Constitutional and Parliamentary Reform in the United Kingdom:

Lessons for Canada

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Since 1997 the United Kingdom has embarked on what some have called the most ambitious period of constitutional and parliamentary reform since the Reform Acts of the 19th Century. On House of Lords reform alone there have been six White papers, one Royal Commission, a dozen parliamentary votes and more than a score of reports by parliamentary committees. On broader issues of governance there has been a Green Paper, *The Governance of Britain*, a White Paper, development of a Cabinet Manual, significant legislation changing the process for government formation and numerous reflections on the nature of constitutional convention. Part One of this paper will look at British experience in reforming the Lords. Part Two will look at constitutional convention. In both areas it will suggest lessons to draw from British experience. First we need to reflect briefly on the nature of Westminster style government and the usefulness of Canada-United Kingdom comparisons.

Unfortunately there is no agreement as to what rules and institutions precisely constitute this model although several traits are often cited. Phillip Norton argues that the essence of the Model is the concept of Her Majesty's Official Opposition.[1] Others define it in terms of criteria which include a first-past-the-post electoral system where two major parties win the vast majority of the seats, an impartial Speaker, executive dominance over the legislature, responsible government, and the confidence convention. None of these, however, is exclusive to the Westminster Model.

One way to compare Canada and the United Kingdom can be found in the work of Arend Lijphart.[2] He sets forth ten characteristics of systems with a view to separating them into majoritarian or consensus models. He considers Westminster a subset of the majoritarian model. He then applies ten criteria to each of the states he is examining:

- The concentration of executive power in one-party
- Cabinet dominance
- A two party system
- A majoritarian and disproportional system of elections
- Interest group pluralism
- A unitary and centralized government
- The concentration of legislative power in a unicameral legislature
- Constitutional flexibility
- Absence of judicial review
- A central bank controlled by the executive

When various states are compared using these criteria he comes to the conclusion that New Zealand (before 1996) and Barbados are closest to the Westminster model. Nevertheless using his measurements we see that Canada and the United Kingdom are closer than the United Kingdom and Barbados or the United Kingdom and New Zealand on 6 of the 10 variables.

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[1] Philip Norton, "Parliament and Political Parties, Speaker's Lecture Series," *Democracy Live* (24 January 2014), online: <http://www.bbc.co.uk/democracylive/25879961>.

[2] See Arend Lijphart, *Patterns of Democracy: Government forms and Performance in Thirty-Six Countries*, 2nd Edition, Yale University Press, New Haven and London, 2012.

Without embarking on an extensive discussion of Lipjhart's methodology this paper assumes that the heart of the Westminster model and what is shared by Canada and the United Kingdom is the classical idea of a mixed constitution (not to be confused with the later idea of checks and balances).

A mixed constitution combines elements of monarchy, aristocracy and democracy (in modern terms (constitutional monarchy, appointed meritocracy, individuals chosen by elections with universal suffrage). What links us to Britain and separates us from Australia, and New Zealand is the appointed upper house and the underlying theory that good governance derives from institutions which bring together actors from these three different perspectives. Having a mixed constitution also serves to differentiate us from our American neighbours who have put all their eggs in the democracy basket. It should be possible, therefore, to compare aspects of the Canadian and British parliaments.

Part I: The House of Lords and its Reform

There are important differences between the Senate and the House of Lords**.** One relates to powers. The power of the Lords was curbed by the *Parliament Act, 1911*. In 1906 the Liberals had won a large majority but their budget was defeated by the Conservative majority in the Lords. After being re-elected the Liberals brought forth a bill to curtail the Lords ability to amend or veto money bills. The *Parliament Act* as subsequently amended in 1949 now limits the ability of the Lords to delay a bill passed by the Commons for one year.[3]

Related to this is the Salisbury-Addington Convention which covers the possibility of obstruction by the Upper House. In 1945 the post war Labour Government found itself with virtually no members in the House of Lords so it negotiated an agreement to provide that the Lords will not obstruct bills that seek to implement policies clearly outlined in an election manifesto. This does not affect the Lords ability to amend legislation. The convention still governs relations between the chambers[4] although the advent of coalition government in 2010 makes it rather more complicated since the Coalition Agreement is a mixture of manifestos of two different parties.[5]

Another key difference is the absence of any upper limit on membership. For centuries the Lords was a small body with 50 or so members but as its powers declined membership grew to well over 1000 before the removal of most hereditary peers in 1999. As of January 2014 there were 778 peers with 221 Conservatives, 220 Labour, 99 Liberal Democrats, 181 Crossbenchers plus a

[3] For a full discussion of the *Parliament Act 1911* see Philip Norton, Parliament Act 1911 in its Historical Context, in David Feldman, ed. *Law in Politics, Politics in Law*, Hart Publishing, 2013.

[4] By 2000 the party standings in the Lords were more equal and the convention was questioned by some and considered by a Joint Committee on Conventions which reported in 2006. The Committee concluded that the convention should still apply and the rejection of Bills at second reading on a regular basis would be inconsistent with the role of the Lords as a revising chamber.

[5] Meg Russell, *The Contemporary House of Lords*, Oxford University Press, Oxford, 2013, p.84.

few dozen others such as Bishops, representatives of minor parties and some who are on leave of absence.[6]

The existence of many independent Lords, the so called crossbenchers, is another difference. In 1958 the *Life Peerages* Act provided for appointments for life rather than the traditional hereditary appointments that were handed down from father to first born son. This completely changed the composition and atmosphere of the Upper House. Aside from allowing women to sit, a number of life peers chose to sit without any party affiliation. They became known as Crossbenchers and their numbers have increased over the years. Only a few, such as former Speakers of the House, come from a political background. Others tend to be drawn from the professions including professors, doctors, scientists, businessmen and members of the voluntary sector and the performing arts. Most are still actively involved in their professions. They do not have a party Leader but many of those functions are performed by a Convener.[7]

The British approach to appointment is also slightly different in practice, if not in theory. An informal custom has developed of alternating party appointments among the party leaders so that all parties have significant representation in the Upper House. The Prime Minister still decides how many appointments the opposition parties shall receive and he recommends opposition appointments but he does so on the advice of opposition party leaders.

