The Origins of the Caretaker Convention: Governor General Lord Aberdeen's Dismissal of Prime Minister Tupper in 1896

J.W.J. Bowden[*]

ABSTRACT

Under exceptional circumstances, Governors can exercise their discretionary authority, sometimes known as the reserve power, to reject a Prime Minister's constitutional advice and thereby either force the Prime Minister to resign or dismiss the Prime Minister from office outright. This article deals with one such overlooked precedent which occurred in Canada in 1896. Governor General Lord Aberdeen rejected the constitutional advice of Prime Minister Sir Charles Tupper to make several outgoing patronage appointments shortly after Sir Wilfrid Laurier's Liberals won a parliamentary majority in a general election. The fascinating written correspondence between Aberdeen and Tupper and subsequent parliamentary debates between Tupper and Laurier illustrate two distinct and competing understandings of the Spoils System versus what we would now call the Caretaker Convention, as well as competing conceptions of parliamentary sovereignty versus popular sovereignty, which, in turn, determine whether the incumbent prime minister should resign before the new parliament convenes, or, alternatively, face the new parliament and resign only after losing a vote on the Address-in-Reply or supply. Some jurisdictions have adopted confirmation voting to remove the ambiguity from that debate altogether. Finally, these two fully fledged and competing viewpoints demonstrate the tension between the descriptive versus the normative in a political constitution and highlight the nature of constitutional conventions themselves as fundamentally, dialectical or dialogical: we therefore derive their meaning and the better interpretation through debate.

1. INTRODUCTION

A series of minority parliaments in Canada elected between 2004 and 2021, as well as several minority legislatures in Canadian provinces and territories

[*] Independent Scholar.

returned between 2017 and 2021, have renewed interest in the basic constitutional conventions underpinning Responsible Government, which strong two-party systems and majority parliaments tend to mask behind a facade of automatic and simple transitions of power. In particular, Stephen Harper, the Conservative Prime Minister from February 2006 to November 2015, inspired many scholars to take a renewed interest in the constitutional conventions relating to how the Governor General and Lieutenant Governors prorogue and dissolve parliaments, form governments, and appoint (and sometimes dismiss) ministers. Yet most initial forays into Harper's controversial snap election in August 2008 and tactical prorogations of a minority parliament in December 2008 and December 2009 glossed over or ignored several instructive Canadian precedents.[1] For instance, when Harper secured a tactical prorogation of the 1st session of the 40th Parliament in December 2008 in order to postpone a vote of confidence for a few weeks, many scholars derided his actions as unprecedented,[2] even though in August 1873 Sir John A. Macdonald secured a tactical prorogation of the 1st session of the 2nd Parliament in order to postpone a vote of confidence.[3] The two cases differed only in their outcomes: the opposition remained united and forced Macdonald to resign the premiership in November 1873; in contrast, the proposed Liberal-New Democratic coalition collapsed shortly after the prorogation in December 2008 even before the 2nd session of the 40th Parliament convened in January 2009.[4] Harper remained prime minister for a further six years. Another crucial fact escaped notice amidst the furore of December 2008: if Governor General Michaëlle Jean had rejected Harper's constitutional advice to prorogue parliament, then she would have forced Harper to resign and would, in turn, have forced herself to appoint Stephane Dion, the leader of the opposition and Liberal Party, as the next prime minister. Several precedents in Canadian political history — including one from 2017 — show that Governors who have rejected their Prime Minister's constitutional advice thereby force those Prime Ministers to resign.[5] This

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1 Peter H. Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

2 *Ibid*. Within this compilation, only Michael Valpy even mentioned Macdonald's prorogation in 1873. Michael Valpy, "The 'Crisis': A Narrative," chapter 1 in *Parliamentary Democracy in Crisis,* edited by Peter H. Russell and Lorne Sossin, 3-18 (Toronto: University of Toronto Press, 2009) at 13.

3 Barbara J. Messamore, "A Matter of Instinct: Lord Dufferin in the Pacific Scandal," in *Canada's Governors General, 1847-1878: Biography and Constitutional Evolution* (Toronto: University of Toronto Press, 2006) at 148-177.

4 Brian Topp, *How We Almost Gave the Tories the Boot: The Inside Story Behind the Coalition* (Toronto: Lorimer, 2010) at 163.

5 Alpheus Todd, *Parliamentary Government in the British Colonies*, 2nd ed (London: Longmans, Green, and Co., 1894) at 760-761, 769; Sir John George Bourinot, *Parliamentary Procedure and Practice*, 4th ed. (Montreal: Dawson Brothers Publishing, 1916) at 102; Robert Macgregor Dawson, "The Constitutional Question," *Dalhousie Review* VI, No. 3 (October 1926) at 332-337; Eugene Forsey and Graham C. Eglington, *The Question of Confidence in Responsible Government* (Ottawa: Parlia-

article highlights one of these obscure precedents from the close of the 19th century.

On 23 June 1896, the Liberals won a parliamentary majority after eighteen years of Conservative rule. But the incumbent Prime Minister Sir Charles Tupper did not resign until 8 July, and *not* because his Conservative Party had lost the election. Instead, Tupper resigned because Governor General Lord Aberdeen had rejected his constitutional advice and refused to appoint senators and make other patronage appointments after the election. Tupper says so unambiguously in his written correspondence with Aberdeen. The dispute between Aberdeen and Tupper hinged upon the Principle of Restraint, which has since evolved into the Caretaker Convention, and whether Prime Ministers should resign after an election in which another party has won a parliamentary majority before the new parliament meets, or whether he should test the confidence of the new parliament and resign only after finding it wanting on the Address-in-Reply or supply. These constitutional conventions remained in flux in the late 19th century. Tupper and his successor, Sir Wilfrid Laurier, debated the merits of the two scenarios shortly after the next parliament met in September 1896. A scorned Tupper prevaricated against his unceremonious dismissal and argued that a series of precedents from the mid-19th century allowed the incumbent government to meet the new parliament and resign only after losing a vote of confidence instead of resigning after losing at the polls. In contrast, Laurier championed popular sovereignty over parliamentary sovereignty and kept referring to "the people" to justify his newer understanding of the constitutional conventions of forming governments. Laurier's view has prevailed ever since — at least in majority parliaments. Like members of parliament themselves, learned scholars often disagree and debate the meaning of constitutional conventions and the better course of action in any given case, as subsequent Canadian controversies like the King-Byng Affair of 1926 and Harper's tactical prorogations in 2008 and 2009 reveal.[6] Constitutional conventions are dialectical: we discover and derive what they mean and how they should apply through debate.

2. THE SHORT PREMIERSHIP OF SIR CHARLES TUPPER

The origins of Aberdeen's dismissal of Tupper in 1896 took root in the succession crisis within the Conservative Party between 1891 and 1896. Sir John A. Macdonald had served as Prime Minister of the Province of Canada and the Dominion of Canada for 28 years and four non-consecutive terms

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ment of Canada, 1985) at 16-17; Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943) at 88, 89, 96, 100, 112-113, 122, 127.

6 *Supra* note 1; Nicholas A. MacDonald and James W.J. Bowden, "No Discretion: On Prorogation and the Governor General," *Canadian Parliamentary Review* 34, No. 1 (Spring 2011) at 7-16; Peter Aucoin *et al., Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011) at 104, 207.

between 24 May 1856 and 6 June 1891, when he died in office only a few weeks after leading his Conservatives to their fourth consecutive parliamentary majority.[7] His death sent the Conservative Party into chaos, and four subsequent Conservative Prime Ministers either resigned or also died in office between June 1891 and July 1896. Governor General Lord Stanley appointed Senator Sir John Abbot as Macdonald's successor, though he only managed to serve one year (16 June 1891 to 24 November 1892) before tendering his resignation due to ill health; he died in October 1893.[8] Stanley then appointed Sir John Thompson on 5 December 1892, but he died of cardiac arrest while dining with Her Majesty Queen Victoria at Windsor Castle on 12 December 1894.[9] Governor General Lord Aberdeen settled on Senator Sir Mackenzie Bowell on 21 December 1894 simply because he had already been serving as Acting Prime Minister while Thompson travelled out of the country. His doomed premiership only lasted until 27 April 1896.[10] In January 1896, Sir Mackenzie's cabinet rebelled against him and demanded his resignation.[11] While Bowell did not step down and make way for a successor until a few months later, the cabinet revolt succeeded: Sir Charles Tupper became the Leader of the Government in the House of Commons and *de facto* Prime Minister from 15 January until the Governor General appointed him as Prime Minister *de jure* on 1 May 1896. Tupper and Bowell had struck a bargain which allowed Bowell to save face: Bowell would continue serving as Prime Minister from his perch in the Senate until the dissolution of parliament, but Tupper would take the premiership and lead the party in the election. Tupper explains this unusual arrangement in his autobiography:

> Asked by the recalcitrant members of the Cabinet to assume the leadership, I refused, declaring that I would not do so except at the request of the Premier, Sir Mackenzie Bowell. It was not until all efforts on his part at reconstruction had failed that he requested me to become leader of the party. I told him I would do so if he was prepared to receive back all of his colleagues, to which he assented. The Government was then reconstructed by my appointment as

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7 J.W.J. Bowden, "Canada's Legal-Constitutional Continuity, 1791-1867," *Journal of Parliamentary and Political Law* 14, No. 3 (2020) at 599. His terms in office were from 24 May 1856 to 2 August 1858, 6 August 1858 to 24 May 1862, 30 May 1864 to 5 November 1873, and 17 October 1878 to his death on 6 June 1891.

8 Privy Council Office, "Fourth Ministry: 16 June 1891 — 24 November 1892," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017); Michael Wilcox, "Sir John Abbot," entry in *The Canadian Encyclopedia,* 4 January 2019.

9 Privy Council Office, "Fifth Ministry: 5 December 1892 — 12 December 1894," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017).

10 Barry K. Wilson, *Sir Mackenzie Bowell: A Prime Minister Forgotten by History* (Loose Canon Press, 2021) at 179; Privy Council Office, "Sixth Ministry: 21 December 1894 — 27 April 1896," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017).

11 Barry K. Wilson, "Sir Mackenzie Disembowelled: The 1896 Cabinet Coup," *The Dorchester Review* 9, No. 1 (Summer 2019) at 22-28.

> Secretary of State and leader of the party in the House of Commons until after the session was over, when, by arrangement, I was to succeed Sir Mackenzie Bowell as Prime Minister.[12]

Sir Charles Tupper joined the Bowell ministry on 15 January 1896 as "Secretary of State of Canada," and the *Hansard* for the last months of the 7th Parliament also refers to Tupper as "Leader of the Government in the House of Commons," since Prime Minister Senator Sir Mackenzie Bowell sat in the upper chamber.[13] The 7th Parliament lasted the full five years and came within one day of its maximum lifespan, whereupon it would have dissolved automatically by efflux of time on 25 April 1896 pursuant to section 50 of the *British North America Act, 1867*.[14] Governor General Lord Aberdeen finally dissolved it on ministerial advice on 24 April 1896.[15] Bowell then stepped down in accordance with the agreement that he and Tupper had reached in January, and Aberdeen appointed Tupper as Prime Minister on 1 May 1896, during the writ. Tupper moved quickly to counteract his tenuous hold over a cabinet which had already ousted his predecessor; after all, if ministers can betray one Prime Minister, then they could easily betray a second. Tupper issued what would become the first of six iterations of an Order-in-Council pertaining to "The Special Prerogatives of the Prime Minister" over and above the rest of cabinet. Sir Wilfrid Laurier later in 1896 found this device useful and re-issued it upon his appointment, as did Sir Robert Borden in 1911, Arthur Meighen in 1920, R.B. Bennett in 1930, and, lastly, W.L. Mackenzie King in 1935.[16] Amongst other things, this memorandum established the

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[12] Sir Charles Tupper, *Reflections of Sixty Years* (Toronto: Cassell and Company, Limited, 1914) at 308-309.

[13] Privy Council Office, "Sixth Ministry: 21 December 1894 — 27 April 1896," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017). Canada, House of Commons, *Debates*, 7th Parliament, 6th Session, Monday, 16 March 1896, at 3599-3625. In this example, MPs could not agree on the exact date on which the 7th Parliament would dissolve by efflux of time in 1896; the *Debates* refer to Tupper as the Leader of the Government in the House of Commons.

[14] James W.J. Bowden, "When the Bell Tolls for Parliament: Dissolution by Efflux of Time," *Journal of Parliamentary and Political Law* 11, No. 1 (2017) at 129-144.

[15] Privy Council Office, Order-in-Council P.C. 1896-1598, "Dissolution of Parliament," 24 April 1896; Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 19 August 1896, c. 1. Though both Aberdeen and Tupper in their correspondence stated that the 7th Parliament dissolved by efflux of time on 25 April 1896, it did, in fact, dissolve by proclamation on 24 April 1896, as the Privy Council Office's records of Orders-in-Council and the House of Commons *Debates* from the 8th Parliament record.

