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Greg Clarke

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Kimberly Hay

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Kimberly Hay
ccs@law.ualberta.ca
(780) 492-5681

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Centre for Constitutional Studies
448D Law Centre
University of Alberta
Edmonton, AB T6G 2H5
Canada
(780) 492-5681 (phone)
(780) 492-9959 (fax)
ccs@law.ualberta.ca
www.law.ualberta.ca/centres/ccs

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Centre for Constitutional Studies
448E Law Centre
University of Alberta
Edmonton, AB T6G 2H5
Canada

ccs@law.ualberta.ca
(780) 492-5681

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Rebuttal to Edmund A. Aunger, "The Constitution of Canada and the Official Status of French in Alberta"

Ken Munro*

In a *Canadian Parliamentary Review* article "The Constitution of Canada and the Official Status of French in Alberta,"[1] Professor Edmund Aunger contends that French is an official language of Alberta and that this status is entrenched in the Canadian Constitution. Since the Supreme Court of Canada ruling in *R. v. Mercure*,[2] which held that Saskatchewan (and by implication Alberta) was officially bilingual but could amend its constitution unilaterally with respect to language, new evidence has come to light which calls into question the right of Alberta and Saskatchewan unilaterally to remove French as an official language of the province. Aunger claims that he has discovered that the official status of French dates from 1835 in Rupert's Land and the North-Western Territory, and that that status was carried over into Confederation in 1870 through section 23 of *The Manitoba Act, 1870*[3] when these lands were acquired by Canada. This federal legislation, Aunger argues, entrenched bilingualism in the province of Manitoba and all of the remainder of Rupert's Land and the North-Western Territory. For Alberta, this status was confirmed through amendment to the *North-West Territories Act, 1877*[4] and the *Alberta Act*[5] of 1905. Based on a careful study of the history of this period, it is evident that Aunger has misunderstood "the historical origins and constitutional foundations of linguistic duality in Canada."[6]

Aunger insists that French had "a status recognized in law and in fact"[7] in the District of Assiniboia from its creation in 1835, because the use of French was permitted at meetings of the Council of Assiniboia, before the courts in the District of Assiniboia, and because petitions were accepted and laws were often printed in French and English. Based on a statement by George Cartier that French was an "official language" of Rupert's Land and the North-Western Territory,[8] Aunger assumes that French was a constitutionally guaranteed linguistic right, which could only be removed through a proper process of constitutional amendment. He insists that the Parliament of Canada guaranteed the people of Rupert's Land and the North-Western Territory that this linguistic right would be carried over into the Canadian Constitution once Canada had acquired these territories.[9] The process for this transfer would occur under section 146 of the *Constitution Act, 1867*,[10] formerly called the *British North America Act, 1867*. Under section 146 of the *Constitution Act, 1867*, the Canadian Parliament — through a formal Address to the Queen — was required to indicate to the people of Rupert's Land and the North-Western Territory the terms and conditions of their entry into Confederation and, if the Queen (effectively the United Kingdom government) approved these measures by order-in-council, the Dominion of Canada would be permitted to acquire this vast expanse of land. According to Aunger, French linguistic rights formed part of the 1867 Address to the Queen requesting the admission of Rupert's Land and the North-

Western Territory to the Dominion of Canada,[11] otherwise she would not have permitted Canada to acquire those lands. In using the process laid out in section 146, Aunger goes on to argue, Canada committed itself to bilingualism in this vast region, and French language rights were "recognized and entrenched" in the Constitution of Canada for the benefit of the whole area from what would become Labrador through the Yukon and to all of the provinces and territories in between.[12]

A recent case before the Court of Appeal for the Northwest Territories, *Yellowknife Public Denominational District Education Authority v. Euchner*,[13] sheds light on the flaws of Aunger's argument. Although the case before the Northwest Territories appeals court focused on schooling, the court's analyses and conclusions about Parliament's *1867 Address*, and the Queen's responding 1870 order-in-council,[14] challenge Aunger's views with respect to linguistic rights. The Court of Appeal noted that "the *1867 Address* sets out the undertakings the Parliament of Canada was willing to assume as a condition of the transfer of the North-Western Territory and Rupert's Land to Canada."[15] In its decision, the court stated that "Parliament's obligations, if any, relate only to its agreeing to govern and legislate for the territories, protect legal rights through courts of competent jurisdiction and settle aboriginal land claims."[16] (It should be noted that French linguistic rights were not specifically mentioned in either the *1867 Address* or the *1870 Order*.) Furthermore, the court was firm in insisting that "even if some parts of either or both the *1870 Order* and the *1867 Address* could be construed as terms and conditions obliging Parliament to enact legislation, the precise content of that legislation would still fall wholly within Parliament's discretion, there being no intention to constrain the exercise of that legislative authority."[17] While the court was addressing denominational school rights in its decision, the same reasoning would apply to linguistic rights: "the absence of explicit language of entrenchment in the 1870 Order militates strongly against construing it as entrenching such rights."[18] As the court concluded, "[n] either the imperial Parliament nor Canada's Parliament could have intended to entrench as a right in the *1870 Order* something neither they, nor her Majesty, chose to include as a subject matter therein."[19]

Besides misconstruing the import of the *1867 Address* and the *1870 Order*, Aunger misconstrues the significance of the Royal Proclamation of 6 December 1869[20] (addressing the Red River Colony) and the purported promises made by Prime Minister John A. Macdonald's envoy to the colony, Donald Smith, which Aunger claims bound the Canadian government to respect existing linguistic rights in Rupert's Land and the North-Western Territory by entrenching French linguistic rights for the newly acquired territories in the Constitution of Canada.[21] Several difficulties arise with Aunger's argument. First, he fails to place the proclamation in its proper historical context. The purpose of the proclamation was to encourage those Métis engaging in armed resistance to governmental authority in Red River to lay down their arms and return to their homes. The proclamation informed the insurgents "that in case of your immediate and peaceable obedience and dispersion, I shall order that no legal proceedings be taken against any parties implicated in these unfortunate breaches of the law."[22] Since the Métis in revolt were more concerned with direct talks with Ottawa than with promises set forth in a proclamation, the document was never presented to the residents assembled as a convention in Red River. Even Louis Riel, the architect of the resistance in Red River —whom Aunger fails to mention at all in his article — only saw a copy of the document itself at the residence of Bishop Taché on 11 March 1870, as delegates from the colony were preparing to go to Canada to enter into discussions about entry into Confederation.[23]

Furthermore, the Alberta Court of Queen's Bench ruled in *R. v. Jones*[24] that claims under Royal proclamations can only be enforceable when implemented or sanctioned by legislation. In the case of the Royal Proclamation of 6 December 1869, neither the Crown nor the people of Manitoba nor the Northwest Territories referred to it during the process of passing, or following the passage of, the *Manitoba Act, 1870* and the *North-West Territories Act* of

1875.[25] Never was this proclamation acted upon by any party in reliance on alleged rights and never has any court case referred to this proclamation as an authority for any rights. In fact, when the matter of the proclamation was raised before the Convention of 40 on 27 January 1870, the chairman said that "even though the proclamation had no direct and immediate bearing on the transfer of the country…" the convention should hear what the Queen had to say.[26] Louis Riel then stated that he was not a Canadian subject and "for that reason the Governor-General of Canada has no business with us yet, and I have no business with him..." but he was willing to have the proclamation, if there was one, read.[27] It never was produced or read at the convention. Clearly, Riel and the delegates to the 1870 convention had little interest in the proclamation.

In addition to his view of the proclamation, Aunger's understanding of Donald Smith is equally faulty. Smith had no authority to make any promises to the inhabitants of Red River. He was sent as a Canadian commissioner "to the people of Red River"[28] to attempt to bring law and order back to the colony (which was embroiled in an armed resistance), and to encourage Riel and his Métis followers to send a delegation to Ottawa to lay their wishes before the Canadian government before Canada officially acquired the territory. In a recent decision of the Manitoba Court of Queen's Bench, *Manitoba Metis Federation Inc. et al. v. Attorney General of Canada et al.*,[29] the court found that Macdonald outlined to Smith precisely what the federal government was prepared to concede.[30] The prime minister was clear that Smith could authorize a delegation to visit Ottawa to represent the claims of the resistors to Canada's takeover, but that "[t]he representation of the Territory in Parliament will be a matter for discussion and arrangement with such delegation."[31] There was no mention of Smith "binding the Canadian government to respect existing rights in Rupert's Land and the North-Western Territory."[32] In fact, neither in Smith's commission from the Canadian government[33] nor in his instructions were French linguistic rights explicitly mentioned. He was not authorized "to negotiate or to come to terms with the insurgents," but was asked "to probe the causes of the trouble, to explain away misapprehensions and to report upon the best mode of effecting the speedy transfer of the North-West to Canada."[34] As Macdonald told Bishop Taché, "in case a delegation is appointed to proceed to Ottawa, you can assure them that they will be kindly received, and their suggestions fully considered."[35] Macdonald was clearly not about to commit the Canadian government to any specific legislation with respect to Red River before discussion occurred between Red River representatives and the Canadian government, let alone commit to any promise of entrenching French linguistic rights in the Canadian Constitution.

Donald Smith was very careful not to go beyond his mandate. In a report to Ottawa, Smith insisted that he never acknowledged the "provisional government" headed by Louis Riel to be legal at any time during his stay in Red River.[36] At his meeting with the Convention of 40 on 27 January 1870, Smith said he explained the views of the Canadian government to the delegates, "and gave assurances that on entering confederation, they would be secured in the possession of all rights, privileges, and immunities enjoyed by British subjects in other parts of the Dominion..."[37] The convention then went about preparing a "list of rights" embodying "conditions on which they would be willing to enter the confederation."[38] During the preparation of the list, Riel asked Smith whether he would pledge that Parliament would sanction through legislation what Smith suggested would be granted to the territories. Smith replied that "[t]he Government will certainly bring the matter before Parliament, but it is the Parliament which must finally decide."[39] Smith told Ottawa that the delegates at the convention "professed confidence in the Canadian Government, to which I [Smith] invited them to send delegates…"[40]

Aunger correctly indicates that three delegates were sent from Red River to deal directly with Ottawa.[41] He is wrong, however, to claim that there were negotiations and that an "agreement" resulted, which "brought about the union of the territories."[42] As the Manitoba Court of Queen's Bench stated in *Manitoba*

Metis Federation, "A treaty or agreement can only be concluded by people with capacity or authority to do so. Here, neither the delegates from Red River nor Macdonald or Cartier had such capacity or authority. As well, a treaty or an agreement must have consensus as to terms, certainty of terms, and finality. Here there was not."[43] The court then concluded that "[t]here was no treaty. There was no agreement. There was an Act of the Parliament of Canada [the *Manitoba Act, 1870*] which is recognized as a constitutional document."[44]

Through the *Manitoba Act, 1870*, Rupert's Land and the North-Western Territory entered Canada (and became known as the Northwest Territories) with a very small portion of Rupert's Land set aside for the creation of the Province of Manitoba. In addition, under section 23 of the Act, French and English became the official languages of the new province. Aunger incorrectly states that through the *Manitoba Act, 1870*, the official use of the French and English languages in Manitoba and the Northwest Territories was "enshrined in the Constitution of Canada in 1870."[45]

The *Manitoba Act, 1870* was an act of the Canadian Parliament that could be modified at any time by Canada or by the Parliament of the United Kingdom. Indeed, the British Parliament did alter the nature of the *Manitoba Act, 1870* by incorporating it within the Constitution of Canada a year later by an act of the United Kingdom Parliament.[46] This amendment to the *Constitution Act, 1867* entrenched bilingualism in the province of Manitoba as noted in 1979 by the Supreme Court of Canada in *Attorney General of Manitoba v. Forest*,[47] and reiterated a decade later in *Mercure*. Thus, Aunger is wrong to conclude that French language rights were entrenched in Manitoba in 1870 rather than 1871. In any case, the determination of whether bilingualism was entrenched in Manitoba in 1870 or 1871 is not critical to Aunger's argument regarding bilingualism in Alberta.

What is important to the question of bilingualism in Alberta is Aunger's rather imaginative but false supposition that, through the *Manitoba Act, 1870*, "the province of Manitoba and the North-west Territories [entered Confederation] with twinned governments and common institutions."[48] By insisting that the Lieutenant Governor of Manitoba governed the Northwest Territories, Aunger concludes that section 23 of the *Manitoba Act, 1870* "established official bilingualism in territorial institutions."[49] This assertion is inaccurate. The Lieutenant Governor of Manitoba and the Lieutenant Governor of the Northwest Territories were one and the same person, but with entirely separate offices of state. On 30 July 1870 Adams Archibald was appointed Lieutenant Governor of Manitoba;[50] "[b]y separate instrument dated July 30, 1870, he also was appointed Lieutenant-Governor of the North-West Territories."[51] In August 1870, Archibald received instructions from the Under Secretary of State for the Provinces relative to his appointment as Lieutenant Governor of Manitoba and also separate and extensive instructions relative to his position as Lieutenant Governor of the Northwest Territories.[52]

Archibald's position in 1870 was akin today to the status of Elizabeth II as Queen of Canada and at the same time Queen of the United Kingdom. Although Queen and Head of State of both countries, Elizabeth's role and duties are different in each country, and neither country's laws and practices apply to the other. The same was true for Adams Archibald in 1870. Although resident in Winnipeg, he acted very differently as Lieutenant Governor of Manitoba than he did as Lieutenant Governor of the Northwest Territories. His main duty as Lieutenant Governor of the Territories was to collect information for the use of the Canadian government.[53] To fulfill this obligation, he hired Lieutenant W. F. Butler to undertake a fact-finding expedition throughout the North West.[54] As Lieutenant Governor of Manitoba, his primary task was to establish the elaborate apparatus of a provincial government at Winnipeg.[55] The Lieutenant Governor of Manitoba eventually acted like other lieutenant governors in a province with a premier, while the Lieutenant Governor of the Northwest Territories acted as both head of the Territories and head of government until the arrival of responsible government at the end of the nineteenth century.

Finally, in discussing Senator Marc Girard's

amendment to the *North-West Territories Act* in 1877, Aunger's reasoning becomes rather muddled. On the one hand, he suggests that the amendment inserting an article providing for bilingualism into the original Act was not necessary because bilingualism already existed in the Northwest Territories through section 23 of The *Manitoba Act, 1870*; on the other hand, he lauds Senator Girard for successfully amending the Act "to recognize official bilingualism in the North-West Territories."[56] In the spring of 1987 I wrote an article in which I argued that through Senator Girard's amendment to the *North-West Territories Act* of 1875, the Northwest Territories became officially bilingual at that time. Despite subsequent attempts by the territorial legislature to modify section 110 (the section of the *North-West Territories Act* providing for the use of French and English in the Territorial legislature and courts), that section was carried over, as originally written, into the *Alberta Act* at the time the province of Alberta was created in 1905. I suggested, however, that French language rights could be modified by the provincial government of Alberta alone.[57] Unlike The *Manitoba Act, 1870*, section 110 "was at no time included in the Constitution by the Parliament of the United Kingdom, or by the Parliament of Canada pursuant to any action taken by it under the *Constitution Act, 1871*."[58] Both Aunger and I agree that the Province of Alberta was bilingual until 1988 at which time the legislature passed a bilingual act, which transformed Alberta into a province, which was unilingually English. I contend the province acted constitutionally because bilingualism was not entrenched in the Constitution and language rights can be modified by the province alone; Aunger argues that the province acted unconstitutionally in 1988 because French language rights were entrenched in the Constitution both before and after the province was created.

In his article, Aunger informs us that the Provincial Court of Alberta in *Sa Majesté la Reine et Gilles Caron*[59] held that on the basis of new evidence, "the official status of the French language was entrenched in the constitution of Canada."[60] On appeal, the Alberta Court of Queen's Bench is considering whether Alberta is correct in its contention that no new evidence has emerged since *Mercure* which would cause the court to overturn or amend the Supreme Court's 1988 decision. This is the issue over which the courts are presently grappling.

Notes

* Department of History and Classics, University of Alberta.

1 Edmund A. Aunger, "The Constitution of Canada and the Official Status of French in Alberta". (2009) 32:2 in *Canadian Parliamentary Review* 22.

2 1988 SCC 107 (CanLII) [*Mercure*].

3 *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba*, 1870, 33 Vict., c. 3 (Can.).

4 *An Act to amend the "North-West Territories Act, 1875."*, 38 Vict., c. 49 (Can.).

5 1905, 4-5 Edw. VII, c. 3 (Can.).

6 Aunger, *supra* note 1 at 23.

7 *Ibid*.

8 *Ibid*. at 24.

9 *Ibid*.

10 (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Section 146 reads:
It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

11 *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, 16 & 17 December 1867, reprinted in R.S.C. 1985, App. II, No. 9, Sch. A [*1867 Address*].

12 Aunger, *supra* note 1 at 24.

13 2008 NWTCA 13 (CanLII) [*Euchner*].

14 *Rupert's Land and North-Western Territory Order* (U.K), 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9 [*1870 Order*].

15 *Euchner*, *supra* note 13 at para. 68.

