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Cabinet Manuals and the Crown

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Dans une monarchie constitutionnelle fondée sur la convention de gouvernement responsable, le principe voulant que les ministres assument la responsabilité de toutes les actions de la Couronne revêt une importance primordiale. Or il arrive souvent que la population, les médias, la classe politique et même les spécialistes comprennent mal le rapport entre les gouverneurs et leur premier ministres. Les manuels de Cabinet peuvent toutefois favoriser une meilleure compréhension des travaux du gouvernement et un débat factuel plus équilibré sur le pouvoir exécutif en apportant un éclairage sur les précédents historiques et les usages courants. Les auteurs examinent ainsi la nature des conventions et principes constitutionnels tout en les distinguant des coutumes en la matière. Et ils s'appuient sur le Manual of Official Procedure of the Government of Canada *de 1968 pour illustrer la fonction d'« officialisation » exercée par les manuels de Cabinet.*

À l'aide d'exemples actuels, ils font aussi valoir qu'un meilleur accès au savoir constitutionnel aurait profité au public, aux médias et aux spécialistes. En fait, une meilleure connaissance du Manual *précité aurait pu façonner le débat, estiment-ils, car les manuels de Cabinet préservent en définitive la neutralité politique des gouverneurs en détournant de leur pouvoir discrétionnaire les critiques des médias et du public pour les recentrer vers leur juste cible : les ministres responsables et le bien-fondé de leurs recommandations. Ce faisant, les manuels de Cabinet viennent clarifier le cadre constitutionnel canadien et désigner où réside vraiment l'obligation de rendre compte.*

Considerable academic discussion has arisen over "cabinet manuals" in the Commonwealth realms,[1] and the idea of such a manual in Canada has attracted much interest.[2] In these debates, one document, the *Manual of Official Procedure of the Government of Canada*, has been largely unknown, ignored, or dismissed—often on the grounds that it is a "very technical document" and "too bulky and too dense to serve the purposes of a cabinet manual."[3] Admittedly, the Canadian manual was designed for practitioners (decision-makers in government) and is thus quite technical

in nature. But to dismiss the *Manual* on the basis that it is too complex is curious logic—one would hardly discard tomes on parliamentary procedure on such grounds. Despite its perceived shortcomings, the *Manual* offers considerable insight on constitutional practices in Canada and the rationales underlying those practices.

This chapter will explore the use of cabinet manuals in navigating Canada's complex constitutional framework; specifically, it will expand on the role such manuals play in clarifying the role of the Crown, the Queen, and her representatives in Canada vis-à-vis first ministers, in a system predicated on the conventions of responsible government. The chapter begins with a discussion of constitutional conventions, the political norms that cabinet manuals are meant to describe. We then explore how cabinet manuals "officialize" these norms. Third, we examine the *Manual of Official Procedure of the Government of Canada* as an effort to officialize constitutional conventions in Canada. Finally, we examine instances in Canada where a cabinet manual could have been used by the media and academics to clarify the nature of certain Crown prerogatives, and the impact that an authoritative source may have had on shaping academic and public discourse about these powers.

Constitutional Principles, Conventions, and Customs

Cabinet manuals serve to document the use of constitutional conventions. To understand the purpose of these manuals, it is first necessary to appreciate what conventions are and how they operate.[4]

Constitutional conventions are unwritten, politically enforceable norms. These norms evolve from practices and customs that complement and contextualize laws or the written constitution. Norms imply exceptions, and more broadly allow for exemptions. In practical terms, conventions help decision-makers determine how they should act in any given situation.[5]

In contrast, customs do not hold such a degree of suasion. They exist as hallmarks of older times. Indeed, as Andrew Heard has put it, customs refer to "symbolic traditions or pleasing rituals whose observance or absence has no substantial impact on the operation of constitutional rules and principles."[6] For example, it is only by custom that the governor general does not enter the House of Commons.

More fundamentally, constitutional conventions are the manifestations of constitutional principles. These principles underpin conventions and provide their normative justification. When a convention no longer conforms to its corresponding principle, it loses its purpose and is called into question.[7]

Decision-making of a constitutional nature thus amounts to the application of conventions; in other words, the adaptation and adjustment of precedents and norms to the circumstances of a current situation.

Conventions allow Westminster parliaments to adapt organically when necessary in order to strike an effective balance between continuity and change.

Equally important, the validity or soundness of a convention may be ascertained based on whether it conforms to constitutional principles. The viability of the Westminster system depends upon the adaptability of convention and its ability to ensure that its constitutional conventions continue to serve, rather than contradict, the fundamental principles found in the constitution. The Supreme Court of Canada recognized this in the *Patriation Reference*, stating that:

> While they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system.… That is why it is perfectly appropriate to say that *to violate a convention is to do something which is unconstitutional* although it entails no direct legal consequence.[8] [emphasis added]

Unwritten principles and conventions, it should be recognized, can be more powerful and persuasive than written rules. Codified sets of rules rely upon the coercive force of law; convention encourages proper behaviour through self-restraint and a sense of duty to respect the Constitution, Parliament, and the Crown.