The Coalition Agreement sets a goal that political representation should roughly reflect the percentage of votes cast for each party in the most recent election. Labour is still over represented according to this formula but without a membership limit a Prime Minister can appoint more Lords to attain his share of the vote after an election.

One final difference is that unlike Canada, Members of the House of Lords do not receive any salary.[8]

The House of Lords Act

In the 1997 election the Labour Party put forth an ambitious constitutional and political agenda which included a "more democratic and representative" second chamber. This led to a Royal Commission and adoption of the *House of Lords Act, 1999.* It originally proposed to expel all hereditary peers from the Upper House. However the Government accepted an amendment as a two-step approach to this rather radical reform. The amended Bill provided that two royal

[6] Peers are disqualified from sitting and voting in the House of Lords while serving as a member of the European Parliament, or serving as a Judge,

[7] For a discussion of the role of the crossbenchers see Meg Russell and Maria Sciara, Independent Parliamentarians en Masse: The Changing Nature and Role of the Crossbenchers in the House of Lords, *Parliamentary Affairs*, vol 62, no 1, 2009.

[8] Members of the House of Lords can claim a daily allowance of £300 for each qualifying day or attendance and travel expenses. Only Ministers and certain office holders receive a salary under the Ministerial and other Salaries Act (1975). The House of Lords Draft Reform Bill of 2011 proposed that members of the reformed Lords receive a taxable salary and pensions in line with provisions of the Independent *Parliamentary Standards Authority established in 2009 for the House of Commons*.

officeholders (the Earl Marshal and Lord Great Chamberlain) would retain their seats plus 90 additional hereditary peers chosen by election by their peers.

The 1999 reform reduced overall membership from 1330 to 669. Hundreds of opposition peers were removed leading many to predict the neutering of the House of Lords. But in fact the House has become more balanced with no party having an overall majority and with the balance of power resting with the Liberal Democrats and the Crossbench independents. This has made for a more assertive, self-confident House less concerned about challenges to its legitimacy.[9]

One manifestation of the new assertiveness was an increase in the number of defeats of government measures. During the Blair years there were 450 such defeats with 88 in 2002 alone. While the number has declined somewhat this is not because of less scrutiny by the upper house but rather due to a greater willingness of ministers to engage with the Lords before sending bills off to them. A database on the number of defeats shows that they range from minor technical questions to major policy issues in the areas of finance, security and criminal law.[10]

Appointments Commission

A second reform was creation of an Appointments Commission in April 2000 as advocated in the Royal Commission chaired by Lord Wakeham.[11] The Commission is an independent, advisory body consisting of seven members, including the Chair. The Conservatives, Labour and Liberal Democratic each have one member of the House of Lords on the Commission, nominated by the respective party leader for a term of three years. The other three members and the Chair are non-political and independent of Government. The current Chair of the Commission is the crossbench Lord Ajay Kakkar a Professor and Surgeon at University College in London.

The Commission has two main functions -- to recommend individuals for appointment as crossbench peers and to vet nominations for life peers, including those nominated by the political parties. Since establishment it has recommended more than sixty people for appointment following a process which is not unlike an application for a job in the public service, a university or a corporation. There have been about five thousand applications since 2000 but with no deadlines a regular and continuous assessment process is carried on by the Commission.[12]

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[9] See Meg Russell and M. Sciara, The House of Lords in 2005: A more representative and assertive chamber? in Michael Rush and M. Giddings (eds) *The Palgrave Review of British Politics*, Palgrave, Basingstoke, 2006. Also Meg Russell and M. Sciara, Why Does the government get defeated in the House of Lords? *British Politics*, vol 2, no. 3, 2007, pp. 299-322.

[10] See http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats

[11] For the history of the Commission see testimony of Lord Jay of Ewelme to the House of Commons Committee on Political and Constitutional Reform, June 27, 2013.

[12] The cost of the Commission is about £118,997. The major element of expenditure was staff costs, at £76,065. Commission members' fees - £8,000 for the Chairman and £3,000 for other members. The remainder of the expenditure was for administrative costs including travel and subsistence, staff training, publications and stationery. As a public body, the House of Lords Appointments Commission is subject to the provisions of the Freedom of Information Act 2000.

The selection criteria and the assessment process are published in full on the Commission website.[13] The Commission recommends individuals for the crossbenches based on merit and their ability to make a significant contribution to the work of the House. The Commission considers nominees who would broaden the expertise and experience of the House and reflect the diversity of the United Kingdom. It is mandated to ensure that the individuals it recommends are independent have integrity and are committed to the highest standards of public life.

A 2010 study examined the appointments by the Commission since its inception. It found that of the 63 appointments 23 were women and 13 were from a minority ethnic background, which equates to 37% and 22% of the Commission's appointments, respectively. This compares well against the current composition of the Lords, where just over 20% of Members are women and 5% are from minority ethnic backgrounds. The report also identified the range of expertise in the House and concluded that there were one or two areas, such as science, which were not as well represented as they should be.[14]

The Commission will usually interview 6 or 7 people for before making a recommendation.[15] The Prime Minister decides the actual number of appointments the Commission may make in a year and after averaging about six a year since inception, Prime Minister Cameron asked in 2012 that the Commission make no more than two recommendations a year for the time being. All Prime Ministers since Tony Blair have stated they will only decline to pass on a Commission recommendation to the Queen in exceptional circumstances.

The Commission also has a role in vetting individuals nominated to the House of Lords by the Prime Minister and political parties. It is not asked to comment on the suitability of those so nominated but simply to advise the PM on the propriety of individual nominees. It does not have a right of veto over any party nomination. [16]

The Commission takes the view that propriety means:

i) the individual should be in good standing in the community in general and with the public regulatory authorities in particular; and
ii) the past conduct of the nominee would not reasonably be regarded as bringing the House of Lords into disrepute. [17]

Its advice to the PM is confidential and it does not disclose or comment on either the identity or number of nominees it may have advised against. However in the summer of 2005 a list of 28 nominees for appointment was submitted by the Prime Minister to the Commission in the usual way. Publication of the list was delayed and stories began to appear in the press stating that the

[13] See http://lordsappointments.independent.gov.uk/news.aspx

[14] Meg Russell and Meghan Benton, Analysis of existing data on the breadth of expertise and experience in the House of Lords, Report to the Appointments Commission, Constitutional Unit, University College, March 2010.

