CODIFYING CONSTITUTIONAL CONVENTION: THE CASE FOR A CANADIAN CABINET MANUAL

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Abstract

The proper functioning of Canada's parliamentary democracy relies on the mutual acceptance of our constitutional conventions. Yet, Conservative rhetoric during both the 2008 parliamentary crisis and the 2011 federal election campaign cast serious doubt on such agreement. This issue raises the question: how can our constitutional conventions be clarified to prevent future constitutional crises? A possible solution lies in the Cabinet Manual. Both New Zealand and the United Kingdom have implemented Cabinet Manuals to codify their constitutional conventions in a single document. Drawing on these examples, this paper presents a strong case for the adoption of a Cabinet Manual in the Canadian context. It suggests that Canada implement a Cabinet Manual as a step towards preventing constitutional crisis, while creating an important informational tool for politicians, public servants, and the public alike.

Introduction

For Canada's parliamentary democracy to function properly, it is integral that key political actors agree on the fundamentals of our constitution. However, with the recent prevalence of minority governments, this agreement was called into question. During both the December 2008 'parliamentary crisis' and the 2011 federal election campaign, the Conservative Party of Canada, led by Prime Minister Stephen Harper, appeared to hold markedly different views on key constitutional conventions than those espoused by constitutional experts. Most notably, Harper openly questioned the legitimacy of the Governor General calling on a coalition of opposition parties to form a government if he were to face a vote of non-confidence in the House of Commons. This lack of consensus led prominent constitutional expert Peter Russell to fear that "a situation may arise in the near future in which lack of agreement on conventions governing the Governor General's reserve powers could plunge Canada into a serious constitutional crisis" (Russell, 2010: 207).

With Stephen Harper winning his long-coveted majority on May 2, 2011, those who share Russell's fear can rest easy for at least four years. However, as unpredictable as Canada's party system now seems, it is a near certainty that there will be future minority governments. The question, then, remains: what can be done to clarify constitutional conventions so that future

constitutional crises can be avoided? In New Zealand and the United Kingdom (UK), governments have introduced a Cabinet Manual to address this very question. A Cabinet Manual seeks to codify, in a single document, important practices and constitutional conventions that guide the functioning of the executive. With the Manuals from both New Zealand and the UK containing several chapters and over 140 pages, a comprehensive discussion of all of their content is beyond the scope of this paper. Instead, I will focus on the chapters that codify the conventions on which Canadian political actors have failed to find consensus in recent years – most notably on elections, government formation, and the role of the Governor General.

This paper will be divided into three parts. The first section will describe how constitutional conventions fit into the overall makeup of Canada's constitution. Second, this paper will outline the divergence of opinion held by key political actors on constitutional conventions during the 2008 parliamentary crisis and the 2011 federal election campaign. The third section will discuss the content of the Cabinet Manuals from New Zealand and the United Kingdom and demonstrate how a similar document could be introduced in the Canadian context. Ultimately, this paper will argue that a Canadian Cabinet Manual should be drafted and implemented as it would mark a significant step towards preventing future constitutional crises, while increasing government transparency and providing an accessible informational tool to political actors, civil servants, journalists, and the general public.

I. Constitutional Conventions

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

interpreting constitutional conventions comes from the fact that they "…give guidance but are not absolute clarion calls for one specific course of action. Nor are conventions legally binding like laws. Conventions are flexible and adapt and change over time as circumstances change" (Franks, 2009: 33). If a legal expert from another planet were to come to Canada and examine the country's founding document – the Constitution Act, 1867 – it could be reasonably forgiven for assuming that the Governor General has immense power in governing the country and that Cabinet government does not exist in Canada (Kitteridge, 2006: 4; Slattery, 2009: 79). In fact, the only written constitutional reference to the workings of parliamentary government comes in the preamble to the Constitution Act, 1867, which states that the four original provinces "expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to the United Kingdom" (Canada, 1867).

