitution of Canada as per the supremacy clause of s.52 (2) of the *Constitution Act, 1982*, and they are subject to amendment under s.41 (a) – the “office of Queen, Governor General and Lieutenant Governor of a Province” – of the same. For want of a better term, I have called them “constitutionalized powers” to reflect that they fall under the ambit of section 41(a).

Part III of the *Constitution Act, 1867* codifies some of the Crown’s powers. Section 9 shows that the power and authority of the Crown (at the time of enactment, the one and indivisible Crown of

the United Kingdom but now the Crown of Canada) precedes the *Constitution Act* itself: “the Executive Government and Authority of and over Canada is hereby declared to continue to be vested in the Queen.”

Section 11 established the Privy Council of Canada. By constitutional convention, the Ministry, a committee of the Privy Council, consists of current Ministers of the Crown and acts as the political executive. Section 13 differentiates the Governor from the Governor-in-Council and states that the latter “act[s] by and with the advice of the Queen’s Privy Council for Canada.” These two sections form the core of Responsible Government.<sup>20</sup>

Section 24 grants the Governor General the power to “summon qualified persons to the Senate,” and section 96 empowers the Governor General to appoint judges. Section 30 states that the Governor General “shall [...] summon and call together the House of Commons.” This power also includes prorogation by implication, because a parliament can only be summoned “from time to time” if the Governor has previously prorogued it. Summoning opens a session, and prorogation ends a session. Until the early 20<sup>th</sup> century, the Governor General both opened (summoned) and closed (prorogued) a session of Parliament by a speech from the throne. Section 50 codifies the power of dissolution and states that “Every House of Commons shall continue for Five Years from the Day of Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.” Section 54 codifies the Royal Recommendation, which the Governor General issues on and in accordance with the advice of Cabinet, and thus a crucial aspect of Responsible Government itself.<sup>21</sup>

Under the Constitution of Canada, only the political executive’s basic operating procedures and the constitutional conventions of Responsible Government remain uncodified, such as the Office of Prime Minister itself, the “Cabinet” as the political executive and active committee of the Privy Council, and the constitutional relationship between the Governor and Ministers of the Crown. Taking all these factors into account, where the *Constitution Act, 1867* mentions the Governor General, the Prime Minister, by convention, tenders and takes responsibility for that advice; where it mentions the Governor-in-Council, the Cabinet collectively tenders advice and takes responsibility. The Patriation of the Constitution in 1982 ensured that these principles form part of the Constitution of Canada under s.52 (2) and is therefore subject to amendment under s.41 (a).<sup>22</sup>

Through the *Letters Patent Constituting the Office of Governor General, 1947*, the King of Canada, on and in accordance with the advice of the Prime Minister of Canada, delegated certain of the Crown’s powers to the Governor General of Canada. However, the Queen of the Canada remains the source of the constitutional powers and authorities. Among those prerogatives are the royal prerogative of mercy and all other “powers and authorities lawfully belonging to the [Queen of Canada],” such as all those prerogatives pertaining to the conduct of war and diplomacy and honours.

Warren J. Newman, Senior General Counsel in the Department of Justice, has argued that “the prerogative and other key executive powers of the Crown contemplated by the law of the Constitution are exercised in accordance with a web on constitutional conventions associated with the principle of responsible government.”<sup>23</sup> He also states that section 9 authorizes “the



exercise of the royal prerogative to dissolve or prorogue Parliament.”<sup>24</sup> Newman suggests that these crucial powers of the Crown enjoy a double protection as both constitutionalized former prerogatives and as provisions of the *Constitution Acts, 1982*: “The powers to summon, prorogue, and dissolve Parliament flow from the prerogatives of the Crown and the provisions of the Constitution.”<sup>25</sup> Section 41(a) protects the “Office of the Queen, Governor General and the Lieutenant Governor of a province” from any one legislature alone and ensures that only a constitutional amendment authorized by the House of Commons, Senate, and the ten provincial legislative assemblies can alter it.<sup>26</sup> Therefore, the Parliament of Canada alone, or a provincial legislature alone, cannot abolish the power of dissolution. The “office” includes the powers of the Crown of Canada, personified by Queen Elizabeth II and her heirs and successors, and represented by the Governors.<sup>27</sup> This is why the Parliament of Canada and all eight provincial legislatures that have passed fixed-election laws have included non-derogation clauses reaffirming and saving the power of the Governor General and Lieutenant Governors to dissolve their respective legislatures.<sup>28</sup>

The Constitution of Canada includes both the Governor General’s written constitutional powers to dissolve Parliament under section 50 of the *Constitution Act, 1867* and the uncodified conventions of Responsible Government that Ministers of the Crown take responsibility for all acts of the Crown and that the Governor General acts on and in accordance with the Prime Minister’s advice in dissolving parliament, save for exceptional circumstances.<sup>29</sup> Parliament therefore cannot limit how the Prime Minister can exercise the discretion to advise and take responsibility for dissolution without also necessarily limiting how the Lieutenant Governor promulgates that advice. The legislature cannot drive a wedge between the Governor and First Minister of the Crown without a constitutional amendment.<sup>30</sup> Therefore, the Crown’s powers of summoning, proroguing, and dissolving parliament (and any other powers enumerated in the *Constitution Acts*) are not “prerogatives” *per se* under the law and rules of the Constitution, at least not in the British sense where the prerogative powers of the British Crown exist only at the mercy of the British Parliament.

It is high time that Canadian jurists and scholars acknowledge that Dicey’s definition of the prerogative powers, and its implied teleology, do *not* apply to the constitutionalized powers of the Crown of Canada. What the Parliament of Canada and the provincial legislatures can legislate with respect to the powers of the Crown, such as dissolution, depends upon this understanding. Unfettered *parliamentary* supremacy along the English, and later British, model has never existed in British North America or in the Dominion of Canada.<sup>31</sup> Instead, Canada has developed along the lines of *constitutional* supremacy. From the *Constitutional Act, 1791* through the *Act of Union, 1841*, Upper and Lower Canada and the United Province of Canada, as Crown colonies, enjoyed varying degrees of self-government and Responsible Government only in their internal affairs and were still subject to the jurisdiction of the Imperial Parliament in London, particularly in matters of defence and foreign policy. The same principle applied to the Atlantic and Pacific Crown colonies. The *British North America Act, 1867* re-organized the Crown colonies of British North America into an indissoluble federal union. From 1867 until roughly 1931, the combination of Imperial jurisdiction and the federal-provincial powers the division of powers again ensured that unfettered parliamentary supremacy never existed. From 1931 to 1982, the Parliament of Canada or the provincial legislatures alone could not unilaterally amend certain parts of the Constitution; the *British North America Act* remained a British statute,

which meant that only the British Parliament could amend it. Canada finally patriated the *British North America Act* in 1982 and added a bill of rights and an amending formula to the Constitution. That patriated amending formula and s.52 (2) of the *Constitution Act, 1982* constitutionalized and entrenched the “Office of Queen, Governor General or Lieutenant Governor of a Province.”<sup>32</sup>

In the early 17<sup>th</sup> century, the English Parliament took full advantage of its sovereignty and enacted legally enforceable restrictions to the Crown’s prerogative powers after a foolish King over-reached and exercised his prerogative of dissolution cavalierly. In the 21<sup>st</sup> century, the British Parliament has eliminated the prerogative of dissolution. This arrangement reveals a fundamental difference between the British and Canadian constitutions: the Parliament of Canada cannot invoke its parliamentary sovereignty as a deterrent against executive domination or alleged abuse of the powers of the Crown. This latent political enforceability – that parliament may substitute its authority for that of the Crown – simply does not apply in Canada, because the Parliament of Canada or a provincial legislature alone does not possess the sovereign power to put the Crown’s powers of prorogation or dissolution into abeyance. Only an amendment under s.41 (a) of the *Constitution Act, 1982* could do so.

Dicey’s definition of prerogative alludes to this parliamentary deterrence against the Crown, if prerogative refers to “the residue of discretionary and arbitrary authority, which *at any given time* is left in the hands of the Crown.” The British Parliament can wield its sovereignty like a sword against the British Crown. At any given time, parliamentary sovereignty hangs over the Crown like the Sword of Damocles; occasionally, Parliament swings the sword and chips away at the Crown. But in Canada, the Constitution shields the Crown and Parliament from one another and preserved their entrenched positions.

The Supreme Court of Canada has also supported this doctrine on the separation of powers, which would provide another defence of the constitutionalized powers of the Crown. Each branch of government must conform to the Constitution, and one part of the Constitution cannot abrogate another.<sup>33</sup> Justice McLaughlin commented:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.<sup>34</sup>

The Supreme Court re-affirmed this doctrine of the separation of powers in subsequent cases.<sup>35</sup> The court’s doctrine on the separation of powers reinforces the argument that Parliament alone cannot alter or abridge the constitutionalized powers of the Crown, such as prorogation and dissolution.

