

**IN SEARCH OF A MARRIAGE COUNSELLOR: A PROPOSAL FOR
STRENGTHENING THE ENFORCEMENT OF CANADIAN CONSTITUTIONAL
CONVENTIONS AS LEGAL RULES OF POLITICAL BEHAVIOUR**

by

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Abstract

Canada's constitutional framework consists of both written and unwritten sources. Within the subset of unwritten constitutional sources lies the body of constitutional conventions: rules of political morality that limit the scope of behaviour that would otherwise be legally permitted. Conventions are established by precedents and understood by political actors to be binding upon them. But the orthodox view holds that they are beyond the purview of the legal system and enforceable exclusively within the political realm.

This thesis proposes measures for more effective regulation of political behaviour for compliance with constitutional conventions. These proposals are inspired by Prime Minister Stephen Harper's announcement in 2014 that he would refrain from advising the Governor General to fill vacancies in the Senate of Canada. By convention, the Governor General only exercises the legal power to appoint Senators on the Prime Minister's advice. Challenging the constitutionality of the Prime Minister's conduct therefore implicated constitutional conventions. The author describes a judicial review application brought for this purpose as an illustrative example of the impracticality of litigation to enforce constitutional conventions. Drawing on that experience, he argues that Canadian jurisprudence ought to be renovated to accommodate and accept conventions as legally cognizable and enforceable rules. He further proposes the creation of an independent officer of Parliament accountable for monitoring political behaviour for compliance with constitutional conventions and drawing public attention to situations where conventional rules are breached.

Preface

This thesis is the original, unpublished, independent work of the author, Aniz Alani.

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Finally, I thank my patient and supportive wife, Nicole, without whom none of this would be possible.

Dedication

To Flynn and Isla: never stop learning. (Graduation is a laudable goal, too, though.)

To Nicole: for everything.

Chapter 1: Introduction

“A Canadian citizen who wants to know how her country is governed should be able to get clear, authoritative answers to these questions without much trouble; so should a civics teacher in a school classroom or a person preparing for Canadian citizenship. These are not small technical questions – they are basic to knowing how Canadian government and democracy work – yet the citizen who looks for answers to these questions in the written text of Canada’s Constitution will look in vain.”¹

1.1 CANADA’S CONSTITUTION: WRITTEN AND UNWRITTEN, LEGAL AND NON-LEGAL COMPONENTS

Canada’s constitutional framework comprises several constituent parts. Some aspects are found in written sources. Others are “unwritten”, including general principles that may be invoked to articulate central themes or assumptions. The Constitution of Canada is the “supreme law of Canada”. It should therefore not be surprising that many of its aspects carry the force of law. Constitutional conventions, however, are considered to have no legal effect whatsoever. This means it is possible for government behaviour or action to be unconstitutional without also being unlawful. The peculiar consequence of this state of affairs is that despite Canadian courts being bound to the supremacy of the Constitution, legal doctrine precludes them from enforcing constitutional norms, namely conventions, that are not currently recognized as legal rules.

In this thesis, I propose a more robust framework for enforcing constitutional conventions. In particular, I consider two mutually compatible potential avenues for enhancing compliance and accountability. The first option is broadening the scope of judicial review to include all aspects

¹ Peter H Russell, “A Project to Reduce Canadians’ Constitutional Illiteracy” (2016) 25:3 Const Forum Const 1 at 91.

of the Constitution rather than merely those aspects classically understood to be part of Canadian constitutional law. The second alternative is establishing an independent expert regulator to assess political behaviour against extra-legal constitutional norms and call public attention to incidents of detected non-compliance.

1.2 PRACTICAL SIGNIFICANCE OF A MORE ROBUST ENFORCEMENT FRAMEWORK

A more robust framework for enforcing constitutional norms carries practical significance. The prospect of political power being exercised in a seemingly unconstitutional yet not illegal manner is not merely theoretical. This thesis draws its inspiration from the fact pattern I describe in chapter two: in 2014, Canada's Prime Minister publicly signaled that he would refrain from causing appointments to be made to the Senate. As a matter of constitutional law, Canada's Governor General must appoint a qualified individual to the Senate to fill each vacancy that arises. However, by established convention, the Governor General only exercises this legal power to appoint Senators on the Prime Minister's advice. The Prime Minister's refusal to provide advice on Senate appointments necessarily frustrated the constitutional framework. It offended principles and assumptions on which the Constitution relies. In this sense, it might fairly have been described as "unconstitutional". Yet it was not obviously "illegal". Most importantly for the purposes of this thesis, in the absence of an enforceable *legal* obligation, it remains unclear whether Canadian courts could play any role in compelling the Prime Minister to act differently.

As a lawyer, I found the Prime Minister's unprecedented refusal to fill Senate vacancies deeply problematic. From a rule of law perspective, I was troubled that the lack of political will to appoint Senators had the practical effect of tolerating non-compliance with a written requirement

of Canada's supreme law. For reasons explored in greater detail in chapter two, the Prime Minister's "moratorium" on Senate appointments enjoyed broad popular support. It was also apparent, meanwhile, that there was insufficient political support to amend the Constitution so as to normalize the moratorium. The Prime Minister was, in effect, attempting to do indirectly that which he could not (legally) do directly.

In the scenario just described, the dichotomy between constitutional law and constitutional convention presents, for all practical purposes, a distinction without a difference. My project in response was to test the courts' role in upholding the Constitution. I applied to the Federal Court for judicial review of what I characterized as the Prime Minister's decision not to advise the Governor General to summon qualified individuals to the Senate. I sought a particular legal remedy, known as a judicial declaration, stating that the Prime Minister was required to provide this advice within a reasonable time after a vacancy occurs in the Senate. What followed was a time-consuming and resource-intensive endeavour to seek a judicial opinion on the *legality* of the Prime Minister's moratorium. Some 18 months after it was initially filed, the Federal Court dismissed the application as being "moot". By that time, an intervening federal election had resulted in a change of government. The new Prime Minister did not continue his predecessor's moratorium. Indeed, he initiated a novel process for identifying candidates for appointment to the Senate. In the circumstances, reasoned the Federal Court, there was no pressing issue left to be resolved.

Courts appropriately avoid “legislat[i]ng” on academic legal questions”.² This thesis examines the core question unaddressed by the Federal Court: if a government or political actor is alleged to breach a constitutional norm that falls short of violating constitutional *law*, what if any legal remedy exists to cure the breach? I go further by arguing that the law ought to recognize certain constitutional conventions as being sufficiently “legal” in nature to justify judicial scrutiny.

1.3 OUTLINE OF THESIS

I begin in chapter two by describing the specific fact scenario that inspired my search for a more robust enforcement mechanism for constitutional conventions. Here I review the factual background behind Prime Minister Stephen Harper’s moratorium on Senate appointment and the attempt to challenge its constitutionality through litigation. I identify the obstacles that needed to be overcome in order to resolve the constitutional issue before the courts. I conclude that the case demonstrates that public law litigation is a flawed and undesirable mechanism for resolving controversies involving constitutional convention.

I respond to the flaws revealed in the existing litigation process in two ways.

First, I argue in chapter three that Canadian law should be reformed to reflect constitutional conventions having *legal* content, force and effect. I describe conventions as being part of a system of common law features that has evolved over time to accommodate previously non-justiciable concepts. Courts have changed their attitudes and practices toward concepts like principles of equity, exercises of prerogative power, and “unwritten” constitutional principles to the point where all of these may now be used to ground *legal* arguments and justifications for

² *Alani v Canada*, 2016 FC 1139 at para 20 [*Alani JR*].

judicial control. The same, I argue, should now inform the courts' modern understanding and treatment of constitutional conventions.

Second, I present in chapter four a non-mutually exclusive alternative for enforcing constitutional conventions. Here I propose the creation of an independent officer of Parliament with expertise in the analysis and application of constitutional conventions. I suggest core features of this officer's proposed mandate and the regulatory model that would enhance accountability for compliance with conventions.

Finally, in chapter five, I conclude by returning to the scenario described in chapter two by speculating as to how the constitutional controversy surrounding Mr. Harper's refusal to appoint Senators might have been resolved differently under each of the alternative models described throughout the thesis.

Chapter 2: Senate Vacancies: a case study on enforcing constitutional conventions

2.1 INTRODUCTION

In this chapter, I describe an attempt to use litigation as a tool for holding political actors accountable for alleged breaches of constitutional conventions. In *Alani v. Canada (Prime Minister)*, the Federal Court was asked to review an alleged decision in 2014 by Prime Minister Stephen Harper not to advise the Governor General to fill vacancies in Canada's Senate.³ The "Senate vacancies" case was never decided on its merits. The 2015 general election resulted in a change in government and Prime Minister. The case was argued in 2016 based on the evidentiary record that had been developed before the election. However, the Federal Court declined to decide the merits of the case because the intervening change in government policy concerning Senate appointments made the litigation "moot".

2.1.1 Relevance as a case study for enforcing conventions through litigation

Both despite and because of the case's unsuccessful outcome, it is a useful illustration of the advantages and disadvantages of relying on litigation to resolve controversies involving constitutional conventions. The procedural objections raised by the Government of Canada in response to the litigation demonstrate challenges that litigants must overcome. Delays within the litigation process itself present a further difficulty. Nor is litigation a cost-free exercise: the Federal Court ordered the unsuccessful applicant to pay the government's costs of defending a judicial review application that became moot by the time it was heard. Yet the litigation itself

³ *Ibid.*

generated publicity and academic commentary. In so doing, the litigation arguably raised public awareness of a constitutional issue and enhanced political accountability. For this reason, it makes for a worthwhile case study in how to – and how not to – use litigation as a tool for enforcing constitutional conventions.

2.1.2 Chapter outline

I begin by setting out in section 2.2 the factual background to the litigation. Next, I describe in section 2.3 the apparent lack of timely and effective non-legal remedies for curing the alleged constitutional breach. I then identify in section 2.4 various procedural hurdles that would have had to be overcome in order to obtain the requested judicial remedy. In section 2.5 I summarize key advantages and disadvantages of relying on litigation to resolve controversies involving litigation, concluding that it is a suboptimal method of regulating compliance.

2.2 FACTUAL BACKGROUND TO THE LITIGATION

In this section, I describe the factual background to the Senate vacancies case. I begin in section 2.2.1 by summarizing the Senate's role in Canada's system of government. Then, in section 2.2.2 I describe the historical and political context in which Prime Minister Stephen Harper deliberately delayed filling Senate vacancies.

2.2.1 Canada's Senate

To put the Senate vacancies case in context, it is helpful to situate the Senate itself within the Canadian system of government.⁴ Canada's Parliament is bicameral. It consists of the House of Commons and the Senate. The House of Commons comprises members elected to represent geographically based constituencies based roughly on population. Members of the House of Commons (or "Members of Parliament") must face re-election at least once every five years. The Senate, in contrast, is an appointed body comprised of 105 members, each representing a specific province or territory in which they reside and own property. Unlike Members of Parliament, Senators enjoy security of tenure. Short of resignation or disqualification, they retain their seats until age 75.

Senators are formally "summoned" by the Governor General. By convention, the Governor General only exercises this formal legal power on the advice of the Prime Minister. In practice, therefore, it is the Prime Minister alone who decides who is appointed to the Senate.

2.2.2 Prime Minister Harper's refusal to appoint Senators

On December 4, 2014, the Right Honourable Stephen Harper, then Prime Minister of Canada, was asked by a reporter when he intended to fill empty Senate seats. At the time, there were 16 vacancies. Mr. Harper had not recommended any Senate appointments since March 25, 2013.

His response indicated that he was in no rush to fill the vacancies:

"I don't think I'm getting a lot of calls from Canadians to name more senators right about now. [...] We will be looking at this issue, but for our government the

⁴ See, e.g., Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007), (loose-leaf updated 2015, release 1) at §9.5.

real goal is to ensure the passage of our legislation by the Senate and thus far, the Senate has been perfectly capable of fulfilling that duty.”⁵

Mr. Harper’s ambivalence to fill Senate vacancies has been explained by two key factors:⁶ the unpopularity of the Senate and some of its members in light of recent and ongoing political scandals, and the failure by Mr. Harper to implement a program of reforms to the Senate he had been pursuing for much of his political career.

First, at the time of Mr. Harper’s statement, the Senate had been the source of significant political embarrassment within Canada generally and to the Prime Minister and his political party in particular. Beginning in November 2012, the legitimacy of living and travel expense claims of certain Senators came under scrutiny and led to an investigation by an external auditing firm and subsequently by law enforcement. This eventually led to criminal charges being laid against three Senators. In November 2013, the Senate voted to suspend three Senators implicated in the expenses scandal – Mike Duffy, Pamela Wallin, and Patrick Brazeau. All three had been appointed to the Senate on Mr. Harper’s advice.⁷ When Mr. Harper said he “wasn’t receiving a lot of calls” to appoint more Senators, it was at a time when Mr. Duffy’s criminal trial was regularly generating national headlines with media reports focusing on partisan campaigning and fundraising work being undertaken at public expense.

⁵ Joanna Smith, “Stephen Harper in no rush to fill Senate vacancies”, *Toronto Star* (December 4, 2014) <https://www.thestar.com/news/canada/2014/12/04/stephen_harper_in_no_rush_to_fill_senate_vacancies.html> accessed 6 December 2016.

⁶ See, e.g., Aaron Wherry, “After appointing 56 senators, Stephen Harper is done”, *Maclean’s* (24 July 2015) <<http://www.macleans.ca/politics/after-appointing-56-unelected-senators-stephen-harper-decides-hes-done/>> accessed 23 April 2017.

⁷ *Ibid.*

Second, Mr. Harper's reluctance to make Senate appointments is informed by his longstanding political campaign – and failure -- to achieve Senate reform. Specifically, Mr. Harper had previously pledged to implement Senate reforms that included imposing term limits for Senators and establishing a framework for consultative elections within each province and territory.⁸ In February 2013, amid controversy that Mr. Harper's proposed package of Senate reforms could not be implemented by Parliament acting alone (i.e., without the consent of some or all of the provinces), the Governor in Council referred a series of questions to the Supreme Court of Canada regarding the amending procedures required to implement the aforesaid Senate reforms (as well as the repeal of property ownership qualifications for Senators). The Supreme Court was also asked what amending formula applied to the abolition of the Senate.

On April 24, 2014, the Supreme Court of Canada releases reasons for judgment in the *Senate Reform Reference*. The Court unanimously rejected arguments advanced on behalf of the federal government that Parliament, acting unilaterally under section 44 of the *Constitution Act, 1982*,⁹ could change the duration or senatorial terms or implement consultative elections.¹⁰ Instead, each of these reforms would require the approval of Parliament *plus* seven provinces having at least 50% of the national population. The Court also concluded that the abolition of the Senate would require unanimous consent of the provinces.

Soon after the Supreme Court of Canada released its judgment, Mr. Harper expressed disappointment with the decision:

⁸ Canada, Parliament, Senate, Special Committee on Senate Reform, *Minutes of Proceedings*, 39th Parl, 1st Sess, No 2 (7 September 2006).

⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

¹⁰ *Reference re Senate Reform*, [2014] 1 SCR 704, 2014 SCC 32 at para 50 [*Senate Reform Reference*].