[15] The Select Committee on the Constitution, Meeting with Lord Jay of Ewelme, Chairman of the House of Lords Appointments Commission, Evidence Session No. 1. January 25, 2012.

[16] See House of Lords Appointments Commission, Annual Report, October 2011 to September 2013.

17See http://lordsappointments.independent.gov.uk/vetting-for-propriety.aspx

Commission had concerns about some of those nominated because they had made large loans and donations to the Labour Party.

Following publication of the final list a police investigation was launched into what became known as the "Cash for Honours Scandal."[18] Ultimately no one was convicted but the questioning of the Prime Minister by police and the arrest and subsequent release on bail of one member of the Lords contributed to the declining support for the Labour Party.

Some observers felt that the leaks, which were assumed to come from the Appointments Commission might erode its reputation for independence and political neutrality[19] but this does not seem to have been the case. Despite limited powers it serves as a deterrent to unseemly appointments.

The Parliamentary Votes on Election versus Appointment

The reform process put to rest, for the foreseeable future, the issue of election to the Lords. This took place slowly over the course of three brutal debates and votes during three different Parliaments.

The first such vote took place on February 4, 2003 simultaneously in both Houses. The vote was on the report of a Joint Committee which had been tasked with looking at a government white paper and coming up with a specific proposal. The Joint Committee decided to submit several different options to Parliament ranging from a fully appointed Upper House to a fully elected one with various combinations in between. The debate in the Lords featured over 90 speakers and was dominated by those arguing for a fully appointed House.[20] In the House of Commons there was more support for an elected House of Lords.[21]

Prime Minister Tony Blair argued against the creation of a hybrid House and expressed his support for the House of Lords as a revising chamber not a rival chamber. He pointed out it was a free vote but one of constitutional importance so the government would require a consensus rather than a simple majority before taking any action.

The Commons rejected all eight options for reform while the Lords voted by a 3:1 margin for a fully appointed House. The option which MPs defeated by the fewest number was for an 80 per cent elected chamber.

[18] Stockbroker Barry Townsley who had donated £6,000 (and loaned £1 m on commercial terms) to the Labour Party withdrew his acceptance as did Sir David Garrard and Sir Gulam Noon.

[19] See Robert Hazell, *Constitutional Futures Revisited,* Palgrave McMillan, London, 2008, p. 293.

[20] See House of Lords, *Debates,* January 21, 2003 cols 575-688; January 22, 2003, cols 720-838.

[21] See House of Commons, Debates, January 2, 2003, cols 187-272.

The result was a paradox. "By defeating eight resolutions to amend the *status quo* the Commons was left with the status quo – but a *status quo* barely distinguishable from one of the eight defeated outcomes, and the most decisively defeated at that."[22]

The most likely explanation for this outcome is that many spoke in favour of election but voted with the Prime Minister against the idea of a hybrid House.[23] According to the chief architect of the 2003 debacle, House Leader Robin Cook.

> Tony Blair's intervention brilliantly positioned a democratic second chamber as a threat to the Commons rather than a challenge to the Executive by warning that it might become a rival. He therefore conscripted enough, though not most, Labour MPs to voting for a wholly appointed Chamber. Such a Chamber will not demand any scrutiny that will trouble the Executive and will therefore not offer any hope of restoring public respect for parliamentary democracy[24]

This is substantiated by Blair's own memoires where he states his preference for a reformed appointment process.[25]

After another election won by Labour and another White Paper the House again voted on the issue of House of Lords Reform in March 2007.[26] Amazingly they did not seem to learn much from the previous experience and once more put forth several options in a free vote. One slight difference was that the votes were not held simultaneously.

This time four of the options were defeated but a majority of MPs voted in favour of both an 80% elected chamber and a wholly elected chamber. They also supported a motion for the removal of the remaining 92 hereditary peers and for the continuance of a bicameral parliament. The new Leader of the Government, Jack Straw, expressed his satisfaction with the result and announced that cross party discussions would continue.[27]

A week later he was somewhat less sanguine as the House of Lords defeated all options for an elected chamber and solidly supported the concept of an all appointed Upper House. Asked if he would rely upon the *Parliament Act* to proceed without the Lords Mr. Straw said the House of Commons could proceed that way if they wished but "we are not at that position yet."[28]

A few months later Gordon Brown replaced Tony Blair as Prime Minister and it was decided to bring out yet another White Paper on Lords Reform. Fatigue and in fighting among Labour over leadership issues had taken considerable steam out of the reform movement.

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[22] See P. Dorey and A. Kelso, House of Lords Reform Since 1911: Must the Lords Go? Palgrave, Basingstroke, 2011. Also I McLean, A Spirling and M. Russell, None of the Above: The UK House of Commons Votes on Reforming the House of Lords, *The Political Quarterly*, vol 74 no. 3, pp.298-310.

[23] *Ibid*. pp.308-309.

[24] See Robin Cook, The Point of Departure, Simon and Schuster, London, 2003, p. 280.

[25] Tony Blair, *Tony Blair: A Journey*, Alfred Knopf, New York, 2010, p. 640.

[26] House of Commons, *Debates*, March 6, 2007, cols 1389-1488 and cols 1524-1638

[27] House of Commons, *Debates*, March 7, 2007, col. 1636.

[28] Downing Street, Afternoon press briefing, March 15, 2007. Since 1949 only 4 bills have passed against the will of the Lords.

A survey found that election of members of the House of Lords was fifth out of seven factors considered important by the general public when it came to reform of the Lords. Careful consideration of legislation was first, followed by a trustworthy appointments process. In addition more of the public felt the Lords were doing an acceptable job carrying out their duties than member of the House of Commons.[29]

The 2010 election produced a Conservative-Liberal Democratic Coalition with a written agreement that favoured an elected Upper House. With the largest opposition party also in favour it appeared that reform along those lines was inevitable. Yet the entire reform process came to a halt as the result of yet another vote on July 9, 2012.

This time the government proceeded differently. There were no options presented and there was no free vote. It was a whipped vote on a government Bill, the *House of Lords Reform Bill*. It proposed reducing membership in the Lords to 300 members. Most Lords (240) would be elected with the remaining 20% appointed. There would also be 12 Bishops sitting as ex-officio members.

