On the Formation of Government

*Hugo Cyr**

During the last decade, in Quebec and elsewhere in Canada, the media have competed to be the first to declare on election nights who will form the next government. Irrespective of whether they predicted that any political party would be able to obtain a majority of seats, these announcements have been made within only a few hours of the polls closing. These announcements have systematically preceded any public statement by the leaders of the political parties involved. Indeed, the media have developed the unfortunate habit of substituting an entire set of constitutional rules and principles leading to the formation of government by a simplistic heuristic: "The political party that wins the largest number of seats wins the election and has the right to form the next government." The media present the issue as automatic, merely a matter of arithmetic.

Even if this heuristic works well when a party has won a majority of seats, it is completely inadequate as a statement of the constitutional law and conventions related to the formation of government in our parliamentary system.

This article thus aims to flesh out the Canadian constitutional rules and principles applicable to government formation and illustrate how constitutional considerations come into play in the variety of possible scenarios. A quick reference tool is appended to the text to facilitate consultation of the applicable rules and principles to those different situations.

Lors de chacune des élections générales fédérales ou québécoises ayant mené à la formation d'un gouvernement minoritaire au cours de la dernière décennie, les médias se sont fait concurrence pour annoncer en primeur qui allait former le prochain gouvernement, et ce, avant même que l'un ou l'autre chef de parti se soit exprimé de quelque façon que ce soit sur les résultats des élections. Les médias ont pris la très fâcheuse habitude de remplacer l'ensemble du corpus de règles et principes constitutionnels applicables à la formation du gouvernement par l'application de la maxime simpliste suivante : « le parti politique ayant fait élire le plus grand nombre de députés a gagné les élections et a droit de former le prochain gouvernement ». Les médias présentent la chose comme s'il s'agissait d'un automatisme, d'une simple question d'arithmétique.

Or, si cette heuristique ne cause pas de difficultés particulières lorsqu'un parti politique remporte une majorité de sièges, elle est tout à fait inadéquate pour décrire le droit et les conventions applicables en matière de formation du gouvernement dans notre système parlementaire.

Cet article vise donc à expliciter les règles et principes constitutionnels canadiens applicables à la formation du gouvernement et à illustrer les différents facteurs constitutionnels devant entrer en ligne de compte en fonction des divers cas de figure possibles. Un aide-mémoire se trouve en annexe du texte de manière à faciliter la consultation de ces règles et principes applicables à ces diverses situations.

* LLB, BCL (McGill), LLM (Yale), LLD (Université de Montréal). Dean, Faculté de science politique et de droit, Université du Québec à Montréal, member of the Centre de recherche interdisciplinaire sur la diversité et la démocratie au Québec (CRIDAQ) and Lawyer (Barreau du Québec). This article is a translation of a longer article published in French, at Hugo Cyr, "De la formation du gouvernement" (2013) 43:2 RGD 381. That article received the *Prix Germain-Brière* from the *Revue générale de droit.*

Note that the principles, rules and practices related to the "Prime Minister" and "Governor General" apply *mutatis mutandis* to "premiers" and "lieutenant governors" unless expressly mentioned.

Introduction

During each of the federal general elections or Quebec elections that have led to the formation of a *minority* government over the last decade, major television stations have competed to be the first to announce who would form the next government,[1] even before the leader of one party or another spoke out in any way about the election results. Why is there such a competition? Of course, social media have put pressure on traditional media to broadcast information faster, but while that may impact the speed of delivering individual results, it does not necessarily explain the race between themselves to call who would form the new government. Perhaps they are attempting to show that they are more relevant and that they offer higher quality information than other stations. Alternatively, perhaps they are seeking to please an audience eager to hear the results and move on to something else. Who knows? What we do know, however, is that by systematically announcing that the party with the larger number of seats would form the next government, the "fourth estate" practically settles the issue of knowing who should form the next government and as such dismisses the numerous possibilities constitutional law offers the members of Parliament in this matter. In other words, the media pre-empt the role of duly elected parliamentarians in choosing the next government.

Indeed, the media has acquired the unfortunate habit of replacing the entire corpus of constitutional rules and principles applicable to the formation of government by the simplistic maxim: "The political party who gets the largest number of MPs elected wins the elections and has the right to form the next government." The media present this as if it were automatic, which is to say a simple matter of arithmetic. Not even a few hours after the polling stations close, televised media, with certainty and authority, tell the entire population

1 For a detailed account of how major television stations raced to announce who would form the next government during the 2004, 2006, 2008, and 2011 federal elections and the 2007 Quebec election, see Hugo Cyr, "De la formation du gouvernement"(2013) 43:2 RGD 381, 385. In 2015 federal election, CBC News (Canada Votes 2015 Election Night, Livestream, online: <http://live.cbc.ca/Event/Canada_Votes_2015_Election_Night/197448957>) and Radio-Canada (Hugo Dumas, "On s'est couché tôt!", La Presse+ (20 October 2015) 23) projected a Liberal government at 9:40 P.M. Eastern Time. That was 10 minutes after polls had closed in Ontario and Quebec while polls were still open in British Columbia. TVA did it a minute later (*ibid*). At 10:32 P.M. Eastern Time TVA projected that it would be a majority government and Radio-Canada followed 5 minutes later with the same projection (*ibid*). Same for CBC (CBC, Livestream: Canada Votes 2015). The 2015 Quebec election to an even faster call: CTV projected a Liberal government at 8:18 P.M., TVA at 8:22 P.M., and 3 minutes later, Radio-Canada followed (Richard Therrien, "Des analystes étonnés et sonnés", Le Soleil (8 April 2015) 24). CTV projected a few minutes later, at 8:36 P.M., that it would be a majority government and Radio-Canada was the first French-speaking broadcaster to announce the same at 8:43 P.M. (*ibid*).

who will form the next government. As their only caveat, they allow for the possibility that vote counts could be incorrect. But when no party obtains a majority of seats, they do not *describe* the political situation; consciously or not, they *shape* it.[2] And once electronic media reach a consensus regarding the identity of the next government, it becomes very difficult for political actors to stray from this consensus. This is even truer considering that, should we believe some surveys, Canada's population in general, and Quebec's population in particular, have a very poor understanding of our political system: most citizens even believe they vote *directly* to elect their prime minister![3]

Yet even if the heuristic according to which "the party having obtained the largest number of seats forms the government" causes no particular difficulty when a political party obtains a majority of seats — as it controls a majority of seats, the party is thus assured that it has the House's confidence, — it is inadequate as a method of describing the applicable law and conventions in relation to government formation. In reality, according to applicable constitutional conventions, when no party obtains a majority of seats,[4] it is impossible to determine who will form the next government by relying only on the number of seats won by one party or another.

2 The day following general elections, printed media followed suit. All used as their headlines the same conclusions as electronic media. For the 1979 general federal elections, the matter was simpler since the incumbent Prime Minister, Pierre E. Trudeau, had declared that very evening: "I think it's my duty at this time to recommend to my colleagues that we hand the government over … . That I recommend to the governor-general that he ask Mr. Clark to form a government." (Claude Henault & Julia Elwell, "Trudeau sees 'duty' to hand it to Clark", *The* [*Montreal*] *Gazette* (23 May 1979) 1). Thus newspapers were not taking much of a risk by using headlines such as: "Tories poised to form minority government", *The* [*Montreal*] *Gazette* (23 May 1979) 1. Things degenerated, however, for subsequent elections.

The printed media subsequently assumed and declared that the party having won a plurality of seats would form a minority government — notwithstanding the possibility for the other parties to enter into a coalition to form the government. For a detailed account of how francophone newspapers portrayed the situation in subsquent elections, see Hugo Cyr, "De la formation du gouvernement", *ibid*, 386-88.

3 Peter H Russell, "Ignorance of Parliamentary Rules Is Distorting Debate over Legitimacy", *The Star* (3 December 2008); see Ipsos Reid's press release, "In Wake of Constitutional Crisis, New Survey Demonstrates that Canadians Lack Basic Understanding of our Country's Parliamentary System" (15 December 2008), online: Historica Canada <www.historicacanada.ca/sites/default/files/PDF/polls/dominioninstitutedecember15factum_constitutional_crisis_en.pdf>. According to this last survey, 70% of Quebeckers allegedly believe that Canadians directly elect Canada's Prime Minister (*ibid*).

4 We also note that a party can hold a majority of seats without this fact leading to a certainty about who can form the government. This is the case, notably, when a prime minister dies and the rules within their party do not set out a way to immediately choose their successor.

To prove this point, simply think of the federal government formed by Mackenzie King in 1925, when he had obtained 15 fewer seats than the Conservative Party. King, the incumbent prime minister, who had lost his own seat following the elections, was able to cling to power thanks to the support his government received from a third party (the Progressives). Or think of David Peterson's 1985 Ontarian government. Thanks to an alliance with the Ontarian New Democratic Party, Peterson was able, upon a motion of non-confidence, to overturn the incumbent government less than a month after the ballot, and to replace it by forming a minority Liberal government that lasted over two years. Peterson's Liberals had four seats fewer than the Progressive Conservatives.

These are not the only Canadian cases where the government was formed by one or more parties having obtained neither a majority nor even a plurality of the legislative assembly's seats, but they are the best-known examples. We can also refer to 1929, soon after the Saskatchewan general election, when the Liberal minority government (28 seats) fell and was replaced by a government comprised of a coalition formed by the Conservatives (24 seats), Progressives (5 seats), and a few independent representatives.[5] In Quebec, in 1878, Gustave Joly de Lotbinière's incumbent Liberal government remained in power despite the fact that his party only obtained 31 seats during the general election, while Joseph-Adolphe Chapleau's Conservatives had obtained 32. The Liberal Party then enjoyed the support of two "independent conservative" MLAs, allowing it to remain in power for another 14 months.[6] Australian parliamentarism, based on principles similar to ours, is full of examples similar to these,[7] once even going so far as to recognize the authority of the *third* party in the House of Representatives to form the government![8]

5 John H Archer, "Saskatchewan: A Political History" (1985) 8:3 Can Parliamentary Rev 7.

6 Quebec, National Assembly, "Chronologie parlementaire depuis 1791 (1878-1879)", online: <www.assnat.qc.ca/fr/patrimoine/chronologie/chrono41.html>.

7 The Australian government was formed by a party having obtained neither a majority nor even a plurality of seats in 1906, 1922, 1928, 1937, 1940, 1954, 1961, 1969, and 1998. (See University of Western Australia, "Australian Politics and Elections Database", online: <http://elections.uwa.edu.au/> [U of WA, "Australian Politics and Elections Database"].)

