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Dalhousie Law Journal

Volume 48 | Issue 2 Article 6

1-2026

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Recommended Citation
Léonid Sirota, "What to Do About the Decay of the Conventions of the Canadian Constitution" (2025) 48:2 Dal LJ 821.

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What to Do About the Decay of the Conventions of the Canadian Constitution

Constitutional conventions are central to the operation of the Canadian constitution. Yet because they are not legislated rules, their coming into being and disappearance can be subject to considerable uncertainty. Worse, it appears that conventions can disappear or be replaced inadvertently, without anyone fully appreciating that this is happening. This article describes this process in relation to three conventions of the Canadian constitution: the one regulating the appointment of the Chief Justice of Canada, the convention of civil service neutrality, and the convention governing the choice of Prime Minister in a hung Parliament. It argues that these conventions are being ignored or disregarded due to a combination of institutional amnesia on the one hand and populist pressures on the other. The article considers three possible avenues for preventing the breakdown of constitutional conventions: protest by the civil society, experts, and political actors; the compilation of an authoritative cabinet manual; and judicial enforcement of conventions. But none of these is likely to be fully effective, especially against populist opposition, and both the cabinet manual and the judicial enforcement of conventions would risk having undesirable consequences too.

Les conventions constitutionnelles sont au cœur du fonctionnement de la Constitution canadienne. Pourtant, comme elles ne sont pas inscrites dans la loi, leur apparition et leur disparition peuvent être soumises à une grande incertitude. Pire encore, il semble que les conventions puissent disparaître ou être remplacées par inadvertance, sans que personne ne s'en aperçoive vraiment. Le présent article décrit ce processus en relation avec trois conventions de la Constitution canadienne : celle qui régit la nomination du juge en chef du Canada, celle de la neutralité de la fonction publique et celle qui régit le choix du premier ministre en cas de parlement sans majorité. Il soutient que ces conventions ne sont pas respectées ou sont méconnues en raison, d'une part, d'une amnésie institutionnelle et, d'autre part, de pressions populistes. L'article examine trois solutions possibles pour empêcher l'effondrement des conventions constitutionnelles : la protestation de la société civile, des experts et des acteurs politiques; la compilation d'un manuel officiel du Cabinet; et l'application judiciaire des conventions. Mais aucune de ces solutions n'est susceptible d'être pleinement efficace, en particulier face à l'opposition populiste, et le manuel du Cabinet ainsi que l'application judiciaire des conventions risqueraient également d'avoir des conséquences indésirables.

* Reading Law School. I am grateful to Mark Mancini and to an audience at the Public Law Conference 2024 for comments on previous versions of this article. All remaining errors are mine.

Introduction

In what remains the leading judicial discussion of constitutional conventions in Canada, and arguably the Commonwealth, the Supreme Court of Canada observed that "many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution."[1] Yet so important are these constitutional rules—the conventions of the constitution—the opinion recognized, that the breach of some of them "could be regarded as tantamount to a *coup d'état*."[2] Not all conventions are quite like that; as

1. *Re: Resolution to amend the Constitution*, 1981 CanLII 25 (SCC) at 877-878 [*Patriation Reference*]; see *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, at paras 141-143 (relying on the *Patriation Reference* in its discussion of conventions) [*Miller I*].
2. *Patriation Reference*, *supra* note 1 at 882.

Andrew Heard has argued, many can take some bending before they are broken and constitutionally dramatic consequences ensue.[3]

But conventions, it seems, are not only vulnerable to breaking or bending. They can also be forgotten. This need not always be "tantamount to a coup d'état," but if a convention was and no longer is followed, the constitution is changed to a greater or lesser extent.[4] It seems at least disquieting that this can be the result of mere forgetfulness, and more than just disquieting, perhaps, if the forgetfulness is not accidental, but the result of misdirection or misinformation by populist politicians.

This article describes the issue by drawing on Canadian developments in the last ten years and considers possible avenues of redress, none of which, however, are altogether satisfactory even at an intellectual level, let alone especially likely to succeed. It begins with a refresher on the nature of constitutional conventions in Part I. Part II describes cases where constitutional conventions have been neglected, forgotten, or disregarded: the appointment of the Chief Justice of Canada, lapses in the neutrality of the public service, and the selection of a Prime Minister in the event an election produces a hung Parliament. Part III suggests two possible causes of these developments: a sort of collective (and above all institutional) amnesia on the one hand, and populism on the other. Finally, Part IV considers three options for countering the forgetting of constitutional conventions: the mobilisation of public opinion and of relevant constitutional actors; non-binding codification of conventions in a cabinet manual; and judicial enforcement, notably of entrenched constitutional provisions codifying conventions.

I. *The life and death of conventions*

As noted above, constitutional conventions are central to Westminster-type constitutional systems. Despite this, they are readily misunderstood, and not only by laypersons but also by lawyers and judges. A quick reminder of their nature and function is therefore in order. This is intended to be uncontroversial, focusing on the standard account of conventions rather than the heterodox one that questions the received wisdom on the distinction between conventions and law.[5]

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3. Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 2014) at 212-213.

4. *Ib*id at 211.

5. See e.g. TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013) at ch 2; Léonid Sirota, "Towards a Jurisprudence of Constitutional Conventions" (2011) 11:1 OUCLJ 29 [Sirota, "Jurisprudence"]; Léonid Sirota, "The Supreme Court and the Conventions of the Constitution" (2017) 78 SCLR (2d) 31 [Sirota, "SCC Conventions"]; Farrah Ahmed, Richard Albert & Adam Perry, "Judging Constitutional Conventions" (2019) 17:3

A preliminary point to make is that, while conventions, like other constitutional rules, ultimately belong to the particular constitution they are part of and can differ from one jurisdiction to another, the Canadian constitution shares some of its key conventions with that of the United Kingdom, as well as of other former dominions.[6] This, above all, is the meaning of the statement in the preamble of the *Constitution Act, 1867*, that Canada was to have "a Constitution similar in Principle to that of the United Kingdom,"[7] notwithstanding the obvious differences between the two flowing from the federal character of the constitution of Canada.[8] As a result, both precedents and statements of the relevant conventions from these jurisdictions are relevant to understanding the conventions of the Canadian constitution.[9]

The idea that there exist two categories of constitutional rules, of which constitutional law is one and convention the other, is firmly imprinted in the conscience of lawyers in Westminster-type systems thanks to AV Dicey. In his *Introduction to the Study of the Law of the Constitution*, Dicey defined conventions as "understandings, habits, or practices which…regulate the conduct of the several members of the sovereign power, of the Ministry, or other officials."[10] But conventions are more than simple understandings or habits. They are rules, understood to be binding by those whose behaviour they constrain as well as by informed observers of politics.[11] Typically, the existence of conventions depends on relevant constitutional actors expressing this understanding.[12] And, crucially, conventional rules are

Intl J Constitutional L 787; Farrah Ahmed, Richard Albert & Adam Perry "Enforcing Constitutional Conventions" (2019) 17:4 Intl J Constitutional L 1146.

6. But see James WJ Bowden & Nicholas A MacDonald, "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia" (2011) 6:2 JPPL 365 at 394-397 (discussing some differences between Canadian, UK, New Zealand, and Australian interpretations of some conventions).

7. *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, reprinted in RSC 1985, preamble; Eugene Forsey, *How Canadians Govern Themselves*, 10th ed (Ottawa: 2020) at 1 [Forsey, *Canadians*] (noting that the framers of the *Constitution Act, 1867* "freely, deliberately, and unanimously" adopted British constitutional principles, i.e. "responsible government, with a cabinet responsible to the House of Commons, and the House of Commons answerable to the people"). For an extensive discussion of the preamble, see Peter C Oliver, "'A Constitution Similar in Principle to that of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207.

8. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan, 1915) at 162 (arguing that the Constitution Act, 1867 is better described as similar in principle to the Constitution of the United States, not the United Kingdom).

9. See Hugo Cyr, "De la formation du gouvernement" (2013) 43:2 RGD 381 at 411-412.

10. Dicey, *supra* note 8 at 23.

11. See Heard, *supra* note 3 at 4-5 for a survey of definitions to this effect.

12. Sir W Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press 1959) at 136; *Patriation Reference*, *supra* note 1 at 888. Indeed, in the *Patriation Reference*, this criterion was central to the reasoning of the majority on the conventional question: (*ibid* at 904-905).

supported by constitutional reasons, the nature of which will be explained presently.

First, though, let us note that conventions constrain the exercise of discretion which the law of the constitution leaves in the hands of constitutional actors such as the Crown or its representative, ministers (individually or collectively), or one of the Houses of Parliament. Thus, the Crown exercises its prerogative powers in accordance with the advice of its responsible ministers, even though the law affects to see these powers as the Crown's alone. The Prime Minister must either tender the government's resignation or advise the Crown to dissolve Parliament if the government loses a vote of confidence in the House of Commons, even though no law requires him or her to do so.

The reason these rules constrain constitutional actors to behave in these ways is to ensure that the government is carried out, in Holdsworth's words, "in accordance with the prevailing constitutional theory of the time."[13] One defining characteristic of conventions and what distinguishes them from mere habits or traditions, such as the custom that requires a newly-elected Speaker of the House of Commons to be dragged to the chair while putting up a show of reluctance and resistance,[14] is that they give effect to constitutional principles:[15] often the democratic principle, but sometimes others, such as judicial independence[16] or federalism.[17] As a result, a violation of convention means also a departure from constitutional principle.

The other defining characteristic of conventions, meanwhile, is that, on the orthodox understanding of their constitutional status, they are not enforced by the courts. The courts can, to be sure, take note of them, including to interpret constitutional provisions[18] and to develop pre-existing common law rules.[19] In the *Patriation Reference*, the Supreme Court of Canada asserted its ability to say what conventions are or are not,

13. WS Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932) 17 Iowa LR 161 at 163.

14. See UK Parliament, "Election of the Speaker," online: <parliament.uk/business/commons/the-speaker/speaker-and-the-chamber/election-of-speaker/> [perma.cc/EUB5-3HPA]. (The Parliament's website diplomatically explains that "[t]his custom has its roots in the Speaker's function to communicate the Commons' opinions to the monarch. Historically, if the monarch didn't agree with the message being communicated then the early death of the Speaker could follow.")