This approach to constitutionalism stands in stark contrast to the principles that underpin the American constitution, which embodies the idea that "ambition must be made to check ambition," as James Madison famously described in the *Federalist Papers*.[9] He added,

> The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[10]

The Westminster system trusts that the government restrains itself and requires that Parliament will hold it to account when it does not; the American system presumes the self-interest and ambition of the political actors and therefore codifies institutional checks and balances in order to constrain and contain their excesses.

It is important for the effective functioning of a system like constitutional monarchy, which relies so much on convention, that there be a widely accepted political ethic and understanding of the "proper behaviour" that convention entails. When some conventions are misunderstood or misinterpreted or ignored, a cabinet manual may serve a useful purpose

in reminding political actors of how constitutional conventions are meant to work.

Cabinet Manuals and Officialization

Cabinet manuals, or handbooks, as with any non-justiciable interpretive references, are not designed to prescribe specific solutions to future and unknowable constitutional crises. Nor are they designed to serve as exhaustive lists.[11] Handbooks instead serve as guidelines and statements of general principles that can exert suasion on political actors and clarify their roles through a shared ethos. One way handbooks do so is by "officializing" conventions. Officialization refers to the government's endorsement of a particular interpretation of convention, which it then uses as a point of reference in constitutional and procedural decision-making. The government's officialization should not be construed as the only possible interpretation or an exhaustive list, particularly because subsequent governments may revise and update it.

An alternative to preserving the organic nature of conventions would be to "codify" them, thereby converting conventions into statutory or constitutional law in order to coerce adherence to constitutional principles and responsible government by the force of law. This approach would move issues from the political to legal realm, from Parliament and the electorate to the courts.

In 1990, Eugene Forsey took a strong stance against the codification of constitutional conventions and vigorously defended the Westminster tradition of unwritten constitutional conventions:

> Conventions are essentially, and intensely, practical. They rest ultimately on common sense. They are, accordingly, flexible, adaptable. To embody them in an ordinary law is to ossify them. To embody them in a written Constitution is to petrify them.[12]

Codification thus does not merely "ossify" or "petrify" politically enforceable constitutional convention—it eliminates the constitutional character of convention altogether. Indeed, with codification, conventions would cease to develop organically to the extent that they become law. Codification eliminates the politically enforceable character of convention altogether by converting these political norms into justiciable law.[13]

But transforming constitutional conventions into justiciable law comes at a price. For instance, the electorate can hold governments to account when they fail to respect constitutional conventions, but they cannot throw out of office a court with whose decisions they disagree.

If former conventions are codified in statute or in the written constitution, they become subject to judicial review and interpretation. For

example, Prime Minister Trudeau's Constitutional Amendment Bill of 1978 (which failed) would have both preserved the executive power of dissolution and codified the prime minister's and governor general's respective roles in the event that the government lost the confidence of the House of Commons.[14] The courts could potentially have ruled upon the legality and constitutionality of dissolutions, and thus the results of elections themselves, and in turn which party or parties would form a government. In this way, codification can empower the courts at the expense of both the Commons and the electorate. In 2007, the Parliament of Canada passed legislation that sets out fixed elections every four years, though the law deliberately bypasses, and does not purport to amend, the written constitution through a non-derogation clause that preserves the governor general's power to dissolve Parliament.[15] However, this issue was still brought before the courts after the early dissolution of the 39th Parliament in 2008. While both the Federal Court and Federal Court of Appeal rejected the application, the courts would not be able to dismiss so easily a case that refers to a strict, codified provision of the written constitution.[16]

Cabinet manuals officialize, rather than codify, conventions. The officialization of constitutional conventions into handbooks of all types generally preserves the flexibility of the Westminster system and can serve as educational guidance for the media, parliamentarians, and the general public. Moreover, having manuals that officialize instead of codify averts the possibility of involving the courts in political matters.

Ultimately, it is best for elected officials to sort out disagreements over different interpretations of convention among themselves and let the electorate assess the wisdom of their decisions. But a politically enforceable handbook—a guide, but not an arbiter—can encourage constitutional actors to better understand their responsibilities. In turn, the media might report more accurately on issues involving constitutional conventions, particularly those that tend to arise during minority parliaments. With a manual providing better information to the media, one could then hope that the public would better understand when and how to hold their elected representatives to account for their adherence to, or deviation from, Canadian constitutional conventions. In Canada, such a manual was created, but it was not made public and it has not been updated. Nonetheless, this manual remains a valuable officialization of Canada's constitutional conventions, one that can still be used to gauge how the decisions of recent governments accord with current conventions.