“Given the Supreme Court has said we’re essentially stuck with the status quo for the time being, and that significant reform and abolition are off the table, I think it’s a decision that I’m disappointed with [and] that a vast majority of Canadians will be very disappointed with.”¹¹

In summary, Mr. Harper’s refusal to appoint Senators can be explained by political factors. The Senate itself was deeply unpopular among many Canadians. Some would have preferred it be significantly reformed or abolished altogether.¹² Yet Mr. Harper lacked the legal authority and the broad consensus among the provinces needed for any significant reforms. Withholding advice to the Governor General needed to fill the increasing number of vacancies was a politically expedient way to distance Mr. Harper from the unpopular Senate, albeit a strategy of questionable constitutional propriety.

2.3 A CONSTITUTIONAL DEFECT IN SEARCH OF A REMEDY

If Mr. Harper’s moratorium on Senate appointments was constitutionally improper, it is not clear what political or legal remedy was available to address the situation. There was no obvious and meaningful short-term political cost to his approach, which did not attract strong criticism from his political adversaries.

Indeed, the Leader of the Opposition at the time, Thomas Mulcair, had himself previously advocated for a moratorium on Senate appointments as an indirect means of abolishing the

¹¹ Jordan Press & Mark Kennedy, “‘Significant reform and abolition are off the table’: Stephen Harper ‘disappointed’ by Supreme Court Senate reform decision”, *National Post* (25 April 2014) <<http://news.nationalpost.com/news/canada/canadian-politics/harper-not-allowed-to-reform-or-abolish-senate-without-approval-from-provinces-supreme-court-rules>> accessed 6 December 2016.

¹² See, e.g., Mark Kennedy, “Most Canadians want Senate reformed, not abolished: poll”, *National Post* (30 December 2015) <<http://news.nationalpost.com/news/canada/canadian-politics/most-canadians-want-senate-reformed-not-abolished-poll>> accessed 23 April 2017.

Senate through attrition.¹³ Justin Trudeau, as leader of the Liberal Party of Canada with approximately 35 of 308 seats in the House of Commons,¹⁴ focused his criticism of Mr. Harper's moratorium to the allegation that he could not be trusted to keep his promise not to appoint any more Senators.¹⁵ Only Elizabeth May, as leader of the Green Party of Canada with only two seats in the House of Commons,¹⁶ openly questioned the legality of Mr. Harper's moratorium.¹⁷ In short, as Mr. Harper himself later explained, "[t]he vacancies [would] continue to rise and other than some voices to the Senate and some people wanting to be appointed to the Senate nobody [was] going to complain."¹⁸

The political party he led, the Conservative Party of Canada, held a comfortable majority of occupied seats in the Senate. There was therefore no apparent risk of being unable to control the Senate's legislative agenda. The only apparent long-term risk of withholding appointments was that Mr. Harper might be giving a political opponent the opportunity to secure a majority in the

¹³ "MULCAIR: Well I want to get rid of unelected, unaccountable Senators, you're right. That's been a longstanding position of our party. For once I agreed with Mr. Harper because he chose to imitate my suggestion that we allow it to simply wither on the vine. He's not – he said he wouldn't name any more Senators and there are 20someodd who haven't been named. And precisely that. I mean I'm not going to name Senators. The NDP is not going to name Senators. We can't go against that fundamental belief.": *CBC News*, "Full text of Peter Mansbridge's interview with Tom Mulcair", (9 September 2015) <<http://www.cbc.ca/m/touch/politics/story/1.3221262>> accessed 23 April 2017.

¹⁴ Canada, Library of Parliament, "Party Standings (1867 to date) in the House of Commons", <<http://www.lop.parl.gc.ca/ParlInfo/lists/PartyStandingsHistoric.aspx?Section=03d93c58-f843-49b3-9653-84275c23f3fb>> accessed 23 April 2017.

¹⁵ Laura Payton, "Stephen Harper vows not to name any senators before reforms made", *CBC News* (24 July 2015) <<http://www.cbc.ca/news/politics/stephen-harper-vows-not-to-name-any-senators-before-reforms-made-1.3167112>> accessed 23 April 2017.

¹⁶ Library of Parliament, *supra* note 14.

¹⁷ Elizabeth May and Deborah Coyne, "Harmonizing Canadian Governance, With or Without a Reformed Senate", *Green Party of Canada* (27 July 2015) <<https://www.greenparty.ca/en/blog/2015-07-28/harmonizing-canadian-governance-or-without-reformed-senate>> accessed 23 April 2017.

¹⁸ Mia Robson, "No new Senate appointments: Harper", *Winnipeg Free Press* (24 July 2015) <<http://www.winnipegfreepress.com/special/federal-election/No-new-Senate-appointments-Harper-318469901.html>> accessed 18 March 2017.

Senate sooner than otherwise if the Conservative Party did not return to form government.¹⁹

Weighed against the political cost of being seen to “further entrench” the unpopular Senate while still Prime Minister, however, Mr. Harper presumably did not find that risk particularly compelling.

2.4 PROCEDURAL OBSTACLES TO OBTAINING JUDICIAL RESOLUTION

In *Alani v. Canada*, the government raised four procedural objections, any of which would have been sufficient to dismiss the application for judicial review. Specifically, the government argued that: (i) the individual applicant lacked “standing” to raise the challenge; (ii) the subject matter of the application was non-justiciable; (iii) the Federal Court lacked jurisdiction over the Prime Minister’s advice-giving role concerning Senate appointments. Further, the government raised mootness as an additional bar to deciding the case since the moratorium on Senate appointments had ended with the change of government.

A detailed review of the arguments for and against the procedural objections described above is beyond the scope of this chapter. Instead, I highlight considerations presented by some of these objections. They illustrate some of the challenges an applicant must overcome in order to bring a constitutional challenge based on conventions before the courts.

¹⁹ Campbell Clark, “Stephen Harper’s game of Senate appointment make-believe will end”, *The Globe and Mail* (21 May 2015) <<http://www.theglobeandmail.com/news/politics/stephen-harpers-game-of-senate-appointment-make-believe-will-end/article24559164/>> accessed 31 March 2017.

2.4.1.1 *Justiciability*

The government objected that the timing of the Prime Minister's advice on filling Senate vacancies was non-justiciable, particularly because it involved a constitutional convention. Justiciability, sometimes referenced as the "political questions objection", relates to "the appropriateness and ability of a court to deal with an issue before it". As Stratas J.A. observed in *Hupacasath First Nation v. Canada*, "[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government."²⁰ Some issues, such as the factors underlying a decision to sign a treaty, for example, have been recognized as being "beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers."²¹

It remains an open question as to whether all controversies involving constitutional conventions are inherently non-justiciable. Scholars including Lorne Sossin argue that the non-enforceability of conventions by the courts must be distinguished from their non-justiciability.²² The government's objection on this ground was never resolved in the Senate vacancies case. The courts' proper role in adjudicating controversies involving constitutional conventions is a topic I

²⁰ 2015 FCA 45 at para 62 [*Hupacasath*].

²¹ *Ibid* at para 68.

²² Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed, (Toronto: Carswell, 2012) at 11-12: "Occasionally, a court will refer to a matter as non-justiciable in the sense that a court will not or cannot enforce a remedy. These are related concepts but it is important to distinguish between a non-justiciable matter and a matter unenforceable by the courts. **The classic illustration of this distinction in Canadian law is the constitutional convention.** Constitutional conventions are unwritten rules which governments are obliged to follow. However, if these conventions are not followed, a court cannot enforce them. The violation of a convention, in other words, gives rise to political, not legal sanctions. **Conventions are thus justiciable in the sense that a court could interpret the scope of a convention and declare whether a convention has been breached by government action.** They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention." (Footnotes omitted; emphasis added.)

discuss in detail in chapter three. In any event, until courts conclusively resolve whether conventions are justiciable, any litigant challenging compliance with constitutional conventions in the courts will likely be expected to address similar objections in order to succeed in obtaining a judicial remedy.

2.4.1.2 Standing

In order to obtain a remedy from the courts, a litigant must establish standing. The overall function of a standing requirement is to ration the limited public resources devoted to the administration of justice,²³ but a “genuine interest” requirement also serves to identify individuals and groups who are likely to have something of value to contribute to the judicial decision-making process.²⁴

In the Senate vacancies case, the government objected that the applicant lacked standing to mount a legal challenge absent a personal or proprietary interest in the outcome of the litigation, or the victim of alleged infringement of a *Charter* right. As with the justiciability objection, the Federal Court did not decide whether the applicant had standing. Standing will be a recurring hurdle for litigants to overcome where litigation is used to challenge compliance with constitutional conventions. Where standing is raised as a procedural bar to obtaining a legal remedy, it essentially requires a plaintiff or applicant to prove a sufficient interest in the case to be granted an audience. As Mary Liston observes, “[s]tanding is therefore an end in itself as a

²³ Donald JM Brown & The Honourable John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2009) (loose-leaf updated 2013) at 4:3200.

²⁴ *Ibid* at 4:3531.

form of legal status...”.²⁵ A “mere” interest by a concerned citizen in the proper and lawful functioning of government may not necessarily be sufficient to establish standing. As a practical matter, the threat of litigation failing for lack of standing may mean that litigation intended to adjudicate controversies involving constitutional conventions will be limited to those brought on behalf of established public interest advocacy groups or recognized experts in a relevant field.

2.4.1.3 Declaratory relief

In the Senate vacancies case, the applicant did not seek a mandatory order that the Prime Minister be compelled to recommend the appointment of Senators to the Governor General. Instead, the applicant requested a “declaration” that the Prime Minister must provide advice “within a reasonable time”. Strictly speaking, declarations do not directly compel action. Rather, a declaratory judgment is a formal statement by the court upon the existence or non-existence of a legal state of affairs.²⁶ Although declarations are not in themselves enforceable, the absence of coercive relief is rarely a problem when the subject is a government or a public body that can normally be relied upon to obey the declaratory judgment.²⁷ As a practical matter, issuing a declaration regarding the scope of the Prime Minister’s obligations in respect of Senate appointments would achieve *legal* recognition of his duties in light of a constitutional convention.

²⁵ Mary Liston, “Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process” in John Bell et al., eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 213 at 215.

²⁶ Sir Henry Woolf, Jeffrey Jowell, Andrew Le Sueur, *de Smith’s Judicial Review*, 6th ed (London: Sweet and Maxwell, 2007), c 18-038, as cited in Brown and Evans, *supra* note 23 at 1:7100.

²⁷ Hogg, *supra* note 4 at 59-4.

The government argued this would undermine the essential legal unenforceability of conventions. The appropriateness of declaratory relief in the context of a constitutional convention remains unresolved by the courts. As such, any litigant relying on the courts to assess political behaviour for compliance with constitutional conventions faces the additional hurdle of needing to persuade the court that this legal remedy is available as a regulatory tool.

2.5 LITIGATION AS A VEHICLE FOR MEDIATING CONVENTION-BASED CLAIMS

In this section, I provide some concluding observations on the example provided by the Senate vacancies case as a litigation-based mechanism for resolving claims based on constitutional conventions. In particular, I will describe advantages and disadvantages of a litigation-centred strategy.

2.5.1 Advantages of a litigation-centred strategy

Where an individual or group identifies a concern that political actors are behaving contrary to constitutional convention, the methods for challenging such behaviour are necessarily limited. Using litigation as a tool for effecting the enforcement of constitutional conventions gives rise to two clear advantages. Litigation requires the government to respond to claims of non-compliance, and it has the potential to generate public awareness of the alleged non-compliance through resulting media coverage.

2.5.1.1 *Requirement to engage*

Unlike the publication of an op-ed piece or scholarly article arguing why political behaviour is unconstitutional, public law litigation processes demand some form of response from government. While an open letter calling for action or accountability on behalf of a distinguished

group of academic scholars or other individuals respected for their knowledge and expertise in a matter might attract an official response from the relevant government actors, invoking the litigation process ensures some modicum of justification in response. As a means of promoting accountability, therefore, litigation has an undeniable advantage in that it compels a response. Depending on the applicable rules of court, there are also typically time limits for responding that can be enforced as necessary.

Apart from the production of documents akin to document discovery in an action, the procedure to be followed for a judicial review application in Federal Court also compels a formal responding record containing the respondent's written arguments and any supporting affidavit evidence. In this way, the Senate vacancies litigation required the government to articulate its legal position in relation to the Prime Minister's alleged obligation to fill Senate vacancies. The fact that the litigation compelled the government to commit to any legal position at all attracted media interest both before and after the change in government following the October 2015 federal election. In this way, the litigation process provided mechanisms for accountability that extended well beyond the courtroom.

2.5.1.2 *Media coverage*

Since the filing of the judicial review application on December 8, 2014, the Senate vacancies case generated media coverage approximately 60 separate instances including print articles, newspaper and magazine editorials, television and radio media, plus a further 13 known blog articles including pieces written by legal academics and commentators. During the Maclean's National Leaders Debate held during the 2015 federal election campaign, the court case was specifically referenced by moderator Paul Wells in a question to then Prime Minister Stephen

Harper asking whether he had sought constitutional advice on his policy of not appointing Senators indefinitely.²⁸ In addition to compelling the government to formally respond to the challenge that the Prime Minister's failure to fill Senate vacancies was unconstitutional, the litigation itself facilitated a broader public debate about the alleged non-compliant behaviour.

It certainly cannot be presumed that all public law litigation, even that alleging constitutional violations by the Prime Minister, will merit or receive public attention through media coverage. Where it does, however, litigation and the media can be leveraged alongside each other in support of a broader campaign to raise awareness about, and potentially enforce, alleged violations of constitutional conventions.

2.5.2 Disadvantages and barriers to litigating convention-based claims

Litigation will not typically be a practical means of enforcing constitutional conventions. Litigation requires a significant financial commitment, both to prosecute the case and to withstand the risk of an adverse costs award if unsuccessful. Where a remedy is required within a short time frame, litigation may be too slow to provide practical relief.

2.5.2.1 Costs to prosecute case

Litigation is plainly not a cost-free exercise. While any method of enforcement necessarily involves transaction costs, the financial cost of prosecuting a challenge against alleged violations of constitutional conventions is potentially significant. Absent a well-resourced claimant or the availability of legal representation provided on a deeply discounted or *pro bono* basis, litigation

²⁸ *Maclean's*, "Tale of the tape: Read a full transcript of the Maclean's Debate" (7 August 2015) <<http://www.macleans.ca/politics/ottawa/tale-of-the-tape-read-a-full-transcript-of-macleans-debate/>>.

will not typically be a practical means of enforcing constitutional conventions. To address this gap, more robust reliance on interim or advance cost awards or state funding for counsel may be warranted. The current case law establishing these forms of funding treats their availability as exceptional.²⁹

2.5.2.2 Threat of adverse costs awards

In addition to being required to fund one's own litigation expenses, a public law litigant challenging breaches of constitutional convention must also account for the risk of being ordered to pay the government's costs of defending the case. In the Senate vacancies litigation, the government sought and obtained an order that the applicant pay its costs of defending the proceeding.³⁰ This, too, is a cost that litigants must be prepared to bear if relying on the court process to adjudicate claims involving constitutional conventions.