16 *Ibid.* at para. 76.
17 *Ibid*.
18 *Ibid.* at para. 81.
19 *Ibid*.
20 Aunger, *supra* note 1 at 24. For the proclamation, see "Proclamation of Sir John Young, Governor General of Canada, Dec. 6, 1869" in E. H. Oliver, ed., *The Canadian North-West, Its Early Development and Legislative Records*, vol. 2 (Ottawa: Government Printing Bureau, 1915) at 901.
21 *Ibid.*
22 *Ibid*.
23 Raymond J. A. Huel, *Archbishop A.-A. Taché of St. Boniface* (Edmonton: University of Alberta Press, 2003) at 109.
24 [2000] ABQB 591 (CarswellAlta) at paras. 21 and 38.
25 *An Act to amend and consolidate the Laws respecting the North-West Territories*, 1875, c. 49 (Can.).
26 "THIRD DAY, Jan. 27, 1870," *The New Nation* (29 January 1870).
27 *Ibid*.
28 "Report of Donald A. Smith, Esq., to The Hon. Joseph Howe, Secretary of State for the Provinces, Ottawa, 12th April 1870" in Oliver, *supra* note 20 at 920.
29 2007 MBQB 293 (CanLII) [*Manitoba Metis Federation*].
30 *Ibid.* at para. 87.
31 *Ibid.* at para. 88.
32 Aunger, *supra* note 1 at 24.
33 "Commission issued to Donald A. Smith appointing him Special Commissioner, Dec. 17, 1869" in Oliver, *supra* note 20 at 907-08.
34 George F. G. Stanley, *The Birth of Western Canada* (Toronto: University of Toronto Press, 1961) at 89 and 90.
35 Macdonald to Taché, private correspondence (16 February 1870) as cited in Stanley, *ibid.* at 110.
36 920.
37 *Ibid.* at 925.
38 *Ibid*.
39 *Manitoba Metis Federation*, *supra* note 29 at para. 471.
40 "Report of Donald A. Smith, Esq., to The Hon. Joseph Howe," *supra* note 28 at 926.
41 Aunger, *supra* note 1 at 25.
42 *Ibid.*
43 *Manitoba Metis Federation*, *supra* note 29 at para. 507.
44 *Ibid* at para. 510.
45 Aunger, *supra* note 1 at 23.
46 *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c.28.
47 [1979] 2 S.C.R. 1032.
48 Aunger, *supra* note 1 at 25.
49 *Ibid.* at 25.
50 *Manitoba Metis Federation*, *supra* note 29 at para. 152.
51 *Ibid.* at para. 153.
52 *Ibid*. at paras. 154-56.
53 "Under Secretary of State for the Provinces to Archibald, Aug. 4, 1870" in Oliver, *supra* note 28 at 974-75.
54 Lewis Herbert Thomas, *The Struggle for Responsible Government in the North-West Territories 1870-97* (Toronto: University of Toronto Press, 1956) at 51.
55 *Ibid.* at 49.
56 Aunger, *supra* note 1 at 25.
57 Kenneth Munro, "Official Bilingualism in Alberta" (1987) 12.1 *Prairie Forum* 37.
58 *Mercure, supra* note 2 at 299.
59 2008 ABPC 232 (CanLII).
60 Aunger, *supra* note 1 at 26.

Confidence: How Much is Enough?

Peter Neary*

Did Prime Minister Stephen Harper, faced with almost certain defeat in the Commons in December 2008 on a matter of confidence, act unconstitutionally by seeking to prorogue a newly elected parliament that had been sitting for only two weeks? And did Governor General Michaëlle Jean violate the principles of responsible government by granting prorogation? These questions have been the subject of intense debate in the Canadian media and may rank with the King-Byng crisis of 1926 in future academic and legal discussion of the constitution. In my opinion, while the prime minister tested the limits of "responsible government," the Governor General respected precedent and acted appropriately and wisely in her decision.

Let's begin by winding the clock back to the election of 23 January 2006. Following that vote government in Canada changed hands smoothly, efficiently, and promptly – and in accordance with the time-honoured principles of responsible government, which lie at the heart of our constitution. On the night of the election, Prime Minister Paul Martin made known that he would leave office. Though the Liberals had come second in the party standings, no party had won a majority and Martin could have chosen to test his strength in the new Parliament and see if he could carry on in government. But like Prime Minister Louis St. Laurent, who had found himself in similar circumstances after the election of 1957, Martin chose to resign. His decision removed all doubt about what should happen next constitutionally, and cleared the way for the events that followed. On 6 February 2006 Stephen Harper, whose Conservatives had won the largest number of seats (but not a majority), was sworn in as Canada's twenty-second prime minister, a position he has held ever since (the term of a prime minister does not run from election to election, as is sometimes implied in the Canadian media, but from the date of swearing in until the date of resignation: i.e., Stephen Harper is still in his original term). No party represented in the Parliament elected in 2006 questioned the legitimacy of the change of government. After a hard electoral battle, Paul Martin exited the office of prime minister gracefully and decisively and in the process made life simple for Governor General Jean, the guardian of the constitutional order, who was new to her office. Her role after the election of 23 January was to accept the resignation of one government and swear in another in circumstances that were unambiguous. Power changed hands in 2006 without a constitutional ripple in Canada, and the Harper government was able to maintain the confidence of the new House of Commons (i.e., win votes on matters of confidence) thereafter.

This record put Prime Minister Harper clearly in the driver's seat on the crucial matter of dissolution (i.e., determining the timing of the next election). Historically, this has been one of the prime minister's most prized prerogatives — crucial both in keeping discipline in his own ranks and in managing the opposition. Under Canadian practice, if a prime minister has an established record of parliamentary support, his or her advice to the governor general to dissolve is accepted if and when it is offered. This is so whether the government had been defeated in the House of Commons or not. On a critical matter, the prime minister and the prime minister alone offers the crucial advice, which in the normal course of events the governor general accepts. In our flexible system, the Crown has one chief adviser at a time, and the advice of that individual is normally accepted by the governor general (who nevertheless retains an undefined reserve power to deal with extraordinary circumstances). This is a fundamental

constitutional reality and ensures clarity in our system of government. We have one governor general at a time and one prime minister at a time, with the former (though with reserve final authority) acting on the advice of the latter.

Strangely, in 2007 Prime Minister Harper acted to limit his own freedom of manoeuvre in relation to dissolution by pushing through legislation (Bill C-16[1]) to fix election dates in the country (the next vote was scheduled for 19 October 2009). In practice, assuming a minority situation, this legislation seemingly transferred the whip hand to the opposition parties; the government was on an agreed electoral schedule but its opponents could trigger an election by passing a vote of non-confidence. However, the new law, which is a dog's breakfast, also begins with a preamble stating that nothing in its terms alters the existing powers of the governor general. When it came to actually wanting an election, the prime minister was able to get around the legislation by roping the opposition leaders (they foolishly agreed to this) into a consultation procedure leading to dissolution and using the argument that the Parliament elected in 2006 had become dysfunctional. The Governor General granted the request of the Prime Minister to dissolve, and the legitimacy of her action was not challenged by the opposition parties (though the lobby group Democracy Watch eventually started a court action to have the election call declared illegal).

The vote, held on 14 October 2008, produced a mixed result for the governing Conservatives. They increased their number of seats in the House of Commons but were again in a minority position. Following the election, as expected, the government carried on and, again, its right to do so was not challenged by the opposition parties (two of which — the Liberals and the Bloc Québécois — had fewer seats than they had had in the previous Parliament). Obviously, if they had wanted to, the opposition parties could have combined immediately after the election, made known that they would defeat the government at the first opportunity, agreed on a candidate for prime minister, and insisted that Parliament be called together as soon as possible. Such a sequence of events would have resembled what had happened in Ontario in 1985, when, following a provincial election, the Liberals and NDP had made an agreement to oust the governing Conservatives forthwith. If the opposition parties had ganged up at this moment and in this fashion, a change of government, though politically surprising, would have been constitutionally irresistible after 14 October. In fact, nothing of the sort happened and business proceeded as usual, with the new fortieth Parliament being called together for the first time on 19 November. Subsequently, the government established a record of confidence in that Parliament when, on 27 November, the House of Commons approved the motion, as amended, for an address in reply to the Speech from the Throne (this was duly noted at the time by Government House leader Jay Hill). How many confidence votes must a prime minister leading a minority government have under his belt for his advice to dissolve to be accepted by the governor general? There is no written rule about how much is enough but, given the deep convention of the governor general following the lead of the prime minister in a key matter, one confidence win is probably enough. Arguably, following the successful completion of the debate on the address in reply, Prime Minister Harper regained the upper hand with respect to dissolution. As with its acceptance of the prime minister's ad hoc procedure leading to the election call, the opposition parties had let another potentially opportune moment pass.

With everything seemingly on course for Parliament to continue its work and the government to continue governing, matters changed drastically after Finance Minister Jim Flaherty presented an Economic and Fiscal Statement, also on 27 November and immediately *before* approval was given to the address in reply motion, as amended. This offered a lacklustre response to the developing global financial and economic crisis, while announcing that, as an economy measure, the country's political parties would be taken off the public payroll. All of this had the effect of emboldening the opposition parties, which now, finally, had good reason to combine to oust the government. An agreement, announced on 1 December, was hastily made among them to bring down the

government and install a Liberal-NDP coalition with Liberal leader Stéphane Dion as prime minister. Though not part of the coalition, the Bloc Québécois agreed to sustain it in office.

Faced with the previously unimaginable, the Prime Minister turned to the expedient of prorogation to avoid immediate and certain defeat in a confidence vote. His intended course of action was highly controversial across the country. Many took the view that prorogation in current circumstances would violate a basic principle of responsible government (i.e., by preventing MPs from debating and voting on a fundamental issue), was therefore unconstitutional, and should be refused by the Governor General. In practice, at a lengthy meeting with Stephen Harper on 4 December, which riveted national attention on Rideau Hall, the Governor General agreed to prorogue — but on the understanding that Parliament would resume sitting on 26 January 2009. Her action was measured and judicious; it both respected the deep convention of the governor general following the advice of the prime minister and upheld the notion that Parliament does not exist at the sufferance of the government. The Prime Minister got his way — but Parliament would soon be able to test the government in a confidence vote (albeit in different political circumstances). Of course, if Stephen Harper had been refused prorogation on 4 December, he could have advised dissolution. Importantly for Canadian democracy, at the end of an unprecedented series of events, the opposition parties did not challenge the legitimacy of the Governor General's decision. Remarkably, however, there was talk of a campaign against the Governor General by government supporters if she had gone the other way. Any such action would have been reprehensible and poisonous to the constitutional order, which hinges on respect for the neutrality, fairness, impartiality, and discretion of the governor general.

When Parliament resumed sitting in January 2009, a chastened government presented its budget. This was approved, and the proposed coalition faded away. So where are we now constitutionally? If, in the fullness of time, the Harper government is defeated on a matter of confidence, the Prime Minister will have choices: he could resign and, if asked, advise the Governor General to send for someone else to form a government (this is unlikely), or he could request the dissolution of the fortieth Parliament and the calling of another election. Given that the governor general normally acts on the advice of the prime minister and that the government has successfully met the new House of Commons and established a record of support, his request for dissolution would no doubt be granted (the imaginings of opposition coalition hopefuls notwithstanding). In sum, we are back constitutionally to where we were before the 2008 federal election was held.

Since the current period of minority government began in 2004, there has been much loose talk and writing in Canada about the role of the governor general. Practically speaking, her job is to ensure continuity of administration, carry out the ceremonial duties of her office, and avoid bringing the Crown into disrepute. Involvement in party politics (e.g., listening to a host of self-interested advisers and would-be cabinet ministers) would certainly invite disrepute. Happily for the Governor General, this can easily be avoided by applying without fear or favour the simple and time-tested rules of responsible government. These specify a sequence of events that keep the Crown above the political fray, where it belongs. Since the election of 2004 put Paul Martin's Liberal government in a minority position, there has been much chattering in the country about the right to dissolution in a fractured Parliament, but in practice this comes up against an unavoidable reality. For the governor general to refuse dissolution to a prime minister who has successfully governed (i.e., had for a time, however brief, the confidence of the House of Commons) would be both risky and dangerous. Prime Minister Harper has met this test, and his advice on dissolution, whatever the timing, will have to be heeded. Ultimately, the sorting-out of a messy Parliament and political situation is not the responsibility of the governor general, but of the democratic electorate she defends.

Canadians may be of a mind to change the existing rules about the timing of national

elections and the operation of the parliamentary system (especially in minority situations). But unless and until they do, the existing rules apply, and established practice is crystal clear: the governor general accepts the advice given by the prime minister and leaves the final verdict to the electorate, where it rightly belongs. According to her memoirs, Governor General Adrienne Clarkson seems to have had a different view of her position, but her particular understanding of the constitution was never tested. Recently, the claim has also been made that the Governor General should give a public accounting for her constitutional decisions,[2] but this would have its own perils (as would judicial intervention — though there may be activist judges itching to make the interpretation of the prerogative powers of the Crown the last frontier of the *Canadian Charter of Rights and Freedoms*[3]). The governor general is the protector of the constitution, not a political actor. Absent the most exceptional circumstances, her job is to follow precedent, eschew politics, and maintain the legitimacy of her office. This is exactly what Governor General Jean achieved in December 2008 when confronted with the hard choice put to her by a prime minister who had blundered badly and was running for cover.

Notes

* Peter Neary is a Professor Emeritus in the Department of History, University of Western Ontario, London, Ontario.

1 *An Act to Amend the Canada Elections Act*, S.C. 2007, c. 10.

2 See for example, Lorne Sossin & Lorraine Weinrib, "Canada's Constitutional Black Box," University of Toronto Faculty Blog, online: <http://utorontolaw.typepad.com/faculty_blog/2008/12/lorne-sossin-and-lorraine-weinrib-canadas-constitutional-black-box.html>.

3 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule

Bruce Hicks*

Introduction

On 4 December 2008, the Governor General of Canada, Her Excellency the Right Honourable Michaëlle Jean, granted a request from Prime Minister Stephen Harper for a prorogation of Parliament, just six weeks after a federal election, three weeks into the new session, and two sitting days before an opposition motion of non-confidence was likely to defeat the government and pave the way for a Liberal-led coalition government assuming power.

The media interest in this event was high because of the daily drama it offered and because of the constitutional questions it raised. While former governor general Adrienne Clarkson has since objected to the word *crisis* being used to describe this event, noting that "just because a resolution has to be found does not mean the situation is a crisis,"[1] the truth is there was sufficient uncertainty surrounding what the Governor General could, should, and might actually do that public faith in Canada's constitutional conventions and its system of responsible parliamentary government was shaken.

During the event, a number of academics were asked by the media to help Canadians understand the relevant constitutional rules and possible decision outcomes, yet the ensuing public discussion coming from the academy did nothing to alleviate the sense of uncertainty. Even after the fact, there continued to be concern about the precedent just set and lingering doubts about what the Governor General might do if, when the new session of Parliament began in January 2009, the Prime Minister again asked her to use her reserve powers, in the next instance to dissolve Parliament and call an election. This concern was so great that thirty-five academics penned an open letter recommending the course of action she should take if dissolution were proposed to her in January.[2] In turn, a book on the prorogation event, entitled *Parliamentary Democracy in Crisis*, was released with the stated goal of helping to instruct Canadians on the principles and rules of parliamentary democracy, though the essays therein contained showed continuing disagreement on the finer points of constitutional law.[3]

I was one of the people called upon to provide explanations of the workings of the constitution during the event; indeed, this is a challenge for an academic at the best of times because one runs the risk of being dragged from observer to participant. This was in fact what happened several days before the fateful 4 December meeting of Canada's *de facto* head of state and her first minister. In one interview, carried on CTV Newsnet, I said that in spite of the often-quoted line of a governor general's role being to thwart the will of a ruthless prime

minister (in this case, one trying to avoid a confidence vote in Parliament), the Prime Minister might successfully frame prorogation as simply a mechanism to temporarily "cool things down." After all, Parliament would still be able to vote on a motion of non-confidence upon its return in January 2009, and a viable alternative government would either still be viable, or it would have already fallen apart.[4]

By 3 December 2008, when the parliamentary caucuses of the political parties met in secret to plan strategy, the euphemism of a "cooling off" period had found its way into the talking points issued to the Conservative caucus by the Prime Minister's Office, and was being repeated *ad nausea* to the throng of media, which was now giving almost complete attention to this unfolding drama.

Over the next twenty-four hours, I had the opportunity to revisit this idea a number of times, including during the live telecast of the Governor General's decision on the morning of 4 December.[5] I pointed out that what was important was not what the Prime Minister would argue but rather what the Governor General would accept. I also took the opportunity to suggest that the Governor General should be guided by the principle of doing the least harm. I drew an analogy to the way the speaker of the House of Commons casts a vote in the event of a tie, suggesting that the very reason the Governor General might be willing to accept a recommendation of prorogation was that it left the most options in play before a Parliament that would be returning one month later to deal with the confidence questions that were sure to top the parliamentary agenda (via a new throne speech and a promised budget).

A number of academics have since written about the events surrounding this prorogation,[6] and several have objected to the idea of prorogation as a cooling off, arguing that such an interpretation is anathema to constitutional convention as it implies a value judgment. As Andrew Heard has put it, "considerations, such as the need for a prolonged cooling off period… are absolutely none of the governor general's concern when making a decision on constitutional grounds."[7] Others have been less offended by the idea of a cooling off period, though they still emphasize that it could not have been done for a longer period of time, say more than six months.[8] My do no harm analogy faired slightly better.[9]

These events have led me to propose the thesis at the centre of this article: that the governor general ought to use (and acknowledge the existence of) an apolitical decision rule in exercising her reserve powers or personal prerogatives. Before turning to this thesis, it is worth noting that the reason terms like cooling off and do no harm have a resonance that goes well beyond the moment is that they offer an emotional heuristic.[10] That they have salience should be as much a concern to scholars as any possible misconceptions surrounding the constitution they might generate. In addition, media interest has not been only on the constitutional constraints that bind political actors, but also on the possible decision outcome, and while the academy is usually singularly interested in the former, the public is usually singularly interested in the latter. All decisions, even those constrained by clear constitutional conventions (which the reserve powers often are not), involve attention both to constitutional constraints and preferred outcomes. Perhaps, a decision matrix can offer insight into the constitutional rules at play by taking both constraints *and* outcomes into account.

In the days and weeks following prorogation, the merits of enunciating an apolitical decision rule became more evident. During this period, the government reconsidered its policy positions, the national executive of the Liberal Party preempted its leadership contest by anointing a leader, and the new leader of the opposition rejected the triparty coalition agreement, opting instead to support the government. Each of these political events was driven not by new developments within Parliament but by the continued lack of clarity regarding application of the relevant constitutional conventions.

Elsewhere I have argued that some of the drama could have been avoided if the Governor General has simply issued written decisions.[11] While this would have eliminated the sense of crisis and provided clarity for future decisions

in identical circumstances, it has since become apparent that we need to go further: the need is not simply for less ambiguity, it is for predictability.