8 In the 1906 federal election, Alfred Deakin's incumbent Protectionist Party government remained in power with only 16 seats, despite the fact that George Reid's Anti-Socialist Party had 27 elected representatives and the Labour Party had 26, i.e. ten more than the incumbent government. (See *ibid*, "Commonwealth Parliament, House of Representatives election [ID 0257]", online: <http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=688>.) Alfred Deakin remained in power until November 1908 when the Labour Party dislodged him. However, after entering into a new coalition with George Reid's party, Alfred Deakin again formed a government in May 1909, before losing power for good following the general election in which a majority of seats went to the Labour Party

In fact, when no party obtains a majority of seats, it is completely possible and legitimate, according to current legal rules and constitutional conventions, for the next government be formed in one of the following ways:

1. The incumbent government, whether it has a plurality of seats or not, remains in power and tries to secure the confidence of the elected Chamber as soon as it opens.

2. The incumbent government, whether it has a plurality of seats or not, remains in power thanks to a support agreement with one or more parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against entering into an agreement with a minority government has no constitutional relevance).

3. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a majority government (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).

4. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government which attempts to obtain the confidence of the elected Chamber as soon as it opens (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).

5. The incumbent government, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that remains in power thanks to a support agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition or entering into an agreement with a minority government has no constitutional relevance).

in April 1910. (See *ibid*, "Commonwealth Parliament, House of Representatives election [ID 0258]", online: <http://elections.uwa.edu.au/elecdetail.lasso?keyvalue=689>.)

6. The incumbent government eventually fails in its attempt as set out in (1), but again forms the government thanks to one or more agreements as set out in scenarios (2) to (5).

7. The incumbent government concedes its defeat, and another party, whether it has obtained a plurality of seats or not, forms the new government due to the fact that it is the one with the highest chance of obtaining the confidence of the elected Chamber as soon as it opens.

8. The incumbent government concedes its defeat, and another party, whether it has a plurality of seats or not, forms the new government thanks to a support agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against entering into an agreement with a minority government has no constitutional relevance).

9. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a majority government (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).

10. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that will attempt to obtain the confidence of the elected Chamber as soon as it opens (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition after the elections has no constitutional relevance).

11. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, enters into a coalition with one or more parties, granting them Cabinet positions, to form a minority government that will be supported by an agreement with one or more other parties with the goal of ensuring the confidence of the elected Chamber in exchange for certain compromises on policies to be implemented (the fact that the concerned parties asserted before the elections that they were for or against forming a coalition or entering

into an agreement with a minority government has no constitutional relevance).

12. The incumbent government concedes its defeat and another party, whether it has a plurality of seats or not, fails to form the government as set out in scenarios (7) to (11). This same party or another can again attempt to bring about scenarios set out in (7) to (11), or the parties can notify the Governor General that no new government can be formed and that new elections must be held.

As this article will show, many factors must come into play when forming a government, and such factors are completely blotted out by the heuristic used by the media and the public.

Of course, certain politicians have taken advantage of the population's misunderstanding of government formation. The 2008 federal Parliament "prorogation crisis" is a good illustration of this. Only a few days after the parliamentary session opened, Prime Minister Harper, who led a minority government at the time, asked the Governor General to prorogue the session when the opposition parties were getting ready to have a non-confidence motion adopted with the goal of defeating the government and replacing it with a coalition. The government attempted to convince the public that its manoeuvring was legitimate by asserting that democracy required the party having obtained the most seats to "win" the elections.[9] This campaign had the effect of increasing public confusion as to the mechanisms according to which parliamentary democracy functions. The politicians who opposed the government of the time were not in a good position to rectify the erroneous impressions created by the government, since their declarations were automatically assimilated to partisan interests. The media were badly equipped to pick up on this error; they themselves had supported this view with their habit of automatically declaring the party having obtained the most seats during the elections as the "winner", and as a result they were not able to set the record straight in an effective manner. Lawyers and political scientists were also suspected of defending some partisan interest or of seeking to appropriate — through "pseudo-expertise" — the people's democratic power, and were also not able to inform the population adequately about the applicable rules once the political storm was underway.

9 See, among others: Les Whittington, Bruce Campion-Smith & Tonda MacCharles, "Liberals, NDP and Bloc sign coalition pact", *The Toronto Star* (1 December 2008), online: <www.thestar.com/news/canada/2008/12/01/liberals_ndp_and_bloc_sign_coalition_pact.html>.

In 2009, British lawyers and political scientists had anticipated the risks associated with the media and the citizenry's misunderstanding regarding the formation of a minority government. Seeing that the Labour Party ran the risk of not winning a new term in 2010 and that there was a real possibility, for the first time in three decades, that no one party would obtain a majority of seats on its own, academics from the University College London's Constitution Unit and the Institute for Government prepared a detailed document on the rules and conventions pertaining to the formation of governments in minority settings among British-tradition parliaments.[10] Following this report, the British government decided to follow New Zealand's example, which had gathered, in an official document — its Manual for the Cabinet — the rules and principles meant to guide the government and public administration's conduct, including during elections and government formation. New Zealand's manual had the advantage of providing explicit rules for government formation when general elections give no party a majority of seats.[11] The United Kingdom government was then able to produce a first draft of the chapter on elections and government formation before the May 2010 election. The British government's Cabinet Manual was finished after the election.[12]

The discussions and consultations surrounding the production of the manual, in British academic, political and media circles, prepared the ground adequately for the next election, at the end of which no party won a majority of seats. The media patiently waited to announce the next government for five days, which ended up being necessary to determine the composition of the new government. Such restraint was especially beneficial since the Conservative Party and the Liberal Democratic Party had both declared at various times before the election[13] that they did *not* intend to take part in a coalition government; nevertheless, they concluded that in light of the division of seats fol-

10 Robert Hazell & Akash Paun, eds, *Making Minority Government Work: Hung Parliaments and the Challenge for Westminster and Whitehall* (London: Institute for Government, 2009).

11 New Zealand, Cabinet Office, *Cabinet Manual, 2008*, online: <https://cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf> [NZ, *Cabinet Manual 2008*].

12 United Kingdom, Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on The Operation of Government* (2011), 1st ed, online: <www.gov.uk/government/publications/cabinet-manual> [UK, *Cabinet Manual 2011*].

13 A few days only before the 2010 general election, the Tories had said they did not wish to form a coalition government with the Liberal Democrats, but that they were instead ready to form a minority government if they did not succeed in obtaining a majority of seats (Andrew Porter & Robert Winnett, "General Election 2010: Tories Rule out Lib Dem Alliance", *The Telegraph* (2 May 2010), online: <www.telegraph.co.uk/news/election-2010/7670867/General-Election-2010-Tories-rule-out-Lib-Dem-alliance.html>; James Chapman, "Cameron: I don't need a coalition: Tories Would 'Dare' Lib Dems to Vote Down Their Budget", *Daily Mail* (3 May 2010), online: <www.

lowing the election, it would be wiser to agree among themselves[14] to form a coalition government enjoying a majority of seats.[15] One of the great successes in preparing for this election was the fact that "None of the media declared that the Conservatives had 'won' simply by being the largest single party. And none suggested that it was up to the Queen to decide."[16]

A few years ago, a number of political science and law academics,[17] political actors from all affiliations, and senior public servants met in Toronto at the instigation of Professor Peter Russell to attempt to shed some light on the constitutional conventions surrounding the formation of government in our parliamentary system. The group came to the general conclusion that being able to rely on authoritative guidelines would be most useful, like in New Zealand and the United Kingdom, particularly as regards constitutional conventions dealing with the dissolution of Parliament, caretaker governments at election time, the formation of government, and the vote of confidence.[18] It also came to the conclusion that improvements were required to "assist in informing politicians, academics and voters about the role of such conventions in our parliamentary

dailymail.co.uk/news/election/article-1270459/David-Cameron-admits-facing-difficult-tough-decisions-spending-cuts-plug-163bn-deficit.html>.

As for the Liberal Democrats, they had first said they did not want to form a coalition if so invited after general elections in which, hypothetically, no party would have a majority of seats (Patrick Wintour & Nicholas Watt, "Lib Dems Rule Out Coalition Government", *The Guardian* (14 February 2010), online: <www.theguardian.com/politics/2010/feb/14/liberal-democrats-coalition-hung-parliament>). The Liberal Democrats claimed they would rather enjoy the power of influencing the government with their ability to decide the government's fate during an eventual vote of confidence. The party then changed its position one month before the elections, showing some openness regarding the possibility of joining a coalition if certain conditions were met ("Clegg Does not Rule out Lib Dems Joining any Coalition", *BBC News* (13 April 2010), online: <http://news.bbc.co.uk/2/hi/uk_news/politics/election_2010/8614630.stm>).

14 Discussions between the incumbent Labour Party and the Liberal Democrats also took place, but failed ("General Election 2010: Talks Between Labour and Liberal Democrats Break Down", *The Telegraph* (11 May 2010), online: <www.telegraph.co.uk/news/election-2010/7711447/General-Election-2010-talks-between-Labour-and-Liberal-Democrats-break-down.html>.

15 Patrick Wintour, "Cameron and Clegg Unveil Final Coalition Agreement", *The Guardian* (20 May 2010), online: <www.theguardian.com/politics/2010/may/20/cameron-clegg-unveil-coalition-agreement>.

16 Robert Hazell & Ben Yong, Constitution Unit (University College London), "Lessons from the process of government formation after the 2010 election", presentation in front of the Political and Constitutional Reform Committee, Commons Select Committee, UK Parliament, October 2010 at 4 (see online at: Constitution Unit Blog, "The Cabinet Manual — At Last a Rough Guide for Ministers", online: <www.constitution-unit.com/2011/01/07/the-cabinet-manual-%e2%80%93-at-last-a-rough-guide-for-ministers/>.)

17 Disclaimer: I was part of this group.

18 Peter Russell & Cheryl Milne, "Adjusting to a New Era of Parliamentary Government: Report of a Workshop on Constitutional Conventions" University of Toronto, David Asper Centre for Constitutional Rights, 3-4 February 2011, online at 11: <www.scribd.com/document/51666494/Adjusting-to-a-New-Era-ofParliamentary-Government-Workshop-Report-Final-3>.

democracy"[19] in order to avoid the useless re-creation of a constitutional-crisis perception like the one we experienced during the event that led to the controversial prorogation of Parliament at the end of 2008.

This text falls in line with the objective of informing various actors about the legal or conventional rules and principles surrounding the formation of government in our parliamentary system, with the goal of making the rules of the game clearer *before a crisis strikes*. Indeed, because of the lack of deep understanding about the constitutional rules and principles that apply to government formation in our Westminster parliamentary system — and since even lawyers and politicians often also tend to rely on the heuristic according to which the party with the largest number of seats forms the government, it seems important to set the record straight. It is necessary to state clearly how the different constitutional rules and principles condition the formation of government in a series of realistic, if unusual, scenarios. In doing so, we should take care to highlight the situations that are the subject of consensus and those around which a certain controversy remains.