15. Bowden & MacDonald, *supra* note 6 at 368.

16. See Heard, *supra* note 3, ch 6.

17. See *ibid* at ch 5.

18. See e.g. *Ontario (AG) v OPSEU*, [1987] 2 SCR 2 [*OPSEU*]; *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 [*Osborne*].

19. See e.g. *United Kingdom (AG) v Jonathan Cape Ltd* [1976] QB 752; *Wells v Newfoundland*, [1999] 3 SCR 1999 at paras 52-54.

and it has exercised this power on occasion, although in all subsequent cases where it was called upon to do so it actually refused to declare the existence of purported conventions propounded by litigants.[20] But, in theory at least, the statement of the content of conventions, even by an apex court, is not the same thing as enforcement. Constitutional actors could legally disregard it. The Supreme Court of the United Kingdom has summed up the orthodox position by claiming that "[j]udges…are neither the parents nor the guardians of political conventions; they are merely observers."[21]

Because conventions are not legislated rules, they can be said to suffer from the kinds of defects that HLA Hart attributes to the rules of pre-legal normative systems:[22] they are difficult to identify and to change and, in particular, it can be difficult to say when a convention has come into being or when it has ceased to be. This article addresses one specific aspect of this issue: the uncertainty that can surround conventions ceasing to be (and potentially giving way to new ones).

II. *The incredible vanishing conventions*

Conventions, as we have seen, connect political practice and constitutional theory. The relationship is not a one-way one. While the theory imposes constraints on the practice, it is also shaped by its constitutional setting. When this changes, the conventions that made sense in the old environment can disappear with it. Thus, to state the obvious, when an unelected upper house of a legislature is abolished, the conventions that governed its relationship with the elected lower house go with it. A slightly more subtle manifestation of the same phenomenon is the fate of the dual-first minister variation on responsible government that had developed in the United Province of Canada from 1848 to 1867.[23]

That constitutional conventions may change in response to changes in the institutional arrangements which they regulate, or, as Holdsworth suggests, to the evolution of the prevailing "constitutional theory," is unsurprising and untroubling.[24] What does call for an explanation and

20. See Sirota, "SCC Conventions," *supra* note 5, for an overview of the cases.
21. *Miller I*, *supra* note 1, at para 146.
22. See Colin R Munro, "Laws and Conventions Distinguished" (1975) 91 LQ Rev 218. For the view that this argument is overstated see Sirota, "Jurisprudence," *supra* note 5, at 37-43.
23. See e.g. Letter from Viscount Monck to John A Macdonald (24 May 1867), Library and Archives Canada, Macdonald Papers, MG26-A, Volume number: 51, Microfilm reel number: C-1505. ("I desire to express my strong opinion that, in future, …the position of First Minister shall be held by one person…and that the system of dual First Ministers, which has hitherto prevailed, shall be put an end to. I think this is of importance…with a view to the complete consolidation of the Union which we have brought about.")
24. See e.g. Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the

perhaps a reaction is constitutional conventions changing without such an impetus and indeed, seemingly, for no reason. While it is tempting to suggest that this is no more than can be expected in the ephemeral world of political behaviour, this view sells short both the importance and the substantial character of conventions. Past examples of such change are not easy to find; indeed, I know of none.[25]

And this is unsurprising. Conventions could not be the crucially important "binding constitutional rules"[26] that they are on any account of Westminster-type government if they were but froth on a constitutional daydream. In order to guide behaviour, rules—conventions as much as laws—need to have at least a measure of permanence.[27] That conventions do work to guide both officials and, as the *Patriation Reference* suggests, even voters, entails that they are (relatively) stable rules, and this, in turn, suggests that they are not liable to random change for no particular reason. At best, the absence of a reason is illusory, and the conventions are responding to changes in the underlying "constitutional theory" that hidebound observers are failing to discern. At worst, something disturbing is happening. Three examples illustrate this dynamic, which I consider in order of, arguably, increasing seriousness.

1. *Appointing the Chief Justice of Canada*

One convention that has been disregarded and indeed displaced in recent years regulates the appointment of the Chief Justice of Canada. Compared to those I discuss below, it is arguably rather less important. As Peter McCormick notes, "ultimately, the chief justice is just one vote among the nine on the court," and not necessarily a vote in the majority.[28] The Supreme Court's functioning does not fundamentally depend on the Chief Justice's identity or the rule for choosing him or her. Even so, the Chief Justice does have a number of prerogatives and special functions, and the

Legacy of the Patriation Reference" (2011) 54 SCLR (2d) 117 at 132 (stating, albeit without evidence, that "there used to be acknowledged conventions about religious representation in Cabinet and on the Supreme Court" which "have properly been jettisoned as political mores have changed.")

25. The 19th-century rule, today best remembered for its role in the "double-shuffle" of 1858, that legislators had to resign and stand for a by-election upon appointment to the ministry is sometimes supposed to be an example. It is not. Far from being a convention, it resulted from the combined effect of the Act further to secure the Independence of Parliament, S Prov C 1857 (20 Vict), c 22 at ss III and VI.

26. Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms," (2019) 28:1 Const F Const 1 at 2.

27. Lon L Fuller, *The Morality of Law* (rev ed) (New Haven: Yale University Press, 1969) at 79-81.

28. Peter McCormick, "Choosing the Chief: Duality, Seniority, and Beyond" (2013) 47:1 J Can Studies 5 at 6.

way in which he or she is chosen can be consequential in ways small and not-so-small. McCormick points out that

> Chief justices preside over the hearing of cases for which they are on the panel, and over the post-hearing conference that follows. Chief justices decide whether a particular case will be referred to a panel smaller than the full court, and they also decide which justices will (and therefore which will not) sit on that panel and take part in the decision… When chief justices are on a panel…they direct the assignment of the writing of the majority reasons. The chief justice is also the public face of the Supreme Court, the person who speaks for the court on major issues when the occasion justifies, and the one with the best opportunity to command public and media attention for the speeches that justices now frequently give in a variety of venues.[29]

The Chief Justice is also *ex officio* the chair of the Canadian Judicial Council,[30] and thus has an important role in disciplinary proceedings against all federally-appointed judges in Canada, in addition to at least an informal role in disciplining the members of the Supreme Court.[31] And, of course, the Chief Justice serves as the administrator of Canada in the absence of the Governor General,[32] and so could, in theory, find him- or herself at the centre of constitutional politics in that capacity. McCormick is right, then, that the conventions governing the choice of the Chief Justice matter, even if they matter less than many others.

McCormick describes the history of the appointments to the office of Chief Justice. At first glance they appear to support either a convention requiring "duality alternation" (that is, alternation between Quebec and non-Quebec judges, or perhaps between francophone and anglophone ones) or a convention requiring the promotion of the most senior puisne judge (below some uncertain ceiling of proximity to mandatory retirement).[33] But a deeper study allowing for "[t]he chances of a false positive—of a choice dictated by completely different considerations, completely random with respect to the French/English question, but generating

29. *Ibid* at 7.

30. *Judges Act*, RSC 1985, c J-1, s 59(1)(a).

31. These disciplinary roles, and the way in which they intersect with the Chief Justice's position as the public face of the Supreme Court, came into focus with the recent resignation of Justice Brown in the wake of dubious misconduct accusations. See e.g. Leonid Sirota, "Image-conscious Supreme Court Chief Justice failed Russell Brown," *The National Post* (21 June 2023), online: <nationalpost.com/opinion/leonid-sirota-image-conscious-supreme-court-chief-justice-failed-russell-brown> [perma.cc/UC27-9FGH].

32. Letters Patent Constituting the Office of Governor General of Canada, Imperial Order-in-Council, proclaimed in force 1 October 1947, at s VIII.

33. McCormick, *supra* note 28 at 14.

alternation anyway"[34]—shows, he argues, that the seniority convention is far likelier to have been followed with respect to most appointments up to and including that of Chief Justice McLachlin in 2000. He points, in particular, to the promotion of Brian Dickson over Jean Beetz to succeed Chief Justice Laskin in 1984, which fits seniority being the decisive criterion, and undermines the relevance of alternation.[35]

But, as noted above, what makes a convention is not just regularity of practice, but its acceptance as mandatory by constitutional actors and its being rooted in constitutional principle. As to the former, McCormick notes that histories of the SCC "repeatedly refer to 'the seniority principle' or 'the seniority rule' or 'the tradition of appointing the senior puisne justice' as directing the choice of one chief justice after another."[36] The alternation principle, by contrast, goes unmentioned.[37] As for the constitutional reasons, these have to do with the independence of the SCC (and the judiciary more broadly). Denying the Prime Minister, who by convention advises the Governor General on the appointment of the Chief Justice, discretion to promote a politically sympathetic puisne judge serves to maintain a distance between the SCC and the government's priorities. In particular, it is very rare for a Prime Minister to both appoint a judge to the Supreme Court and then promote him or her to the Chief Justiceship; indeed, more often than not, the promoting Prime Minister has not even come from the same party as the one who made the original appointment.[38] Reasons for an alternation principle are not impossible to identify, but the emergence of the alternation practice, if indeed there was one by the time of McCormick's article's publication, did not map onto them clearly, if at all.[39] In particular, while one might surmise that the growing importance attached to bilingualism would support the duality-alternation convention, it seems odd that it was ignored by the Prime Minister who, first, saw through the original *Official Languages Act*[40] and then the *Canadian Charter of Rights and Freedoms*, which enshrined key principles of official bilingualism into constitutional law.[41]

Yet when Chief Justice McLachlin retired in 2017, she was succeeded neither by Justice Rosalie Abella (already 71 and so perhaps too close to

34. *Ibid* at 15.
35. *Ibid*.
36. *Ibid* at 16.
37. *Ibid* at 16-17.
38. *Ibid* at 18-19.
39. *Ibid* at 20.
40. RSC 1970, c O-2 (later repealed and replaced by the *Official Languages Act*, RSC 1985, c 31 (4th Supp).
41. *Constitution Act, 1982*, ss 16-23, being Schedule B to the *Canada Act 1982* (UK), c 11.