[16] Privy Council Office, Order-in-Council P.C. 1896-1853, "Functions of the Prime Minister," 1 May 1896; Privy Council Office, Order-in-Council P.C. 1896-2710, "Functions of the Prime Minister," 13 July 1896; Privy Council Office, Order-in-Council P.C. 1911-2437, "Function of the Prime Minister Defined," 10 October 1911; Privy Council Office, Order-in-Council P.C. 1920-1639, "Functions of the Prime Minister Defined," 19 July 1920; Privy Council Office, Order-in-Council P.C. 1930-1930, 7 August 1930; Privy Council Office, Order-in-Council P.C. 1935-3374, 25 October 1935.

quorum of cabinet at four ministers. All iterations of this Order-in-Council reserve key appointments as "the special prerogative of the Prime Minister", including those of "Privy Councillors, Cabinet Ministers, Lieutenant Governors and Provincial Administrators, Speaker of the Senate, Senators, Chief Justices of all Courts, Sub-Committees of Council [which refers to cabinet committees], Deputy Heads of Departments, Librarians of Parliament, and Crown Appointments in both Houses of Parliament."[17]

But this centralised prime ministerial instrument could not save Tupper from the superior authority of the Governor General, the Queen's representative in Canada, and the new House of Commons which the people had just elected. Even though the Conservatives won the plurality of the popular vote, the Liberals secured a parliamentary majority on 23 June 1896; out of 213 seats, they won 117 compared to the Conservatives' 89, while the other 7 seats went to vote-splitters and spoilers.[18] The election of 1896 marked only the third time since Confederation in 1867 that a transition between ministries would happen because one party won a majority over another in an election — and the first since 1878, eighteen years before. Alexander Mackenzie's Liberals formed a new government mid-parliament in November 1873 after the Pacific Scandal forced Macdonald's resignation, and the Liberals went on to win a majority in their own right in Mackenzie's snap election in January 1874.[19] Macdonald then marked his triumphant return in the election of 1878 and led the Conservatives to further victories in 1882, 1887, and once more 1891.[20] Sir Charles Tupper resigned the premiership that he had so long sought on 8 July 1896[21], before the 8th Parliament met, and thus enjoys the ignominious distinction as the only Prime Minister of Canada whose tenure coincided purely with the writ when parliament was dissolved. Tupper's tenure also remains the shortest in

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17 *Ibid.*

18 Audrey O'Brien and Marc Bosc, "Appendix 12: General Election Results Since 1867," in *House of Commons Procedure and Practice,* 2nd ed (Ottawa: House of Commons, 2009) at 1274. Laurier's Liberals won 117 seats compared to 89 of Tupper's Conservatives, 4 MPs under the "Protestant Protective Association," 2 MPs under the banner of "Patrons of Industry", and 1 independent. The Liberals won a healthy majority of 21.

19 *Ibid.,* 1273. On 22 January 1874, Mackenzie's Liberals won 133 seats compared to 72 of Macdonald's Liberal-Conservatives and 7 independents. The Liberals won a massive majority of 60.

20 *Ibid.* In 1878, the country swung massively back over to Macdonald's Liberal-Conservatives, with 137 MPs, versus merely 68 Liberals. The election of 1882 almost exactly replicated those results, with 139 Liberal-Conservatives versus 71 Liberals. The Liberals made some gains in 1887, winning 89 seats opposite 123 of Macdonald's Liberal-Conservatives and 3 "National-Conservative" MPs. In Macdonald's last election where he campaigned against reciprocity once more, Canadians returned the exact same party standings: 123 Liberal-Conservatives opposite 89 Liberals and 3 National-Conservatives. The Liberal-Conservatives held their majority of 31.

21 Privy Council Office, "Seventh Ministry," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 8 January 2018).

Canadian history, at only 69 days. Governor General Lord Aberdeen then appointed Sir Wilfrid Laurier as Prime Minister on 11 July 1896.[22] But Tupper's short premiership nevertheless made its mark on Canadian political history because of the manner in which and reasons for which Lord Aberdeen dismissed him from office.

3. OFFICIAL CORRESPONDENCE BETWEEN GOVERNOR GENERAL LORD ABERDEEN AND PRIME MINISTER SIR CHARLES TUPPER

The correspondence between Aberdeen and Tupper provides historians a fascinating insight into how constitutional conventions change over time and into the constitutional relationship between the Crown and the First Minister of the Crown. Aberdeen explained why he rejected some of Tupper's proposed appointments, and his reasons would later underpin the Principle of Restraint in the 20th century and the Caretaker Convention in the 21st. The exchange also leaves no doubt that Tupper resigned as Prime Minister specifically because Aberdeen rejected his constitutional advice and refused to sign off on Orders-in-Council summoning senators. The House of Commons petitioned on 28 August 1896 "for copies of all correspondence between His Excellency the Governor General and Sir Charles Tupper, respecting certain proposed appointments and Orders in Council."[23] The *Sessional Papers* published at the end of 1896 contain eight letters and memoranda going back and forth between Aberdeen (or his Private Secretary Captain John Sinclair) and Tupper between 4 July and 13 July 1896.

The Liberals won a parliamentary majority on 23 June, and Tupper first met with Aberdeen in person on 2 July. Lady Aberdeen in her diary described Tupper at this meeting as a "plucky old thing [...] blooming in a white waistcoat & seemingly as pleased with himself as ever."[24] She also observed that "he did not at all appear as the defeated Premier come to render an account of his defeat & of its causes to the representative of the Sovereign."[25] Tupper's correspondence confirms Lady Aberdeen's observation. On 4 July, Governor General Lord Aberdeen sent a "Memorandum to the Prime Minister for Himself and His Colleagues" in which he outlined his objections to his outgoing Prime Minister's suggestion that he would like to fill up vacancies before leaving office. Aberdeen's official memorandum from 4 July

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[22] Privy Council Office, "Eighth Ministry," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 8 January 2018).

[23] Canada, House of Commons, "To An Address of the House of Commons, Dated 28th August, 1896, for copies of all correspondence between His Excellency the Governor General and Sir Charles Tupper, respecting certain proposed appointments and Orders in Council: Memorandum for the President of the Privy Council," in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, 1-9.

[24] John T. Seywell, "The Canadian Succession Question, 1891-1896," *The Canadian Historical Review,* 37, No. 4 (December 1956) at 334.

[25] *Ibid.*

summarised what he and Tupper had discussed on 2 July.[26] In the interim, Aberdeen and Sinclair brushed up on Alpheus Todd's works and consulted with Sir John George Bourinot (the Librarian of Parliament), who, according to Lady Aberdeen's diary, supported how Lord Aberdeen had approached the constitutional questions in contention.[27] Other Governors General have gone on to consult constitutional experts in similar circumstances.[28] Aberdeen's memorandum to Tupper even alludes to his consultations with constitutional experts with the line about "taking every means in my power to inform myself" of how to proceed. Tupper received Aberdeen's memorandum on the evening of 3 July then met with Aberdeen again for two hours on the morning of Saturday, 4 July.[29]

From the outset, Aberdeen took the view which had developed in the United Kingdom in the 1870s and 1880s during the Disraeli-Gladstone Oscillation that an incumbent Prime Minister should resign *before* the first session of the new parliament meets if another party had won a parliamentary majority in the recent election. Aberdeen made clear to Tupper that "it is impossible for me to ignore the probability that in the event of your deciding to meet Parliament the present Administration will fail to secure the support of the House of Commons."[30] Next, Aberdeen underscored the paramountcy of passing supply, which had run out on 30 June (the end of the fiscal year) because the previous session of parliament had become so bogged down in the Manitoba Schools Question that it had failed to pass supplementary estimates in the spring of 1896. The Bowell government instead had to resort to the Governor General's Special Warrants on 24 April to fund the operations of government until the end of the fiscal year on 30 June 1896.[31] This, in turn,

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[26] *Ibid.*

[27] *Ibid.,* at 335.

[28] Governor General Michaëlle Jean sought advice from Peter H. Russell and Peter Hogg in December 2008. Valpy, "'The Crisis'", 16. Valpy reports that Jean met with Harper and the Clerk of the Privy Council Kevin Lynch for 'more than two hours' on 4 December, that Jean then left the meeting to consult Peter Hogg in another room at Rideau Hall, and, finally, returned to inform Harper that she would sign his instrument of advice to prorogue the 1st session of the 40th Parliament. Peter H. Russell modestly revealed that Jean had also sought his advice in December 2008. Louise Elliott, "PM Gave Jean Pledges in Prorogation Crisis: Harper Promised Quick Return of Parliament and New Budget, Advisor Says," *CBC News,* 2 October 2010.

[29] *Supra* note 24, at 335.

[30] Aberdeen (Governor General of Canada), "A. Memorandum to the Prime Minister for Himself and His Colleagues under date 4th July, 1896," 2-3, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, 2.

[31] Privy Council Office, Order-in-Council P.C. 1896-1575, "Supplies, Supplementary Estimates 1895-1896," 24 April 1896. In Canada, the Governor General's Special Warrants function as supplementary estimates and allow the executive by Order-in-Council to spend money for limited duration while Parliament is dissolved, which the next Parliament would have to approve retroactively after the election. Parliament delegated this authority to the Governor-in-Council through the *Consolidated Revenue and Audit Act*. Most provincial legislatures have likewise provided for Lieutenant Governor's Special Warrants under similar circumstances.

supported the argument that the 8th Parliament should be convened as soon as possible — with Sir Wilfrid Laurier, leader of the Liberal Party, as Prime Minister. Aberdeen continued:

> In the first place, the business to be transacted by Parliament, though foreseen and not in character exceptional, is urgent. The supplies for the public service are already entirely exhausted. This contingency was in view when the date of the meeting of Parliament was fixed. It is in the public interest that Parliament shall meet on as early a day as possible, and be able to proceed with business forthwith.
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> Again, in regard to the various recommendations which in detail or by inference we discussed on Thursday, and in regard to all business which is not urgent and yet outside routine requirements, the assumption that the Government has failed to secure the confidence of the electorate at the polls leaves undiminished, indeed increases, the stringency of the limitations of an already somewhat peculiar position.[32]

In addition, Aberdeen underscored that he wanted the outgoing Tupper ministry to limit itself to matters both "urgent" and "in the public interest." Aberdeen also argued that because he had appointed Tupper's ministry during the writ and that it had therefore never held the confidence of any House of Commons, "the acts of the present Administration are in an unusual degree provisional."[33] He imposed a clear limitation on Tupper akin to what falls under the Caretaker Convention today:

> And as the powers of an Administration undoubtedly full and unrestricted must surely always be used with discretion, their exercise would seem to be rightly limited under such circumstances as the present to the transaction of all necessary public business, with it is a further duty to avoid all acts which may embarrass the succeeding Government.[34]

Aberdeen then strongly intimates that he will not accept Tupper's advice to appoint new senators and judges, but in that subtle and polite British way that bullish colonials often misinterpret as an invitation for further debate.

> On this ground I would ask your further consideration of some of the recommendations which we discussed incidentally on Thursday. On this ground, too, I felt obliged to withhold the expression of my acquiescence in your suggestion as the appointment of Senators and Judges. (You have since then laid before me certain recommendations as to Senatorships which are vacant). These are life appointments, and with them, under such circumstances as the present, it would seem proper to leave all other life appointments, and the creation of all new offices and appointments for the consideration of incoming Ministers, unless always such a course is shewn [*sic*] to be contrary to the public interest. [...]

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32 *Supra* note 30, at 2.

33 *Ibid.*

34 *Ibid.*

> As to the remaining recommendations which are before me, and generally as to the other business of a similar nature, all seem to me to be subject to the same governing consideration. Whatever business can wait without detriment to the public interest may properly do so.[35]

Aberdeen rejected the appointment of Captain V.B. Rivers as the Assistant Superintendent of the Cartridge Factory in Quebec City because "This position has been vacant for two years." Aberdeen added: "It seems, therefore, desirable to reserve it, with any other similar recommendations as to vacancies of long duration for the consideration of the incoming Government, unless this course can be shown to be detrimental to the public interest."[36] Here Aberdeen reiterated his rationale that outgoing governments should restrict themselves to necessary and uncontroversial public business; if a post has remained vacant for two years, then it cannot be absolutely vital. Outgoing ministries should exercise restraint and only make the necessary and routine appointments that *not* making would prove deleterious to the national interest. This exact premise underpins the Caretaker Convention today and applies both after the writ until a new government emerges, as in this case, and during the writ as well. Finally, Aberdeen singled out one egregious case of patronage that would have required multiple steps to pull off. Tupper submitted three Minutes of Council that would have become Orders-in-Council if Aberdeen had signed off on them: one to "waive marks in promotion examination of J.L. Payne", another "setting aside Promotion Examination after Mr. Payne having failed in such examination" and a third to appoint J.L. Payne as an Assistant Clerk of the Privy Council.[37] Aberdeen refused to appoint Payne because he believed that Tupper had given him unlawful advice in seeking such blatant and transparently corrupt patronage.

