

# Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis

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## 1. INTRODUCTION

The preamble to the *Constitution Act, 1867*, declares that Canada is to have “a Constitution similar in Principle to that of the United Kingdom”, which thus includes a constitutional monarchy and a system of parliamentary and responsible government. The law of the Constitution of Canada is to be found primarily in the provisions of the *Constitution Acts*, as well as the rules of the common law and the royal letters patent relating to the exercise of the Crown’s prerogatives. The conventions of the Constitution are rules of conduct, informed by principle and precedent, which govern the exercise of legal power by constitutional and political actors. The distinction between the legal and the conventional rules of constitutional behaviour are fundamental to our system of government, as the conventional rules are not enforceable by the courts, since they are not rules of law. This distinction guides us, from the standpoint of the separation of powers, as to the appropriate role of the courts and the legitimate purview of constitutional judicial review. It also assists in delineating the boundaries of the competency of constitutional lawyers and other constitutional experts such as historians and political scientists, respectively.

On September 7, 2008, the Governor General of Canada, Her Excellency Michaëlle Jean, issued a proclamation dissolving the 39<sup>th</sup> Parliament. The dissolution was on the advice of the Prime Minister, the Right Honourable Stephen Harper. The Governor General also signed the proclamation issuing election writs, which set the polling date for a general election to be held on October 14, as well as a proclamation summoning Parliament to meet in November. The election returned another minority government. On November 18, the House of Commons met to elect the Speaker, and the opening of the first session of the 40<sup>th</sup> Parliament with the Speech from the Throne was read by Her Excellency on November 19 in the Senate chamber. On December 4, 2008, after a meeting at Rideau Hall that lasted over two hours, the Governor General acceded to the Prime Minister’s request for

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prorogation of the parliamentary session. On January 26, 2009, the second session of the 40<sup>th</sup> Parliament opened with another Speech from the Throne.

Thus, in a period of less than five months, Canadians were witness to several key exercises of the royal prerogative: the dissolution of Parliament, the election and summoning of a new House of Commons, the opening and prorogation of one parliamentary session and the opening of a second session. These bald facts, combined with the actions of the political actors of the day, including the possibility of a parliamentary vote of non-confidence in the government and the mooting of a potential coalition government to be led and supported by the opposition parties, made for high political drama. *Parliamentary Democracy in Crisis*, the title of a useful book of essays<sup>1</sup> by seasoned journalists, political scientists and constitutional specialists commenting on these events, captures the popular perspective, although some of those observers, including a former Governor General who wrote the preface to the collection, questioned whether there was really a crisis at hand, which would have suggested that a constitutional impasse had been in the making.<sup>2</sup>

Whatever the view one takes of the rhetoric associated with these political events — and the underlying premise of the Ontario Bar Association's conference theme, "The Constitutional Crisis of 2009" — there is no gainsaying the fact that it was an extraordinary period in the parliamentary and democratic life of the nation.

Professor Peter Hogg, in his own essay for the OBA panel discussion, has ably and cogently addressed the questions as to whether the Governor General possessed a discretion in determining whether or not to grant prorogation, and if so, whether the Governor General exercised that discretion wisely. As a law officer of the Crown, these questions are necessarily beyond my purview, at least in public commentary. My aim is a modest but significant one: to remind ourselves of the distinctions to be drawn between the law and the conventions of the Constitution when constitutional principles are at play, as was the case with the political events of 2009.

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<sup>1</sup> Peter H. Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis*, Toronto: University of Toronto Press, 2009.

<sup>2</sup> The Rt. Hon. Adrienne Clarkson, Foreword, in Russell and Sossin, *op.cit.* p. ix: "The idea that we were in crisis is something I personally take with a grain of salt; just because a resolution has to be found does not mean that the situation is a crisis. We have a viable way of governing ourselves: it has been tested through our history since responsible government became the norm in 1848 . . ." See also Michael Valpy, "The 'Crisis': A Narrative", at p. 3: "Was it a parliamentary crisis when our country's constitution — shaped through centuries of inherited and home-moulded evolution — worked precisely as it should, however baffling the machinery appeared to most Canadians (let alone foreigners)? Was it a crisis, or an empurpled drama created by politicians and the news media?"