mandatory retirement at 75), nor by Justice Michael Moldaver (days shy of his 70th birthday), nor yet by Justice Andromache Karakatsanis, just 62, and thus eminently eligible, age-wise, but by the fourth-senior puisne judge, Justice Richard Wagner. The seniority convention was evidently disregarded, in favour of a Quebec francophone judge succeeding an anglophone from a common law province. McCormick points out that when Justice Laskin was promoted to the Chief Justiceship over the heads of more senior colleagues, this occasioned considerable controversy.[42] Yet not only was this not the case when Chief Justice Wagner was appointed,[43] but on the contrary, his appointment had been expected and seen as consistent with "tradition"[44] or indeed, in the words of a scholar of Canadian judicial politics, a "quasi-convention."[45] Indeed, it is the apparent consideration of Justice Abella for the appointment that was seen as inconsistent with tradition and at "risk [of] snubbing Quebec."[46]

In one sense, the seemingly universal acceptance of what seems to be a new rule for appointing a Chief Justice is a comparatively small matter. It is worth noting that, among the Quebec judges, Justice Wagner was the senior one, and insofar as that was the reason why he rather than Justice Gascon or Justice Côté was promoted, the principle of judicial independence reflected in denying the Prime Minister the freedom to choose whom he or she wants as Chief Justice is still respected. Like most of his predecessors, Chief Justice Wagner was appointed to this role by a different Prime Minister, and indeed one from a different party than the one who appointed him to the Supreme Court in the first place. One might even argue that, insofar as it respects the principles supporting the old convention (despite implementing them in a somewhat different way) as well as an additional principle of constitutional significance (long reflected in the appointment of the Governor General[47]), the approach followed was

42. McCormick, *supra* note 28 at 17.

43. See e.g. Kathleen Harris & Aaron Wherry, "Quebec jurist Richard Wagner named next Supreme Court chief justice," *CBC News* (12 December 2017), online: <cbc.ca/news/politics/chief-justice-supreme-court-1.4444163> [perma.cc/D9F8-FTDW] (recording uniform praise for the appointment, although, to be sure, it is rare for anything other than praise to be voiced in relation to the SCC).

44. "Appointment of a Quebec Supreme Court chief justice follows tradition," *CTV News* (12 December 2017), online: <montreal.ctvnews.ca/appointment-of-a-quebec-supreme-court-chief-justice-follows-tradition-1.3718921> [perma.cc/XA8Y-46RX]; Sean Fine, "Trudeau facing choice of new chief justice from Quebec or dark-horse candidate, sources say," *The Globe and Mail* (21 Nov 2017), online: <theglobeandmail.com/news/politics/trudeau-facing-choice-of-new-chief-justice-from-quebec-or-dark-horse-candidate-sources-say/article37047641/> [perma.cc/6QPP-WQPQ].

45. Emmett Macfarlane, "Richard Wagner is the right choice to be Supreme Court chief justice," *Maclean's* (13 December 2017), online: <macleans.ca/facebook-instant-articles/richard-wagner-is-the-right-choice-to-be-supreme-court-chief-justice> [perma.cc/FKN2-4RRB].

46. Fine, *supra* note 44.

47. Heard, *supra* note 3 at 36-37.

an improvement. Yet the seeming condemnation of one convention to oblivion and its possible replacement by another with no protest, indeed no awareness of what had just happened, is remarkable. And the other instances where conventions have been forgotten are not so benign.

2. *Public service neutrality*

A convention that is in danger of being disregarded or forgotten to considerable deleterious effect is that of civil service neutrality. Unlike the political executive—i.e. the ministry, headed by the Prime Minister—which "advises" the Crown in the exercise of its prerogative and statutory powers, but only for so long as it retains the confidence of the House of Commons, the civil service in Westminster systems is permanent and politically neutral. As the UK Cabinet Manual puts it, "[m]inisters are required to uphold the political impartiality of the Civil Service," which means among other things that "civil servants should not be asked to engage in activities likely to call into question their political impartiality."[48] Conversely, civil servants are expected to be "acting solely according to the merits of the case and serving equally well governments of different political persuasions."[49] While the UK Cabinet Manual does not state this explicitly, these rules reflect longstanding constitutional conventions. In *Osborne v Canada*, the Supreme Court observed that "[t]he existence of a convention of political neutrality, central to the principle of responsible government, …is not seriously disputed."[50] While it may be possible to argue that the neutrality of the public service is itself a principle, implemented by a range of more specific conventions,[51] in my view characterizing it as a convention is justified, since it is a single rule which lends itself to a consistent, generally applicable statement, as in the UK Cabinet Manual. Yet even an undisputed convention may be forgotten or otherwise disregarded.

While I focus on the behaviour of public servants, it is fair to note that some Canadian politicians have not held up their end of the neutrality bargain. A study of senior provincial civil servants has found significant political influence on promotions to the top rungs of the bureaucratic ladder.[52] At the federal level, in the run-up to the 2006 election that brought him to power, Stephen Harper claimed that "a Liberal civil service—at

48. UK, Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (London: Cabinet Office, 2011), at ss 7.2 and 7.3 [*UK Cabinet Manual*].
49. *Ibid* at s 7.4.
50. *Osborne*, *supra* note 18 at 86.
51. I am grateful to an anonymous reviewer for pressing this objection.
52. Christopher A Cooper, *At the Pleasure of the Crown: The Politics of Bureaucratic Appointments* (Vancouver: UBC Press, 2020).

least senior levels [of which] have been appointed by the Liberals" would serve as one of the "checks on the power of a Conservative government."[53] The imputation of partisanship is not in keeping with the convention of neutrality. Yet the event appeared to justify the suspicion, however uncalled for it may have seemed when voiced. Civil servants appear to have acted on "a conviction that they are better guardians of basic values of our democracy than elected officials," engaging in "passive (or semi-active) opposition to the elected government from within."[54] Harper left office with a parting letter of thanks to the civil servants, but as one report put it, "[t]heir reaction, in a nutshell [was]: don't let the door hit you on the way out."[55]

It is hardly a surprise that the change of government did not bring with it a return to civil service neutrality. The same report quoted the president of the Public Service Alliance of Canada union as "look[ing] forward to building a positive and constructive relationship with the new Liberal government where trust and respect for public service workers is restored."[56] Perhaps this was still a comparatively neutral expression of optimism in the face of a change of administration. But, days later, the new Prime Minister "Justin Trudeau paid a visit to…the headquarters of Canada's foreign affairs department," where he "was greeted by a rapturous, applauding throng of federal employees" in what the *Globe and Mail* would describe as "a cringe-inducing love-in."[57]

Christopher Cooper explains that, when the government was shaken by allegations that the Prime Minister's office sought to ensure that a politically connected engineering consulting firm would escape prosecution for corruption in its foreign activities, it was able to count on the "promiscuous partisanship" of the Clerk of the Privy Council, the head of the civil service.[58] When questioned by a parliamentary select

53. "Harper sees Liberals under every federal bed," *The Globe and Mail* (19 January 2006), online: <theglobeandmail.com/opinion/harper-sees-liberals-under-every-federal-bed/article1328244/> [perma.cc/VS5T-RBG2].

54. Konrad Yakabuski, "Yes, minister, no more: Today's bureaucrats have a different attitude," *The Globe and Mail* (28 September 2015), online: <theglobeandmail.com/opinion/yes-minister-no-more-todays-bureaucrats-have-a-different-attitude/article26551463/> [perma.cc/EH2W-4LCL] (the quoted words originally appeared in an article published pseudonymously by a senior official in an online journal that now appears to be inaccessible).

55. Stephanie Levitz, "'It has been an honour,' Harper says in parting note to public servants," *CTV News* (3 November 2015), online: <ctvnews.ca/politics/article/it-has-been-an-honour-harper-says-in-parting-note-to-public-servants/> [perma.cc/8CNU-P96B].

56. *Ibid*.

57. "Editorial: Civil servants don't get to pick their government. That's up to voters," *The Globe and Mail* (2 December 2015), online: <theglobeandmail.com/opinion/editorials/civil-servants-dont-get-to-pick-their-government-thats-up-to-voters/article27571139/ > [perma.cc/65Q4-E4J6].

58. Christopher A Cooper, "Promiscuously Partisan Public Servants? Publicly Defending

committee, the Clerk went "beyond explanation and description to defend and promote the government's reputation" and, in doing so, "moved away from objectivity—displaying truth-obfuscating tactics of withholding information, emphasizing certain facts over others and making false statements."[59] While it is conceivable that this was the result of an equal-opportunity servility rather than actual partisan alignment between the civil servant and his political masters, Cooper observes that this "testimony was perceived by some committee members and the public—including former senior public servants—as having abandoned impartiality in its promotion and defence of the government."[60]

More recently, a successor of that Clerk of the Privy Council commissioned a report,[61] which highlights ongoing challenges to the neutrality of Canada's federal public service. Indeed, Joseph Heath surmises that "the public service [being] concerned about increased opportunities for violations of neutrality (i.e. partisan behaviour) by its members on social media" is one of the reasons the report was commissioned.[62] And, to be sure, the report duly notes that "[a] professional, non-partisan public service continues to be critical to Canada's parliamentary democracy."[63] Yet it hedges the "commitment to impartiality and…willingness to set aside personal biases when making decisions" with "enabling public servants to…feel like they can be 'a whole person' at work," and notes that "it is now more common for public servants…to be vocal advocates for specific social justice causes, and that challenges can arise when trying to align outside interests with public service values and ethics."[64] As Heath notes, "more emphasis on political neutrality as a structuring condition on the ethics of public administration" would have been in order.[65]

Admittedly, the evidence for the proposition that the conventions of civil service neutrality are being forgotten in Canada is not unambiguous. It may well be that, on any number of occasions, civil servants provide the government with duly impartial advice. It may well be that they are doing

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and Promoting the Government's Reputation to the Detriment of Bureaucratic Impartiality and Truthfulness" (2023) 19 Int' J Pub Leadership 116 at 117.

59. *Ibid*.

60. *Ibid*.