Our alien legal expert would be confused because the constitution of Canada does not exist in the form of a single document. It actually comprises a large number of written texts and "a host of unwritten principles and rules that fill out and explain the texts" (Slattery, 2009: 80). These unwritten rules are called constitutional conventions, which Andrew Heard defines as "informal rules that bind political actors to behave in a certain way…These conventions impose obligations because they protect the basic constitutional principles that would be seriously harmed if they were ignored" (50: 2009). For example, conventions establish the existence and function of the Prime Minister and cabinet, prevent the Governor General from hiring and firing members of the Privy Council at will, require the government to resign or call an election if it loses a clear vote of confidence, and prevent the federal government from disallowing provincial laws (Heard, 2005: 19; Sossin and Dodek, 2009: 92). In this sense, "conventions are about

defining or restricting the exercise of formal power that exist in law but are circumscribed in practice" (Sossin and Dodek, 92-3: 2009).

A key difference between conventions and written elements of our constitution is that conventions cannot be enforced by the courts. The punishment for failing to abide by a convention is, therefore, strictly political with the power for enforcement lying with "other institutions of government, such as the governor general, the Houses of Parliament, or ultimately the electorate" (Slattery, 2009: 82). However, it is important to note that although courts cannot enforce them, conventions remain vital to questions of constitutionality. In its landmark ruling on the Patriation Reference, 1981 the Supreme Court of Canada stated succinctly and unequivocally that "constitutional conventions plus constitutional law equal the total constitution of the country" (Supreme Court of Canada, 1981). In the Court's view, an act that violates a convention can correctly be called unconstitutional even though it has no direct legal consequences (Slattery, 2009: 82).

There remains broad agreement on the vast majority of constitutional conventions in Canada today. Logically, "constitutional conventions are only effective as rules of proper conduct when the relevant actors accept that they are bound to observe them" (Russell, 2010: 205). However, as conventions are not comprehensively written down in one place, there is room for disagreement over what is appropriate for a political actor in particular circumstances (Heard, 2009: 50). Of course, this lack of consensus can lead to potential or real parliamentary crises. This is precisely what happened in 2008 and what many feared could happen after the 2011 election campaign when Stephen Harper made it abundantly clear that he did not agree with certain conventions regarding government formation. In both cases, he questioned whether it would be legitimate for the Governor General to call on a group of opposition parties to form a

government, without first having another election. At the same time, experts argued that such an action would be in line with conventions on confidence and responsible government, and therefore perfectly legitimate. The next section will detail the political posturing and rhetoric that confirmed a concerning lack of consensus on these constitutional conventions.

II. Eroding Common Ground

The Conventions at Stake

Canada's parliamentary democracy is based on the convention of responsible government. According to Jennifer Smith, "Responsible government is a one-rule system. The rule is that the government must have the confidence of the elected House of Commons" (2009: 176). This principle allows the Cabinet to make decisions on behalf of the Crown. In other words, despite the vast legal powers invested in the Crown and the Governor General, they will only be exercised "on the advice of ministers who command the confidence of the House of Commons" (Russell, 2010: 206). This principle has enjoyed support from political leaders since the founding of Canada.

However, there are key exceptions to this convention as the Governor General still retains reserve or prerogative powers where he or she may act on his or her own discretion and even refuse a request of the Prime Minister. An important example of this power is the widely accepted ability of the Governor General to refuse the request for a fresh election if a government loses confidence in the early months of a new Parliament, particularly if an alternative government could function (Forsey, 2005: 4; Heard, 2009: 49). Former Governor General Adrienne Clarkson even wrote in her memoirs that she was prepared to refuse a request for dissolution for at least six months following the 2004 election (Clarkson, 2006: 192). Stephen

Harper and the Conservative Party seemed to disagree on the appropriate use of the reserve powers in both the 2008 coalition crisis and the 2011 federal election campaign, as detailed below.

2008 Coalition Crisis

The chronology of the so-called "coalition crisis" has been well documented by several authors and does not need to be repeated in detail here (see in particular Sculthorpe, 2010; Valpy, 2009). In essence, after winning a strengthened minority government in the 2008 federal election, Stephen Harper reached out to his opponents with a throne speech marked by a cooperative tone. A month later, however, in a "parliamentary kamikaze statement" (Russell, 2009: 143), the Conservatives presented a fiscal update that provided no economic stimulus spending while simultaneously proposing to eliminate public subsidies of political parties – a move that would have been particularly detrimental to opposition parties. In a rapid turn of events, the three opposition parties signed a formal accord indicating that a Liberal-NDP coalition with Bloc support could form a new government. Stephen Harper then called on Governor General Michaëlle Jean to prorogue parliament, and she acceded to his request. In the interim, Michael Ignatieff became Liberal leader and supported the Conservative budget when Parliament resumed in January 2009.