And so we will explain who, according to applicable Canadian constitutional rules and principles, should form the government following a general election in which the following scenarios occur:

1. The incumbent government has:
   a. A majority of MPs; or
   b. More MPs than each of the other parties taken individually, which is to say that it has the plurality of seats or the same number of MPs as another party.

2. A party other than the incumbent government has more MPs than each of the other parties taken individually.

3. Two or more parties other than the incumbent government have the same number of MPs, a number which is more than the incumbent government.

As a complement, we will examine the potential impact of an agreement between two or more political parties to form a coalition to designate a government following general election, and the percentage of votes expressed to determine who must form the government.

19 *Ibid*.

Since the Constitution's formal sources are surprisingly terse on the matter, we will examine each scenario mentioned above to determine who should form a new government in each of these hypothetical situations pursuant to the applicable constitutional conventions and practices. We also thought it would be useful to compile an outline of our conclusions regarding the rules used to determine who can form the government following a general election. Such a document is thus appended to this article.

Let us thus begin this study by specifying the nature of the sources[20] (A) on which we will base our analysis, starting with "constitutional conventions" (1). We will then briefly discuss "constitutional practices" as well as distinctions to be made between these two notions (2), followed by the constitutional conventions and practices of other Commonwealth member States (3). General rules and principles applicable to government formation will then be presented before we examine the application of these standards to a variety of scenarios in which no political party succeeds in securing a majority of seats during general elections (B).

A. The nature of non-legal constitutional sources

1. Constitutional conventions

"Constitutional conventions" are rules that are usually unwritten and *are not* part of constitutional *law*, although they are part of the Constitution and they do govern the operation of political institutions.[21] These rules are perceived as mandatory by relevant actors, either due to their purpose or, perhaps, because

20 We use the expression "constitutional convention" here because it is a standard technical term in literature. We do however note that legal theory, makes a distinction between a "convention" and an "independent but shared conviction." According to action theory, a "convention" exists when actors obey a rule of conduct because of the fact that other actors also do. Let us take the example of a "coordination convention": the convention according to which we walk on the right side of the sidewalk — here mimicking the rule from traffic regulations — rests on the expectations that others will follow the same rule and that in this way we can coordinate our actions. As for the "independent but shared conviction," it does not depend on others' actions. It rests on a shared belief that a rule constitutes a valid reason for action. We will avoid deciding here on the exact nature of the type of prescription which forms the "constitutional convention"; this issue will require further examination.

21 This section and the next reuse to a large extent the analysis of these two types of constitutional sources presented in our paper: Hugo Cyr, "L'absurdité du critère scriptural pour qualifier la Constitution" (The Absurdity of the Scriptural Qualifier for a Constitution) (2012) 6 JPPL 293, cited with approval by the Supreme Court in *Reference re Senate Reform*, 2014 SCC 32 at para 25, [2014] 1 SCR 704.

of how ancient they are.[22] They constitute a standard that can guide the actions of political actors as well as serve as a standard of performance for such actions.

Constitutional conventions complete and sometimes even *contradict* the "written rules of the written Constitution." This is notably the case of the constitutional convention according to which the Governor General has no choice but to assent to a bill that has received the House of Commons and the Senate's assent, notwithstanding the express power to "withhold the Queen's Assent" or "reserve the Bill for the Signification of the Queen's Pleasure" set out in section 55 of the *Constitution Act, 1867*.[23] In this sense, the constitutional convention is perceived by the political actors to whom it applies as superseding the written rule of the formal constitution.

Finally, it must be emphasized that the courts can recognize the existence of these conventional rules,[24] but that they will not usually enforce them.[25] The

22 In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 888, 125 DLR (3d) 1 [*Patriation Reference*], the majority adopts the opinion of Sir Ivor Jennings according to which "A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it."

23 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5. In the United Kingdom, some recently wondered whether Her Majesty had to agree to sanction a bill that had obtained the approval of the House of Commons and the House of Lords but that the (minority) government recommended not to sanction. See Nick Barber, "Can Royal Assent Be Refused on the Advice of the Prime Minister?" (25 September 2013) *Constitutional Law Association* (blog), online: <www.ukconstitutionallaw.org/blog> and the references found therein.

24 *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793 at 803, 140 DLR (3d) 385 [*Quebec Veto Reference*]:

> It should be borne in mind however that conventional rules, although quite distinct from legal ones, are nevertheless to be distinguished from rules of morality, rules of expediency and subjective rules. Like legal rules, they are positive rules the existence of which has to be ascertained by reference to objective standards. In being asked to answer the question whether the convention did or did not exist, we are called upon to say whether or not the objective requirements for establishing a convention had been met.

25 *Patriation Reference*, *supra* note 22 at 880 and following (majority) and 853 following (minority). Let us note however that if the courts do not sanction constitutional conventions, they can sometimes take them into account when interpreting and implementing constitutional law. Such was the case notably in the *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 560, 83 DLR (4th) 297 [*Reference Re Canada Assistance Plan (BC)*] where the court considered that:

> A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction of a money bill. By virtue of s. 54 of the *Constitution Act, 1867*, such a bill can only be introduced on the recommendation of the governor general who by convention acts on the advice of the Cabinet. If the Cabinet is restrained, then so is Parliament.
>
> The text of section 54 at issue only requires that the money bill be introduced by the Governor General in Council; all MPs and senators can present bills that are not financial in nature. Thus it would be false, legally, to say that "[a] restraint on the Executive in the introduction of legislation is a

sanction for violating a constitutional convention is a political one rather than a legal one.

The exercise of the Governor General's constitutional powers is strongly circumscribed by a series of *constitutional conventions*; the Governor General's discretion is reduced to a minimum. These conventions' main reason for being is, of course, the entrenched constitutional principle of democracy.[26] The discretionary margin left to the Governor General is what is called their "reserve powers." The issue of government formation raises several questions that depend on the interpretation we give to these reserve powers and to the conventions that frame them.

2. Constitutional practices

Constitutional practices are not — strictly speaking — rules, but simply "*customs"* in the exercise of power; as *habits*, they are not understood to be mandatory. We could no doubt speak of "constitutional customs" as the doctrine often does, but we believe this expression hinders the comprehension of the issue at hand. Indeed, a custom is not simply a regular behaviour, it is also supported by a normative aspect that guides actors and offers a standard of evaluation for their behaviour. For that matter, it is to this extent that customs are a source of law in international and civil law. Practices do not possess this normative nature. Let us take for example the issue of whether, prior to the enactment of the *Constitution Act, 1982*, there existed a constitutional convention requiring the *unanimous* agreement of provinces to allow the adoption by the Canadian Senate and House of Commons of a resolution whose object is to request a modification of the Canadian constitution by the London Parliament that would affect the provinces' legislative authority. The Supreme Court of Canada, in the *Quebec Veto Reference,*[27] came to the conclusion that if precedents were favourable to the thesis that unanimous consent was required, "one essential requirement for establishing a conventional rule of unanimity was missing. This requirement was acceptance by all the actors in the precedents. Accordingly, there existed no such convention."[28] Precedents, on their own, thus only constitute "constitutional practices," not conventions.[29] As such, con-

fetter on the sovereignty of Parliament itself" if our reasoning didn't take into account constitutional conventions.

26 In the *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, the Supreme Court of Canada recognized that democracy is an entrenched constitutional principle.

27 *Quebec Veto Reference*, *supra* note 24.

28 *Ibid* at 808.

29 The *Reference* did, however, find that there was a constitutional convention requiring "a substantial degree of provincial consent." *Patriation Reference*, *supra* note 22 at 905; *Quebec Veto Reference*, *supra* note 24 at 808.

stitutional practices can serve as guides in decision making without binding the actors involved.

Due to the opaque nature of the beliefs of the actors involved, it is often difficult to distinguish what falls within the conventional realm from what is a simple practice. We will indicate throughout our analysis what seems to be clearly of one type or the other, and we will highlight questionable cases.

3. Constitutional conventions and practices from other members States of Commonwealth

Since the Canadian Constitution is "similar in Principle to that of the United Kingdom,"[30] in answering the questions set out in the introduction, it will be useful to examine parliamentary experience not only of Quebec (which has had only two minority governments over the 20th and 21st centuries[31]) and Canada, but also, to the extent that their parliamentary models are similar, the experience of other Commonwealth member states. Indeed, if the various parliamentary traditions can guide us, those inherited directly from British parliamentary experience are of even greater use than those stemming from presidential traditions. In this regard, it is useful to remember that academic literature on the conventions related to a monarch's, a Governor General's, or a Lieutenant-Governor's powers most often treat these three situations as identical and, subject to the relevant differences between the formal constitutions, the solution chosen in one state is usually considered also applicable in another Member state of the Commonwealth. Because of this, the United Kingdom and New Zealand have done us a great service, since both countries have summarized the current state of their conventions and practices related to the formation of minority governments in manuals for the use of their respective Cabinets.[32] This is even truer since the United Kingdom's manual, published a few years ago, was the object of several public consultations, including consultations of both Houses of Parliament, and the entirety of these reports has been made public. These consultations have allowed, in particular, a refinement of the language used and an improvement of the anticipated various circumstances in which Her Majesty must call upon a party leader to form a minority government. We will refer to these manuals throughout our analysis.

30 *Constitution Act, 1867*, *supra* note 23 at preamble.

31 See the 2007 minority Liberal government and the 2012 minority PQ government.

32 UK, *Cabinet Manual 2011*, *supra* note 12; NZ, *Cabinet Manual 2008*, *supra* note 11.

B. General rules and principles applicable to government formation

A constitutional monarchy such as ours rests on the unwritten principle according to which *the Queen reigns but she does not rule.* The Supreme Court of Canada summarizes this rather simply in the following manner:

> The Queen of Canada is our head of state, and under our Constitution she is represented in most capacities within the federal sphere by the Governor General. The Governor General's executive powers are of course exercised in accordance with constitutional conventions. For example, after an election he asks the appropriate party leader to form a government. Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government", "Cabinet" and "executive."[33]
>
> La Reine du Canada est le chef de notre État et, aux termes de notre Constitution, elle est représentée en la plupart de ses qualités, au niveau fédéral, par le Gouverneur général. Les pouvoirs exécutifs de ce dernier s'exercent, bien sûr, conformément à certaines conventions constitutionnelles. Par exemple, à la suite d'une élection, il demande au chef de parti approprié de former un gouvernement. Une fois le gouvernement en place, les principes démocratiques commandent que le gros des pouvoirs du Gouverneur général soient exercés en conformité avec la volonté des dirigeants de ce gouvernement, à savoir le cabinet. C'est donc le cabinet qui détient le véritable pouvoir exécutif. Et comme c'est le cabinet qui contrôle le gouvernement, il en résulte dans la pratique que les termes "gouvernement", "cabinet" et "exécutif" se chevauchent jusqu'à un certain point.