The *Manual of Official Procedure of the Government of Canada*

The Privy Council Office (PCO) produced the *Manual of Official Procedure of the Government of Canada* between 1964 and 1968 at the behest of Prime

Minister Lester Pearson and under the direction of Gordon Robertson, Clerk of the Privy Council.[17] Henry F. Davis and André Millar are credited as the primary researchers and authors of the *Manual*. In his foreword, Pearson explained that the *Manual* "fills a long-recognized need for quick and thorough guidance on the many constitutional and procedural issues on which the Prime Minister, individual ministers or the Government must from time to time exercise discretion and judgement."[18] Pearson added,

> The *Manual* examines the principal elements of government, states the legal position in given situations, and identifies the considerations relevant to decision and discretion in particular circumstances. Precedents are described and evolution outlined. Administrative procedures are defined and representative documents are included as sources or examples.[19]

Political and constitutional issues tend to arise suddenly and require immediate attention. In a system built upon on convention and custom, ministers and officials must be fully informed of all the relevant precedents and procedural considerations before making decisions. The *Manual* fulfils this need and, in Pearson's words, "obviate[s] the requirement for urgent research on courses of action whenever a situation arises."[20]

The United Kingdom and New Zealand refer to their equivalent references as cabinet manuals, perhaps because they deal exclusively with the executive. However, the *Manual of Official Procedure of the Government of Canada* far exceeds the scope of the British and New Zealand documents, because it also includes extensive material on the House of Commons, the Senate, and Parliament as a whole.

PCO classified the *Manual* as "confidential," printed one hundred copies, and distributed them to the office of each minister and deputy minister, the governor general and the governor general's secretary, and the chief justice and the executive secretary of the Supreme Court.[21] Government House forwarded a copy to Buckingham Palace.[22] Each copy was numbered, in order to be able to "recall them for amendment" and "to revise the *Manual* periodically in order to reflect changes in law and practice."[23] In a draft letter to cabinet ministers, PCO reiterated Pearson's foreword that the government had "long felt the need for authoritative guidance on the law and procedures in the operation of the federal executive."[24] The *Manual*, like other cabinet manuals, provides a concise officialization of conventions and customs but does not codify them. This type of guidebook is made for the executive by the executive.

Pearson ended his foreword by dedicating the project to future prime ministers: "I am confident that it will be of valuable assistance to any successors in the office of Prime Minister and to all those directly responsible for the process of government in Canada."[25] Pearson also affirmed

that "the *Manual* is designed to be expanded to cover additional areas of interest and new practices arising from changes in law or custom."[26]

The *Manual of Official Procedure of the Government of Canada* (volume 1) and its *Appendices* (volume 2) consist of over 1,500 pages and 17 chapters, each of which breaks down the subject into five sections: Position, Background, Procedure, Ceremonial, and Appendices. The Position section "describes the situation where decisions may have to be taken or discretion exercised in stated circumstances."[27] The Background describes the historical precedents that "led to the present position," and the Procedure prescribes the administrative action necessary to implement a decision and identifies those responsible for such action."[28] Volume 2 is a compilation of templates and historical documents that support the content of volume 1.

The chapters cover the following topics, in order of appearance: ambassadors, high commissioners, and consuls; cabinet; elections; funerals and memorial services; government; governor general; honours and awards; House of Commons; judges; lieutenant governors; ministers; Parliament; prime minister; Privy Council; Senate; Sovereign; and visits by foreign dignitaries.

Each chapter breaks down the subject yet further. For example, the chapter on government contains five subtopics: resignation of government, formation of new ministries, restraints on business which may be transacted by governments in certain circumstances, considerations relating to minority governments, and access to records of other administrations. The chapter on the governor general contains the greatest number of subheadings, including the "appointment and extension of term," "removal," and "death." It also covers the choice of prime minister; the summoning, prorogation, and dissolution of Parliament; consultation with the governor general; and the "prerogative of mercy."

The Trudeau government largely abandoned the *Manual*, including the final French-language version,[29] and focused on the drastic constitutional questions arising from the late 1970s and the patriation of the Constitution. Subsequent governments were preoccupied with efforts to pass the Meech Lake and Charlottetown accords, referenda on the secession of Quebec, onwards to the Clarity Act in 2000—by which time thirty years had passed since the *Manual* was drafted.

In addition to constitutional debates, the sheer bulk of the *Manual* may explain why it has never been revised or updated. [30] In response to media inquiries during the federal election of 2011, the Privy Council Office prepared a memorandum on the *Manual*. While sources have noted that the *Manual* is considered by PCO to be dated in its interpretation of some conventions, it is still consulted from time to time as a reference.[31]

The Canadian practice may have also been to shift away from single-reference sources altogether, focusing instead on more specific guidelines such as *Accountable Government: A Guide for Ministers and Ministers of State* (2008 and 2011); *Guidance for Deputy Ministers* (2003); *Accounting Officers: Guidance on Roles, Responsibilities and Appearances before Parliamentary*

Committees (2007); *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants during an Election* (2008); and *Responsibility in the Constitution* (1977).[32]

Nonetheless, it becomes apparent that in more recent contexts the *Manual of Official Procedure of the Government of Canada* would have provided useful information not only on the more controversial uses of the executive powers of prorogation and dissolution, but also on various other powers of the Crown and aspects of responsible government that have received media attention.