The bill did not propose changing the constitutional powers and privileges of the House once it was reformed, nor would the relationship with the House of Commons change. The most controversial proposals involve how Peers would be elected and the terms they would serve. Each elected Lord would serve a single, non-renewal term of 15 years (three normal election cycles). Elections would be held at the same time as General Elections for the House of Commons, but would be staggered, so that one-third of the seats would be contested in each election.

Appointed members would be nominated by a new *statutory* Appointments Commission and recommended by the Prime Minister for appointment by the Queen. These appointed Lords, like their elected counterparts, would be staggered, with 20 appointments made each election. Appointed Lords would serve the same term as elected members.

The draft bill was sent to a Joint Committee where a majority (14) endorsed the approach but 12 members signed an alternative report. The main argument of the dissidents was put by Philip Norton who questioned whether election alone necessarily adds legitimacy to the Chamber. If members were elected to a single non-renewable term of 15 years as proposed in the bill they would never have to face the electorate again and could hardly be considered any more accountable or legitimate than appointees.

Once again there was concern that a largely elected Upper House would challenge the primacy of the Commons. The question would arise as to which elected House had more credibility. Conversely if the Lords was to remain in its current subordinate position *vis a vis* the House it made little sense to elect members to a chamber with limited powers.

It was also hard to imagine most of the crossbench peers who are independent and considered extremely competent standing for popular election. The same is true of many of the party elders

[29] See House of Lords, Library Note, *House of Lords Reform*, June 28, 2010, LLN 2010/15.

who contribute their experience to the present Upper House. A PR election system, it was argued, would end up producing a much more partisan House.

Finally, but perhaps crucially, some members were not prepared to move forward with the reform proposal without the benefit of a referendum.[30] Labour members, in particular, had committed in the 2010 Manifesto to a referendum on reform of the Lords.

After a spirited debate the Bill came to a vote. The House adopted the bill at second reading but 91 Conservatives voted against it despite a three line whip and 19 others abstained. When many Labour members said they would oppose a programming motion (time allocation) needed to get it considered in committee, the Deputy Prime Minister, Nick Clegg, announced that the whole package of Lords Reform was being abandoned. He claimed the Conservatives had "broken the coalition contract." Prime Minister Cameron disputed this, saying that the agreement contained no specific promise to enact reform of the House of Lords.

Since 2012 there have been various reform proposals but almost all of these have focused on limited reforms such as no longer replacing hereditary peers when they die, removing persistent non attendees or codifying a formula for determining the relative numerical strengths of party groups.[31]

Before looking at some lessons for Canada we need to briefly summarize the situation in this country in light of two recent developments.

The Trudeau initiative and the Supreme Court Decision

In January 2014 while awaiting a decision of the Supreme Court on the process for Senate reform, Liberal Leader Justin Trudeau shocked Canadians including his own Senators by announcing he was expelling all Liberal Senators from the National Liberal Caucus. The idea generated considerable interest even from unlikely sources such as the Canada West Foundation, Preston Manning, Conrad Black, and the Sun Newspapers. It was also ridiculed by populists on the right who prefer an elected Senate and ones on the left who prefer abolition.

One advantage of the Trudeau approach is that it recognizes that in a Westminster system appointment is not by definition illegitimate. The problem is length of appointments, quality of appointments and source of the appointments.

It also recognized the Senate has evolved into a base for party-fundraisers and an extension of the Prime Minister's Office. At best this is unseemly and at worse it is an abomination of our form of government.

[30] Sir Alan Haselhurst, Rethinking House of Lords Reform, *Canadian Parliamentary Review*, winter 2012, pp. 12-16.

[31] See House of Commons, Political and Constitutional Reform Committee, House of Lords Reform: What Next, Ninth Report of session 2013-14, vol 1 Report, Vol II written evidence, October 17, 2013

Trudeau's idea to expel the Liberal Senators from National Caucus, to undertake to keep them out of fundraising for election campaigns and to create a non-partisan appointment process to select highly qualified people is a breath of fresh air. [32]

Unfortunately it is also a half-baked solution. It shares with the discredited Harper approach the goal of Senate reform without constitutional amendment. It is very possible that the kind of change he seems to envisage including a new appointment process will require a constitutional amendment under the general amending formula.

The proposal also confuses non-partisanship and independence. Political bodies are going to be partisan and there is nothing wrong with that. It is not good enough to have come up with a bunch of Senators who may be independent of the Liberal National Caucus. We need to reflect on the more important question of how to get truly independent minded people into the Senate. Similarly we want a mixture of political and independent people in the Senate. And the political people should not all be appointed from one party. A starting point to resolving these problems can be found in British experience.

Four Lessons and a Proposal for Canada

The first lesson from British experience is that we have omitted a key step on the path toward a reformed Senate. A hundred years ago the British started by reforming the powers of the Lords. That should be our first step. That debate would force a rethinking about the purposes we want fulfilled by the Chamber.

Ideally we need a Chamber where it does not matter so much who has a majority. As long as the theoretical powers of the Senate are the same as those of the House, Prime Ministers will be concerned about having a majority of loyal members in the Upper House and loath to make reforms that derogate from that.

Take away the power of the Senate with a type of suspensive veto (which we already have for constitutional matters) and you open the way for a more dispassionate, reflective, effective chamber.

It may be argued that we do not need to limit Senate powers because of the tradition of Senate deference to the elected House. But there is no Salisbury Convention in Canada and the tradition of deference does not prevent delaying legislation indefinitely.

It is the potential for obstruction that will continue to encourage Prime Ministers (including Mr. Trudeau) to appoint partisans until they obtain a majority of supporters in the House. Ironically it is more likely that a workable British style convention could be achieved if Mr. Mulcair became Prime Minister because he would have no hope of appointing enough Senators to form a majority. He might be inclined, as was Labour in 1945, to find a way to live with an appointed chamber.

[32] See Gary Levy, What is not to like about Justin Trudeau's Senate Reform*, Hill Times*, February 4, 2014

A second lesson from British experience shows that reform takes a long time and that limited, piecemeal reforms have a much greater chance of succeeding than do grand schemes. The original Harper bill for term limits looked like incrementalism but the opposition resisted in the belief, subsequently justified, that it was part of a much larger and more fundamental change.