This first principle according to which "the Queen reigns but she does not rule" is completed by the principle of "responsible government." As the Supreme Court emphasizes in the quoted excerpt, the Governor General must ask "the *appropriate* party leader to form a government." According to this second principle, the government is primarily accountable to the elected Chamber and is, as such, not subject to the double responsibility which would require that it also enjoys the confidence of the monarch. Because of the constitutional principle of "parliamentary democracy,"[34] it is important to note that it is the vote of confidence of a majority of elected MPs that gives the

33 *Reference Re Canada Assistance Plan (BC), supra* note 25 at 546-47.

34 See *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 377-78, 100 DLR (4th) 212 (*per* McLachlin J, as she then was, for L'Heureux-Dubé, Gonthier and Iacobucci JJ).

government its democratic legitimacy. In other words, in our constitutional system, the government has no direct democratic legitimacy because it is not elected by the population; its democratic legitimacy is always derived from the support elected MPs grant it. Without the support of a majority of MPs on a confidence issue, the government no longer enjoys the democratic legitimacy that the constitution requires to fully exercise its functions.

From these principles stem four major consequences which we must keep in mind throughout our analysis:

1. Her Majesty and her representatives (the Governor General and lieutenant governors) are the guardians of the government's *constitutional* legitimacy (as opposed to its democratic legitimacy) and must ensure its continuity.[35]

2. Her Majesty and her representatives normally exercise their powers in accordance with the advice from the prime minister or Cabinet who must *enjoy the confidence of the elected legislative assembly*.

3. When the prime minister loses the elected Chamber's confidence, or following the Chamber's dissolution, the prime minister can no longer bind the Governor General with his or her advice. The incumbent prime minister and government remain in post as a "caretaker government" since the Crown cannot be deprived of a government.

4. When governors general must act without taking into consideration the opinion transmitted by the incumbent prime minister as *decisive*, as occurs during the appointment of a new prime minister, then they exercise their "reserve powers."[36] The governors general then have the

35 The Honorable Edward Roberts, former Lieutenant-Governor of Newfoundland and Labrador, summarizes this duty thusly: "Chief among the vice-regal constitutional duties — indeed, one could accurately call it the first and most important responsibility of any lieutenant-governor or the governor general — is to ensure that the Queen's government continues to function" (the Honourable Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times" (2009) 32:1 Can Parliamentary Rev 13 at 15).

36 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 9.7(b). Henri Brun and Guy Tremblay, constitutionalists at Laval University, interpret the conventional restraints on Her Majesty's representative in such an expansive way that he would practically have no reserve power left except in the event of a coup. During the 2008 prorogation crisis, Brun expressed himself in these categorical terms: [Translation] "We remain in a monarchist system. In a constitutional monarchy, the Queen and her representatives *have no political power and must act in all circumstances in accordance with the elected government's directives*" [emphasis added]. He added: "We're in a classic conflict situation between Parliament and the government. If there is no way for the actors present to compromise and agree, there is only one referee: the people, the electorate" (Malorie Beauchemin, "Vers une crise constitutionnelle? La situation pourrait relancer le débat sur le rôle de la gouverneure

> duty of exercising these powers in an impartial, non-partisan manner[37] and must be guided by a duty to protect the constitutional order.[38] As such, they must avoid any appearance of partisanship[39] and must encourage decision making that complies with applicable rules and principles all the while abiding the MPs' will.[40] Even though Her Majesty or her representatives must not act in such a way as to tarnish the Crown's image, the exercise of reserve powers does not necessarily have to enjoy popular support.[41]

What general rules and principles apply to government formation? To illustrate the possible tensions between the powers granted by constitutional law

---

générale", *La Presse* (4 December 2008) A7). See also, Guy Tremblay, "La gouverneure générale doit accéder à la demande de Harper", *Le Soleil* (4 December 2008) 33. These statements seem to confuse our parliamentarism with a political system in which the government is elected directly by the population. Contrary to widely held parliamentary conventions throughout the Commonwealth, Professors Brun and Tremblay believed that if the Conservative Party of Canada had been defeated in the confidence vote initially planned, the Governor General would have had no choice but to trigger a new general election — even though the last one had just taken place. Calling upon the "coalition" to form a new government would have been "unconstitutional" according to Professor Brun (Henri Brun, "Michaëlle Jean n'a pas le choix", *La Presse* (4 December 2008) A37). Yet, as Oxford Professor Geoffrey Marshall summarized so well: "[T]o admit an automatic right of any government to dissolve Parliament at any time would run counter to the views expressed by most constitutional authorities" (Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1986) at 37). For example, Sir Ivor Jennings wrote: "The right of dissolution, for instance, is not solely within the competence of the prime minister. A sovereign who thought that the power was being put to serious abuse could refuse to allow a dissolution" (Sir Ivor Jennings, *The British Constitution*, 5th ed (Cambridge: Cambridge University Press, 1966) at 118). For a recent opinion, see also: Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?" in Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 47 at 49.

37 Stanley A de Smith, *Constitutional and Administrative Law* (Victoria: Penguin Books, 1971) at 99.

38 Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 74. Bogdanor also notes at page 75 that Her Majesty is not bound by precedents when exercising her reserve powers, but that she must decide in function of what is appropriate in the particular circumstances of the issue she faces.

39 *Ibid* at 74-76. Jennings, *supra* note 36 at 119.

40 The UK *Cabinet Manual 2011*, *supra* note 12 at para 2.9:

> Historically, the Sovereign has made use of reserve powers to dismiss a prime minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign. [William IV had dismissed the government headed by Lord Melbourne which held the support of a majority in the House of Commons.] *In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt 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 to the Sovereign who is best placed to be able to command the confidence of the House of Commons.* As the Crown's principal adviser this responsibility falls especially on the incumbent prime minister, who at the time of his or her resignation 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 [emphasis added].

41 Heard, *supra* note 36 at 59.

and the constraints imposed by constitutional conventions, the Supreme Court of Canada, in the *Patriation Reference*, set out in very broad terms the constitutional conventions guiding the formation of a government following a general election:

… it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.

It is also a constitutional requirement that the person who is appointed prime minister or premier by the Crown and who is the effective head of the government should have the support of the elected branch of the legislature; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election … . Ministers must continuously have the confidence of the elected branch of the legislature, individually and collectively. Should they lose it, they must either resign or ask the Crown for a dissolution of the legislature and the holding of a general election.

…

Another example of the conflict between law and convention is provided by a fundamental convention already stated above: if after a general election where the opposition obtained the majority at the polls the government refused to resign and clung to office, it would thereby commit a fundamental breach of convention, one so serious indeed that it could be regarded as tantamount to *a coup d'état.* The remedy in this case would lie with the Governor General or the Lieutenant-Governor as the case might be who would be justified in dismissing the ministry and in calling on the opposition to form the government.[42]

… selon une exigence fondamentale de la Constitution, si l'opposition obtient la majorité aux élections, le gouvernement doit offrir immédiatement sa démission. Mais si fondamentale soit-elle, cette exigence de la Constitution ne fait pas partie du droit constitutionnel.

Une autre exigence constitutionnelle veut que la personne nommée premier ministre fédéral ou provincial par la Couronne et qui est effectivement le chef du gouvernement ait l'appui de la chambre élue de la législature; en pratique, ce sera dans la plupart des cas le chef du parti politique qui a gagné une majorité de sièges à une élection générale … . Les ministres doivent continuellement jouir de la confiance de la chambre élue de la législature, personnellement et collectivement. S'ils la perdent, ils doivent soit démissionner, soit demander à la Couronne de dissoudre la législature et de tenir une élection générale.

…

Une convention fondamentale dont on a parlé ci-dessus offre un autre exemple du conflit entre droit et convention : si après une élection générale où l'opposition a obtenu la majorité des sièges, le gouvernement refusait de donner sa démission et s'accrochait au pouvoir, il commettrait par là une violation fondamentale des conventions, si sérieuse d'ailleurs qu'on pourrait la considérer équivalente à un coup d'État. Le remède dans ce cas relèverait du gouverneur général ou du lieutenant-gouverneur selon le cas, qui serait justifié de congédier le ministère et de demander à l'opposition de former le gouvernement.

While this *obiter dictum* is a start, some qualifications are required here. We will do so in the next section, in which we will analyze in more detail the issues raised in the introduction. We can however say right away that there are only *two rules which govern the selection of a prime minister following a general election. Those rules have achieved the status of conventional rules in Canada and Quebec:*

- The incumbent prime minister can keep his position until Parliament is again in session,[43] since he has the *right* to attempt to obtain the confidence

---

42 *Patriation Reference, supra* note 22 at 877-78, 882 (majority on the conventional issue).

43 A problem can, however, occur if the incumbent prime minister avoids asking the Governor General to summon Parliament for a long period of time after a general election, thus avoiding submission to a vote of non-confidence. Eugene Forsey touches upon this hypothesis in a letter sent to the Governor General on August 15, 1984 (archive made public by Helen Forsey, daughter of the late Senator Forsey (19 January 2009), online: Rabble News <www.rabble.ca/news/prorogation-revisited-eugene-forsey-parliament-and-governor-general>). It is clear that in such a case, the prime minister would not be able to request the dissolution of Parliament *before* a confidence vote was held ("It is well established that the governor general should not allow a prime minister to use dissolution of Parliament to escape facing a vote of confidence in the House, especially when the session is new" (CES [Ned] Franks, "To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?" in Russell and Sossin, supra note 36 at 33). According to Forsey:

> If no party gets a clear majority in the election, and the incumbent Government decides not to resign (as it has a perfect right to do) but attempts to carry on for an extended period without meeting the new House (financing the country's business by means of governor general's special warrants, as provided for in the Financial Administration Act, Section 23), then, at some point, Her Excellency would have the right, indeed the duty, to insist that Parliament should be summoned; the right, the duty, to refuse to sign any more special warrants till it was summoned. She would have to say:
>
> > "Prime minister, responsible cabinet government means government by a cabinet with a majority in the House of Commons. I don't know whether you have such a majority. No one knows. The only way to find out is by summoning Parliament and letting it vote. If you will not advise me to summon Parliament forthwith, then I shall have to dismiss you and call on the Leader of the Opposition. It is not for me to decide who shall form the Government. But it is for the House of Commons. I cannot allow you to prevent the House of Commons from performing its most essential function. To permit you to do that would be to subvert the Constitution. I cannot allow you to usurp the rights of the House of Commons."
>
> I have said, "for an extended period", and "at some point". What period? What point?
>
> There can be no precise answer. How many grains make a heap? But if, let us say, for three months, or four, or five, or six, the newly elected Parliament had not been summoned, at some point there would most certainly be a public outcry
>
> … .
>
> I must emphasize that the courts could do absolutely nothing.
>
> I must emphasize also that, in law, the Government could stay in office, and finance the ordinary business of government by governor general's special warrants, for a very long time. True, it would have to summon Parliament within twelve months of the last sitting of the previous Parliament. But, having done so, it could then prorogue it, after a session of a few hours, and repeat the performance a year later. (Indeed, it could dissolve Parliament after a session of only a few hours, as Mr King did on January 25, 1940.)

of the new elected Chamber;[44]

- If the incumbent prime minister resigns after the elections — before or after losing a vote of confidence of the newly elected legislative assembly — the Governor General must designate as the new prime minister the party leader who is *most likely to enjoy the confidence of the elected House of Parliament*.[45]

The latter principle is not as simple as it seems. Here are a few explanations on the application of the two principles.