Serious disagreement on constitutional conventions emerged with Stephen Harper's vitriolic reaction to the possibility of a coalition government. Shortly after the coalition agreement was signed, Harper declared that, "The opposition has every right to defeat the government, but Stéphane Dion does not have the right to take power without an election…. Canada's government should be decided by Canadians, not backroom deals. It should be your choice – not theirs" (MacCharles et al., 2008). Days later, Harper sharpened his attack when

speaking to supporters at a Conservative Christmas Party event: “We will use all legal means to resist this undemocratic seizure of power…. My friends, such an illegitimate government would be a catastrophe for our democracy, our unity and our economy, especially at a time of global instability” (CBC News, 2008a). Harper seemed to be arguing that the House of Commons could dismiss a government, but could not replace it from its own ranks, without a new election (Smith, 2009: 183).

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

> What we want to do is basically take a timeout and go over the heads of the members of parliament, go over the heads [sic.] frankly of the Governor General, go right to the Canadian people. They’re speaking up loudly right across this country in a way I’ve never seen…. But you know what I’m saying is we’re going over the heads of the politicians and the Governor General directly to the Canadian People. We live in a democracy. They’re the ones that rule. (CBC News, 2008b)

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

The Conservatives rhetoric seemed to resonate with the public. Over 60 per cent of Canadians said they were “angry” with the coalition’s attempt to take power, with a majority holding this sentiment in every part of the country except Quebec (Ipsos, 2008). Moreover, several polls showed that if an election had been held at the height of the crisis, the Conservatives would have easily won a majority mandate (Ekos Research Associates, 2008; Ipsos, 2008; Strategic Council, 2008). Quite simply, “there was no doubt that Harper’s inflammatory and tendentious rhetoric was stunningly effective in mobilizing public opinion against the proposed coalition” (Franks, 2009: 40).

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

> The most important decision in modern politics is choosing the executive of the national government, and democracy in the 21st century means the voters must have a meaningful voice in that decision. Our machinery for choosing the executive is not prescribed by legislative or constitutional text; rather, it consists of constitutional conventions – past precedents followed in the light of present exigencies. The Supreme Court has said it will expound these conventions but will not try to enforce them. The virtue of relying on conventions is that they can evolve over time, like common law, and can be adapted to the new realities of the democratic age…. How, then, should Michaëlle Jean decide if the government is defeated over the budget? Arguably, a new election would be called for, even though it would only be five months after the last election. Gross violations of democratic principles would be involved in handing government over to the coalition without getting approval from voters. (2009)

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

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

> It is our opinion that in the event of a non-confidence vote or a request for dissolution of Parliament after only 13 sitting days of the House of Commons, the Governor General would be well-advised to call the leader of the opposition to attempt to form a government. This would be most appropriate in the circumstances where that leader has already gathered the assurance that he would enjoy the support of a majority of votes on any issue of confidence for the next year or so. The principle of democracy would be protected in so far as the new government would enjoy the support of a majority of the elected officials. This would ensure the stability of our political system. (Beaulac et al., 2009)

Several other academics were even more forceful with their condemnation arguing that the Conservatives "…betray an abysmally inaccurate view of fundamental constitutional realities"

(White, 2009: 154), that "…Prime Minister Stephen Harper has undermined the right conduct of parliamentary democracy (Smith, 2009: 175), and that Harper's strategy "was all incorrect, but politically effective" (Cameron, 2009: 190). Clearly, Harper and Flanagan's perspective differed dramatically from the view held by the vast majority of Canadian constitutional experts. Once the 2008 crisis had ended, this rhetoric dissipated for a time; however, it was brought back as part of the strategy for the 2011 Conservative federal election campaign.