The Prorogation of 2008

Prime Minister Stephen Harper's prorogation of December 4, 2008, generated lively scholarly and public controversy over the role of the governor general under responsible government and the executive prerogative powers of the Crown.[33] Yet this prorogation episode offers a good example of where officializations can prove useful. Indeed, from the start reference to the *Manual* would have clarified the respective constitutional roles of the prime minister and governor general and the crucial differences between prorogation and dissolution. It would have explained the government's traditional position on the use of prorogation: "The Governor General accepts the Prime Minister's advice on summoning and proroguing Parliament."[34] Further, "the Governor General does not retain any discretion in the matter of summoning or proroguing Parliament, but acts directly on the advice of the Prime Minister."[35] Indeed, "the decision to prorogue is the Prime Minister's."[36]

At the time of the prorogation controversy, Brian Topp was a senior advisor to the leader of the New Democratic Party, Jack Layton, in coalition negotiations with the Liberal Party. Topp anticipated the use of prorogation as a tactic by the prime minister to avoid the impending vote of no confidence in the government.[37] But he also admitted that, upon learning of the existence of "a manual drafted in the 1960s by the Privy Council Office" from one of his "Conservative correspondents," trying to persuade the governor general to deny the prime minister's request for prorogation was a "forlorn hope."[38] From his own account, Topp understood, and accepted, that the *Manual* "directs the governor general to grant a prorogation of the house to the prime minister, unconditionally and in every case."[39]

Governor General Michaëlle Jean prorogued the first session of the 40th Parliament on and in accordance with Prime Minister Harper's advice on December 4, 2008. Though this was done after obliging the prime minister to wait in Rideau Hall for two hours so that she could consult constitutional scholar Peter Hogg,[40] upon the expiration of her mandate in 2010 Jean explained that she kept Harper at Rideau Hall "not to create

artificial suspense" but rather "to send a message … that this [prorogation] warranted reflection."[41] This, of course, was an act within her rights to be consulted, to advise, and to warn.

By constitutional convention, "it is custom for Parliament to be on summons and therefore it is always prorogued to a certain stated date."[42] In fact, the governor general issues two instruments "by and with the advice and consent of the Prime Minister": the first proclamation prorogues the current session, and the second pro forma proclamation summons the next session after forty days for "despatch of business."[43] The prime minister may then advise the governor general to extend the duration of the intersession through a separate proclamation.[44] Every prorogation of the Parliament of Canada, from 1867 to the present, has adhered to this convention.

On December 4, 2008, Prime Minister Harper assured the governor general that he would not advise a subsequent extension of the prorogation and pledged that his government would meet the Commons in January 2009. Harper thus conformed to the standard pro forma proclamation that accompanies prorogation of the Parliament of Canada. Previous prime ministers have advised extensions. For instance, Prime Minister Chrétien advised Governor General Clarkson to prorogue Parliament on November 12, 2003, and to recall it on January 12, 2004.[45] Chrétien resigned, and Governor General Clarkson swore in Paul Martin as prime minister on December 12, 2003.[46] On January 12, 2004, Martin advised Clarkson to extend the prorogation to February 2.[47]

Some commentators also objected when Harper advised Jean to appoint eighteen senators during the intersession and variously claimed that Harper did not possess, or should not have possessed, the legal-constitutional authority to tender that advice during the intersession.[48] But, as will be further explained, the ministry's powers and authorities derive from the Crown, not from Parliament,[49] which means that cabinet still carries on all executive functions when Parliament is adjourned, prorogued, or dissolved.

Other Contemporary Applications

The 2008 prorogation of Parliament provides one example of an incident where the availability of information on the exercise of Crown prerogatives could have clarified contentious issues to the media, academics, and the public. In this section we turn to three contemporary uses of Crown prerogative that caused some confusion in the media and academia, and that serve as examples of where officializations could have provided valuable insights.

The first is the caretaker convention, more properly "the principle of restraint," and its use during the 2011 federal election when Canada

committed to participate in the Libya mission. The second is the use of state funerals, with the example of Jack Layton, the late leader of the New Democratic Party in August 2011. The final example is the use of the royal prerogative of mercy to pardon farmers in the summer of 2012.

The Principle of Restraint (or the Caretaker Convention) and Nature of the Government's Authority

As the *Manual* emphasizes, the nature of the government's authority is such that "a Government receives its authority from the Crown and is responsible to Parliament for the exercise of that authority."[50] As a result, cabinet carries out all executive functions whether Parliament is sitting, adjourned, prorogued, or dissolved.