1. Conventions regarding the incumbent prime minister

Being appointed by the Crown, a prime minister remains in office until he or she resigns or is dismissed. That being the case, an incumbent prime minister benefits from a constitutional convention allowing him or her to be the first to attempt to obtain the confidence of the elected Chamber following a general election.[46]

The only protection against such conduct is the reserve power of the Crown, the governor general, to refuse such prorogation or dissolution, and, if necessary, to dismiss the Government which advised such prorogation or dissolution.

44 For example, in the October 1886 election in Quebec, the incumbent Conservative government only obtained 26 seats versus 33 for the Liberal Party. The 3 seats obtained by the National Party and the 3 seats won by independent conservatives must also be counted. The incumbent government attempted to remain in power despite the Liberal majority, but when the session opened, it was defeated in a vote of confidence. The Lieutenant Governor then invited the Liberals to form the new government.

Additionally, on the federal level, in 1925, incumbent Prime Minister Mackenzie King was personally defeated at the general election and the Liberal Party of Canada only obtained 101 sears versus 116 for the Conservative Party (in an elected House comprised of 245 MPs). He nevertheless remained at his post, was re-elected in a partial election and was supported by the House of Commons until the end of June 1926, when the events of the King-Byng affair took place.

45 UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.9: "… who is best placed to be able to command the confidence of the House of Commons."

46 See, for example, the following list of authorities presented by Anne Twomey in support of this statement (Anne Twomey, "The Governor-General's Role in the Formation of Government in a Hung Parliament" Sydney Law School Research Paper No. 10/85 (27 August 2010), online: SSRN <http://ssrn.com/abstract=1666697>); the Honourable Eugene A Forsey, "The Courts and The Conventions of The Constitution" (1984) 33 UNBLJ 11 at 15-16; Ian Killey, *Constitutional Conventions in Australia* (Melbourne: Australian Scholarly Publishing, 2009) at 212-13; Peter H Russell, "Learning to Live with Minority Parliaments" in Russell and Sossin, *supra* note 36 at 137; Bogdanor, *supra* note 38 at 148; George Winterton, "Tasmania's Hung Parliament, 1989" (1992) PL 423 [Winterton, "Tasmania"]; Eugene A Forsey, "Introduction — The Present Position of the Reserve Powers of the Crown" in Herbert V Evatt and Eugene A Forsey, *Evatt and Forsey on the Reserve Powers* (Sydney, Legal Books, 1990) at xxv; Denis O'Brien, "Dissolving Parliament" (1990) 1:1 PL 17 at 20; Republic Advisory Committee, *An Australian Republic — The Options*, vol 2 (Canberra: Australian Government Publishing Service, 1993) appendix 6 at 248 [Republic Advisory

As head of a "caretaker government," an incumbent prime minister cannot ask the Governor General to trigger new elections before Parliament begins its new session.[47] Also, an incumbent prime minister who refuses to resign after the re-elected Chamber votes on a motion of non-confidence can be removed from office by the Governor General.[48] As such, the Governor General would not — in these circumstances — have to grant the prime minister's request to trigger new elections. Holding new elections should only happen if the Governor General comes to the conclusion that the elected Chamber's composition is such that it could not function and that there is no alternative government.[49]

Committee, *The Options*]; Australia, Advisory Committee on Executive Government, Australia Constitutional Commission, Australia Parliament, *Report of the Advisory Committee on Executive Government* (Canberra: Australia Government Publishing Service, 1987) at 40, Practice 3(b) [Constitutional Commission, *Report on Executive Government*]; Geoffrey Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 32 [Marshall, *Constitutional Conventions, 1984*]; David Butler, *Governing Without A Majority*, 2nd ed (Basingstoke: Macmillan, 1983) at 73.

47 It seems that in 1971, the incumbent Newfoundland Premier, Joseph Roberts "Joey" Smallwood, had asked the Lieutenant-Governor, on no less than *five* occasions, to trigger new elections before the legislative assembly began its business. The Lieutenant Governor systematically refused. The incumbent Premier finally resigned before the House resumed its business. See: David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995) at 58.

48 See the section quoted above from the *Patriation Reference*, *supra* note 22 at 882.

If the Governor General has never made use of that power in Canada, Canadian provincial Lieutenant Governors did use the power to dismiss the government on at least five occasions (for reasons unrelated to a refusal to resign following a vote of non-confidence). See: the Honourable Ronald I Cheffins, "The Royal Prerogative and the Office of the Lieutenant Governor" (2000) 23:1 Can Parliamentary Rev 14.

49 The convention to this effect is magnificently summarized in the famous letter from Sir Alan Lascelles, private secretary to the King, sent to the London *Times* (reproduced in Geoffrey Philip Wilson, *Cases and Materials on Constitutional and Administrative Law*, 2nd ed (Cambridge: Cambridge University Press, 1976) at 22-23:

> In so far as this matter can be publicly discussed, it can be properly assumed that no wise Sovereign — that is, one who has at heart the true interest of the country, the constitution, and the Monarchy — would deny a dissolution to his prime minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another prime minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons. When Sir Patrick Duncan refused a dissolution to his prime minister in South Africa in 1939, all these conditions were satisfied: when Lord Byng did the same in Canada in 1926, they appeared to be, but in the event the third proved illusory… .

On the possibility of another government formation obtaining the confidence of the Lower House as a reason to refuse to trigger elections, see also: Bogdanor, *supra* note 38 at 159-60; Marshall, *supra* note 46 at 39-40; B S Markesinis, *The Theory and Practice of Dissolution of Parliament* (Cambridge: Cambridge University Press, 1972) at 87; de Smith, *supra* note 37 at 105; Eugene A Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1968) at 269; ECS Wade and AW Bradley, eds, *Constitutional Law*, 7th ed (London: Longman, 1965) at 118. On the fact that elections were recently held as a reason to refuse to trigger new elections, see: Heard, *supra* note 36 at 49.

Such would no doubt be the case if the elected Chamber was unable to elect a Speaker of the House.[50]

So if the incumbent prime minister does not obtain the Chamber's confidence or if the prime minister is defeated on a confidence issue relatively early in his or her new term, the Governor General has the duty to find a new prime minister.[51] Looking for this alternative can take several days to a few weeks.[52] However, if the non-confidence motion is "*constructive*" — asserting non-confidence in the government while declaring confidence in one or more other parties for them to form the new government — it seems the Governor General should then follow the Chamber's wishes by asking the incumbent

50 In 1908, after the Newfoundland elections, the Liberal Party and the People's Party *divided equally among themselves the available seats.* The MPs did not succeed in electing a speaker of the assembly. The incumbent Premier then went to ask the Governor for the House's dissolution. The Governor refused. The incumbent Premier resigned and the Governor invited the leader of the People's Party to form the new government. Unable to have a speaker elected for the Lower House, the People's Party leader in turn went to see the Governor to request the House's dissolution. Having exhausted governmental alternatives, the Governor granted the dissolution. The People's Party won the next election with flying colours. See: Roberts, *supra* note 35 at 15.

51 For example, in May 1985, the incumbent Ontarian Progressive Conservative government obtained 52 seats versus the Ontario Liberal Party's 48 and the Ontario New Democratic Party's 25. The government remained in power briefly until the end of June, when a motion of non-confidence was adopted by the Liberals and New Democrats who had entered into a two-year "confidence and supply" agreement (*infra* note 58). The Lieutenant Governor then called upon the Liberal Party leader to form a new government.

This convention regarding the duty to find a governmental alternative is also illustrated by the events that followed the 1923 British elections, at the end of which Prime Minister Stanley Baldwin lost his majority and found himself with a plurality of seats. He remained in post and went before the Lower House to attempt to gain its confidence. Having failed, he resigned along with his government, and the second formation with the most seats was then called upon to form the new government.

52 After the general election, newly elected British MPs took five days to form a coalition which replaced the incumbent government; various experts considered this timeframe to be rather short:

> The five-day government formation period in May 2010 was long in British terms, but remarkably short compared to many other western democracies. Allowing for a slightly slower pace in future might be sensible, since an overly compressed timetable can lead the parties to put to one side difficult decisions or to agree upon policies without sufficient consideration. Certainly, we would not desire months of negotiations as in the Netherlands or Belgium, but two weeks or so, as is common in Scotland, Canada and New Zealand, might strike a sensible balance between the two extreme positions.
>
> (UK, HC, "Political and Constitutional Reform Committee, Lessons from the process of Government formation after the 2010 General Election," HC 528, vol 1 (London: The Stationery Office, 2011), written evidence submitted by the Institute for Government, Ev 66 [UK, "Lessons from the process of Government formation after the 2010 General Election"].)
>
> German observers were horrified at the time taken to form the new UK government. By European standards it was indecently, recklessly short. But even by the standards of other Westminster countries it was rushed. Australia, Canada and New Zealand have typically allowed at least

prime minister to resign and then inviting the persons named in the motion for form the new government.[53]

An incumbent prime minister, seeing that the opposition has obtained a majority of seats, has no obligation to resign "immediately." Yet the *constitutional practice* is that when another party has obtained a *majority* of seats, the incumbent prime minister resigns before the beginning of the next parliamentary session.[54]

A more challenging question, however, *is whether the incumbent prime minister has a duty not to resign* if they observe that they will not be able to form the next government but that, given the distribution of seats among several political parties, there is no clear alternative as of yet. Views on this issue are divided.[55] There is at least one Canadian case in which such a duty, should it

---

10 days for the formation of a new government after an election. It took 17 days before Julia Gillard formed her new minority government after Australia's September 2010 election.
(*Ibid*, written evidence submitted by Professor Robert Hazell & Ben Yong, Constitution Unit, University College London, Ev 71.)