> the question is asked whether this appointment is in accordance with the Statutes and Regulations which govern such cases, *i.e.,* whether it infringes upon an existing law, under which circumstances, it, with any other cases of a similar kind if there be any such, cannot properly receive sanction.[38]

Two days later on 6 July, Tupper replied with a long-winded four-page "Memorandum to His Excellency the Governor General" outlining a series of precedents from the 1850s, 1860s, and 1870s to support why Aberdeen should accept his proposed appointments. Tupper rebutted Aberdeen's previous letter point by point. He also cited Alpheus Todd, one of the foremost constitutional historians of the 19th century and a former librarian of Parliament under both the Province and Dominion of Canada who wrote several treatises on the

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35 *Ibid.*

36 *Ibid.*

37 John Sinclair (Governor General's Private Secretary), "G. Memorandum of the Return of Documents Recently before the Governor General, dated 11th July, 1896," 8-9, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, at 9.

38 *Supra* note 30, at 3.

constitutional history of the United Kingdom and of Canada. He relied on Todd's treatise *Parliamentary Government in England*, first published in 1867. Interestingly, Tupper did not cite Todd's companion work, *Parliamentary Government in the British Colonies*, which delves into precedents from Canada and Australasia at length and first appeared in the 1880s. Tupper deliberately privileged older sources, which only reinforces how he did not grasp that the conventions of Responsible Government had changed by the mid-1890s. In contrast, Aberdeen insisted on enforcing a new understanding: outgoing ministries should not unduly bind their predecessors and should not waste time on meeting the new parliament only to suffer defeat on the Address-in-Reply and delay the necessary change in government, which party discipline makes a foregone conclusion in majority parliaments.

First, Tupper attempted to deny that the Liberals had won the election at all, asserting "the division of parties was very close and might be materially affected by the recounts which were to take place within a few days, as there were a large number of elections in which the parties had been declared elected by a very small margin."[39] Tupper sounds Trumpian in his desperate dissembling. In reality, the Liberals won the election with a majority of 21, with 117 seats versus the 86 seats that the Conservatives had retained. It would take an awfully large number of recounts indeed to reverse those fortunes. Second, Tupper inadvertently made the damning admission that, for practical purposes, the Bowell government had lost control of the *Order Paper* and thus the confidence of the House of Commons because it could neither pass the remedial bill on the Manitoba Schools Question nor even supply. This admission strengthened Aberdeen's argument that Tupper should leave these offices vacant, given that Tupper never commanded the confidence of any House of Commons as Prime Minister.

> Your Excellency is aware that the failure to pass the supplies in the usual manner for the now current [fiscal] year was due to the fact that the life of Parliament terminated on the 25th [of] April, and that the Opposition took advantage of that circumstance to pursue a course of unparalleled obstruction, which enabled them to prevent any legislation being carried through by the Government.[40]

Tupper contrasted the dysfunctional last session of the 7th Parliament, which the Liberals obstructed up to its maximum life at the end of April, with how the British House of Commons conducts itself under similar circumstances. And his observations still hold true today. The British House of Commons might withdraw its confidence from Her Majesty's Government but then allow essential business to proceed and pass supplies for a few days, in a "Wash Up" before parliament is prorogued and dissolved, as it did in 1979.[41]

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[39] Sir Charles H. Tupper (Prime Minister of Canada), "B. Memorandum from Sir Charles Tupper to His Excellency the Governor General, under date 6th July, 1896," 3-7, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, at 3.

[40] *Ibid*., at 4.

[41] Margaret Thatcher, "Her Majesty's Government (Opposition Motion)," in *House of Commons Debates*, 28 March 1979, series 5, volume 965, cc 461 and 590.

But the Canadian House of Commons has never recognised this practice. For instance, after defeating or withdrawing confidence from Her Majesty's Canadian Government in 1979, 2005, and 2011, the Prime Minister of Canada asked the Governor General to dissolve parliament either that same day or the next.[42] Tupper protested this difference in practice which had already arisen between the British and Canadian Houses of Commons by the 1890s and believed that Aberdeen should grant him dispensation over it:

> I may venture to remind Your Excellency that the exigencies of the public service and difficulties to which you alluded have been caused by the obstruction of public business by the Opposition, notwithstanding that the Government, of which I was the Leader in the House of Commons, had the support of a large majority of that House. At that time the unfortunate circumstances to which I have referred enabled comparatively few persons to prevent any legislation or public business being done by the House. Had the Opposition in Canada adopted the course followed in the Imperial Parliament in 1892, when the Opposition voted the estimates for the year and expedited public business, no such difficulty could have presented itself, and I fail to see why such obstruction on the part of an Opposition should entitled them to the special consideration of the Crown.[43]

Tupper cut his teeth in the debates over the grant of Responsible Government to Nova Scotia in the 1840s. He resented what he saw as Lord Aberdeen's unpardonable intrusion into Canadian autonomy and attempt to subject Responsible Government in Canada to a higher degree of vice-regal discretion and oversight than Her Majesty the Queen would exercise over her ministers in London.

> I should fail in my duty to Your Excellency as well as to the principles which govern the administration of public affairs in Canada, where Parliamentary Government is carried on precisely as it is in England, if I did not draw your attention to the very serious consequences of the views which you have indicated as guiding your action on the present occasion.[44]

Tupper cites examples where Todd supports the older tradition that Ministers can remain in office after an election in which another party won a majority and test the confidence of the new House of Commons. Tellingly, however, most of these examples come from the United Kingdom in the 1850s and

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[42] Joseph P. Clark (Prime Minister of Canada), House of Commons, *Debates,* 31st Parliament, 1st Session, 13 December 1979, 2362; Michael Ignatieff (Leader of the Opposition), "Business of Supply: Opposition Motion — Confidence in the Government" in House of Commons, *Hansard (Debates)*, 40th Parliament, 3rd Session, volume 145, no. 149, 25 March 2011, 9246; Stephen Harper (Leader of the Opposition), "Government Orders (Supply): Opposition Motion — Confidence in the Government" in House of Commons, *Hansard (Debates)*, 38th Parliament, 1st Session, volume 140, no. 157, 24 November 2005, 10073.

[43] *Supra* note 39, at 6-7.

[44] *Ibid.*, at 4-5.

1860s. Tupper emphasises that *Parliament* did not attempt to interfere, making no mention of Queen Victoria. Tupper would have argued that since Her Majesty the Queen would not intercede in such cases in the United Kingdom, and since Canada inherited its system of government from the United Kingdom, the Governor General should likewise not attempt to interfere with filling up vacancies in Canada. Tupper notes the case of Lord Palmerston who, after tendering his resignation in 1858 (but before his successor took office) nominated three persons to the Order of the Garter, still the highest chivalric honour in England. In 1866, Lord Russell filled up vacancies after announcing his intention to resign. After his defeat in 1869, Disraeli likewise nominated the Earl of Mayo as Viceroy of India. Other examples abound. In 1852, Lord Derby led a single-party minority government to defeat in the House of Commons, 234 to 146, and secured a dissolution of parliament and fresh elections. Derby's Tories suffered defeat in the election but stayed on until the meeting of the next parliament, whereupon Derby did not resign until after the House of Commons defeated the ministry on supply 305 to 286. Here Tupper omitted the end of that precedent: the 4th Earl of Aberdeen, the Governor General's ancestor, succeeded Derby as a Tory Prime Minister. In 1859, Lord Derby again led the Conservatives to defeat in the general election that year but met the next parliament and did not resign the premiership again until after losing a vote of confidence in the House of Commons. Tupper did, however, cite a recent precedent from New Zealand where in 1891 a defeated ministry advised the Governor General to appoint new Legislative Councillors.[45]

But here Tupper omits some crucial facts. Tupper advised Aberdeen to *re*-appoint Sir Auguste-Réal Angers and Alphones Desjardins as Senators for Quebec because they had both resigned from the Senate to run for the House of Commons in the election of June 1896 and lost.[46] He also asked Aberdeen to appoint Nathaniel Whitmore White as a Senator for Nova Scotia because his constituents had just voted him out of the House of Commons. Finally, Tupper wanted Aberdeen to appoint George Gooderham as a Senator for Ontario.[47] Given that Laurier had pledged during the election campaign to appoint Sir Oliver Mowat, then the Liberal Premier of Ontario, as a Senator for the Province of Ontario and Leader of the Government in the Senate,[48] it is difficult to conclude that Tupper sought to fill up a vacancy in the Senate for Ontario with a Conservative for any reason other than to undermine Laurier and prevent him from crafting the cabinet that he wanted. Even Tupper acknowledged the difference, given that he pressed Aberdeen to re-consider only two of his four nominations:

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45 *Ibid.,* at 5-6.

46 *Supra* note 24, at 333.

47 *The Globe,* "CORRESPONDENCE: The Governor-General and Sir Charles Tupper," 29 August 1896, at 13.

48 Sir Charles H. Tupper (the Younger), "The Functions of a Governor-General," *The National Review* (November 1896) at 385.

> In relation to the recommendation for the Senate, I may say that Your Excellency is aware that Messrs. Angers and Desjardins resigned their seats in the Upper House in order to place their services at the disposal of the Crown, and have thus an undoubted claim to special consideration.[49]

In addition, the British and New Zealand precedents that Tupper cited are not persuasive because of crucial differences between the upper chambers of the three countries. The British Sovereign can, on the Prime Minister's advice, create new peerages *ad infinitum* and thus swamp the House of Lords, and the Governor General of New Zealand could, on the Prime Minister's advice, similarly stack the Legislative Council with new members.[50] In contrast, the *British North America Act, 1867* established the Senate of Canada as a chamber of regional representation and set a hard limit on the maximum number of Senators per province and in total.[51] Tupper concludes:

> No question, therefore, can possibly arise as to the British constitutional practice in regard to the right of a defeated Ministry to carry on the public business until their successors are appointed, and to fill any vacancies that may exist.[52]

He also dismissed Aberdeen's concern that the Senate had already tilted too far in favour of the Conservatives against the Liberals, noting that "Lord Salisbury was not precluded from the creation of additional Peers, although the disparity between the Liberals and the Conservatives in the House of Lords was at least as great as that which exists in the Senate here."[53] He added that the Conservative majority in the Senate during the Liberal premiership of Alexander Mackenzie from 1873 to 1878 only defeated two government bills.

The strongest argument in favour of Tupper's position derives from the Canadian precedent of 1878, when Governor General Lord Dufferin approved 82 appointments submitted by outgoing Liberal Prime Minister Alexander Mackenzie, which included "a Deputy Minister, a Judge of the Supreme Court of Canada, four puisne Judges and a County Court Judge."[54] Tupper did not mention that in 1873, Lord Dufferin had also agreed both to make

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49 *Supra* note 39, at 6.

50 New Zealand Parliament, "Evolution of Parliament — Legislative Council," 21 December 2020.

51 In 1896, the Senate consisted of 81 members: 24 from Ontario, 24 from Quebec, 24 from the Maritimes (10 from New Brunswick, 10 from Nova Scotia, 4 from Prince Edward Island), 3 from British Columbia, 4 from Manitoba, and 2 from the Northwest Territories. Section 21 of the *Constitution Act, 1867* sets the maximum number of Senators, and section 22 lists their breakdown by province and territory. Section 26 contains a procedure for appointing four or eight additional Senators (or, in 1896, three or six additional Senators) as a means of breaking deadlock with the House of Commons, but even then, the Constitution limits the size of Canada's upper chamber. Senate of Canada, *Journals,* 7th Parliament, 6th Session, volume 30, at iv-vi.

52 *Supra* note 39, at 6.

53 *Ibid.*

54 *Ibid.*

appointments requested by Prime Minister Sir John A. Macdonald shortly before he resigned in disgrace, and then subsequently approved Prime Minister Mackenzie's advice to cancel many of these same appointments.[55] Aberdeen seems not to have found this argument convincing, though he never responded to the relevant precedent directly.

Toward the end of his main memorandum, Tupper knew that he had to admit defeat, but before doing so, he admonished Lord Aberdeen one last time and accused him of undermining Canada's system of Responsible Government:

> In conclusion, I may be permitted to say to Your Excellency that under the British constitutional system which Canada has the happiness to enjoy, the Queen's representative, like Her Majesty, is the executive head of the country, removed from the arena of public controversy, however fierce the conflict of parties may be; and in my judgement no more fatal mistake could be made than any interposition in the management of public affairs which would cause the Governor General to be identified with either one party or another.[56]

Finally, Tupper's own unambiguous words should remove any doubt that a Governor General who rejects a Prime Minister's constitutional advice necessarily forces that Prime Minister to resign, because a Prime Minister must maintain the confidence not only of the House of Commons but of the Governor General as well.