## **5. The Constitution of Canada**

In 1917, William Renwick Riddell (then a Justice of the Supreme Court of Ontario) explained to his American audience the differences between the English and American concepts of the

“constitution.” He described the constitution, in the English sense, as “the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed,” while constitution in the American sense refers to “a written document [...] which authoritatively and without appeal dictates what shall and what shall not be done.”<sup>36</sup> Riddell added that under the English and Canadian sense of “constitution,” an action could be legal but unconstitutional, while in the American sense, that which is unconstitutional is also illegal.

The Supreme Court of Canada (SCC) combined the two conceptions of the constitution in the *Patriation Reference* and later re-affirmed it in the *Secession Reference*. The SCC declared:

the phrases ‘Constitution of Canada and ‘Canadian Constitution’ [...] embrace the global system of rules and principles which govern the exercise of constitutional authority in the whole and every part of the Canadian state.<sup>37</sup>

[...]

[C]onstitutional conventions plus constitutional law equal the total constitution of the country.<sup>38</sup>

However, the SCC broke down the “Constitution of Canada” into separate categories and differentiated between the “law of the constitution,” which are justiciable and on which the courts adjudicate, from the “rules of the constitution” or “requirements of the constitution,” which are not justiciable but rather politically enforceable. The SCC classified some of the constitutional conventions associated with Responsible Government – such as the confidence convention – under the latter, non-justiciable category of “rules of the constitution.”<sup>39</sup>

The SCC also concluded:

[W]hile they are not laws, *some conventions may be more important than some laws*. Their importance depends on that of the value or principle which they are meant to safeguard. Also *they form an integral part of the constitution* and of the constitutional system. [. . .]. That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence [emphasis added].<sup>40</sup>

The SCC re-affirmed and expanded upon this principle in the *Secession Reference*:

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading.<sup>41</sup>

In other words, a literal reading of the *Constitution Act, 1867* would be profoundly misleading because it would suggest that the Governor General, as the representative of the Crown, acts not merely as the repository of executive power, but that he also exercises executive power through Personal Rule in the manner of Charles I.<sup>42</sup> The Constitution of Canada thus includes both the formal, constitutional provisions and the informal, constitutional conventions. Only the combination of the formal and informal yields a statement that is both legally true and constitutionally accurate.<sup>43</sup> The literal reading of the *Constitution Act* that the Governor General promulgates all acts of the Crown is true but misleading. The converse that “the powers of the

royal prerogative are exercised, in reality, by the federal and provincial governments” is politically true but legally incomplete and inaccurate, because the Crown, as personified by the Queen and represented by the Governor General and Lieutenant-Governors, still holds these powers and formally promulgates them.<sup>44</sup> The true and accurate formulation would take into account the democratic principle, which manifests itself through Responsible Government. Responsible Government means that Ministers of the Crown take responsibility for all acts of the Crown; the Governor therefore promulgates all acts of the Crown on and in accordance with ministerial advice. Responsible Government precludes the possibility of Personal Rule.

In the *Secession Reference*, the SCC’s definition of the “democracy principle” necessarily includes Responsible Government and the confidence convention, and not merely the right to vote in free and fair parliamentary elections.<sup>45</sup> Ministers of the Crown take responsibility for all acts of the Crown and are responsible to the people’s elected representatives in the Assembly, and indirectly, to the people themselves.

The democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself.<sup>46</sup>

Even if the courts cannot enforce constitutional conventions pertaining to Responsible Government, the constitutional relationship between the First Minister and Governor still forms part of the constitution and an inextricable link that legislatures cannot separate through statute. Binding the Prime Minister necessarily means binding the Governor General because under Responsible Government, Ministers of the Crown take responsibility for all acts of the Crown, and the Governor thus acts upon the advice of Ministers, save for exceptional circumstances. Even in the latter case, a Governor who rejects a First Minister’s advice would dismiss him and appoint a new First Minister who takes responsibility for that dismissal.

## **6. The *Conacher* Rulings: Constitutional Conventions and Fixed Elections**

On 7 September 2009, the Governor General dissolved the 39<sup>th</sup> Parliament on and in accordance with the advice of Prime Minister Stephen Harper. This early dissolution provoked a political controversy because it contradicted, and seemed to violate, the Harper government’s own fixed-election law. Some critics contended that Prime Minister Harper acted either illegally or unconstitutionally, or both. This argument pertains to the Constitution of Canada, which consists of the written provisions of the *Constitution Acts* as well the uncodified principles and conventions of Responsible Government, normally called “constitutional conventions.” Prime Minister Harper acted neither illegally nor unconstitutionally; in other words, he neither broke the law nor violated a constitutional principle or a constitutional convention.

An advocacy group called Democracy Watch (then presided by Duff Conacher) took the early dissolution of the 39<sup>th</sup> Parliament to the Federal Court, which denied the application. The Federal Court of Appeal then dismissed Democracy Watch’s appeal.<sup>47</sup> However, the Federal Court in particular did respond to the arguments of the applicants and the respondents.

Based on Andrew Heard's conception of constitutional convention, Democracy Watch argued that Prime Minister Harper had unilaterally created a constitutional convention in the form of a self-denying ordinance so that he could no longer advise the Governor General to dissolve Parliament early unless the Government had lost the confidence of the Commons.<sup>48</sup> Democracy Watch argued, "conventions that have been incorporated into legislation are enforceable by the courts as ordinary statutes [...]."<sup>49</sup> Democracy Watch also submitted that Parliament intended the federal fixed-elections law to "stabilize" the system of government in a time of minority parliaments.<sup>50</sup> However, the logical outcome of a "fixed-election" law would surely involve a fixed-term parliament and first look to a mid-parliamentary change of government and early dissolution only as a last resort. The *Fixed-Term Parliaments Act, 2011* of the United Kingdom has enacted that principle.

In reality, a statute law cannot expressly incorporate a constitutional convention, which the courts would in turn enforce. A statute does not automatically generate a constitutional convention that supersedes the wording of the statute itself. The fixed-elections law in Canada deliberately preserves the Governor General's power to dissolve parliament under section 50 of the *Constitution Act, 1867*; by necessity, it also preserves the constitutional conventions underpinning Responsible Government: that the Governor General dissolves Parliament on the advice of the Prime Minister.

A statute law on fixed elections that deliberately preserves the power of the Crown to dissolve the legislature by extension necessarily preserves the constitutional relationship between the Governor and First Minister; it does not and cannot incorporate a constitutional convention. Parliament cannot pass a constitutional convention into law for at least two reasons: first, because constitutional conventions emerge and cannot be designed or imposed; second, because codifying a pre-existing constitutional convention in statute moves the former constitutional convention from the realm of political enforceability to the purview of the courts and legal enforceability. Democracy Watch proposed a paradox because political enforceability and conventions are mutually exclusive to legally enforceable laws.<sup>51</sup>

Constitutional conventions are unwritten, politically enforceable norms which evolve from practices and customs that complement and contextualize laws or the written constitution. Norms imply exemptions and allow for exemptions—particularly in situations without precedent. Conventions help political actors determine how they ought to act in a given situation.<sup>52</sup> In addition, constitutional conventions are the manifestations of constitutional principles, which underpin conventions and provide their normative justification.<sup>53</sup>

In contrast, a custom refers to "symbolic traditions or pleasing rituals whose observance or absence has no substantial impact on the operation of constitutional rules and principles."<sup>54</sup> The practice of dissolving majority parliaments after only four years amounted to a custom rather than a convention because it did not support any underlying constitutional principle and because it did not apply to minority parliaments.

Professor Heard later elaborated on the reasoning behind the *Conacher* rulings and argues that constitutional conventions could derive from four sources: historical customs and precedents, by mutual agreement, by unilateral declaration, and through principle.<sup>55</sup> Heard argues that the fixed-

elections laws created constitutional conventions by agreement and the stated intentions of the Harper government.

However, what Heard calls “conventions by agreement” amount to a lesser class of pledge or custom that falls below the threshold of a true constitutional convention. Heard cites the resolutions of the Imperial Conferences of 1926 and 1930 and the *Meech Lake Accord* while pending ratification. In reality, both of these “conventions by agreement” represented temporary or transitional phases. The *Statute of Westminster, 1931* codified into the law of the United Kingdom and of Canada many of the resolutions of those Imperial Conferences – which the Dominion Prime Ministers always intended as a temporary measure. Similarly, Prime Minister Mulroney’s agreement to bind himself to section 4 of the *Meech Lake Accord* and only nominate Senators whom the provinces had chosen acted as a transitional phase. If the provinces had ratified the *Meech Lake Accord*, then this “convention” would have become a codified provision of the Constitution of Canada and thus ceased to be a “convention.” Since the *Meech Lake Accord* failed, Mulroney “no longer felt obliged to act on provincial lists.”<sup>56</sup> Neither of these temporary, transitional measures amounted to constitutional conventions – they were constitutional fads of convenience.