A formal decision rule offers predictability. That members of Parliament (MPs) can predict how the speaker of the House of Commons will cast his or her deciding vote, for example, allows party whips and MPs to predict vote results, thereby preventing undesired defeats of legislation, particularly on matters of confidence that will precipitate a federal election. Understanding and predicting the decisions of the governor general would have similar benefits for the exact same reason. It is the purpose of this article to flesh out this idea by considering the relative merits of relying on conventions to guide the governor general's exercise of the reserve powers or adopting (or perhaps openly acknowledging) a formal apolitical decision rule.

The first part of this article deals with constitutional conventions, beginning with a review of the literature, to illustrate the inherent ambiguity that surrounds conventions in general and the personal prerogatives in particular.[12] The governor general's reserve power concerning dissolution is then modeled to illustrate that, even with a minimalist approach, decisions must be taken that fall outside of such a model. The second part of the article deals with the idea of a formal apolitical decision rule, and begins with a consideration of the decision rule adopted by speakers in Parliament. While such a rule may already underlie decisions taken by the governor general, who must manage competing parliamentary interests while remaining outside of the political fray, it is only by formally enunciating the rule that ambiguity can be removed and predictability assured.

Constitutional Conventions

Sir Kenneth Wheare has advanced the classic definition of a constitutional convention as "a binding rule, a rule of behavior accepted as obligatory by those concerned in the working of the constitution."[13] Building on this definition, Sir Ivor Jennings has suggested that the existence of a convention can be ascertained by asking three questions: are there precedents, is there a reason for these precedents, and do the constitutional actors involved believe that they are bound by these precedents?[14] Each of these questions (that together make up the "Jennings test" for the existence of a constitutional convention) poses a particular challenge for the reserve powers, including the power to summon, prorogue, and dissolve Parliament, appoint and dismiss ministers, and withhold royal assent.[15]

Reserve Powers

The Supreme Court of Canada, in its *Patriation Reference*, used the Jennings test and stated that, for a convention to exist, the specific actors affected by the rule must have agreed to be bound by it.[16] In the minority opinion, penned by then chief justice Bora Laskin, it was also argued that a convention must be clear and removed from controversy, and that it is the plenary unit that must agree to be bound.[17] Nevertheless, the royal prerogative is only exercised by the governor general personally when the other constitutional actors, specifically the prime minister but also the other party leaders in Parliament, are not in agreement. These moments are always controversial; the nuances of the convention to be followed are rarely clear; and the plenary unit will be in discord. One might even characterize these instances as moments of constitutional *crisis*.

For the most part, the governor general quietly summons, prorogues, and dissolves Parliament (as recommended by the prime minister) without any controversy. But it is on those occasions that the governor general is called upon to reject the recommendation of the prime minister or to substitute an alternative that the exercise of the royal prerogative becomes truly personal. By definition, in these instances the relevant constitutional actors are not in agreement, and the very fact that these instances are rare means that there is a paucity of precedent upon which to base the argument that a convention exists to guide constitutional practice.

When Albert Venn Dicey first identified the existence of conventions, he observed that some "have nothing but a slight amount of custom in

their favour and are of disputable validity," and "may be violated without any other consequence than that of exposing the Minister or other person by whom they were broken to blame or unpopularity."[18] This suggestion has been universally criticized as it runs contrary to the notion of a convention as a *binding* rule.[19] Nevertheless, it would seem to be an apt description for the exercise of the reserve powers.

With little precedent to work with, the governor general (like all constitutional actors presumably) is guided in part by democratic theory in her exercise of the reserve powers. Indeed, Dicey himself was guided by considerations of democracy in his reckoning of conventions. His stated goal in taking what were nothing more than vague customs, imbuing them with democratic principles, and calling them a "constitutional morality" binding the Crown, was to "secure the ultimate supremacy of the electorate as the true political sovereign of the state."[20] In operationalizing this model, the convention emerged that most exercises of the royal prerogative — used by the Crown to govern — should be decided by ministers who must then answer for their exercise before Parliament and before the electorate. The evolutionary nature of conventions has left some exercises of the royal prerogative in the hands of the governor general personally (the reserve powers) because there has been *no agreement* to allow ministers of the Crown to exercise them directly. It is argued here that the royal prerogative remains personal in these instances is to ensure it is not exercised to the advantage of any single branch of government.

Nevertheless, ministers and prime ministers have repeatedly tried to seize the reserve powers. For example, in England it has only been since British prime minister Stanley Baldwin that a prime minister has recommended the dissolution of Parliament without discussion in the full Cabinet.[21] Shortly thereafter, a 1920 Canadian order-in-council[22] authorized the Canadian prime minister to make the recommendation for dissolution to the governor general and while this continued to be done through a minute of council, in 1957 the unprecedented invention of an "instrument of advice" emerged for this purpose to give the prime minister greater independence and exert additional influence over the exercise of the governor general's personal prerogatives.[23]

The very use of the word "advice" for this document is significant. With respect to exercises of the royal prerogative, a convention exists that ministerial advice should never be refused, so it is binding on the governor general. It is noteworthy that British prime minister Harold Macmillan refused to use the word advice when requesting dissolution, insisting instead that it be called a recommendation since a prime minister has "no right to advise a dissolution."[24]

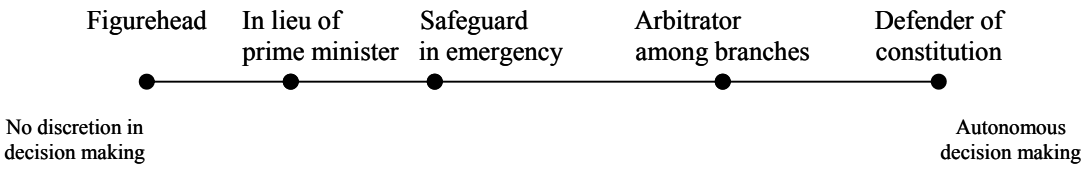
Governor General's Decision-Making Autonomy

Disagreement over the application of constitutional conventions as they relate to the governor general's exercise of the reserve powers is not simply a question of ambitious politicians placing the monarch, and her representative, in a politically awkward position as they actively try to take over powers which they have been previously denied. Scholars too disagree about the implications of democratization for the Crown. Put simply, does democratic theory eliminate any non-ceremonial role for the monarch, rendering her a figurehead, or is there a specific political role for an unelected head of state, even a hereditary one, in a democracy?[25]

Figure 1 presents a continuum of possible degrees of autonomy in decision making. Legal scholars will tend to fall on the more restrained end of the continuum (suggesting a limited role for the head of state) while their political scientist counterparts will likely fall toward the less restrained end (though one of the features of constitutional conventions today is that there is disagreement over their application even when starting from similar conceptual positions).[26]

Sir William Anson, for example, was of the view that everything the King, or by extension the governor general, did required advice (i.e., a minister willing to take responsibility for it), noting that the King could "either convert his ministers to his point of view or, before taking

Figure 1
Governor General's Decision-Making Autonomy



action, must find other ministers who agree with him."[27] Walter Bagehot — famous for the pronouncement that a constitutional monarch has only the right to be consulted, to encourage, and to warn — thought that if there should ever be an instance when the King felt his ministers were acting against the public interest, the King should dissolve Parliament and see if the people would change the government for him.[28]

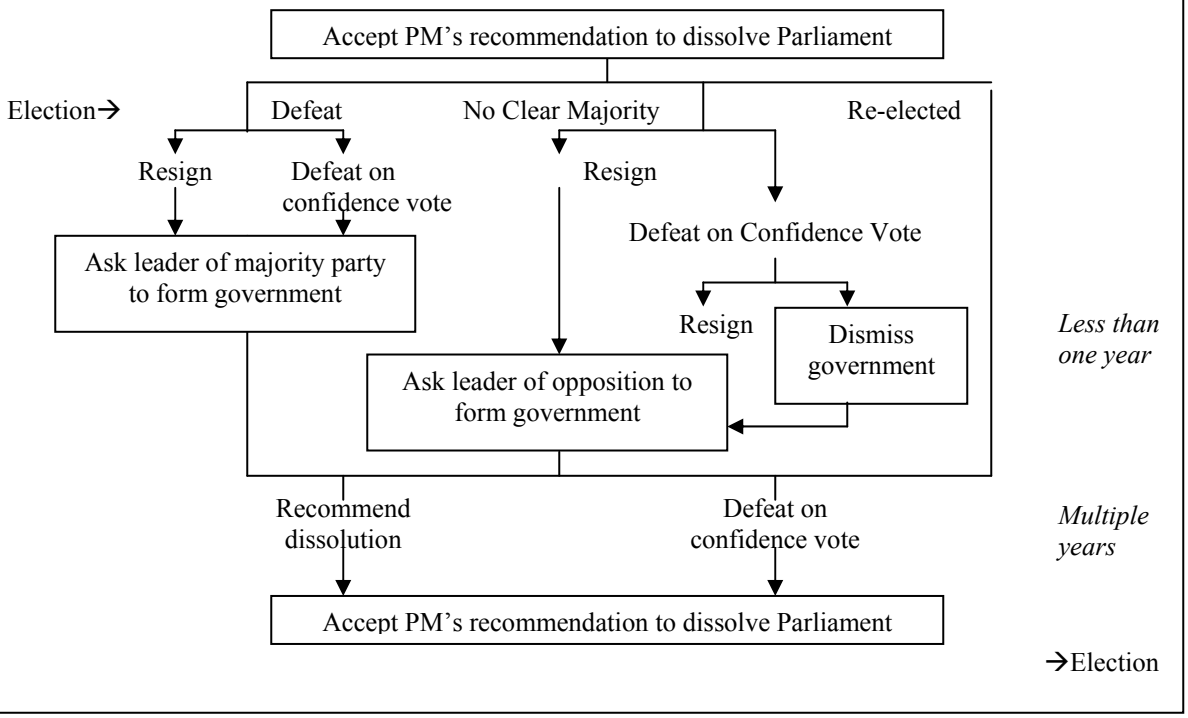
Even those most reluctant to acknowledge an autonomous decision-making role for the head of state are confounded by the question of who appoints a prime minister when there is a vacancy. As British prime minister Harold Wilson pointed out, an outgoing prime minister has no duty, much less a right, to recommend who should form a government.[29] Berriedale Keith argued that that duty belongs to the new prime minister who is advising the Crown on his own appointment, citing British prime minister Robert Peel's claim that "I am by my acceptance of office responsible for the removal of the late government."[30] The advice given to King George V by the lord chancellor was that potential ministers (including a possible prime minister) cannot render advice, nor can the King be bound by such.[31] Jennings has rightly dismissed this idea of retroactive advice as "pure fiction."[32] Others have argued that the key to the exercise of the reserve powers is not so much the advice as it is the presence of an identifiable minister who can be held to account for the decision before Parliament and the electorate.[33] Each strain of opinion is a variation on the theme of stripping the head of state of decision-making autonomy, while still permitting for eventualities in which decisions need to be taken.

In the *Patriation Reference*, the Supreme Court noted that conventions are unenforceable by the courts, although they are enforced by other institutions of governance including the head of state.[34] Of course even the most minimalist constitutional role for the governor general, some argue, places a decision burden on that office which goes beyond what ought to be permitted by a democratic constitution. To complicate matters, it is a role that the public perhaps expects, given the frequent invocation of the line (attributed to Eugene Forsey) that the governor general must "thwart the will of a ruthless prime minister."[35] While this is a misrepresentation of Forsey's much nuanced thinking on conventions, it reflects a popular conception of the governor general's role and this, in turn, points to a very real danger. If the public has expectations for the governor general that contradict the constitutional conventions constraining exercises of the reserve powers, this can undermine the office and the conventions which are a part of our system of government. What is more, this situation is likely to get worse as the combination of Canada's electoral system and its regionalized politics continues to deliver indecisive elections. Governors general may be increasingly called upon to use their reserve powers.

Modeling a Constitutional Convention as a Decision Rule

Figure 2 reflects a minimalist approach to the governor general's exercise of the reserve powers that most scholars, irrespective of where they are on the continuum (including the thirty-five who penned the open letter in January 2009), can agree the governor general has by convention. In this construct the governor gen-

Figure 2
Minimalist Role for the Governor General in Dissolution, Appointment, and Dismissal



eral is called upon to exercise very little discretion. Following an election, which was called on the recommendation of the prime minister, the governor general initially does nothing. If the prime minister is moved by the election result to resign, then the governor general simply calls upon the leader of the party with the most members in the Commons, or the second most members if the prime minister's party got the most seats, to form a government. If the prime minister does not resign, even if he fails to win the most seats in the Commons, he can face the House and try to win a vote of confidence. If the prime minister is promptly defeated on a motion of non-confidence, then it is assumed by most scholars that he will then resign and the governor general, upon receiving the prime minister's resignation, will simply turn to the leader of the opposition to form a government. The involvement of the governor general in these matters is straightforward and requires no exercise of discretion.

If the prime minister meets Parliament and retains its support, then the governor general equally has no need to use discretion. At some point after a year, if the prime minister recommends dissolving Parliament the governor general simply obliges, whether or not that request came after a defeat on a parliamentary motion of non-confidence in the government. But what if this occurs *before* a year has passed? Here, even scholars sharing the minimalist approach disagree. The thirty-five who penned the open letter had to acknowledge that they could not agree among themselves that the governor general should call upon the leader of the opposition to form a government if a prime minister's recommendation for dissolution or defeat on a motion of non-confidence occurs within six or, perhaps as many as, nine months of the last election.

While not mentioned in the open letter, another likely point of disagreement among scholars is whether or not the governor general can dismiss a prime minister. It is always assumed that the prime minister will resign if she fails to get dissolution or if she is defeated on a motion of non-confidence. But what happens if the

prime minister does not resign?

Of course, this minimalist view of the exercise of the personal prerogatives is not shared by all scholars. As noted in the previous section, there are those who feel the governor general should exercise no decision without advice and those who see a specific role for the head of state including a role as mediator of relations between executive and legislative branches.

Complications in Conceiving Conventions as Decision Rules

To begin with, it needs to be recognized that the minimalist role for the governor general in Figure 2 is based upon the premise that conventions are respected by all relevant constitutional actors. But the discretion constitutional convention grants the governor general in the exercise of the reserve powers is itself premised on some political actors not always respecting the rules. Not to put too fine a point on it, but the only reason to have a governor general exercise reserve powers, rather than surrender all royal prerogative to ministers who will be bound by constitutional convention, is to guard against a ruthless prime minister refusing to respect the constitution.

Constructing a decision rule out of convention thus becomes complicated. As conventions are based, in the first instance, on precedent, authors who discuss conventions are forced to examine each reserve power individually to determine the relevant precedents. Dismissal and appointment of ministers, prorogation, dissolution and summoning of Parliament, and royal assent, are all informed by precedents involving different circumstances.

For example, the last time the King considered dismissing a British prime minister was in 1913 over controversy regarding Home Rule for Ireland, though Jennings argues that dismissal would not have been constitutionally justified in that instance.[36] In 1975, Australian governor general John Kerr dismissed the Whitlam government after a series of defeats on legislation in the Senate and appointed a prime minister who would recommend the dissolution of both chambers of Parliament, which he promptly did.[37] Less controversially, the Australian governor general refused the recommendation of three prime ministers to dissolve Parliament after a defeat on a vote in the lower house (1904, 1905, and 1909). In Canada, a prime minister has never been dismissed; nor have governors general ever denied prorogation or commanded the summoning of Parliament without prime ministerial advice.

Without precedents to draw upon, the governor general will have to ask herself (and her personal advisors) questions before exercising her reserve powers that require a subjective foray into autonomous decision making. As Figure 3 illustrates, answering the questions the governor general must ask herself will require degrees of discretion that might be uncomfortable for some.

This list of questions is by no means exhaustive, and it is only designed to illustrate the degree of discretion that might be required of the governor general in exercising the reserve powers. It needs to be pointed out that there are a large number of even more controversial considerations that have been advanced as worthy of consideration, in addition to those mentioned in Figure 3. For example, Michael Valpy and Ned Franks suggest that the "state of Canada's economy, the viability of an alternative coalition government, and the mood of Parliament and the country" were all considerations discussed in the two-and-a-half-hour meeting that led to prorogation.[38]

The questions in Figure 3, however, are questions that scholars have recommended the governor general consider in an effort to shield her from making political decisions, but even here we can see a subjective dimension that could cast doubt on the nonpartisanship of the role of governor general. What is needed is a more clearly defined decision rule, one that will insulate the governor general from the accusation that she took partisan considerations into account in exercising her reserve powers.

Figure 3
Questions that May be Considered by the Governor General in Exercising Reserve Powers

Autonomy in decision making:

Dependent on advice ⟷ *Personal*

On appointment of a prime minister

- Does a political party have a clear majority?
  - Does the leader of any party have the support of the majority of members in the Commons?
    - Is there a coalition?
      - Is the government viable?

On summoning Parliament

- Is the prime minister taking too long?

On dissolving Parliament

- Has the government lost a confidence vote?
  - Is the request within one year of the last election?
    - Is there a viable alternative government?
      - Will this decision hurt the office of governor general?

On dismissing a prime minister

- Has the government been defeated on a motion of non-confidence?
  - Is it within one year of the last election?
    - Is there a viable alternative government?
      - Will this decision hurt the office of governor general?

An Apolitical Decision Rule

The idea for an apolitical decision rule was first advanced on this side of the Atlantic in 1863 with respect to the speaker of the legislative assembly of the united province of Canada. It was proposed that on those rare instances where he was called upon to break a tie vote in the assembly he should not use his vote in a partisan manner, but rather to "keep the question as long as possible before the House in order to afford a further opportunity to the House of expressing an opinion upon it."[39] This practice was based on an earlier decision by a speaker of the United Kingdom House of Commons, and it provides a useful model for an apolitical decision rule capable of guiding not just parliamentary speakers but others institutional actors responsible for enforcing conventions, including the governor general.