We will never know for sure but if the Harper government had moved immediately on term limits alone it is possible that no province would have gone to the trouble of challenging that reform all the way to the Supreme Court. Now, in light of the Supreme Court decision, term limits require a 7/50 constitutional amendment.

A third lesson is that Parliament must be engaged. The Supreme Court decision is not a substitute for parliamentary debate. Unlike in Britain our debate has produced no white papers, no green papers, no joint committees, no special committees. Even the election platforms of the parties have been vague. Essentially the same proposition was introduced multiple times before the government washed its hands of the matter and referred the issue to the Supreme Court. After the decision the government further abdicated its responsibility by saying reform was now in the hands of the provinces.

A fourth lesson is that if we want more independent Senators we need an appointments commission and the British provide a model that should be examined carefully. Also, like the British, we could start the practice of alternating appointments among party leaders. Certain Caribbean commonwealth countries have written into their constitution the alternation of appointments among the Prime Minister, the Leader of the Government and the Governor General on his own. (Such a practice would only be feasible if Senate powers were limited as explained above).

The Supreme Court has made it clear there is no real path to Senate reform without constitutional amendment. Should either Mr. Trudeau or Mr. Mulcair become Prime Minister after the next election they will find themselves in a minority in the upper house. Either of them should introduce a stand-alone constitutional amendment to limit the Senate to a 12 month suspensive veto over legislation. The Conservative majority may oppose this but assuming it has been part of the election program and assuming provincial premiers are not out of touch with popular opinion it should be possible to obtain agreement of at least seven provincial premiers with 50% of the population.

Then the new Prime Minister, be it Trudeau or Mulcair, can introduce his legislation and even without a majority of seats in the Senate things will be passed after a maximum one year delay, which is not much longer than it takes now even with a majority in the Senate. It would then be possible to make appointments without worrying about party affiliation with or without an appointments commission. Better appointments would, over time, remove the argument for an elected Senate with all the problems that involves for a Westminster style government.

Part II Constitutional Convention

One frequent complaint about Westminster style institutions is excessive executive dominance. But in fact the Westminster model is intended to concentrate power while still providing mechanisms (short of gridlock) to hold governments to account. What keeps a powerful

executive from turning into an arbitrary dictatorship is a fragile layer of largely unwritten constitutional conventions, unenforceable by the courts, but absolutely essential to its operation.[33] The force of constitutional convention derives from an underlying consensus and willingness by the political players and by the wider public to follow the rules. The collapse of consensus over the meaning of these unwritten understandings may turn out to be a graver threat to our system than executive dominance.[34]

Here are some examples of constitutional conventions and recent challenges to them in Canada:

- Following an election the incumbent Prime Minister has a right to remain in office and to meet Parliament if he believes he has a reasonable chance to win a confidence vote. (In 2011 Stephen Harper argued that the party that wins the most seats on election day should be called upon to form the government. Incredibly he was supported in this by the Leader of the Opposition.[35]
- The Government will accede to any demand from the Leader of the Opposition for a debate and a vote on a non-confidence motion.[36] (In 2008 Mr. Harper prorogued Parliament rather than permit an opposition non confidence motion to be heard.)[37]
- The Government must maintain confidence of the House of Commons. (In 2005 Paul Martin ignored defeat in a vote of non-confidence because it was an amendment to a committee report rather than a stand-alone motion despite the fact that he prevented a stand-alone motion from coming to the floor.)[38]
- The Governor General will normally accept the advice of the Prime Minister but in extraordinary circumstance he or she may exercise discretion. (In 2008 Mme. Jean seemed to accept the idea that she had no discretion to deny a request for prorogation even though it had no other purpose than to prevent a vote a non-confidence)[39]

[33] There is a vast literature on constitutional and parliamentary conventions including A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed, MacMillan, London, 1959.; Ivor Jennings, The Law and the Constitution, University of London, 1959, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Oxford University Press, Oxford, 1984; For their application in Canada see Andrew Heard, Constitutional Conventions: The Heart of the Living Constitution, *Journal of Parliamentary and Political Law,* vol 6, no. 2, 2012

[34] The late Peter Aucoin, in an unpublished presentation to the Liberal Caucus workshop during the 2008 prorogation crisis, observed "conventions that do not rely upon consensus can no longer be considered to be conventions." See also Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, Democratizing the Constitution, Reforming Responsible Government, Emond Montgomery Publications, Toronto, 2011, p. 208 where a similar point is made in slightly different language.

[35] Statement by Michael Ignatieff, March 26, 2011, http://www.scribd.com/doc/51597039/Ignatieff-statement.

[36] Erskine May formulates the convention as follows: In allotting a day for this purpose the Government is entitled to have regard to the exigencies of its own business but a reasonable early day is invariably found.

[37] See Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, *op cit*.

[38] Andrew Heard, Just What is a Vote of Confidence? The Curious Case of May 10, 2005, *Canadian Journal of Political Science*, vol 40, no 2, 2007.

[39] See Lorraine Weinrib, Prime Minister Harper"s Parliamentary time Out: A Constitutional Revolution in the Making? In Peter Russell and Lorne Sossin, *Parliamentary Democracy in Crisis*, university of Toronto Press, 2009..

In 2011 a workshop held at the University of Toronto considered the precarious state of our constitutional conventions.[40] Since then others have reflected on what can be done to preserve, protect and if necessary change constitutional convention. But nothing has happened in Canada so it is useful to look at experience in the United Kingdom.

A Fifteen Year Dialogue about Conventions

Legislators, academics and public servants in the United Kingdom have been engaged in conversation about constitutional conventions for more than a decade. In the dying days of the John Major administration the House passed a resolution setting out terms of the Convention of Ministerial Responsibility. It was prompted by the Scott inquiry which examined allegations that senior ministers had misled parliament by changing guidelines relating to the sale of arms to Iraq so as to keep certain companies from being prosecuted for breach of an embargo.[41]

Despite its very general terms the Resolution was welcomed by observers as a step toward codification of an important convention.