During an election, the legislature is dissolved and thus ceases to exist altogether. While members of the legislature thus lose their offices, ministers of the Crown remain in office and continue to govern. The government possesses full legal powers and authorities for the duration of its tenure, but it may exercise self-restraint and limit itself to the routine and necessary, because the House of Commons cannot fulfil its core function of holding the government to account and of scrutinizing spending during the writ.[51] As the *Manual* makes clear,

> As long as a Government is in office its legal authority is unimpaired and its obligation to carry on the government of the country remains, whether Parliament is dissolved or not. The necessity to account to Parliament for the exercise of this authority does impose restraints in certain circumstances. The extent of these restraints varies according to the situation and to the disposition of the Government to recognize them.[52]

In addition, the tenure of the prime minister determines the term in office of his or her ministry, which means that his or her resignation or death results in the automatic resignation of all other serving cabinet ministers and the end of that ministry.[53] The governor's first constitutional duty is to ensure that there is always a first minister and cabinet in office.[54]

In 2008, the PCO produced a directive entitled *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants during an Election*. This document provides an official interpretation of the principle of restraint:

> During an election, a government should restrict itself – in matters of policy, expenditure and appointments – to activity that is: a) routine, or b) non-controversial, or c) urgent and in the public interest, or d) reversible by a new government without undue cost or disruption, or e) agreed to by the Opposition (in those cases where consultation is appropriate).[55]

By way of example, during the federal election of 2011, Foreign Affairs minister Lawrence Cannon consulted with opposition leaders on Canada's participation in a NATO-led mission in Libya before travelling abroad to hold meetings on the subject.[56] These international meetings pertaining to Canada's participation in Libya required the attendance of a minister of the Crown and were both "urgent and in the public interest" and "agreed to by the Opposition."

State Funerals

On August 22, 2011, Jack Layton died only two months after the previous general election, when he became leader of Her Majesty's Loyal Opposition. The Government of Canada arranged for a state funeral in his honour. The *Manual* provides some guidelines on state funerals that indicate the rationale and process behind this decision.[57]

> There is no accepted definition of what constitutes a State funeral in Canada. It should be regarded as being a funeral which merits official participation at the highest level, organized and financed by the State even though the extent of actual Government involvement in each area, participation, organization and finance, may vary greatly according to the circumstances and the wishes of the family. A State funeral is justified on the ground that the State is a "co-bereaved" because of the position of the deceased.[58]

It also explains that current and former governors general and prime ministers, and current cabinet ministers "have been regarded as entitled to State funerals." In addition, "there is no regular pattern for Government participation in funerals of senators ... [or] members of Parliament."[59]

However, the prime minister also possesses the personal discretion to offer a state funeral to any Canadian. The prime minister "decides whether a State funeral should be proposed and ascertains the wishes of the family of the deceased."[60] In such cases, the prime minister also "determines, in consultation with the family, and with the Cabinet if he so wishes, what the Government's involvement should be, in particular what the Government representation will be."[61] Prime Minister Harper conformed to this protocol; he offered a state funeral to the Layton family and they accepted the honour.[62]

Royal Prerogative of Mercy

On August 1, 2012, the law repealing the Canadian Wheat Board's monopoly entered into force. The same day, Prime Minister Harper announced that his government had invoked the royal prerogative of mercy in order to issue full pardons to farmers who had violated the criminal prohibition against breaking the Wheat Board's monopoly while it still held the force

of law.[63] The Harper government considered the previous criminal prohibition unjust and believed that these farmers should not carry criminal records for having committed a crime that no longer existed.[64]

The *Manual* contains some guidance on the royal prerogative of mercy, although this section would require extensive revisions because Parliament has since abolished capital punishment and passed the Criminal Records Act, which codifies procedures used by the Parole Board in seeking applications for clemency. Indeed, although the relevant provisions of the Criminal Code have changed, the *Manual* recognizes the effect of the Criminal Code on the prerogative in a non-derogation clause that explicitly preserves the royal prerogative of mercy: "Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy."[65]

> The prerogative of mercy delegated to the Governor General in the Letters Patent and enunciated in the Criminal Code are one and the same. The procedure has been to take action with reference to the statutory provisions of the Code although the prerogative would continue to exist, as set out in the Letters Patent, even if the Criminal Code were silent on the subject.[66]

In other words, the executive power of mercy remains a prerogative power and is also a statutory power simultaneously. Parliament chose to place the statutory power alongside the prerogative power, yet the statute does not supplant the prerogative.

The *Manual* focuses mostly on the historical development of the royal prerogative of mercy, which the Sovereign has delegated to the governor general through Letters Patent. It explains that prior to the Letters Patent, 1878, the governor general exercised *personal* discretion; thereafter, the governor general exercised the maximum limit of the Bagehotian rights to be consulted, to advise, and to warn with respect to any clemency for capital crimes.