2011 Election Campaign

The Harper Conservatives continued to demonstrate their disagreement with constitutional conventions regarding the Governor General's reserve powers during the 2011 federal election campaign. This contention began in earnest just before the writ was dropped. The day before the vote of non-confidence, Government House Leader John Baird responded to a question from Liberal Deputy Leader Ralph Goodale by saying:

> *MR. SPEAKER, ONE OF THE MOST FUNDAMENTAL TRADITIONS IN CANADA AND ONE OF THE MOST FUNDAMENTAL PARTS OF OUR LIBERAL DEMOCRACY IS THAT THE PERSON WITH THE MOST VOTES WINS. THE LIBERAL PARTY IS SHOWING OUTRAGEOUS CONTEMPT FOR CANADIAN VOTERS BY SAYING THAT IT DOES NOT MATTER WHICH GOVERNMENT THEY ELECT BECAUSE IT WILL FORM A COALITION WITH THE NDP AND THE BLOC QUÉBÉCOIS AND MAKE RECKLESS DECISIONS FROM AN UNSTABLE GOVERNMENT. (BAIRD, 2011)*

HERE, BAIRD WAS CHARACTERIZING A DIRECT LINK BETWEEN VOTERS AND GOVERNMENT FORMATION AS A "FUNDAMENTAL TRADITION" OF CANADIAN DEMOCRACY. HOWEVER, CONTRAST HIS STATEMENT WITH THAT OF POLITICAL SCIENTIST LAWRENCE LEDUC:

> To argue that a coalition government is somehow illegitimate, or that members of certain parties in Parliament should have no voice in its formation or survival, is simply to deny the reality of our current politics, or even to subvert the fundamental principles of parliamentary democracy. (2009: 132)

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

Stephen Harper continued to promulgate such disagreement during two of the most-observed media events of the campaign. The first was the English leaders' debate, watched by almost four million Canadians (Ladurantaye, 2011). Nearly half way through the debate Harper said:

> *BUT OUR POSITION IS VERY CLEAR. THE PARTY THAT WINS THE MOST SEATS FORMS THE GOVERNMENT; THAT'S HOW OUR DEMOCRACY IS SUPPOSED TO WORK. IF WE FORM A CONSERVATIVE MINORITY, I WOULD BE HONOURED ONCE AGAIN TO GOVERN CANADIANS. IF WE DO NOT WIN THE ELECTION, THE CONSERVATIVE PARTY WILL NOT GOVERN THIS COUNTRY. MR. IGNATIEFF WILL NOT MAKE THAT COMMITMENT; HE WILL SAY THAT...HE'S WILLING TO ACCEPT A MANDATE FROM THE OTHER PARTIES TO GOVERN. THE PARTY THAT WINS THE ELECTION HAS TO GOVERN. OTHERWISE WE WILL HAVE A PARTY DEDICATED TO THE BREAK UP OF THE COUNTRY DECIDING WHO CAN OR CANNOT FORM THE GOVERNMENT. (GLOBAL NEWS, 2011A)*

With this statement, Harper seemed to disavow the legitimacy of opposition parties forming a coalition in the event of a minority government.

The second instance was in an interview with CBC's chief correspondent Peter Mansbridge. In the interview, Mansbridge attempted to have Harper acknowledge the constitutional legitimacy of a group of opposition parties creating a coalition to form a government. However, Harper once again refused to accept that possibility saying, "*MY VIEW IS THAT THE PEOPLE OF CANADA EXPECT THE PARTY THAT WINS THE ELECTION TO GOVERN THE COUNTRY…AND I THINK THAT ANYTHING ELSE THE PEOPLE WILL NOT BUY." LATER IN THE INTERVIEW HE SAID, "I THINK IF THE OTHER GUYS WIN, THEY GET A SHOT AT GOVERNMENT AND I DON'T THINK YOU CHALLENGE THAT UNLESS YOU'RE PREPARED TO GO BACK TO THE PEOPLE" (CBC NEWS, 2011). AS HE HAD IN 2008, HARPER APPEARED TO BE QUESTIONING THE APPROPRIATENESS OF THE GOVERNOR GENERAL USING HIS OR HER RESERVE POWERS TO CALL ON AN OPPOSITION LEADER TO FORM GOVERNMENT.*

Throughout the campaign, Harper used the spectre of a coalition government to try to convince voters that the only viable option was a "stable majority" (Chase, 2011). Though it is difficult to assess the effect of this rhetoric, Harper did win a majority of seats. Moreover, during the election, a poll indicated that 52% of Canadians were opposed to the idea of a coalition (Global News, 2011b). As Harper garnered just under 40% of the popular vote in the election, it seems that once again the Conservative rhetoric may have influenced the Canadian public. In any case, not only was there disagreement among key political actors, but Canadian voters seemed deeply divided as well.