Precedent for an apolitical decision rule

In the 1844 first edition of what is now the leading authority on British parliamentary privilege and practice, Sir Thomas Erskine May noted that the speaker had asserted the right to cast his vote, like any other member, "according to his conscience, without assigning a reason," though he could "best discharge his duty by leaving the bill open to further consideration."[40] In every edition of Erskine May since, the rule has taken the form that "in order to avoid the least imputation upon his impartiality, it is usual for him, when practicable, to vote in such a manner as will not make the decision of the house final, and to explain his reasons, which

Figure 4
Application of Decision Rule to Prime Minister's Request for Prorogation (2008)

Decision: 1) Prorogue Parliament	*Decision* 2) Refuse to prorogue	*Decision* 3) Dissolve Parliament
Options left in Play: -Government continues -Confidence motion -Government resigns -Coalition government -Opposition government -Election	*Options left in play:* -Confidence motion -Government resigns -Coalition government -Election	*Options left in play:* -Government continues -Election

are entered in the Journals."[41] In the Canadian House of Commons, this apolitical decision rule means the speaker, when obliged to vote, chooses not to defeat a bill at first reading, second reading, or committee stage, and to leave the bill in its current form rather than vote to have it amended.[42]

The advent of verbatim transcripts of proceedings is a relatively recent phenomenon, so the first full transcript of a speaker's ruling on this question is 1976, where the British speaker confirmed Erskine May's formulation, but also made the interesting observation that while the speaker and his or her deputies are expressly casting their votes in a manner to ensure fairness between both sides of the House, the media will inevitably refer colloquially to the chair as having cast its vote for or against the government.[43]

Application of an apolitical decision rule

If we look at Governor General Lord Byng's exercise of the reserve powers in the now-familiar King-Byng affair of 1926, we see a governor general deciding to leave the matter before Parliament as long as possible. He refused Prime Minister Mackenzie King's request for dissolution and, following King's subsequent resignation, allowed for the leader of the opposition to try to form a government (a process that took months rather than days). It was only when Parliament was shown to be truly dysfunctional that he granted the request for dissolution.

Figure 4 illustrates the implications of the three options before the Governor General in December of 2008: accept or refuse the Prime Minister's recommendation to prorogue Parliament, or dissolve Parliament (on this matter, at least, there was a precedent). As can be seen, the decision to prorogue Parliament had the advantage of leaving the most possibilities before Parliament. Dissolving Parliament would simply have forced a new election, and permitted the government to continue. Refusing prorogation would have left more options in play than dissolution, but there were several factors that limited these options further, including the House of Commons' rules concerning opposition votes and a signed agreement between opposition parties, so the refusal of prorogation in practice would have only left in play the appointment of the opposition leader as prime minister in a coalition government.

Did the Governor General consider the viability of the coalition? Would she, having prorogued Parliament, agree to dissolution in January were the government to be defeated, or would she appoint a coalition government? Was the fact that the Liberal leader resigned (with a leadership contest underway) a consideration in her decision to accept prorogation? Would she have been more likely to refuse dissolution of Parliament if the Liberal leadership had been settled? Indeed, it is not important that we answer any of these questions, only that we acknowledge that some doubt existed about what the Governor General might do.

Merits of an apolitical decision rule

Having the governor general issue a written decision explaining her exercise of the reserve powers would remove a great deal of uncertainty and strengthen the constitutional conventions hedging their use.[44] Having the governor general acknowledge and formalize the use of an apolitical decision rule would allow predictability in her future exercises of the royal prerogative, thereby creating a level playing field for members of Parliament.

Pointing out that an apolitical decision rule guides the governor general in her work may not eliminate the media using colloquialisms like a cooling off period to summarize the outcome of the exercise of the reserve powers, but it would go further than the current approach in claiming for the office of governor general a process that ensures impartiality and objectivity. It would also clarify for Canadians how their parliamentary system works; the very acknowledgement that the governor general is striving to keep matters before Parliament until the Commons has fully explored all options is a reminder that it is to Parliament that the government is responsible. In fact, the decision rule itself would strengthen the hand of the legislative branch by switching the scales from a process that is singularly reliant on prime ministerial recommendation to one that is centred on parliamentary accountability.

One final point should be made about coalition governments. Jennings has stated that to ensure impartiality, "[t]he rule is that on defeat and resignation of the Government the Queen should first send for the leader of the Opposition."[45] On the other hand, Geoffrey Marshall has argued that in minority parliaments, having the governor general appoint a coalition government would be more in keeping with the governor general's duty to remain impartial as a coalition government would have the support of the majority of elected MPs, certainly more support than the leader of any single political party.[46] The evidence supports this, as coalition governments tend to "pull the government towards the centre of the policy spectrum and reduces the distance between the government and the voters."[47] An apolitical decision rule provides for the possibility of coalition governments since leaving the matter before Parliament as long as possible ensures that political parties have an opportunity (perhaps even an incentive) to explore various permutations. Yet it relieves the governor general from an overt role in the establishment of a coalition government.

Conclusion

The control of the reserve powers by constitutional convention suffers from inevitable ambiguity as they must be applied amid controversy and over the disagreement of the constitutional actors. Certainly Canada's electoral system, with the growth in regional politics and parties, has been returning more divided Parliaments, a phenomenon which is likely to continue. This means, in turn, that the governor general will be called upon more frequently to exercise the reserve powers. If the public's expectation of the governor general is that she appropriately acts on her discretion in exercising her reserve powers, then ambiguous decisions will lead to dissatisfaction with this office and with Canada's parliamentary system of government. Yet, the democratic theory informing these very same conventions points to a rather straightforward decision matrix. Put simply, to respect responsible government a governor general should naturally try to exercise her reserve powers such that as many options as possible will remain available to elected members of Parliament. This decision rule has been acknowledged to be apolitical by speakers in Parliament since before Confederation, and is used to ensure that their nonpartisan office is kept above the political fray they are periodically called upon to mediate. This approach has admittedly never been expressly adopted by a governor general, but then again, no explanation for a governor general's exercise of the reserve powers has ever been expressed formally, so even the reasons underlying convention are largely speculative.

It seems likely that governors general in the past have followed this very decision matrix, whether consciously or not. They may have been guided simply by an attempt to respect conven-

tions though, as Patrick Monahan points out, governors general are not likely to be schooled in the constitution.[48] It is more likely that governors general have been driven by a sense of fairness and a commitment to the principles of responsible government. Some may have been simply responding to a need to protect the office of which they were made temporary custodians. But each of these motives point to the existence of a decision rule such as the one elaborated here.

However, it is necessary to go further and publicly acknowledge and embrace the merits of this decision rule. This rule allows the head of state to remain above the political fray as guardian of the parliamentary system of government, as court of last resort for certain constitutional questions, and as the ultimate defender of the interests of the true political sovereign of the state — the people. For those who desire a minimalist role for the governor general, the rule removes much of the subjectivity implicit in decision making informed by precedent.

Having a formal rule enunciated will create a more level playing field so that political actors can predict outcomes, which will reduce the speculation among academics and the media that contributed to a sense of "crisis" in the December 2008 prorogation episode. It will also eliminate the need for a prime minister to stand in front of Rideau Hall and account, or fail to account, to the public for why in which the governor general's personal prerogatives have been used.

Notes

* Département de science politique, Université de Montréal.

1 Adrienne Clarkson, "Foreword" in Peter H. Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) [*Parliamentary Democracy in Crisis*] at xii.

2 « Le Parlement est roi, » online: Constitution Acts <http://www.constitutionacts.blogspot.com>. They recommended that dissolution be denied though, as noted later, they could not agree on how many months following an election this convention applied.

3 Russell and Sossin, eds., *supra* note 1.

4 The coalition proposal was just taking shape at the time of this comment.

5 More accurately it was a live telecast of the Governor General's front door, as everyone waited for the "possibility" of the Prime Minister emerging to announce her acceptance of his recommendation. If his recommendation for prorogation had been refused, and this is especially true if he then tendered his resignation and it was accepted, he was expected to leave by the side door and make no comments on the grounds of Rideau Hall (though one can imagine he would have had plenty to say when he returned to Parliament Hill). The governor general by tradition never makes a comment.

6 In addition to the fourteen papers published in *Parliamentary Democracy in Crisis*, *supra* note 1; and Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?" *Points of View*, Discussion Paper No. 7 (Edmonton: Centre for Constitutional Studies, 2009). See also Bradley W. Miller, "Proroguing Parliament: A Matter of Convention" (2009) 20 Public Law Review 100; and Donald A. Desserud, "The Governor General, the Prime Minister and the Request to Prorogue" (2009) 3:3 Canadian Political Science Review 40. In addition, *LawNow* published a number of papers on prorogation in its November 2009 edition, online: <http://www.thefreelibrary.com/LawNow/2009/November/1-p5672>.

7 Andrew Heard, "The Governor General's Decision to Prorogue Parliament: A Dangerous Precedent," online: <http://www.sfu.ca/~aheard/elections/prorogation-2008.html>.

8 Jack Stilborn, "The Role of the Governor General: Time to Revisit the Visits" (2009) 30:7 Policy Options at 100.

9 It was adopted by Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?" in Russell and Sossin, eds., *supra* note 1 at 51.

10 For a discussion of how emotional heuristic might operate see Bruce M. Hicks, "Do Large-N Media Studies Bury the Lead, or Even Miss the Story?" (2009) 3:2 Canadian Political Science Review 89.

11 Bruce M. Hicks, "Lies My Fathers of Confederation Told Me: Are the Governor General's Reserve Powers a Safeguard for Democracy?" (2009) 25 Inroads: The Canadian Journal of Opinion 60. [Hicks, "Reserve Powers"].

12 This ambiguity was acknowledged to exist as far back as A.V. Dicey when he first posited the

existence of unwritten constitutional conventions. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1865) [Dicey] at 422. John Stuart Mill had in 1861 suggested the existence of "unwritten maxims" of the constitution. See J.S. Mill, *Considerations on Representative Government* (Chicago: Henry Regnery, 1961). There are a number of threads of Dicey that can be traced back to nineteenth-century writers. See O. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors" (1966) 29 Modern Law Review 137.

13 Kenneth Clinton Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1951) at 179. For a study specifically of Canadian conventions, see Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Oxford University Press, 1991).

14 Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1960) at chapter 3.

15 Some of these prerogatives, such as withholding royal assent, are argued to no longer exist due to the negative precedent that they have not been used in recent years. This is the case made over the powers of disallowance and reservation. See for example, Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell 1997) [Hogg, *Constitutional Law*] at 120. However, caution should be urged as this was also the position scholars took concerning section 26 of the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Eugene Forsey called this section the "Cheshire cat" of the Constitution, yet Prime Minister Brian Mulroney was able to convince the Governor General and the Queen to use this clause to appoint additional senators in 1990 so as to ensure passage through the Senate of the goods and services tax.

16 This was a higher level of concurrence than originally advocated by Jennings, and was suggested by Hogg, *Constitutional Law*, ibid. at 9. See *Reference re: Amendment of the Constitution of Canada*, [1982] 1 S.C.R. 753 [*Patriation Reference*] at 878-80. Jennings is explored in greater detail in *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 [*Objection by Quebec*].

17 *Patriation Reference*, *ibid*. at 760.

18 Dicey, *supra* note 12, footnote 26.

19 See Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1986) [Marshall].

20 Dicey, *supra* note 12 at 422. After all, conventions are shaped by emerging and evolving ideas of the nature and legitimacy of government. See W.S. Holdsworth, "The Conventions of the Eighteenth-Century Constitution" (1932) 17 Iowa Law Review 161.

21 Baldwin "consistently increased the importance of the prime minister by transferring definitely to his office control of the discretionary power of the Crown." See A. Berriedale Keith, *The King, the Constitution the Empire and Foreign Affairs: Letters and Essays 1936-7* (London: Oxford University Press, 1938) at 41.

22 *Ibid*.

23 When asked about this change in the House of Commons, the parliamentary secretary to the prime pinister claimed that the earlier mechanism of conveying the recommendation through a formal "minute of Council was considered inappropriate as a means of addressing the Governor-General on those matters on which the tendering of advice is the responsibility of the Prime Minister alone and not of the Committee of the Privy Council." Canada, *House of Commons Debates* vol. 4 (4 April 1966) at 3776 (John R. Matheson). No explanation was given for how this had become a prime ministerial responsibility in Canada, or how a new and creatively named "instrument of advice" could emerge within the codified system of privy council documentation inherited from the British.

24 Harold Macmillan, *Riding the Storm* 1956-1959 (London: Macmillan, 1971) at 750.

25 This is a debate that equally underlies discussions over the powers of the judiciary and over the appropriate role for the Senate in Canada.

26 Ironically, this legal scholar/political scientist positioning is reversed in the debate over the role of the courts relative to Parliament, with Canadian political scientists tending to argue for a more limited judicial role. See for example, F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001), and contrast legal scholars Peter W. Hogg, "The Charter Revolution: Is it Undemocratic?" (2002) 12 Constitutional Forum constitutionnel 1; and Kent Roach, "Constitutionalism and Commons Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Canadian Bar Review 481. This might suggest a bias for particular institutions.

27 Marshall, *supra* note 19 at 20.

28 Walter Bagehot, *The English Constitution* (Cam-

bridge: Cambridge University Press, 2001).

29 Harold Wilson, *The Governance of Britain* (London: Harper Collins, 1977) at 22.

30 Berriedale Keith, *The British Cabinet System* (London: Stevens, 1951) at 449.

31 Harold Nicolson, *King George the Fifth: His Life and Reign* (London: Constable, 1952).

32 Ivor Jennings, *Cabinet Government* (London: Cambridge University Press, 1961) [Jennings] at 449.

33 Andrew Heard, "The Governor General's Suspension of Parliament: Duty Done or a Perilous Precedent?" in Russell and Sossin, eds., *supra* note 1 at chapter 4.

34 *Patriation Reference*, *supra* note 16 at 881-83. This was affirmed in *Objection by Quebec*, *supra* note 16 at para. 98.

35 See for example, W.T. Stanbury, "Write it Down: Codify the Unwritten Conventions for Canada's Sake" *The Hill Times* (15 December 2008); and Larry Zolf, "Boxing in a Prime Minister" *CBC News* (28 June 2002), online: CBC <http://www.cbc.ca/news/viewpoint/vp_zolf/20020628.html>.

36 Jennings, *Cabinet Government*, supra note 34 at 412.

37 John Kerr, *Matters for Judgement: An Autobiography* (London: Macmillan Press, 1978); and Gough Whitlam, *The Truth of the Matter* (New York: Penguin, 1979).

38 Michael Valpy, "The Crisis: A Narrative" in *Parliamentary Democracy in Crisis*, *supra* note 1 at 16.

39 *Journals of the Legislative Assembly of the United Province of Canada* (Ottawa: Queen's Printer for Canada, 19 August 1863) at 33.

40 Thomas Erskine May, *A treatise upon the law, privileges, proceedings, and usage of Parliament* (London: Charles Knight & Co., 1844) at section 218. His citation was a speaker's ruling of 4 June 1821.

41 William McKay, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 23rd ed. (Markham: LexisNexis Butterworths, 2004) at 413.

42 Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice* (Montreal: McGraw, 2000) at 268-69.

43 U.K., *House of Commons Debates*, vol. 919 (11 November 1976) at cc.662.

44 Hicks, "Reserve Powers," *supra* note 11.

45 Jennings, *Cabinet Government*, *supra* note 36 at 32.

46 Marshall, *supra* note 19 at 34.

47 André Blais and Marc André Bodet, "Does Proportional Representation Foster Closer Congruence Between Citizens and Policymakers?" (2006) 39:10 Comparative Political Studies 1243.

48 Patrick Monahan, *Constitutional Law* (Toronto: Irwin Law, 2002) at 79.

Semi-Presidentialism à la française: the Recent Constitutional Evolution of the "Two-Headed" Executive

David Marrani*

Introduction: a Semipresidential Constitution?

Since 1789, the large number of constitutional texts in France has reflected ambivalence about the organization of the polity. On the one hand, by transferring the onus of sovereignty from a monarch to the people (sometimes theorized as the nation) the governing body could become a representative regime with an assembly as its main governing institution. This "pure," sometimes "excessive" parliamentary form of government was to be the basis of numerous constitutional texts. On the other hand, French constitutional texts did not necessarily excise remnants of the ancient tribal Indo-European society established through a Franco-Germanic hierarchical monarchic society. Indeed, ambivalence and discontent in French society regarding the dialectical relationship between these two poles of government today finds expression in contrasting parliamentary versus presidential regimes. The fifty-one-year-old Constitution of the Fifth Republic is an attempt to reconcile these two regime forms.

The structural debate of "who shall govern" formed part of the preparatory debate for the drafting of the 1958 Constitution of the Fifth Republic, and it is present in the text itself. It is also present in two major constitutional modifications that took place in 1962 (direct election of the head of state) and 2000 (reduction of the head of state's term of office from seven to five years), although it is less evident in the 2008 amendment (limit to two consecutive terms of office).[1] This article looks at the dynamics within the text of the Constitution, particularly the revisions that concern the role of head of state (the president), that give the executive a major influence on governance in France. It considers the current semipresidential system of government and the workings of the "two-headed" executive (head of state and head of government). The significant modifications to the Constitution examined here have created space for major changes in the functioning of the institutions of the Fifth Republic. In particular, the partisan synchronization of the offices of president and prime minister has become an important psycho-political matter rather than a legal-political one, and in this article I present a taxonomy, organized around the most relevant changes to the Constitution of the Fifth Republic with regard to its semipresidential aspects (the 1962 and 2000 revisions), using the categories of pure synchronization, nonsynchronization, and forced synchronization. I will also briefly address the current situation under President Nicolas Sarkozy and the 2008 constitutional revision.