> Adhering respectfully but firmly to the opinions I have ventured to express in this memorandum, which I regret to find do not agree with those of Your Excellency, it remains only for me to tender the resignation of my colleagues and myself, and to ask that we may be relieved from our responsibilities as Ministers of the Crown at the earliest convenience of Your Excellency.[57]

The record leaves no doubt: Tupper submitted his resignation in writing to Aberdeen on 7 July because Aberdeen had rejected his constitutional advice; Tupper left office the following day. But the official correspondence between Aberdeen and Tupper does not reveal that Tupper tried to change his rationale for resigning. According to Canadian historian John Seywell, Tupper went back on his word on the morning of 8 July and proposed a new arrangement: that he would withdraw the proposed Orders-in-Council summoning Senators, that Aberdeen would promulgate the Orders-in-Council for minor appointments, and that "the whole constitutional issue [would] be kept secret."[58] Aberdeen rejected Tupper's rearguard action and insisted that he remain true to his resignation in writing.[59]

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[55] Privy Council Office, Order-in-Council P.C. 1873-1595, 13 November 1873.

[56] *Supra* note 39, at 7.

[57] *Ibid.*

[58] *Supra* note 24, at 335.

[59] *Ibid.,* at 336.

On 9 July, Lord Aberdeen wrote another short letter to Tupper. He did not state outright that he had accepted Tupper's resignation, but he evidently had. In his last official note to Tupper, Aberdeen instead re-stated why he refused to sign off on his proposed patronage appointments:

> My action at the present time has been guided solely by a regard for the following facts, namely, that—
>
> 1. Parliament expired on April 25th.
> 2. The result of the General Elections on June 23rd was the defeat of the Government.
> 3. The supplies for the public service came to an end on July 30th, and by the view that, pending the assembly of Parliament, the full powers and authority, unquestionably possessed by the Government, should be exercised in such directions only as are demanded by the exigencies of the public interest, and so as to avoid all acts which may tend to embarrass the succeeding Administration.[60]

Aberdeen made two curious errors in details and dates here. Aberdeen himself dissolved the 7th Parliament on advice on 24 April[61] — it did not, in fact, dissolve by efflux of time on 25 April — and the supply from the Governor General's Special Warrants ran out on 30 June rather than 30 July, because the fiscal year in Canada started on 1 July at the time.[62] But the general arguments in points 2 and 3 stand. Here Aberdeen utterly rejects the old British tradition and insists that popular sovereignty must replace parliamentary sovereignty where the electorate has granted one party an absolute majority of seats in the House of Commons. This, in turn, allows the Governor General to assume the role of the guarantor of Responsible Government against Prime Ministers who tried to defy the popular will by shamelessly filling up vacancies as a last gasp of the Spoils System. Aberdeen further reiterates that while the ministry possesses plenary legal authority, it should nevertheless observe the Principle of Restraint and not bind its successor with craven and unnecessary patronage appointments. Aberdeen knew that he could afford to reject Tupper's constitutional advice because Laurier would take responsibility for Tupper's dismissal.

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[60] Aberdeen (Governor General of Canada), "C. Memorandum from His Excellency the Governor General in reply, under date 9th July, 1896," at 7, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, at 7.

[61] *Canada Gazette,* volume 29, number 44 (Ottawa: Queen's Printer, 2 May 1896), 2022. The proclamation of dissolution says that Aberdeen dissolved the 7th Parliament on 24 April. House of Commons, *Debates,* 8th Parliament, 1st Session, 19 August 1896, column 1. The very first passage of this Hansard says: "The Seventh Parliament of the Dominion, which had been prorogued from the twenty-third day of April, 1896, and thence from time to time, was dissolved by proclamation on the 24th day of April, 1896, and writs having been issued and returned, a new Parliament was summoned to meet for the despatch of business on Wednesday, the 19th day of August, 1896, and did accordingly meet in that day."

[62] Privy Council Office, Order-in-Council P.C. 1896-1575, "Supplies, Supplementary Estimates 1895-1896," 24 April 1896.

Aberdeen would no longer deign to communicate directly with his disgraced former Prime Minister, so the remaining letters to Tupper came from Captain John Sinclair, Lord Aberdeen's Private Secretary. On 8 July, Sinclair informed Tupper and the outgoing cabinet that His Excellency had approved 453 submissions dated from 23 June to 8 July but restated forcefully that Aberdeen would not approve certain classes of appointments:

> Memorandum with reference to the Treasury Board Reports numbered 2611, 2612, 2613, 2614, 2640, and 2653, which are returned herewith subject to this memorandum and signed by the Governor General, having been submitted to him on the 6th and 7th instant. The undersigned [John Sinclair] is directed by the Governor General to request that pending their further consideration by Council His Excellency's approval be withheld from all recommendations which involve —
>
> 1 The creation of new offices or appointments;
> 2 The filling of vacancies for which no provision has been made by Parliament and which have existed for more than one clear fiscal year;
> 3 Superannuations (and the consequential appointments) for which application has not been received.[63]

On 11 July, Sinclair sent a final letter back to the outgoing Tupper Ministry confirming in writing that Lord Aberdeen had decided on 8 July to reject four proposed appointments to the Senate, six Revising Officers, and three patronage appointments within the civil service.

> The following Minutes of Council which have not yet received the signature of the Governor General are herewith returned to you. Numbers 1329, 1425, 2098, 2304, 2305, 2411, 2412, 2450, 2451, 2452, 2453, 2473, 2616, 2617, 2619, 2088, 2398.[64]

In total, Aberdeen promulgated 1,045 Orders-in-Council between appointing Tupper on 1 May and dismissing him on 8 July 1896, and he signed 470 of them from 24 June, the day after the election, to 8 July.[65] In contrast, Aberdeen rejected only 17 of Tupper's Minutes of Council and returned them to the Privy Council Office unsigned.[66] Aberdeen exercised his vice-regal

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[63] John Sinclair (Governor General's Private Secretary), "E. Memorandum of the Governor General's Approval of Treasury Board Minutes, at 2611, 2612, 2613, 2614, 2640, 2653, submitted on the 6th and 7th July, 1896, dated 8th July, 1896," at 8, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, 8.

[64] John Sinclair John (Governor General's Private Secretary), "G. Memorandum of the Return of Documents Recently before the Governor General, dated 11th July, at 1896," 8-9, in *Sessional Papers,* No. 7, 8th Parliament, 1st Session, 28 August 1896, at 9.

[65] The Library and Archives of Canada maintain a database on historical Orders-in-Council from 1867 to 1920. I counted the number of Orders-in-Council promulgated each day of Tupper's premiership and then added up the total.

[66] *Supra* note 64, at 9.

discretion judiciously and clearly distinguished between the three classes of subjects that he would reject versus everything else that he accepted as routine.

Tupper resigned on 8 July 1896 and that Aberdeen commissioned Sir Wilfrid Laurier as the next Prime Minister on 11 July 1896. Laurier thus took responsibility for Tupper's dismissal and said so in the House of Commons later that fall. Furthermore, the 8th Parliament sustained Lord Aberdeen's decision to dismiss Sir Charles Tupper and appoint Sir Wilfrid Laurier by voting in favour of the Address-in-Reply to the Speech from the Throne.[67] But Tupper argued that the House of Commons, not the Governor General, should have decided his fate proactively rather than merely confirming it retroactively. He believed that the incumbent ministry should remain in office, test the confidence of the new House of Commons, and resign only after suffering a defeat on the Address-in-Reply or supply or a direct motion of non-confidence. Tupper argues throughout his correspondence with Aberdeen that this method both preserves and protects the partisan neutrality of the Crown and also recognises the supremacy of the House of Commons, as opposed to the people, in deciding who governs.

4. TUPPER AND LAURIER DEBATE THE ROLE OF THE GOVERNOR GENERAL UNDER RESPONSIBLE GOVERNMENT AND POPULAR VS PARLIAMENTARY SOVEREIGNTY

As soon as the 1st session of the 8th Parliament had convened on 20 August 1896, Tupper began chomping at the bit to pontificate on the great injustice that had befallen him that July. He asked that Laurier obtain Aberdeen's permission to publish the memorandums that he had exchanged with Aberdeen earlier that summer.[68] On 21 August, Laurier informed the House that His Excellency had agreed,[69] and the correspondence between Aberdeen and Tupper then officially became part of the public record as *Sessional Paper no. 7*.[70] Tupper delivered on 21 September a passionate soliloquy and apology (in the classical sense of the word) for his defeated government that took up a staggering 48 columns in the *Debates*.[71] Tupper and Laurier then debated the propriety of Governor General Lord Aberdeen's actions in a fascinating exchange which revealed competing narratives of parliamentary sovereignty versus popular sovereignty, restraint versus the

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67 Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 27 August 1896, column 306.

68 Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 20 August 1896, column 6.

69 Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 21 August 1896, column 10.

70 Canada, House of Commons, "To An Address of the House of Commons, Dated 28th August, 1896, for copies of all correspondence between His Excellency the Governor General and Sir Charles Tupper," at 1-9.

71 Canada, House of Commons, *Debates*, 8th Parliament, 1st Session, 21 September 1896, columns 1623-1671.

Spoils System, and the circumstances under which the Governor General can or should reject ministerial advice. Their debates show that two viable and legitimate interpretations of when the incumbent Prime Minister should resign — whether before or after the new parliament meets — competed in the 1890s. Laurier invoked "the people" frequently throughout his response, while Tupper dismissed general elections as mere "popular manifestations" and would never deign to utter a crude phrase like "the people."

Tupper, deeply embittered by his dismissal two months earlier, speaks almost exclusively in the first-person singular, which betrays his selfishness and self-importance.[72] In contrast, Laurier seems witty and charismatic, largely speaking in the first-person plural and third person to include his parliamentary party and supporters. In the mid-1890s, Laurier often recounted the Fable of the Sun and the North Wind, casting himself as the purveyor of "Sunny Ways" versus his blustery and dour Conservative opponents. The Laurier-Tupper debates here certainly lend themselves to that dichotomy. Tupper seems very much a man of the 19th century while Laurier seems decidedly modern. Lady Aberdeen described Tupper and Laurier in similar terms in her diary. She judged Tupper "a man whose whole life has been devoted to scheming & who will spare no means of any sort which may be of use in securing of his party with himself as Premier."[73] In contrast, she idolised Laurier and praised him as a visionary who "look[s] more into the future & take[s] a more statesmanlike view of things than the others."[74]

(a) Tupper's Last Stand: Defending the Spoils System Under the Auspices of Parliamentary Sovereignty

Tupper argued that Responsible Government means that Ministers of the Crown, not the Governor General, take responsibility for all acts of the Crown and that the Governor General must derive the information on which he acts from his ministers and not from outside sources. He also acknowledged that the Governor General can dismiss one group of ministers and appoint another and that the new Prime Minister would then take responsibility for the dismissal of his predecessor; in this manner, the Governor General maintains a personal non-responsibility and neutrality. Sir Wilfrid Laurier heartily and openly accepted responsibility for Tupper's dismissal, thus defending and vindicating Aberdeen and making Tupper's argument moot. Tupper also confirms that he had originally planned on remaining as Prime Minister for several more weeks until the new House of Commons defeated his government on the Address-in-Reply or on supply, and he repudiated any notion of restraint as an irrelevant contrivance.

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[72] Tupper's contemporaries also took note of his raging ego and tendency to place himself at the centre of Canadian political events. For example, Liberal partisans would disrupt Tupper's speeches in during the election of 1896 by yelling, "I, I, I". Wilson, *supra* note 10, at 179.

[73] *Supra* note 24, at 332.

[74] *Ibid.*, at 333.

Tupper kicked off his quixotic and brazenly self-righteous defencespeech with a general outline of Canada's system of government.

> Under the form of government that we possess, my hon. friend the First Minister [Sir Wilfrid Laurier] and his colleagues, on assuming office, were necessarily and naturally obliged to assume responsibility for every act of His Excellency from the time of what I may call the crisis which ensued on the general election.[75]

Tupper quoted from Sir John A. Macdonald's main speech in favour of federating British North America from 5 February 1865 on ministerial responsibility: "[...] the representative of the Sovereign can act only on the advice of his Ministers, those Ministers being responsible to the people through Parliament."[76] Tupper reiterated to the House of Commons what he had written to Aberdeen: "[...] the Government did not possess the confidence of His Excellency" and that he therefore had to resign as Prime Minister.[77] Here Tupper interprets the conventions of Responsible Government accurately, though in a way which would seem either actively hostile or utterly alien to the ultra-democratic sensibilities predominant in the early 21st century: the Prime Minister (and thus the ministry as a whole, the tenure of which depends upon that of the Prime Minister) must maintain not only the confidence of the House of Commons but also the confidence of the Crown as well. Canadian constitutional historians and political scientists readily understood this maxim well into the 20th century, though they mostly either ignored or rejected it by the 21st.