61. Canada, Privy Council Office, *Deputy Ministers' Task Team on Values and Ethics Report to the Clerk of the Privy Council*, (Ottawa: PCO, 2023), online (PDF): <canada.ca/content/dam/pco-bcp/images/clk/dm-ve/rpt-eng.pdf>.

62. Joseph Heath, "Comment on the Values and Ethics Report to the Clerk of the Privy Council," *In Due Course*, 5 April 2024, online: <josephheath.substack.com/p/comment-on-the-values-and-ethics> [perma.cc/3HMG-V7HF].

63. Privy Council Office, *supra* note 61, at 4.

64. *Ibid* at 14.

65. Heath, *supra* note 62.

so now that the man whom some of them greeted with "a cringe-inducing love-in" has left office and been replaced by one whom "young, woke"[66] civil servants may regard with less affection.

But the incidents and the sentiments described above suggest that there is more than one bad apple spoiling the barrel, and furthermore that the people in charge are not resolute in addressing the problem. On the contrary, they seem happy enough to foreground the bad apples' feelings. Indeed, as Cooper suggests, and to use another putrid metaphor, the fish may be rotting from the head. Yet feelings offer no justification for disregarding or modifying the conventions of civil service neutrality. One may plausibly believe that "gender-neutral bathrooms" or novel "gender markers" on security forms are necessary to keep up with contemporary notions of inclusivity.[67] But that takes nothing away from the force of Justice Beetz's observation in *OPSEU*: "The government of a large modern state is impossible to manage without a relatively large public service which effectively participates in the exercise of political power under the supervision of responsible ministers."[68] This may have been said 37 years ago, in "days more barbarous than ours,"[69] but however much more enlightened our notions of diversity and inclusion have become, it is difficult to see how their evolution may have undermined the constitutional principle and practical reality identified in *OPSEU*.

A government that knows that some meaningful proportion of the public service is actively opposing it, whether as a result of sheer partisanship or in the name of bringing their whole selves to work, is, in effect, "without a…public service." So too, a government that knows that the leadership of the civil service does not seem all that fussed about or is actively complicit in this. Yet there seems to be a real risk that the crucial constitutional convention that prevents this unhappy situation is being left behind by the Canadian public service's complacency in the face of employee beliefs incompatible with its maintenance. The implications of this would reach far beyond those of a change in the conventions governing the choice of the Chief Justice.

3. *Government formation*

The conventions governing the formation of the political executive, especially in the wake of an election that produces a hung Parliament, i.e. one where no single party secures a majority of seats in the House

66. *Ibid*.
67. Privy Council Office, *supra* note 61 at 12.
68. *OPSEU*, *supra* note 18 at 42.
69. *Edwards v Canada (AG)*, 1929 CanLII 438 (UK JCPC).

of Commons are, if anything, even more fundamental. They are also, unsurprisingly, the subject of general agreement among those who know them, although they can be misstated by the unwary or incautious. Yet the 2015 election campaign produced an episode of collective amnesia from which Canada has not truly recovered.

The SCC's majority on the conventional question in the Patriation Reference outlined the basic principle of government formation:

> It is…a constitutional requirement that the person who is appointed prime minister or premier by the Crown and who is the effective head of the government should have the support of the elected branch of the legislature; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election. Other ministers are appointed by the Crown on the advice of the prime minister or premier when he forms or reshuffles his cabinet.[70]

The application of this rule in the aftermath of elections that produce single-party majorities ("most cases" in the first-past-the-post electoral system) poses no difficulty. If the winning party already had the majority prior to the election, the government simply continues in office, subject to any reshuffle by the first minister; if another one did, the outgoing first minister resigns and makes way for the leader of the incoming majority.[71] The difficulty, if indeed there is one, arises when no one party obtains a majority.

The orthodox view is that the applicable principle, regardless of the composition of a newly-elected legislature, is that the government must enjoy the confidence (or, in the *Patriation Reference*'s more colloquial term, "support") of the legislature. The existence of a one-party majority simply makes clear, as soon as the votes have been counted, where confidence lies.[72] Absent such clarity, "the current prime minister has a right to remain in office to meet Parliament" but "only to meet Parliament and not…to carry on governing into the future."[73] That is true whether or not the incumbent governing party is the largest in the new Parliament, provided always that no other party has a majority by itself.

But, alternatively, the incumbent can resign "and, therefore, allow another party to form a government."[74] This might be the consequence

70. *Patriation Reference*, *supra* note 1 at 878.
71. See e.g. Heard, *supra* note 3 at 48; Forsey, *Canadians*, *supra* note 7 at 3; Lagassé, *supra* note 26 at 11.
72. Cyr, *supra* note 9 at 389.
73. Heard, *supra* note 3 at 48; see also Forsey, *Canadians*, *supra* note 7 at 4; Cyr, *supra* note 9 at 418-19; Lagassé, *supra* note 26, at 6.
74. Heard, *ibid*; see also Forsey, *Canadians*, *supra* note 7 at 4

of, as Heard puts it, a sense of having "suffered a moral defeat"[75] or, less high-mindedly, of anticipating being unable to secure the legislature's confidence and wishing to avoid the prolonged embarrassment of a futile fight leading to inevitable defeat. It may well be the only tenable course of action politically, and from a political perspective, having many fewer seats than one of the opposition parties is surely a relevant consideration. But the purely political considerations that weigh on a first minister's mind are not of constitutional significance.

In Hugo Cyr's words, in a hung Parliament, one "cannot determine who will form the next government by relying entirely on the number of seats won by one party or another."[76] The idea that the party holding the plurality of seats will form the next government is at most a "custom," a regularity of practice that "lack[s] a firm rationale" and hence is not binding as a convention, whose "limitations…are exposed when an election produces a tight result, with two parties carrying a comparable number of seats."[77] At worst, "[a]cceptance of this [alleged rule] would transfer to the Governor General a most important power which properly belongs, and in a parliamentary democracy must belong, to the House of Commons."[78]

It is worth noting that the cabinet manuals of both the United Kingdom and New Zealand, which make the conventions of government formation explicit, are to the same effect. They emphasize the central importance of confidence and, accordingly, the requirement that the Prime Minister be the person who will be able to secure confidence;[79] they make no mention of a party's winning the plurality of seats having any significance;[80] and they are very insistent that the determination of where confidence lies is a matter for politicians, which the Sovereign or his representative ought to be

75. *Ibid*.
76. Cyr, *supra* note 9 at 389; Lagassé, *supra* note 26 at 6.
77. Lagassé, *supra* note 26 at 11.
78. Eugene A Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 UNBLJ 11. This seems to dispose quite decisively of the seemingly opposite view in in Eugene Forsey, "Professor Angus on the British Columbia Election: A Comment" (1953) 19:2 Can J Econs & Political Science 226 at 227 that "the leader of the largest party is entitled, as of right, to be asked to form a government." That statement is, in any case, immediately qualified, *ibid*: it applies "when a government is defeated either in Parliament or at the polls." While a "defeat at the polls" might be taken to describe all cases where another party wins a plurality of seats, the better reading—more consistent with Forsey's later view, as well as with that of other commentators—is that it refers to the opposition winning an outright majority.
79. *UK Cabinet Manual*, *supra* note 48 at ss 2.7 and 2.8; NZ, Cabinet Office, *Cabinet Manual 2023*, (Wellington: Cabinet Office, 2023) <dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual> [perma.cc/7SLY-CZCE] [*NZ Cabinet Manual*] at ss 2.2 and 6.42.
80. More than this, Cyr, *supra* note 9 at 430-431, shows that such a mention was pointedly removed from the draft of the *UK Cabinet Manual* following criticism.

kept out of.[81] The latter point would be of no relevance if the determination were as mechanical as finding out which party has won more seats than any other, which is why the constitutional nature of Forsey's suggestion mentioned in the paragraph above is, with great respect, uncertain. To be sure, the relevant conventions in the different Commonwealth realms might diverge. But no convincing argument for the proposition that this has happened so that Canadian conventions are now different from those applicable in the UK and New Zealand has been made.[82]

Resignation in the face of an opponent securing a plurality of seats in the House of Commons has been the practice of Canadian Prime Ministers since 1925.[83] Yet, as Heard notes, "this is an instance where a string of consistent precedents misleads one into thinking that a convention exists, but the precedents are not supported by constitutional principle."[84] And indeed people have, over time, been misled. In the *Patriation Reference*, the dissenting opinion on the conventional question mentioned a purported "rule that after a general election the Governor General will call upon the leader of the party with the greatest number of seats to form a government."[85] As we have seen, the majority judges were more careful. Heard notes that the Liberal party leaders, Paul Martin and Michael Ignatieff, expressed this view during election campaigns in 2005 and 2011 respectively, though the latter had to reverse himself following a "quiet backlash,"[86] while Hugo Cyr has noted that media have operated on the implicit assumption that this view was correct following elections in 2004–14.[87]

While Cyr argues that, in doing so, the media "do not describe the political situation, but shape it, wittingly or not,"[88] what is even more likely to shape government formation is the views of the political actors themselves. Remarkably, in 2015, all the major party leaders took the position that the plurality winner was entitled to form a government.[89] This

81. *UK Cabinet Manual*, *ibid* at 2.13; *NZ Cabinet Manual*, *ibid* at ss 2.2 and 6.44; see also Lagassé, *supra* note 26 at 9-10 (describing the principle that "it is for the parties in the legislature to determine who governs," without the Crown's involvement, as a "practice" somewhat short of a convention, in the Canadian context).

82. See Charlie Buck, "Conventions from on High," online (blog): *Double Aspect* (3 August 2023) <doubleaspect.blog/2023/08/03/conventions-from-on-high> [perma.cc/3S9U-KEHF] (attempting such an argument); Leonid Sirota, "Government Formation, Revisited," online (blog): *Double Aspect* (4 August 2023) <doubleaspect.blog/2023/08/04/government-formation-revisited> [perma.cc/AS8R-2NR9] (explaining why that attempt is not persuasive).

83. Heard, *supra* note 3 at 49.

84. *Ibid*.

85. *Patriation Reference*, *supra* note 1 at 857.

86. Heard, *supra* note 3 at 49.

87. Cyr, *supra* note 9 at 385-386 and the copious footnotes on these and the following pages.

88. *Ibid* at 386 (translation mine).