2.5.2.3 Time and delay

Litigation is also not ordinarily a speedy exercise. Although the *Federal Courts Rules*³¹ contemplate that a judicial review application will be perfected (i.e., ready for hearing) within 130 days from the time of filing, the Court can order extensions of time. The Senate vacancies litigation illustrates the potential that the behaviour giving rise to alleged non-compliance with constitutional convention may "correct itself" or otherwise moot litigation proceedings brought

²⁹ See, e.g., Chris Tollefson, Darlene Gilliland & Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation", (2004) 83 Can Bar Rev 473; Martin Twigg, "Costs Immunity: Banishing the 'Bane' of Costs from Public Interest Litigation", (2013) 36 Dal LJ 193; Cristin Schmitz, "Hammer of costs pounding down public interest litigation, critics say", *The Lawyers Weekly* (25 November 2016) <<http://www.lawyersweekly.ca/articles/3246>>.

³⁰ *Alani JR*, *supra* note 2 at para 25.

³¹ SOR/1998-106.

to seek a legal remedy. To the extent that the objective of any related litigation is limited to ending or modifying the political behaviour that inspired it, this practical concern is inconsequential. However, the possibility that political actors can remove the factual underpinning necessary for the courts to resolve the issues raised in litigation – while potentially exposing the parties challenging the political behaviour in question to adverse costs liability – further underscores the precarious nature of relying on litigation to regulate compliance with constitutional conventions.

2.6 CONCLUSION

Litigation is an inefficient and ineffective manner of regulating political behaviour for compliance with constitutional compliance. As the Senate vacancies case illustrates, public law litigants faces significant challenges particularly where responding governments are not strongly receptive to having a challenge heard on its merits or in an expeditious manner. As an enforcement mechanism, litigation relies on individual challengers and public interest groups to marshal the resources necessary to adequately present the court with the factual record and arguments necessary to prevail. In the absence of a robust and predictable framework for subsidizing the costs of litigating conventional issues, and immunizing public interest litigants from adverse costs liability, litigation's potential to challenge political behaviour on conventional grounds rests on citizens' willingness to absorb the costs and risks of doing so.

Chapter 3: The treatment of constitutional conventions under Canadian law

3.1 INTRODUCTION

In the previous chapter, I concluded that litigation is currently an ineffective tool for regulating political behaviour for compliance with constitutional conventions. This ineffectiveness stems, in part, from the current state of the law that treats conventions as existing outside the legal system and thus not legally enforceable. Under this current state, conventions are strictly rules of political morality incapable of enforcement by the courts.

In this chapter, I develop the argument that constitutional conventions ought to be understood and applied as part of a broader *legal* framework for Canada's system of government. I argue that conventions are part of a system of common law features that has evolved over time to accommodate previously non-justiciable concepts. In particular, I draw on equity, prerogative powers, and "unwritten" constitutional principles as examples of concepts that have eventually been accepted as falling within the purview of Canadian courts. The same, I argue, should now inform the courts' modern understanding and treatment of constitutional conventions. I will further argue that the role of courts and the political branches of government can be respected and maintained through the principled use of declaratory judgments to "enforce" constitutional conventions.

I begin by describing in section 3.2 the essential nature of constitutional conventions as non-legal rules of political morality. Here I describe varying categories of conventions, as well as specific examples of particular conventions for context. I continue in section 3.3 by arguing that the common law has evolved in analogous respects by recognizing the justiciability of concepts that,

like conventions, were previously treated as being beyond the purview of the law. I conclude in section 3.4 that judicial treatment of conventions ought to be renovated to allow for their assessment and enforcement in appropriate circumstances.

3.2 THE NATURE OF CONVENTIONS

Conventions are rules of political morality. They are not strictly “bright line” rules, however, each setting out “a single criterion which has to be satisfied for the rule to apply, expressed as a quantitative measure”.³² The content of these rules are nuanced. They permit exceptions. Still, conventions are rules.

Conventions have been described along other non-legal rules of constitutional behaviour, including “maxims”, “practices”, “customs”, “usages”, “precepts”, and “conventions”.³³ Edward A. Freeman famously described conventions as forming part of “a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the statute or the common law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right.”³⁴ Geoffrey Marshall described conventions as “what we might call the positive morality of the Constitution - the beliefs that the major participants in the political process as a matter of fact have about what is required of them.”³⁵ Freeman accepted that “it would be utterly impossible to define [cases requiring application of political morality] beforehand in the terms of an Act of Parliament”,

³² Julia Black, “Forms and paradoxes of principles-based regulation” (2008), 3:4 *Capital Markets LJ* 425 at 437.

³³ Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 3.

³⁴ Edward A Freeman, *The Growth of the English Constitution from the Earliest Times*, 3rd ed (London: Macmillan and Co, 1876) at 114.

³⁵ Marshall, *supra* note 33 at 11-12.

even though “we practically understand” how a large class of political subjects can be best dealt with “by tacit understandings, and which can hardly be made the subjects of formal enactments by Law.”³⁶

3.2.1 Classification of conventions

Within the category of what scholars generally understand to be “conventions”, there are varying degrees of “convention-ness”. Conventions vary as to the level of precision and specificity with which they circumscribe action or behaviour. Albert Venn Dicey remarks that at least some conventions “are never violated and are universally admitted to be inviolable”, while others “have nothing but a slight amount of custom in their favour and are of disputable validity.”³⁷ Because of this, for example, “... no one can define with absolute precision the circumstances under which a Prime Minister ought to retire from office”, or “fix the exact point at which resistance of the House of Lords to the will of the House of Commons becomes unconstitutional”.³⁸ According to Dicey, these and other applications of constitutional conventions pertain to matters for which no definite principle can be laid down and for which “[t]he nature of the proof differs under different circumstances.”³⁹

Andrew Heard classifies conventions by arguing that five inter-related factors can vary in combination to provide distinct classes of rules. The first relates to the importance or reason that lies behind the rule. The second pertains to the level of agreement on the principle behind the

³⁶ Freeman, *supra* note 34 at 125-126.

³⁷ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 26.

³⁸ Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics*, 2nd ed (Don Mills: Oxford University Press, 2014) at 455.

³⁹ Dicey, *supra* note 37 at 457-459.

rule. The third relates to the level of agreement as to the specific terms of the rule. A fourth tracks how closely the rule's content embodies the principle behind the rule. The fifth factor is the degree to which informal rules are supported by existing precedents.⁴⁰ From this framework emerges Heard's classification of conventions reproduced in Table 1.⁴¹ Underlying the classification structure, however, is an assessment of the impact non-compliance with a conventional rule would have on important constitutional principles.

⁴⁰ Heard, *supra* note 38 at 207-208. This table substantially reproduces Heard's Table 7.1, "Different Categories of Conventions".

⁴¹ *Ibid* at 214.

Table 1- Heard's classification of conventions

Type of rule		Characteristics	Examples
<p>True conventions</p>	<p>Fundamental conventions</p>	<p>Broad support for the rule's existence.</p> <p>Clear terms.</p> <p>Strict compliance essential to protect important constitutional principles.</p>	<p>Governors must not refuse royal assent or reserve bills on their own initiative.</p> <p>Politicians must not try to influence judges on the conduct and outcome of court cases.</p> <p>A government must resign if clearly defeated in a general election.</p>
	<p>Semi-rigid conventions</p>	<p>Wide support for existence of rule.</p> <p>General terms are agreed to but some details may vary.</p> <p>Compliance protects important constitutional principles.</p>	<p>Individuals appointed to cabinet must either already hold a seat in the legislature or obtain one in a relatively short period of time.</p> <p>The Prime Minister selects a Governor General after consulting others.</p> <p>The Supreme Court of Canada will be composed on a regional basis.</p>
	<p>Flexible conventions</p>	<p>Wide support for the rule in principle.</p> <p>General acceptance of occasional breaches.</p> <p>Complete non-compliance would undermine important constitutional principles.</p>	<p>The Senate should not reject outright measures approved by the House of Commons.</p> <p>The federal cabinet should be composed of members from each province.</p> <p>Federal and provincial governments should consult with each other before introducing changes affected areas of overlapping jurisdiction.</p>
<p>False conventions</p>	<p>Infra conventions⁴²</p>	<p>Vocal minority may support rule but no general support for its existence.</p> <p>Basic disagreements over possible terms or acceptable uses of the rule.</p> <p>No clear impact on important constitutional principles seen without the rule.</p>	<p>Governors should be able to dismiss a government because of scandal.</p> <p>Legislators should not be able to cross the floor to join another party caucus without running in a by-election.</p> <p>Cabinet ministers should resign for the mistakes of their staff.</p>

⁴² Heard, *ibid*, describes these as false conventions “because their controversial nature leaves them below the three classes of true convention; infra-conventions are not themselves proper constitutional conventions.”

3.2.2 The orthodox law/convention dichotomy

Conventions impose obligations that supplement or even contradict formal laws. This potential for conflict between law and convention underpins the Supreme Court of Canada's recognition as orthodoxy of a rigid dichotomy between laws enforceable by the courts and conventions enforceable only in the political sphere:

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of governments themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.⁴³

In the *Patriation Reference*, the Supreme Court of Canada majority speculates that conventional rules “cannot” be enforced by the courts because they are “generally in conflict with the legal rules which they postulate”. This conflict, the majority observed, “is not of a type which would entail the commission of any illegality” but rather “results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.” Examples illustrating this point include the *legal* power or discretion of the Queen, Governor General or a Lieutenant Governor to refuse assent to a bill passed by both Houses of Parliament or by a Legislative Assembly, as contrasted with the

⁴³ *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 880, 1 CRR 59 [*Patriation Reference* cited to SCR].

convention that they cannot refuse such assent on any ground on their own motion because, for example, they disapprove of the policy of the bill. The majority describes this as an example of a conflict between a legal rule – which creates a complete discretion – and a conventional rule which completely neutralizes it. If there were a conflict between the legal rule and the convention (i.e., assent were improperly withheld), the courts if asked would be bound to enforce the law rather than the convention. As such, the courts would “refuse to recognize the validity of a vetoed bill”.⁴⁴

3.2.3 Recognized conventions

The established test for determining the existence of a constitutional convention derives from Sir Ivor Jennings’ formulation of a test in the United Kingdom. The so-called “Jennings test” was endorsed by the Supreme Court of Canada in the *Patriation Reference*⁴⁵ and currently stands as the operating test for the recognition of conventions in Canada:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.⁴⁶

Perhaps the most uncontroversial and fundamental constitutional convention in Canada relates to the principle of responsible government. Responsible government is essentially the principle that political decisions will be made and executive powers will be exercised by popularly elected representatives. It stands in contrast to feudal or purely monarchical systems in which authority

⁴⁴ *Ibid* at 880-882.

⁴⁵ *Supra* note 43.

⁴⁶ Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 136.

is both held and wielded by an unelected head of state. In Canada, this means: that the Crown will only act on advice from the Cabinet, that Cabinet ministers answer questions on the floor of the House of Commons, and that if a government is defeated on a confidence measure it must resign, which results in an election of a new government forming and trying to secure the confidence of the House.⁴⁷ Scholars have argued that responsible government is not only an implicit assumption of Canada's Constitution or a purely "unwritten" principle but in fact an express feature of Canadian constitutional law by virtue of various provisions in the *Constitution Act, 1867*⁴⁸ concerning the Queen's Privy Council for Canada to "aid and advise" in the government of Canada.

Andrew Heard describes the duty to ensure that there is a Prime Minister in place that either has or is likely to win the confidence of the legislature as "the first and foremost duty of any parliamentary head of state".⁴⁹ The Governor General (or Lieutenant Governor of a province) can decide among possible contenders for forming government after an election and have a recognized role to play in ensuring a viable government is always in place. Heard notes that Commonwealth constitutions based on the Westminster model give Governors General (and Lieutenant Governors) discretion in appointing a Prime Minister (or Premier).⁵⁰ Aside from constraining Governors General from appointing a Prime Minister on a personal whim, for example, conventions also provide guidance as to the factors to consider when selecting a Prime Minister where no one party wins a majority of seats in the House of Commons.

⁴⁷ Andrew C Banfield, "Canada" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) at 194.

⁴⁸ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

⁴⁹ Heard, *supra* note 38 at 47.

⁵⁰ *Ibid* at 48.

In such cases, by convention, the current Prime Minister has a recognized right to remain in office to meet Parliament. Heard describes this right as a “limited” one, being “a right to meet Parliament and not a carte blanche to carry on governing into the future.” The incumbent Prime Minister is entitled by convention to see if his or her party can win the confidence of a majority of the newly elected members, and the incumbent government has a conventional duty to test the confidence of the House expeditiously.⁵¹

Although the incumbent is permitted by convention to test the confidence of the newly elected House of Commons, he or she may also elect to concede having suffered a moral defeat and allow another party to form government. Heard notes, for example, that Paul Martin announced he would resign as Prime Minister after the 2006 election, and that Pierre Trudeau did the same thing after the 1979 election.⁵² In the 2006 example, Paul Martin’s Liberal Party of Canada won 103 of 308 seats while the Conservative Party of Canada secured 124 seats. In the 1979 example, Pierre Trudeau’s Liberal Party secured 114 seats compared to the Progressive Conservative’s 136 (of a total of 282) seats.

3.2.4 Examples of courts considering issues involving conventions

In this section, I will examine three examples of conventional rules that have been alleged to exist in the context of litigation seeking judicial recognition and, in some cases, enforcement, of a constitutional convention. My purpose in doing so is to demonstrate the Canadian courts’ willingness to consider whether specific conventions exist, how they have tackled the fact-

⁵¹ *Ibid.*

⁵² *Ibid* at 48-49.

finding task of conventional recognition, and how their approaches have evolved to more readily entertain public law claims by private parties seeking declaratory judgments.

3.2.4.1 *The Quebec Veto Reference*

In the *Quebec Veto Reference*,⁵³ the Supreme Court of Canada was asked to opine on whether there was a constitutional convention giving the province of Quebec a veto over constitutional amendments. The issue underlying the reference arose following the Court's ruling in the *Patriation Reference*, concluding that "a substantial degree of provincial consent" was required to effect constitutional amendments.⁵⁴

By the time the Supreme Court had heard the appeal of the Quebec Court of Appeal's judgment, which concluded that Quebec held no such veto over constitutional amendments, the *Canada Act, 1982* has already been passed by the UK Parliament and proclaimed into force. The Supreme Court upheld the Quebec Court of Appeal's decision largely on the basis that the appellant failed to demonstrate compliance with the second stage of the Jennings test: acceptance or recognition by the actors in the precedents. The Court described this acceptance as "the most important requirement for establishing a convention."⁵⁵ The Court also noted the lack of any statements by representatives of federal authorities recognizing that Quebec had a conventional

⁵³ *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, 1982 CanLII 219 [*Quebec Veto Reference* cited to SCR].

⁵⁴ *Patriation Reference*, *supra* note 43.

⁵⁵ *Quebec Veto Reference*, *supra* note 53 at 814.

power of veto over certain types of constitutional amendments, nor any statements “by the actors in any of the other provinces” acknowledging such a convention.⁵⁶

The case came to the Court as a reference question, so standing was not an issue. As a question raised on behalf of the executive government – rather than a private litigant challenging government behaviour – the costs of the litigation were paid out of the public purse. Neither the Quebec Court of Appeal nor the Supreme Court of Canada considered the questions posed to be non-justiciable in the sense that they invited the judiciary to step outside its institutional role by answering a question lacking a sufficient legal component. For these reasons, as will be the case with most reference questions submitted to courts by executive governments, many of the disadvantages of litigation described in chapter two did not materialize. The *Quebec Veto Reference* illustrates that courts accept the invitation to adjudicate claims involving constitutional conventions and issue *legal* judgments accordingly – at least in the context of a reference question submitted by government itself.