Tupper then arrives at the crux of one his main arguments: that the Governor General must only act on the advice of his responsible ministers and must not keep his own counsel or take the initiative based on what he reads in the press. Responsible Government collapses if "persons holding no position of responsibility, secretly, unknown to the country, unknown to Parliament, unknown to the Government of the country, obtain the ear of the Governor General."[78] Tupper quotes from one of Aberdeen's letters in their correspondence of July 1896 and offers his critique:

> [*Aberdeen's letter to Tupper*] After taking every means in my power to inform myself, it is impossible for me to ignore the probability that, in the event of your decision to meet Parliament the present Administration will fail to secure the confidence of the House of Commons.

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[75] Sir Charles Tupper (Prime Minister of Canada), "Supply — The Change of Government" in House of Commons, *Debates*, 8th Parliament, 1st Session, 21 September 1896, column 1624.

[76] *Ibid*. Incidentally, Macdonald dated London's grant of Responsible Government to the Province of Canada to 1841 rather than 1848, as most historians in the 20th century would say. James W.J. Bowden, "1841: The Year of Responsible Government? *The Dorchester Review* 6, no. 2 (2016): 84-87.

[77] *Supra* note 75, at 1629.

[78] *Ibid*., at 1655.

> [*Tupper to the House of Commons*] I contend that the position taken there is utterly unknown to the British constitution, to the English parliamentary system, and to the system that prevails in Canada. I say that there are no means by which His Excellency without violating the constitution of the country could take to inform himself with reference to the position in which his Government stood. [...] I contend that [...] the Governor General [...] had no means of informing himself except by his constitutional advisors and the voice of Parliament.[79]

But the last phrase in Tupper's statement "and the voice of Parliament" undermines the argument that he tries to make (that the House of Commons of the 7th Parliament, dissolved for the election, gave a majority to the Conservatives) and inadvertently supports Aberdeen's original contention that Canadians returned a majority for the Liberals in the House of Commons in the 8th Parliament — the one that ought to matter as a point of reference.

Most of the precedents from the United Kingdom from 1868 onward, throughout the Disraeli-Gladstone and Gladstone-Salisbury Oscillations, also worked against Tupper and in favour of Aberdeen.[80] Benjamin Disraeli, the One-Nation Conservative, had established an important new precedent in 1868 by tendering his resignation to Her Majesty Queen Victoria shortly after the results of the general election demonstrated that Gladstone's Liberals and their allies had won a parliamentary majority. Disraeli preferred not to go through the charade of remaining as Prime Minister, meeting the new parliament, suffering certain defeat on the Address-in-Reply or supply, and only then resigning in disgrace. Gladstone replicated this precedent in 1874, as did Disraeli again in 1880, and Gladstone once more in 1885, followed by Salisbury in 1886. These precedents forced Tupper to argue from a normative corner: Disraeli, Gladstone, and Salisbury did resign before meeting those new parliaments, but, in Tupper's counter-factual thought experiment, they should not have done so. Tupper then praises Salisbury for having reverted to the older method of meeting the new House of Commons and testing its confidence in 1892, but he elided the specific circumstances that compelled Salisbury to stay on, and thus derives the wrong lesson from this precedent.[81] Salisbury decided to remain in office and test the confidence of the minority parliament in August 1892 because the Conservatives and Liberal Unionists won the plurality of seats, with 314 seats opposite the 272 which Gladstone's Liberals won. But the Irish National Federation under Justin McCarthy returned 72 MPs who ended up supporting the Liberals. In contrast, Laurier's Liberals won an outright majority in 1896. The British House of Commons rejected the Address-in-Reply to the Queen's Speech on 11 August 1892 on a division of 350 to 310, and Salisbury resigned.[82] Gladstone's amendment to the Address-in-Reply said:

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79 *Ibid.*, at 1629.

80 *Ibid.*, at 1630-1631.

81 *Ibid.*, at 1631.

> MOST GRACIOUS SOVEREIGN, We, Your Majesty's most dutiful and loyal Subjects, the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, beg leave to thank Your Majesty for the most Gracious Speech which Your Majesty has addressed to both Houses, of Parliament.
>
> We feel it, however, to be our duty humbly to submit to Your Majesty that it is essential that Your Majesty's Government should possess the confidence of this House and of the Country, and respectfully to represent to Your Majesty that such confidence is not reposed in the present Advisers of Your Majesty.[83]

Queen Victoria then had to appoint William Gladstone for his fourth and final term as Prime Minister on 15 August 1892. The division of 350 to 310 does not correspond exactly but still comes close to the 314 Conservatives and combined number of 344 Liberal and Irish nationalist MPs. Gladstone's pro-Home Rule Liberals then formed a single-party minority government until 1894 with the support of the Irish nationalists. This precedent conforms to the conventions which have emerged in Canada in minority parliaments and minority legislatures, where the incumbent government can test the confidence of the new House of Commons or assembly.

Tupper made the same counter-factual assertion about Alexander Mackenzie, who, in his estimation, should not have resigned before meeting the new parliament after the Conservatives won a majority in the elections of 1878. Tupper deliberately misrepresents statements which Gladstone made to the British House of Commons and which Mackenzie wrote to Dufferin as "apologies" (in the modern sense of the word) for having resigned before meeting and testing the confidence of their new Houses of Commons. In fact, Gladstone, in the *Hansard* which Tupper quoted, simply explained: "although it is a course which was justified by the circumstances, it is one which ought not to be adopted in the absence of strong justifying circumstances."[84] Gladstone might not have foreseen that the "strong justifying circumstances" that he saw as an aberration would become the norm in the 20th century. But Gladstone did not, as Tupper absurdly claimed, "apologize for having established the precedent of resigning without meeting parliament, when beaten at the polls";[85] rather, he offered a reasonable explanation of his decision, which allowed constitutional conventions to evolve.

Tupper also dissembled on Alexander Mackenzie's correspondence with Governor General Lord Dufferin in 1878. Mackenzie acknowledged to Dufferin with some bitterness that the "protectionist principle undoubtedly obtained a victory at the polls." Therefore, he explained to Dufferin, "We felt, however, that it would be unpleasant to remain in office after ascertaining that there was no possibility of the policy of the Government being sustained by the

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82 United Kingdom, House of Commons Debates, 11 August 1892, vol 7, cc332-430.

83 *Ibid.*, at 430.

84 *Supra* note 75, at 1631.

85 *Ibid.*

new House." Mackenzie also believed — and at this stage in Canadian history, correctly and reasonably — that he could have chosen whether to remain in office and meet the new parliament, and resign only after losing the vote on the Address-in-Reply or supply or, alternatively, to resign of his own accord before the new parliament met. Mackenzie weighed the possibilities:

> The other course [meeting the new parliament] would doubtless by the one in accordance with English practice, but there are precedents of a recent date in favour of a resignation before the meeting of Parliament of both political parties in England. Feeling that we are justified in pursuing that course, I have resolved, with the concurrence of my colleagues, to close up all business in the departments at the earliest possible moment with a view on enabling our successors to meet Parliament at an early day, with measures for carrying into effect the policy to which they committed themselves at the election.[86]

Even by 1878, three British precedents showed that the incumbent Prime Minister should resign when faced with a House of Commons in which another party won a majority, and Mackenzie had considered them persuasive and relevant in Canada. Tupper seized upon the last statement and peddled this fantasy that Mackenzie's explanation to Dufferin somehow "apologizes for having surrendered his trust without meeting Parliament."[87] In reality, Mackenzie believed that he could, in 1878, have chosen between one of two options of equal constitutional validity. Mackenzie's decision had set the first of two precedents which would better define the circumstances under which an incumbent ministry could remain in office and meet the new parliament. Here Tupper dissembles and attempts to deprive Mackenzie of agency retroactively because he disagrees with the decision that his predecessor made eighteen years earlier. Tupper lamented that "the [Mackenzie] Government had a legal right to hold office until the usual time for the legislative assembly, and to do all acts which a Ministry in possession of authority could do, and to disregard absolutely the popular manifestation at the late elections."[88] Constitutional conventions have always evolved to bow to practicalities, and Tupper simply refused to acknowledge how and why broadening the franchise for elections to the House of Commons, which contributing to an increasingly entrenched form of party discipline, forced constitutional conventions over forming governments to change between the 1860s and the 1890s.

Tupper triumphantly concludes that his ministry could have remained in office and met the new parliament, even though the House of Commons could also have passed something akin to a modern confirmation vote against him and in favour of a Liberal ministry headed by Laurier:

> I have established beyond question the right that myself and my colleagues were in a position and fairly entitled to meet Parliament at the early day which it was called, if we so desired and wished. [...] it

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[86] *Ibid.*, at 1632.

[87] *Ibid.*

[88] *Ibid.*, at 1634. Emphasis added.

> would have been open to use to consider whether we might not promote the public business of the country in the condition it then was by meeting Parliament on the day for which it was summoned, and placing honourable gentlemen opposite, who would have had control of the House, in a position to elect a Speaker and to take a vote of credit from Parliament, previous even to the formation, if they desired it, of their government [...].[89]

At best, the federal Canadian precedent from 1878 also offers mixed and contradictory guidance in 1896. One the one hand, Prime Minister Alexander Mackenzie tendered his resignation to Governor General Lord Dufferin shortly after the returns from the general election made clear that Sir John A. Macdonald's Liberal-Conservatives had won a resounding parliamentary majority; as a matter of practicality, Mackenzie recognised that the protectionist National Policy had defeated his Liberals' program of reciprocity and low tariffs. That would not have supported Tupper's argument for remaining as Prime Minister, meeting the new parliament, and then suffering defeat on the Address-in-Reply or supply. On the other hand, however, Dufferin did accept Mackenzie's outgoing appointments, including that of a justice to the Supreme Court, which lent some credibility to Tupper's argument that Aberdeen should have done the same.[90] As Tupper told the Commons, "every submission to Lord Dufferin by Mr. Mackenzie after his overwhelming defeat was approved by Lord Dufferin."[91]

Tupper then quoted from the portion of Aberdeen's letter where His Excellency argued, "the acts of the present Administration [led by Tupper] are in an unusual degree provisional" because he did not commission Tupper as Prime Minister until *after* dissolving the 7th Parliament. Tupper lashed out at Aberdeen: "There is no warrant for the statement of a provisional character in the formation of the Government to which His Excellency alludes."[92] Yet, by definition, Tupper's ministry never held the confidence of any parliament, and this unusual circumstance strengthened Aberdeen's resolve to reject Tupper's constitutional advice. Even some contemporary sources like the *Globe* newspaper (admittedly a Liberal outlet) described the Tupper ministry as unprecedented and noted that Governor General Lord Aberdeen "had to act without the guidance of authority" because Tupper had "formed his Ministry after the death of Parliament" and therefore "lacked the formal endorsation of the House."[93] This most extraordinary transition of power between ministries during the writ has never happened again in Ottawa. Prime Ministers John Turner in 1984 and Kim Campbell in 1993 also had short tenures cut short by massive electoral defeat; they never faced the House of Commons merely

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89 *Ibid*., at 1633.

90 James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 26-27.

91 *Supra* note 75, at 1647.

92 *Ibid*., at 1637.

93 *The Globe,* "No Precedents," 1 September 1896, at 6.

because it had already adjourned for its summer recess in both years, not because those parliaments had already been dissolved.

Tupper continued to lambast Governor General Lord Aberdeen in the House of Commons. He repeated the charge that the impending dissolution by efflux of time combined with concerted opposition had prevented the House of Commons from passing supply, as if he, the Leader of the Government in the House of Commons and *de facto* Prime Minister, could absolve himself of his responsibility for having failed to obtain supplies for fiscal year 1896:

> But for that extraordinary circumstance of the life of Parliament terminating on a certain day, and placing the control of this Parliament in the hands of a few individuals who were ready to prevent supplies being voted; supplies would have been voted at the last session.[94]

Canadian Prime Ministers have usually opted to secure discretionary dissolutions of parliament after four years instead of closer to the maximum lifespan of five years precisely because brushing up against a mandatory dissolution by efflux of time smacks of political desperation and an attempt to postpone inevitable defeat. In fact, the previous Prime Minister Senator Sir Mackenzie Bowell had originally conferred with cabinet and agreed to call an election for spring 1895 but later reneged on this pledge and feathered the "nest of traitors" that eventually deposed him in 1896.[95] If Bowell had not backed out of the election in 1895, then Tupper would probably never have become prime minister. Tupper here inadvertently acknowledges that the Bowell ministry did not, for practical purposes, command the confidence of the House of Commons in the spring of 1896 because it had lost control of the *Order Paper*.