89. See Eric Adams, "Minority Governments: The Constitutional Rules of the Game," *The Globe*

was in the context of an election campaign so close and unpredictable that, less than a week before its conclusion experts confidently predicted a hung Parliament and saw nearly equal chances of Liberals and Conservatives having a plurality of seats.[90] Criticism followed,[91] but no stated changes of position. In the event, the 2015 election did not produce a hung Parliament but an unexpected Liberal majority. The 2019 and 2021 elections did result in a hung Parliament, but the Liberals remained the largest party and their leader remained Prime Minister without controversy.

However, in 2023 the prospect of a successor becoming Prime Minister despite failing to win even a plurality in the House of Commons at the next election provoked renewed discussion about whether the plurality party was entitled to form government. An unnamed advisor to the leader of the opposition acknowledged that the incumbent government was entitled to meet the House of Commons and secure its confidence, but promised to "go nuclear" if this were to happen.[92] A strategist who worked on the 2021 campaign claimed that "[t]here's just a natural sense among people that the party that won the most seats is the party that should form the government… It's easy to understand and it aligns with people's sense of fairness."[93] Without endorsing this perspective, one of Canada's leading columnists expected the opposition to "try everything in their power to call the government's legitimacy into doubt, appealing to precedent and popular belief—the government is the party that wins the most seats–over constitutional principle," which may well end "in some sort of crisis."[94] In

and Mail (18 September 2015), online: <theglobeandmail.com/opinion/minority-governments-the-constitutional-rules-of-the-game/article26406464> [perma.cc/8BKS-4USR] (quoting statements of the leaders of the Conservative, Liberal, and New Democratic parties in television interviews).

90. Bill Curry, "Post-election possibilities for a minority Parliament," *The Globe and Mail* (13 October 2015), online: <theglobeandmail.com/news/politics/post-election-possibilities-for-a-minority-parliament/article26794110> [perma.cc/HN5J-HKC5].

91. *Ibid*; see also John Ibbitson, "Governor-General could play key role if election ends with hung Parliament," *The Globe and Mail* (12 October 2015), online: <theglobeandmail.com/news/politics/govenor-general-could-play-key-role-if-election-ends-with-hung-parliament/article26775965> [perma.cc/69DE-N2U9]; Adrienne Clarkson, "Minority Governments: Time for the G-G to come out from behind the scenes," *The Globe and Mail* (14 October 2015), online: <theglobeandmail.com/opinion/minority-governments-time-for-the-g-g-to-come-out-from-behind-the-scenes/article26807855> [perma.cc/X7AF-9RDN] (decrying "ill-informed discussion that would seem to equate Canada's parliamentary system with the mysteries of the enthronement of the emperor of Japan").

92. Stuart Thomson, "With the Liberals and NDP working together, is it majority or bust for Poilievre?," *The Hub* (25 April 2023), online: <thehub.ca/2023/04/25/with-the-liberals-and-ndp-working-together-is-it-majority-or-bust-for-poilievre> [perma.cc/NKT4-BN4V].

93. *Ibid*.

94. Andrew Coyne, "Rule by the Second-Place: The Coming Crisis of Legitimacy in Federal Politics," *The Globe and Mail* (7 July 2023), online: <theglobeandmail.com/opinion/article-rule-by-the-second-place-the-coming-crisis-of-legitimacy-in-federal> [perma.cc/W34S-E9G7].

response, the editor of a conservative online publication hypothesized that the party's argument would be that "the Liberals had conspired with left-wing academics, the broader opinion elite and the (publicly funded) media to effectively overturn the election results," leading to "mass protests and even violence" in response to what he characterized as a breach of "convention."[95]

It would, no doubt, be somewhat premature to confidently conclude that the conventions of government formation have been forgotten in Canada. Yet the degree of confusion that already exists, as evidenced by the comments of the party leaders in 2015 (and indeed before that) seems undeniable. Of course, as Eric Adams observed at the time, "party leaders approach government formation not as scholars, but as politicians hoping to secure an electoral advantage, especially in the context of a too-close-to-call election campaign."[96] But insofar as conventions are dependent, at least in part, for their existence on their recognition by the relevant constitutional actors, the scholars' views may be beside the point. As the comments quoted in the preceding paragraph suggest, attempting to uphold constitutional orthodoxy may only result in the scholars' being accused of partisanship and even, in effect, something resembling treason.

This risks very serious consequences. Canada's system of government, like all Westminster-type systems, relies on the ability of the government to secure the approval of Parliament (especially the House of Commons[97]) for taxation and spending and, ideally, key items of its legislative agenda. More broadly, the support of a parliamentary majority is what ensures that the effective exercise of power by the ministers (on whose advice the crown exercises its prerogative and statutory powers) is democratically legitimate. A government that has the support of no more than a plurality in the House of Commons may find itself unable to secure funds and support for legislation from the rest of the House—in a word, to govern. Nor would it wield the Crown's powers legitimately. It thus seems inevitable that the acceptance of the view that a plurality winner of an election is constitutionally entitled (and not merely politically well positioned) to form government would entail the further claim that this winner is also entitled not to be opposed by a hostile majority of Parliament, and that

95. Sean Speer, "I agree with @acoyne that this post-election outcome is quite likely and possibly explosive" (8 July 2023), online: <x.com/Sean_Speer/status/1677643049806057472> [perma.cc/FU6B-ZR5V].

96. Adams, *supra* note 89.

97. *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 53 (UK) ("Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons"); Heard, *supra* note 3 at 145-47.

opposition is antidemocratic and illegitimate. But this would amount to a subversion not only of the principles of Westminster constitutionalism, but of democracy itself.[98]

III. *Causes*

The forgetting or disregard of conventions described above is remarkable, and puzzling in the absence of apparent changes to either broader institutional arrangements or the fundamental principles of Canada's constitution. It may perhaps be tempting to say that it is no more than should be expected. As Chief Justice Marshall argued in the United States, the constitution "establish[es] certain limits not to be transcended" by government institutions, and "that those limits may not be mistaken, or forgotten, the constitution is written."[99] If this essential precaution is not taken, one might chide, what can you expect but mistakes and forgetfulness? Perhaps they are indeed inevitable. Yet the conventions of responsible government, in particular, have been followed, not without disputes and perhaps quite serious mistakes,[100] but without the sort of casual negligence that seems to be apparent of late.

Why now, then? I cannot offer anything like a definitive explanation. Doing so would require knowing the thoughts and the motivations of a considerable number of politicians, their advisers, civil servants, and perhaps other people such as journalists. But two hypotheses, not necessarily mutually exclusive, let alone exhaustive, may be ventured. One might be described as institutional amnesia; the other, as populism.

Conventions may sometimes, and perhaps often, be ignored due to failures of institutional memory. For example, the remarkably long tenure of Chief Justice McLachlin, who outlasted three Prime Ministers (including one who was himself in office for nearly a decade), may plausibly have meant that, by the time she retired, not only people in the upper echelons of government but also journalists and many scholars simply had no recollection of the motivations and constraints that shaped her appointment, let alone her predecessors'. Turnover in the civil service may also be contributing to the dissipation of its institutional memory, including institutional memory of conventions. It may be more difficult to ascribe political leaders' seeming willingness to disregard the conventions

98. On the importance of opposition in democratic politics, see generally Jeremy Waldron, "The Principle of Loyal Opposition" in Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016) at 93.

99. *Marbury v Madison*, 5 US (1 Cranch) 137 at 176 (1803).

100. The King-Byng affair in Canada and the Australian constitutional crisis of 1975 are probably the most notorious examples of disputes and, plausibly, mistakes. But this is no place to argue about who, if anyone, actually acted wrongly in these cases.

of government formation to forgetfulness, given their sheer constitutional importance. Yet perhaps it really is part of the story too. After all, while hung Parliaments have been a regular feature of Canada's political life in the last 70 years, situations where the single largest party wasn't able and willing to form a minority government alone have been almost non-existent at the federal level, and very rare in the provinces. Meanwhile, Canada's increasing isolation from fellow Westminster-type democracies may be depriving politicians from the stock of precedents that they have produced, such as the government formed by the second-, third-, and fourth-largest parties in New Zealand in 2017.[101]

That said, institutional amnesia is probably not all there is to it. As the comments quoted in the discussion of the conventions of government formation above suggest, there is also a considerable degree of what might be characterized as populism involved. Of course, populism is a concept that lacks a generally accepted definition, partly because it is often used as an epithet more than a means of sober analysis, and partly because, as those who do endeavour to use it in the latter way agree, it is protean and adaptable.[102] Alison Young adopts a definition of populism as an "ideology which focuses on promoting the will of 'the people' against the will of the elites who currently occupy a position of governmental power."[103] What I have in mind is similar, but with a number of qualifications.

First, I would emphasize the importance not only of the will but also of the sentiments and beliefs of the people, from which the will actually or at least hypothetically proceeds. Young argues that "[i]t is not just populists …who appeal to emotion over rationality; it is politicians and society writ large."[104] That is no doubt true,[105] but this hardly diminishes the centrality of popular emotion and belief to populism. Populism need not be the characteristic of a given political party or movement. It is a disposition—an attitude, a way of thinking. It is quite possible for "politicians and society writ large" to be populist, albeit no doubt to different degrees, if

101. See e.g. Eleanor Ainge Roy, "Jacinda Ardern to be New Zealand's next PM after Labour coalition deal," *The Guardian* (19 October 2017), online: <theguardian.com/world/2017/oct/19/jacinda-ardern-new-zealand-prime-minister-labour-coalition-deal-winston-peters> [perma.cc/7KYN-9ZWD](noting that the Labour party had ten fewer seats, in a 120-seat House of Representatives, than the formerly governing National Party; Labour and its coalition partner New Zealand first together had one seat fewer than National, but would govern with the support of the Greens).

102. See Alison L Young, "Populism and the UK Constitution" (2018) 71:1 Current Leg Probs 17 at 19-22 for an overview.

103. *Ibid* at 22, drawing on C Mudde & C Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017).

104. Young, *ibid* at 24.

105. See Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton: Princeton University Press, 2007).

the promotion of the will of the people and the conflict with elites is one of their central concerns.