> No longer is ministerial responsibility merely an unwritten constitutional Convention… It is now a clear parliamentary rule, set down in resolutions by both Houses of Parliament… The government acting on its own cannot now change the terms of this Convention in the way that the Conservative government did throughout its period in office.[42]

Defining conventions in parliamentary resolutions is one approach. Another is to replace convention with statute. The 2007 Green Paper entitled, the *Governance of Britain* proposed sweeping changes many of which would replace prerogative powers with statutes.[43]

The March 2008 White Paper on Constitutional Renewal[44] included a Draft Constitutional Renewal Bill, which eventually became the *Constitutional Reform and Governance Bill* 2010. Among other things it replaced the Ponsonby Rule, a constitutional convention that required most international treaties to be laid before Parliament 21 days before ratification. This is now a statutory requirement.

A third approach to dealing with constitutional conventions is to incorporate them into a manual.[45] The British approach to these three ways of dealing with constitutional conventions is examined in more detail in the following section.

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[40] Peter Russell and Cheryl Milne, *Adjusting to a New Era of Parliamentary Government*, Report of a Workshop on Constitutional Conventions, Faculty of Law, University of Toronto, February 3-4, 2011 www.aspercentre.ca a follow up document was published by the Public Policy Forum, *Government Formation: The Need for Clear Guidelines*, June 1, 2011 see www.ppforum.ca. See also Peter Russell, The Principles, Rules and Practices of Parliamentary Government: Time for a Written Constitution, *Journal of Parliamentary and Political Law*, vol 6 no 2. August 2012.

[41] See Adam Tomkins, *The Constitution after Scott: Government Unwrapped* Clarendon Press, 1998, p. 62.

[42] *Ibid. p.62.*.

[43] *The Governance of Britain*, Presented to Parliament by the Secretary of State for Justice and Lord Chancellor , July 2007, CM 7170.

[44] The Governance of Britain: Constitutional Renewal, Presented to Parliament by the Lord Chancellor and the Secretary of State for Justice, March 2008, CM 7342

[45] Canada actually had this kind of document, *Manual of Official Procedure of the Government of Canada,* long before New Zealand and Great Britain popularized the idea[45]. However the Canadian manual written in 1968 by Henry Davis and André Millar of the Privy Council Office was a 1500 page collection of precedents that reflected

The Statutory Approach: Fixed Date Election Legislation

The most significant example of changing constitutional convention through statute is the British *Fixed Term Election Act*. The 2007 Green Paper summarized the existing convention as follows.

> The Prime Minister will, by convention, ask the Monarch to dissolve Parliament when it has passed a motion of no confidence in the government. Otherwise, Parliament is only dissolved if the Monarch so chooses and in practice, for over a hundred years, he or she has done this whenever, and only when, the Prime Minister has requested it. This gives the Prime Minister significant control over Parliament.[46]

The Green Paper argued that that the convention should be changed so that the Prime Minister is required to seek the approval of the House of Commons before asking the Monarch for dissolution.

The 2010 Coalition Agreement provided for a Resolution of the House with the support of 55% of the membership in order to secure an early dissolution. However the Government decided to proceed by legislation.

The *Fixed-term Parliaments Act* came into force in September 2011 and does much more than set the date for future elections. It eliminates the constitutional convention that a Prime Minister may ask for dissolution of Parliament at a time of his choosing and normally expect to have his request granted by the Queen. Instead it provides for elections to be held on May 7, 2015 and every fifth year thereafter.

Early elections can only be held under two conditions: (1) if a motion for an early general election is agreed either by at least two-thirds of the whole House or (2) if a motion of no confidence is passed and no alternative government is confirmed by the Commons within 14 days.

During passage of the Bill there were discussions about the constitutional implications of these changes. Some argued that the legislation would still allow an incumbent government to trigger an early election through tabling a motion of no confidence in itself or by the strategic resignation of a Prime Minister at a time when the Opposition was not prepared to form a government.

Initially, the Bill provided for non-confidence motions to be certified as such by the Speaker. This provision was removed, following concerns that the legislation would make the Speaker's consideration of confidence motions and the practices of the House questions for the courts. Instead, the Act now provides for a set formula to be used. Firstly, the motion must be: "That this House has no confidence in Her Majesty's Government".

If this motion is carried, a new government can be confirmed in office within 14 days by a resolution as follows: "That this House has confidence in Her Majesty's Government"

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only the thinking of the Executive and was kept under lock and key for more than 40 years. See Nicholas MacDonald and James W.J. Bowden, The Manual of Official Procedure of the Government of Canada: An Exposé, *Constitutional Forum* vol. 20 no 1, October 17, 2011, pp. 33-39. Also article *in Toronto Star*, March 24, 2011.

[46] Green Paper, *op. cit.* p. 20. For a concise statement of the traditional convention see Sir Alan Lascelles 'Dissolution of Parliament: Factors in the Crown's Choice' *The Times, London, May 2, 1950.*

If a new Government cannot be formed in this period dissolution is triggered. There is no provision for an extension of the 14 day period but dissolution need not follow immediately as the Bill allows the Prime Minister some latitude in recommending a suitable polling day.

The fixed term election legislation has yet to be tested and it may well have some unintended consequences. For example, by setting out the form in which confidence and no confidence motions would be valid there is some question as to whether other types of censure motions could be debated and if passed what would be their effect.

The strength of the UK approach, compared to Canada's fixed date election legislation, is that it takes the logic of limiting the Royal Prerogative over dissolution, to its logical conclusion leaving no room for politicians like Stephen Harper in 2008, Pauline Marois and Kathleen Wynne in 2014 to unilaterally ignore their own fixed date election legislation.[47]

The Cabinet Manual Approach

One idea was discussed at the University of Toronto workshop was to draft a manual of principles, along the lines of the New Zealand Cabinet Manual or the British Cabinet Manual to reflect existing conventions.[48] But how are we to codify conventions if there is no consensus on their nature? Are the political leaders of the day are really the best people to clarify our conventions?[49] British experience is instructive on these points.