## 2. THE LAW OF THE CONSTITUTION WITH RESPECT TO PROROGATION AND DISSOLUTION

The law of the Constitution on the summoning, dissolution and the prorogation of Parliament may be set out briefly as follows. Section 9 of the *Constitution Act, 1867* provides, under the rubric, “Executive Power”, that

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

The Queen in question was, of course, Her Majesty Queen Victoria, as the preamble to the Act of 1867 recorded that the original provinces had expressed the desire to be “federally united into One Dominion under the Crown of the United Kingdom.” Section 2 of the Act made it equally clear that the provisions of the Act “referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.”<sup>3</sup> Thus, to the extent that the exercise of the royal prerogative to dissolve or to prorogue Parliament constitutes executive action on the part of the Crown, it is authorized in relation to Canada by section 9 of the *Constitution Act, 1867*, and those powers repose in the Queen in right of Canada, Her Majesty Queen Elizabeth II.

The Governor General carries on the government of Canada on behalf of and in the name of the Queen, as can be inferred from section 10 of the *Constitution Act, 1867*.<sup>4</sup> The Queen, in law, is advised by the Privy Council. Section 11 establishes the Queen’s Privy Council for Canada to “aid and advise in the Government of Canada”, and section 12 provides that the powers, authorities and functions of pre-Confederation colonial governors, “as far as the same continue in existence and are capable of being exercised in relation to the Government of Canada” are vested in and exerciseable by the Governor General, “with the Advice or with the Advice and Consent of or in conjunction with the Queen’s Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires”. The office of the Governor General is itself constituted by the royal Letters Patent, the most recent dating from October 1, 1947.

The prerogative and other key executive powers of the Crown contemplated by the law of the Constitution<sup>5</sup> are exercised in accordance with a web of constitutional conventions associated with the principle of responsible government. Thus, the Queen and her representative, the Governor General, are advised by the Minis-

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<sup>3</sup> This provision was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), but a provision to the identical effect was then inserted into the *Interpretation Act* (U.K.).

<sup>4</sup> Section 10 of the *Constitution Act, 1867* reads: “The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.”

<sup>5</sup> “Another part of the Constitution of Canada consists of the rules of the common law . . . An important part of these rules concerns the prerogative of the Crown . . . Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the law of the constitution.” *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 734 at p. 877.

ters of the Crown who, in accordance with the wishes of the Prime Minister, form the Cabinet, the effective (and wholly conventional) part of the formal Privy Council for Canada. The Ministers of the Crown must, by convention, retain the confidence of the elected House of Commons to govern legitimately.

The Queen is also, under our system of government, an integral part of the Parliament of Canada, and thus essential to the exercise of legislative power. All too often, common parlance conflates just one of the Houses of Parliament, the House of Commons, with Parliament itself, but as a matter of law, section 17 of the *Constitution Act, 1867* makes it clear that Parliament is, at least on the temporal plane, “God in Three Persons, Blessed Trinity”:

There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Section 38 of the *Constitution Act, 1867* reposes in the Governor General a discretionary power and imposes thereby an occasional duty to summon the House of Commons, in the following terms:

The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Section 50 of the *Constitution Act, 1867* expressly contemplates (albeit parenthetically) the dissolution of the House of Commons by the Governor General:

Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General).

Whether sections 38 and 50 are framed in relation to the Governor General as a specific conferral of constitutional power, or simply as an acknowledgment of the role the Governor General was expected to play, as the Queen’s representative, in relation to the Parliament of Canada — is of little material consequence. It is the royal Letters Patent constituting the office of the Governor General that make explicit the delegation of legal authority from the Sovereign to the Governor General, in respect of both dissolution *and* prorogation:

VI. And We do further authorize and empower Our Governor General to exercise all powers lawfully belonging to Us in respect of summoning, proroguing or dissolving the Parliament of Canada.<sup>6</sup>

The Letters Patent are not amongst the instruments listed in the schedule to the *Constitution Act, 1982* that form part of the Constitution of Canada, but there is no doubt as to their fundamental and organic character.

Like the other prerogative powers of the Crown, the legal powers to summon, prorogue or dissolve Parliament are, of course, exercised in accordance with constitutional conventions that are in turn, as we have mentioned, founded upon principles of democracy and responsible government. It is here that the law of the Constitution must be differentiated from the conventions of the Constitution. The latter,

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<sup>6</sup> Letters Patent Constituting the Office of the Governor General of Canada, effective October 1, 1947.

while normative in character in that they are generally considered by political actors to be binding upon them, are not enforceable as a matter of constitutional law.