Heard also argues that conventions can also come about “through authoritative unilateral declarations by key political actors.”<sup>57</sup> These “conventions by declaration” in fact amount to individual policy preferences, not a robust constitutional convention that binds the officeholder’s successors. What one Prime Minister can unilaterally impose, his successors can, just as arbitrarily, unilaterally undo.

Both the “convention by agreement” and “convention by declaration” lack the necessity and permanence that underpins true constitutional conventions, such as the confidence convention and the core arrangement of Responsible Government. Heard even cites Brun’s definition that “convention is necessarily bilateral or multilateral.”<sup>58</sup> To elevate the Prime Minister’s unilateral personal preferences and temporary, transitional customs to the level of “constitutional conventions” trivializes the true constitutional conventions that uphold Responsible Government and the democratic principle. These conventions support underlying principles and have remained largely intact since the nineteenth century; they do not fade in and out of fashion. The conventions of Responsible Government emerged in order to maintain the infallibility of the Sovereign: the Queen still does no wrong because Ministers of the Crown, rather than the Queen, take responsibility for all acts of the Crown.

The “spirit” of these fixed-elections laws springs from a false and disingenuous premise that a legislature can somehow codify a constitutional convention into law by bypassing the amendment of the *Constitution Acts*, or that a selective and unrepresentative set of ministerial statements create a convention by agreement, or that one Prime Minister can unilaterally create a convention by declaration that binds his successors. These methods would conjure up contrived conventions rather than create them. Prime Minister Harper therefore could have broken a non-existent spirit.

### III: Fixed-Elections in Canada: The Political Cynicism of Evading Constitutional Amendment

#### 1. Background

In Canada, section 50 of the *Constitution Act, 1867* stipulates that “every House of Commons shall continue for Five Years from the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General) and no longer.” Section 4(1) of the *Constitution Act, 1982* reaffirms this principle at the federal level and applies it to all the provinces as well: “No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.” Few parliaments in Canada and in legislatures in the provinces have lived out the maximum five years; instead, Canadian political customs center on quadrennial parliaments and elections every four years. Dissolution remains a power of the Crown, and it entails three separate proclamations. First, the Governor dissolves the Parliament on and, apart from exceptional circumstances, in accordance with the advice of the First Minister. Second, the Governor issues the writs of election on the advice of Cabinet. Third, the Governor summons the first session of the next parliament *pro forma* on the advice of the First Minister. Critics of the established constitutional position argue that the First Minister possesses too much power because he could call a “snap election” to the advantage of his own governing party and to the detriment of the opposition.

In response to such criticism over the “undemocratic” power of dissolution, the Parliament of Canada and eight provincial legislatures, as of 2013, have adopted the Canadian model of the fixed-elections law. British Columbia pioneered this model and passed its fixed-elections law in 2001. Newfoundland and Labrador passed a similar law in 2004 – though this law contains a unique variation, as described below. Ontario passed its equivalent law in 2005, followed by New Brunswick in 2007, Saskatchewan, Prince Edward Island, and Manitoba in 2008, and Alberta in 2011. Only Quebec and Nova Scotia have not passed such laws. The “Canadian model” of fixed elections refers to a statute law that fixes elections every four years, but which preserves the established constitutional positions of the Governor and First Minister through a non-derogation clause in order to by-pass the *Constitution Acts*. (Newfoundland and Labrador’s act contains a unique, and probably unconstitutional, provision on mid-parliamentary changes of government).

Most Canadian Ministers of the Crown portrayed (at least in the Second Reading debates) the government bills for fixed elections as a means of preventing a First Minister who leads a majority government from calling a “snap election.” Based on the political usage of this term, a “snap election” occurs when a First Minister advises dissolution prior to the customary quadrennial interval and while his government still commands the confidence of the assembly. However, a “snap election” could conceivably include another category, where after a mid-parliamentary change of government, the new First Minister wants to “seek a mandate” from the electorate and thus advises the dissolution of the parliament before the customary quadrennial interval. The first category would include the federal elections of 1911, 1958, 1965, 1997, 2000, and 2008, and the second category would include the federal elections of 1874, 1968, and 2004. They argue that the non-derogation clause merely ensures that in a minority parliament, the First Minister could still advise dissolution and fresh elections if the assembly had withdrawn its

confidence from the government beforehand. Various governments and assemblies across Canada accepted this arrangement, which reflects a preference for early dissolution over mid-parliamentary changes of government. However, a First Minister leading a single-party minority government could also deliberately engineer the defeat of his own government by tabling legislation that the Opposition could not possibly support. The Assembly would then withdraw its confidence from the Government, thus precluding the executive initiative necessary for a true “snap election”, but some observers would still regard such a course as “breaking the spirit” of the fixed-elections law.

In reality, the Canadian model of fixed elections merely sought to remove the *initiative* – and not the power – of dissolution from the First Minister. The First Minister would theoretically only advise dissolution after his government had lost the confidence of the Assembly, or in order to ensure that election day occurs on the date that the statute prescribes. At most, the Canadian fixed-election laws may only prevent a parliament from sitting for longer than four years (though even this is debateable) – they do not ensure that the parliament must last a minimum of four years. Parliament can still be dissolved sooner because the non-derogation clauses by-pass the Constitution and preserves the established constitutional positions of the First Minister and Governor. Only a constitutional amendment that abolishes the Crown’s power of dissolution and vests it in Parliament itself could eliminate “snap elections.”

## **2. The Historical Antecedents of Fixed Elections in Canada, 1988-2007**

At the federal level, the Reform Party championed both fixed elections and a form of constructive non-confidence in the late 1980s and throughout the 1990s, though it did not cite a specific snap election as a grievance. In a pamphlet from 1992, the Reform Party pledged to “support the holding of elections every four years at a predetermined date.”<sup>59</sup> As early as 1988, the Reform Party favoured constructive non-confidence and treated the possibility of mid-parliamentary changes of government, rather than early dissolution, as the first option:

The defeat of a government measure in the House of Commons should not automatically mean the defeat of the government. Defeat of the government motion should be followed by a formal motion of non-confidence, the passage of which would require either the resignation of the government or dissolution of the House for a general election.<sup>60</sup>

In its platform for the election of 2000, the Canadian Alliance stated the principle of fixed elections more forcefully but abandoned constructive non-confidence. “A Canadian Alliance government will,” it declared, “set fixed election dates every four years, to remove from the Prime Minister the discretionary power to call an early snap election or hold onto office late.”<sup>61</sup> The Canadian Alliance sought to eliminate the Prime Minister’s discretion on dissolution in order to preclude both early elections and “late” elections that break the quadrennial custom. The election of 1993 would fall under the latter, and the election of 1997 would fall under the former.

The Conservative Party of Canada also originally sought to eliminate the Prime Minister’s discretion on dissolution. Its platform of 2004 pledged to implement a law “requiring fixed election dates every four years, except when a government loses the confidence of the House (in which case an election would be held immediately, and the subsequent election would be four years later on the date established in the legislation)” because “Canadians are appalled that we



are subject to mid-term elections, called simply for the personal and partisan benefit of the Prime Minister.”<sup>62</sup> The Conservatives only formed the official opposition in that 38<sup>th</sup> Parliament, but Opposition Leader Stephen Harper introduced a private member’s bill on fixed-elections in an attempt to fulfill the campaign promise. While Bill C-512 did not go beyond First Reading, it reveals a distinct evolution in the Conservative Party’s strategy.

This ill-fated *Dissolution of Parliament Act* would have repealed section 50 of the *Constitution Act, 1867* and replaced the quintennial fixed-term parliament with a quadrennial fixed-term parliament. The bill would have reduced the maximum life of a parliament from five to four years under section 44 of the *Constitution Act, 1982*, while preserving the power of the Crown to dissolve parliament and thus avoiding an amendment under s.41 (a). The bill contained a non-derogation clause, “Nothing in this Act affects the power of the Governor General to dissolve the Parliament whenever the Governor General sees fit.”<sup>63</sup> This bill would not have prevented early dissolution, but by amending the *Constitution Act, 1867* itself to shorten the maximum life of a parliament to four years, it would have attempted to codify the quadrennial custom and make “late elections” impossible. It would have set fixed elections to very third Monday in November, beginning in 2004. However, this bill did not take into account section 4 of the *Constitution Act, 1982*, which reaffirms the quintennial maximum for a federal parliament and establishes the quintennial maximum for the provincial legislatures. The new section 50 of the *Constitution Act, 1867* would then have contradicted section 4 of the *Constitution Act, 1982*. Section 4 falls under the *Charter* and may be subject to the General Amending formula, but one could make a good case that it, too, falls under section 44, the amending formula that allows the Parliament of Canada alone to amend the constitution “in relation to the executive government of Canada or the Senate and House of Commons.”