Implications

What emerged during the events of 2008 and 2011 was a clear set of evidence that key political actors – the Prime Minister first among them – did not agree on constitutional conventions surrounding the reserve powers of the Governor General or the suitability of a coalition of opposition parties coming together to form the government. On the one hand there was a near consensus of expert opinion saying the reserve powers of the Governor General could, and perhaps should, be used to call upon the leader of the opposition to form government in the event of a non-confidence vote shortly after an election. On the other hand, Stephen Harper and the Conservative Party argued that power could only be given to the leader of another party through another election. Some observers have labeled this a debate between parliamentary democracy and populist or electoral democracy (Sculthorpe, 2010; Smith, 2009). For Smith, it would more accurately be called a dispute between parliamentary democracy and "faux populist" democracy (2009). She holds that although there are important democratic reforms to be made, ignoring or deliberately misleading the public about our system of parliamentary democracy is

not one of them. “The fact of the matter is,” argues Smith, “that under the system of responsible government, the voters speak first on the composition of the House” (2009: 185). Indeed, it is ultimately the majority of MPs that rule in the House of Commons, not simply the ‘winning party.’

Though it did not come to pass in either situation, these events could have seen Stephen Harper lose the confidence of the House of Commons. Then, instead of resigning, it seems he would have asked the Governor General to call another election immediately. This demand would have forced the Governor General to decide whether or not to use his or her reserve power to refuse the Prime Minister’s advice. The only precedent for such situation is the King-Byng affair of 1926. At the time, Lord Byng refused Prime Minister King’s request for dissolution because King was facing a vote of non-confidence in the House. King then resigned forcing Byng to call on Arthur Meighen, the leader of the opposition, to form a government. Though Meighen accepted, he quickly lost confidence himself, and King used the whole affair to his advantage in the ensuing election campaign. Ultimately, “King won the election, and the office of the governor general suffered” (Franks, 2009:44). Like Lord Byng, a Governor General faced with Harper’s request would be left with two choices: (1) plunging Canada into yet another election while setting a precedent against the use of the reserve powers or (2) calling for an opposition leader to form a government that would quickly be attacked as illegitimate (Russell, 2010: 207-8). With either decision, he or she would have been seen as wrong by one side of political opinion.

Regardless of one’s view on the Governor General’s reserve powers, it can surely be agreed that the office is placed in an impossible situation if key political actors are working under different assumptions on what role it must play. The Governor General has been described

as a “referee who ensures that the major players are on the field and that the most basic rules of the game are obeyed” (Heard, 2009: 48). However, this role becomes untenable if the captains of the opposing teams do not agree on the fundamental rules of the game (Russell, 2010: 208). In short, “the lack of clarity surrounding the constitutional rules and conventions on which the Governor General must base her decisions risks creating a perception of arbitrariness” (Chalmers, 2009: 36).

Moreover, neither the height of a parliamentary crisis nor the middle of an election campaign is an ideal time to find common ground on constitutional conventions. Indeed, it was impossible to know if Harper was pursuing a genuine attempt to provide voters a more direct role in the formation of government, or if he was simply abusing and manipulating the foundations of the constitution for partisan political gain. What is therefore needed is a way in which the rules can be codified outside of heated partisan debate, so that all players and observers can be on the same page. The following section will attempt to outline such a solution.

III. Solutions Over Crisis

The previous section highlighted the potential pitfalls of our constitutional status quo. With stark disagreement on our constitutional conventions, the Governor General is at risk of being placed in the middle of a political dogfight in the period following the election of a minority government. As Lorraine E. Weinrib argues, “Harper’s actions have demonstrated the weaknesses of our constitutional framework. This framework is informal, resting on principles and practices inherited from the United Kingdom. It depends on the sense of responsibility and the self-restraint of those who exercise political power” (2009: 74). What buttresses, then, can

we build around our constitutional framework to reduce the chances of future parliamentary crises?

A Written Constitution?

Some observers have suggested that recent events have created a need to codify the fundamental principles of Canadian governance and incorporate them into a written constitution (Weinrib, 2009: 75). This route was attempted in 1978 by Pierre Trudeau when his government introduced its Constitutional Amendment Bill (Bill C-60) (Russell, 2010: 209). Among other things, the Bill outlined when the Governor General could properly exercise his or her reserve powers. However, the Supreme Court ruled that elements of the Bill required provincial consent and the Bill never passed (Smith, 1999: 11).