In modern times, the longest period required for the choice of a party leader having to form the next government following a general election in the United Kingdom was six weeks. That's how long it took the Labour Party to obtain its first (minority) government in 1923, as discussed in the previous note. (Rodney Brazier, *Constitutional Practice: The Foundations of British Government*, 3rd ed (Oxford: Oxford University Press, 1999) at 30.)

53 Republic Advisory Committee, *The Options*, *supra* note 46 at 249; Constitutional Commission, *Report on Executive Government*, *supra* note 46 at 41, Practice 7; Butler, *supra* note 46 at 132; George Winterton, *Monarchy to Republic* (Sydney: Oxford University Press, 1994) at 43.

54 UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.12.

55 On caretaker conventions, the NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.16 states:

> On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or *(after an election) until a government is sworn in following the government formation process* [emphasis added].

The Manual is even more explicit at para 6.43, *ibid*:

> Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is sworn in, at which time the incumbent prime minister will advise the Governor-General to accept the resignations of the entire ministry.

However, the UK *Cabinet Manual 2011, supra* note 12 at para 2.10 states:

> The application of these principles depends on the specific circumstances and it remains a matter for the prime minister, as the Sovereign's principal adviser, to judge the appropriate time at which to resign, either from their individual position as prime minister or on behalf of the government. Recent examples suggest that previous prime ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. It remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention.

A footnote also states the debate having led to this position in the following terms:

> It has been suggested in evidence to select committees that the incumbent prime minister's responsibility involves a duty to remain in office until it is clear who should be appointed in their place (UK, "Lessons from the process of Government formation after the 2010 General

exist, was not performed: It was when Prime Minister St-Laurent resigned following the 1957 general election in which the Liberal Party of Canada had obtained fewer seats than the Progressive Conservative Party. Since no party had obtained a majority of seats,[56] it was not immediately clear whether a change in government was in order. Prime Minister St-Laurent's resignation could have been seen as premature. Yet the Progressive Conservative Party managed to form a minority government which lasted approximately nine months, making it possible to see Prime Minister St-Laurent's resignation as an adequate interpretation of the parliamentary situation.[57]

In the United Kingdom, While Gordon Brown was facing pressure to resign earlier by certain members of the media, and while the Cabinet Office and Buckingham Palace officials wanted him to remain in post a little longer, the Political and Constitutional Reform Committee of the House of Commons came to the conclusion that Brown's decision to resign following the 2010 elections in which the Conservatives had not yet finalized their agreement with the Liberal Democrats was adequate.[58] Nevertheless, since it was already clear that the future government — no matter its final composition — would be headed by Conservative leader David Cameron, no certain precedent was set, except for the possible proposition that if a duty to remain exists, it may last only until

Election", *supra* note 52 at paras 16-22). Whether the responsibilities of the prime minister in these circumstances amount to a duty and how far they extend has been questioned, and the House of Lords Constitution Committee concluded that an incumbent prime minister has no duty to remain in office following an inconclusive general election until it is clear what form any alternative government might take. (UK, HL, "Constitution Committee — Twelfth Report: The Cabinet Manual", HL107 (London: The Stationery Office, 2011) at para 61) [UK, "Twelfth Report: The Cabinet Manual"].

56 The Conservative-Progressive Party had obtained 111 seats, the Liberals, 104, the Social Democratic Party of Canada (*Co-operative Commonwealth Federation*) had won 25 seats, the Social Credit Party of Canada had 19 seats, and 6 independent MPs ran under various banners more or less associated with the two main parties (Liberal-Labour Party (1), independent Liberal (2), independent Conservative (1) or simply "independent" (2)). See Parliament of Canada, "History of federal ridings since 1867 — General Elections — 23rd Parliament", online: <www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=23&ridProvince=0&submit1=Recherche&Language=E>.

57 Hogg, *supra* note 36 at 9.7(b). Let us note, in other respects, that if this Progressive Conservative government lasted only about nine months, that is because Prime Minister Diefenbaker himself asked the governor general to trigger new elections. The Prime Minister then obtained one of the largest majorities in federal parliamentary history, with 208 seats out of 265 (See Parliament of Canada, "History of federal ridings since 1867 — General Elections — 24th Parliament", online: <www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Search=Gres&genElection=24&ridProvince=0&submit1=Recherche&Language=E>.

58 UK, "Lessons from the process of Government formation after the 2010 General Election", *supra* note 53 at paras 3, 19-25.

the identity of the prime minister's successor is clear.[59] A few months later, the same House of Commons committee concluded in another report that "[t]he evidence indicates that there is a continuing dispute over the extent to which a Prime Minister has a duty to remain in office when it is unclear who else might be best placed to lead an alternative government."[60]

As a result, in the case where it is not immediately clear who will form the next government, it would be wise on the part of the Governor General to encourage the incumbent prime minister to delay their resignation until the question will have been satisfactorily answered, even if that means temporarily not accepting the prime minister's resignation. It goes without saying that the opinion of the incumbent prime minister who concedes they cannot continue to lead the government could not be binding upon the Governor General on the issue of the formation of the next government. This incumbent prime minister cannot enjoy the presumption that they enjoy the confidence of the elected Chamber. However, such an opinion could be useful in evaluating viable options. The two main advantages in keeping the incumbent prime minister in place in cases where the composition of the government is uncertain are to avoid (1) a government vacancy *and* (2) a hasty decision by the Governor General with regards to the formation of the new government to remedy such a vacancy. We must not forget that it is the Governor General's duty to ensure the Crown has a government at all times and that there is no gap in the exercise of power for a period longer than the few minutes — or, at worst, hours — required for the incumbent prime minister's resignation, its acceptance and the next chosen person's swearing-in.

In light of this, we can draw the following conclusions:

- The incumbent government can, according to the applicable constitutional conventions, attempt, should it so wish (without being obligated to), to obtain the confidence of the elected Chamber in each of the following circumstances: It has more MPs than every other individual party, it has fewer MPs than one or several other parties, or it has the same number of MPs as another party.[61]

59 *Ibid*.

60 UK, HC, "Constitutional implications of the Cabinet Manual: Sixth Report of Session 2010-11," HC 734, vol 1 (London: The Stationery Office, 2011) at para 74.

61 See the analysis of the 1908 Newfoundland general election, *supra* note 47.

The latter scenario recently occurred in the 2010 Australian general election and, the same year, in the general election of the State of Tasmania. Indeed, the Australian general election had granted the incumbent Labour government the same number of seats as the Liberal/National Coalition. Through a "confidence and supply" agreement entered into with an MP from the Green Party

- Yet if the incumbent government obtains less than a majority of seats, the result of such an attempt to obtain the elected Chamber's confidence is uncertain and will depend on the decisions made by the other parties represented within the elected Chamber.

- In the scenario where the incumbent government attempts to obtain the confidence of the elected Chamber following a general election and this attempt succeeds, the incumbent government remains in power.

- Should the incumbent prime minister (and thus their government) resign without attempting to obtain the confidence of the elected Chamber following a general election, the incumbent government no longer remains in power.

- Should the incumbent prime minister fail to obtain the confidence of the elected Chamber following a general election, the incumbent government cannot remain in power. This, however, probably does not exclude the possibility for the incumbent government to form a new government following a subsequent "confidence and supply" agreement with one or more other parties or a coalition agreement (these issues will be examined in the next section).

2. The convention regarding the duty of the Governor General to appoint the party leader most likely to enjoy the confidence of the elected Chamber as prime minister

Must the Governor General simply name the leader of the party that has obtained the highest number of seats, whether it consists in a majority or a simple plurality of seats? Or must they name the leader of a party which, although it has not obtained the highest number of seats, is nevertheless in a better position to *obtain* the support of a majority or plurality[62] of the elected Chamber? This

and four independent MPs, the Labour Party was finally able to control the House with 76 seats versus 74 (one independent MP and another from the National Party of Western Australia took the opposition's side). A little later, one member of the coalition accepted the position of Speaker of the House in replacement of a Liberal MP, thus allowing the latter's party to hold 76 seats versus 73 instead of 75 versus 74.

In the case of the Tasmanian State's general election, the Labour Party and Liberals both won 10 seats while the Green Party secured 5. See Anne Twomey's analysis of this issue, *supra* note 46, at 19-25.

62 There are essentially five possible forms of support to a minority party for the formation of a government: (1) *ad hoc* support depending on the particular topic covered by the vote; (2) agreement not to vote against the government on confidence issues (favorable vote or abstention); (3) "confidence and supply" agreement in which the ally party undertakes to vote in favour of the minority

question arises because it is possible for the party having obtained a plurality of seats to be unable to count on the support of a sufficient number of MPs from other political parties to ensure a majority support in a vote of confidence.

Commentators have stated that there is a constitutional convention according to which Her Majesty or her representatives should, if the incumbent prime minister is unable to remain in post, automatically invite *the* opposition party having obtained *the highest number of seats* in the general election to form the government.[63] We, however, believe that the practice of naming the leader of the party that has obtained the highest number of seats as prime minister is based on the custom of majority governments. It is merely a heuristic, not a constitutional convention. *In no way whatsoever does it take into account the possibility that some alliance may have a better opportunity to obtain the majority support of the elected Chamber than a single party holding a plurality of seats.* Indeed, Geoffrey Marshall wrote that the "proposition that the Leader of the Opposition must always be sent for is clearly incompatible with the consideration of coalition as being on an equal footing with minority government."[64] If Sir Ivor Jennings believed such a practice allowed the demonstration that Her Majesty was impartial in determining a new government,[65] this can only be done at the risk of being forced to choose a party that has no chance of obtaining the confidence necessary for the government to function and that is already condemned to fail, as all could know before it even attempts to obtain the assembly's confidence. The automatic nature of the supposed convention makes its *raison d'être* vanish by imposing governmental instability and undermining the credibility of Her Majesty and her representatives. And as we will see later on, there are many other mechanisms to demonstrate the impartiality of Her Majesty or her representatives during the selection of a new government.

Consequently, although this is a controversial issue, we believe that the practice of naming the leader of the party having obtained a plurality of seats has not transformed into a constitutional convention. In fact, it is our belief that there is no conventional rule automatically dictating which party leader must form the government when no party obtains the majority of Parliament's elected seats.[66]

---

government on these issues; (4) coalition by which members of the ally party gain access to the Cabinet; (5) party fusion.

63 See the list of authors identified by Anne Twomey, *supra* note 46 in fns 15-18 and the accompanying text.

64 Marshall, *Constitutional Conventions, 1984*, *supra* note 46 at 34.

65 Sir I Jennings, *Cabinet Government*, 3rd ed (Cambridge: Cambridge University Press, 1961) at 32.

66 See Brazier, *supra* note 52 at 31:

> It seems from all this that there are no "rules" about government formation from a hung

The actual issue revolves around the capacity for one party to secure the elected Chamber's confidence. Which standard applies here? Is it a matter of how predictably the elected Chamber's confidence can be *obtained*, or how predictably it can be *maintained* for a reasonably long period?