The powers to summon, to prorogue or to dissolve Parliament have long been recognized as core executive powers. Sir William Blackstone, in his venerable *Commentaries on the Laws of England*, observed:

For, as the king has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence.<sup>7</sup>

And Blackstone added this important caution:

If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the first; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a victim to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the dispatch of business and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.<sup>8</sup>

In *The Constitutional History of England*, a course of lectures delivered by Professor F.W. Maitland, “[p]owers relating to the constitution, assembling and dissolving of parliaments, and of assenting to statutes”, were placed first in the order of classification of the powers of the Crown.<sup>9</sup> Maitland emphasized that “the king’s power of summoning, proroguing, dissolving parliament, is very large.”<sup>10</sup>

The king without breaking the law can dissolve a parliament whenever he pleases. Any restraints on this power are not legal restraints.<sup>11</sup>

Modern British authorities are of a similar view as to the nature of this executive power. Stanley de Smith and Rodney Brazier observe that the power “to dissolve and prorogue Parliament . . . is derived from the prerogative.”<sup>12</sup> Professors Bradley and Ewing concur: “By virtue of the prerogative the Sovereign summons, prorogues and dissolves Parliament.”<sup>13</sup> Hood Phillips states that “[t]he exercise of

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<sup>7</sup> William Blackstone, *Commentaries on the Laws of England*, 1756; Book I, ch. 2, at p.181, Oxford: Clarendon Press; (facsimile edition of the Legal Classics Library, New York: Gryphon Editions, 1983).

<sup>8</sup> *Ibid.* at pp. 181-182.

<sup>9</sup> F.W. Maitland, *The Constitutional History of England*, Cambridge: University Press, 1908 (Legal Classics Library facsimile edition, 2000), at p. 422.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at p. 374.

<sup>12</sup> Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 8th ed., London: Penguin Books, 1998, at p. 144.

<sup>13</sup> A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 13th ed., Essex: Pearson Education Ltd., 2003, at p. 248.



the royal prerogative is necessary to summon, to prorogue or (before the expiration of the statutory period) to dissolve Parliament.”<sup>14</sup> He adds: “Prorogation terminates a *session* of Parliament. It is effected by command of the Queen — acting by convention on the advice of the Cabinet . . .”<sup>15</sup> Erskine May writes:

The prorogation of Parliament is a prerogative act of the Crown. Just as Parliament can commence its deliberations only at a time appointed by the Queen, so it cannot continue them any longer than it pleases.<sup>16</sup>

### 3. THE POWERS TO SUMMON, PROROGUE AND DISSOLVE PARLIAMENT ARE CONSTITUTIONALLY ENTRENCHED

The royal powers to summon, prorogue and to dissolve Parliament are constitutionally entrenched in Canada by section 41 of the *Constitution Act, 1982*, which protects “the office of the Queen, the Governor General and the Lieutenant Governor of a province” from constitutional amendment except where the amendment is authorized by the federal legislative houses and the legislative assemblies of the ten provinces.<sup>17</sup> It would not appear to be open to Parliament to curtail or circumscribe those royal powers under section 44 of the *Constitution Act, 1982*, which provides that “[s]ubject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.” Section 44 is subordinate to section 41, which means that under section 44 a statute of the Parliament of Canada amending the Constitution “in relation to the executive government of Canada” cannot alter the “office of the Queen” or that of “the Governor General” in a material way, just as a provincial legislature cannot, in making laws amending the constitution of the province under section 45, alter the office of the Lieutenant Governor, which is also protected by section 41.<sup>18</sup>

That the protection afforded to the “office” of the Queen and those of her representatives, the Governor General and the Lieutenant Governors, extends to their royal powers is evident from the opinion of the Judicial Committee of the Privy Council in *Re Initiative and Referendum Act*<sup>19</sup>, in which their Lordships, in construing the scope of section 45’s predecessor, the first head of section 92 of the *Constitution Act, 1867*, noted that the position of the office of the Lieutenant Gov-

<sup>14</sup> O. Hood Phillips, *Constitutional and Administrative Law*, 5th ed., London: Sweet & Maxwell, 1973, at p. 99.