I would also note that, despite its emphasis on the conflict between the people and the elites, populism is not an appeal to unalloyed direct democracy. It does not reject institutions as a category. Although a given populist current may attack institutions as currently constituted or even advocate the dismantlement of some of them, populism's general concern is rather to ensure that institutions act in accordance with the will of the people. In short, populism is the creed of those who would recognize themselves in the (probably apocryphal) words: "There go the people. I must follow them, for I am their leader."[106]

The populist influence is obvious in the reasons given for the misunderstanding of the conventions of government formation described above. The misguided interpretation of the constitution is given the imprimatur of "a natural sense among people" of how the rules ought to work and the "people's sense of fairness." By contrast, the correct understanding of the applicable conventions is associated with the elites—"left-wing academics" and state-funded media. In this perspective, the self-interest of the politicians who misinterpret conventions in a way that makes it easier for them to take power is not to the detriment of their authoritativeness, since they seek to align the functioning of the institutions with the people's expectations and desires. It is scholars and journalists, however little any of them may personally stand to benefit, who are corrupt, because they would deny the people their hearts' desire.[107]

Populism may seem less relevant to the other instances of the disregard of conventions described above. One might think that the people have no strong opinions about matters internal to the Supreme Court of Canada, for example, such as the identity of the Chief Justice. But that would be to disregard an opinion that deserves some consideration: that of the Court itself. The court has declared that the rules reserving three of its nine seats to Quebec's lawyers and judges of its superior courts[108] serve not only to ensure that the court has sufficient expertise in the province's civilian private law, but also to guarantee "representation of Quebec's legal traditions *and social values* on the Court," thereby "enhancing the

106. See Suzy Platt, ed, *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service*, (Washington, DC: Library of Congress, 1989) at no 1021 (attributing these words to Alexandre Ledru-Rollin but noting other attributions, as well as a biographer's comment that the attribution to Ledru-Rollin is "probably apocryphal"; a Google search yields multiple attributions to Benjamin Disraeli, all of them unsourced).

107. See Cyr, *supra* note 9 at 394, describing a similar dynamic at the time of the 2008 "prorogation crisis."

108. *Supreme Court Act*, RSC 1985, c S-26, s 6 [*Supreme Court Act*].

confidence of Quebec in the Court."[109] In fairness to the Court, there is at least some evidence that this view is indeed shared by the public.[110] Yet the sense that the Supreme Court's role is not merely to apply expertise to legal problems of public importance, as for instance the criteria it must apply for granting leave to appeal might suggest,[111] but to ensure representation of social values, is of a piece with the populist belief that institutions must align themselves with the people. The embrace of the Quebec-rest-of-Canada alternation in preference to pure seniority for the choice of the Chief Justice makes sense if maintaining that alignment is as or more important than a focus on expertise (or at any rate experience) that the seniority convention implies.

Populism, then, contributes to the forgetting of conventions because it emphasizes the people's sense of justice and fairness, as well as their desire to see institutions align themselves with their values and beliefs. When the relevant actors, especially political decision-makers, focus on following the people, they no longer attach much importance to constitutional conventions, which crucially depend on the knowledge and the beliefs of elites and experts. A folk constitution, detached from both history and underlying principles, substitutes itself for the constitution as understood by those whose opinions would carry more weight in a less populist political climate.

IV. *What might be done?*

What responses are possible in the face of a forgetting or disregard of conventions caused by some combination of a loss of institutional memory and populist pressure? I outline three possibilities: first, protest and criticism directed at the relevant constitutional actors; second, official but non-binding codification of conventions; and third, judicial enforcement, notably, but not exclusively, via a codification of conventions in binding constitutional provisions.

1. *Hue and cry*

The most straightforward solution to the ignorance or forgetting of constitutional conventions, in the sense that it does not require any institutional, let alone constitutional, reform, is a pointed reminder of the conventional rules to alert those about to break them or raise the alarm at

109. *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21 at para 56 [*SCA Reference*]

110. Policy Options, online: <policyoptions.irpp.org/magazines/august-2023/judicial-system-confidence> [perma.cc/2FUW-HPML] (claiming that 74 per cent of respondents to a survey agree that "[t]he decisions made by the Supreme Court should reflect the current values and beliefs of Canadian society").

111. *Supreme Court Act*, *supra* note 108 at s 40(1).

their having been broken. I refer to this as "hue and cry," for short. Andrew Harding suggests that civil servants may have an especially important role to play in this regard, because unlike "[p]oliticians, who remain in ministerial office for relatively short periods of time" and are subject to short-term political pressures, they are able "to take a constitutional view of matters and to remind ministers of the constitutional implications of their actions."[112] Of course, this perspective may be unduly optimistic if the top ranks of the civil service are themselves mired in partisanship. But political actors, academics, journalists, and members of the civil society can raise a hue and cry too. So long as the reason why a convention is at risk of being disregarded is merely institutional amnesia, or perhaps if the populist pressures contributing to it are not especially strong, hue and cry may be enough to alert the relevant actors to the risks they are about to incur and the damage they may inflict on the constitution.

One example where hue and cry succeeded at averting an impending breach of convention occurred in the process of the appointment of a judge to the Supreme Court of Canada in 2016. In addition to the requirement that three of the Court's nine judges be, prior to their appointments, sitting judges of Quebec's superior courts or members of the Quebec bar, a well-established convention allocates three seats to Ontario lawyers or judges, two from those from the Western provinces, and one to Atlantic Canada.[113] Despite this, when Justice Thomas Cromwell, from Nova Scotia, retired, the Canadian government's announcement seemed to invite applications from "[q]ualified lawyers and persons holding judicial office from across Canada" to succeed him.[114] The convention of regional representation was at risk of being ignored.

However, the government's position provoked vigorous criticism. The then-president of the Canadian Bar Association addressed a letter to the Prime Minister and Justice Minister "urging them to reconsider respecting the custom of regional representation."[115] Scholars explained the raison

112. Andrew Harding, "Conventions and Practical Interpretation in Westminster-type Constitutional Systems" (2022) 20:5 Intl J Constitutional L 1914 at 1926-1927.

113. Heard, *supra* note 3 at 164-165; but see Paul Daly, "The New Supreme Court of Canada Appointment Process: Some Thoughts," online (blog): *Administrative Law Matters* (5 August 2016) <administrativelawmatters.com/blog/2016/08/05/the-new-supreme-court-of-canada-appointment-process-some-thoughts> [perma.cc/GY3U-3WSP] (claiming that "[c]onventions are fluid").

114. Prime Minister of Canada, "New process for judicial appointments to the Supreme Court of Canada" (2 August 2016), online: <pm.gc.ca/en/news/backgrounders/2016/08/02/new-process-judicial-appointments-supreme-court-canada> [perma.cc/M7S3-8Z7R].

115. Joanna Smith, "Supreme Court short list to include Atlantic Canadian judges: minister," *The Globe and Mail* (11 August 2016), online: <theglobeandmail.com/news/national/feds-have-obligation-to-appoint-judges-quickly-beverley-mclachlin/article31375419> [perma.cc/EY53-5ZP4].

d'être of the convention of regional representation[116] and emphasized its constitutionally binding character.[117] Most important, in all likelihood, was political opposition, the governing "Liberals [being] repeatedly grilled on the issue during question period."[118] Ultimately, the House of Commons unanimously agreed to a motion, introduced by Conservative MP (and former Justice Minister) Rob Nicholson, calling "on the government to respect the custom of regional representation when making appointments to the Supreme Court of Canada and, in particular, when replacing the retiring Justice Thomas Cromwell, who is Atlantic Canada's representative on the Supreme Court."[119]

When the next vacancy on the Supreme Court of Canada, created by the retirement of Chief Justice Beverley McLachlin, a Western Canadian, was filled, the government, by its own account, "listened…to Canadians from coast to coast to coast, and agree[d] that regional representation is" not merely "important" but "fundamental."[120] The search for McLachlin CJ's replacement "was limited to applicants from western Canada—that is, British Columbia, Alberta, Saskatchewan, and Manitoba—as well as from northern Canada, including the Northwest Territories, Nunavut, and the Yukon."[121] Regional representation had not only survived, after all, but arguably came out stronger from this near-death experience.

But how much encouragement can one take from this episode? In some ways, the circumstances were unique. For one thing, the convention at issue was especially clear and straightforward. In contrast to that of public service neutrality it was not a matter of nuance. In contrast to the appointment of the Chief Justice, it is one that is applied with some frequency and regularity. In contrast to the rules of government formation, it needs no historical or overseas precedents to understand. The other reason why the convention of regional representation may have been an unusually easy one to defend is that a political constituency could be mobilized on its behalf. In a committee meeting after Rowe J's appointment

116. Robert Schertzer, "Why regional representation on the Supreme Court does (and doesn't) matter," *Policy Options* (17 August 2016), online: <policyoptions.irpp.org/fr/magazines/2016/08/why-regional-representation-on-the-supreme-court-does-and-doesnt-matter> [perma.cc/8B5B-RD22].

117. Leonid Sirota, "Unconstitutional," online (blog): *Double Aspect* (15 August 2016) <doubleaspect.blog/2016/08/15/unconstitutional> [perma.cc/4BJF-HWYC].

118. Katie Simpson, "MPs unanimously support regional representation for Supreme Court," *CBC News* (27 September 2016), online <cbc.ca/news/politics/mps-vote-in-favour-of-regional-representation-scc-custom-1.3781520> [perma.cc/SW3W-JR3A].

119. House of Commons, Journals, 42-1, Vote No 109 (27 September 2016).

120. House of Commons, Standing Committee on Justice and Human Rights, Evidence, 42-1 , No 72 (4 December 2017) at 15:35 (Hon Jody Wilson-Raybould).

121. *Ibid*.

had been announced, a Liberal MP observed: "I'm from Atlantic Canada. I'm a lawyer from Nova Scotia, and I know that my colleagues and I were watching with interest to see what would happen with regard to the custom of regional representation. We believed that that was an important aspect, and it was part of the process."[122] Other conventions may not have regional lobbies within governing majorities to watch over them.