Varieties of Partisan Synchronization

On 21 December 1958, in the first presidential election under the new Constitution, Charles De Gaulle was elected by an enlarged electoral college, composed mainly of members of parliament. It was quite certain that he would be elected president if his party led parliament (as it did). But when the president was elected by direct universal suffrage after the 1962 change, the electoral college had reached a critical mass. Because of the bicephalous character of the executive under the Constitution of the Fifth Republic, and due to the new balance within the constitutional arrangement, there was, after 1962, a new possibility for president and parliament, directly elected by the people, to be synchronized. This possibility affected the very functioning of the bicephalous executive. The prime minister, who has usually been a close ally of the president, needed a majority in the directly elected lower chamber (*Assemblée nationale*), otherwise he would be unable to pass policy into law. Maurice Duverger writes that the majority is first formed around the head of state and the president is normally the party leader. If the president is not, then the party leader should be the prime minister, although in recent times the situation has been more complex, even confused.[2] Duverger also predicted that a majority in the directly elected chamber from a different party than the president would oppose him.

In fact, two such situations after 1962 have occurred: the period of constitutional functioning under a *fait majoritaire* (a majority in the two directly elected institutions) and the period of functioning under *cohabitation* (literally living together; it is usual here to characterize a two-headed executive with two opponents). The *fait majoritaire* is often called the *période normale*. This implies that there is a "normal" reading of the French Constitution and an "abnormal" one, but this dichotomy is problematic. It is preferable, instead, to adopt the concepts of synchronization and nonsynchronization within the executive, and therefore between the two institutions elected by the people: president and lower legislative chamber (whether or not we consider their status as representative or not). In any case, it is evident from the positions taken after the two efforts at constitutional revision that "normalcy" and "abnormality" constitute important aspects of the justification used by the political elites and commentators (the 2008 amendment is an exception): pure synchronization is normal and therefore good; *cohabitation* is not normal, so it must be bad. As a result, the situation had to be brought back to normalcy, even if by force.[3] The Fifth Republic was supposedly ill and the remedy was to enforce partisan synchronization between president and elected chamber.

Pure synchronization

In the "normal" functioning of the institutions the *fait majoritaire* is created by a directly elected head of state who is the leader of the party or coalition leading the elected lower chamber. As we have seen, the presidential term of office lasted for seven years until amended in 2000, and the *Assemblée nationale* members' term of office lasted for five years. This discrepancy in term of office left the "two-headed" executive in a peculiar position.

In a situation of *fait majoritaire*, there is pure synchronization reflecting a strong semi-presidential system. There have been three periods of pure synchronization: 1958-86 (De Gaulle's first and second terms, Georges Pompidou, Valéry Giscard d'Estaing, and François Mitterrand's first term and the period before the 1986 general elections), 1988-93 (Mitterrand's second term, the period before the 1993 general elections), and 1995–97 (Jacques Chirac's first term and the period before the 1997 general elections). Despite appearances, the phenomenon of pure synchronization is varied as regards the power balance between president and prime minister.

The head of state in a situation of pure synchronization is no longer considered a referee or politically neutral (*un arbiter*). The president is involved in policy making, although he may use his prime minister as an intermediary between himself and the people or members of parliament. This may contribute to an inverted

reading of what is happening. The president is supposed to preside while the prime minister executes: it is a system that should be simultaneously presidential and parliamentary. In fact, the president becomes the real and unique motor of the executive; he defines the program of his government. But articles 20 and 21 of the French Constitution state that the "the government shall determine and conduct the policy of the nation" and "shall direct the conduct of government affairs," not the head of state. The president, in receiving democratic legitimacy from an election that was supposed to put him above all partisan games, enters the political arena. This has an impact not only on the function of the head of state, but also on the president's ability to stay in power. Indeed, if the president is the real actor of the executive, he will suffer from taking and making decisions. (Giscard d'Estaing was not re-elected in 1981, for example, while Mitterrand in 1988, and Chirac in 2002 were re-elected after a period of nonsynchronization).

The strong leadership of the head of state is only possible because the president increases his legitimacy with his democratic mandate; as a result, constitution practice that differs from its letter goes uncontested. Strong leadership contributes to a modification of the classic functions of government as laid out in the Constitution, and the classic parliamentary practice of government as the initiator and maker of laws is no exception.

Indeed, in every case of presidential powers exercised on the advice of the prime minister or the government, the practice of *fait majoritaire* modifies the reality of the Constitution, inverting the meaning of the articles' wording. In relation to the wording of article 8, paragraph 1, which obliges the prime minister to resign only if he decides to, we note that, in practice, it is always the head of state who forces the head of government to resign, legality being respected by a purely artificial agreement on the legal mechanism involved. Article 8, paragraph 1 is worded in such a way as to suggest that the prime minister will issue a letter of resignation and the president will accept it. In reality, the president asks the prime minister to prepare this letter when the prime minister is first appointed.

Similar comments can be made on the use of article 11. According to the text, the government is supposed to advise the president on the holding of a referendum (although not on a constitutional amendment, which is dealt with, normally, in article 89). Nevertheless, referenda are initiated by the head of state. This phenomenon is certainly evident in the case of the "Father" of the French Constitution. Indeed, some have claimed that De Gaulle's use of article 11 (in 1962 and 1969) was illegal.[4]

Outside the scope of presidential discretionary powers, the president needs the government and/or the prime minister to act legally. Countersigning of presidential documents in a period of *fait majoritaire* is automatic. It is the core of the bicephalous organized executive. Both heads sign acts of the executive. In a condition of synchronization, the two heads have similar wills and present a unified opinion. Unlike the former republics, however, in the Fifth Republic there is no ambiguity: the head of state is the decision maker and the prime minister follows suit.

The appointment and firing of government members, under article 8, paragraph 2, is presented as something the president does with the help of the prime minister. In fact, in the *fait majoritaire*, the head of state not the prime minister chooses ministers and gets rid of them. The same may be said of article 13, paragraph 1 of the Constitution, or the understanding of articles 15 and 21. Article 13 states that government regulations are deliberated upon by a council of ministers. The initiative is left to ministers and the discussion is collegial, with the president signing only government regulations. In a situation of *fait majoritaire*, the president interferes with this process and may refuse to sign. In article 15 and 21 the president is the head of the army, but the prime minister (and in some respects the minister of defence) also has some powers in this area. In a situation of *fait majoritaire* the latter are mere executants of the presidential will and lose all freedom to act on their own initiative.

Nonsynchronization based on political factors

Nonsynchronization occurs when the directly elected head of state and the majority of the directly elected lower chamber are from different sides of the political spectrum. In corollary fashion, *cohabitation* is a counter to *fait majoritaire* and in that situation the system of government is closer to a prototype of the parliamentary system of government than it is to a presidential system.[5]

These issues may initially seem somewhat mechanical, or simply questions of timing. The president's term of office was seven years and that of the *Assemblée nationale*, five years. In a purely parliamentary regime, there would be no problem when at year *n* + *five* of the presidential mandate, the lower chamber shifted to the opposition, leaving a head of government from the other political side. In the case of the Fifth Republic, the bicephalous executive makes the partisan views of the two executive heads extremely important. In situations of nonsynchronization, the prime minister is either the leader or a strong figurehead for the party or coalition leading the directly elected chamber. The two-headed executive is not synchronized anymore and although that is no cause for alarm in a parliamentary system of government, it appears to disrupt the system of strong leadership established by De Gaulle (hence the comment made earlier on the normal and abnormal functioning of the Constitution). Then again, even with a president confined to his constitutional powers, there is still a strong leader as the figurehead of the country. This situation was manifest in 1967 and 1978.

In March 1967 it was expected that general elections would be won by the opposition and that a majority hostile to De Gaulle would be returned, although in the end a very small majority supporting the president was elected to the *Assemblée nationale*. In 1978, the Left was expected to win the general elections. If it was clear in 1967 that De Gaulle would not remain president if facing a hostile *Assemblée nationale*, in 1978 Giscard d'Estaing was prepare to remain in place and therefore create an opportunity for the Fifth Republic's first instance of nonsynchronization. The loss of a general election is a clear demonstration that a party has lost the support of the people who have become disenchanted with how the country is ruled. De Gaulle would certainly have resigned had he faced an instance of nonsynchronization, respecting "his" populist interpretation of the Constitution. In light of the proximity of the March 1967 elections to the well-known political phenomenon of May 1968,[6] it is worth considering the potential impact of rigidity in Frances's political institutions. The people had not seen anything changing and took to the streets. De Gaulle's resignation might have brought about a left-wing presidency, which would have accepted the need to govern alongside an opposition party-led *Assemblée nationale*. But this is only supposition. What is important to note in this "missed" cohabitation is the necessity of equilibrium within the basic institutions of government. If there is none, political opposition is left to people taking to the streets rather than working within the mechanisms for institutional mediation.

The second possibility offered by nonsynchronization is an executive with two opposing leaders. It occurred in neither 1967 nor 1978, although the president was ready for the possibility of nonsynchroniszation. The first instance of this phenomenon was in 1986, and two variations have taken place in more recent history.

A left-wing president briefly faces a right-wing prime minister

President François Mitterrand lost general elections twice, each time within two years of the end of his term of office. On 16 March 1986,[7] Mitterrand lost the support of the lower chamber; the general election was won by a right-wing coalition made up of the Rassemblement pour la République and Union pour la démocratie française (RPR-UDF) lead by Chirac. Mitterrand did not resign but appointed Chirac as head of government, who remained in place until the presidential election of 1988. The general elections of 21 and 28 March 1993 again returned a right-wing majority. The Parti socialiste (PS) won only fifty-six seats (17.5 percent of the vote). During this period, 1993-95,

Mitterrand appointed Edouard Balladur, Chirac preferring a "semi retreat" to prepare for the presidential election of 1995.

A right-wing president facing a left-wing prime minister

In 1997, Chirac decided to dissolve a strongly supportive lower chamber and provoke general elections. He subsequently lost his majority. This triggered the beginning of a long period of nonsynchronization, 1997–2002. Lionel Jospin became prime minister and he remained in this position until the 2002 presidential election.[8]

Political disagreement within the executive may have an impact on constitutional practice in many ways. The functioning of the Constitution described in situations of synchronization is mirrored in nonsynchronization with the president losing many of his powers (strong presidential leadership remains on matters of external sovereignty, with diplomatic matters and defence being part of the "presidential domain"). The president may decide to block the work of the government by using constitutionally sanctioned discretionary powers to sign delegated legislation (*ordonnances*). Under article13, paragraph 1 of the Constitution, Mitterrand refused to sign three *ordonnances*.[9] This nonsynchronization creates an interesting situation, which does not comply strictly with the constitutional *gaullienne* vision of the Fifth Republic. While many were considering the risk of a major institutional crisis under nonsynchronized institutions of government, the fact is that such occurrences prove the Constitution to be simultaneously rigid and yet flexible in its application. The Constitution remained rigid, allowing *alternance* in 1981, and allowing dissonant executives in 1986, 1993, and 1997. However, the Constitution also proved flexible in its resistance to a reading not intended in 1958.

Cohabitation produced a condition of equilibrium around the most important keystone of the institutional arrangement of the Fifth Republic, which was a move from a noninstitutionally based equilibrium during periods of synchronization (where the people/nation provides the counterweight to political institutions belonging to the same party or political coalition), to an institutional equilibrium (nonsynchronization), where the counterweight forms around the executive itself. This "return" to a parliamentary system of government provides more opportunities for input by the people. As such, the electorate may s tangibly see the result of its efforts at the end of election day. Nonsynchronization may therefore characterize an instance of power used against power.[10]

Nonsynchronization may, at times, be conceptualized in more personal terms as a problem of personality conflicts between head of state and head of government, although the term *cohabitation* is best constrained to refer to problems arising from the lack of partisan uniformity in presidency and lower chamber. In any case, what French commentators have shared in analyzing situations of nonsynchronization is its presentation as an abnormal situation, which needs to be considered and dealt with. Constitutional changes proposed in 2000 presented a solution.

Commentators have been able to defend a "normal" reading of the Constitution with reference to the "normal" political conditions of synchronized political institutions. However, the normal reading of the Constitution is De Gaulle's interpretation, while the conventionally abnormal reading, associated with situations of nonsynchronized political institutions is actually a reading of the Constitution as organizing a parliamentary system of government, and it is an interpretation consistent with a plain reading of the Constitutional text. The effort to force synchronization through constitutional amendment is the way in which the Constitution was been rendered once again "normal."

Forced Synchronization Based on Constitutional Amendment

The modification of the Constitution in 2000 was marked by the wish to tackle the possibility of nonsynchronization. This change focused on the mandate of the president, reducing it to five years, aligning it with the tenure of the deputies. In that respect, it was necessary, after the 2000 amendment, to differ the end of the term of office of the deputies. Parliament may

legislate to complete the Constitution through *loi organique*, special statute law that details some articles of the Constitution. In 2001, it was decided to extend the term of office of the deputies by eleven weeks to allow legislative elections to take place after the presidential election.[11] Article L.O. 121 of the *Code électoral* was modified as a consequence. The general elections were planned for a few weeks before the presidential election on 24 March 2002, and the presidential election was to be held either on 14 or 21 April 2002. The spirit or logic of the institutional arrangement was to be examined.[12] In the light of the 2000 constitutional evolution, it was considered illogical to set the elections for directly elected members of parliament to take place before the presidential election. The *Conseil constitutionnel*, which automatically controls all *loi organique*,[13] referred in its decision to the special position of the presidential election: "because of the place of the election of the president of the Republic by direct universal suffrage in the functioning of the Fifth Republic";[14] the counsellors went on to explain that it was logical for the general election to follow the presidential one. They made clear that "it was desirable that the presidential election precedes, as a general rule, the legislative elections and that this rule should be applied to the presidential election foreseen in 2002."[15] Everything was organized to synchronize this chronology: first electing the president, then electing the *Assemblée nationale*. That said, some possibilities remained for nonsynchronization, like the dissolution of the *Assemblée nationale*, or the resignation or even death of the president, for example.[16] Only the president can activate the end of the synchronization, and even if this happens, it will be limited to a short *cohabitation*. Since 2002, this has lead to a forced synchronization.

This is a new situation and there are only two examples to explore. In 2002, Chirac was elected with a large majority because he was facing the extreme right candidate Jean-Marie Le Pen. A "republican front" was built around Chirac that would also lead to success in the general elections. An ally of the new president, Jean-Pierre Raffarin, became prime minister. He was definitely the secretary of the president. The bicephalous executive was back to "normal." Even when Dominique de Villepin was appointed after the defeat of the referendum on the European Constitutional Treaty, the functioning of the institutions was a strongly semipresidential one. The only opposition the president had to face came from among his supporters. Nicolas Sarkozy abducted the presidential party, and became its leader while a member of the government (although not its chief). A second reading of pure synchronization is the 2007 election. Although he has been president for only two years, it is, of course, too early to judge the actions of Sarkozy, although journalists have dubbed him a "hyperpresident" or "omnipresident."[17] Sarkozy, who is a young president, provides a stark contrast to Chirac in many ways, partly because he follows Chirac's presidency. Indeed, Sarkozy has probably earned the tag given him. Alain Badiou, a French philosopher, has sarcastically compared Chirac to the Brejnev years in a recent article published in *Le Monde*, comparing Chirac to Leonid Brejnev. Chirac was portrayed as the caretaker of the system rather than as someone who took action. This particular method of ruling made him look like a president of the Third or the Fourth Republic, closer to the pure French model of a parliamentary regime, but at the same time it made him appear very distant, more like a monarch.

In fact, this may have been a way of dealing with the forced synchronization that resulted from the 2000 constitutional amendment. Sarkozy declared recently that "*Je l'avais rêvé, je le mets en oeuvre*"[18] (I dreamt it, I will do it), and the message is, indeed, that he *will* do it. Sarkozy indicated that he would take decisions, hence the journalists' accusation of hyperpresident, omnipresident or even "telepresident." Nevertheless, this very *gaullienne* reading of the presidency is reflected in Sarkozy's proactive bent; he has not taken the dull path of counterbalancing the pure synchronization that once again marks the French regime. The presidential election was followed by legislative elections, and no one would have predicted the sudden reversal of the majority over this time. President Sarkozy led his *Union pour un Mouvement Populaire* (UMP) party to a massive victory in the lower chamber of the French parliament. The majority returned in both directly elected institutions

is naturally similar. But this is, in a way, done artificially. The constitutional text does not organize any balance between the institutions; it only organizes them. The *new* reading of the Constitution by the French president so far includes the following changes:

a) All appointed ministers must face public vote. As the timing of presidential and general elections is locked-in, the president appointed his government after his election. New ministers are forced by the president to campaign to get a seat in the lower chamber of parliament. One minister, a former prime minister under Chirac and Mayor of Bordeaux, Alain Juppe, lost in his attempt to be elected deputy. He subsequently left his position as minister,[19] clarifying the new rule by immediately tendering his resignation to the president and the prime minister.

b) Government is being opened-up. The president asked eminent figures from the opposition to join his team at different levels. First, he appointed some as members of government with the best examples being the appointment of Bernard Kouchner as Minister of French Foreign and European Affairs, assisted by Jospin's ex-cabinet director, Jean-Pierre Jouyet; and the former national secretary of the Parti socialiste, Eric Besson, as *Secrétaire d'Etat à la Prospective et l'Evaluation des politiques publiques*, and the president of Emmaüs France, Martin Hirsch, as *Haut commissaire aux solidarités actives contre la pauvreté*.

c) Institutions are being reformed. A new committee tasked with proposing reforms, the *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République*, was officially set up by the president on 18 July 2007. The committee delivered its report on 30 October 2007, making seventy-seven proposals. President Sarkozy conducted a constitutional reform process that was approved by the parliament meeting in *Congrès* on 21 July 2008.[20]

The exercise in forced synchronization, so far, has been a process directed by the president. Since 2002, forced synchronization has proceed either by 1) positioning the president closer to the neutral personage of the Third and Fourth Republics (as in the case of Chirac); or 2) positioning the president as an proactive force in the creation of institutionalized opposition.

In conclusion, this situation cannot be left to the letter of the text of the Constitution. In its current version, after an amendment drafted during the period of nonsynchronization to produce a *plus jamais ça*, a balanced way of operating, changes to the Constitution have forced a democratization that might destroy democracy itself.

Conclusion: a Postmodern (or Second Modern) System?