3.2.4.2 Ontario English Catholic Teachers Association

In *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, the Supreme Court of Canada was asked to recognize a convention giving a right to Ontario school boards to levy and determine property taxes for education purposes.⁵⁷ Unlike the *Quebec Veto Reference*, this case was brought by a private party rather than at the behest of government. While reviewing, and indeed confirming, the Court’s previous statements concerning the nature and

⁵⁶ *Ibid.*

⁵⁷ 2001 SCC 15, [2001] 1 SCR 470 [*OECTA*].

role of conventions in the *Patriation Reference*,⁵⁸ the Court emphasized that conventions carry only political sanctions. Nevertheless, the Court did not appear to object to the appellants “nevertheless seek[ing] a declaration that a constitutional convention exists ... presumably so that they could then seek a remedy for a violation of this convention in the appropriate forum.”⁵⁹

As a factual matter, however, the Court concluded that the convention sought to be recognized by the appellants did not actually exist, stating: “... [T]here is no evidence of such a convention developing in Ontario.”⁶⁰

OECTA is a useful example of a failed attempt at recognizing constitutional convention in two distinct ways. First, it arose in the context of litigation brought, at least in part, by a non-governmental actor and outside the framework of a reference case. This fact suggests that it is open to private litigants to advance conventional arguments rather than merely provincial and federal governments. Second, it post-dates the *Patriation Reference*⁶¹ and *Quebec Veto Reference*⁶² decisions, suggesting a shift over time in the Court’s willingness to adjudicate cases involving conventions. The Court’s commentary implies that it would have been willing to issue the requested declaration if the plaintiffs succeeded in proving the existence of the alleged convention. If the orthodox law/convention dichotomy was rigidly applied, it would have been simpler for the Court to dismiss the case on the basis that issues of convention are either non-justiciable or not legally enforceable – even by declaration.

⁵⁸ *Supra* note 43.

⁵⁹ *OECTA*, *supra* note 57 at para 65.

⁶⁰ *Ibid* at para 66.

⁶¹ *Supra* note 43.

⁶² *Supra* note 53.

3.2.4.3 *Conacher*

A final example of an attempt to use litigation to recognize and enforce conventions is *Conacher v Canada (Prime Minister)*. In that case, Democracy Watch, a not-for-profit organization that advocates for democratic reform, and its co-founder Duff Conacher challenged by way of judicial review Prime Minister Stephen Harper's decision to advise the Governor General to dissolve the 39th Parliament and set an election date in alleged violation of section 56.1 of the *Canada Elections Act*. This legislation established fixed election dates.⁶³ Conacher applied for a declaration "that a constitutional convention exists that prohibits a Prime Minister from advising the Governor General to dissolve Parliament except in accordance with section 56.1 of the *Canada Elections Act*".⁶⁴ The Federal Court recognized that "[a]lthough there are no legal limits to the Governor General's discretion, other than the qualifier that each Parliament cannot last for more than five years, a political limitation exists in the form of a constitutional convention whereby the Governor General will only exercise power to dissolve Parliament when advised to do so by the Prime Minister."⁶⁵

Conacher argued that the fixed date legislation *created* a constitutional convention constraining the Prime Minister's discretion to advise the Governor General to dissolve Parliament otherwise than in accordance with the fixed election date schedule or if there has been a prior vote of non-confidence in the House of Commons.

⁶³ SC 2000, c 9.

⁶⁴ *Conacher v Canada (Prime Minister)*, [2010] 3 FCR 411, 2009 FC 920 [*Conacher FC*].

⁶⁵ *Ibid* at para 10 (emphasis added).

The Federal Court applied the Jennings test for recognition and concluded that there were no precedents to establish the existence of a new convention limiting the Prime Minister's discretion to advise the Governor General.⁶⁶ The Court specifically rejected the argument that section 56.1 of the *Canada Elections Act* evidenced an "explicit agreement" to create a new convention, in part because the legislative record was ambiguous about what was intended and because the provision itself makes no mention of conventions.⁶⁷ The Federal Court of Appeal upheld the Federal Court's judgment declining to issue declaratory relief, but it did so on the narrow basis that the statutory wording did not preclude the Governor General from exercising discretion to dissolve Parliament.⁶⁸

Conacher provides a further example of the courts' willingness to consider whether a convention constrained the Prime Minister's discretion. As Andrew Heard observes, "the precedent clearly exists for other applications to be launched seeking declaratory judgment."⁶⁹

3.3 THE COMMON LAW'S EVOLVING RECOGNITION OF JUSTICIABLE CONCEPTS

Conventions are currently considered to be outside the courts' purview. Similarly, principles of equity were entirely unrecognized by common law courts until chancery and common law courts were fused in the late 19th century. Exercises of prerogative power were previously considered fully insulated against judicial review. Today, courts recognize that all governmental action,

⁶⁶ *Ibid* at para 70.

⁶⁷ *Ibid* at para 72.

⁶⁸ *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 6, leave to appeal to SCC refused, 2011 CanLII 2101. [*Conacher FCA*].

⁶⁹ Heard, *supra* note 49 at 223.

regardless of its source of power, must conform to legal norms.⁷⁰ Courts have also recognized a non-exhaustive set of “unwritten” constitutional principles. These principles are not expressly described in any constitutional text but nevertheless carry constitutional force. They may be used to ground legal arguments for challenging governmental action⁷¹ or even invalidating legislation.⁷² In this section, I argue by analogy that conventions should be incorporated as part of Canada’s legal framework just as equitable principles, prerogative powers and unwritten constitutional principles have developed into justiciable concepts.

3.3.1 Law and equity

Constitutional conventions provide a “gloss” over legal rules in a manner broadly analogous to the way in which the rules of equity historically provided a “supplement” to the common law. Historically, the Court of Chancery had discretion to administer justice and fairness in particular cases to “do more perfect and complete justice than would be the result of leaving the parties to their remedies at common law”.⁷³ Until the fusion of courts of equity and law, however, it was well established that the Court of Chancery could not override the courts of common law, as illustrated by the maxim *Aequitas sequitur legem*, meaning “equity will not allow a remedy that is contrary to law.”⁷⁴

As with the principles of equity “following” or supplementing the common law, constitutional conventions may *limit* the manner in which a discretionary power created and recognized by law

⁷⁰ *Hupacasath*, *supra* note 20.

⁷¹ See, e.g., *Lalonde v. Ontario*, (2002) 56 OR (3d) 505 (CA) as cited in Heard, *supra* note 38 at 226.

⁷² See, e.g., *Christie v. British Columbia*, 2005 BCCA 631 as cited in Heard, *supra* note 38 at 226.

⁷³ *Wilson v Northampton and Banbury Junction Railway Co.* (1874) LR 9 Ch App 279 at 284 (per Lord Selborne L.C.).

⁷⁴ See also *Tulk v Moxhay* (1848), 2 Ph 774, [1843-60] All ER Rep 9 (LC) at 68-69 All ER (per Lord Templeman): “...[E]quity supplements but does not contradict the common law.”

is to be exercised, if at all. Dicey describes conventions having “one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised”.⁷⁵ However, conventions may not supersede the constitutional law by expanding the scope of a discretionary power beyond that provided by law or remove a legal duty to perform a function altogether.

3.3.2 Prerogative powers

The Crown prerogative refers to those residual powers left over from when the monarch was directly involved in government. These powers now include making treaties, declaring war, deploying the armed forces, regulating the civil service, and granting honours and pardons. Today they are typically exercised by government ministers but may be invoked by the monarch personally acting under ministerial advice.⁷⁶ Since the early seventeenth century, courts confirmed that they could determine the existence and extent of a prerogative power.⁷⁷ However, UK jurisprudence held that courts could not question or review the manner in which a prerogative power had been exercised.⁷⁸

The UK’s treatment of exercises of prerogative power as non-justiciable was initially incorporated into Canadian law. Over time, however, both UK and Canadian courts recognized that the source of government power – statutory or prerogative – has no bearing on the

⁷⁵ Dicey, *supra* note 43 at 422-423.

⁷⁶ Thomas Poole, “Judicial Review at the Margins: Law, Power, and Prerogative” (2010) 60 UTLJ 81 at 85.

⁷⁷ *Prohibitions del Roy* (1607) 12 Co Rep 63; *Case of Proclamation* (1611) 12 Co Rep 74 at 76, as cited *ibid* at 88.

⁷⁸ Poole, *supra* note 76 at 88.

availability of judicial review.⁷⁹ The initial blanket prohibition on judicial review of exercises of prerogative power was eventually relaxed to allow for a very limited assessment of the acceptability and defensibility of government decision-making, “often granting the decision-making a very large margin of appreciation”.⁸⁰ Even then, an applicant had to establish an “egregious” case.⁸¹ A further liberalization saw the courts willing to review exercises of prerogative powers here *Charter* rights were at issue.⁸² What matters today is whether the factors underlying a decision are within or beyond the courts’ “ken or capability to assess” and whether that assessment “would take courts beyond their proper role within the separation of powers.”⁸³ Thus, the courts’ historical reluctance to engage in review of exercises of prerogative power has been replaced by a contemporary functional approach focused on enforcing “executive accountability to legal authority” and “protecting individuals from arbitration [executive] action”⁸⁴ regardless of its source.

Certain prerogative powers, particularly the personal prerogatives of the Monarch, are “strongly hedged by constitutional conventions”.⁸⁵ The interplay between conventions and prerogative powers makes the courts’ lingering reticence to adjudicate claims involving conventions ironic, incongruous and overdue for renovation.

⁷⁹ See, e.g., *R v Ministry of Defence, ex parte Smith*, [1995] 4 All ER 427, aff’d [1996] QB 517, [1996] 1 All ER 257 (CA); *Black v Canada (Prime Minister)*, (2001) 54 OR 3d 215, 199 DLR 4th 228 (CA) at para 44; *Hupacasath*, *supra* note 20 at para 64.

⁸⁰ *Hupacasath*, *supra* note 20 at para 67.

⁸¹ See, e.g., *Thorne’s Hardware v Canada*, [1983] 1 SCR 106 at 111, 143 DLR 3rd 577; *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, [2013] 3 SCR 810 at para 28, as cited in *Hupacasath*, *supra* note 20 at para 67.

⁸² *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441, 18 DLR 4th 481.

⁸³ *Hupacasath*, *supra* note 20 at para 68.

⁸⁴ *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR 4th 385 at para 70 [*Quebec Secession Reference*], as cited in *Hupacasath*, *supra* note 20 at para 66.

⁸⁵ Poole, *supra* note 76 at note 25.

3.3.3 Constitutional principles

Canadian law expressly endorses the use of unwritten constitutional principles. Canadian courts have incorporated certain constitutional principles by reference and accepted the invitation “to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.”⁸⁶ These principles “are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”⁸⁷ Having “full legal force”,⁸⁸ unwritten constitutional principles have been recognized as constituting “substantive limitations upon government action”, giving rise to obligations that may be “very abstract and general” or “may be more specific and precise in nature”.⁸⁹

It should make no practical difference whether a fundamental principle such as responsible government has been characterized as a “constitutional convention”,⁹⁰ an “unwritten constitutional principle”,⁹¹ a “foundational constitutional principle”,⁹² part of the Constitution’s “internal architecture”,⁹³ part of the “basic constitutional structure”,⁹⁴ an “organizing principle”,⁹⁵ an “unwritten norm”,⁹⁶ among the “unwritten postulates which form the very

⁸⁶ *Quebec Secession Reference*, *supra* note 84 at para 53.

⁸⁷ *Ibid* at para 54.

⁸⁸ *Patriation Reference*, *supra* note 43 at 845, cited in *ibid*.

⁸⁹ *Quebec Secession Reference*, *supra* note 84 at para 54.

⁹⁰ *OECTA*, *supra* note 57 at para 65; *Patriation Reference*, *supra* note 43 at 878, 880; *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69 at 86. See also *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 at para 40.

⁹¹ *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319.

⁹² *Quebec Secession Reference*, *supra* note 84 at para 49.

⁹³ *Senate Reform Reference*, *supra* note 10 at para 26.

⁹⁴ *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 57.

⁹⁵ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3.

foundation of the Constitution of Canada”,⁹⁷ or a “principle [that] is clearly implicit in the very nature of a Constitution”.⁹⁸ Responsible government is not, for example, so much more inherently “political” that it ought to be treated differently than other constitutional principles such as democracy or the protection of minorities. Indeed, in explaining what the “foundational” unwritten principle of democracy entails, the Supreme Court of Canada describes “the development of responsible government in the 19th century”⁹⁹ *as part of the evolutionary struggle that culminated in “a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated.”*¹⁰⁰ So fundamental was this set of assumptions that their explicit mention in the *Constitution Act, 1867* “might have appeared redundant, even silly, to the framers.”¹⁰¹ Both unwritten principles (by their various labels) and conventions exist to fill gaps in the express terms of the constitutional text. Their “powerful normative force” similarly places a substantive – and what ought to be legally recognizable – obligation on government action.

3.4 CONCLUSION

Conventions ought to be considered as part of the *legal* governance framework that Canada’s Constitution seeks to implement. Just as jurisprudence over the justiciability of the Crown prerogative has evolved over time – from a blanket prohibition to a limited scope of judicial review where individual rights were at stake to the courts’ current willingness to review

⁹⁶ *Ibid.*

⁹⁷ *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 752.

⁹⁸ *Ibid.* at 750.

⁹⁹ *Quebec Secession Reference*, *supra* note 84 at para 63.

¹⁰⁰ *Ibid.* at para 62.

¹⁰¹ *Ibid.*

exercises of the prerogative power for compliance with the Constitution writ large – Canadian courts would do well to discard the orthodox distinction between law and convention by recognizing fundamental conventional norms as background assumptions that properly inform constitutional interpretation and, where necessary, provide the *legal* basis for constraining government action.

Chapter 4: A Constitutional Conventions Commissioner

4.1 INTRODUCTION

Canadian constitutional conventions are characterized as rules of political morality. To varying degrees, they are integral to the functioning of Canadian government. Unlike laws, however, they are not directly enforceable by the courts. Instead, conventions are indirectly enforced by the threat of political repercussions that could flow from non-compliance.

This current state of regulation is suboptimal. It relies too heavily on an informed electorate to identify cases of non-compliance and punish offenders. As an alternative, litigation aimed at obtaining a judicial declaration as to the scope of a convention and its application to a specific set of circumstances remains a theoretical possibility. However, litigation has significant disadvantages as a regulatory device. As discussed in chapter two, a litigant challenging political behaviour faces hurdles that include establishing standing, justiciability and jurisdiction.

Litigation is also a potentially lengthy and resource-intensive process, making it unfeasible as a standalone remedy for addressing non-compliance.

In this chapter, I propose a mutually compatible alternative to relying on public outrage or litigation to regulate compliance with constitutional conventions. Specifically, I propose that Parliament appoint an independent officer (or “Commissioner”) responsible for investigating and assessing political behavior for compliance with recognized constitutional conventions. This Commissioner would also contribute to the enforcement of conventional norms. He or she would achieve enforcement objectives through a variety of available regulatory tools: through public advocacy, formal reports to Parliament, moral suasion, and, if necessary, by resorting to litigation to obtain a judicial remedy for alleged non-compliance.