<sup>15</sup> *Ibid.* at p. 102.

<sup>16</sup> Erskine May’s *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed., Sir William McKay, ed., London: Lexis Nexis, 2004, at p. 274.

<sup>17</sup> On the operation of s. 41 and Part V of the *Constitution Act, 1982* more generally, see W.J. Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada”, in Mitchell et al., eds., *A Living Tree: The Legacy of 1982 in Canada’s Political Evolution*, Toronto: LexisNexis, 2007, at pp. 747–780.

<sup>18</sup> For an extended essay on, *inter alia*, the potential ambit of s. 44, see W.J. Newman, “Defining the ‘Constitution of Canada’ since 1982: the Scope of the Legislative Powers of Constitutional Amendment under Sections 44 and 45 of the *Constitution Act, 1982*”, (2003) 22 Supreme Court Law Review (2nd) at pp. 424–498.

<sup>19</sup> [1919] A.C. 935.

ernor, who directly represents the Sovereign in the province, “renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province.”<sup>20</sup> They observed:

The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it.<sup>21</sup>

In that case, the power at issue was the giving or withholding of assent to a bill passed by the provincial legislative assembly. However, in Ontario *Public Service Employees Union v. Attorney General of Ontario*,<sup>22</sup> Beetz J. of the Supreme Court of Canada emphasized that “[t]he fact that a province can validly give legislative effect to a prerequisite condition of responsible government” — in that particular case, legislating to ensure public service neutrality — “does not necessarily mean that it can do anything it pleases with the principle of responsible government itself.”<sup>23</sup> He added:

Thus it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. The principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.<sup>24</sup>

That it is broadly accepted that it is not within the power of Parliament in relation to the Governor General — or the provincial legislatures in relation to their respective Lieutenant Governors — to tamper with the royal power of dissolution is evident in the federal and provincial fixed-date elections legislation. Bill C-16, enacted by Parliament in 2007, amended the *Canada Elections Act* to provide for the holding of a general election on the third Monday of October every four years, but that rule was made subject to subsection 56.1, which itself provides that

Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General’s discretion.

In referring to this provision in *Conacher and Democracy Watch v. Canada*,<sup>25</sup> Shore J. of the Federal Court of Canada stated unequivocally:

It is important to examine the constitutional context because Canada has a system of constitutional supremacy that lays out the boundaries of Parliament’s power. In this case, the constitutional context is that the Governor General has discretion to dissolve Parliament pursuant to Crown prerogative

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<sup>20</sup> *Ibid.* at p. 943.

<sup>21</sup> *Ibid.*

<sup>22</sup> [1987] 2 S.C.R. 2.

<sup>23</sup> *Ibid.* at p. 46.

<sup>24</sup> *Ibid.*

<sup>25</sup> 2009 FC 920 at para. 53. This decision was appealed to the Federal Court of Appeal; the hearing of the appeal took place on May 25, 2010 and the appeal was denied from the bench.

and Section 50 of the *Constitution Act, 1867*. Any tampering with this discretion may not be done via an ordinary statute, but requires a constitutional amendment under Section 41 of the *Constitution Act, 1982*, which requires unanimous consent of all provincial governments as well as of the federal government before a change can be made to the “office of the Governor General”. Subsection 56.1(1) explicitly leaves the Governor General’s discretion untouched.

It is also interesting to observe that the *Parliament of Canada Act*,<sup>26</sup> in providing in s. 2 that Parliament is not automatically dissolved by the demise of the Crown, immediately goes on in s. 3, to safeguard the Crown’s prerogative of prorogation and dissolution:

Nothing in section 2 alters or abridges the power of the Crown to prorogue or dissolve Parliament.

As to whether legislation could be validly enacted by Parliament to fetter the Prime Minister’s advice to the Governor General on prorogation — or, for that matter, dissolution — the better view would appear to be that Parliament cannot fetter the Prime Minister’s capacity to advise the Governor General on these matters.