This article has analyzed the true nature of the Fifth French Republic through an examination of the revision, evolution, and dynamics of the Constitution. To conclude, the functioning of the Constitution of the French Fifth Republic does not match the intention of its creators. On the one hand, 1958 was to be the start of a system with a president-monarch acting as a neutral referee (*un arbiter*), legitimized by strong constitutional personal powers, together with a parliamentary regime aided by a rationalized parliament and a strong prime minister. Oscillating between synchronized and nonsynchronized partisan situations, the original logic gave way to a head of state becoming a leader, then moving again to a more "normal" parliamentarian regime (although the president would conserve certain strong powers relating to external affairs, and strongly resist the will of the prime minister on every occasion).

There is no doubt that the French head of state is one of the most powerful positions assigned by any constitution. However, it remains the strong leadership of a state in transition. Three factors may help to illustrate this.

First, the emergence of a transnational so-

ciety in Europe is radically changing the structure of the relationship between the people/nation and its governing body. Second, the French Republic has been facing globalization with a lot of economic problems undermining the way the system has recently developed. Third, the decline of the nation-state concept, and of representative institutions, particularly the elected chamber as an institution that clearly represents the people.

There is also in France, finally, the deeply rooted reference to the leader of "the group," the "father of the horde." Since the decapitation of Louis XVI, there has been a succession of political systems of government oscillating between strong and weak leaders. Particularly since 1870, the strength of the leader has been dramatically decreased by successive constitutions. De Gaulle believed that the strong leader should be restored to the French Constitution. As France democratizes, however, the head of state has been symbolically "killed" with regular election. In that respect the 1962, 2000, and, in a way, the 2008 amendments of the Constitution have given the people even more opportunities to weaken the head of state. The 2008 change goes even further in that respect, obliging the "father" to step down after ten years. If this does not happen, the group may not be happy and may show its discontent by taking to the streets. De Gaulle when re-elected in 1965 replaced himself; "the group" protested in 1968. Chirac, re-elected in 2002, again replaced himself; "the group" again protested in 2005.

The difficulty in relation to the Constitution of the Fifth Republic is that it is a text of consensus, a settlement in which the position of the leader is similar to that of a clan that recalls the memory of a strong figurehead, power, and God, while the parliament remains the rational institutionalized democratic side of the Republic. It is a difficult game.

Notes

* Lecturer in Public and Comparative Law, University of Essex, United Kingdom. The original version of this article was presented as a lecture to the Law School of the International University of Audentes, Tallinn, Estonia in May 2007. A revised version was presented at the Public Law section at the 2007 SLS Conference in Durham. I wish to thank professor John Bell for his help. The present version has been revised in style (rather than in substance) under the helpful advice of Cliona Marrani.

1 *Loi n° 62-1292 du 6 November 1962, relative à l'élection du Président de la République au suffrage universel*, J.O., 7 November 1962; *Loi constitutionnelle 2000-964 du 2 October 2000, relative à la durée du mandat du Président de la République*, J.O. 229, 3 October 2000, 15582; *Loi constitutionnelle 2008-724 du 23 July 2008, de modernisation des institutions de la Ve République*, J.O., 24 July 2008, 11890.

2 During President Jacques Chirac's last term of office, Nicolas Sarkozy served as minister for the home office, and was the leader of the party supporting Chirac.

3 Indeed, when one is not well, one has to force oneself to take a pill!

4 Instead of using article 89, which is the one concerning constitutional revision, De Gaulle used article 11 in dealing with constitutional matters in 1962 and 1969. This practice was widely criticised.

5 Jacques Chapsal, *La vie politique sous la Ve République 2 1974-1987*, 3d ed. (Paris: PUF Thémis, 1987) at 534: « *Tout semble indiquer que le président de la République s'est comporté comme la reine de Grande-Bretagne, qu'il lui était impossible de faire autrement et que les mécanismes de la Ve République ont basculé du présidentialisme au parlementarisme*. »

6 The same comments may be made about the situation in 2002 and 2005.

7 The traditional model of deputy elections since 1958 had been the majoritarian system of two rounds of runoffs. In 1986, proportional representation was used and elections organized for a single day.

8 Jospin was so damaged by the nonsynchronization that, as candidate of the Parti socialiste to the presidential election in 2002, he did not even reach the second round.

9 Concerning the privatization of public enterprises on 13 July 1986; the remodelling of constituencies on 2 October 1986; and the management of working time on 17 December 1986.

10 See R. F. Howell, "The Philosopher Alain and French Classical Radicalism" (1965) 18:3 The Western Political Quarterly 594.

11 *Loi organique 2001-419 du 15 May 2001, modifiant la date d'expiration des pouvoirs de l'Assemblée nationale*, J.O., 113, 16 May 2001, 7776.

12 *Rapport de M. Christian Bonnet au nom de la commission des lois*, 186 (2000-01).

13 *Lois organiques* are acts of the French parliament that complete the Constitution without the need to amend it. The possibility of *lois organiques* being adopted is specified in the constitutional text itself. As such, these differ from laws amending the Constitution (that are not considered by the *Conseil constitutionnel*), as well as from "normal" statutes that may be controlled.

14 Cons. constitutionnel, 9 May 2001, *Loi organique modifiant la date d'expiration des pouvoirs de l'Assemblée nationale*, 2001, 2001-444 DC 9: « *en raison de la place de l'élection du Président de la République au suffrage universel direct dans le fonctionnement des institutions de la cinquième République*. »

15 *Ibid*. « *qu'il était souhaitable que l'élection présidentielle précède, en règle générale, les élections législatives et que cette règle devait s'appliquer dès l'élection présidentielle prévue en 2002*. »

16 The *Conseil constitutionnel* mentioned a general rule because it is possible to have a case where the synchronization may be lost (although the probability of this happening has been dramatically diminished).

17 François Jost and Denis Muzet, *Le Téléprésident, Essai sur un Pouvoir Médiatique* (Paris: L'aube seuil, 2008).

18 V. Le Guay and J. Esperandieu, *Le Journal du Dimanche*, Paris (8 July 2007), online : <http://www.lejdd.fr/cmc/politique/200727/sarkozy-je-l-avais-reve-je-le-mets-en-oeuvre_36389.html>.

19 *Ministre d'Etat, ministre de l'Environnement, du Développement durable, de l'Energie et des Transports*.

20 Mainly, the amendment concerned the equilibrium of powers within basic political institutions, rebalancing them by (slightly) diminishing the rights of the head of state and increasing the rights of the French parliament and the rights of the citizens.

Canada, the United Nations Human Rights Council, and Universal Periodic Review

Joanna Harrington*

Introduction

In 2006, a new United Nations (UN) Human Rights Council came into existence, replacing the former UN Commission on Human Rights with a restructured body for the promotion of fundamental rights and freedoms. Heralded as a turning point for human rights within the UN system, the new forty-seven-member Council is intended to operate with a renewed emphasis on fairness, objectivity, and transparency. To help achieve these goals, the Council has developed a new mechanism for monitoring the human rights performance of all states, which it has labeled Universal Periodic Review or simply UPR. In essence, UPR is a form of performance review for states, conducted by other states, using an agreed set of standards to be universally applied with equal force. Under UPR, the human rights record of all 192 states in the world will be reviewed and assessed every four years through a process of written reports and interstate dialogue that examines a state's domestic human rights law and policies, including its constitutional protections. Canada underwent its first UPR review in February 2009, while serving as a member of the Council from 2006-09. The aim of this article is to provide an assessment of the UPR mechanism through an examination of Canada's recent experience. An overview of the Council's creation in 2006 will also be provided, as well as the details of the Council's mandate and functions, including the rules governing the UPR process.

The Creation and Mandate of the Human Rights Council

The Human Rights Council was created by the UN General Assembly through the adoption of a resolution on 15 March 2006,[1] which left the details of its functions and procedures to be negotiated during the Council's first year of operation. According to this resolution, the Council was created to serve as an intergovernmental body responsible "for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner."[2] The Council was also directed to address situations of violations of human rights, including gross and systematic violations, through the adoption of recommendations, and was tasked with promoting the effective coordination and mainstreaming of human rights within the UN system.[3] The Assembly also required the Council to be guided in its work by the "principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation …"[4]

In creating the Council, the Assembly also abolished the sixty-year-old Commission on Human Rights, which, despite its successes in standard setting and the generation of new conceptual understandings of human rights,[5] had become a discredited talking shop, much criticized for its politicization, double standards, and selectivity, and whose membership at times allowed "the foxes to guard the henhouse."[6] Of course there are contrary views, with Professor

Marc Bossuyt of the University of Antwerp describing the politicization criticism as one:

> based on a (widespread) misconception: the principal UN human rights organ is not a tribunal of impartial judges, not an academy of specialists in human rights, nor a club of human rights activists. It is a political organ composed of States represented by governments that as such reflect the political forces of the world as it is. [7]

Nevertheless, the text of the Assembly's resolution clearly indicates a desire to strengthen and improve the human rights machinery of the UN by recognizing "the need to preserve and build on [the Commission's] achievements and achievements and to *redress its shortcomings*."[8] As Professor Nico Schrijver of the University of Leiden has observed: "Institutionally it is the first time that a UN body has been dismantled and replaced in order to achieve greater effectiveness."[9]

The creation of the Council also constitutes a key component of the larger project of UN reform that was endorsed by states at the World Summit held in September 2005.[10] For some, the hope had been to create a Human Rights "Council" with a standing comparable to that of the UN's Economic and Social Council and the Security Council. This proposal found support in the report by the independent "High Level Panel on Threats, Challenges and Change" issued in December 2004,[11] and from the UN's top civil servant at the time, UN Secretary-General Kofi Annan, who was of the view that:

> we need to restore the balance, with three Councils covering respectively, (a) international peace and security, (b) economic and social issues, and (c) human rights, the promotion of which has been one of the purposes of the [UN] Organization from its beginnings but now clearly requires more effective operational structures. These Councils together should have the task of driving forward the agenda that emerges from summit and other conferences of Member States, and should be the global forms (sic.) in which the issues of security, development and justice can be properly addressed. The first two Councils, of course, already exist but need to be strengthened. The third requires a far-reaching overhaul and upgrading of our existing human rights machinery.[12]

But to achieve such a change in legal terms would require an amendment to the UN's constitutive treaty, the 1945 *Charter of the United Nations*,[13] which in turn would require the agreement of all states parties. Pragmatism thus led to the creation of the Council by resolution, with the new Council becoming a subsidiary organ of the General Assembly, albeit with an agreement embedded within the resolution "to review the status of the Council within five years."[14]

In practical terms, however, the new Council has gained an elevation in institutional standing as a subsidiary body of the General Assembly, since the former Commission on Human Rights was one of nine commissions created by and reporting to the fifty-four-member Economic and Social Council, which in turn reports to the Assembly. The new Council is also designed to meet more frequently than the former Commission, with a minimum of three sessions per year,[15] thus serving more like a standing body on human rights than a yearly get-together of government officials and human rights activists.[16] In an attempt to address concerns of past politicization, the General Assembly has directed that all "members elected to the Council shall uphold the highest standards in the promotion and protection of human rights" while also providing for the possible suspension of Council members that commit gross and systematic violations of human rights by way of an Assembly vote.[17] Admittedly, proposals for more robust criteria for membership have not received sufficient state support,[18] and for some, the membership of China, Cuba, and Saudi Arabia alongside Canada on the Council during the formative years of 2006-09 illustrates the weak nature of the Assembly's exhortations. Nevertheless, while the potential exists for the Council to serve as nothing more than "old wine in new bottles,"[19] the use of the "Council" label was intended to mark a break from the past and a desire to engage in a more constructive international dialogue on the promotion and protection of human rights.

The Push for a Peer Review Mechanism

During the discussions in the lead-up to the 2005 World Summit, a proposal to establish a new "peer review" function for the new Council gained some ground among state representatives, with many hoping that such a mechanism would ensure that no state would be immune from human rights-related scrutiny. This proposal also received the endorsement of then Secretary-General Annan, who expressed the view (in a report circulated to states before the Summit) that "peer review would help avoid, to the extent possible, the politicization and selectivity that are hallmarks of the Commission's existing system."[20]

In Annan's view, the Council "should have an explicitly defined function as a chamber of peer review"[21] to assess the performance of all states in regard to all human rights commitments and obligations. This new mechanism, in Annan's estimation, "would complement, but would not replace"[22] the state reporting procedures that exist pursuant to the terms of the core human rights treaties,[23] but which only apply to states that choose to ratify these treaties. As Annan explained, "the latter arise from legal commitments and involve close scrutiny of law, regulations and practice" with a view to making "specific and authoritative recommendations for action," while the desired "peer review" function for the new Council would be "a process whereby States voluntarily enter into discussion regarding human rights issues in their respective countries … based on the obligations and responsibilities to promote and protect those rights arising under the Charter, and as given expression in the Universal Declaration of Human Rights."[24]

Annan was also aware that the new Council would "need to ensure that it develops a system of peer review that is fair, transparent and workable," which in turn required "agreement on the quality and quantity of information used as the reference point for the review."[25] He also viewed the outcome of the peer review process as one that "would help the international community better provide technical assistance and policy advice," but Annan admitted that "it would help keep elected members [of the Council] accountable for their human rights commitments."[26]

Yet despite Annan's involvement, the rather sparse four-paragraph mention of the proposed Council in the Outcome Document from the World Summit[27] suggests that there was no agreement among states as to the Council's precise functions. By March 2006, and the adoption of a specific resolution to create the Council,[28] there was support for a new peer review function, renamed one of "periodic" review, but no decision could be reached on its specific modalities. This resulted in the General Assembly directing the Council to:

> Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; …[29]

However, the rules governing this new "universal periodic review" function were left to be negotiated by states within the Council, and they are now found in the "institution-building package" that was eventually adopted after a year of intense behind-the-scenes negotiations.[30]

The Council's "Institution-Building Package"

During its first year of operation, the Council was required by the General Assembly to determine the details of its new functions, with the Council being mandated to also "assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure."[31] The Council was given until June 2007 to reach agreement, resulting in the eventual adoption of a package deal termed the "institution-building package."[32] This package

was adopted officially by the Council by consensus, but became the subject of a divisive vote when forwarded to the General Assembly for its endorsement.[33] Representatives of the United States and Australia (the latter now led by a Labour Government), both not members of the Council at the time, objected to a package deal that made the situation in the occupied Palestinian territories the only human rights situation in the world to be designated a permanent item on the Council's agenda, arguing that this was in contravention of the Council's founding principles of non-selectivity and objectivity.[34] Canada shared this view, having stated its criticisms in the House of Commons some six months earlier,[35] and having also explained (when the resolution was before the General Assembly's Third Committee) that Canada "categorically rejected the manner in which the package had been pushed through at the fifth session [of the Council], when procedural maneuvering had taken precedence over the principles at stake, thereby doing a disservice to the Council and the causes it espoused."[36] Such maneuvering had prevented Canada from calling a vote on the package before the Council. As a result, Canada (along with Australia, Israel, and the United States) has disassociated itself from the "consensus" concerning the institution-building package, albeit it is within this package that one finds the main elements and details of the Council's future work program.

These elements include the retention of almost all the "special procedures" (as they are called) that were developed within the former Commission involving the use of various special rapporteurs and working groups, as well as a revised complaint procedure for gross and systematic violations.[37] The institution-building package also provides for the creation of a small think tank to be known as the Human Rights Council Advisory Committee[38] and also provides the content for the new UPR mechanism, which is viewed by many as the Council's most innovative reform, although academic observers have already noted that the former Commission had developed a similar "periodic reporting procedure" in the early 1960s that was eventually abolished because the reports it generated on state performance were ultimately considered to be of marginal utility.[39]

The Ground Rules for Universal Periodic Review

The UPR mechanism is a state-driven, "action-oriented," intergovernmental process that, according to the terms of the institution-building package, must not be "overly burdensome" nor "overly long."[40] States are to be reviewed by other states and not by independent experts (however determined) in the field of human rights. The process is intended to be "cooperative"[41] rather than confrontational; however, it is to be conducted through a working group consisting of the entire forty-seven-member Council[42] and thus its progress is potentially affected by other activities being undertaken by these states within the Council in terms of both time and politics. Observer states (i.e. non-Council member states) may also "participate" in the proceedings of the working group, but "other relevant stakeholders" (including human rights NGOs) may only "attend" the review (and thus neither speak nor ask questions).[43] Clearly, time constraints are an issue, given the need to review all 192 UN member states over a four-year period,[44] with a timetable having been established to ensure that all first reviews take place by 2011.[45] A "troika" of three states, selected by the drawing of lots but with respect for the ever-important principle of geographic distribution, serves as the facilitator for each state's review within the UPR process to keep matters on track.[46]

In terms of content, a UPR review consists of the advance provision of documentation, followed by the holding of an "interactive dialogue" within the working group, and then the adoption of a final outcome by the Council, which may or may not include recommendations for improvement.[47] The documentation consists of a national report to be prepared by the state concerned, preferably "through a broad consultation process";[48] a compilation, prepared by the Office of the High Commissioner for Human Rights (OHCHR), of the information contained in the reports of the various treaty-monitoring bodies and special rapporteurs concerning the

country being reviewed; and any "additional, credible and reliable information provided by other relevant stakeholders" thus opening the door to information supplied by NGOs and national human rights institutions.[49] The actual review takes place during a three-hour session[50] of the working group where the state, as represented by a delegation of government officials, is questioned by representatives of other states. A report is then prepared by the working group for the state to consider and respond to as it deems necessary, leading the Council to eventually adopt a standardized "outcome" text "consisting of a summary of the proceedings of the review process, the conclusions and/or recommendations, and the voluntary commitments of the state concerned."[51]

While the pace is clearly unrelenting for the diplomats involved, the creation of the UPR mechanism is intended to send the message that no country is immune from human rights scrutiny. All countries will be subjected to this new form of periodic peer review, albeit the term "peer" is used loosely here to refer to any other state. The involvement of observer states in the working group, along with the weak qualitative requirements for Council membership (as discussed above) means that all states can be peer reviewers absent any further qualifications, with realists noting that a country such as Cuba, North Korea, or Zimbabwe is no peer of Canada on matters of human rights. In any event, the focus of the review of a state is on the national level, with one of the stated goals of UPR being to raise awareness and foster improvements "on the ground," while also serving as a means to assess a state's fulfillment of "its human rights obligations and commitments."[52] It is also hoped that the new UPR mechanism will allow for the sharing of best practices, support cooperation in the promotion of human rights, and facilitate the provision of technical assistance to states in need.[53]

Canada's UPR Review: Consideration of Past Recommendations by UN Bodies

Canada underwent its first UPR review in February 2009, with the review taking place while Canada was a Council member as required by the rules found within the institution-building package.[54] As also required by these rules, the OHCHR prepared a ten-page compilation of the recommendations made by the various UN treaty monitoring bodies and special rapporteurs concerning Canada,[55] as well as a ten-page summary of the submissions made by various NGOs.[56] These documents are accurately called "compilations" and "summaries" since no independent assessment or additional analysis is provided by the OHCHR as to the validity or practicality of the information they contain. This is not, however, the fault of the OHCHR as the rules, along with budgetary considerations, limit the role of the UN's human rights secretariat to one of compiler, notwithstanding the possibility that a special rapporteur, or an entire committee of experts, could be mistaken as to their understanding of the human rights situation "on the ground" in another country. There is also the possibility that the state concerned did not agree with the findings of the UN body, nor the recommendations made which, while non-binding,[57] are nevertheless included in a seemingly neutral compilation of data that is now destined for worldwide dissemination via the internet. Diplomacy and restraint usually dissuade states from issuing line-by-line rebuttals every time a UN body issues a report, but this may have to change with the OHCHR's compilations set to gain a shelf life well beyond the UPR process.