> While the prerogative of mercy is now only exercised on advice, the Governor General is nevertheless expected to reach a personal judgement for which purpose he is given full background information. He is free to express any concerns he may have about the advice offered and may even ask for it to be reconsidered.[67]

However, a further paragraph clarifies, "In non-capital cases it is usual for the Governor General to accept the recommendation laid before him."[68]

Thus in 2012, the Harper government acted on the authority of the prerogative power, which the statutory power has not displaced. While the governor general grants an "ordinary pardon" under the royal prerogative of mercy on and in accordance with the advice of the minister of public safety, whose responsibilities include the Parole Board of Canada, in this case the Prime Minister's Office took the initiative and first contacted

the farmers.[69] Some opposition MPs criticized the Harper government's decision; Liberal leader Bob Rae even accused the government of having "corrupt[ed] the process."[70] Yet it was generally misunderstood that the prerogative of mercy exists alongside the statutory process contained in the Criminal Records Act.

Cabinet Manuals: Clarifying the Role of the Crown

Unwritten convention, precedent, and history form the foundation upon which Canada's constitutional framework rests and from which it derives its authority and legitimacy. This principle of the importance of history and convention means that we must apply historical precedents and the existing body of knowledge to contemporary situations. The contemporary cases we have discussed demonstrate that the Government of Canada has followed proper constitutional practice, as found in the *Manual*. Importantly, the government does not need to endorse these references publicly in order to abide by them. Officializations are therefore useful in analyzing the government's actions and decisions, but their utility might increase if they were publicly acknowledged and if the media referred to them in doing research for political reporting.

In other words, the *Manual* and other officializations can "obviate the requirement for urgent research on courses of action whenever a situation arises,"[71] not only with respect to the federal executive itself, but also for political journalists who analyze and disseminate this information to the public. In this way, cabinet manuals may assist in educating those in Parliament, the media, academia, and citizens on how some of the internal mechanics of government work, in much the same way as the Canadian House of Commons procedural authority—*House of Commons: Procedure and Practice*—has served to educate people on the role and procedure of Parliament.[72] In addition, the *Manual* provides a solid academic foundation upon which scholars can base their research as to the nature, state, and existence of certain conventions, customs, and procedures. Scholars could ground their research in how the system operates, thereby eliminating the need to speculate.

For our purposes here, the importance is ensuring the integrity of the Crown, specifically, emphasizing that ministers of the Crown take responsibility for all acts of the Crown; that the Queen and her representatives are above politics and do not as a matter of course exercise personal discretion; and that calls for political accountability must be directed to politicians.

The tapestry of laws, principles, and conventions that governs the Canadian constitutional framework and the relationship between its constituent parts are remarkably complex. Officialization serves to clarify the system and provides for greater understanding as to where accountability properly lies.

Notes

1. See Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual* (Wellington: Her Majesty the Queen in Right of New Zealand, 2008). First produced in 1979, this manual is now on its eighth edition. While it does not delve into historical precedents, at 180 pages it presents succinct descriptions of the machinery of government on a range of issues like the formation of governments, the governor general's reserve powers, and the caretaker convention. See also Cabinet Secretariat, Department of the Prime Minister and Cabinet, *Cabinet Handbook*, 6th ed. (Canberra: Commonwealth of Australia, 2009). First produced in 1983, at 40 pages it focuses on descriptions of the conventions and practices relating to collective and individual ministerial responsibility. See also Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and the Rules on the Operations of Government* (London: Crown Copyright, 2011). At 110 pages, the first edition resulted from the publication in December 2010 of a draft cabinet manual, which the Brown government originally authorized in anticipation of a hung parliament; the Cameron government subsequently agreed to allow the manual to undergo extensive consultation with Parliament. The production of this manual followed a 2009 study entitled *Making Minority Parliament Work: Hung Parliaments and the Challenges for Westminster and Whitehall*, authored by scholars of the Constitution Unit at University College London.
2. See "Government Formation in an Age of Hung Parliaments: Background Paper," *Public Policy Forum* (February 2011); "Government Formation in Canada: Ottawa Roundtable," *Public Policy Forum* (March 21, 2011); and Peter H. Russell and Cheryl Milne, *Adjusting to a New Era of Minority Government: Report of a Workshop on Constitutional Conventions* (Toronto: University of Toronto, David Asper Centre for Constitutional Rights, 2011).
3. Peter H. Russell, "Principles, Rules and Practices of Parliamentary Government: Time for a Written Constitution," *Journal of Parliamentary and Political Law* 6, no. 2 (2012): 362.
4. Portions of this section are excerpts or modifications to the authors' work "Writing the Unwritten: The Officialization of Constitutional Conventions in Canada, the United Kingdom, New Zealand, and Australia," published in the *Journal of Parliamentary and Political Law* 6, no. 2 (2012).
5. Bowden and MacDonald, "Writing the Unwritten," 367.
6. Andrew Heard, "Constitutional Conventions and Parliament," *Canadian Parliamentary Review* 28, no. 2 (2005): 20.
7. Bowden and MacDonald, "Writing the Unwritten," 368.
8. Reference re Resolution to Amend the Constitution, [1981] SCR, paras 883-84.
9. Alexander Hamilton or James Madison, "The Structure of the Government Must Furnish the Proper Checks and Balances between Different Departments," *The Federalist Papers,* No. 51, reprinted from the *New York Packet*, February 8, 1788.
10. Ibid.
11. Sir Gus O'Donnell, "The New Cabinet Manual" (address to the Institute for Government, London, United Kingdom, February 24, 2011), accessed May 29, 2011, http://www.ucl.ac.uk/constitution-unit/events/public-seminars-10-11/cabinet-manual.