I begin by sketching out the proposed structure and key features of the Commissioner’s role. In doing so, I draw on examples of statutory frameworks that define aspects of existing independent parliamentary officers. Next, I review Lon Fuller’s description of eight ways in which law-making can fail. I apply those warnings to the context of conventions as rules of political morality. I then draw out ways in which conventions are currently unsatisfying as a means of rule-making. I hypothesize about the ways in which the proposed new Constitutional Conventions Commissioner might alleviate these concerns.

I draw upon regulatory scholar Julia Black’s description of accountability as the relationship between an actor – which I will refer to as a “regulatee” -- and another (a “regulator”) in which the regulatee is called upon to explain and justify to a regulator its actions against one or more different sets of criteria after the fact.¹⁰²

Next, I isolate and define a particular type of accountability that I argue an effective regulatory framework should aspire to promote. Recognizing that every model of regulating behaviour involves trade-offs between conflicting objectives, identifying this specific form of accountability as deserving priority is essential to evaluating the efficacy of any proposed regulatory framework. Specifically, I draw on Colin Diver’s three dimensions of rules – accessibility, transparency, and congruence – and argue that congruence ought to be prioritized above accessibility and transparency in regulating conventional behaviour given the nature and purpose of constitutional conventions.

¹⁰² Julia Black, “Calling Regulators to Account: Challenges, Capacities and Prospects” in Nicholas Bamforth & Peter Leyland, eds, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013) 354 at 356.

4.2 OFFICE OF THE CONSTITUTIONAL CONVENTIONS COMMISSIONER

The Office of Constitutional Conventions Commissioner I propose would be an independent officer of Parliament. The Commissioner would have two primary roles: a regulatory role and a recording function.

The first proposed mandate involves the Constitutional Conventions Commissioner inquiring into and reporting on whether present or proposed behaviour by political actors is congruent with established constitutional conventions. Similar to the manner in which the Auditor General serves a validation function by assessing whether public funds are spent in a manner consistent with appropriate financial and other standards, the Constitutional Conventions Commissioner would serve an audit function with respect to whether political action follows conventional principles. Where the Commissioner in the course of his or her “audit” inquiry concludes that there are inconsistencies with conventional principles, the Commissioner would have an opportunity and an obligation to call public attention to them through a statutory reporting framework similar to that established for other independent parliamentary officers. Like the Information Commissioner, Privacy Commissioner and Official Languages Commissioner, the Constitutional Conventions Commissioner would be tasked with inquiring into complaints from any interested person or investigating matters on his or her own initiative.

Assuming that the Commissioner is broadly respected as an honest broker with specialized expertise in matters of constitutional conventions, he or she may be able to discharge the regulatory function through “soft powers” such as exercising moral suasion over regulatees and by engaging in public advocacy. Failing this, and in aid of the regulatory mandate, the

Commissioner would have discretion to refer issues to the courts for a further determination and potentially for enforcement.

The second role involves a recording or archival function to observe present day political behaviour and rationale provided in support of such behaviour for the purpose of establishing a permanent record. This could later be used to determine whether sufficient precedent and acknowledgement of “bindingness” exists for political behaviour to crystallize into a constitutional convention. This first aspect of the Commissioner’s mandate is intended to be purely descriptive; that is, the Commissioner does not directly or exclusively regulate present day behaviour as part of his or her archival function but rather collects and stores evidence to be used to facilitate regulation of future political behaviour.

In the sections below, I propose certain characteristics that the proposed new Office of the Constitutional Conventions Commissioner ought to hold. In doing so, I draw upon existing examples of statutory frameworks that currently exist for other parliamentary officers.¹⁰³

4.2.1 Appointment

The Constitutional Conventions Commissioner should be regarded as an expert, impartial and well-respected “straight shooter” committed to serving his or her mandate in the public interest.

An officeholder who is viewed as a partisan or patronage appointment will be less likely to influence political actors – particularly those for whom compliance with the Commissioner’s

¹⁰³ Existing Officers of Parliament include the Office of the Auditor General, the Official Languages Commissioner, the Information Commissioner, the Privacy Commissioner, the Parliamentary Budget Officer, the Chief Electoral Officer, the Conflict of Interest and Ethics Commissioner, the Commissioner of Lobbying, and the Public Sector Integrity Commissioner. For the purposes of this paper, I randomly selected the first four of these offices. They may not be fully representative of the complete range of existing parliamentary officers.

determination of conventionally consistent behaviour will come at a political cost in any given circumstance.

To protect against this, the proposed Constitutional Conventions Commissioner should be appointed by the Governor General after consultation with the leader of every recognized party in the Senate and House of Commons and approval of both Houses of Parliament. This follows the model of appointment used for existing parliamentary officers, including the Auditor General¹⁰⁴, Official Languages Commissioner,¹⁰⁵ Information Commissioner,¹⁰⁶ and Privacy Commissioner.¹⁰⁷

Given the interplay between the Constitutional Conventions Commissioner and the Governor General and civil service, it would also be prudent to consult with the Governor General and Clerk of the Privy Council before selecting an incumbent.

A potential concern with seeking the Governor General's input as part of a consensus-based selection process may arise if there is disagreement between the Governor General and one or more of the other consulted stakeholders but particularly including those actors on whose advice the Governor General ordinarily acts. The Governor General should therefore be free to exercise his or her individual discretion rather than be seen to acting on the advice of his or her ministers.

¹⁰⁴ *Auditor General Act*, RSC 1985, c A-17, s 3(1) [*Auditor General Act*].

¹⁰⁵ *Official Languages Act*, RSC 1985, c P-21, s 49(1) [*Official Languages Act*].

¹⁰⁶ *Access to Information Act*, RSC 1985, c A-1, s 54(1) [*Access to Information Act*].

¹⁰⁷ *Privacy Act*, RSC 1985, c P-21, s 53(1) [*Privacy Act*].

4.2.2 Qualifications

Rather than narrowly prescribe a specific set of qualifications for a Constitutional Conventions Commissioner to hold, I suggest that consideration be given generally to the knowledge and experience that would be desirable for a candidate to have. The Commissioner need not necessarily, for example, be legally trained. However, it would be helpful to be able to understand and apply legal and constitutional principles set out in a variety of constitutional sources including constitutional texts and jurisprudence. Similarly, while an academic background in political science would seem an obvious asset, what is more essential is that the Commissioner has a nuanced understanding of all aspects of Canadian government theory and practice. These traits will naturally add perceived legitimacy to the conclusions advocated by the Commissioner while instilling public confidence that they were reached in an analytically robust manner.

4.2.3 Tenure

Fundamentally, the officeholder should be provided with sufficient security of tenure to ensure actual and perceived independence. The duration of a Commissioner's term should also be of sufficient length to provide each Commissioner with the benefit of being able to obtain useful feedback from mistakes and identify situations in which they are trapped by misleading schema.¹⁰⁸ Terms of tenure for existing parliamentary officers offer some guidance. The Auditor General holds office during good behaviour for a non-renewable ten year term.¹⁰⁹ The Official

¹⁰⁸ Jeffrey J Rachlinski & Cynthia R Farina, "Cognitive Psychology and Optimal Government Design" (2002) 87 Cornell L Rev 551 at 559.

¹⁰⁹ *Auditor General Act*, *supra* note 104, s 3(1.1).

Languages Commissioner¹¹⁰ and Information Commissioner¹¹¹ each hold office during good behaviour for indefinitely renewable seven year terms. The Privacy Commissioner holds office during good behaviour for a once-renewable term of seven years.¹¹²

The practicality of term limits will depend in part on the size of the pool of qualified and willing candidates from which to draw. Presumably, there are fewer recognized experts in the analysis and determination of constitutional conventions than, for example, there are qualified auditors.

The importance of “getting it right”, and the assumption that there is indeed an objectively “right” answer in the case of constitutional conventions to be found, suggests that there may at least initially be fewer suitable Commissioners to cycle through in order to satisfy term limits.

Once a Commissioner is appointed, however, principles of independence suggest that they ought not to be easily removable from office. The Auditor General¹¹³ and Privacy Commissioner,¹¹⁴ for example, are subject to removal only for cause by address of the Senate and House of Commons.

This feature should apply to the Commissioner as well. It does not guarantee actual independence from Parliament itself, but the threshold for removal should be significantly high that it does not occur other than where Parliament considers it necessary and worth the political capital of exercising an exceptional option.

¹¹⁰ *Official Languages Act*, *supra* note 105, ss 49(2)-(3).

¹¹¹ *Access to Information Act*, *supra* note 106, s 54(2)-(3).

¹¹² *Privacy Act*, *supra* note 107, ss 53(2).

¹¹³ *Auditor General Act*, *supra* note 104, s 3(1.1).

¹¹⁴ *Privacy Act*, *supra* note 107, ss 53(3).

4.2.4 Information gathering powers

As a starting point, the Commissioner should be given broad statutory powers to gather and collect information relevant to his or her mandate. The Auditor General, by comparison, is generally entitled to “free access at all convenient times” to information related to his or her responsibilities,¹¹⁵ and may examine persons under oath on any matter pertaining to an audit by him or her.¹¹⁶

Under the Jennings test for recognizing constitutional conventions,¹¹⁷ it is critical to identify both past precedents that support a rule’s existence and also to what extent political actors *believed* a conventional rule was binding upon them. A significant practical difficulty in attempting to discern whether a given rule has become a constitutional convention is the lack of access to a complete record of what political actors believed was binding on them. In the result, conventional scholars are largely limited to publicly available statements by political actors. Public statements by political actors, however, are fraught with interpretation challenges. Given their nature, a self-serving political statement may not necessarily reflect what a political actor actually believed to be true at the time of the statement. In the context of a retrospective analysis, there is typically no opportunity to cross-examine an actor on their historical statements. Moreover, the passage of time adds further complications in terms of the reliability of the actor’s memory.

¹¹⁵ *Auditor General Act*, *supra* note 104, s 13(1).

¹¹⁶ *Ibid*, s 13(4).

¹¹⁷ Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 136: “We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.”

A Constitutional Conventions Commissioner could add significant value to the robust development and evolution of conventions by recording a near-contemporaneous authoritative record of political actors' impressions and understandings relative to conventional principles as they carry out their duties and functions. Doing so would provide enduring insight into political actors' behaviour. This would represent an improvement over what is currently available in the form of disparate public statements pieced together by researchers attempting to determine the extent to which precedents exist that support a particular standard or whether that standard has acquired or maintained the status of a constitutional convention. To facilitate this, I propose that the Constitutional Conventions Commissioner be granted broad access to the political actors whose conduct is most relevant to the application of the Jennings test for establishing conventions. This would include, at a minimum, the Governor General, the Prime Minister and Cabinet, and in some situations the leaders of recognized political parties in both houses of Parliament. In addition to enjoying "open door access" to meetings and forums relevant to his or her mandate, the Constitutional Conventions Commissioner should also be empowered to compel evidence from past and present day political actors whose perspectives and rationales for behaviour are relevant to the determination and analysis of constitutional conventions, similar to the broad evidence-gathering and inquiry powers of the Auditor General.

Providing an individual Commissioner, and to a lesser but inevitable extent his or her staff, with this proposed broad level of unprecedented access to highly confidential and politically sensitive discussions necessarily requires a significant degree of confidence in the Commissioner's discretion. The use of highly trusted agents to serve the national interest in a politically neutral manner is not itself unprecedented. The Clerk of the Privy Council, for example, is entrusted with the custody of Cabinet records and administers the convention governing access to Cabinet

and ministerial papers included after a change in government occurs.¹¹⁸ The Constitutional Conventions Commissioner's proposed level of access is arguably greater in the sense that he or she would be privy to discussions between the Governor General and his or her advisors, while also being permitted to observe subjects such as leaders of political parties in otherwise closed-door forums as they prepare to engage in politically charged debates. This underscores the central importance of identifying and selecting a Commissioner who holds the trust and confidence of those key political actors to whom he or she will be granted privileged access.

Disclosure by the Constitutional Conventions Commissioner of information obtained from political actors through these broad evidence-gathering powers would understandably limit the candour desired for the information obtained to have evidentiary value. To mitigate the chilling effect the Commissioner's broad access might have, information gathered by the Commissioner for the purpose of recording current understandings of whether a convention is understood to be binding might be kept confidential in the same way confidences of the Queen's Privy Council for Canada are immune from disclosure under the *Canada Evidence Act*.¹¹⁹ As with Cabinet confidences, this protection would cease to apply after twenty years.¹²⁰ While this time restriction would preclude reliance by anyone on information obtained under the Commissioner's enhanced access as "precedents" when assessing political behaviour for compliance with constitutional conventions during the twenty year period of protection, in the longer term it would yield a more robust data set of information to which the Jennings test could be applied than is currently available. The criticality of all available evidence from the most

¹¹⁸ Canada, Privy Council Office, *Open and Accountable Government* (Ottawa: Privy Council Office, 2015) <http://pm.gc.ca/sites/pm/files/docs/OAG_2015_English.pdf> accessed 9 December 2016 at 28-29.

¹¹⁹ RSC 1985, c C-5, s 39.

¹²⁰ *Ibid*, s 39(4)(a); see also *Access to Information Act*, *supra* note 106, s 69(3)(a).

recent twenty years should also not be overstated: in the realm of constitutional conventions, behaviour over a longer term is more likely to constitute a relevant precedent. Nor does protecting from disclosure a subset of specially obtained data preclude relying on publicly available information or statements regarding the same political actors' behaviour as evidence of a continued practice consistent with a suggested constitutional convention.

4.2.5 Recording role

A particular weakness of conventions from an accountability perspective is that they lack accessibility. There is currently no compendium describing their content, and no single authoritative reference source. With the benefit of the information-gathering powers described in section 4.2.4 and the Commissioner's own expertise in analyzing the historical record for convention-related data, the Commissioner would be well equipped to serve a further role in recording the scope and content of existing conventions. With the Commissioner's aid, Canada could take steps to "codify" its conventions for ease of reference as has been done in other jurisdictions including the United Kingdom. In such jurisdictions, codification of conventions has taken the form of "soft law" executive guidance, but also codifications in statute, intergovernmental agreements, parliamentary committee reports, and judicial guidance.¹²¹

Under the rubric of "executive guidance", the United Kingdom has developed a "Cabinet Manual" to address issues relating to the executive and ministers, cabinet decision making, Parliament, the law, the civil service, government finance, and official information. Hazell attributes its origin to "widespread fears before the United Kingdom's 2010 election about the

¹²¹ Robert Hazell, "The United Kingdom" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) at 179.

uncertainty that might follow a ‘hung Parliament’ in which no party commanded an overall majority.”¹²² Built on the example of New Zealand’s Cabinet Manual, Cabinet Secretary Sir Gus O’Donnell, with the consent of Prime Minister Gordon Brown, published *Elections and Government Formation* as part of a new Cabinet Manual in February 2010.¹²³

Hazell argues that the British experience of codification debunks the myth that codification causes conventions to lose their flexibility, pointing to examples of revisions being made periodically to reflect comments on consultation drafts and other developments.¹²⁴ As a chiefly descriptive account of the executive’s understanding of conventions, the United Kingdom’s project of developing a Cabinet Manual serves as a useful example for Canada to consider following.