While the OHCHR's compilation usefully collects into one document the various strands of information produced by various parts of the UN human rights machinery, thus enhancing access to this information, the compilation also reports on subject matters that need context and analysis, as well as factual verification, for such information to be of utility to a performance review. For example, the compilation duly notes the regret expressed by two treaty monitoring bodies that "domestic violence is not a criminal offence" in Canada,[58] but makes no mention of the existing provisions under Canadian law that address the constituent offences. This omission of context, analysis, and verification can easily mislead a reader into thinking that Canada

lacks any penal laws to address domestic violence, and for states so motivated, the statement provides fodder for campaigns to embarrass Canada during its UPR review. Another example of the need for context and analysis can be found in the compilation's reference to the concern expressed by one treaty monitoring body concerning the "absence of effective measures to provide civil compensation to victims of torture"[59] — a startling across-the-board statement if true, but the compilation fails to note that this specific recommendation relates to a claim for compensation made by an Iranian national for torture committed in Iran at the hands of Iranian officials.[60] Canada's courts rejected this claim on the basis of the long-standing doctrine of foreign state immunity, finding that state practice worldwide had yet to modify the legal doctrine so as to oblige a cause of action in a third state. Even the expert witness hired by the plaintiff had "conceded that no country has enacted legislation to give a civil remedy for torture committed outside its jurisdiction by a foreign state" and at trial he "candidly admitted that he was advocating a position where international law was going (and, in his view, should be heading),"[61] thus conceding it was not law as yet.

While the OHCHR compilation correctly highlights areas where Canada's human rights law is lacking, such as the government's reluctance to implement requests for interim measures of protection,[62] and the suggestion by the Supreme Court of Canada that in an exceptional case an individual can be deported to face a risk of torture,[63] the compilation also touches on matters more of policy than law, as well as matters of provincial jurisdiction, again without the benefit of context or further analysis. For example, the compilation notes that one treaty monitoring body and one special rapporteur have espoused the view that Canada should "take measures against acts negatively impacting the rights of indigenous peoples outside Canada and to explore ways to hold the corporations accountable for such violations abroad."[64] However, no mention is made of the extraterritorial aspects of these recommendations, and the consequences that would flow from Canada attempting to regulate conduct taking place outside its borders; nor is any thought given to the federalism implications of any proposed regulation by Ottawa of provincially incorporated companies and provincially regulated stock exchanges. Moreover, it should also be noted that these recommendations do not concern matters of clear obligation under human rights law, but instead reflect the advocacy efforts of scholars and NGOs designed to push human rights law beyond its present boundaries. While such advocacy can be considered a noble endeavour, and a possible input into future law-making by states, this does not excuse the UN mechanisms from leaving the impression that Canada is in breach of existing obligations of international law.

As for touching on matters of provincial jurisdiction without the benefit of analysis and context, the compilation notes that one treaty monitoring body has "recommended that Canada eliminate discrimination on the basis of religion in school funding in Ontario,"[65] but makes no mention of how Ottawa should do this, given that education is constitutionally a matter of provincial responsibility. Mention is also not made of the broader context in which this issue arises, with the Supreme Court of Canada having ruled that Ontario's funding of Catholic (but not Muslim or Jewish) schools is not unconstitutional.[66] Recent provincial elections in Ontario have also shown little public appetite for the achievement of equality through subsidy programs or tax breaks for schools of other religious denominations. Space constraints prevent a full listing of the positive and negative aspects of the OHCHR's compilation, but as illustrated by the above examples, and frankly as required for most other forms of performance review, there is always a need for context and independent verification to ensure credibility.

Information from Nongovernmental Organizations

As for the NGO-provided information summarized by the OHCHR, much of it reflects the particular interests of the organizations that chose to make submissions, with the content of each submission duly recorded without

reference to any competing views or independent assessment. Thus the OHCHR's summary reveals, for example, that the Canadian HIV/AIDS Legal Network has complained that Canada's "access to medicines regime" was "unnecessarily complex and cumbersome," while Reporters Without Borders has complained of "an increase in incidents where courts override the confidentiality of sources."[67] However, this process does not encourage any nongovernment defenders of Canada's human rights record to provide their views, nor does it seek rebuttal information on specific issues. Matters of politics also arise within the NGO submissions, with Canada's decision to vote against the adoption of a United Nations Declaration on the Rights of Indigenous Peoples in September 2007[68] being a predictable subject of comment, with several NGOs also lobbying for the declaration's "implementation" in Canada,[69] albeit that implementation is an odd term to use for a non-legally binding, political text that is not a treaty.[70] Ironically, some NGOs also criticized the special rapporteur working on matters of concern to indigenous peoples for deciding it was inappropriate to promote the implementation of the declaration with respect to Canada because Canada had voted against its adoption.[71]

Of the forty-nine organizations that contributed information for Canada's UPR review, only fourteen held "consultative status" with the UN's Economic and Social Council, with such status serving as a rough measure of an NGO's permanence, accountability, and general bona fides, albeit not a guarantee. The system of accreditation is not perfect. Nevertheless, to gain consultative status an NGO must be officially registered as such with the appropriate government authorities for at least two years, must have an established headquarters, a democratically adopted constitution, the authority to speak for its members, a representative structure, appropriate mechanisms of accountability, and democratic and transparent decision-making processes.[72] And yet, for the purposes of reviewing a state's human rights performance within the UPR process, any unaccredited "Tom, Dick or Harry" can make a submission, which is then duly summarized by the OHCHR without further analysis or verification and published on the internet. The contrast with the limitations placed on using information provided by nonregistered associations in domestic court proceedings, and the use of expert witnesses, is stark.

It also appears that few, if any, of the organizations that submitted information for Canada's review were in a position, either by way of orientation or institutional expertise, to provide an overall assessment of Canada's human rights record. The Canadian Human Rights Commission (CHRC) did make a submission, but notwithstanding its name, the work of the CHRC is focused on matters of discrimination and equality, and not all human rights.[73] The Commission has a limited statutory mandate to comment on the entire range of Canada's international human rights obligations, which extend from prison conditions to housing rights, to free speech and freedom of assembly, the right to life, and the rights of Aboriginal peoples, absent a discrimination lens through which to view the full variety of human rights.[74] Of course, the CHRC may engage in consultations to enhance its knowledge base, and according to its 2008 Annual Report to Parliament: "In developing its submission, the Commission carried out extensive research and consulted with all provincial and territorial human rights commissions in the country, as well as over 60 Non-Governmental Organizations … facilitated through the Canadian International Human Rights Network, established by Rights and Democracy."[75] But one may well ask why the CHRC did not mention consultation with academics who teach and research within the full breadth of the field of human rights, and whose terms of employment ensure their independence from both government and advocacy organizations.

Nevertheless, the CHRC did make a submission for Canada's UPR review, with the OHCHR's summary indicating that the CHRC praised Canada for its recognition of the rights of gays and lesbians, including the legal recognition of same-sex marriages,[76] placing Canada in opposition to the views of one UN treaty monitoring body, which has found a state's refusal to recognize same-sex marriages as being

permissible under international human rights law.[77] Canada can, of course, go further domestically than the minimum requirements of international law, and can also choose to disagree with the declaratory views of a treaty monitoring body. As for other matters mentioned by the CHRC in its submission, those included in the summary all relate to the situation of Canada's Aboriginal peoples, with the CHRC expressing "regret" with respect to Canada's position on the adoption of the Indigenous Rights Declaration.[78] The CHRC had previously expressed such "regret" in its 2007 Annual Report to Parliament,[79] although no mention is made of this comment being the result of a recommendation, suggestion or request as required by the CHRC's governing statute.[80] Nor does the CHRC adequately explain how what it describes as a "not legally binding" text can address matters of discrimination in Canada.[81] Nevertheless, the CHRC clearly has a view that it has chosen to express, and not just to Parliament, but also to the UN and the world. Others, of course, may have a different view, with the Toronto Star having opined that Canada was right to vote against the declaration, because of its significant flaws and "fuzzy wording and overly broad guarantees."[82]

In addition to these views from others, another voice missing from the nongovernmental inputs into Canada's UPR review is that of academics, with only one academic having made a submission concerning Canada's review, albeit with a specific focus.[83] Many academics, however, may not be aware of the UPR process, nor of Canada's review within it, and if aware, may not be willing to participate under the guise of a "relevant stakeholder" rather than as an independent assessor or scientific observer. Of course, it does not help that the Canadian government does not engage with academics in general with respect to its international human rights activities, and to my knowledge, does not issue invitations to those within Canada's post-secondary community who teach, research, and write about human rights to its consultation sessions with civil society (although some academics may gain entry by associating with an invited NGO).[84] Truly independent academic researchers, however, operate with the benefit of autonomy and freedom from instruction, and a professional commitment to methods of analysis based on evidence and objectivity. Their work could be a useful source of information for assessing Canada's human rights record, whether positive or negative, with modern technologies making it easy for governments (and for that matter, human rights commissions and parliamentary committees) to engage in consultations beyond the confines of the Toronto-Ottawa-Montreal corridor. It is also fairly easy for anyone to skim the websites of Canada's university faculties of business and law, and departments of sociology, history, and political science, to build a database of academic contacts with a variety of interests in the field of human rights, and advance planning would allow for notices to be sent to scholarly associations for distribution to their members.

Canada's National Report

In addition to the documentation prepared by the OHCHR, Canada also submitted a twenty-one page national report, which was said to be "prepared in collaboration by the federal, provincial and territorial governments in Canada"[85] but apparently without the "broader process of consultation" desired by the rules.[86] The report reveals that Canadian government officials did consult with "Canadian civil society" (whoever that might include) at a workshop held in June 2008, and later posted information on its website inviting civil society to submit questions and comments.[87] There is, however, no information suggesting that this invitation to participate was actively drawn to the attention of university researchers, lawyers, provincial Law Societies and local Bar associations, chambers of commerce and business associations, and the general public, and at least one parliamentary committee has already concluded that "the processes and procedures used for Canada's first UPR, both at the [Council] and at the domestic levels, lacked clarity and transparency."[88] This committee has also urged the Canadian government to develop a "clear, effective and transparent plan for Canada's next UPR" with the hope that such a plan "could establish broad and meaningful consultation and

engagement with relevant stakeholders, parliamentarians and the Canadian public during the time period leading up to the next UPR."[89]

In any event, Canada's national report was submitted to the OHCHR approximately one month before Canada's scheduled dialogue session in Geneva. With respect to content, Canada used its report to explain the significance of its federal structure as well as its existing arrangements for the protection and promotion of its human rights obligations, emphasizing quite correctly that Canada can implement these obligations through a combination of laws, regulations, policies, and programs at the federal, provincial, and territorial levels.[90] Canada also stated which human rights treaties it was currently considering for future ratification, and thus indicated which treaties it was not considering regardless of the encouragements expressed in the past by various UN treaty monitoring bodies.[91] Canada also identified issues likely to be discussed during its review, tackling head-on challenges arising with respect to Canada's record concerning the rights of Aboriginal peoples, poverty reduction, homelessness, violence against women, and issues of racism arising within the context of immigration, and national security.

Canada's Dialogic Review within the Working Group

A month later, on 3 February 2009, the "interactive dialogue" concerning Canada's human rights record took place within the "Working Group on the Universal Periodic Review," facilitated by a troika of diplomats from the United Kingdom, Azerbaijan, and Bangladesh. During the three-hour session, Canada was represented by a delegation of nineteen civil servants, with nine having been sent to Geneva from Ottawa at the taxpayers' expense, and three having come from the provincial civil services of Saskatchewan and Québec.[92] Predictably, Canada was asked to reconsider its position with respect to the Indigenous Rights Declaration, and was asked by several states why it did not criminalize domestic violence (!). Some states even repeated this question after Canada had responded orally at its first opportunity to correct the record,[93] suggesting that this "dialogue" is more an opportunity for diplomats to deliver pre-prepared statements in the order of a speaker's list than a true opportunity for information gathering. The statements made at the UPR dialogue cover a wide range of topics and reveal no general themes, nor do they reveal a focused inquiry. Canada was asked, for example, to ratify more treaties, including the *American Convention on Human Rights*[94] (a regional treaty and thus beyond the scope of the UPR's mandate), while Canada was also asked (rightly in my view) to improve its consultation processes in preparing for its UPR review.[95] Canada also faced questions about allegations of racial profiling and discrimination against members of the Arab and Muslim community, as well as questions about its use of national security certificates, alongside questions about poverty reduction, socioeconomic disparities, and homelessness. Canada's voting record within the Council[96] was also a factor at its UPR review, with Cuba asking why Canada was no longer "an advocate for the third world" and Algeria, Syria, and Iran criticizing Canada's "double standards and politicization" within the Council, presumably in reference to Canada's opposition to a series of Council resolutions focusing on Israeli actions in the occupied territories. Canada was also asked about its change of policy on seeking clemency for Canadians facing the death penalty abroad,[97] an issue that had been in the news and in the domestic courts,[98] but which received no comment in any of the advance documentation provided by the OHCHR, nor in the national report provided by Canada.

After the dialogue, Canada received a report prepared by the working group summarizing the comments made by its peer reviewers and providing a list of the sixty-eight recommendations that had been made during the session.[99] Canada responded publicly to these recommendations in early June 2009, posting its response on the website of the Department of Canadian Heritage.[100] Given the wording of some of the recommendations, which can easily mix agreeable platitudes with content of concern, it is not easy to state categorically that Canada has either accepted or rejected all sixty-eight rec-

ommendations. A more nuanced count would suggest that Canada has accepted twenty-six recommendations, has accepted in part fourteen recommendations, has accepted the underlying principle of eight recommendations, but has rejected outright fifteen recommendations. The remaining five recommendations concern matters that are already in place. Having given a response to the recommendations, a decision on the final outcome of Canada's UPR review was adopted by the Council's plenary on 9 June 2009, using the standard form and without a vote.[101] Questions remain, however, as to the usefulness of this review and whether Canada's progress in meeting the recommendations with which it has agreed will be monitored through a credible process at either the national or international level. There is also a question as to whether anyone, apart from the government officials involved and several human rights NGOs, will even follow the results of Canada's review, given the lack of effective mechanisms to engage a broader segment of society in consultation, raising in turn the question of whether the new UPR mechanism, as currently constituted, can truly serve as a catalyst for stimulating a national process of self-examination, scrutiny, and effective review.

Conclusions

While the UPR mechanism is often touted as the main innovation of the new Human Rights Council, its state-driven structure does not bar political considerations from arising, and allied states are clearly free to work together on either a concerted campaign of "gotcha" aimed at one state or another, or as a mutual praise society to assist each other's review. In establishing the UPR mechanism, it was hoped that the process would provide needed information concerning the situation of human rights "on the ground" to enable states to draw on the experience of others for inspiration and guidance. It was also hoped that each UPR review might stimulate an authentic national dialogue within each state, and either raise awareness or supplement existing efforts to "name and shame" those states deserving criticism for their human rights record. On the other hand, a UPR review could also simply serve as a mask for accountability, giving the appearance that a state is taking action to ensure the implementation of its obligations. Clearly, for the UPR process to become truly innovative (and distinct from its past incarnation before the former Commission), there needs to be greater opportunities for the use of truly independent appraisals of a state's human rights performance, and not simply the cut-and-paste summation of treaty body recommendations and information supplied by advocacy groups. States such as Canada could, however, assist with this desire for expert information and independent assessment by expanding the consultation circle. Parliamentary committees could review the recommendations made by UN bodies when they are first made, making use of the relevant testimony of various experts during their inquiries. The reports produced by these parliamentary committees could then be used in the preparation of Canada's next national report, providing a means to respond to any inaccurate or inappropriate recommendations long before such recommendations are repeated in a submission for a UPR review. And yet, in the final analysis, it may be expecting too much of a UN intergovernmental body which, despite laying claim to the evocative label of "human rights," remains a political body subject to the political machinations of states wanting to achieve very different political goals. One may also have to ask, perhaps in preparation for the Council's planned review in 2011, whether a state-controlled body tasked with reviewing the human rights record of its peers has the necessary institutional structure to serve as a credible voice for ensuring the implementation and enforcement of existing human rights obligations, with national bodies — including government, Parliament, and the courts — being the more likely conduits for concrete action.

Notes

* B.A. (UBC), LL.B. (UVIC), Ph.D. (Cambridge); Professor of Law at the University of Alberta and past Scholar-in-Residence with the Legal Affairs Bureau of the Government of Canada's Department of Foreign Affairs and International Trade from 2006-08. The views expressed in this article are those of the author and should not be attrib-

uted to the Government of Canada.