Yet such lobbies (whether regional or otherwise constituted) may be essential. Although it is customary to say, as a majority of the SCC did in the *Patriation Reference*, that "the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate,"[123] the ignorance of the public about the constitution makes it a most unlikely backstop for the enforcement of constitutional rules. Hue and cry may succeed when institutions, or sufficiently important factions within them, are inclined to listen, but not otherwise. Tellingly, the voluminous scholarship on government formation cited here, some of it produced with the explicit intention to enlighten the public and the political actors and so avert a potential constitutional crisis,[124] appears to be having no effect.

2. *Cabinet manual*

A somewhat more onerous solution, in terms of the demands it places on government institutions, is the codification of constitutional conventions in an authoritative but not legally binding compilation.[125] I will refer to it as a cabinet manual, drawing on the names of such compilations in the United Kingdom and New Zealand,[126] although, as Vanessa MacDonnell and Philippe Lagassé have argued, Canada might do well not to follow that model exactly.[127] A cabinet manual can provide an authoritative record of key conventions to which politicians can refer to guide their choices and which citizens and civil society actors can use to support criticism of these choices. It can thus be a tool against institutional amnesia and a support in hue and cry efforts.

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122. House of Commons, Standing Committee on Justice and Human Rights, Evidence, 42-1, No 30 (24 October 2016) at 16:20 (Colin Fraser).
123. *Patriation Reference*, *supra* note 1 at 882-883.
124. Cyr, *supra* note 9 at 397.
125. Bowden & MacDonald, *supra* note 6 at 372-73 argue strenuously against such a use of "codification": for them, the term implies legal enforceability. In my view, however, the essence of codification is the aspiration to completeness, rather than the legally binding nature of the code.
126. Respectively *UK Cabinet Manual* and *NZ Cabinet Manual*, *supra* notes 48 and 79. Both include summaries of other rules, ranging from legislation to cabinet procedures, in addition to conventions.
127. Philippe Lagassé & Vanessa MacDonnell, "Writing Canada's Political Constitution" (2023) 48:2 Queen's LJ 27 at 39.

In both the United Kingdom and New Zealand, the need to bring constitutional conventions to the attention of the public was a key motivation behind the compilation of cabinet manuals. The brief foreword to the UK Cabinet Manual authored by David Cameron, the Prime Minister at the time the manual was compiled, explains that in it "conventions determining how the Government operates are transparently set out in one place. Codifying and publishing these sheds welcome light on how the Government interacts with the other parts of our democratic system."[128] Similarly, the Prime Minister's foreword to the current edition of the New Zealand Cabinet Manual describes it as "part of New Zealand's constitutional arrangements, documenting the executive's view of how it functions and the main conventions that operate within government."[129]

The late Peter Russell has called for Canada to adopt its own cabinet manual, describing this as "[a] project to reduce constitutional illiteracy."[130] He noted that in both New Zealand and the United Kingdom, the election of hung Parliaments and the attendant issues of government formation provided the impetus for, respectively, the prominence and the creation of cabinet manuals. In the circumstances, cabinet manuals provided important guidance for political actors.[131] But, in Russell's estimation, cabinet manuals also serve to promote voters' understanding of the constitutional rules. Indeed, "[m]aking the Cabinet Manual available on the internet was a giant step in increasing the constitutional literacy of New Zealanders."[132] If this could be achieved in Canada, then not only would politicians have a convenient aide-mémoire to hand, but the gap between the folk constitution they are tempted to invoke and follow and the real one would narrow or disappear.

Unfortunately, Russell provided no evidence in support of his claim about the "giant" impact of the New Zealand cabinet manual, and no reason to think a cabinet manual *could* have such an impact. New Zealanders themselves are not sanguine about the level of popular understanding of their constitutional arrangements. A decade ago, a panel appointed by the government noted the existence of a "consensus that our constitution should be more easily accessible and understood."[133] Shortly thereafter,

128. David Cameron, "Foreword by the Prime Minister" in *UK Cabinet Manual*, *supra* note 48 at iii.
129. *NZ Cabinet Manual*, *supra* note 79.
130. Peter H Russell, "A Project to Reduce Canadians' Constitutional Illiteracy" (2016) 25:3 Const Forum Const 91.
131. *Ibid* at 93 (New Zealand) and 94 (United Kingdom).
132. *Ibid* at 93.
133. NZ, *Constitutional Advisory Panel, New Zealand's Constitution: A Report on a Conversation* (Full Report) (Wellington: Constitutional Advisory Panel, 2013) at 16. In fairness, I would note that this panel received well over 5,000 submissions, in a country of, at the time, fewer than five

would-be constitutional reformers invoked the presence of "a plethora of obscure conventions…and manuals" as a key reason for advocating that the constitution be codified, shorn of its non-legal components, and entrenched.[134] While I am not in a position to assess the accuracy of these concerns, which may presumably be exaggerated too, it seems safe to say that, at a minimum, a cabinet manual is no panacea.

Indeed, there is no reason to think a cabinet manual, even a clearly written and easily accessible one, can solve the problem of voter ignorance about the constitution. As Ilya Somin notes, in 2014, "only 36 percent of Americans could even name the three branches of the federal government," while "35 percent could not name even one"[135]—despite the first three Articles of the Constitution of United States beginning by "vest[ing]," respectively, the "legislative," "executive," and "judicial" powers.[136] The writers of a cabinet manual would be hard-pressed to express themselves more clearly. Yet, as Somin points out, "[d]emand for information, not supply is the main constraint on political"—or constitutional—"learning in a world where most people are rationally ignorant about politics."[137] Rationally, because "an individual voter has little incentive to become well informed about politics"[138] or constitutional affairs, since he or she "has virtually no chance of influencing the outcome of an election."[139]

As a result, a cabinet manual cannot do very much to prevent conventions being forgotten or ignored, although it might have other benefits.[140] It can provide some protection against institutional amnesia, but only if the relevant convention has first been recorded there. This would no doubt be the case for the conventions governing government formation, but might not be for some others, such as those dealing with the appointment of the Chief Justice, which might escape the compilers' attention.[141] A cabinet manual will likely not be especially effective against the development of folk constitutional ideas and consequent populist pressures. One would

million people, which one might think suggests an impressive level of popular engagement with the constitution.

134. Geoffrey Palmer & Andrew Butler, *A Constitution for Aotearoa New Zealand* (Wellington: Victoria University Press, 2016) at 9-10.

135. Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*, 2nd ed (Stanford, CA: Stanford University Press, 2016) at 20 (footnote omitted).

136. US Const, arts I-III.

137. Somin, *supra* note 135,at 91.

138. *Ibid* at 77.

139. *Ibid* at 75.

140. Lagassé & MacDonnell, *supra* note 127 at 30 (arguing for giving political actors "an opportunity to reflect on the political rules and norms").

141. See e.g. *ibid* at 46 (not mentioning appointments to the Supreme Court in their list of topics for inclusion in a compilation of the rules of the political constitution).

hope that it would commit an incumbent government that took part in its drafting, or at least clearly endorsed a pre-existing version, not to break the rules set out in it.[142] But it could probably not bind an opposition party lacking such investment. On the contrary, appeals to a cabinet manual could be represented as yet another instance of special pleading by elites, to be ignored at best and actively resisted at worst. The fact that a cabinet manual is compiled by the executive of the day may render it inherently suspect to populists, even if its "content…is not party political" but "a record of fact."[143] And, of course, one need not be an ill-informed populist to worry about the executive writing a cabinet manual in a manner that enshrines partial, controversial, or doubtful understandings of conventions. The process of compiling a cabinet manual must be carefully designed to avoid partiality or even the appearance of partiality.[144] But that may not be enough.

3. *Judicial enforcement*

The final, and likely the least feasible, response to the issue of conventions being forgotten or neglected would be to make them judicially enforceable. This can be brought about in a number of ways, from courts simply enforcing conventions without any prior authorization, to legislative codification, to entrenchment in an amendment to the constitution of Canada. The benefit of judicial intervention is its binding character. A court ruling cannot be dismissed as mere academic or journalistic opinion, or a contentious interpretation of uncertain rules. Judgments must be followed even if they are, in fact, controversial or indeed mistaken interpretations of uncertain rules[145]—unless, of course, one is willing to take the step into outright lawlessness.

While the orthodox view of constitutional conventions suggests that their judicial enforcement is not possible "without expression in imperative constitutional text or statute"[146]—and perhaps, not even then[147]—courts may be able to enforce the substance of conventional rules

142. See *ibid* at 50-52.

143. Cameron, *supra* note 128 at iii.

144. See Lagassé & MacDonnell, at 48-49 (discussing these concerns and suggesting ways to address them).

145. The risk of mistake is often invoked as an argument against judicial enforcement or even recognition of conventions: see e.g. Dodek, supra note 24. Whether judges would get conventions wrong more frequently than the law, and whether, if so, this outweighs other reasons that may exist for enforcing conventions are questions outside the scope of this article.

146. *Patriation Reference*, *supra* note 1 at 784.

147. *Miller I*, *supra* note 1 at paras 148-149 (disclaiming any ability to enforce a convention that had been codified in statute because "[w]e would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts" and "context

by designating them as something else. The Supreme Court of Canada arguably did that in *Reference re Senate Reform*,[148] where it opined that any change to "constitutional architecture" would require an amendment pursuant to Part V of the *Constitution Act, 1982*.[149] On one view, at least, this "architecture" consists of constitutional conventions.[150] Recent decisions of UK courts, which have begun to treat principles underpinning conventions as legally binding limits on the prerogative powers[151] that many, although not all, conventions circumscribe, point to another approach for effective judicial enforcement of conventions, foreshadowed by Fabien Gélinas in Canada.[152] But one might also argue, or at any rate a Canadian judge has recently argued that (at least some?) conventions "form part of Canada's federal constitutional common law in the sense they are judge-made rules,"[153] the *Patriation Reference*'s rejection of just this argument notwithstanding.[154] On this approach, "the courts are entitled and may recognize [conventions] in the appropriate case through the Court's declaratory power, notwithstanding they are not laws that may be enforced by the courts."[155] This, however, is quite heterodox.