In 2006, the Conservatives reiterated their pledge to “introduce legislation modeled on the BC and Ontario laws requiring fixed election dates every four years, except when a government loses the confidence of the House (in which case an election would be held immediately, and the subsequent election would follow four years later).”<sup>64</sup> The Harper government introduced Bill C-16, which amended the *Canada Elections Act* instead of the *Constitution Acts*. It adds the non-derogation clause, “Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion,”<sup>65</sup> and prescribes that the fixed elections occur on the third Monday in October, beginning in 2009.

The Minister of Justice and Attorney General Rob Nicholson appeared before the Standing Committee on Procedure and House Affairs on the fixed-elections bill. Nicholson reiterated the standard political line that “the bill does not affect the powers of the Governor General to call an election sooner if a government loses the confidence of the House.”<sup>66</sup> But he was less forthright in acknowledging that it also does not affect the power of the Governor General to dissolve parliament if the government has not lost the confidence of the Commons. Nicholson then rejected the insertion of clause that would “constrain the Prime Minister’s ability to request dissolution of Parliament to certain circumstances.” He explained:

The Governor General’s legal power under the Constitution and the exercise of that power on the advice of the Prime Minister are fundamentally and inseparably linked. If one limits the Prime Minister’s ability to advise, one risks constraining the Governor General’s powers in a way that would be unconstitutional.<sup>67</sup>

Nicholson then affirmed that eliminating the Crown's power of dissolution would require an amendment under section 41(a), which is why the bill "does not in any way fetter the discretion or the prerogative of the Governor General."<sup>68</sup>

Patrick Monahan appeared before the Senate Committee on Legal and Constitutional Affairs and agreed:

Nothing [in the bill] would legally prevent the Prime Minister, if he claimed that this was a matter of some extraordinary set of circumstances that required an election, from seeking a dissolution by advising the Governor General to dissolve the House, and the Governor would act on the advice of the Prime Minister, in accordance with the principles of Responsible Government.<sup>69</sup>

British constitutional scholar Robert Hazell wrote on the deficiencies of the Canadian model on fixed elections in his submission to the British parliamentary committee studying the *Fixed-Term Parliaments Bill*. He described Canadian federal elections as "nominally fixed" because the Harper government's bill "preserved the prerogative powers of the Crown in order to avoid a constitutional amendment."<sup>70</sup>

### **3. Provincial Fixed-Elections Laws, 2001-2011**

#### *A) British Columbia*

British Columbia pioneered the Canadian model of fixed elections in 2001. Unlike the other provinces, British Columbia has partially codified its provincial constitution into a *Constitution Act* and includes its fixed-elections provision therein. And unlike the other provinces and the federal level, British Columbia's legislation contains a substantive clause affirming the Lieutenant Governor's power rather than a non-derogation clause *per se*. Section 23(1) preserves the powers of the Crown: "Lieutenant Governor may, by proclamation in Her Majesty's name, prorogue or dissolve the Legislature when the Lieutenant Governor sees fit." Section 23(2) then sets out fixed elections on the second Tuesday in May every four years, starting in 2005. British Columbia has since held scheduled elections in 2009 and 2013. In this polarized two-party province, elections normally result in majority governments. Minister G. Plant described the bill at First Reading as "ensur[ing] that provincial elections must be held on a fixed date every fourth year or immediately if a government loses a confidence vote."<sup>71</sup> At Second Reading, he explained that the bill "preserves the constitutional prerogative of the Lieutenant Governor to prorogue or dissolve the Legislative Assembly" so that the "Lieutenant-Governor may dissolve the Legislative Assembly and call a general election immediately" if the government loses the confidence of the assembly.<sup>72</sup> He also declared that the law would "take some of that power [to dissolve the Legislative Assembly] out of the Premier's office."<sup>73</sup> Plant precluded the possibility of a mid-parliamentary change of government that would also involve a transfer of power between parties.

However, a mid-parliamentary, intra-party change of government did occur on 30 May 2011 when Christie Clark became Premier half way through the life of the 39<sup>th</sup> Legislature. Notwithstanding the fixed-elections law, some New Democratic MLAs in opposition called upon

Premier Clark to advise an early dissolution.<sup>74</sup> New Democratic MLA Mr. Leonard Krog argued that the new Liberal Premier “needs to call a general election.” Fellow New Democratic MLA Norm Macdonald agreed. Macdonald stated that his constituents expressed an “expectation of another election.”<sup>75</sup> While the Liberal leadership race was still under way, he argued that the Premier Gordon Campbell’s replacement as Liberal party leader and Premier should call an early election because “governments need mandates.” Finally, New Democratic MLA Bob Simpson tabled a bill to move fixed elections from the spring to the fall and to hold the first fall election in October 2012.<sup>76</sup>

Interestingly, if British Columbia had adopted Newfoundland and Labrador’s variant of the law, Clark would have been obliged to advise an early dissolution. Moreover, since British Columbia amended its provincial constitution, it may have in fact reduced the maximum life of its Parliament from five to four years.

### *B) Newfoundland and Labrador*

Newfoundland and Labrador passed the second fixed-elections law in Canada in 2004 by amending its *House of Assembly Act* and *Elections Act* in 2004. Section 3(1) includes the standard non-derogation clause that preserves the established constitutional position of the Premier and Lieutenant-Governor: “Notwithstanding subsection (2), the Lieutenant-Governor may, by proclamation in Her Majesty’s name, prorogue or dissolve the House of Assembly when the Lieutenant-Governor sees fit.”<sup>77</sup> Section 3(2) sets the fixed election every second Tuesday in October, starting in 2007.

The law then adds a unique – and probably unconstitutional – innovation in section 3.1, “Election on change of Premier.” This section states that if a mid-parliamentary change of government, whether inter-party or intra-party, occurs “before the end of the third year following the most recent general election,” the new Premier “shall not later than 12 months afterward provide advice to the Lieutenant-Governor that the House of Assembly be dissolved and a general election be held.”<sup>78</sup> In Canadian law, “shall” means “must”. The law mandates that the Premier advise the Lieutenant-Governor to dissolve the Assembly and infringes upon the constitutional relationship between the two. The law can no more forbid the Premier from advising the Governor to dissolve the assembly than it can *force* the Premier to advise the Governor to dissolve the assembly. Most interestingly of all, this section 3.1 is *not* subject to the non-derogation clause of section 3(1), which only applies to section 3(2). Under section 3(1), the Premier *may* advise an early dissolution, but under section 3.1, he *must* advise an early dissolution. Newfoundland and Labrador’s law therefore preserves the Premier’s discretion to advise an early dissolution, as do all the other fixed-election laws – but it would prevent a Premier appointed mid-parliament from serving for the remainder of that parliament. Section 3.1 means that, as those New Democratic MLAs in British Columbia argued, a Premier appointed mid-parliament should advise an early dissolution in order seek his or her own “mandate” from the electorate. This troublesome provision also raises the spectre of judicial review or gubernatorial activism: what would happen if the new Premier appointed mid-parliament refused to advise the Lieutenant-Governor to dissolve the House of Assembly early? The courts would perhaps have to order the Premier to advise an early dissolution. Alternatively, the other principles of Responsible Government suggest that the Lieutenant-Governor would have to

dismiss this Premier and appoint another who would advise the early dissolution pursuant to the law.