12. Eugene Forsey, "The Present Position of the Reserve Powers of the Crown," in *Evatt and Forsey on the Reserve Powers* (Sydney: Legal Books, 1990), xc.
13. Bowden and MacDonald, "Writing the Unwritten," 372-73.
14. Privy Council Office, *The Constitutional Amendment Bill* (Ottawa: Her Majesty the Queen in Right of Canada, 1978), 19-20.
15. Parliament of Canada, "An Act to Amend the Canada Elections Act," Bill C-16, 39th Parliament, 1st Session, 2006-2007 (Ottawa: Her Majesty the Queen in Right of Canada, 2007). Royal assent, May 3, 2007.
16. *Conacher v. Canada (Prime Minister)*, 2009 FC 920, para. 75-78; *Conacher v. Canada (Prime Minister),* 2011 4 F.C.R., para. 13.
17. Privy Council Office, "Draft Letter to Cabinet Ministers," June 17, 1968, Ottawa. However, the *Manual* was only distributed in June 1968 under Prime Minister Pierre Trudeau. Intriguingly, the correspondence between Robertson and Davis suggests that Pearson regarded the *Manual* as a tool for prime ministerial centralization.
18. Privy Council Office, *Manual of Official Procedure of the Government of Canada,* prepared by Henry F. Davis and André Millar (Ottawa: Government of Canada, 1968), iii.
19. Ibid.
20. Ibid.
21. Privy Council Office, "Memorandum for the Prime Minister: *Manual of Official Procedure of the Government of Canada*," March 18, 1968, Ottawa.
22. Privy Council Office, letter from Henry F. Davis to the Secretary to the Governor General, March 17, 1969, Ottawa.
23. Privy Council Office, "Draft Letter to Cabinet Ministers," June 17, 1968, Ottawa.
24. Ibid.
25. *Manual of Official Procedure,* iii.
26. Ibid.
27. Ibid., iv.
28. Ibid.
29. Privy Council Office, "Memorandum for Mr. Robertson: Manual of Procedure," Henry F. Davis, January 23, 1969, Ottawa.
30. Privy Council Office, "*Manual of Official Procedure of the Government of Canada:* Qs and As," Ottawa, 2011.
31. Privy Council Office, "Memorandum for Rachel Curran: Access to Information Request for the *Manual of Official Procedure of the Government of Canada*," Ottawa, 2011.
32. Privy Council Office, *Guidance for Deputy Ministers* (Ottawa: Her Majesty the Queen in Right of Canada, 2003); Privy Council Office, *Accounting Officers: Guidance on Roles, Responsibilities and Appearances before Parliamentary Committees* (Ottawa: Her Majesty the Queen in Right of Canada, 2007); Privy Council Office, "Responsibility in the Constitution," accessed June 15, 2011, http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=constitution/table- eng.htm.
33. See Nicholas A. MacDonald and James W. J. Bowden, "No Discretion: On Prorogation and the Governor General," *Canadian Parliamentary Review* 34, no 1 (2011): 7-16. See also Peter Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009); Peter Hogg,

"Remarks on the Governor General's Discretionary Powers" (address to the Spring Seminar on the Role of the Governor General of the Canadian Study of Parliament Group, Ottawa, March 26, 2010); Peter Hogg, "The 2008 Constitutional Crisis: Prorogation and the Power of the Governor General," *National Journal of Constitutional Law* 27 (2010); "Dates and the Expansion of the Governor General's Power" (address to the University of Ottawa's Faculty of Common Law's Forum on "Canada's New Governor General: The Challenges Ahead," September 28, 2010); Barbara J. Messamore, "Conventions of the Role of the Governor General: Some Illustrative Historical Episodes," *Journal of Parliamentary and Political Law* 4 (December 2010); Henri Brun, "La monarchie réelle est morte depuis longtemps au Canada," *La Presse*, December 4, 2008; Guy Tremblay, "La gouverneure générale doit accéder à une demande de prorogation ou de dissolution," *Le Devoir*, December 4, 2008.