From the standpoint of constitutional law, the legal power to prorogue or to dissolve Parliament lies entirely in the hands of the Governor General. However, as a matter of constitutional convention, that power is almost always exercised on the advice of the Prime Minister. It has been argued by some that since the Governor General is not bound, as a matter of law, to heed the Prime Minister’s advice, it might be possible to fetter the Prime Minister’s discretion while leaving the formal legal power of the Governor General untouched. Indeed, legislation such as Bill C-16, *An Act to amend the Canada Elections Act* (the fixed-date elections legislation mentioned above), and Bill C-20, the *Senate Appointment Consultations Act* (which, if enacted, would have put in place a process of public participation in the selection of candidates for appointment to the Senate) were predicated, at least in part, on the premise that it may be possible to influence, indirectly, the behaviour of political actors without interfering in the legal powers of the Governor General.

However, for sound constitutional reasons, no Act of Parliament has gone so far as to purport to fetter the Prime Minister’s substantive capacity to advise the Crown. The reason is that in our system, there is a risk that in statutorily binding a Prime Minister’s capacity to advise the Governor General on the exercise of her powers, Parliament would in fact be affecting the office and powers of the Governor General.

The preamble to the *Constitution Act, 1867* affirms that Canada is “One Dominion under the Crown of the United Kingdom” and is to have “a Constitution similar in Principle to that of the United Kingdom”, which includes the principles of a constitutional monarchy and responsible government. It is axiomatic that the Governor General is not, except in very limited circumstances, meant to exercise her powers to summon, to prorogue or to dissolve Parliament on her own initiative, but rather, to act on the advice of her Ministers. Although the requirement to heed the advice of the Prime Minister is a rule of convention, not law, the principle that

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<sup>26</sup> R.S.C., 1985, c. P-1.



the Governor General is to act on the advice of her ministerial councillors is evident from the formal existence of the Queen's Privy Council for Canada, which, as we have seen, is established by section 11 of the *Constitution Act, 1867*, and whose constitutional role it is to "aid and advise in the Government of Canada". Further indicia and attributes of that role may be found in sections 12 and 13 of the Act, which refer to powers "vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires", and that provisions of the Act referring to the Governor General in Council "shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada".

The broad scheme of the *Constitution Act, 1867* is thus to recognize that the executive powers and prerogatives of the Crown are normally to be exercised upon the advice of the Queen's Privy Council for Canada, in accordance with the principles of the Constitution of the United Kingdom, as contemplated by the preamble to the Act. Although it is open to Parliament, under section 44 of the *Constitution Act, 1982*, to amend the Constitution of Canada in relation to the executive government, we have already noted that that power is subject to section 41, which protects the offices (and powers) of the Queen and the Governor General. Since the powers of the Governor General are normally to be exercised on the advice of the Privy Council and more particularly, the Prime Minister, legislation binding the Prime Minister's capacity to advise the Governor General on the exercise of her prerogative powers to prorogue or to dissolve Parliament might be found by the courts to constitute an invalid attempt to control the exercise of those powers by the Governor General. As Shore J. observed in the *Democracy Watch* decision, "the Governor General will only exercise power to dissolve Parliament when advised to do so by the Prime Minister. The Prime Minister has traditionally had unlimited discretion in regard to this advisory power."<sup>27</sup> The Court was loathe to second-guess the exercise of the Prime Minister's advisory power, notably because it would be "effectively dictating to the Governor General" the exercise of his or her discretion.<sup>28</sup>

This was also the position taken by the Minister responsible for the carriage of the legislation through Parliament, the Hon. Robert Nicholson, in the parliamentary debates on Bill C-16:

The Governor General's legal power under the Constitution and the exercise of that power on the advice of the Prime Minister are inextricably linked. If one limits the Prime Minister's ability to advise, one risks constraining the Governor General's power in a way that would be unconstitutional.

In rejecting the appeal in the *Democracy Watch* case, Stratas J.A. of the Federal Court of Appeal, writing for the Court, observed:

In our view, given the connection between the Governor General and the Prime Minister in this regard, the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role.<sup>29</sup>

<sup>27</sup> *Supra* at para. 10.

<sup>28</sup> *Supra* at para. 74.

<sup>29</sup> 2010 F.C.A. 131, at para. 5.