Ed Byrne, the Minister responsible for this bill, described section 3(1) as “eliminating the snap elections of the past;” he added that section 3.1 means that the new Premier appointed mid-parliament “must, within a twelve-month period – not may, but must – go to the people of the Province to seek their own mandate.”<sup>79</sup> Jack Harris, then the Leader of the provincial New Democratic Party, argued that the mandated early dissolution “is not really required” and represents “more of a political issue” than a constitutional one.<sup>80</sup>

Newfoundland and Labrador’s law includes an unconstitutional provision for the sake of “electoral democracy” – at the expense of “parliamentary democracy.”<sup>81</sup>

### C) Ontario

Ontario adopted its fixed-elections law in 2005, and it follows the standard Canadian model. Section 9(1) of Ontario’s *Elections Act* states, “Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, by proclamation in Her Majesty’s name, when the Lieutenant Governor sees fit.”<sup>82</sup> Section 9(2) sets fixed elections on the first Thursday in October in 2007 and every four years thereafter. The Minister responsible, Michael Bryant, told the Assembly that the bill would abolish “the right of the Premier to call elections based on partisan and political considerations.”<sup>83</sup> New Democratic MPP Peter Kormos challenged the McGuinty government’s claim – and he may have been the only elected representative in the entire country to articulate the correct argument against the Canadian model of fixed elections. Mr. Kormos derided the bill as “purport[ing] to create fixed elections dates,” and he noted that the *Constitution Act* already sets fixed elections by limiting Parliament to a maximum life of five years and that the bill preserves the established constitutional positions of the Premier and the Lieutenant-Governor.<sup>84</sup> If only other parliamentarians had taken notice!

### D) New Brunswick

New Brunswick incorporated its fixed-elections law into *Legislative Assembly Act* in 2007. It includes the standard non-derogation clause in section 2(3): “Nothing in this section affects the power of the Lieutenant-Governor to prorogue or dissolve the Legislative Assembly at the Lieutenant-Governor’s discretion.”<sup>85</sup> This law also contains a small variation relative to those of the other provinces and the federal level. Section 2(4) sets the fixed election on the fourth Monday in September in 2010 at intervals of four years, as those of the other provinces do. However, this section codifies the formal and informal aspects of Responsible Government that the Lieutenant Governor dissolves the Assembly on and in accordance with the advice of the First Minister, who takes responsibility for the dissolution. It reads: “the Premier shall provide advice to the Lieutenant-Governor that the Legislative Assembly be dissolved and a provincial general election be held.”<sup>86</sup> In effect, this provision prescribes the same policies as those of Ontario and the other provinces: while the Premier could advise an early dissolution such that the legislature lasts less than four years, the legislature cannot last longer than four years, which means that the Premier has to advise dissolution in accordance with the fixed date. New Brunswick’s act may also have attempted to amend its provincial constitution by reducing the maximum life of a parliament from five to four years.

### E) Saskatchewan

Saskatchewan incorporated its fixed-elections law into its *Legislative Assembly and Executive Council Act* in 2008. Under the heading “prerogative of the crown not affected,” the non-derogation clause of section 8.2 reads, “Nothing in section 8 or 8.1 alters or abridges the power of the Crown to prorogue or dissolve the Legislative Assembly.”<sup>87</sup> Section 8.1 mandates that elections shall occur every four years on the first Monday of November, starting in 2011. The Intergovernmental Affairs and Justice Committee examined the bill and invited the Attorney General, Mr. Don Morgan, and Darcy McGovern, Director of Legislative Services in the Ministry of Justice, to appear. Mr. McGovern confirmed that Saskatchewan’s fixed-elections law preserves the prerogative power of dissolution because only a constitutional amendment could eliminate it; he concluded, “it remains the ability of the Crown to dissolve the House at the direction of the Premier.”<sup>88</sup> The Attorney General then acknowledged that the Premier could advise an early dissolution, but that he would probably “pay a horrific price and would have no real reason to go back to the voters” and that an early dissolution would be “problematic from a political perspective.”<sup>89</sup> Nevertheless, it would still be legal and constitutional.

### F) Prince Edward Island

In 2008, Prince Edward Island added its fixed-election law into its *Election Act*; section 4.1(1) contains the standard non-derogation clause, “Nothing in this act affects the powers of the Lieutenant Governor, including the power to dissolve the Legislative Assembly, by proclamation in Her Majesty’s name, when the Lieutenant Governor sees fit.”<sup>90</sup> Section 4.1(2) fixes the election to the first Monday in October every four years, starting in 2011.

### G) Manitoba

Manitoba also passed its law in 2008, and it conforms to the Canadian norm. Section 49.1(1) of its *Elections Act* contains the non-derogation clause, “Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature at the Lieutenant Governor’s discretion.”<sup>91</sup> Section 49.1(2) fixes the elections on the first Tuesday in October every four years, starting in 2011.

The federal and provincial election laws will mandate that Manitobans, Saskatchewanians, Ontarians, Prince Edward Islanders, Newfoundlanders & Labradoreans, and Canadians as a whole go to the polls in the fall of 2015. These overlapping federal and provincial elections would create a logistical nightmare because the federal and provincial political parties rely on the same volunteers even though only the New Democratic Party enjoys complete federal-provincial integration. Canada and Ontario simply cannot hold general elections simultaneously. Even Manitobans have expressed consternation at the prospect of simultaneous federal and provincial campaigns, and the chief of staff of the Premier of Manitoba has suggested that Manitoba may hold its next election in the spring of 2016 instead.<sup>92</sup> However, the Legislature of Manitoba had to amend its fixed-elections law in order to avoid statutorily mandated simultaneous federal and provincial campaigns because the original law did not permit the flexibility to dissolve later (but it would still allow early dissolutions). The Selinger government therefore introduced a bill in 2012 “postponing fixed date election”; if Manitoba’s fixed election period overlaps with the

federal fixed election period, “the general election must be held instead on the third Tuesday of April in the next calendar year.”<sup>93</sup>

This piecemeal amendment responds to one specific situation and has exposed one of the fundamental flaws in so-called “fixed elections”: they are fixed until the Premier says otherwise by advising an early dissolution, or until the assembly says otherwise by amending the statute. The provinces may now have to tinker with their “fixed elections” as required in order to avoid any overlap with the fixed elections at the federal level.

#### *H) Alberta*

Alberta passed its fixed-elections law in 2011 with a slight variation to the Canadian model that would spare the province from the logistical problem of concurrent federal and provincial elections. Section 38.1(1) of its *Election Act* contains the non-derogation clause, “Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, in Her Majesty’s name, when the Lieutenant Governor sees fit.”<sup>94</sup> Rather than fixing the election on a precise day of the month, 38.1(2) builds in a flexible date for the first fixed election, “within a three-month period beginning on March 1, 2012 and ending on May 31, 2012.” Subsequent elections will fall within that range of three months every four years.

### **IV: The Waxing and Waning Prerogative of Dissolution in England and the United Kingdom**

#### **1. There And Back Again: Dissolution’s Journey, 1640 to 2011**

In England and the United Kingdom, the power of dissolution has oscillated between prerogative and statute on several occasions since 1640. Prior to that year, no parliamentary statute restricted the King’s prerogative powers of summoning, proroguing, and dissolving parliament. The Tudor and Stuart monarchs summoned parliaments not merely to request tax revenue, but also to enact policies.<sup>95</sup> They also relied on prorogation as a tactic to prolong the life of a favourable parliament rather than risk dissolving it and summoning a new, potentially less pliable parliament.<sup>96</sup> For instance, Henry VIII used prorogation to extend the life of the Reformation Parliament to seven years; it sat through seven sessions between 1529 and 1536 and passed a variety of statutes that broke with the Holy See and established England as an independent Protestant kingdom.<sup>97</sup> Charles II used prorogation to prolong the life of the Cavalier Parliament and its Royalist majority from 1661 to 1679. The Stuarts also expressed their hostility toward what they regarded as parliamentary encroachment on Divine Right by dissolving pesky parliaments. The Sovereign thus determined at his own discretion both the duration of each individual parliament through prorogation and the number of years between parliaments through dissolution.

Ever since Charles I reigned for 11 years without summoning a parliament, and levied illegal taxes in the interim, various parliaments eliminated, restored, and limited the Crown’s prerogatives of summoning and dissolution in order to regulate both the maximum life of a

parliament and the maximum number of years between each parliament. These statutes include the following:

1. The first *Triennial Act, 1640*;
2. The *Act Against Dissolving the Long Parliament Without Its Own Consent, 1641*;
3. The second *Triennial Act, 1664*;
4. The third *Triennial Act, 1694*;
5. The *Septennial Act, 1715*;
6. The *Parliament Act, 1911*; and
7. The *Fixed-Term Parliaments Act, 2011*.

During the Royal Supremacy (1534-1688), parliamentary sovereignty provided a primitive and nascent form of political enforceability. While the Sovereign could undoubtedly exercise at his discretion the prerogative powers of the Crown that he personified, a good King would do so with aplomb, tact, and political sagacity in order to avoid alienating his subjects. The Tudors largely succeeded, but the Stuarts failed spectacularly.

The English Parliament passed the first *Triennial Act* as a political response to Charles I's 11 Years' Tyranny (a period from 1629 to 1640 where he refused to summon parliament and levied illegal taxes by prerogative) and his hasty dissolution of the Short Parliament of 1640 after it sat for only three weeks. However, Charles had to summon a second parliament in the same year (which became known as the Long Parliament) in order to raise supply to finance his campaign in the Bishop's War in Scotland.<sup>98</sup> Parliament took advantage of the King's weak position and imposed a law that limited the King's prerogatives of summoning, prorogation, and dissolution.