Tupper prevaricated so strongly against His Excellency Governor General Lord Aberdeen that the Speaker of the House of Commons had to intervene and enforce the Standing Order prohibiting members from speaking disrespectfully of the Sovereign, the Royal Family, and the Governor General.[96] Speaker James David Egan admonished Tupper for having accused Aberdeen of partisanship in the House of Commons — an implication that he had even made in his correspondence with Aberdeen — and noted the redundancy of Tupper's charge, "especially when the leader of the Government [Prime Minister Sir Wilfrid Laurier] has frankly avowed entire responsibility for the acts of His Excellency the Governor General."[97] But Tupper continued his earlier argument, insisting that his having been

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94 *Supra* note 75, at 1636.

95 Wilson, *supra* note 10, at 196-197.

96 *Standing Orders of the House of Commons — Including Appendices* (Ottawa: House of Commons, January 2021) at 12. Standing Order 18 contains this rule today: "No member shall speak disrespectfully of the Sovereign, nor any of the royal family, nor of the Governor General [. . .]."

97 James David Egan (Speaker of the House of Commons), "Supply — The Change of Government," in House of Commons, *Debates,* 8th Parliament, 1st Session, 21 September 1896, column 1638.

appointed Prime Minister during the writ, when no parliament existed, did not render his ministry provisional in any way; he concluded:

> If His Excellency was not prepared to give me the fullest confidence until I ceased to be His Minister, he had no right to call upon me. Having been called upon, I maintain that I was entitled to the enjoyment of that confidence, and that a more fatal precedent cannot be established in this country than that the executive head of the country can go behind his Ministers and seek outside opinion.[98]

Strictly speaking, Tupper did enjoy Aberdeen's "fullest confidence until [he] ceased to be His Minister"; the break simply came earlier than Tupper would have liked, and Tupper admitted as much when he offered his resignation in writing.

Of his 92 proposed appointments from early July, Aberdeen agreed to 66 and refused 26. Tupper argued that Aberdeen's actions had set a "fatal precedent" to Responsible Government because the Governor General could now "undertake to dictate to his constitutional advisors what they shall do and what they shall not do."[99] While accepting the matter of fact that a Governor General *can* dismiss one set of advisors and appoint another, he cautioned that this practice could lead to arbitrary "personal rule" on the part of the Governor General: "If the Governor General is to make himself responsible, or to make the successors of his Ministry responsible for the action that he takes, where does he place himself?"[100] He continued:

> If the Governor General adopts the position that he is responsible for the acts to which he signs his name, instead of throwing that responsibility [...] upon the shoulders of his constitutional advisors, [...] he is driven to that which would render good government utterly impossible in Canada.[101]

Tupper even raised the spectre of the English Civil Wars of the 1640s, the American Revolution in the 1770s and '80s, and the Canadian Rebellions of 1837 — the latter of which he was old enough to remember — and alluded to the "great struggles not only in the mother country in times far gone by but in Canada down to a period within the recollection of persons within the sound of my voice."[102] Such a fate flows from putting the "influence of the Crown in opposition to the people and to the Parliament."[103]

(b) Laurier Appeals to Popular Sovereignty

Laurier opened against Tupper with a withering salvo and delivered all his remarks in an almost poetic and whimsical cadence:

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[98] *Supra* note 75, at 1638.

[99] *Ibid.*, at 1649.

[100] *Ibid.*, at 1650.

[101] *Ibid.*, at 1651.

[102] *Ibid.*, at 1650.

[103] *Ibid.*

> He has drawn to the attention of the House largely upon principles which no one disputes, upon principles which have come to us from men whose names will ever be dear to all shades of Liberals and Reformers. But when it came to the application of these principles, the Hon. Gentlemen once more showed that when an ingrained Tory, if I may speak of him, or a Liberal-Conservative, as I suppose he would prefer to be called, undertakes to apply Liberal principles, he is always apt to fall into sad and lamentable error.[104]

Laurier criticised Tupper for refusing to resign the premiership even when the results of the general election became known and showed that the Liberals had won a parliamentary majority; Tupper had defied popular sovereignty, "the people." In his first column in *Hansard,* Laurier invoked "the people" five times:

> When, on 9th July, the telegraphic wires spread the news throughout the country that the Administration of the Hon. Gentlemen had surrendered the seals of office into the hands of His Excellency the Governor General, the impression was general throughout the country that he and his colleagues had at least loyally accepted their defeat, that they were loyally obeying the mandate that had received from the people, commanding them in no uncertain tones, to vacate their offices and to give them up to men in whom the people had declared their confidence. [...] If they surrendered the seals of office, it was not in obedience to the mandate of the people, but it was because, although they still presumed to offer advice to His Excellency, His Excellency would no longer accept the advice of men whom the people had rejected. If His Excellency had accepted the advice of those hon. gentlemen defeated though they were, they would have remained to govern the country until, as the hon. gentlemen has said himself, they had been kicked once more by the representatives of the people.[105]

Laurier denounced Tupper's attempt to ask that the House of Commons censure Governor General Lord Aberdeen and invoked "the people" thrice more: "The Governor General has committed no wrong against the people of Canada."[106] On the contrary, "he has made himself the champion of the rights of the people of Canada."[107] Laurier argued that Aberdeen saved Responsible Government by forcing Tupper to resign and "to abide by the verdict of the

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[104] Sir Wilfrid Laurier (Prime Minister of Canada), "Supply — The Change of Government" in House of Commons, *Debates,* 8th Parliament, 1st Session, 21 September 1896, column 1660. Laurier mocks the moniker "Liberal-Conservative," but the Conservatives formerly referred to themselves as the "Liberal-Conservative Party" from the 1850s until Arthur Meighen became leader in 1919. This reflected its origins as a loose coalition of moderate Tories and moderate Whigs who supported Responsible Government and Representation by Population in the Province of Canada.

[105] *Ibid.* [emphasis added].

[106] *Ibid.,* at 1661 [emphasis added].

[107] *Ibid.*

people, which otherwise they [Tupper and his cabinet colleagues] would have disobeyed."[108] Laurier also condemned Tupper's enthusiastic embrace of the Spoils System and praised Aberdeen for having intervened on the grounds that the outgoing administration should show restraint and not try to fill up vacancies just prior to leaving office. (By the 20th century, the Privy Council Office had reached the same conclusion.)[109] Laurier scorned Tupper's opportunism:

> [A]s soon as he found that that the Government had been defeated [...], they set their hearts and hands at once to the task of filling the public service, from the Senate Chamber to every messengers' room, filling every hole, every nook and corner, and crevice, with their appointments, so that the new Administration would have been forced to live [...] in an atmosphere saturated with Toryism; and for years, perhaps, they would have been paralysed by conditions imposed upon them.[110]

Laurier then rebutted Tupper's claim that the Governor General can only know what his constitutional advisors tell him by pointing out that Tupper had in fact acknowledged the Conservatives' defeat in the newspapers, which anyone can read. If Tupper's argument that the Governor General can only act upon information provided by his constitutional advisors means anything, Ministers of the Crown must proactively inform the Governor General of what they know. The British well understand this principle; Her Majesty the Queen holds a weekly audience or telephone call with her Prime Minister and receives reams of briefing notes and state papers each week couriered in those handsome red boxes.[111] Laurier cited an article from 25 June 1896 (two days

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[108] *Ibid*. [emphasis added].

[109] Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada,* Henry F. Davis and André Millar (Ottawa, Government of Canada, 1968) at 89-90; Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* (Ottawa: Her Majesty the Queen in Right of Canada, 2008) at 1; Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* (Ottawa: Her Majesty the Queen in Right of Canada, August 2015); Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* (Ottawa: Her Majesty the Queen in Right of Canada, September 2019); Canada. Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* (Ottawa: Her Majesty the Queen in Right of Canada, August 2021).

[110] *Supra* note 104, at 1662.

[111] Antony Jay, "The Confidential Consultant," chapter 3 in *Elizabeth R: The Role of the Monarch Today* (London: BBC Books, 1992, at 46-55; John Major and Tony Blair, interviews with Andrew Marr in *The Diamond Queen*, 6 February 2012; Margaret Thatcher, interview by Brian Lamb, CSPAN, 9 March 1991. This practice of regular consultations in Canada seems less institutionalised and more dependent on the personal relationship between any given Governor General and Prime Minister, though David Johnston stated in an interview in 2012 that he and Prime Minister Harper met regularly to discuss matters of state. David Johnston, interview with

after the election) in the *Montreal Gazette,* which reported that "Sir Charles attributes the disaster to the fatal mistake which had been made of refusing to dissolve Parliament after the adoption of the remedial order and the calling of a session to deal with the Remedial Bill when the life of Parliament expired on a fixed date."[112] Laurier asked Tupper rhetorically, "Will the hon. Gentleman pretend here that he would not treat His Excellency with the same respect as he treated the correspondent of a newspaper?"[113] Laurier concluded:

> So His Excellency in just two days after the elections learned that his Ministers had been defeated, and from that moment His Excellency was within his right — not only within his right but within his duty — when he kept the hon. Gentleman strictly to the advice he had given — that is to say, that he [Tupper] was prepared to resign after he had completed matters of routine, but he would not go beyond that.[114]

Here Laurier omitted some pertinent information. On 24 June, the day after the election, Laurier sent a telegram to Lord Aberdeen's Private Secretary, Captain John Sinclair, which said: "it would be a 'great injustice to the Liberal party if any Senators or Judges were appointed by the retiring [Tupper government].'"[115] Tupper's actions also supported Laurier's argument. Tupper's son visited the Aberdeens in Quebec City on 24 June and handed the Governor General a telegram on his father's behalf in which he "admitted that the early press reports indicated a Conservative defeat but observed that since many seats were lost by close margins nothing could be done until after the recounts."[116]

Laurier argued that the constitutional conventions of Responsible Government had evolved toward popular sovereignty in both the United Kingdom and Canada because the expansion of the franchise had made the House of Commons a representative sample of the population. In the British case, Laurier cited the Great Reform Act of 1832 and alluded to the Second Reform Act of 1867 and the Third Reform Act of 1884, but he did not provide any Canadian examples. He says:

> In the early days, government was responsible to Parliament. But it could hardly be said that Parliament represented the people — it represented the privileged classes, but not the people; and the great Reform Bill of 1832, followed as it has been by successive instalments and extensions, brought the Parliament of Great Britain and the Parliament of Canada to be expressions of the direct voice of the people.[117]

Sandie Rinaldo, "For Queen & Country: In Conversation with the Governor General," *CTV News*, 11 December 2012.

[112] *Supra* note 104, at 1663.

[113] *Ibid.,* at 1663.

[114] *Ibid.,* at 1664.

[115] *Supra* note 24, at 333.

[116] *Ibid.*

Here Laurier inadvertently exposed his argument to a fusillade of objections by proponents of electoral reform, who were already advocating in favour of instant run-off balloting and multi-member proportional representation across the British Empire by the 1880s.[118] After all, the Liberals won a parliamentary majority with 45.1% of the popular vote even though the Conservatives won the plurality of the popular vote, at 46.3%.[119]

Laurier concluded that new constitutional conventions had emerged by the late 19th century, whereby the incumbent government should resign if the general election gave another party a parliamentary majority:

> This is a new doctrine, which is new in operation — that as soon as the voice of the people has been heard, immediately the Ministers of the Crown shall take advice as to whether they have been supported or not by the people.[120]

Laurier traces this new system back to the Disraeli-Gladstone Oscillation of the 1860s and 1870s. It started in 1868 when British Prime Minister Benjamin Disraeli resigned after the results of the general election made clear that William Gladstone's Liberals and their allies had won a parliamentary majority. Disraeli refused to let his Conservatives limp on and lose the Address-in-Reply to the Queen's Speech in the new parliament. Laurier characterises Disraeli's precedent as "a novel step, a step not possible in the last century, but a step not only necessary but advisable under the new development of the British constitution."[121] Laurier quotes Disraeli's own rationale:

> It is now clear that the present Administration cannot expect to command the confidence of the newly-elected House of Commons. Under the circumstances, Her Majesty's Ministers have felt it due to their own honour, and to the policy they support, not to retain office unnecessarily for a single day.[122]

The disagreement between Tupper and Laurier therefore hinges upon what constitutes routine business and whether the incumbent government has a right to remain in office and test the confidence of the new House of Commons after another party wins a parliamentary majority. Laurier contends that when an election deprives the incumbent ministry of its majority in the House of Commons and swings that majority to the other party, the incumbent Prime Minister must resign long before the new parliament convenes. This later

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[117] *Supra* note 104, at 1664 [emphasis added].

[118] Sir Sandford Fleming, *An Appeal to the Canadian Institute on the Rectification of Parliament* (Toronto: Copp Clark, 1892), 1-31; Thomas Hare, *The Machinery of Representation*, 2nd ed (London: W. Maxwell Law Booksellers and Publisher, 1857); Thomas Hare, *Treatise on the Election of Representatives, Parliamentary and Municipal* (London: Longman, Brown, Green, Longman's, and Roberts, 1859).