The *Manual of Official Procedure of the Government of Canada* once served a similar purpose but has not been actively maintained for decades.¹²⁵ It is accordingly out-of-date. Recent efforts by the Privy Council Office to publish current guidelines on issues governed by convention, including the *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Service During an Election* published in August 2015 ahead of the October 2015 federal election,¹²⁶ are an encouraging step in this direction.

¹²² *Ibid* at 181-182.

¹²³ *Ibid* at 181.

¹²⁴ *Ibid* at 185-186.

¹²⁵ Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada*, by Henry F Davis and André Millar (Ottawa: Privy Council Office, 1968).

¹²⁶ Canada, Privy Council Office, *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election* (Ottawa: Privy Council Office, 2015) <<http://pco-bcp.gc.ca/index.asp?lang=eng&page=convention&doc=convention-eng.htm>> accessed 6 December 2016.

A Constitutional Conventions Commissioner's mandate should include contributing to the publication of a similar guide within Canada. This could entail leading the publication of a modern manual on conventions. Alternatively the Commissioner could review and comment upon content developed by the Privy Council Office or another area of government. In any event, making Canadian conventions accessible to the public by documenting them would be a significant improvement over the current state.

4.2.6 Enforcement role

The Constitutional Conventions Commissioner's mandate suggests that the officeholder would tend to be considered a persuasive, credible and dispassionate voice in relations to matters of conventional compliance. However, I do not suggest that the Commissioner ought to be considered to have the final word on issues of conventions. Rather, I propose that the Commissioner's role in enforcing conventions be grounded in his or her ability to influence others in one of three ways.

First, the Commissioner may succeed in persuading the relevant political actors to modify their ongoing or proposed behaviour to avoid non-compliance with a constitutional convention.

Second, by articulating publicly the analysis leading to the Commissioner's determination that political behaviour conflicted with conventional rules, the Commissioner might be able to use "shaming" to influence public opinion such that political actors adjust their behaviour to remove the conflict. Robert Baldwin and Julia Black observe that for some actors, "naming and shaming may be seen as non-punitive, to others it may be viewed as far more punitive than a fine."¹²⁷ For

¹²⁷ Robert Baldwin and Julia Black, "Really Responsive Regulation", (2008) 71:1 Mod L Rev 59 at 86.

some political actors, “shaming” avoidance may be sufficient to alter non-compliant behaviour. In the case of Stephen Harper’s refusal to provide the Governor General with the advice necessary to fill accumulated Senate vacancies, this use of shaming would likely have been ineffective. In such cases, the Commissioner ought to have the same power as certain other officers of Parliament to refer issues to the Federal Court for a judicial determination. Interested members of the public also ought to be able to have recourse to the court by way of judicial review where the Commissioner declines to do so.

Similar to reference cases – but notably unlike ordinary litigation brought against government actors by private actors – any conventional issues raised under my proposed model would be addressed to the courts through a statutory framework endorsed by Parliament. This framework would empower the Commissioner to “refer” specific issues to the courts for adjudication, and it would also permit interested parties to seek judicial review of the Commissioner’s findings on a particular issue. The Constitutional Conventions Commissioner who advances or responds to issues brought into the judicial forum would also have been appointed by Parliament itself. Unlike court decisions that are grounded in the Constitution, judicial pronouncements that are premised on an interpretation of a convention with which Parliament fundamentally disagrees might be “corrected” by legislation that overrides the field of subject matter previously governed by convention. In the same vein, Parliament is free to intervene at any time in a matter under inquiry by the Constitutional Conventions Commissioner by supplanting through legislation a codification (or repeal) of rules previously addressed – or alleged to be addressed – exclusively by convention and removing them from the Commissioner’s purview.

Enabling a mechanism for recourse to the courts would allow public interest groups to challenge conclusions reached by the Constitutional Conventions Commissioner. It would also facilitate

participation in the inquiry and determination process at first instance confident in the knowledge that perceived defects in the Commissioner's processes can be raised again in an independent forum. The prospect of being scrutinized through the litigation process might be expected to have a moderating effect on the Commissioner – in effect, mitigating the risk that the Commissioner will rely unduly on his or her own perceived expertise.

But relying, even in part, on third party public interest groups to complete the regulatory circle has its pitfalls. It is no perfect safeguard, for example, against the Commissioner “incorrectly” overlooking a situation of conventional non-compliance that also fails to attract the attention of a public interest group. In this sense, conventions retain a fundamentally democratic flavour similar to within the status quo regime: if political behaviour violates an established constitutional convention, and there is insufficient political will to challenge the non-compliance, the convention eventually bends to popular will. The Jennings test, it will be recalled,¹²⁸ requires that the relevant political actors consider themselves bound by a rule in order for the rule to constitute a convention. At some point, even if the rule was previously considered necessary to give effect to an important constitutional assumption or understanding, a convention that yields only indifference ceases to be a rule of conventional morality at all. Still, unlike the current state, institutionalizing the role of the Constitutional Conventions Commissioner means there is always at least one agent permanently available to monitor political behaviour and consider its compliance with conventional rules of morality. While the possibility remains that the Commissioner will abide false positives or false negatives, that risk is significantly mitigated relative to the current framework largely reliant on political actors to police themselves.

¹²⁸ See note 117.

Nor is adding judicial recourse as a further layer of guardianship an absolute guarantee of congruence between conventional principles and political behaviour. The adversarial judicial process relies on parties to litigation to marshal evidence and vigorously test opposing arguments. Suboptimal judicial outcomes, from a congruence perspective, can still occur if the parties to litigation – including the Commissioner – fail to present judges with an accurate account of the facts required to draw conclusions about conventions, among other potential causes of judicial error. However, a well-functioning Office of the Constitutional Conventions Commissioner should, at least over time, contribute significantly to the robustness of data available for analyzing conventionally relevant political behavior. The Commissioner’s own expertise and impartiality should improve the likelihood that judicial decisions will be reached with the benefit of all relevant information and arguments. This, too, suggests an improvement over the current state in terms of accountability.

4.2.7 Challenges

Creating an independent watchdog to supervise political behaviour for compliance with constitutional conventions requires overcoming practical obstacles. Political actors, particularly those in power at any given time, might be forgiven for not championing the creation of a fully staffed, independent regulator to publicly scrutinize their behaviour.

Once created, it is plausible that the Commissioner would be exposed to both significant pushback and lobbying from regulatees. The challenge for the Commissioner will be to demonstrate resiliency to these pressures while being seen as a fair and impartial arbiter of controversial disputes involving conventions. These challenges are not unique to the domain of conventions. Regulators and regulatees face similar tensions predictably often. To mitigate the

risk of harmful regulatory capture, the Commissioner’s processes ought to allow for public participation in appropriate circumstances. The possibility of judicial review of the Commissioner’s decisions, including decisions not to pursue particular complaints of non-compliance, also protects against capture.

4.3 CONVENTIONS AND ACCOUNTABILITY

The primary goal of a regulatory regime for constitutional conventions should be enhancing accountability. Legal scholars tend to associate accountability with compliance with the rule of law.¹²⁹ Compliance with the law, which scholars such as Margaret Radin recognize broadly to include “any kind of directive or principle”,¹³⁰ requires that rules be created and maintained according to certain minima. Conventions can be conceptually accommodated within this broad category of rules. The way in which they are made, applied, and enforced can be better informed by scholarship on rule-making and accountability.

4.3.1 Fuller’s eight law-making sins

Lon Fuller described eight ways in which law-making can fail. His description is instructive in considering the ways in which conventions can succeed or fail as rules.

First, there can be a failure to achieve rules at all. Second, laws fail if not publicized to the people expected to observe them. Third, laws created retroactively fail to guide future action and undercut the integrity of rules prospectively in effect since they are constantly at risk of being

¹²⁹ See, e.g., TRS Allan, “Accountability to Law” in Nicholas Bamforth & Peter Leyland, eds, *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013) 77 at 78.

¹³⁰ Margaret J Radin, “Boilerplate” in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) 288, n 7.

changed retrospectively. Fourth, rules can fail at being understandable. Fifth, rules can contradict each other. Sixth, rules fail if it is impossible to comply with them. Seventh, if rules change too frequently, people cannot orient their actions to them. Finally, rules fail if there is no congruence between the rules as announced and their actual administration.¹³¹ I draw inspiration from Fuller's rule-making sins when considering the ways in which conventions currently undermine accountability and proposing mechanisms for addressing these shortcomings.

Establishing a Constitutional Conventions Commissioner would promote accountability by reducing the risk of allowing conventions to "fail" at least four of Fuller's prescriptions for effective rule-making. The Commissioner would help publicize the rules that political actors are expected to follow by bringing clarity to the scope of existing conventions. An expert such as a Commissioner would also help educate the public and political actors in particular about the substantive content of conventions, helping to make them more understandable. The Commissioner's interpretation of conventions could also reduce the perception that conventions conflict with each other by resolving apparent inconsistencies. Perhaps most significantly, an expert Commissioner could assist political actors and the public to ensure that there is actual congruence between the principles underlying each convention and the actual behaviour that results.

4.3.2 Accountability relationships

Currently, the regulator and regulatee relationships involved in constitutional conventions are opaque at best and non-existent at worst. A Constitutional Conventions Commissioner would

¹³¹ Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 39.

enhance accountability by calling upon political actors to explain and justify their actions to the public at large while clarifying criteria relevant to constitutional conventions.

Relationships are relevant to conventions, particularly in the sense that political actors navigate relationships between themselves and conventions inform those relationships. The relationship between the Governor General and the Prime Minister, for example, is heavily influenced by convention. Relationships also matter to the extent that political opponents might call each other to account for compliance with conventions. But where actors of various political stripes find themselves aligned on an issue of convention, their relationships can also undermine the likelihood of effective regulation.¹³² Again, all of these reporting relationships would be enhanced by the addition of an independent Constitutional Conventions Commissioner. While the public, media, political parties and their members,¹³³ and the political actors themselves would retain roles as “regulators” when policing political behaviour, relationships between the Commissioner and political actors can help avoid non-compliant behaviour by positioning the Commissioner as a quasi-regulator.

Accountability arrangements can include formal sanctions and consequences, the use of reporting frameworks, shaming, moral suasion, and leveraging of relationships. As Black observes, “[a] highly critical media campaign can be more effective in causing the resignation of

¹³² Returning briefly to the “Senate vacancies” fact pattern from which this chapter’s proposal draws its inspiration, it is noteworthy that both Prime Minister Stephen Harper and Leader of the Opposition Thomas Mulcair were aligned in favouring a moratorium on Senate appointments. Although these actors were political rivals, there was therefore little or no observed public criticism by either of the other’s apparent disregard for constitutional convention.

¹³³ Party members might serve similar oversight functions by applying pressure (or providing support) to their leaders in the face of a controversy involving constitutional conventions. The practicality of relying heavily on political party apparatus to mediate such disputes is beyond the scope of this thesis. However, I suggest that the educational and advisory functions performed by the proposed Commissioner would invariably strengthen political party memberships’ abilities to play a meaningful role in this regard.

a chief executive ... than any legal power to sack him”.¹³⁴ However, a recalcitrant regulatee might not be persuaded to correct his or her behaviour because of public backlash alone. While conventions might be effective in regulating political behaviour even in the absence of a strictly legal remedy, they may not necessarily be. The breadth of available accountability arrangements is a reminder that regulation need not rely on a “one size fits all” approach.

4.3.3 Diver’s rubric of accountability features

In this section, I tease out the specific accountability goals I argue a Constitutional Conventions Commissioner would promote. Legal academic Colin Diver articulated a helpful framework for assessing the optimal precision of administrative rules depending on the particular accountability objectives of a given regime.¹³⁵ For him, the salient features of accountability include transparency (i.e., the quality of using “words with well-defined and universally accepted meanings within the relevant community”),¹³⁶ accessibility (i.e., a rule’s applicability to concrete situations without excessive difficulty or effort),¹³⁷ and congruence (i.e., where “substantive content of the message communicated [by a rule] produces the desired behavior”).¹³⁸ The creation of a Constitutional Conventions Commissioner would increase both transparency and accessibility of conventions.

Constitutional conventions by their nature tend to lack both transparency and accessibility.

Constitutional provisions lack transparency in the sense that they can often only be accurately

¹³⁴ Black, *supra* note 102 at 357.

¹³⁵ Colin Diver, “The Optimal Precision of Administrative Rules” (1983) 93:1 Yale LJ 65.

¹³⁶ *Ibid* at 67.

¹³⁷ *Ibid* at 67-68.

¹³⁸ *Ibid* at 68.

understood by taking into account the large body of constitutional common law jurisprudence, which itself is susceptible to modifications and outright reversals over time. Even when equipped with complete access to all relevant case law concerning the interpretation of constitutional provisions, end users are faced with the daunting task of applying multi-factored legal tests to concrete fact patterns. Like much of legal rulemaking in common law Canada, constitutional law lacks accessibility. However, if applied dutifully, multi-factor lists serve to enhance congruence. This trade-off between accessibility and congruence is sufficiently well-accepted in Canadian law that multi-factor lists regularly form part of common law standards developed by the courts. For example, in attempting to provide guidance to trial courts in determining whether the predominant purpose of an investigative inquiry is the determination of penal liability such that *Charter* protections and other procedural safeguards apply, the Supreme Court of Canada offered that “the trial judge will look at all factors, including but not limited to such questions as...”, followed by a seven part list of non-exhaustive considerations.¹³⁹

4.3.3.1 Transparency

Diver’s concept of transparency draws on, among other sources, H.L.A. Hart’s notion of rules “which multitudes of individuals could understand”¹⁴⁰ and what Lon Fuller described as a rule’s “clarity”.¹⁴¹ As examples of the importance of transparency being reflected in legal practice, Diver points to the “void for vagueness” doctrine in American jurisprudence and the failure of academic misconduct standards to provide a sufficiently clear guide for students’ behaviour.¹⁴² A

¹³⁹ *R v Jarvis*, [2002] 3 SCR 757, 2002 SCC 73 at para 94.

¹⁴⁰ HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 121.

¹⁴¹ Fuller, *supra* note 131 at 63-65.

¹⁴² Diver, *supra* note 135 at 67-68.

Canadian jurisprudential corollary can be found in the *Charter* principle that “[i]mpermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted for an act or omission that is not clearly prohibited by a valid law.”¹⁴³

Conventions tend to lack transparency. Framed as general principles, they are frequently vague. The scope and content of conventions can only be determined by evaluating historical evidence, including whether there has been sufficient consensus among political actors that they considered themselves bound by a particular conventional rule. Yet as vague and difficult to discern as their content may be, conventions remain important pieces of Canada’s constitutional fabric. Compliance with constitutional conventions is an objective that should rest on the same plane as compliance with other constitutional sources. Given the severe political consequences that could befall a regulatee who fails to comply with the requirements of a conventional rule (e.g., the dismissal of a Prime Minister), one might reasonably expect greater transparency as to their content.

4.3.3.2 Accessibility

Second, Diver describes a rule’s “accessibility” to its intended audience as an accountability virtue. By this he means a rule is accessible if it is “applicable to concrete situations without excessive difficulty or effort.” For Diver, accessibility is what drives calls for the “simplification” of complex legal regimes like tax codes.¹⁴⁴

¹⁴³ *R v Levkovic*, [2013] 2 SCR 204, 2013 SCC 25 at para 1.