Parliament expressed its dissatisfaction in Charles I through formal long title of the first *Triennial Act, 1640*: "An Act for the preventing of inconveniencies happening by the long intermission of parliaments." In its preamble, Parliament admonished Charles I's eleven years of Personal Rule:

Whereas by the Laws and Statutes of this Realm, the Parliament ought to be holden at least once year for the redress of grievances, but the appointment of the time and place for the holding thereof hath always belonged to his Majesty and his Royal Progenitors. And whereas, it is by experienced found that the not holding of Parliaments accordingly hath produced sundry and great mischiefs and inconveniences to the King's Majesty, the Church, and the Commonwealth.<sup>99</sup>

Section 6 of the first *Triennial Act, 1640* stipulated that only an act of parliament itself could prorogue the session or dissolve the parliament and that only the House of Commons and the House of Lords could adjourn themselves within the first fifty days of the life of the parliament.<sup>100</sup> Section 2 of the act mandated that the King must summon a parliament at least once every three years; if he did not, the Lord Chancellor would instead issue the writs under the Great Seal. However, the Parliament would not necessarily sit for three years. For instance, Parliament could sit for one year and remained dissolved for two years. On the third year, the King, or other office-holders authorized under the act, would summon a new Parliament. The first *Triennial Act* also affirmed parliamentary privilege, including the right of the Lords and Commons to elect their own speakers. Overall, the *Triennial Act, 1640* limited and circumscribed

the King's prerogatives to summon, prorogue, and dissolve parliament – but it did not put them into abeyance. The balance of power under this act might have proven stable over the long term, but the Long Parliament soon went further and established itself as an unelected oligarchy.

In 1641, the Long Parliament extracted further concessions from Charles I and temporarily put into abeyance the prerogative powers of adjournment, prorogation, and dissolution through the *Act Against Dissolving the Long Parliament Without Its Consent*. The preamble of the act noted Charles I's tendency to dissolve pesky parliaments hastily, his contempt for the ancient principle of grievance before supply, and that the King needed revenue in order to prosecute the Bishops' War in Scotland.<sup>101</sup> The act temporarily put key prerogative powers into abeyance by declaring,

this present Parliament now assembled shall not be dissolved unless by Act of Parliament to be passed for that purpose; nor shall be, at any time or times, during the continuance thereof, prorogued or adjourned, unless it be by Act of Parliament to be likewise passed for that purpose.<sup>102</sup>

This act build upon the principles contained in the *Triennial Act, 1640* and declared that only an act of parliament could adjourn, prorogue, or dissolve that particular parliament. This statute displaced the prerogative powers of the Crown, but only for the life of that parliament. Once the Long Parliament dissolved itself, the prerogative powers of summoning, prorogation, and dissolution would re-emerge under the terms of the *Triennial Act, 1640*.

The Long Parliament survived the tumult of the English Civil Wars of the 1640s, the execution of Charles I in 1649, the Cromwellian Interregnum of the 1650s, and finally, the Restoration of the Crown and Charles II in 1660. Charles II summoned his first Parliament in 1661 but did not dissolve it until 1679. This Cavalier Parliament lasted almost as long as the Long Parliament that it succeeded, notwithstanding the provisions of the second *Triennial Act, 1664*. The Long Parliament's *Act Against Dissolving the Long Parliament* naturally expired upon its dissolution, but the first *Triennial Act* of 1640 – and its limitation on the prerogative powers – remained on the books until the Royalist Cavalier Parliament repealed it in 1664 and replaced it with the second iteration of the *Triennial Act, 1664*. The Cavalier Parliament declared that the first *Triennial Act* had “derogate[d from] His Majesty's just Rights and Prerogatives inherent to Imperial Crown of this Realm” and so duly repealed it.<sup>103</sup> The Cavalier Parliament “beseeched” Charles II to summon a new parliament at least once every three years “because by the ancient Laws and Statutes of this Realm made in the Reign of Edward III, Parliaments are to be held very often.” Unlike the first *Triennial Act*, however, Parliament but did not specify that the King must issue the writs of election every three years.<sup>104</sup> Charles II ignored the law and kept the Cavalier Parliament alive for eighteen years. This second iteration of the *Triennial Act* bears some resemblance to the Canadian model of fixed elections, because both styles of legislation preserve the prerogative of dissolution, contain no enforcement mechanism, and rely on the discretion of the Crown. By repealing the *Triennial Act, 1640*, which limited the prerogative of summoning, prorogation, and dissolution, the Cavalier Parliament allowed the King's prerogative powers to return to full force with no restrictions. Prerogatives automatically reoccupy their former position when parliament repeals the act that originally put them into abeyance.



The first *Triennial Act, 1640* only ensured that the interval between parliaments would last no more than three years, but it only guaranteed that a parliament could last for 50 days before its dissolution. It did not ensure that the parliament itself would last three years. The second *Triennial Act* in practice enforced neither the maximum life of a parliament nor the maximum number of years between parliaments. However, Parliament finally dealt with both through the third *Triennial Act, 1694*. The *Act for the frequent meeting and calling of parliaments* set the maximum life of a parliament at three years, at which time the King would dissolve it. The Act also stipulated that the King must issue writs of election every three years.<sup>105</sup> Parliament thus limited the prerogative powers of summoning and dissolution and regulated them by statute, but it did not put them into abeyance. Parliament later modified this principle through the *Septennial Act, 1715*, which extended the maximum life of a parliament to seven years, and again through the *Parliament Act, 1911*, which reduced the maximum life of a parliament to five years.

## **2. *Fixed-Term Parliaments Act, 2011***

### *A) Putting the Prerogative of Dissolution into Abeyance*

The emergence of Responsible Government in the 19<sup>th</sup> century transferred the initiative of dissolution from the Sovereign to the Prime Minister as Ministers of the Crown took responsibility for all acts of the Crown before Parliament. The fundamental dynamic changed from Crown versus Commons to the Government versus Opposition within the Commons. From 1694 to 2011, the Crown dissolve Parliament; from around 1832 onward, the Sovereign did so on the advice of responsible ministers of the Crown.

In 2011, the British Parliament decided to put the prerogative of dissolution into abeyance through the *Fixed-Term Parliaments Act*. While the prime minister used to advise the Queen to dissolve parliament sometime within its constitutional limit of five years, this law now ensures that parliament dissolves automatically, without any royal proclamation. As long as the Government maintains the confidence of the Commons, the current Parliament (2010-present) shall dissolve “at the beginning of the 17<sup>th</sup> working day before the polling day for the next parliamentary general election,” which will occur on 7 May 2015. Each subsequent polling day will occur on the first Thursday in May every five years. However, the law allows for some flexibility in setting the voting day; the Prime Minister may issue a statutory instrument to delay the polling day by not more than two months – but only if the Commons and Lords each pass a resolution approving of the draft of the statutory instrument beforehand.<sup>106</sup>

Curiously, the Act contains a non-derogation clause that preserves the Queen’s power to prorogue on the advice of the prime minister: “This Act does not affect Her Majesty’s power to prorogue Parliament.” The Act also preserves the conventional (rather than statutory) limits on the prerogative of summoning parliament. After the automatic, statutory dissolution of Parliament, Her Majesty-in-Council must issue a proclamation for the summoning of the new parliament, which would convene, by convention, within twelve days after voting day.<sup>107</sup> In Canada, dissolution still requires a set of three proclamations, as described in another section.

B) *Early Dissolution, the Old Confidence Convention, and the New Constructive Non-Confidence*

The *Fixed-Term Parliaments* also sets out two procedures by which Parliament may dissolve itself before the scheduled elections. The first procedure does not touch upon whether the Government still commands the confidence of the Commons, and the second procedure sets out constructive votes of non-confidence. First, Parliament could pass a motion with a two-thirds super-majority in the form, “That there shall be an early parliamentary general election.” While the dissolution itself would occur without the involvement of the Crown, the Prime Minister would then have to advise the Queen to issue proclamations for the return of writs and the summoning of the next parliament. Second, the Commons could withdraw its confidence in the Government through a simple majority and properly worded motion, “That this House has no confidence in Her Majesty’s Government.” If an alternative Government cannot gain the support of the Commons within fourteen days through a subsequent properly worded motion, “That this House has confidence in Her Majesty’s Government,” then the Parliament dissolves automatically in order to break the impasse.<sup>108</sup> The defeated government would remain in office but exercise restraint under the caretaker convention.