The difficulties encountered by Trudeau highlight the problems associated with attempting to establish our conventions within statute. As any student of Canadian politics knows, few tasks could be more challenging for a federal government than gaining the consent of all provinces and stakeholders to amend the constitution successfully. Moreover, such a move could have the undesirable effect of judicialization of these conventions, giving the Supreme Court a significant role in interpreting highly political questions that require quick resolution (Russell, 2010: 209). Finally, codifying constitutional conventions in law would make change over time exceedingly difficult. Indeed, "…the utility of conventions is precisely their flexibility and adaptability to changing circumstances" (Sossin and Dodek, 2009: 99). For these reasons, adding constitutional conventions to our written constitution would be not only exceedingly difficult, but unadvisable.

A Canadian Cabinet Manual

There remains, however, an option for codifying our conventions without incorporating them into our written constitution: the creation of a Cabinet Manual. The governments of both New Zealand and the UK have each introduced a Cabinet Manual – New Zealand in the late 1970s and the UK in 2009. In both contexts, the documents have been useful for a multitude of reasons. There are three key strengths of a Cabinet Manual that I would like to highlight for the Canadian context: (1) it would allow for codification of constitutional conventions without making them law, (2) it would clarify key conventions to help prevent a constitutional crisis following the election of a minority government, and (3) it would be relatively simple to implement – at least from a logistical perspective.

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

> Successive governments have recognized the need for guidance to provide the basis on which they will conduct themselves while in office. The Cabinet Manual fulfills this need. The endorsement of the Cabinet Manual is an item on the agenda of the first Cabinet meeting of a new government, to provide for the orderly re-commencement of the business of government…. It is like a dictionary: it is authoritative, but essentially recording the current state of the constitutional and administrative language. Thus the content of the Cabinet Manual represents an orderly and continuous development of the conventions and procedures of executive government. (New Zealand, 2008: xvii)

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

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

> 6.39 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome). (New Zealand, 2008: 81)

It goes on to state that:

> 6.57 In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government […]
> 6.58 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention. The Governor-General would expect a caretaker Prime Minister to consult other parties on a decision to advise the calling of an early election, as the decision is a significant one…. It is the responsibility of the members of Parliament to resolve matters so that the Governor-General is not required to consider dissolving Parliament and calling an election without ministerial advice. (New Zealand, 2008: 84)

> The UK Cabinet Manual expresses a similar sentiment:

> 46. Governments hold office unless and until they resign. If the Prime Minister resigns, the Sovereign will invite the person who it appears is most likely to be able to command the confidence of the House to serve as Prime Minister and to form a government. It is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly who that person should be. At the time of his or her resignation, the incumbent Prime Minister may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place. (United Kingdom, 2010: 25)

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

> 58. At present, the Prime Minister may request that the Sovereign dissolves [sic.] Parliament so that an early election takes place. The Sovereign is not bound to accept such a request, although in practice it would only be in very limited circumstances that consideration is likely to be given to the exercise of the reserve power to refuse it, for example when such a request is made very soon after a previous dissolution. In those circumstances, the Sovereign would normally wish to know before granting a second dissolution that those involved in the political process had ascertained that there was no alternative potential government that would be likely to command the confidence of the House of Commons. (United Kingdom, 2010: 28-9)

These guidelines became extremely important in New Zealand after the country adopted the Mixed-Member Plurality electoral system, which usually produces minority parliaments. Despite there not being a single party majority since 1996 (Yong, 2009: 38), "no New Zealand Governor-General has had to exercise any of the other reserve powers to intervene in the day-to-day politics of the moment" (Satyanand, 2011). Instead, political parties have learned successfully to negotiate coalition agreements and communicate to the Governor General which leader is capable of maintaining confidence in the House of Commons.

In the United Kingdom, the likely possibility of a hung parliament was the very reason that spurred on the development of their Cabinet Manual. When their 2010 election produced a minority parliament, the Cabinet Manual was cited as a significant reason for the successful negotiation of a coalition between the Conservatives and the Liberal Democrats (O'Donnell, 2011: 3; United Kingdom, 2010: 1). Indeed, it clearly illustrated the constitutional legitimacy of such an arrangement.