¹⁴⁴ Diver, *supra* note 135 at 67-68.

Conventions, meanwhile, must be applied contextually and with regard to potentially competing principles. The same can be said of many common law principles found only in the annals of law reports. Some conventions, like some common law principles, can be applied to concrete situations with minimal difficulty. For example, in some cases it will be obvious to all concerned that the loss of a vote in the House of Commons on a “confidence” measure warrants an election or change in government. In many cases, however, the application of conventional principles to specific circumstances will require considerable analysis.

4.3.3.3 *Congruence*

Finally, Diver refers to a policymaker’s objective in ensuring that “the substantive content of the message communicated in his words produces the desired behavior.”¹⁴⁵ He describes this goal in terms of a rule’s “congruence” with its underlying policy objective. Diver’s use of the term congruence is similar to that used by Fuller to describe the fit between the law as it is written and as actually applied.¹⁴⁶ In the context of conventions, congruence is a paramount virtue. A conventional rule that constrains a Governor General’s discretion in selecting a Prime Minister following a general election, for example, is only congruent if it broadly reflects the outcome of the democratic process.¹⁴⁷

¹⁴⁵ *Ibid* at 67.

¹⁴⁶ Fuller, *supra* note 131 at 81.

¹⁴⁷ I do not mean here to suggest that congruence requires that the Governor General must always select as Prime Minister the leader of the party whose candidates received a plurality of votes, or even a plurality of seats in the House of Commons. I intend to refer here to a weaker form of congruence with democratic principles, precluding, for example, the selection of a Prime Minister whose party secured the *least* number of seats or the *least* votes of any party.

4.3.3.4 *Trade-offs*

Diver observes that evaluating the precision of a rule in terms of its transparency, accessibility and congruence is both difficult to measure and necessarily involves trade-offs between these competing objectives. He illustrates these challenges with the example of a hypothetical policymaker who must establish certification criteria for commercial aircraft pilots, one aspect of which is to define the circumstances in which a pilot should no longer be able to be certified.

Diver supposes that the policymaker identifies a policy objective of requiring pilots to require when the social cost of allowing them to continue flying exceeds the benefits of allowing them to continue, based on the risk and probability of accidents they might cause as they age. Diver offers three alternative formulations for a rule intended to capture this policy objective. One option is to create a bright-line rule stating that no person may pilot a commercial airplane after his or her sixtieth birthday. A second option is to articulate the prohibition on piloting as contingent on whether a person poses “an unreasonable risk of an accident”. A third option is to prohibit piloting by any person who falls within one or more categories based on assessed indicators of “riskiness” according to variables such as years and levels of experience, hours of air time logged, age, height, weight, blood pressure, heart rate, eyesight, and other vital signs.¹⁴⁸

Each of these three options has its benefits and disadvantages. The first option, for example, is easily the most transparent since the intended audience can be expected to know what “sixtieth” and “birthday” mean. Its greatest flaw is its apparent lack of congruence.¹⁴⁹ It lacks congruence because the underlying policy objective – disqualifying unsafe pilots – is not reflected in the

¹⁴⁸ Diver, *supra* note 135 at 69.

¹⁴⁹ *Ibid* at 70.

rule's actual outcomes to the extent that disqualifies perfectly "safe" pilots over the age of sixty and allows unsafe pilots below that age to continue flying.

Meanwhile, transparency suffers under the second model's reliance on the key phrase "unreasonable risk of an accident", which is open to varying interpretations.¹⁵⁰ The first model is simple to apply, but it will likely disqualify many pilots who should continue flying while potentially allowing some to continue flying who should be grounded.¹⁵¹ The third model is "commendably objective" and may accurately discriminate between pilots who pose low and high risks, but it does so at the cost of being more difficult to apply than the first two models.

These three accountability virtues often work at cross-purposes.¹⁵² A perfectly transparent rule ensures equal treatment of categorically similar cases, but may fail to provide outcomes congruent with the rule's objectives. A rule framed to prioritize congruence, meanwhile, may be too vague to provide fair warning to participants. Finally, a rule that is both transparent and congruent may be so complex and cumbersome that its audience is unable to discern its requirements and govern itself accordingly.¹⁵³

¹⁵⁰ Diver notes, however, that even a facially ambiguous phrase could develop a specific meaning for a particular audience, to whom such a phrase would not pose transparency concerns. On this point, see also the discussion of the importance of the development of an "interpretive community": Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55:2 McGill LJ 257.

¹⁵¹ Diver, *supra* note 135 at 70.

¹⁵² *Ibid* at 71.

¹⁵³ *Ibid* at 72.

4.4 THE COMMISSIONER AS A MITIGATING MEASURE FOR AN UNINFORMED ELECTORATE

In this section, I discuss how the proposed Commissioner addresses some of the accountability deficits that exist in the current state. I focus in particular on the shortcomings that flow from overreliance on the public at large to enforce conventions.

In a system of representative democracy, political actors – especially elected representatives -- might be assumed to act in such a way as to maximize voter support. In the context of achieving compliance with constitutional conventions, this could plausibly imply that parliamentarians will not lightly countenance conventional disobedience for fear of alienating voters. However, in this section, I argue the current regulatory framework for conventions relies too strongly on an informed and engaged electorate. Establishing an independent expert whose mandate includes raising awareness of conventions and detected breaches of them would mitigate this risk of overreliance.

First, conventions themselves are insufficiently transparent and accessible. Second, even if conventions were more transparent and accessible, relying exclusively on the public at large to regulate political behaviour for compliance with conventions assumes an unrealistic degree of public engagement. Third, deferring to popular sentiment to regulate political behaviour weakens minority group protections safeguarded by constitutional conventions. Fourth, insufficiently sophisticated public debate concerning live disputes involving conventions yields inefficiency. Fifth, the output of processes for modifying conventions is particularly inaccessible, thus undermining accountability for effecting changes to conventional norms.

4.4.1 Insufficient transparency and accessibility

Relying on democratic accountability to regulate political behaviour in light of constitutional conventions assumes that the scope and content of conventions are sufficiently transparent and accessible to voters to enable them to reach an informed opinion about whether political actors are complying with conventions. The validity of this assumption is highly suspect.

The standards contained within the body of constitutional conventions frequently lack transparency and accessibility. Conventions are “unwritten” in the sense that there is no modern exhaustive codification of the rules that form constitutional conventions. Nor is there any definitive source of conventional content within the academic literature or non-binding advisory opinions from the courts.

Moreover, there is no “rule of adjudication” to determine whose determination of a convention’s scope or whether a compliance has been achieved prevails. The general state of inaccessibility that afflicts constitutional conventions is aptly captured by Geoffrey Marshall in his lament about the difficulty of applying conventional principles to political behaviour:

Those who are familiar with the problems of extrapolating rules from the reported decisions of the courts will recognise the difficulties. So often the ambit of a rule appears to have been conclusively determined until a hitherto unenvisaged set of circumstances arises, thereby casting doubt on whether all the qualifications and exceptions to the rule had been comprehensively listed. [...] What may appear at first sight, therefore, to be an instance of the breach of a convention may turn out not to have been so at all, since the convention, properly understood, does not extend as far as the circumstances of the alleged breach.¹⁵⁴

¹⁵⁴ Joseph Jaconelli, “The nature of constitutional convention” (1999) 19:1 LS 24 at 33.

The Commissioner would help infuse transparency by providing an informed and trusted voice for articulating the scope of existing conventions. By cataloguing and reporting on nuanced details of conventions, the Commissioner could assist the public fulfill its role as ultimate regulator by providing clarity to what is often an opaque set of rules.

4.4.2 Overreliance on public engagement

Second, to the extent that the conventional regulation of political behaviour relies on the public at large to act as a regulator, the current system risks overestimating the willingness and interest of citizens to expend the time and effort required to assess compliance. The level of engagement demonstrated by the public writ large in respect of any particular aspect of political behaviour correlates with the fundamentality of the convention at issue to the proper functioning of the constitutional state. For example, one might expect a more significant and sustained level of public engagement to arise over the alleged breach of what Andrew Heard classifies as a “fundamental” convention (e.g., the Governor General’s refusal to assent to a bill passed by Parliament) than a “flexible” convention (e.g., the federal government’s implementation of a policy measure without first consulting a province having overlapping subject matter jurisdiction).¹⁵⁵ But flexible conventions are still conventions. Conventions are still rules that form an important part of our constitutional fabric. A system of regulation that relies on democratic accountability to enforce standards of behaviour cannot be successful if those standards are insufficiently important to warrant its regulators’ attention. For at least this subset of conventions unlikely to attract sufficient public interest to “call into account” political actors’ compliance, regulation through democratic accountability begins to look like no regulation at all.

¹⁵⁵ Heard, *supra* note 38 at 207-208.

The Commissioner would assist the public by signaling particular instances of problematic political behaviour, thus freeing the public of much of the worry of needing to detect and identifying breaches of conventional norms. The public’s attention and engagement could thus be reserved for cases where the Commissioner sees fit to “sound the alarm”.

4.4.3 Uncertain conventions: regionalism and the Supreme Court of Canada

A recent example in which the lack of an authoritative source for determining the scope and content of constitutional conventions is found in the case of the Supreme Court of Canada vacancy that arose in 2016 upon the announced retirement of Justice Thomas Cromwell.¹⁵⁶ By convention, Justice Cromwell, who had been appointed from the Nova Scotia Court of Appeal, would be succeeded by a jurist from Atlantic Canada (i.e., Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia).¹⁵⁷ In announcing a new process for selecting Supreme Court of Canada appointments, Prime Minister Justin Trudeau provoked controversy by outlining an application process that was open to all “qualified, functionally bilingual candidates” – including those from outside Atlantic Canada.¹⁵⁸ In particular, the stated criteria were criticized for privileging functional bilingualism over regional diversity. Some commentators suggested that the regional representation convention might be suspended in favour of a broader notion of diversity and inclusion, such as by appointing Canada’s first

¹⁵⁶ Supreme Court of Canada, *News Release* (Ottawa: Supreme Court of Canada, 2016) <<http://scc-csc.lexum.com/scc-csc/news/en/5189/1/document.do>> accessed 6 December 2016.

¹⁵⁷ Lorne Sossin, “There needs to be a full public discussion of the concepts of merit and diversity in Supreme Court appointments”, *Policy Options* (9 August 2016) <<http://policyoptions.irpp.org/magazines/august-2016/the-supreme-courts-long-road-to-transparency-and-inclusiveness/>> accessed 7 December 2016.

¹⁵⁸ Canada, Prime Minister’s Office. *New process for judicial appointments to the Supreme Court of Canada* (Ottawa: Prime Minister’s Office, 2016) <<http://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada>> accessed 7 December 2016.

indigenous member of the Court.¹⁵⁹ Meanwhile, the Atlantic Provinces Trial Lawyers Association considered the appointment of a replacement from outside Atlantic Canada to be unconstitutional. It commenced litigation in the Nova Scotia Supreme Court challenging the government's anticipated non-compliance with the regional representation convention.¹⁶⁰

Ultimately, Prime Minister Trudeau recommended the appointment of Justice Malcolm Rowe of the Court of Appeal of Newfoundland and Labrador to replace Justice Cromwell on the Supreme Court of Canada.¹⁶¹ The convention calling for an appointment from Atlantic Canada was accordingly left undisturbed. However, the uncertainty that pervaded public debate – and even spawned a court challenge – prior to his appointment illustrates the lack of accessibility and transparency of the regional representation convention itself.

Some commentators referred to the convention as a mandatory rule. They did so without acknowledging – or perhaps even realizing – that not all conventions carry the same degree of specificity and “bindingness”. As Andrew Heard points out, conventions vary in terms of the importance or reason that lies behind them, the level of agreement on the principle behind them and on their specific terms, how closely their content embodies their underlying principles, and the degree to which they are supported by existing precedents.¹⁶² With respect to the regional representation convention, Heard classifies this as a “semi-rigid convention” based on the wide

¹⁵⁹ Ian MacLeod and Jason Fekete, “Pressure to name first indigenous Supreme Court judge could see Trudeau shaking up rules”, *National Post* (16 September 2016) <<http://news.nationalpost.com/news/canada/canadian-politics/pressure-to-name-first-indigenous-supreme-court-judge-could-see-trudeau-shaking-up-rules>> accessed 7 December 2016.

¹⁶⁰ Sean Fine, “Lawyers challenge Ottawa on Supreme Court appointment changes”, *The Globe and Mail* (19 September 2016) <<http://www.theglobeandmail.com/news/national/lawyers-challenge-ottawa-on-changes-to-supreme-court-appointments/article31951207/>> accessed 7 December 2016.

¹⁶¹ Canada, Prime Minister's Office. *Malcolm Rowe* (Ottawa: Prime Minister's Office, 2016) <<http://pm.gc.ca/eng/news/2016/10/17/malcolm-rowe>> accessed 7 December 2016.

¹⁶² Heard, *supra* note 38 at 206-207.

support for the existence of the rule and the important constitutional principle that compliance with the rule protects while noting that agreement is lacking with respect to some of the rule's details.¹⁶³ The Atlantic Provinces Trial Lawyers Association's constitutional challenge may have therefore had difficulty establishing whether the convention at issue required an Atlantic Canada "seat" occupied at all times or whether flexibility was permitted to promote other national priorities such as bilingualism or reconciliation with First Nations, for example.

The appointment of a successor from Atlantic Canada may have obviated the short-term need to resolve these questions, but the controversy leading up to Justice Rowe's appointment calls into question how the conventions surrounding the appointment of Supreme Court of Canada judges would have been determined and enforced if the regional convention had not been clearly respected. Suppose, for example, that instead of appointing a functionally bilingual judge from Newfoundland and Labrador, the Prime Minister had instead recommended the appointment of an Indigenous jurist from British Columbia, perhaps with the stated intention of returning to the pool of Atlantic Canadian candidates in 2018 when Chief Justice Beverley McLachlin – whose home province is British Columbia – faces mandatory retirement. Questions as to the legitimacy and legality of Justice Cromwell's successor might persist until the issue of conventional compliance was resolved, potentially leaving the Supreme Court functionally lacking one of its members in the interim.¹⁶⁴

¹⁶³ *Ibid* at 214.

¹⁶⁴ Such was the case while the constitutionality of Justice Marc Nadon's appointment was being determined.: *Reference re Supreme Court Act*, ss. 5 and 6, [2014] 1 SCR 433, 2014 SCC 21 [*Nadon Reference*]: At issue was whether, with respect to one of the three seats reserved for judges from Quebec, section 6 of the *Supreme Court Act* required the appointment of either a current member of the Quebec bar or a current judge of a Quebec superior

Litigation is an unsatisfactory method of adjudicating the scope and impact of the regional representation convention. Such litigation would occur in one of at least three ways. First, a challenge like the one brought by the Atlantic Provinces Trial Lawyers Association could proceed at the instance of any interested party for a judicial determination. Second, a provincial government could submit a reference question to its appellate court for a non-binding advisory opinion. Finally, the federal government could refer the issue directly to the Supreme Court of Canada for an advisory opinion. Only the first of these options can be invoked other than at government's initiative. Litigation advanced by non-governmental entities is also likely to take the longest of these three options to finally resolve given the additional levels of appeal available from a trial level decision. Privately brought litigation is also susceptible to challenge on grounds of non-justiciability, jurisdiction and lack of standing.