This second procedure alludes to the old convention that if the Government loses the confidence of the Commons, the Prime Minister should *first* resign and allow the Sovereign to commission a new Government that could command the confidence of the Commons, and only *second* advise the early dissolution of the present parliament and the issuance of writs for a new general election.<sup>109</sup> However, it also imposes a variant of constructive non-confidence, which ensures that only the Assembly possesses the discretion to declare when it has withdrawn its confidence from the Government.

In Canada (and in the United Kingdom prior to the passage of the *Fixed-Term Parliaments Act*), a vote of confidence falls under three broad categories: first, votes on the Address in the Reply to the Speech from the Throne and supply; second, any government bill that the government deems a matter of confidence; and, third, a motion of want of confidence itself (i.e., “That this House has no confidence in the Government”).<sup>110</sup> Theoretically, the Government could accept changes the Opposition’s amendments to a supply bill and thus retain the confidence of the Commons, but Governments in Canada have generally taken a hard line on this class of confidence vote. The second category generated controversy in the recent series of minority parliaments from 2004 to 2011, where the Government often adopted the tactic of declaring *all* government bills matters of confidence in order to provoke the Opposition into withdrawing confidence from the Government, which would in turn seek fresh elections. The *Government* judges when it has lost the confidence of the Commons on votes relating to government bills and supply bills, and potentially even on an Address in Reply – but the Commons determines when it has withdrawn confidence from the Government on an unambiguous motion of want of confidence.

Once the Cabinet has demonstrated that it commands the confidence of the Commons (such as through the Address in Reply to the Speech from the Throne or on any supply bill), it retains that confidence until the moment that the Commons decides to withdraw it in a subsequent formal vote in the chamber.<sup>111</sup> The Commons expresses its confidence by passing supply and any other major government bill that the government deems a matter of confidence; the Commons can thus

withdraw its confidence from the Government by refusing to pass supply or by voting down a bill that the Government has deemed a matter of confidence.

The *Fixed-Term Parliaments Act* and constructive non-confidence eliminate two of those three categories and ensure that the Government no longer possesses the discretion to determine when the Assembly has withdrawn its confidence; only the Assembly can withdraw confidence from the Government through a properly worded motion. In a pure constructive motion of non-confidence, the Assembly would both withdraw its confidence from the current Government and then propose an alternative government, as Liberal leader Stephane Dion moved on 28 November 2008: “That this House has lost confidence in the current government and is of the opinion that a viable alternative government can be formed within the present House of Commons.”<sup>112</sup> The new procedure under the *Fixed-Term Parliaments Act* allows the Commons to separate the two parts of a pure motion of constructive non-confidence and has fundamentally altered the confidence convention in the United Kingdom.

### C) *Political Motivation Behind the Law*

The Westminster Parliament first created the precedent for fixed-term parliaments and putting the prerogative of dissolution into abeyance through the *Scotland Act, 1998*, which mandates that the Scottish Parliament dissolves and summons itself automatically every four years so that the elections occur on the first Thursday in May, and the new parliament convenes 7 days later.<sup>113</sup>

In the election of 2010, the Liberal-Democratic Party pledged to “introduce fixed-term parliaments to ensure that the Prime Minister of the day cannot change the date of an election to suit themselves [*sic*].”<sup>114</sup> The Conservative Party did not campaign on such a promise. However, the minority parliament elected in 2010 only gave the Conservatives a plurality of the seats, and the Conservative and Liberal-Democratic Parties opted to form a coalition government. The *Fixed-Term Parliaments Act* therefore provided a convenient political tool to ensure the survival of the Conservative-Liberal coalition government, as the two parties openly acknowledged in their initial governing agreement:

We expect [the coalition government] to endure for the duration of the present Parliament. The Government will put a motion before the House of Commons in the first days of the Government stating its intention that, subject to Her Majesty The Queen’s consent, the next General Election will be held on 7 May 2015, to be followed by legislation for fixed term Parliaments of five years.<sup>115</sup>

Echoing the Canadian rationale, the British House of Commons Standing Committee on Political and Constitutional Reform studied the fixed-term parliaments bill and declared that “it is wrong that a Prime Minister should be able to time a general election to his own partisan advantage.”<sup>116</sup>

Given the internal turmoil of the Cameron-Clegg government over issues such as the referendum on electoral reform and the contradictory Conservative and Liberal-Democratic positions on the United Kingdom’s position in the European Union, the *Fixed-Term Parliaments Act* has almost certainly propped up the coalition because of the two-thirds threshold required for an early dissolution. Therefore, like the Canadian laws, the British law has served primarily a political

purpose. A future Parliament could always repeal the *Fixed-Term Parliaments Act* and thus restore the prerogative power of dissolution to its former glory.

## V: Conclusion

The faulty and fraudulent Canadian approach to fixed elections has come about for at least two reasons. First, the complete aversion to formal constitutional amendment has defined Canada's political culture since the electorate rejected the Meech Lake Accord in a country-wide referendum in 1992. Rather than simply referring to "amending the Constitution," Canadian politicians, pundits, and scholars refer to altering the Constitution of Canada under the General 7/50 Formula or the Unanimity Formulas as "opening the Constitution" – with the deliberate allusion to the perils of "opening Pandora's Box." Second, the disconnect between the true fixed-election provision in section 50 of the *Constitution Act, 1867*, which provides for quintennial parliaments and the custom of quadrennial parliaments has produced profound confusion. The quadrennial tradition amounted more to a "custom" than as a convention because prior to the passage of the fixed-elections laws, it acted *not* a binding rule or norm, but merely as a convenient timetable in majority parliaments. It certainly did not apply to minority parliaments.

The two most rationale solutions to bridging this gap would both involve constitutional amendments: either limiting the maximum life of a parliament to four years under section 44 (at the federal level) or under section 45 (at the provincial level), or by eliminating the Crown's power of dissolution under section 41(a). The first option would be easier to achieve (although there is a possibility that it would be subject to the General Formula because section 4 of the *Constitution Act, 1982* reaffirms the maximum life of a parliament at five years). In either case, the maximum life of a parliament does not fall under section 41(a), because increasing or decreasing the life of a parliament does not derogate from the Crown's power of dissolution. The British *Fixed-Term Parliaments Act* clearly follows the second model by putting the prerogative of dissolution into abeyance. In contrast, the Parliaments of Australia and New Zealand have adopted the first model; the Governor-General still dissolves on the advice of the Prime Minister, but they each operate on three-year terms. The triennial maximum makes early dissolutions redundant and impracticable.

Instead, the standard Canadian approach to fixed elections assiduously avoids amending the constitution at all. The Canadian laws provide the least efficient approach: they preserve both the Crown's power of dissolution *and* the maximum life of a parliament at five years but attempt to impose fixed parliamentary terms of four years through an insufficient statute. Section 56.1 of the federal fixed-election law contains the non-derogation clause in order to by-pass an amendment under section 41(1): "Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion." Section 56.1(2) then states, "Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election." The last two federal general elections have not fallen on the fixed cycle. On 7 September 2008, Prime Minister Harper advised the early dissolution of the 39<sup>th</sup> Parliament while his government still commanded the confidence of the Commons. This subsequent minority 40<sup>th</sup> Parliament lasted until 26 March 2011, when the Opposition passed a motion of non-confidence and Prime Minister Harper advised the parliament's early dissolution. Since the

Conservatives command a majority of seats in the 41<sup>st</sup> Parliament, and the cycle of fixed elections resets itself after an early dissolution, the next election should therefore occur in October 2015. The law says that there “must be” a general election every fourth October – but only subject to the non-derogation clause. It does not say that the Prime Minister must advise dissolution, and since the *Constitution Acts* supersede statute to the extent that they conflict with one another, it is possible that the Prime Minister could still opt to dissolve Parliament pursuant to the quintennial limit in the *Constitution Acts* – the true fixed-elections law that the Governor General and Prime Minister must obey.

The Canadian laws only give the illusion of democratizing dissolution. They should all be repealed.