Work on the British Cabinet Manual began well before the 2010 election when polls were predicting a hung parliament. Prime Minister Gordon Brown asked the Cabinet Secretary to codify existing unwritten constitutional conventions accepted as obligatory by all concerned into a document along the lines of the New Zealand Cabinet Manual. It would be used to guide the operations of government following the election.[50]

In February 2010 a draft of certain sections of the Manual concerning elections and government formation in a hung parliament was submitted to the Justice Committee which heard evidence from leading experts from government and academia. In a short report delivered less than a month later[51] the Justice Committee suggested the manual was headed in the right direction but

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[47] See James Bowden, Reigning in the Crown's Power on Dissolution: The Fixed-Term, Parliaments Act of the United Kingdom versus The Fixed-Election Laws in Canada, Paper Presented to the Canadian Political Science Association, 4 June 2013; also James Bowden**,** Premier Marois Copies Prime Minister Harper: The Futility of Fixed-Date Elections Laws, Parliamentum.org, March 5, 2014. It may be argued that a real limitation on limiting the prerogative over dissolution in Canada is section 50 of the *Constitution Act 1867 w*hich vests this power with the Governor General. But an amendment should only require the consent of Parliament and not the 7/50 or unanimity formula

[48] For information on the New Zealand and British Cabinet Manuals see James Bowden and Nicholas MacDonald, Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia, *Journal of Parliamentary and Political Law*, vol 6, 2012. Also Bruce Hicks, Rehabilitating Constitutional Convention, *National Journal of Constitutional Law*, vol 31, Nov/Dec 2012.

[49] See for example Paul Benoit and Gary Levy, Viability of our political institutions being questioned, *Hill Times*, April 25, 2011.

[50] For background on the Cabinet Manual see Bruce Hicks, British and Canadian Experience with the Royal Prerogative, *Canadian Parliamentary Review*, vol 33, no. 2 summer 2010. James Bowden, and Nicholas MacDonald, Cabinet Manuals and the Crown, in D. Michael Jackson and Philippe Lagassé, *Canada and the Crown: Essays on Constitutional Monarchy, Kingston-Montreal: Queen's-McGill University Press, 2013, pp. 179-195.*

[51] See, United Kingdom, Justice Committee, Fifth *Report*, session n 2009-2010, March 26, 2010. http://www.parliament.the-stationery-office.co.uk/pa/cm200910/cmselect/cmjust/396/39604.htm..

added some important observations. For example they called for all political parties to make public commitments to ensure the Queen not be forced to take sides and that Parliament had an opportunity to express its confidence in one government or another.

Following the election and negotiation of the Coalition Agreement work continued and a complete Draft Cabinet Manual was published in December 2010. The Cabinet Secretary described the Manual as:

> the first, comprehensive account of the workings of Cabinet Government which will consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document.[52]

The draft version of the British manual included opinions which were at variance with the traditional understanding of some important constitutional conventions. For example, during the election in a television interview, Nick Clegg stated (along the lines later used by Stephen Harper and Michael Ignatieff) that "whichever party gets the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties.

The Clegg statement was included as a footnote in the Draft Manual. When the House Political and Constitutional Reform Committee examined the manual in January 2011 one of its recommendations concerned this footnote which the committee argued made the Convention less clear.[53]

The Government accepted this point and responded in March 2011.

> The Liberal Democrat Leader's comment (footnote 8 of the draft cabinet manual) set out the negotiating position of the Liberal Democrats which was relevant in the specific circumstances of the 2010 election. It was included for information and is not a constitutional obligation or binding on political parties in the future. The Government will consider whether the Manual should be amended once all the responses have been received on the draft.[54]

This reference was removed when the first edition of the Cabinet Manual was published in October 2011.

Another controversial question taken up by the Committee related to the timing of a Prime Minister's resignation. For example, if during negotiations on the formation of a Coalition a Prime Minister came to the conclusion that he could not reach an agreement with either of the other parties and he resigned before the other two parties had reached an agreement, the Crown would be left without an advisor. Some members felt that Prime Minister Brown had resigned prematurely and if that was the case how could this be prevented in the future?

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[52] Cabinet Office*, Cabinet Manual* First Edition, October 2011

[53] House of Commons, Political and Constitutional Reform Committee, Fourth Report: *Lessons from the Process of Government Formation after the 2010 General Election, published January 2011.*

[54] House of Commons, Political and Constitutional Reform Committee, *Lessons from the Process of Government Formation after the 2010 General Election: Government Response to the Committee's Fourth Report*, March 14, 2011, p 1

The committee disagreed that Brown had resigned prematurely but concluded it would be helpful if the Cabinet Manual were more explicit on this point. Specifically it recommended that

> An incumbent Prime Minister has a duty to stay in office until a successor has been identified, as well as a right to stay in office until it is clear that he or she does not have the confidence of the House.[55]

The Committee also considered the merits of an investiture vote whereby Parliament nominates and votes for one of its own members for Prime Minister before that name is submitted to the Queen. That would create a more obvious link between the results of a general election and the formation of a government. At present the Queen chooses a Prime Minister after a general election on the basis of how her advisers think the newly elected House will vote, without asking the House first. The first test of confidence does not come until days or weeks later on the Speech from the Throne. An investiture vote would reduce the risk of the Monarch being drawn into the political process of determining who is best placed to form a government following an election producing a hung Parliament.[56]

The argument against an investiture vote is that it is a largely superfluous procedure since normally it is obvious who is to be named Prime Minister. Therefore the Committee declined to make any recommendation but suggested the idea, already used in the Scottish Parliament, may warrant study in the future. In Canada, where minority parliaments are becoming more common at both the federal and provincial level such a process might be worth considering.[57]

The British experience with a Cabinet Manual shows that it can be more than a collection of sometimes conflicting precedents and over time it can become of source of authoritative information on constitutional convention.

Deployment of Troops and the House of Commons Resolution Approach

The long-time convention regarding deployment of forces is that the Queen, through the Royal Prerogative, has the legal power to command the armed forces and this power is exercised on her behalf by the Prime Minister and Cabinet. The Suez crisis, the Falklands War, the Gulf War, British involvement in Bosnia, Kosovo, Serbia and Afghanistan were all undertaken without any attempt to seek formal parliamentary approval *before* committing British forces.[58]

Sending troops to Iraq in 2003 marked a departure. The Government decided that a formal vote should be held in Parliament before committing troops but this was done more as a matter of political necessity than out of a sense of constitutional *obligation*.[59] Tony Blair stated: "I cannot think of a set of circumstances in which a Government can go to war without the support of Parliament" but he steadfastly refused to give an undertaking that he would consult

[55] Ibid.
[56] Ibid.
[57] For an excellent discussion of the incidences and implications of minority parliaments in Canada see Dan Desserud, Election Defeats and the Canadian Constitution: A Convention that Warrants Reconsideration. Paper presented to the New England Political Science Association Conference, Woodstock, Vermont, April 25, 2014.
[58] In some cases, such as Afghanistan a vote on the presence of British forces was held many months or years after the deployment but these cannot be considered precedent for consulting Parliament *before* or even shortly after military action is taken.
[59] See Gavin Phillipson, Historic' Commons Syria vote: the constitutional significance (Part I)' UK Const. L. Blog (19th September 2013) (available at http://ukconstitutionallaw.org

Parliament *before* undertaking military action against Iraq. [60] The Attorney General said: "The decision to use military force is, and remains, a decision within the Royal Prerogative and as such does not, as a matter of law or constitutionality, require the prior approval of Parliament."[61] In other words the government was permitting a vote but it did not have to.