With a Commissioner in place, however, the flexibility and scope of the regional representation convention could have been articulated more clearly and at an earlier stage. If an Atlantic Canadian judge was not the Prime Minister's preferred choice, the Commissioner would have played an integral role in assessing the legitimacy of an alternate appointment. Depending on the Commissioner's conclusions, he or she may have attempted to persuade the Prime Minister to reconsider, followed by a public defence or criticism of the appointment. In a worst case scenario, disaffected interest groups such as the Atlantic Provinces Trial Lawyers Association would be in no worse a position in litigating the issue. Indeed, with a robust record of justification (or criticism) generated by the Commissioner, judicial review of the appointment would presumably be simplified and less resource-intensive for would-be litigants.

court. Justice Nadon, who had been appointed from the Federal Court of Appeal and was a former member of the Quebec bar, met neither criterion.

4.4.4 Populism and countermajoritarian constitutional principles

A further concern with relying on the electorate at large to enforce conventional norms is that some conventions reflect a constitutional commitment to countermajoritarian principles. In particular, several conventions directly reflect principles intended for the protection of minority groups.¹⁶⁵ In every discrete situation in which political actors face a decision as to whether to honour or disregard these minority-protecting conventional standards, the majority may be willing to tolerate or even reward behaviour that violates conventions. Even a convention that is facially neutral with respect to the protection of minorities – such as the fundamental convention that prevents the Governor General from withholding assent to a bill approved by Parliament on his or her own initiative – might be susceptible to populist passions where a vocal majority opposes a law designed to improve conditions for an equality-seeking minority group.

Finally, in some situations the expectations reflected in constitutional conventions may be the only identifiable safeguard against government action that violates constitutionalized bargains. Many if not most provisions entrenched within Canada's constitution require more than a simple majority to modify, and in particular the general amending formula contemplates constitutional change only with a substantial degree of provincial consent. Allowing the electorate to legitimize half-hearted implementation of constitutional guarantees allows an end-run around the constitutional amending formulas. A recent example of this risk materializing is former Prime Minister Stephen Harper's refusal to tender advice to the Governor General to allow the appointment of Senators. As discussed in section 2.3, this refusal came at a time when a

¹⁶⁵ E.g., the conventions relating to regional representation within the federal cabinet and the Supreme Court of Canada. See Heard, *supra* note 38 at 162-165.

significant portion of the general population was critical of the continued existence of the Senate, yet where popular support was insufficient to satisfy the constitutional requirements of formalizing the reform or abolition of the Senate. The practical effect of his refusal to tender advice was the suspension of express constitutional provisions (i.e., those requiring the Governor General to fill Senate vacancies when they happen, those guaranteeing each province a specific level of Senate representation).

The Commissioner would mitigate the risk of this sort of majoritarian tyranny by providing counterbalancing advocacy in support of the commonly held foundational principles underlying each convention. Moral suasion might, in some cases, shift public support in a way that promotes congruence between conventions and actual political behaviour. Alternatively, the Commissioner's recording and reporting roles could serve to legitimize a thoughtful and deliberate modification of rules to more closely reflect public will.

4.4.5 Accessibility and the modification of conventions

The Jennings test proposes criteria for establishing a constitutional convention but offers no authoritative mechanism for determining whether those criteria have been met. Joseph Jaconelli laments that despite the Jennings' test focus on reasons for a rule and the goodness of those reasons being potentially sufficient to ground a convention in a single precedent, "[n]o guidance, unfortunately, is provided as to how to appraise the goodness of the reasons that might be proffered."¹⁶⁶ Reasonable people can disagree about whether the preconditions set out in the Jennings test have been met. This adds a layer of uncertainty as to whether in any particular set

¹⁶⁶ Jaconelli, *supra* note 154 at 29.

of circumstances a convention has been breached. In the absence of an external enforcement mechanism, this uncertainty may seem academic since there may be no significant sanction applied even if a political actor's behaviour breaches a convention. According to Dicey, the ultimate sanction for breach of convention was the risk of a loss of confidence of the House of Commons and, in turn, the forfeiture of the right to govern. Dicey argued that the conventional code of political morality is "merely a body of maxims meant to secure respect for the principle of "obedience by all persons to the deliberately expressed will of the House of Commons" and, ultimately, "the will of the nation as expressed through Parliament".¹⁶⁷

In the absence of a formal authoritative enforcement mechanism (e.g., a judicial fact-finding process or an appointed Constitutional Conventions Commissioner), the ability of political actors to modify the scope of constitutional conventions over time poses accessibility concerns. This is because the Jennings test defines conventions by reference to a string of precedents and a history of political actors considering themselves bound by each rule. It is impossible to identify with precision specifically which political actors are accountable for having made a "change" to a conventional rule.

A simple thought experiment illustrates the point. Take, for example, the convention permitting an incumbent Prime Minister to test the confidence of a newly elected House of Commons even in the absence of securing a majority of seats for his or her own party. If a constitutional change were desired requiring that the leader of the political party with a plurality of seats be given the first opportunity to form a government, a formal constitutional amendment would minimally require resolutions of the House of Commons and Senate. If the amendment is interpreted to

¹⁶⁷ Dicey, *supra* note 37 at 456.

involve a change to the Office of the Governor General (insofar as it modifies the powers and duties of the Governor General), it would require unanimous consent of Parliament and all provinces in accordance with s. 41(a) of the *Constitution Act, 1982*.¹⁶⁸ If the amendment is read as merely involving a change “in relation to the executive government of Canada or the Senate and House of Commons”, it could be authorized by Parliament acting alone. In all cases, constitutional change requires parliamentary approval. This approval is documented and openly debated. The fact of the amendment, when it became effective, and who supported or opposed it would be a matter of public record. Supporters and dissenters would be accountable for their policy preferences and could be held accountable for their positions if inconsistent with voters’ wishes.

Alternatively, the constitutional conventions surrounding the selection of a Prime Minister could be modified over time to constrain the Governor General’s discretion such that his or her appointment would be limited to choosing the leader of the party having a plurality of seats in the newly elected House of Commons. A stated virtue of conventions is their inherent flexibility to adapt to changing political circumstances and attitudes. But how, in practice, would this flexibility be manifested?

Andrew Heard identifies two examples of incumbent Prime Ministers “waiving” their conventional right to test the confidence of a newly elected House of Commons and, as a consequence, permitting the leader of the party with a plurality to form government. During the 2015 federal election campaign, leaders of all three major political parties espoused the view that a government should be formed by the party having a plurality of seats – even if not a majority.

¹⁶⁸ *Supra* note 9.

If taken at face value, this could be interpreted as a pre-emptive waiving of the conventional right just described by Stephen Harper, who as outgoing Prime Minister, would have otherwise had a right by constitutional convention to first test the newly elected House's confidence even if his Conservative Party of Canada did not form a majority following the election.

As events actually unfolded, the Liberal Party of Canada formed a majority in the newly elected House of Commons, such that Mr. Harper's concession of defeat was all but guaranteed. In an alternate scenario, however, if the Liberal Party had secured a plurality of Members of Parliament with the New Democratic Party winning the second greater number of seats and Mr. Harper's Conservative Party being the "third place" party, there would have been no legal consequences had Mr. Harper resiled from his earlier statements and invoked his conventional right to test the confidence of the newly elected House of Commons. Instead, he would have risked the political consequences, firstly, of changing his position, and secondly of being seen as desperately clinging to power in the face of a potential defeat in the House of Commons.

In the alternate scenario just described, one might have argued that Mr. Harper's refusal to concede defeat in the absence of having secured a plurality of seats in the House of Commons violated a constitutional convention. Proponents of such an argument could have referred to the "string of precedents" reflected in the behaviour of Pierre Trudeau in 1979 and of Paul Martin in 2006, and indeed in the statements of all major party leaders including former Prime Minister Harper during the 2015 election campaign. Less clear would be whether the second part of the Jennings test was satisfied, namely whether each of these political actors considered themselves "bound" by the alleged rule. It could be argued, for example, that Pierre Trudeau and Paul Martin simply deferred to their sense of political reality by accepting the clear will of the nation and conceding defeat even though either or both of them still believed themselves able, by

convention, to insist on a right to test the confidence of each newly elected House of Commons. That is, the fact that each conceded defeat in the face of another party enjoying a plurality of seats in the House does not necessarily indicate that they considered them bound by convention to do so.

4.5 CONCLUSION

Constitutional conventions are rules of political morality that develop over time and are recognized by political actors as being binding upon them. Unlike legal rules, however, they are not presently enforceable by the courts. Canadian courts have, however, demonstrated a willingness to consider adjudicating issues pertaining to constitutional conventions where the question before the courts contains a sufficient legal component and enforcement of those conventions remains exclusively within the political realm. The current framework for determining, recognizing and enforcing constitutional conventions poses challenges for accountability. Conventions, the scope of which requires a nuanced historical analysis to determine, lack transparency. The difficulty in determining when political behaviour does and does not conflict with established conventions, all of which exist to support important constitutional principles, contributes to the risk of non-congruence.

Accountability for compliance with constitutional conventions can be enhanced by establishing an independent officer of Parliament responsible for inquiring into and reporting on whether present or proposed political behaviour is congruent with the principles embedded in established constitutional conventions, and for observing and recording day-to-day political behaviour relevant to the maintenance and development of conventions generally. This parliamentary officer would bring his or her expertise to bear by “auditing” political actions for consistency

with conventional standards and influencing political actors – and the public at large. The Commissioner would report on instances of compliance and non-compliance. A further mechanism for referring conventional issues to the Federal Court, either at the instance of the Commissioner or an interested party, would add a further layer of oversight that facilitates participation by third party public interest groups and produces a determinative resolution of conventional controversies while remaining subject to legislative override by Parliament in cases where the courts' interpretation of a convention's scope or requirements are fundamentally inconsistent with the public's expectations.

Chapter 5: Conclusion

Conventions form one of several aspects of Canada's Constitution, which in its totality is expressly declared to be "the supreme law of Canada". Its paramountcy is significant: it can be applied to invalidate positive laws enacted by elected representatives. Classical constitutional theorists who have heavily influenced Canadian jurisprudence in this area believed that the study of conventions had no place in the lawyer's toolkit. They feared the unnecessary obfuscation of precedents, preferring instead straightforward common sense principles. Conventions, however, are far from straightforward in their application.

This thesis opened by reflecting on a live and recent example of a constitutional controversy with no apparent mechanism for resolution. The Prime Minister's refusal to appoint Senators to fill a historically unprecedented number of vacancies in Parliament's upper chamber evaded resolution, in part, because it involved a matter of constitutional convention. The Governor General's formal duty to appoint Senators was constrained by the constitutional convention that holds that appointments only occur on the advice of the Prime Minister. With the Prime Minister withholding the required advice, the Senate vacancies remained unfilled indefinitely.

Because classical constitutional theory and Canadian jurisprudence holds that courts cannot enforce constitutional conventions, public law litigation aimed at seeking a declaration from the courts as to the Prime Minister's obligations was an uncertain venture. Given the passage of time, the actual litigation brought to determine the issue was made moot following a change of government and its policy on filling Senate vacancies. The delay and other challenges encountered in the Senate vacancies litigation illustrates the sub-optimality of relying on litigation to address disputes touching on convention. Unless the federal or a provincial

government refer such an issue to the courts for an advisory opinion, litigation requires a private party to mount a challenge. This state of affairs unreasonably demands effort, time and resources from private sources for a prototypically public benefit. Litigation also lacks expediency. As the Senate vacancies case illustrates, the factual circumstances giving rise to a dispute involving conventions can change significantly before a judicial decision is made.

In chapter three, I described the existing treatment of constitutional conventions under Canadian law. Conventions vary in terms of their rigidity and the extent to which they are fundamental to the operation of government. In all cases, however, Canadian law treats conventions as enforceable exclusively within the political realm. Watertight compartmentalization separates legal rules from conventional rules in this regard. Still, the courts have demonstrated a willingness to determine the existence and scope of particular conventions while maintaining a barrier between their recognition and enforcement of such conventions. This warrants revisiting. Just as the common law has evolved to break down previous dichotomies between law and equity, the justiciability of prerogative versus statutory powers, and written versus unwritten constitutional principles, so too should Canadian law adapt to incorporate conventions as part of an exhaustive constitutional law framework.

In chapter four, I proposed a framework for a new Commissioner role that would serve as a permanent observer of political behaviour and draw public attention to assessed instances of non-compliance with constitutional conventions. The current state of enforcement for conventions relies too much on an informed and engaged citizenry. This, in turn, undermines accountability. A freestanding permanent Commissioner with expertise in constitutional conventions and a mandate to observe, record and call attention to political behaviour alleged to conflict with conventional norms would mitigate conventions' lack of accessibility and transparency.

A robust regulatory framework for enforcing constitutional conventions likely draws on a variety of measures within its toolkit. Litigation, on its own, is prone to delays and disincentives for would-be challengers of allegedly non-compliant political behaviour. Unlike other existing mechanisms it forces a response and thus provides at least a rudimentary method of calling political actors to account outside of the political realm itself. A better solution is to entrench the appointment of an expert Commissioner with a mandate to gather data, analyze their impact on the formation and scope of constitutional conventions, and help make political actors accountable for compliance with them. The courts may still be called upon to adjudicate claims involving conventions, whether by way of judicial review of the Commissioner's findings or references from the Commissioner to the Court on particular issues. For this, the courts will need to rethink their historical discomfort with deciding cases involving conventions. That discomfort, I have argued, is misplaced and inconsistent with other developments in Canadian law.

A world in which a full-time expert familiar with the nuances of constitutional conventions and unprecedented access to political actors for data-gathering purposes has a platform for educating Canadians and direct access to the courts is perhaps naïve. It assumes a society in which respect for constitutional conventions exists on the same plane as respect for the rule of law and constitutionalism generally. It would also be a society in which accountability for compliance with conventions was greatly enhanced over the status quo.

I conclude by returning to the fact pattern that inspired this thesis. How would the situation involving Prime Minister's moratorium on Senate appointments have been resolved differently if this thesis' proposals were implemented? A Constitutional Conventions Commissioner may

likely have obviated the need for litigation by providing clarity about the Prime Minister's role in providing advice to the Governor General regarding Senate appointments, and the Governor General's options in the absence of timely advice from the Prime Minister. An authoritative and trusted voice may have neutered Mr. Harper's ability to claim, as he did, that he had complete discretion "to appoint or not appoint" as he saw fit. Criticism from the Commissioner may not have changed Mr. Harper's behaviour, however. The issue may still have proceeded through the courts. If so, a streamlined reference procedure uniquely available to the Commissioner would have made it more expeditious. Issues of standing, jurisdiction and justiciability would not have presented as procedural obstacles to overcome. Of course, a definitive answer from the courts may not have arrived before the 2015 general election, and may never have arrived at all after the change in government that followed. In the final analysis, incorporating conventions as part of Canada's constitutional law framework and bolstering the regulatory regime with the addition of a Commissioner may not be a panacea for all the challenges currently faced with enforcing conventions. Compared to the current state of affairs, however, implementing these solutions would be a boon for accountability.

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