## Endnotes

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- <sup>2</sup> Peter Hogg, *Constitutional Law of Canada*. 5<sup>th</sup> Edition Supplemented. (Toronto: Thomson Reuters, 2011): 1-18.
- <sup>3</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 79.
- <sup>4</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 86-87.
- <sup>5</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 106-107.
- <sup>6</sup> Peter Hogg, *Constitutional Law of Canada*. 5<sup>th</sup> Edition Supplemented. (Toronto: Thomson Reuters, 2011): 1-18.
- <sup>7</sup> Peter Hogg, *Constitutional Law of Canada*. 5<sup>th</sup> Edition Supplemented. (Toronto: Thomson Reuters, 2011): 1-19.
- <sup>8</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 79-80.
- <sup>9</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 86.
- <sup>10</sup> United Kingdom, Parliament of the United Kingdom. *Regency Act, 1937*, chapter 16, 1 Edward VIII and 1 George VI. Section 8 of the Act defines “royal functions” as “all powers and authorities belonging to the Crown, whether prerogative or statutory.”
- <sup>11</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 108.
- <sup>12</sup> Sebastian Payne, “The Royal Prerogative,” In *The Nature of the Crown: A Legal and Political Analysis*, edited by Maurice Sunkin and Sebastian Payne, 77-110. (Oxford: Oxford University Press, 1999), 108.
- <sup>13</sup> Henri Brun, Guy Tremblay, and Eugénie Brouillet, *Droit constitutionnel*. 5th Ed. (Montreal : Éditions Yvon Blais, 2008): 364. « Les actes que sont appelés à poser le gouverneur général et le lieutenant-gouverneur résultent soit de la Constitution, soit de prérogatives coutumières, soit de délégations qui leur soit faites par voie législative. Mais selon les conventions constitutionnelles, de tels actes sont posés conformément à l’avis reçu des gouvernements en fonction. »
- <sup>14</sup> *Re Initiative and Referendum Act, [1919] A.C. 935 (P.C.)*, para. 7.
- <sup>15</sup> *Re: Initiative and Referendum Act 1919 (JCPC)*
- <sup>16</sup> *Re Initiative and Referendum Act, [1919] A.C. 935 (P.C.)*, 3.
- <sup>17</sup> *Re Initiative and Referendum Act, [1919] A.C. 935 (P.C.)*, para. 11.
- <sup>18</sup> *Re Manitoba Language Rights, [1985] 1 S.C.R. 721*, p. 135
- <sup>19</sup> Warren J. Newman and Robert Nicholson in Canada, Senate, Minutes of the Proceedings of the Standing Committee on Legal and Constitutional Affairs, 21 March 2013.
- <sup>20</sup> Janet Ajzenstat, *The Once and Future Canadian Democracy* (Montreal-Kingston: The McGill-Queen’s University Press, 2003), 64.
- <sup>21</sup> Janet Ajzenstat, *The Once and Future Canadian Democracy* (Montreal-Kingston: The McGill-Queen’s University Press, 2003), 66-67.
- <sup>22</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 222; Richard Berthelsen, correspondence with author, 4 August 2012.
- <sup>23</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 219.
- <sup>24</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 219.
- <sup>25</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 229.
- <sup>26</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 222.
- <sup>27</sup> Canada, Parliament, Senate. Minutes of the Proceedings of the Standing Committee on Legal and Constitutional Affairs, 21 March 2013. Warren J. Newman and Minister Rob Nicholson appeared before the committee on the

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Succession to the Crown Bill; at various times, they defined “Office of Queen” as the “powers,” “rights,” “prerogatives,” and “constitutional status” of the Queen.

<sup>28</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 223.

<sup>29</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 224-225.

<sup>30</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 225.

<sup>31</sup> Barry Strayer, *Canada’s Constitutional Revolution* (Edmonton: University of Alberta Press, 2013).

<sup>32</sup> Warren J. Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis,” *National Journal of Constitutional Law* 27 (2009): 222.

<sup>33</sup> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319

<sup>34</sup> *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, page 85.

<sup>35</sup> *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, para. 108, 139.

<sup>36</sup> William Renwick Riddell, “Lecture II: The Written Constitution,” in *The Constitution of Canada in Its History and Practical Workings*. (New Haven, CT: Yale University Press, 1917), 52. The “Supreme Court of Ontario” has since been reorganized and renamed the “Superior Court of Ontario.”

<sup>37</sup> *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R., 874.

<sup>38</sup> *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R., 883-884.

<sup>39</sup> *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R., 876-878.

<sup>40</sup> *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R., 883-884.

<sup>41</sup> *Re: Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 4.

<sup>42</sup> Heather MacIvor, “Unwritten Constitutional Principles,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012): 339.

<sup>43</sup> Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen’s University Press, 2010), 61-63; Philippe Lagasse, conversation with author, November 2012.

<sup>44</sup> *Lise Trudel Thibeault v. Sa Majeste la Reine* [2013] R.J.Q. 1, para. 10.

<sup>45</sup> David E. Smith, *The Republican Option in Canada, Past and Present*, (Toronto: University of Toronto Press, 1999): 60.

<sup>46</sup> *Re: Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 62.

<sup>47</sup> *Conacher v Canada (Prime Minister)*, 2009 FC 920; *Conacher v Canada* [2011] 4 FCR.

<sup>48</sup> *Conacher v Canada (Prime Minister)*, 2009 FC 920 (Memorandum of Fact and Law of the Applicant)

<sup>49</sup> *Conacher v Canada (Prime Minister)*, 2009 FC 920 (Memorandum of Fact and Law of the Applicant at para 63).

<sup>50</sup> *Conacher v Canada (Prime Minister)*, 2009 FC 920 (Memorandum of Fact and Law of the Applicant at para 37).

<sup>51</sup> Andrew Heard, “Constitutional Conventions: The Heart of the Living Constitution,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012)

<sup>52</sup> James W.J. Bowden and Nicholas A. MacDonald, “Writing the Unwritten: The Officialization of Conventions in Canada, the United Kingdom, New Zealand, and Australia.” *Journal of Parliamentary and Political Law* 6 no. 2 (August 2012): 367.

<sup>53</sup> James W.J. Bowden and Nicholas A. MacDonald, “Writing the Unwritten: The Officialization of Conventions in Canada, the United Kingdom, New Zealand, and Australia.” *Journal of Parliamentary and Political Law* 6 no. 2 (August 2012): 368; Brian Slattery, “Why the Governor General Matters,” in *Parliamentary Democracy in Crisis*, edited by Peter Russell and Lorne Sossin (Toronto: University of Toronto, 2009): 85.

<sup>54</sup> Andrew Heard, “Constitutional Conventions and Parliament.” *Canadian Parliamentary Review* (Summer 2005): 20.

<sup>55</sup> Andrew Heard, “Constitutional Conventions: The Heart of the Living Constitution,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012)

<sup>56</sup> Andrew Heard, “Constitutional Conventions: The Heart of the Living Constitution,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012): 333.

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- <sup>58</sup> Andrew Heard, “Constitutional Conventions: The Heart of the Living Constitution,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012): 334.
- <sup>59</sup> Preston Manning, *56 Reasons Why You Should Support the Reform Party of Canada* (Calgary: Reform Party of Canada, 1992).
- <sup>60</sup> Reform Party of Canada, *Platform of Statements and Principles* (Calgary: Reform Party of Canada, 1988), 9. <http://digitalcollections.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=197&REC=6>
- <sup>61</sup> Canadian Alliance, *A Time for Change: An Agenda of Respect for All Canadians – The Plan* (Calgary: Canadian Alliance, 2000), 19-20. <http://www.clearwatercreative.com/images/stories/print-downloads/canadianalliance.pdf>
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- <sup>64</sup> Conservative Party of Canada, *Stand Up For Canada: Federal Election Platform, 2006* (Ottawa: Conservative Party of Canada, 2006), 44.
- <sup>65</sup> Canada, House of Commons, *An Act to amend the Canada Elections Act*. Bill C-16, 39<sup>th</sup> Parliament, 1<sup>st</sup> session, 2006.
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- <sup>67</sup> Robert Nicholson, in Canada, House of Commons, *Evidence*, Standing Committee on Procedure and House Affairs, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, No. 18, Tuesday, 26 September 2006 (Ottawa: Parliament of Canada, 2006), 2-3.
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- <sup>69</sup> Patrick Monahan, in Canada, Senate, *Minutes of Proceedings*, Standing Committee on Legal and Constitutional Affairs, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, No. 21, 15 February 2007 (Ottawa: Parliament of Canada, 2007): 21:48.
- <sup>70</sup> United Kingdom, House of Commons, *Written Evidence Submitted by Professor Robert Hazell*, Standing Committee on Procedure and House Affairs (London: Parliament of the United Kingdom, 9 September 2010), Ev 34, Ev 42.
- <sup>71</sup> British Columbia, Legislature of British Columbia, *Hansard*, 37<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Volume 2, no. 21, Monday, 20 August 2001.
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- <sup>73</sup> British Columbia, Legislature of British Columbia, *Hansard*, 37<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Volume 2, no. 22, Tuesday, 21 August 2001
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- <sup>77</sup> Newfoundland and Labrador, House of Assembly. *An Act to Amend the House of Assembly Act and the Elections Act, 1991*, 45<sup>th</sup> General Assembly, 1<sup>st</sup> Session, 53 Elizabeth II, 2004.
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