34. *Manual of Official Procedure,* 149.
35. Ibid., 150.
36. Ibid., 401.
37. Brian Topp, *How We Almost Gave the Tories the Boot: An Inside Story behind the Coalition* (Toronto: James Lorimer & Company, 2010).
38. Ibid., 156.
39. Ibid.
40. Peter Hogg, *Constitutional Law of Canada,* 5th ed. supplemented (Toronto: Thomson Reuters, 2011), 9-37.
41. Alexander Panetta, "Governor-General Had Hidden Message in Prorogation Crisis," *Globe and Mail*, September 28, 2010. "You have to think about it. You have to ask questions. The idea wasn't to create artificial suspense. The idea was to send a message—and for people to understand that this warranted reflection," said Ms. Jean.
42. *Manual of Official Procedure,* 401. While this is the convention at the federal level, the provinces do not necessarily follow this convention. For example, in Ontario, section 5 of the Legislative Assembly Act stipulates that "it is not necessary for the Lieutenant Governor in proroguing the Legislature to name a day to which it is prorogued, nor to issue a formal proclamation for a meeting of the Legislature when it is not intended that the Legislature shall meet for despatch of business."
43. Ibid.
44. Ibid. The *Canada Gazette* publishes all proclamations and speeches of prorogation. (The governor general normally promulgated prorogation through a speech from the throne in the Senate until the 1940s, when the deputy governor general did so. By the 1960s, the governor general promulgated prorogation by proclamation.)
45. "Proclamation Proroguing Parliament to January 12, 2004," *Canada Gazette*, November 14, 2003; "Proclamation Summoning Parliament to Meet January 12, 2004 (Despatch of Business)," *Canada Gazette,* November 14, 2003.
46. Privy Council Office, "Guide to Canadian Ministries since Confederation."
47. "Proclamation Summoning Parliament to Meet February 2, 2004 (Despatch of Business)," *Canada Gazette*, January 12, 2004.
48. Lorraine Weinrib, "Prime Minister Harper's Parliamentary Time Out," in *Parliamentary Democracy in Crisis*, ed. Peter H. Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009), 64.

49. *Manual of Official Procedure,* 93; R. MacGregor Dawson, *The Government of Canada,* 5th ed., revised by Norman Ward (Toronto: University of Toronto Press, 1970), 174-75.
50. *Manual of Official Procedure,* 89.
51. Bowden and MacDonald, "Writing the Unwritten," 379.
52. *Manual of Official Procedure,* 89.
53. Ibid., 77-79.
54. Department of Canadian Heritage, *Ceremonial and Protocol Handbook* (Ottawa: Government of Canada, 1998), G.4-2.
55. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants during an Election*, 1.
56. Campbell Clark, "Cannon Leaves Hustings to Attend Second Round of Libya Crisis Talks," *Globe and Mail*, April 11, 2011.
57. James W. J. Bowden and Patrick Baud, "Jack Layton and the Prime Minister's Prerogative to Offer State Funerals," *iPolitics*, September 3, 2012.
58. *Manual of Official Procedure,* 61.
59. Ibid., 61-62.
60. Ibid.
61. Ibid., 65.
62. Tim Naumetz, "PMO Says Harper Non-Partisan in Making Statement on Layton," *The Hill Times,* August 23, 2011.
63. Douglas Quan, "Wheat Board Pardons from Harper Could Open the Door to Abuse, Critics Charge," *Vancouver Sun,* August 2, 2012.
64. Department of Public Safety, "Questions and Answers: PM's Announcement of Royal Prerogative of Mercy," Ottawa, 2011. One question read, "Why did the government pardon these individuals?" The answer from the Minister's Office was: "Western Canadian farmers asked for freedom of choice in their own business decisions. They protested the restrictions imposed by the CWB and were charged by the Liberal government. When they won in court, Ralph Goodale had the Liberal government unilaterally change the law to recriminalize their actions. Canadians object to injustice and farmers continued to fight for freedom. When they did, they were punished with unwarranted and unjustified Customs charges. It is time for the injustice to be corrected."
65. Canada, Criminal Code (R.S.C., 1985, c. C-46), section 749.
66. *Manual of Official Procedure*, 166.
67. Ibid., 167.
68. Ibid.
69. Parole Board of Canada, "Fact Sheet: Royal Prerogative of Mercy," November 4, 2008, accessed March 14, 2013, http://pbc-clcc.gc.ca/infocntr/factsh/man_14-eng.shtml; Quan, "Wheat Board Pardons from Harper."
70. Quan, "Wheat Board Pardons from Harper."
71. Privy Council Office, "Draft Letter to Cabinet Ministers," June 17, 1968, Ottawa.
72. Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed. (Ottawa: House of Commons and Yvon Blais, 2009).