#### 4. OF CONSTITUTIONAL CONVENTIONS AND PRINCIPLES

It has also been suggested that a constitutional convention might develop — or could be recognized formally by political actors in the House of Commons — whereby the Prime Minister would be constrained so as not to proffer his advice to the Governor General on prorogation without first obtaining a consensus from the House. However, for such a convention to emerge, the Prime Minister, as the relevant or principal political actor, would have to acquiesce in the new measure. As the Supreme Court of Canada explained in the *Patriation Reference*, demonstrating the existence of a convention requires (1) precedents; (2) a belief by the actors in the precedents that they are bound by a rule; and (3) a reason for the rule.<sup>30</sup> In the *Quebec Veto Reference*, the Supreme Court emphasized that the second of the three criteria is the most significant one because it embodies the normative element:

Recognition by the actors in the precedents is not only an essential element of conventions. In our opinion, it is the most important element since it is the normative one, the formal one which enables us unmistakably to distinguish a constitutional rule from a rule of convenience or from political expediency.<sup>31</sup>

There has also been much topical commentary on whether the most recent exercise of the prorogation power, on December 30, 2009, was an evasion of democratic accountability.<sup>32</sup> Professor Mark Walters, in his usually thoughtful and erudite way, has since argued<sup>33</sup> that the question is not just one of “defending the political value of democracy” but also of constitutional law insofar as (quoting the Supreme Court in the *Quebec Secession Reference*), “legality and legitimacy are linked”<sup>34</sup>, and democracy is one of the unwritten constitutional principles to which the Court ascribed “powerful normative force”.<sup>35</sup> Professor Walters posits that “when a prime minister does anything that is arguably undemocratic, he or she has

<sup>30</sup> *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 754, at p. 888, adopting the test proposed by Sir W. Ivor Jennings in *The Law and the Constitution*, 5th ed., 1959, at p. 156.

<sup>31</sup> *Québec (Procureur général) v. Canada (Procureur général)*, [1982] 2 S.C.R. 793, 1982 CarswellQue 124, 1982 CarswellQue 124F (S.C.C.), at p. 816 [S.C.R.].

<sup>32</sup> See, notably, an open letter written by Daniel Weinstock, a professor of political philosophy at the University of Montreal, and signed by more than 200 other professors of political science, history, law, sociology and other academic disciplines. The letter was published in several newspapers on January 11, 2010.

<sup>33</sup> See Mark Walters, “Prorogation an issue of law, not just a technicality”, *Law Times*, Jan. 25, 2010, p. 7.

<sup>34</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300, 1998 CarswellNat 1299 at para. 33 (S.C.C.).

<sup>35</sup> *Ibid.* at para. 54: “Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have ‘full legal force’, as we described it in the *Patriation Reference*, *supra* at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”

done something that is arguably unlawful.” He acknowledges that the exercise of the prerogative power to prorogue Parliament is governed by constitutional convention, that “conventions are not judicially enforceable”, and that the general consensus amongst observers is that since the Prime Minister “had the confidence of the House of Commons when he advised the governor general to prorogue Parliament”, it is said that “the relevant constitutional rules were technically satisfied”. However, Professor Walters states that “[t]here is good reason to think that a prime minister who uses the convention to undermine rather than uphold the supremacy of elected members of Parliament has violated the convention.” That (and its underlying assumption) is a debatable point, but he goes on to assert:

Second, it’s time to acknowledge that the bright line Dicey drew between law and convention doesn’t exist in Canada. The unwritten principle of democracy that underlies the conventions about how Crowns and prime ministers ought to behave is, within the Canadian constitutional context, a fundamental principle of law.

Conventions may not be judicially enforceable but they are constitutional rules that must be seen as susceptible to legal analysis and legal argument. The alternative is unthinkable. We would have a lawless hole at the very heart of our constitutional order.

Of course the normative workings of constitutional conventions, like other constitutional rules, interest legal scholars, but is that interest — and the democratic principle — sufficient to transform conventions into law, or the alleged breach of a convention into unlawful conduct? With all due respect for the contrary view, such an intellectual enterprise appears to be imbued with wishful thinking.

It is clear from the *Patriation Reference* that a fundamental distinction was drawn between the law and the conventions of the Constitution. The Supreme Court, in its majority opinion on the conventions question, observed that “[t]hose parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the law of the constitution.”<sup>36</sup> It then affirmed, in example after example relating to the operation of the principle of responsible government, that a constitutional requirement established by a convention “does not form part of the law of the constitution . . . None of these essential rules of the constitution can be said to be a law of the constitution.”<sup>37</sup> That fundamental position was maintained in the *Osborne* case, wherein Sopinka J. emphasized that “[u]nderlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism.”<sup>38</sup> In the *Quebec Secession Reference*, although the importance of the unwritten con-

<sup>36</sup> *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 754 at p. 877.