The Governor General, to avoid being perceived as taking part in partisan politics, must let those who have been elected solve the issue of figuring "who has the best chance to enjoy the confidence of the legislative assembly" and what interpretation should be made of the maxim's requirement.[67] The *NZ Cabinet Manual 2008* sums up well the steps to take with their necessary adaptations:

> 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).

Like the New Zealand manual, the British one highlights that the Sovereign is not limited to the information received from the incumbent prime minister and adds that elected parties have a duty to inform the Palace regarding the negotiations underway:

> Where a range of different administrations could potentially be formed, political parties may wish to hold discussions to establish who is best able to command the confidence of the House of Commons and should form the next government. The Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed. This could be done by political parties or the Cabinet Secretary. The Principal Private Secretary to the prime minister may also have a role, for example, in communicating with the Palace.

It is also clear that even though the Governor General can communicate with all elected parties and obtain all information deemed necessary, the number of votes obtained by each party should not be considered when making a

---

Parliament. Such uncertainty in an area of major importance in the constitution may cry out for regulation, but the only "rule" in such circumstances is open-ended and unhelpful, namely that in choosing a prime minister the Queen should commission that person who appears best able to command the support of a stable majority in the House of Commons, or, failing such a person, that politician who seems able to form a government with reasonable prospect of maintaining an administration in office.

67 NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.37: "The process of forming a government is political, and the decision to form a government must be arrived at by politicians."

decision.[68] Hence during the 2010 British elections, the leader of the Liberal Democrat party stated that "whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties"; this statement was repeated in footnote 8 in the discussion draft for the *UK Cabinet Manual*, in the section on negotiations between the parties.[69] The inclusion of this note was severely criticized, as it seemed to suggest that this was a convention, while many agreed it was not.[70] The government's report on the consultation regarding the manual indeed states that "[a] number of responses suggested that footnote 8, which expressed the negotiating position of the Leader of the Liberal Democrats should be removed as it may be confusing."[71] In response, the government clarified as follows: "The footnote at paragraph 49 of the *Draft Cabinet Manual* was included in the draft to provide some context following the general election last year. The footnote has not been included in the final version of the *Cabinet Manual*."[72]

As for Prime Minister Stephen Harper, he essentially argued during the events which led Parliament's prorogation in 2008, that (1) general elections lead to the election of a prime minister; (2) the party having obtained the most seats "has won" and has the right to form the government; (3) the prime minister cannot be replaced by the leader of another political party without new elections being held; and (4) a coalition must have campaigned as such and its members must hold a majority of seats to form the government.[73] Elements (1), (3) and (4) are clearly wrong from a constitutional standpoint, and seem to offer rhetoric to convince the public rather than an assertion of proper constitutional propositions. Point (2) seems to register along the same lines. Given the fact that very few members of the public know how our institutions function,[74] this all seems to support the thesis that these were partisan statements aimed at convincing a volatile public opinion at the time of a possible loss of power to

68 UK, Cabinet Office, *The Cabinet Manual — Draft: A Guide to Laws, Conventions, and Rules on the Operation of Government* (2010), online at 26: <www.gov.uk/government/publications/cabinet-manual>.

69 *Ibid.*

70 See, among other documents, the report from the House of Lords on the draft Manual: "We agree that the statement contained in the footnote to paragraph 49 of the draft Manual does not reflect the current constitutional position on which party has the first right to seek to govern. The footnote should therefore be removed" (UK, "Twelfth Report: The Cabinet Manual", *supra* note 55 at para 63).

71 UK, HM Government, *Government response to comments received on the Draft Cabinet Manual* (October 2011), online at para 44:<www.gov.uk/government/publications/cabinet-manual>.

72 *Ibid* at para 46.

73 See especially Russell, *supra* note 46 at 141.

74 See Ipsos Reid, *supra* note 3.

a coalition and that these statements in no way reflected the state of Canadian constitutional conventions.

During the 2015 general election, CBC news anchorman Peter Mansbridge interviewed the then-leaders of Opposition and asked them their views on the issue. During the interview, Thomas Mulcair, then Leader of the Official Opposition, was asked: "does the party in a minority situation that winds up with the most seats have the automatic right to govern?"[75] Mulcair replied that "under our system of government, that would normally be the case. But there are constitutional conventions that are, that are complex, that are historically applied differently. I think that my adversaries take the approach that you've just described and it's certainly the one that I would take."[76] The interviewer tried to clarify by suggesting to Mulcair that "so whoever has the most number of seats should have the right to govern," but the latter responded that "It's a complex constitutional convention, as you know. There have been instances in the past where governments have tried to hold on."[77] As for Justin Trudeau, then leader of the second opposition party, when asked whether it was his belief that "that whatever party has the most number of seats has the right to try to govern at that point" responded "that's the way it's always been, whoever commands the most seats gets the first shot at governing" and repeated once again that "[w]hoever gets the most seats gets the first shot at trying to command the confidence of the House."[78] But, when pressed by Mansbridge who told him that "well actually the first shot goes to the outgoing party," Trudeau accepted the suggestion by replying "[t]o the outgoing Prime Minister, absolutely."[79] These ambiguous statements are certainly not sufficient to demonstrate the acceptance of a convention providing that the leader of the party controlling a plurality of seats enjoys the right to first test the confidence of the elected Chamber. The context in which such statements were made also point to partisan propositions directed at delegitimizing a possible attempt by the incumbent government to remain in power if no party were to win a majority. One always has to be careful with self-serving state-

75 CBC News, "Full text of Peter Mansbridge's interview with Thomas Mulcair", *CBC News* (9 September 2015), online: <www.cbc.ca/news/politics/canada-election-2015-tom-mulcair-full-interview-transcript-peter-mansbridge-1.3221262>.

76 *Ibid.*

77 *Ibid*.

78 CBC News, "Full text of Peter Mansbridge's interview with Justin Trudeau", *CBC News* (8 September 2015), online: <www.cbc.ca/news/politics/canada-election-2015-justin-trudeau-interview-peter-mansbridge-full-transcript-1.3219779>.

79 *Ibid*.

ments when trying to identify to what rules the relevant actors believe themselves to be conventionally bound.

If the Governor General cannot rely on precise rules dictating ahead of time which party should form the government and cannot rely on the number of votes obtained, how can they choose the leader called upon to form the government? The answer is both simple and complex: *The Governor General has the conventional duty to let, to the extent possible, the political parties and their leaders determine among themselves who must form the government following a general election.*[80] The Governor General can encourage the parties to reach an agreement. To incentivise parties to reach a minimally stable government following a general election in which no party has obtained a majority of seats, the Governor General could inform the parties that they have no intention to call again a new general election if the incumbent government so requests,[81] or if the incumbent or newly elected government fails quickly due to its inability to obtain or keep the elected Chamber's confidence. And so the Governor General would only call a new general election if no other alternative were available (and if the elected Chamber is not functional).[82] The parties would then have an incentive to judge which party or combination of parties has the best chance of enjoying confidence over a longer period. If the process draws out, the Governor General can also put pressure on the parties by delaying the signature of decrees submitted by the "caretaker government" until negotiations are concluded.

Although this all seems simple, the convention's application is not without complications. Indeed, what should be done if the parties do not agree among themselves to name the next government? For example, what is to be done if the party holding a plurality of seats says it wants to form a minority government on its own while two or several parties whose combined seats would form a new plurality or even a majority enter into a collaboration agreement and

80 See NZ, *Cabinet Manual 2008*, *supra* note 11 at para 6.37, text quoted in n 64; the UK, *Cabinet Manual 2011*, *supra* note 12 at para 2.9, text quoted in n 40; Brazier, *supra* note 52 at 33:

> In such a situation it is suggested that the guiding light ought to be that the political crisis should if possible be resolved by politicians — in a phrase, that there should be political decisions, politically arrived at.

81 This is precisely what the Governor of Tasmania did following the 1989 general election. The incumbent government's party had only obtained 17 seats versus 15 for the Labour Party and 5 for the Green Party. According to Anne Twomey, *supra* note 46 at 13, the general viewpoints of commentators were favorable to this statement by the Governor. She relies on, among others: Winterton, "Tasmania", *supra* note 46 at 429, and Brian Galligan, "Australia" in David Butler & DA Low, eds, *Sovereigns and Surrogates — Constitutional Heads of State in the Commonwealth* (Basingstoke: Macmillan, 1991) 61 at 92-97.

82 See *supra* note 49.

also want to form the government? Those are not easy questions. In fact, these questions are so problematic that the Governor General should avoid having to answer them personally. As Walter Bagehot famously declared: "The Sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, and the right to warn."[83] This list seems to leave out the reserve powers which can be exercised only when the Monarch has no choice but to do so. This is because the principle according to which the Monarch reigns but does not govern, combined to the constitutional principle of parliamentary democracy, gives the Monarch only a minimal role. The solution could be that the Monarch (or its representative) proposes to parties — while staying non-partisan — a mechanism to solve the issue while avoiding a personal choice between all possible solutions. The Governor General could then invite MPs to use a parliamentary procedure of governmental investiture. This procedure is not yet common in Canada, but it has been useful in other Westminster-type parliamentary systems, and it requires no major constitutional or legislative amendment. As Professor Robert Hazell and Akash Paun note:

> This conventional mechanism for testing confidence suffers from its obscure nature, which does not facilitate understanding of the process by which the government is formed amongst the general public. It might therefore be preferable for the House of Commons to hold an "investiture vote" as in Scotland and many other countries, which would require MPs to vote on who should lead the new government. This change would not require any legal or constitutional change, as it could be on a motion that simply made a recommendation to the monarch on whom to appoint as PM.
>
> If the election result were very close indeed, such that two party leaders both had plausible grounds to claim the ability to form a government, the debate on the investiture motion would offer an opportunity for the two aspiring PMs to make their cases, and for the parties holding the balance of power to explain their reasons for backing one or other of the candidates. It would therefore also have benefits in terms of accountability and transparency, helping to meet critics' concerns that government formation following an inconclusive election takes place largely behind closed doors, especially if it involves negotiations with minor or third parties.[84]

---

83 Walter Bagehot, *The English Constitution*, 2nd ed (London: Chapman and Hall, 1873) at 85.

84 Hazell & Paun, *supra* note 10 at 83. See *Scotland Act 1998*, c 46 (UK), art 46:

46 Choice of the First Minister.

(1) If one of the following events occurs, the Parliament shall within the period allowed nominate one of its members for appointment as First Minister.

(2) The events are —

(a) the holding of a poll at a general election,

(b) the First Minister tendering his resignation to Her Majesty,

This would facilitate a majority decision and would avoid any perception of partisanship on the part of the Governor General.