[119] Andrew Heard, "Elections: Canadian Election Results by Party, 1867-2019" (Simon Fraser University, 2005-2020).

[120] *Supra* note 104, at 1664 [emphasis added].

[121] *Ibid.,* at 1665.

[122] *Ibid.*

became the norm in the 20th century. But Laurier did not dismiss Tupper's argument out of hand either.

> If I understood him aright, Government is responsible to parliament but not responsible to the people, and the voice of the people can only be heard through the voice of parliament, and the voice of the people spoken by the people is not to be taken into consideration. I do not say that there is not something in that argument. But that is not the modern doctrine, which is, that the Government is not only responsible to Parliament but to the people in whose behalf Parliament speaks. The theory propounded by the hon. Gentleman is a hundred years old. The hon. Gentleman knows that the British constitution is not a cut and dried instrument. If there is one characteristic which distinguishes the British constitution more than another it is its elasticity.[123]

While Laurier acknowledges the merits of Tupper's viewpoint, he still rejects it on the grounds that the constitutional conventions of Responsible Government had evolved along a different trajectory by the dawn of the 20th century. Laurier highlighted the elasticity of constitutional conventions and what the British call the "political constitution"[124]; he therefore regarded Tupper's argument and interpretation of constitutional conventions as legitimate, yet also outmoded and increasingly impractical by the close of the 19th century. Laurier saw the emerging convention as the better view, but not the only view, and thereby acknowledged that constitutional conventions can sometimes remain open to interpretation or support two different possible actions. The Tupper-Laurier debates, and the broader question of the constitutional conventions over when the incumbent ministry should resign, spilled over into the broader public sphere over the next few months.

5. CONTEMPORARY DEBATES ABOUT TUPPER'S DISMISSAL

In November 1896, Sir Charles H. Tupper, the son of the former Prime Minister of the same name, wrote a polemical essay largely reiterating his father's speech in the House of Commons and denouncing Governor General Lord Aberdeen in an English monthly called *The National Review*.[125] Tupper the Younger accused Aberdeen of having made himself "the chief of a political Party in the State, as in the case of the Republic to the South of Canada."[126] While he acknowledges that "the Government was beaten at the polls on June 23rd," he argues that his father's defeated ministry had the right to meet the House of Commons in the 1st session of the 8th Parliament scheduled to convene for despatch of business on 17 July and "there accept defeat at the hands of the people's representatives, 'the voice of the nation'". Tupper the

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[123] *Ibid.,* at 1664 [emphasis added].

[124] Graham Gee and Grégoire C.N. Webber, "What Is a Political Constitution?" *Oxford Journal of Legal Studies* 30, no. 2 (2010) at 273-299.

[125] Tupper (the Younger), "The Functions of a Governor-General," at 384-389.

[126] *Ibid.,* at 385.

Younger then accused Lord Aberdeen outright of what Tupper the Elder only dared imply: of having assumed a form of personal rule "to govern Canada himself."[127] He parroted his father's refrains that Aberdeen never appointed his father as a provisional Prime Minister on 1 May 1896 and that appointing more Conservative senators would not have unduly embarrassed or infringed upon the incoming Laurier ministry.[128] He also quoted many of the same sources that his father cited in his correspondence with Aberdeen in July. Tupper the Younger concluded that London should recall Lord Aberdeen as Governor General of Canada as punishment for having made himself a partisan and the *de facto* leader of the Liberal Party.[129]

William. A. Weir, a lawyer and Liberal MLA in Quebec, wrote a rebuttal to Tupper the Younger's polemic in *The Canadian Magazine* in January 1897.[130] Weir presented a coherent theory of the circumstances under which a Governor General could reject the Prime Minister's constitutional advice, which conforms to what Alpheus Todd and Sir John George Bourinot had written in the 19th century:

> 1. The Sovereign or Governor may refuse the advice of his ministers when, in his judgement, it is detrimental to the public interests.
>
> 2. He has the right to consider what would be the desire of Parliament or the people.
>
> 3. He is bound to find a ministry who will assume the responsibility for his refusal of the advice tendered.[131]

Quoting from Alpheus Todd, Weir also argued that Aberdeen could seek information (not "constitutional advice" *per se*) from advisors or sources other than his ministers, especially given that Tupper the Elder did not keep Aberdeen fully informed.[132] At any rate, Tupper the Elder had acknowledged his defeat and the Liberals' victory in newspaper interviews and would have

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[127] *Ibid.,* at 386.

[128] *Ibid.,* at 388.

[129] *Ibid.,* at 389.

[130] W.A. Weir, "The Functions of the Governor-General: A Reply to Sir Charles Hibbert Tupper," *The Canadian Magazine* VIII, no. 3 (January 1897) at 269-272; Quebec, National Assembly, Members, "William Alexander WEIR (1858-1929)," August 2012. William Alexander Weir was the brother of Robert Stanley Weir, who wrote the English-language lyrics to *O Canada*, now Canada's national anthem. He later served as a Minister of the Crown in Quebec, Speaker of the Legislative Assembly, and a judge who wrote several of Quebec's provincial Civil Law codes. He is, in short, a legitimate authority on Responsible Government in his own right and on par with his contemporaries like Sir John George Bourinot.

[131] *Ibid.,* at 269. Weir even cited an example where the Bowell government, in which Tupper the Younger served as Minister of Justice, had in December 1895 failed to reach consensus on whether to commute the death sentence of Valentine Shortis and therefore asked Governor General Aberdeen to exercise the Royal Prerogative of Mercy at his own discretion, with no formal advice from cabinet either way. The Bowell ministry forced Aberdeen to take responsibility for a controversial decision in order to mask divisions within the cabinet, thereby inverting all the precepts of Responsible Government.

acknowledged his loss in his audiences with Aberdeen.[133] Quoting Sir John A. Macdonald, Weir emphasised that the Governor General is only bound to accept and promulgate the constitutional advice of ministers when the ministry commands the confidence of the House of Commons. The results of the election, which would give the Liberals a majority of 21 in the 8th Parliament, as well as the fact that Aberdeen had appointed Tupper *after* dissolving the 7th Parliament, meant that Tupper's ministry had ''never represented any parliamentary majority" and had lost the confidence of the electorate.[134]

Like *The Globe's* editorials and Aberdeen himself, Weir characterised the appointments of senators as ''embarrassing" to the incoming government.[135] Tupper acknowledged his defeat publicly by 25 June, one day after the election. Weir points out that Aberdeen still approved ''over two hundred" Orders-in-Council between when the Liberals won the election on 24 June and Tupper resigned on 8 July; he simply refused to promulgate a few egregious patronage appointments.[136] Weir concludes with an early form of the argument that Canadian historian Eugene Forsey would flesh out in the 20th century: that the Governor General must sometimes act as the guarantor of Responsible Government and dismiss Prime Ministers who attempt to undermine it. ''Lord Aberdeen exercised his constitutional functions wisely and in the interests of the people of Canada, and in furtherance of their wishes as expressed at the polls on the 23rd June last." Weir also emphasised that the Laurier government had taken responsibility for Aberdeen's dismissal of the Tupper government.[137] Even Tupper ''did not dare" call for a vote on division of his motion and speech in the House of Commons, because even he knew that the Laurier ministry would have won such a vote.[138] Overall, Weir accepts Laurier's argument for popular sovereignty but tempers it with some concessions to parliamentary sovereignty.

6. THE PRECEDENTS FROM 1896 REMAIN RELEVANT TODAY

(a) The Caretaker Convention Emerges

Tupper drew upon the two previous precedents from the 1870s. Macdonald in 1873 and Mackenzie in 1878 each sought significant appointments in the dying days of their ministries, and Governor General Lord Dufferin approved them all. Dufferin agreed to Macdonald's tactical prorogation of the 1st session of the 2nd Parliament on 13 August 1873 in order to postpone a vote of non-confidence over the Pacific Scandal. Sir Hugh

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[132] *Ibid.*, at 270.

[133] *Ibid.,* at 272.

[134] *Ibid.,* at 271-272.

[135] *Ibid.,* at 271.

[136] *Ibid.,* at 272.

[137] *Ibid.*

[138] *Ibid.*

Allan, who headed a company competing for the contract to build a transcontinental railway from Ontario to British Columbia, had donated funds to Macdonald's Conservative Party in the previous election of 1872 in an implied *quid pro quo* to win the competition.[139] The 2nd session convened on 23 October 1873 under the same cloud of corruption; on 5 November, after enduring two weeks of parliamentary fracas and the gradual erosion of his support, Macdonald announced in the House of Commons that he had tendered his resignation and that of his colleagues to Governor General Lord Dufferin earlier that day, which His Excellency had accepted.[140] Dufferin then appointed the leader of the opposition and Liberal Party, Alexander Mackenzie, as the next Prime Minister on 7 November 1873.[141] During those two weeks when the Macdonald ministry maintained only a tenuous grasp on the confidence of the Commons, Macdonald and his cabinet colleagues had submitted several Orders-in-Council filling up vacancies in prominent offices, all of which Dufferin signed. On 21 October, Dufferin approved appointing John Crawford as Lieutenant Governor of Ontario but only after "the term of service [of William Pearce Howland] has expired" and not on a specific date.[142] Macdonald also nominated Sir Samuel Leonard Tilley as the next Lieutenant Governor of New Brunswick once L.A. Wilmot's "term of service has expired" — in essence, a future appointment.[143] Lieutenant Governors have always served at pleasure rather than on fixed schedules, but by convention for around five years.

Mackenzie advised Dufferin to rescind several of Macdonald's Orders-in-Council on 13 November 1873, and Dufferin dutifully carried out this constitutional advice. Mackenzie's Order-in-Council contains an attached list of all of Macdonald's 120 appointments from 21 October to 4 November, with 42 of them crossed out.[144] Mackenzie's Liberals even articulated in the

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[139] Messamore, *Canada's Governors General*, at 148, 157.

[140] *House of Commons Debates,* 2nd Parliament, 2nd Session, "Resignation of the Government," 5 November 1873, at 169. Macdonald said: "The advisers of the Crown until yesterday, until last night, believed that they had a support in this House, with which they could not only meet any vote of want of confidence, but would enable them to carry on satisfactorily and creditably the affairs of the Government of this country. They have, from certain speeches made in this House, and from certain communications, more or less formal, outside of this House, reason to believe that they have not at this moment a good working majority—(*Hon. Mr. Blake*: *Hear, hear*)—and the consequence was that I felt it my duty today to go to his Excellency the Governor General and to respectfully tender him the resignation of the present Government. [. . .] I have it, therefore, in charge from his Excellency to state that he has accepted the resignation of the present Administration, and I have his authority to state that he has sent for Hon. Mr. Mackenzie, the leader of the Opposition, to form a Government."

[141] Privy Council Office, "First Ministry" and "Second Ministry," in *Guide to Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017); MacDonald and Bowden, "No Discretion: On Prorogation and the Governor General," at 8-9.

[142] Privy Council Office, Order-in-Council P.C. 1873-1364, "Lieutenant Governor of Ontario," 21 October 1873.

[143] Privy Council Office, Order-in-Council P.C. 1873-1365, "Lieutenant Governor of New Brunswick," 21 October 1873.

preamble to their Order-in-Council an argument why the Macdonald ministry should not have proposed any appointments at all:

> The rule in Canada has been that Ministers against whom a motion of want of confidence is pending have exercised no authority except such as is incident to the routine of their respective offices [. . .]
>
> A new Administration might by such a course as that under review be subjected to very serious inconvenience and their policy respecting necessary changes or a reorganisation of a Departmental character be impeded or frustrated.
>
> They have to assume the responsibility of conducting the affairs of the country, and it would be manifestly unfair, if the retiring Administration should be making at the last moment a large number of appointments and creating new offices, which the new Administration might not deem to be necessary, have it in their power so to embarrass them as to make their task much more difficult and force upon them a responsibility they themselves would not assume.[145]

Here the Mackenzie ministry presented a normative interpretation of what a convention should say because the precedents up to that point simply did not support this conclusion. Yet Mackenzie still relied on some of the same rationales as Aberdeen in 1896: the outgoing ministry should exercise restraint and limit itself to the routine and necessary and should not undertake appointments or policies which the incoming ministry cannot easily reverse. Dufferin approved this new Order-in-Council, thus rescinding many of the instruments which he had promulgated a few weeks earlier. But he replied with a rationale of his own countering what his new ministers asserted. Dufferin rejected the premise that ministers lose their authority to nominate Governor-in-Council appointees simply because they *might* soon lose the confidence of the House of Commons: "It can hardly be contended that the mere introduction of a vote of want of confidence into the House of Commons must of necessity paralyse such a right."[146] (Dufferin's response appears as a handwritten note on the original Order-in-Council). But Dufferin also upheld Responsible Government in Canada and acknowledged that "the date therefore of the Order in Council cannot always be taken as an exact indication of the period when the appointments may have been virtually made."[147] However, Dufferin conceded that outgoing ministries should restrain themselves "with moderation and discretion" in filling up vacancies.[148] Mackenzie rescinded John Crawford's appointment as the next

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[144] Privy Council Office, Order-in-Council P.C. 1873-1595, "Cancellation of Appointments Made Since 27 October Last by Late Administration," 13 November 1873, at 13/28, 4/29, 7/31, 18/32

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.*

[148] *Ibid.*

Lieutenant Governor of Ontario but spared Tilley's appointment as the next Lieutenant Governor of New Brunswick.