Beyond the greater or lesser heterodoxy of these approaches, the difficulty they present is that it will often be difficult to bring the kind of proceedings where the courts could deploy them, even if they are willing to do so. To be sure, the legality of at least three judicial appointments has

supports our view that the purpose of the legislative recognition of the convention was to entrench it as a convention").

148. 2014 SCC 32 [*Senate Reform Reference*].

149. Being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

150. Leonid Sirota, "Immuring Dicey's Ghost: The Senate Reform Reference and Constitutional Conventions" (2020) 51:2 Ottawa LR 313 [Sirota, "Ghost"]. For other interpretations of the case, see e.g. Kate Glover, "Structure, Substance and Spirit: Lessons in Constitutional Architecture from the Senate Reform Reference" (2014) 67 SCLR (2d) 221; Michael Pal, "Constitutional Amendment After the Senate Reference and the Prospects for Electoral Reform" (2016) 76 SCLR (2d) 377; Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's Senate Reform Reference" (2018) 68:4 UTLJ 661; Emmett Macfarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" (2022) 55:2 Can J Political Science 322.

151. *R (Miller) v Prime Minister*, [2019] UKSC 41 [*Miller II*]. For an argument for this interpretation of Miller, see Leonid Sirota, "The Case of Prorogations and the Political Constitution" (2021) 3 J Commonwealth L 103. See also *R (Tortoise Media) v Conservative Party*, [2023] EWHC 3088 at para 46 (suggesting "a scope for reviewability and justiciability in relation to advice to the Sovereign as to the appointment of a Prime Minister": one would previously have thought that the Sovereign's appoint of a Prime Minister was governed by conventions alone, as discussed above).

152. Fabien Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la 'sécession' du Québec : le fantôme du rapatriement" (1997) 57:2 RB Québec 291.

153. *Hameed v Canada (Prime Minister)*, 2024 FC 242 at para 122 [*Hameed*].

154. *Patriation Reference*, *supra* note 1, at 784.

155. *Hameed*, *supra* note 153, at para 122.

now been challenged in Canada,[156] and it is not inconceivable that a future promotion of a puisne judge of the Supreme Court to the office of Chief Justice could be challenged too, perhaps by way of a reference initiated by a "snubbed" province, however unseemly the resulting spectacle of a Supreme Court forced to pronounce on the competing claims of two of its members would be. But a claim to force the leadership of the public service to behave itself, let alone to take a hard line on future "love-ins" or even on bureaucratic resistance to a politically obnoxious government, is not easy to contemplate. Nor could the courts stop a political party "going nuclear" over a violation of folk constitutional norms rooted in a misguided "sense of fairness."

Legislation or constitutional amendment, for its part, would provide a more secure foundation for judicial enforcement than the various creative jurisprudential approaches described above. If it is true that courts interpret written constitutional provisions more accurately than they identify conventions, this would also reduce the likelihood of mistakes. Putting conventions down into written constitutional words could also serve a pedagogical role even in the absence of enforcement. Indeed, one might hope that the existence of such provisions would obviate the need for judicial enforcement altogether. That said, the codification of conventions in statutory or constitutional provisions would probably do little, if anything, to address the difficulty of identifying viable claims, and claimants, through which they might be enforced. And it would come with its own difficulties and problems.

Drafting would be one. A cabinet manual can afford to be "written in non-technical, easily understood language."[157] A statutory or constitutional provision could not. It would need to be precise and explicit, at the risk of having the courts shy away from applying it, as in *Miller I*. Indeed, whatever one thinks of that decision,[158] judicial reluctance to engage in matters of high politics, especially government formation, without the clearest of laws to follow and justify the courts' actions would be understandable. Judicial involvement, especially in the face of strong populist pressure, would risk undermining the willingness of political actors (and ultimately

156. *SCA Reference*, *supra* note 109; *Quebec (AG) v Canada (AG)*, 2015 SCC 22; The Canadian Press, "Judicial rights group challenges judge's appointment to Quebec Superior Court," *Global News* (14 September 2025), online: <globalnews.ca/news/11422995/droits-collectifs-quebec-robert-leckey/>.

157. Russell, *supra* note 130 at 93.

158. See e.g. Harding, *supra* note 112 at 1922 ("This aspect of the ruling in Miller I, notwithstanding its reiteration of the classic convention versus law theory, is deeply problematic in terms of the hierarchy and evolution of laws and the manner in which we repeatedly see conventions enacted in law").

voters) to follow court rulings. Courts may find themselves obliged to make rulings knowing that these stand a real chance of being disobeyed or at least provoking calls for disobedience, which would make already politically charged cases even more difficult; and hard cases, as is well known, make bad law.

The constitutionality of ordinary legislation attempting to codify conventions could also be challenged. Most obviously, this would be the case when conventions contradict explicit provisions of one of the Constitution Acts.[159] But even in other cases, the argument could be that such legislation, especially insofar as it changes pre-existing conventions at all, affects the "constitutional architecture." Legislation to codify conventions would also run another risk, shared with a cabinet manual but made more concerning by its binding character: that of partisanship. A codification enacted with the support of only one party or even a coalition excluding a significant opposition force would risk being perceived as an attempt to impose that party or coalition's understanding of the rules on those who do not share it—quite possibly with the intent or effect of helping that party or coalition remain in office in the future.[160] Unlike a partisan cabinet manual, it could not simply be ignored. If legislative codification of conventions is ever contemplated, it should only be enacted with the broadest cross-partisan support—but giving the opposition a veto in this way makes the enactment less likely.

A constitutional amendment, although it can be enacted along partisan lines in the House of Commons,[161] would at least have the imprimatur of substantial consensus among provincial legislatures, the exact scope of which may vary depending on the convention at issue. Of course, it is precisely the need to secure such broad consensus that makes the Constitution of Canada very difficult to amend, at least through the procedure provided by Part V of the *Constitution Act, 1982*.[162] Each of the numerous political actors whose concurrence an amendment under Part V requires may have an incentive to resist any attempt to prevent them from

159. Scholtz, *supra* note 150, at 693; Sirota, "Ghost," *supra* note 150, at 345.
160. Compare Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299 (describing a similar dynamic in relation to election law).
161. *Constitution Act, 1982*, *supra* note 41, s 38(1) (requiring "resolutions of the Senate and the House of Commons" to enact an amendment) and s 47 (allowing a resolution of the Senate to be dispensed with on certain conditions).
162. See Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85 (suggesting that the Constitution of Canada may be the world's most difficult to amend); but see Richard Albert, "The World's Most Difficult Constitution to Amend?" (2022) 110:6 Cal L Rev 2005 (making the same suggestion regarding the US Constitution).

appealing to the folk constitution or otherwise constrain their freedom of political action.

A further concern with the entrenchment of constitutional conventions (which would apply, but with less force, to codifying them in ordinary legislation) is that it would stop their evolution and that of the constitution as a whole, to the constitution's detriment. This concern has been raised in critical responses to the *Senate Reform Reference* and its treatment of conventions and "constitutional architecture."[163] While it may have been inapposite there, it would have more force in relation to an attempt to entrench conventions by constitutional amendment. Whether one considers that the loss of flexibility is worthwhile depends, in part, on one's attitude to a broader issue in constitutional law: whether one regards it as directed at enabling change for the better or at arresting change for the worse.[164] If one is generally more worried about using the heavy hand of the law to impede beneficial change (of which the new convention of alternation in the office of the Chief Justice of Canada may be an example), then codification of conventions is to be resisted. If, by contrast, one is concerned that constitutional innovation, especially innovation without "reflection and choice"[165] both of the necessary quantity and channelled through the right procedures, is more likely to be deleterious, then codification, indeed quite rigid codification, is attractive. But be that as it may, the prospects of such codification ever being effected are most uncertain.

Conclusion

I have argued some conventions of Canada's constitution, including ones that are central to its functioning, have been or are in danger of being forgotten and disregarded. In some cases, this may be more cause for puzzlement than regret, as with the conventions governing the appointment of the Chief Justice of Canada. But in others, as with the convention of civil service neutrality and, above all, that governing government formation in a hung Parliament, this process will upset and indeed upend the assumptions about how government institutions are supposed to work and interact with one another and with the voters. I have suggested that the reasons for this are at least twofold. On the one hand, institutional amnesia leads to important conventions being overlooked. On the other, populism

163. Glover, *supra* note 150 at 248, 251; Scholtz, *supra* note 150 at 666.

164. See Leonid Sirota, "More v Roper: A Comment on Lawrence Solum's Defence of Originalism" (2017) 31:3 Diritto pubblico comparato ed Euoropeo Online 635 (addressing this issue in the context of constitutional interpretation).

165. Alexander Hamilton, "The Federalist No. 1: Introduction" in Ian Shapiro, ed, *The Federalist Papers* (New Haven: Yale University Press, 2009) at 7.

means that political actors, on whose behaviour and beliefs the continued existence of conventions depends, prefer following the preferences and intuitions of voters who are simply ignorant about the constitution.

This is not a good thing. At the very least, significant constitutional change should not happen by accident, because the relevant actors have simply forgotten what the rules are (as seems likely enough to have happened with the appointment of the Chief Justice and perhaps with the neutrality of the civil service), or because they have taken advantage of the public's ignorance to mislead it about the rules (as may be happening with government formation). If, for example, a neutral civil service is no longer consistent with widely held beliefs about political morality—widely held, that is, not only among civil servants, but among other constitutional actors too—it may be time to jettison the neutrality convention. But that would require rethinking and restructuring the civil service, notably by abandoning the security of tenure which officials now enjoy, because a partisan civil service cannot effectively support the work of a government of a different partisan persuasion. This may or may not be an improvement to the Canadian constitution, but it is a change of sufficient significance not to be made by inadvertence.

Yet, while I have surveyed various possible responses to the developments I have described, from "hue and cry" by informed observers, to the creation of a cabinet manual similar to those in the United Kingdom and New Zealand, to judicial enforcement of conventions, it is not clear that any of these can be very effective, and some of them, notably the codification of conventions in law, would come at considerable cost and be attended with dangers of their own. And, in particular, insofar as populism is the reason the conventions of Canada's constitution are decaying, attempts to arrest and counter this decay may well result in ever greater populist pressures on the constitutional order.