1 *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., Supp. No. 49 (Vol. III) at 2-5, UN Doc. A/RES/60/251 (2006) [GA Res. 60/251], adopted by a recorded vote of 170 states in favour (including Canada), four against (Israel, Marshall Islands, Palau, and the United States), and three abstentions (Belarus, Iran, and Venezuela).

2 *Ibid*. at para. 2, repeating verbatim paragraph 157 of *2005 World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49 (Vol. I) at 3-25, UN Doc. A/RES/60/1 (2005) [GA Res. 60/1].

3 GA Res. 60/251, *supra* note 1 at para. 3, repeating verbatim GA Res. 60/1, *ibid*. at para. 158.

4 GA Res. 60/251, *supra* note 1 at para. 4.

5 See generally Philip Alston, "The Commission on Human Rights" in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992) at 126-210.

6 The most notorious examples being the widely reported ousting of the United States in 2001, the election of Sudan in 2002, and the Libyan chairmanship in 2003. Nongovernmental organizations (NGOs) certainly viewed the questionable human rights records of some members of the Commission as a central handicap: Nazila Ghanea, "From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?" (2006) 55 International and Comparative Law Quarterly 695 at 699. See also Philip Alston, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council" (2006) 7 Melbourne Journal of International Law 185 at 191-92.

7 Marc Bossuyt, "The New Human Rights Council: A First Appraisal" (2006) 24:4 Netherlands Quarterly of Human Rights 551 at 554.

8 GA Res. 60/251, *supra* note 1, preamble at para. 8 [emphasis added].

9 Nico Schrijver, "The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles?" (2007) 20 Leiden Journal of International Law 809 at 822.

10 See further, GA Res. 60/1, *supra* note 2 at paras. 157-60. See also *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc. A/59/2005 (2005) [*In Larger Freedom*], especially paras. 140-47 and 181-83.

11 See further, *A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change* (Chair: Anand Panyarachun), UN Doc. A/59/565 (2004) at para. 291.

12 *In Larger Freedom*, *supra* note 10 at para. 166.

13 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945) [*UN Charter*].

14 GA Res. 60/251, *supra* note 1 at paras. 1 and 16.

15 *Ibid*. at para. 9.

16 The Commission had met annually in Geneva for one hectic six-week session attended by over 3000 people.

17 GA Res. 60/251, *supra* note 1 at para. 9.

18 On the membership criteria debate, see Philip Alston, "Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council" (2005) 15:1 Journal of Transnational Law & Policy 49. See also Alston, "Reconceiving the UN Human Rights Regime," *supra* note 6 at 188-204.

19 See Schrijver, *supra* note 9.

20 *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General: Addendum: Human Rights Council*, UN Doc. A/59/2005/Add.1 (2005) [*In Larger Freedom (Addendum)*] at para. 8.

21 *Ibid*. at para. 6.

22 *Ibid*. at para. 7.

23 The details of the eight treaty-monitoring bodies and the procedures requiring states to report periodically on their treaty implementation efforts can be found online at <http://www2.ohchr.org/english/bodies/treaty/index.htm>. Canada currently reports to all but two of the eight bodies, since Canada is a party neither to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 U.N.T.S. 3, (1991) 30 I.L.M. 1521 (entered into force 1 July 2003), nor the *Convention on the Rights of Persons with Disabilities*, 13 December 2006, GA Res. 61/106, UN GAOR, 61st Sess., Supp. 49 (Vol. I) at 65-82, UN Doc. A/RES/61/106 (2006), (2007) 46 I.L.M. 443 (entered into force 3 May 2008). Canada, among others, does not consider the Migrants Workers Convention to be a "core" convention, at least at present, given its relatively low level of ratification. Canada is a signatory, but not yet a party, to the Disability Rights Convention.

24 *In Larger Freedom (Addendum)*, *supra* note 20 at para. 7.

25 *Ibid*. at para. 8.

26 *Ibid*.

27 GA Res. 60/1, *supra* note 2.

28 GA Res. 60/251, *supra* note 1.

29 *Ibid*. at para. 5(e).

30 And later clarified by way of a President's State-

ment issued by the Council: see *Modalities and practices for the universal periodic review process*, Human Rights Council President's Statement 8/1of 9 April 2008, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53 at 237-9, UN Doc. A/63/53 (2008).

31 GA Res. 60/251, *supra* note 1 at para. 6.

32 *Institution-building of the United Nations Human Rights Council*, Human Rights Council resolution 5/1 of 18 June 2007, [HRC Res. 5/1] reprinted in *Report of the Human Rights Council*, UN GAOR, 62d Sess., Supp. No. 53 at 48-73, UN Doc. A/62/53 (2007). For a fuller discussion of both the text's adoption and its content, see Claire Callejon, "Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence" (2008) 8:2 Human Rights Law Review 323.

33 See *Report of the Human Rights Council*, GA Res. 62/219, UN GAOR, 62d Sess., Supp. No. 49 (Vol. I) at 434-435, UN Doc. A/RES/62/219 (2007) [GA Res. 62/219], adopted by a recorded vote of 150 to 7 (Australia, Canada, Israel, Marshall Islands, Micronesia, Palau, and the United States), with 1 abstention (Nauru).

34 As recorded in UN GAOR, 62d Sess., 79th Plen. Mtg., UN Doc. A/62/PV.79 (2007) at 10-11. Academic observers have also noted that while the human rights situation in the occupied territories should be addressed, it is unfortunate that a specific agenda item be dedicated to it and not to other human rights situations: Callejon, *supra* note 32 at 337-38.

35 When questioned in the House of Commons on why Canada did not agree with the institution-building package, the Hon. Peter MacKay, then Minister of Foreign Affairs, explained that: "We cannot, for expedience, accept a permanent agenda item on the Palestinian territories, singling out one situation while at the same time eliminating a special human rights scrutiny of countries of concern, such as Cuba and Belarus. It is a contradiction [with the Council's founding principles] …": *House of Commons Debates*, vol. 141, no. 175 (20 June 2007) at 10900.

36 UN GAOR, 62d Sess., Third Committee, 47th Mtg., UN Doc. A/C.3/62/SR.47 (2007) at para. 35.

37 HRC Res. 5/1, *supra* note 32, Annex, Part IV at paras. 85-109. Since 1967 the former Commission had examined information relevant to gross violations of human rights in specific country situations, and since 1970 it had also examined communications that appeared to reveal a consistent pattern of gross and reliably attested violations. The latter become known as the confidential "1503 procedure," so named after the resolution number by which it was created. See further, Nigel S. Rodley & David Weissbrodt, "United Nations Nontreaty Procedures for Dealing with Human Rights Violations" in Hurst Hannum, ed., *Guide to International Human Rights Practice*, 4th ed. (Ardsley, NY: Transnational, 2004) at 65-74. See also Alston, "The Commission on Human Rights," *supra* note 5 at 145-55 (who views the 1503 procedure as deeply flawed), and Callejon, *supra* note 32 at 332 (who notes that the procedure was of more use in the 1970s and 80s when fewer states had ratified the treaty-based complaint procedures).

38 HRC Res. 5/1, *ibid*., Annex, Part III at paras. 65-84.

39 See Bossuyt, *supra* note 7 at 553, fn 12, and for a full discussion, see Alston, "Reconceiving the UN Human Rights Regime," *supra* note 6 at 207-13.

40 HRC Res. 5/1, *supra* note 32, Annex, Part I at paras. 3(h), 3(i) and 3(b) respectively.

41 *Ibid*. at para. 3(b).

42 *Ibid*. at para. 18(a).

43 *Ibid*. at paras. 18(b)-(c). In June 2008, the Council agreed to permit NGOs to make "general comments" during the time allocated for the adoption of the final outcome decision at the Council's plenary session. There remains, however, some state resistance to this opportunity for NGO participation: Marianne Lilliebjerg, "The Universal Periodic Review of the UN Human Rights Council – An NGO Perspective on Opportunities and Shortcomings" (2008) 26:3 Netherlands Quarterly of Human Rights 311 at 314.

44 HRC Res. 5/1, *supra* note 32, Annex, Part I at para. 14.

45 The schedule is available online at <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf>.

46 HRC Res. 5/1, *supra* note 32, Annex, Part I at para. 20.

47 All documents are available from the dedicated website on UPR maintained by the Office of the UN High Commissioner for Human Rights (OHCHR) at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>. A somewhat duplicative site, maintained by a presumably well-intentioned but specifically-created NGO, can be found at: <http://www.upr-info.org/>.

48 General guidelines on the preparation of national reports were adopted by the Council in September 2007. See Human Rights Council decision 6/102 of 27 September 2007, reprinted in *Report of the Human Rights Council*, UN GAOR, 63d Sess., Supp. No. 53 at 75, UN Doc. A/63/53 (2007).

49 HRC Res. 5/1, *supra* note 32, Annex, Part I at para. 15 ("*Documentation*").
50 *Ibid*. at para. 22.
51 *Ibid*. at para. 26.
52 *Ibid*. at para. 4.
53 *Ibid*. at paras. 4(c)-(f).
54 *Ibid*. at para. 8.
55 *Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Canada*, UN Doc. A/HRC/WG.6/4/CAN/2 (17 December 2008) [*OHCHR Compilation for Canada*].
56 *Summary Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Canada*, UN Doc. A/HRC/WG.6/4/CAN/3 (24 December 2008) [*OHCHR Summary of NGO Information for Canada*].
57 It is often forgotten, or overlooked, that the concluding observations made by UN treaty monitoring bodies are recommendatory in nature and not legally binding, with Canada's own Standing Senate Committee on Human Rights oddly noting that: "Strict compliance with UN treaty body recommendations is often lacking" and calling on Canada to "live up to its reputation by implementing and complying with such recommendations": Standing Senate Committee on Human Rights, *Canada and the United Nations Human Rights Council: At the Crossroads: Interim Report* (Chair: Raynell Andreychuk) (May 2007) at 53. Why is "strict compliance" necessary for a recommendation? The Committee even includes mention in its report (at 15), citing the testimony of the Canadian head of Amnesty International, that some treaty body members "are not independent and do not possess the required expertise".
58 *OHCHR Compilation for Canada*, *supra* note 55 at para. 15.
59 *Ibid*. at para. 21.
60 *Bouzari v. Iran (Islamic Republic)*, [2002] O.J. No. 1624, (S.C.J.); affirmed on appeal, [2004] 71 O.R. (3d) 675 (C.A.). For commentary, see Francois Larocque, "*Bouzari v. Iran*: Testing the Limits of State Immunity in Canadian Courts" [2003] 41 Canadian Yearbook of International Law 343.
61 As held by Justice Swinton in *Bouzari v. Iran (Islamic Republic)*, [2002] O.J. No. 1624 (S.C.J.) at paras. 46 and 52, in comparing the expert opinion evidence of Professor Ed Morgan of the University of Toronto, who appeared on behalf of the plaintiff, with that of Professor Christopher Greenwood QC of the London School of Economics, now H.E. Judge Greenwood of the International Court of Justice, who appeared on behalf of the intervenor, the Attorney General of Canada.
62 *OHCHR Compilation for Canada*, *supra* note 55 at para. 8. See further, Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48 McGill Law Journal 55.
63 *Ibid.* at para. 22, with reference to *Suresh v. Canada*, [2002] 1 S.C.R. 3. See further, Joanna Harrington, "The Role for Human Rights Obligations in Canadian Extradition Law" [2005] 43 Canadian Yearbook of International Law 45 at 94.
64 *OHCHR Compilation for Canada*, *supra* note 55 at para. 45.
65 *Ibid*. at para. 25 referring to the case of *Waldman v. Canada*, Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996 (views adopted 3 November 1999), reprinted in *Report of the Human Rights Committee*, UN GAOR, 55th Sess., Supp. No. 40, UN Doc. A/55/40, vol. II, annex IX.H (finding Canada in violation of its international human rights obligations).
66 See *Adler v. Ontario*, [1996] 3 S.C.R. 609.
67 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at paras. 7 and 30.
68 The declaration text is found in the annex to *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 (Vol. III) at 15-25, UN Doc. A/RES/61/295 (2007), adopted by a recorded vote of 143 in favour, 4 against (Australia, Canada, New Zealand, and the United States), with 11 abstentions.
69 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at paras. 5 and 58, and implied in para. 57.
70 Canadian law speaks of the implementation of a ratified human rights treaty, with ratification being an indication of a state's expression of consent, and the interpretive use of the values of an unimplemented but ratified treaty: see *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 69-71.
71 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at para. 16.
72 See *Consultative relationship between the United Nations and non-governmental organizations,* ESC Res. 1996/31, UN ESCOR, Sess. 1996, Supp. No. 1 at 53-61, UN Doc. E/1996/96 (1997).
73 Section 2 of the *Canadian Human Rights Act*, R.S.C., c. H-6, explains that the "Purpose of the Act" is to give effect to the principle that all individuals should not be hindered by discrimination.

This principle is then referenced in section 27 of the Act concerning the CHRC's powers, duties and functions.

74 Pursuant to s. 27(1)(e) of the *Canadian Human Rights Act*, R.S.C., c. H-6, the CHRC "may consider such recommendations, suggestions and requests concerning *human rights and freedoms* as it receives from any source and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment on any such recommendation, suggestion or request" [emphasis added], but this suggests that the CHRC may *consider* matters of human rights and freedoms, beyond matters of discrimination, but its ability to make *reference to and comment on* such matters should be directed to Parliament, which is the audience for a "report referred to in section 61." Under s. 27(1)(f) of the Act, the CHRC can also carry out "such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice", which also illustrates that with respect to matters of human rights and freedoms, as distinct from matters of discrimination and equality, Parliament has placed limits on the CHRC's mandate. Yet, despite these limitations, the CHRC serves internationally as the chair of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

75 Canadian Human Rights Commission, *2008 Annual Report* (Ottawa: Minister of Public Works and Government Services, 2009) at 10. "Rights & Democracy" is the *nom de plume* of the corporation known as the "International Centre for Human Rights and Democratic Development" that was established by Parliament to "initiate, encourage and support cooperation between Canada and other countries in the promotion, development and strengthening of democratic and human rights institutions and programs": *International Centre for Human Rights and Democratic Development Act*, S.C. 1985, c. 54 (4th Supp.), s. 4(1). The work of Rights & Democracy is not focussed on tracking Canada's human rights performance.

76 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at para. 72.

77 See *Joslin v. New Zealand*, Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (views adopted 17 July 2002), reprinted in *Report of the Human Rights Committee*, UN GAOR, 57th Sess., Supp. No. 40, UN Doc. A/57/40 (2002), vol. II, annex IX.Z.

78 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at para. 3.

79 Canadian Human Rights Commission, *Annual Report 2007* (Ottawa: Minister of Public Works and Government Services, 2008) at 5-6.

80 See *supra* note 74.

81 According to the Commission: "While the Declaration is not legally binding, it represents "a standard of achievement to be pursued in a spirit of partnership and mutual respect" (quoting, without citation, but in circular fashion, from the declaration itself): *Annual Report 2007*, *supra* note 79 at 5.

82 "Caution on native rights" *The Toronto Star* (17 September 2007) A6.

83 *OHCHR Summary of NGO Information for Canada*, *supra* note 56 at para. 59. The academic concerned was the Canada Research Chair in International Migration Law.

84 By contrast, the Netherlands has long made use of an independent body comprised of academics and other experts, known as the Advisory Council on International Affairs (AIV), which advises government and parliament on foreign policy matters, including issues relating to human rights, through the production of advisory reports. These reports, and government responses, are made available in several languages at: <http://www.aiv-advice.nl/>.

85 *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to the Human Rights Council Resolution 5/1: Canada*, UN Doc. A/HRC/WG.6/4/CAN/1 (5 January 2009) [*National Report for Canada*].

86 See *supra* note 48.

87 *National Report for Canada*, *supra* note 85 at para. 2.

88 Standing Senate Committee on Human Rights, *Canada's Universal Periodic Review Before the United Nations Human Rights Council: Second Report* (May 2009) at para. 5.

89 *Ibid*. at para. 6.

90 *National Report for Canada*, *supra* note 85 at paras. 8-10 and 18.

91 *Ibid*. at para. 20.

92 Details on the composition of the delegation are found in the annex to *Report of the Working Group on the Universal Periodic Review: Canada*, UN Doc. A/HRC/11/17 (3 March 2009) [*UPR Working Group Report on Canada*] at 24.

93 *Ibid*. at paras. 21 (Italy) and 29 (Mexico), para. 36 (response by Canada), and paras. 40 (Brazil), 45 (Malaysia), 47 (Turkey) and 71 (France). Domestic violence was also raised in the statements delivered by Austria (para. 20), Chile (para. 22), Czech Republic (para. 49), Saudi Arabia (para. 63), Japan (para. 67), and the Syrian Arab Republic (para. 74).

94 22 November 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, (1970) 9 I.L.M. 673 (entered into force 18 July 1978).

95 *UPR Working Group Report on Canada*, *supra* note 92 at paras. 29 (Mexico) and 40 (Brazil) concerning the *American Convention on Human Rights* (*ibid*.) and resulting in recommendation 8, and para. 49 (Czech Republic) concerning consultation.

96 *Ibid*. at paras. 23, 27, 54, and 74, resulting in recommendations 65-68.

97 *UPR Working Group Report on Canada*, *supra* note 92 at paras. 33 (Netherlands) and 76 (Denmark).

98 See *Smith v. Canada (Attorney General)*, 2009 FC 228 (directing the Canadian government to seek clemency for a Canadian citizen named Ronald Smith who had been convicted of murder in Montana and sentenced to death).

99 *UPR Working Group Report on Canada*, *supra* note 92 at para. 86.

100 *Universal Periodic Review Response of Canada to the Recommendations*, UN Doc. A/HRC/11/17/Add.1 (8 June 2009), and made available at: <http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm>.

101 *Outcome of the Universal Periodic Review: Canada*, Human Rights Council decision 11/103 of 9 June 2009, reprinted in *Report of the Human Rights Council on its Eleventh Session*, UN Doc. A/HRC/11/37 at 80.