<sup>37</sup> *Ibid.* at p. 878. See also the illustrations preceding the following passage on p. 882: “This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.”

<sup>38</sup> *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 1991 CarswellNat 830, 1991 CarswellNat 348 at p. 87 (S.C.C.).

stitutional principles canvassed therein by the Supreme Court cannot be denied, the Court noted:

In the *Patriation Reference*, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions.<sup>39</sup>

The distinction between law and convention has been sustained in later cases as well. In *Ontario English Catholic Teachers Association*, the Court cited the previous passage from the *Quebec Secession Reference* as well as the earlier ones from the *Patriation Reference* and concluded that “the remedy for breach of a constitutional convention must be found outside the courts, if a remedy is to be found at all”.<sup>40</sup>

In the *Patriation Reference*, the Court stated:

The foregoing may perhaps be summarized in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.<sup>41</sup>

That basic equation has not been upset by the Court’s emphasis, in the *Quebec Secession Reference*, on unwritten constitutional principles. It is true that constitutional principles such as federalism and democracy seem to straddle the continuing divide between constitutional law and conventions, in that such principles may be employed both to construe the written text and provisions of the Constitution, as well as to provide the *raison d’être* — the reason for the rule — of a given constitutional convention. This is because, as the Court explained in the *Patriation Reference*,

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values of the period.<sup>42</sup>

For instance, “the constitutional value which is the pivot of the conventions . . . relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate”,<sup>43</sup> whereas in respect of the convention at issue in the *Patriation Reference*, “[t]he reason for the rule is the federal principle.”<sup>44</sup> However, the constitutional principles of federalism and democracy invoked by the Supreme Court did not turn the conventions they supported into law.

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<sup>39</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300, 1998 CarswellNat 1299 at para. 98 (S.C.C.).

<sup>40</sup> *O.E.C.T.A. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 CarswellOnt 580, 2001 CarswellOnt 581 at para. 63 (S.C.C.).

<sup>41</sup> *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 754 at pp. 883-884.

<sup>42</sup> *Ibid.* at p. 880.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* at p. 905.

## 5. CONCLUSION

Constitutional principles serve as *legal* principles when they are employed to elucidate and construe the law of the Constitution; they serve as *political* principles when they provide the basis for the conventions of the Constitution.<sup>45</sup> The powers to summon, to prorogue and to dissolve Parliament flow from the prerogatives of the Crown and the provisions of the Constitution. The exercise of these executive powers is controlled by the conventions of the Constitution relating to the principle of responsible government, including the convention that the Governor General will, in all but perhaps the most extraordinary and exceptional circumstances, take the advice of the Prime Minister on these matters, and the convention that the Prime Minister's cabinet, the ministry, must maintain the confidence of the elected chamber of Parliament, the House of Commons, or else resign or seek dissolution and a general election.

While constitutional lawyers must take an active analytical interest in the workings of constitutional conventions, they ought not to treat conventional rules and norms as if they were legal rules and norms. Conventions, although they will usually influence and control the exercise of legal powers and discretion, are still, at heart, rules governed by politics, not law, and their fluidity of scope and application may at times defy precise legal conclusions. It is here that constitutional lawyers should be prepared, if not to defer to, then at least to debate and consider, the special contribution of political scientists and constitutional historians. At the same time, just as constitutional lawyers should not attempt to turn everything into law, political scientists and historians should refrain from transforming all constitutional law into politics (or worse, arrogating to themselves the role of constitutional legal advisers). Maintaining fundamental distinctions can be a salutary exercise for all concerned.

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<sup>45</sup> See generally, W.J. Newman, "'Grand Entrance Hall', Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada", (2001) 14 Supreme Court Law (2d) 197–239; "Réflexions sur la portée véritable des principes constitutionnels dans l'interprétation et l'application de la Constitution du Canada", (2001-2002) 13 N.J.C.L. 117–164; "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation", (2005) 16 N.J.C.L. 175–296.