The Iraq vote generated considerable debate as to whether it constituted a precedent for a new constitutional convention about committing troop but even those who wanted such a convention recognized that the Iraq precedent failed one of the three tests Jennings suggested for a convention – the actors involved must believe themselves to be bound by a rule.

Several Committees took up the issue. In 2006 the House of Lords Committee on the Constitution[62] recommended that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy forces outside the UK. In 2007 the House Committee on Public Administration came to the same conclusion when it said "a parliamentary resolution may be the pragmatic way forward, as a first step toward establishing a legal principle for parliamentary involvement in conflict decisions.[63].

The 2007 Green Paper proposed that Government should seek the approval of the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict, to the greatest extent possible.

The 2008 White Paper included a draft resolution giving Parliament a formal voice in the process by which the Government deploys Armed Forces in armed combat overseas. The proposed resolution was studied by the Joint Committee on the Draft Constitutional Renewal Bill.

In 2009 the Government stated that it was preparing a detailed draft resolution setting out the process the House of Commons should follow in order to approve any deployment of the Armed Forces in conflict overseas.

However in subsequent testimony before the Lords Committee the Lord Chancellor and Secretary of State for Justice stated that work on the draft resolution had proved to be complicated because, among other things, it was difficult to find proper wording to cover possible exceptions for reasons of national security.

The March 2011 debate on the Libya No Fly Zone showed that a convention was evolving. Speaking for the Government Sir George Young said:

> A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter… As with the Iraq war and other events, we propose to give the House the opportunity to debate the matter before troops are committed.[64]

The government quoted the opinion of the Cabinet Secretary, Sir Gus O Donnell, who wrote to the Commons Political and Constitutional Reform Committee in March 2011, stating:

> the Government believes that it is apparent that since the events leading up to the deployment of troops in Iraq, a convention exists that Parliament will be given the

[60] See House of Commons, Liaison Committee, Oral Evidence, January 21, 2003.
[61] House of Commons, *Debates*, February 19, 2003.
[62] *Waging war: Parliament's role and responsibility,* HL Paper 236, London, The Stationery Office Ltd, 27 July 2006
[63] See House of Commons, Committee on Public Administration, 10th Report 2007-2008, para 79.
[64] House of Commons, *Debates*, March 10, 2011, statement by Sir George Young for the Government.

> opportunity to debate the decision to commit troops to armed conflict and, except in emergency situations, that debate would take place before they are committed.

The Cabinet Manual, published the same year, included the same paragraph. The Libya debate was significant because unlike Iraq the Government granted a debate because it believed a convention required it to do so and not just because of political necessity.

> It thus fulfilled all three of Jenning's criteria, as Iraq had not. However, in terms of the substantive content of the emerging Convention, Libya is not a fully satisfactory precedent for one simple reason: the debate took place after military action had already started.[65]

The August 29, 2013 debate over Syria seems to have confirmed the existence of a new constitutional convention that requires a government, to permit a debate and vote in the House of Commons and abide by its result, subject to narrow exceptions for emergency situations.[66]

However that debate took place only a few weeks after the Lords Constitution Committee reversed its position and came out against any codification of the convention regarding the deployment of troops.

> Our view is that formalising Parliament's role in approving the deployment of Her Majesty's armed forces overseas would face a number of significant practical and definitional difficulties. The adoption of a formal resolution would potentially limit the options available to Parliament by removing flexibility; in addition, any such resolution might need to be regularly amended to reflect the changing nature of warfare and deployments.
>
> We consider that the risks and difficulties associated with formalisation outweigh any benefits which it might bring. Neither primary legislation nor a resolution should be introduced as a means of formalising the role of Parliament in approving deployment decisions.[67]

In its response to the Committee on November 1, 2013 the government noted that its decision to recall Parliament and to respect the will of the House has "further demonstrated its commitment to respect the Parliamentary convention: that, before UK troops are committed to conflict, the House of Commons should have the opportunity to debate the matter, except where there was an emergency and such action would not be appropriate.[68]

The government agreed to amend the Cabinet Manual so that it includes a detailed description of the internal arrangements for advising and deciding on the use of armed force.

Nick Clegg summarised the situation post Syria in evidence to the Political and Constitutional Reform Committee when he said, "how does one reconcile enshrining a convention in a way that is strong and meaningful but none the less flexible enough to deal with what are, by definition, unpredictable circumstances." The Government intends to reflect carefully on the experience of

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[65] See Gavin Phillipson op. cit.

[66] See Gavin Phillipson, op. cit.

[67] House of Lords, Constitution Committee, Constitutional arrangements for the use of armed force, 2nd Report of Session 2013–14, July 2013, paragraph 64..

[68] Government Response to Constitution Committee 2nd Report of Session 2013-14, November 1, 2013.

the Syria vote on August 29, as well as the Committee's report and the ongoing inquiry by the Political and Constitutional Reform Committee of the House of Commons before deciding how it wishes to proceed."[69]

The lesson for Canada is that even in Britain some degree of ambiguity is inherent in parliamentary convention. But continual reflection about them is a healthy sign and the absence of serious attempts to understand our conventions and perhaps modify them will facilitate partisan excesses and remove safeguards against the abuse of these conventions in time of political crisis.

Process issues are unlikely to compete with lower taxes or middle class benefits in the next election. But it would be helpful if at least one of the major parties would offer to start the conversation, perhaps by promising a Green Paper on Governance that could address the growing cracks in our constitutional foundation.

[69] House of Commons, Political and Constitutional Reform Committee, Oral Evidence, October 10, 2013.