The use of such a mechanism, no matter how wise, is certainly not a constitutional obligation. So what should be done if the parties refuse to use this process or if the investiture does not succeed in settling on a single governmental option? Ultimately, if political parties are unable to determine who should form the government following general elections, the Governor General, after significant effort to encourage parties to settle the issue, will have to use his or her own judgment regarding the situation as a whole, and comply with their duties to ensure the preservation of the Crown's legitimacy and guard the state's stability. Such a situation is excessively risky for the preservation of the Governor General's legitimacy, and it should be avoided to the extent possible. Yet no one is bound to do the impossible. Here are a few arguments which the Governor General could use as support in making a decision in the hypothetical context where parties represented within the elected Chamber after a general election do not succeed in agreeing among themselves on who should form the government:

- It could be wise to start by inviting the incumbent prime minister to attempt to obtain the elected Chamber's confidence, since he or she has the right to attempt to secure the Chamber's confidence.
- If the incumbent government fails or refuses to obtain the elected Chamber's confidence and resigns, the Governor General must then turn to the other political parties. At this stage, nothing is automatic; no party has a constitutional right or a conventional power to demand to attempt to form a government.

(c) the office of First Minister becoming vacant (otherwise than in consequence of his so tendering his resignation),

(d) the First Minister ceasing to be a member of the Parliament otherwise than by virtue of a dissolution.

(3) The period allowed is the period of 28 days which begins with the day on which the event in question occurs; but —

(a) if another of those events occurs within the period allowed, that period shall be extended (subject to paragraph (b)) so that it ends with the period of 28 days beginning with the day on which that other event occurred, and

(b) the period shall end if the Parliament passes a resolution under section 3(1)(a) or when Her Majesty appoints a person as First Minister.

(4) The Presiding Officer shall recommend to Her Majesty the appointment of any member of the Parliament who is nominated by the Parliament under this section.

See also *Government of Wales Act*, 2006 c 32 (UK), art 47.

- If none of the parties is able to agree with the others to obtain their support,[85] it is plausible that the only remaining solution would be a minority government formed by the party holding the plurality of seats.

- If a party obtains the support of one or more parties and is able to control a majority of seats, it will form the government, as the applicable rules would then be those of a majority government, according to which the party controlling the majority of seats should form the government.

- If however, on one hand, a party succeeds in obtaining the support from one or more other parties, thus controlling a plurality of seats and that, on the other hand, the party which has the largest number of seats of all parties taken individually also seeks to form the government, their competing claims to form the government will be left to the judgment of the Governor General. In exercising this judgment, he or she can no doubt take into account the nature of the support received by the first party, the significance of the plurality thus obtained by that first party compared to the representation of the single largest party, etc. The less significant the plurality obtained by the first party and its allies, the less the nature of the support given to this first party by its allies will be robust, the more elements could favour the party having obtained a plurality of seats on its own. The stability of a government made up of MPs from a single party could then win over the broader representative nature of a government comprised of a larger number of MPs, but which rests on a less certain alliance between various political parties. Conversely, the more significant the plurality obtained by the first party and its allies, the more robust the nature of the support given to this first party by its allies, the fewer the elements could favour the single party with a view to forming the next government. To reiterate: there is no automatic formula in this matter.

The clearer it will be, both for politicians and members of the public, that it is first the responsibility of political parties and their leaders to determine which party or parties can command the elected Chamber's confidence, the more it will be possible for the Governor General to maintain an appearance of impartiality if, in the end, parties are unable to solve the matter and must rely on his or her judgment.

85 For possible forms of agreement, see *supra* note 59.

Conclusion

This article has sought to demonstrate the extent to which the heuristic too often used by the media to describe who must form the government in our parliamentary system ("the party which has won the highest number of seats") is an oversimplification that may cause systematic errors. As we mentioned in the introduction, we hope this paper will contribute to the goal of "informing politicians, academics and voters about the role of … conventions in our parliamentary democracy."[86] A better understanding of logic behind the constitutional rules and principles governing the formation of government is a much better guide than the misleading heuristic which is over-used. Parliamentary democracy, a principle entrenched in our Constitution, demands that the choice of government belongs first and foremost in the hands of all elected MPs, and no one else's. If everyone better understood all the mechanisms that lead to the formation of government, our democracy could only function better.

This way, the governors general will be able to better accomplish their role, as everyone will understand that their true role in government formation does not follow one extreme belief or the other — that, on one hand, it is false to believe that the Governor General has no role to play whatsoever in selecting the government, the mechanism being automatic and, on the other hand, it is also false to think the Governor General must decide the government's composition as soon as parties have difficulty reaching an agreement in this regard.

We finish by stressing that although this article has used the political experience of other Commonwealth member states with which we share a Westminster-type parliamentary system, it would be most useful in improving the way our parliaments function to broaden our horizons and take instruction from more recent parliamentary systems which have attempted to avoid the pitfalls our older institutions have encountered. Indeed, our parliaments would benefit from various measures aimed at "rationalizing" our parliamentarism so that not only government formation, but also government survival and falls, are more in harmony with the democratically expressed will of the elected Chamber members who hold democratic legitimacy in our constitutional system.

86 See *supra* note 19 and accompanying text.

APPENDIX:
Outline of the rules applicable to government formation

According to the applicable constitutional conventions, the incumbent government can attempt, should it so wish (without being obligated to), to obtain the confidence of the legislative assembly in each of the following circumstances:

It has more MPs than each of the other parties individually, it has the same number of MPs as another party, or it has fewer MPs than one or several other parties.

The incumbent government that obtains a majority of seats as part of a general election can remain in power since its majority ensures, in principle, that it will enjoy the Chamber's confidence when the first parliamentary session opens.

Yet if the incumbent government obtains less than a majority of seats following a general election (or if extraordinary circumstances make it lose its majority after elections but before the first parliamentary session opens[87]), the result of an attempt to obtain the legislative assembly's confidence is uncertain and depends on the decisions made by the other parties represented within the Chamber. As such, it will not be possible to know which political party or parties will form the government upon a simple reading of electoral results when these do not correspond to a majority government situation.

In the scenario where the incumbent government attempts to obtain the confidence of the legislative assembly following a general election (whether or not it holds a majority) and this attempt succeeds, the incumbent government remains in power.

In the scenario where the incumbent prime minister resigns following elections, the entire Cabinet resigns as well and the incumbent government no longer enjoys the constitutional benefit of being the first to attempt to obtain the confidence of the legislative assembly. The party that formed the incumbent government then finds itself in the same situation as any other party and is thus subject to the same rules as regards the determination of who should form the next government.

87 This could happen in a hypothetical situation in which one or more MPs die or resign between the time of their election and the beginning of the first parliamentary session, making the incumbent government lose the majority of seats at the first vote of confidence it must face.

Should the incumbent government's attempt to obtain the confidence of the new legislative assembly fail, the incumbent government must resign. This does not, however, exclude the possibility for the incumbent government's party to form a new government or to take part in a new ministry following a support agreement with one or more other parties, thus ensuring that the new government enjoys the confidence of the legislative assembly.[88]

In the scenario where the incumbent party does not remain in government for whatever reason, no constitutional convention sets out that the Governor General is bound to automatically invite the leader of the party having obtained the plurality of seats to form a government. Since the process is not automatic, it is not possible to determine who will form the new government simply by looking at the number of seats obtained by each party.

It is therefore impossible to determine ahead of time who will form the new government in the case where a party other than that which formed the incumbent government obtains more seats than each of the other parties taken individually without controlling a majority.

A fortiori, it is also impossible to determine ahead of time who will form the government in a scenario where two or more parties other than that of the incumbent government get the same number of MPs elected when this number is higher than that of the incumbent government, since there is no constitutional rule dictating in advance which political party or parties must form the government when no party holds a majority of elected Parliament seats.

In the event where a party that has not obtained a majority of MPs nevertheless obtains the support of one or more parties and is then able to control a majority of seats, it can form the next government, because the constitutional convention according to which the party controlling a majority of seats should form the government will apply. It matters little whether this party is the one which won a plurality of seats; what matters is the fact that it is able to command the confidence of a majority of MPs.

If no party holds a majority of seats, the Governor General has the conventional duty to let the political parties and their leaders determine among themselves who must form the government following a general election. Choosing the party that must form the government is a responsibility lying first with the MPs.

88 See *supra* note 59 for the various forms of these support agreements.

Should no party obtain a majority of seats and should MPs be slow to determine who should form the new government, the Governor General has certain practical means to encourage the MPs to fulfill their responsibility. He or she can, for example, put pressure on parties by delaying the signature of decrees submitted by the "caretaker government" until a new government is formed.

In the case where an agreement between two or more political parties to form an "alliance"[89] only results in the control of a plurality – not a majority – of seats, it then becomes the responsibility of all political parties represented in the legislative assembly to determine the significance they give to such as agreement in the political process leading to their choice of a new government. No convention determines who should have priority in forming the government between such an alliance holding a plurality of seats and the party which, prior to the alliance, had obtained a plurality of seats. In the end, if political parties are unable to determine who must form the new government, the Governor General will, unfortunately, be forced to decide. In such a context, the Governor General can certainly use his or her judgment to determine who should form the new government, taking into consideration, among other elements, (a) the nature of the support given to a party thanks to a support agreement with allies who bring it a plurality of seats, and (b) the extent of the plurality of seats on which such an alliance can count compared with that of the party having obtained a plurality of seats when each party's results are considered individually. The less significant the alliance's plurality and the less robust the nature of the support given, the more elements could favour the party having obtained a plurality of seats on its own. The stability which can be offered by a government made up of MPs from a single party could then win over the broader representation which could be offered by a government comprised of a larger number of MPs, but which would rest on a less certain alliance between various political parties. Conversely, the more significant the alliance's plurality and the more robust the nature of the support, the less elements could favour the single party with a view to forming the new government. We reiterate that there is no automatic formula in this matter.

In the case where, following negotiations between the parties represented in the legislative assembly, it becomes clear that the parties are unable to determine by themselves who must form the new government, the Governor General must use his or her own judgment, taking into consideration the entire situation, and comply with his or her duties to ensure the maintenance of

89 On the diversity of possible alliances and their multiple degrees of integration, see *ibid*.

the Crown's legitimacy and defend the state's stability. He must then invite, in complete impartiality, the leader of the party deemed best poised to obtain the legislative assembly's confidence. It is clear that although the Governor General communicate with all elected parties and obtain all information deemed necessary, the number of votes obtained by each party should not be considered in making a decision.

In the case where parties do not succeed in determining who should form the new government and where the Governor General ultimately comes to the conclusion that no party can obtain the legislative assembly's confidence, the Governor General can, as a last resort, dissolve the assembly and trigger a new general election.