The success of the Cabinet Manual in two other parliamentary democracies is strong evidence for its viability and importance in the Canadian context. If a similar codification of constitutional conventions had existed in Canada in recent years, it is hard to imagine how Prime Minister Harper could have claimed that a coalition of opposition parties was illegitimate. Moreover, it would have placed the onus on him and the opposition leaders to provide clear public declarations on who enjoyed the confidence of the House of Commons so that the Governor General would not be forced into the middle of a political debate. When there is a crisis, parliamentary or otherwise, citizens should expect their government to look for ways to mitigate the problem to avoid future crises. In the case of constitutional conventions, a

consideration of other countries' practices demonstrates that a solution in the form of the Cabinet Manual exists and, as shown below, would be possible to bring about in Canada.

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

Within PCO, the Machinery of Government Secretariat is charged with providing the government advice on "transitions from government to government, ethics and accountability issues (consistent with Westminster-style government), and the role of the Crown, the Governor General, and the Government House" (Canada, 2010: 9). In 2006, Prime Minister Stephen Harper had this Secretariat prepare a document called Accountable Government: A Guide for Ministers and Ministers of State. This guide essentially sets out the duties and responsibilities of the Prime Minister and Ministers including ministerial relations with Parliament and ministerial responsibility and accountability (Canada, 2008). It is important to note that some of the sections covered in this document are also enumerated in the Cabinet Manuals from New Zealand and the UK. Conspicuously missing from it, however, are sections that detail government formation and the Governor General's reserve powers. Nonetheless, the document's very existence highlights that PCO has the resources to create a document like the Cabinet Manual and likely could, if given the instruction from the Prime Minister, create a comprehensive Canadian Cabinet Manual

that would properly detail our constitutional conventions and the functioning of cabinet government, in a single document.

Upon completion of the draft, the approval stage would open the document up to several groups for commentary. Perhaps most importantly, a parliamentary committee would scrutinize the draft. It would also be made widely available to the public so that everyone from concerned citizens to constitutional experts could submit comments (United Kingdom, 2010: 5-7). These comments would then be considered in the writing of a final draft. This final document would remain publicly available, allowing not only politicians, but civil servants, journalists, and interested citizens to read and understand the principles of our parliamentary democracy. However, it would be ultimately only Cabinet that could grant final approval of the Manual. After the election of each parliament, Canada's Cabinet Manual would be approved at the first meeting of the new cabinet. If that were to be a minority parliament, it would be not a moment too soon.

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

Other critics will say that the Cabinet Manual cannot stop parliamentary crises, that its existence would not prevent the Prime Minister from challenging, manipulating, or ignoring

constitutional conventions if he wished to do so. They will argue that our system tends to work right now so we need not do anything to change it. I agree that the Cabinet Manual is no panacea. Like conventions it is not legally binding – and intentionally so – to allow it to shift with changing laws and political principles. However, when there is a lack of agreement on the fundamentals of our politics, something needs to change. If the status quo is indefensible and constitutional change is undesirable (if not impossible), the Cabinet Manual represents a middle ground of something possible. It creates an extra step of prudence and transparency and a further protection for our constitution.

Conclusion

This paper focuses on only a small part of the Cabinet Manuals of New Zealand and the United Kingdom. In reality, they also cover the role of ministers and their relationship with the civil service, the caretaker convention, and cabinet decision-making. The potential challenges and benefits of outlining such principles in the Canadian context, and the extent to which government documents like Accountable Government have already done this, certainly deserve further academic research.

However, the sections that cover government formation and the role of the Governor General alone are enough to warrant a definitive need for a Cabinet Manual in Canada. Given our constitutional framework, it is possible for the most important political actors to have fundamental disagreements on our constitutional conventions. Such dissension became deeply apparent during the 2008 parliamentary crisis and the 2011 federal election campaign. In both cases, the Governor General was at serious risk of being forced into the middle of a political fight.

In 1913, British Prime Minister Herbert Asquith wrote to George V insisting on the importance of the Crown being removed from political fights. Without such caution, he warned, "…it is no exaggeration to say that the Crown would become the football of contending factions. This is a constitutional catastrophe which it is the duty of every wise statesman to do the utmost in his power to avert" (McLean, 2008: 9). The implementation of a Canadian Cabinet Manual would be a small, but important step towards averting such catastrophe. This solution does not require constitutional amendment nor does it eliminate the flexibility of constitutional conventions. It would, however, allow our conventions to be codified outside of heated political debate and they would then be made available to all interested parties. We should, therefore, expect no less from our elected officials.

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