The hypocrisy of politicians — saying one thing in opposition and doing the opposite in government — admittedly provides much of the elasticity that allows constitutional conventions to evolve and sustains them with competing interpretations. Five years later, Mackenzie rejected his own precedent and rationale after his Liberals suffered electoral defeat on 17 September 1878 to a resurgent Sir John A. Macdonald, who led the Conservatives to a parliamentary majority on the platform of a protective tariff. Mackenzie tendered his resignation on 8 October 1878.[149] But three days earlier, on 5 October, he had advised Dufferin to appoint Henri-Elzéar Taschereau as a puisne justice of the Supreme Court of Canada.[150] Macdonald did not advise Dufferin to rescind the appointment, perhaps because it took effect on 7 October and could not be overturned, unlike some of his future appointments in 1873.

In 1896, the Tupper Dismissal showed that the Principle of Restraint (now known as the Caretaker Convention) had begun to emerge and applied during the post-writ, that time after a party suffered defeat in an election and another party had won a parliamentary majority, but before the incumbent Prime Minister resigned and the Governor General appointed a new Prime Minister. By the mid- to late 20th century, some precedents began to indicate that the Principle of Restraint applied if the government lost a vote of confidence in the House of Commons and also during the writ; however, not all Prime Ministers observed this convention, and notable constitutional scholars and the Senate of Canada argued as late as 1995 that the Caretaker Convention only applied post-writ and not during the election.[151] In two contrasting examples, Prime Minister Joe Clark decided not to procure the F-18 Hornet for the Royal Canadian Air Force in December 1979 because the House of Commons had just withdrawn its confidence from his government: "It is my judgement that a government that has lost the confidence of parliament does not have the authority to make that decision."[152] Conversely, Prime Minister Kim

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[149] Privy Council Office, "Second Ministry," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017).

[150] Privy Council Office, Order-in-Council P.C. 1878-0882, "Supreme Court of Canada — Judge H.E. Taschereau [appointed] in Room of Judge J.T. Taschereau Resigned," 7 October 1878. Mackenzie's cabinet put forward the nomination on 5 October, and Dufferin promulgated it on 7 October. The Taschereaus kept the Supreme Court in the family. J.T. Taschereau retired to make room for his first cousin once removed Henri-Elzéar. And H.-E. Taschereau's grandson Robert Taschereau served as Chief Justice of Canada in the 20th century. Snell and Vaughan, *The Supreme Court of Canada,* 26-27.

[151] Senate of Canada, Special Senate Committee on the Pearson Airport Agreements, *Report of the Senate Special Committee on the Pearson Airport Agreements,* 33rd Parliament, 1st Session, December 1995.

[152] John Wilson, "Constitutional Conventions and Election Campaigns: The Status of the Caretaker Convention in Canada," *Canadian Parliamentary Review* 18, no. 4 (Winter 1995-1996) at 17. That election held in February 1980 gave the Liberals a

Campbell decided to finalise a contract to privatise Terminals 1 and 2 of Pearson International Airport on 7 October 1993 during the writ itself, even though she had become Prime Minister while the House of Commons was adjourned and thus never commanded its confidence.[153] Patronage appointments in 1984 caused similar controversy to those which Tupper had proposed in 1896.

Liberal Prime Minister Pierre Trudeau took his famous "walk in the snow" and announced on 29 February 1984 that he would retire once the Liberal Party elected a new leader.[154] Trudeau then made several high-profile patronage appointments in the dying days of his second term in June 1984, though Governor General Jeanne Sauvé did not promulgate several of the Orders-in-Council effecting these controversial appointments until after Trudeau had resigned on 29 June.[155] But John Turner, Trudeau's successor as leader of the Liberal Party and therefore as Prime Minister, pledged in writing to Trudeau that he would let them stand and take effect during his premiership, which began on 30 June 1984.[156] Trudeau ultimately secured the appointment of seven senators and two judges on the Federal Court of Canada, and he granted a retiring Liberal cabinet minister a 10-year appointment to the Canadian Transportation Commission.[157] This case bears some resemblance to Tupper's. Trudeau's outgoing patronage appointments generated considerable controversy, in part because John Turner did not hold a seat in the House of Commons, which had already risen for the summer, when Sauvé had appointed him Prime Minister on 30 June.[158] In other words, the Turner government, by definition, did not and could not hold the confidence of the House of Commons — just as Tupper's never did in 1896. Furthermore, Trudeau's patronage appointments elevated several Liberal cabinet ministers and MPs and therefore reduced the Liberals' parliamentary majority to only seven, which would have made Turner's hold on the House of Commons more tenuous than Trudeau's, if he had decided to meet it.[159] Turner advised Sauvé to dissolve the 33rd Parliament on 9 July

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parliamentary majority. Pierre Trudeau began a second term as prime minister and ended up procuring the F-18 Hornets merely a few months after the Clark ministry would have done.

[153] Andrew Heard, "Constitutional Conventions and Election Campaigns," *Canadian Parliamentary Review* 18, no. 3 (Autumn 1995) at 8-11.

[154] *CBC Digital Archives*, "1984: Trudeau Announces His Resignation," 29 February 1984.

[155] Privy Council Office, "Twenty-Second Ministry," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017).

[156] Mary Janigan, "Turner's Days of Decision," *Maclean's*, 25 June 1984, at 18-19.

[157] *Ibid*., at 18-19

[158] Privy Council Office, "Twenty-Third Ministry," in *Guide to Canadian Ministries Since Confederation* (Ottawa: Queen's Printer, 31 April 2017). Turner resigned on 16 September 1984 after serving only 78 days as Prime Minister of Canada.

[159] Janigan 1984, 18-19. Trudeau nominated as Senators former Liberal MP Allan MacEachen, former Fisheries Minister Pierre De Bane, former Public Works Minister

1984, where he ran as a Liberal candidate in Vancouver Quadra.[160] He won his riding but presided over one of the worst losses of an incumbent government up to that time. Brian Mulroney's Conservatives won 211 out of 282 seats on 4 September 1984.[161] Trudeau's outgoing patronage appointments also contributed to the Liberals' loss and spurred a lively exchange between Turner and Mulroney in one of the televised leaders' debates which has since become legendary in Canadian political circles.[162]

The Privy Council Office (PCO) recognised in 1968 through the *Manual of Official Procedure of the Government of Canada* that a caretaker ministry should exercise restraint "if the continuation of confidence in the Government is called into question"; it continued: "A defeat in the House preceding dissolution or a defeat at the polls would be the usual causes of restraint."[163] Under that framework which prevailed throughout the 20th century, only Joe Clark could have found himself subject to the Caretaker Convention; it would not have applied to either John Turner or Kim Campbell. As PCO itself acknowledged in 1968, "The extent of these restraints varies according to the situation and to the disposition of the Government to recognize them."[164] As Tupper discovered in 1896, the extent of these restraints also depends upon whether the Governor General will exercise his discretionary authority,

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Romeo LeBlanc, former Environment Minister Len Marchand, his former legislative assistant Joyce Fairbairn, his former policy advisor Colin Kenney, and Liberal fundraiser and lawyer Daniel Hays. He further nominated former justice minister Mark MacGuigan to the Federal Court of Appeal, former Government House Leader Yvon Pinard to the Federal Court, and former Indian Affairs Minister John Munro to the Canadian Transportation Commission. Turner allowed some of Trudeau's other Order-in-Council appointments, not yet finalized, to go through: Liberal MP Bryce Mackasey became Canada's ambassador to Portugal, Liberal MPs Charlie Turner and Thomas Lefebvre became Senators, Liberal MP Denis Ethier became a member of the Canadian Livestock Feed Board, and Liberal MP Maurice Dupras became the Canadian Consul in Atlanta, Georgia.

[160] Parliament of Canada, ParlInfo, "People: The Right Honourable John Napier Turner, P.C., C.C., Q.C., M.P."

[161] *Supra* note 18, at 1278.

[162] CBC Archives, *Encounter '84:* "I had no option": Turner Flustered in 1984 Election Debate," 25 July 1984. In the English-language leaders' debate on 25 July, Turner claimed, "I had no option" but to allow all of Trudeau's appointments to go through, to which Mulroney retorted, "That is an avowal of failure [. . .] a confession of non-leadership [. . .] You had an option, sir." Canadian journalists widely regard Mulroney's response as the most memorable any leaders' debate from 1968 to the present day. *The Globe and Mail,* "Mr. Mulroney Had Options," 20 May 2009; *The National Post,* "Some Highlights from the Life and Career of Former Prime Minister John Turner," 19 September 2020; Josh K. Elliot, "Unforgettable Exchanges: 4 Pivotal Moments from Past Elections Debates," *CTV News*, 6 August 2015; Elizabeth Thompson, "Doomed Harper Government Made 49 'Future' Patronage Appointments," *iPolitics,* 23 November 2015.

[163] Canada. Privy Council Office, *Manual of Official Procedure of the Government of Canada,* Henry F. Davis and André Millar (Ottawa, Government of Canada, 1968) 89.

[164] *Ibid.*

sometimes known as the Reserve Powers, to reject proposed appointments and force the Prime Minister to resign. The Principle of Restraint gained new prominence in the 21st century under the new and broader guise of the Caretaker Convention. In 2008, PCO drafted internal guidelines on the Caretaker Convention for the general election that year, and it has since released publicly and proactively updated guidelines on the first day of the elections in 2015, 2019, and 2021. PCO now advises the following on the Caretaker Convention:

> government activity following the dissolution of Parliament — in matters of policy, expenditure and appointments — should be restricted to matters that are:
>
> 1. routine, or
> 2. non-controversial, or
> 3. urgent and in the public interest, or
> 4. reversible by a new government without undue cost or disruption, or
> 5. agreed to by opposition parties (in those cases where consultation is appropriate).
>
> In determining what activity is necessary for continued good government, the Government must inevitably exercise judgement, weighing the need for action and the restraint called for by convention.[165]

This sounds strikingly similar to Lord Aberdeen's rationale from 1896 that Tupper's ministry should limit itself to "necessary public business, while it is a further duty to avoid all acts which may embarrass the succeeding Government."[166] However, the Principle of Restraint of the 19th century applied to fewer classes of subjects and activities and for a more limited duration than what the Caretaker Convention covers today. Even Aberdeen did not believe that the Tupper ministry should have limited itself on everything. Over the course of Tupper's premiership from 1 May to 8 July 1896 (69 days), Aberdeen approved 1,045 Orders-in-Council. From the day after the election which the Liberals won (24 June) to 8 July, Aberdeen approved 470. Aberdeen therefore clearly objected not to this flurry of activity in general but only Tupper's most transparently corrupt patronage in particular. Neither Dufferin nor Aberdeen enforced the strict and broad restriction on all government activity that applies today before, during, and after the writ.

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[165] Privy Council Office, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During An Election* (Ottawa: Her Majesty the Queen in Right of Canada, 2019).

[166] Aberdeen, A., "Memorandum to the Prime Minister," at 2.

(b) Appointing and Dismissing Ministries

The Governor General's authority over forming governments and dissolving parliaments is paramount because he must ensure first and foremost that there is always a duly-appointed ministry in office which can take responsibility for all decisions carried out in the Queen's name.[167] As such, while members of the House of Commons cease to be MPs upon the dissolution of parliament, the ministry remains in office until the Governor General replaces them. The Caretaker Convention provides a political solution to the legal-constitutional conundrum that the ministry remains in office during the writ with the same plenary executive authority that it possesses when the House of Commons sits, even though the Prime Minister and cabinet cannot command the confidence of a House of Commons which no longer exists. The incumbent ministry should restrict itself to routine and necessary business during the election and until either the results of the election sustain the ministry, or until the Prime Minister resigns to make way for his successor. When voters elect a majority parliament, the caretaker period ends before the new parliament meets because either the incumbent stays in office or the Governor General appoints the leader of the majority party as the new Prime Minister. But when voters return a minority parliament, the caretaker period does not end until the results become clear, such as if the incumbent Prime Minister resigns, or if the incumbent Prime Minister can plausibly continue to govern and none of the other parties indicate that they would seek to oust him from office upon the Address-in-Reply. If the other parties do contest the incumbent's legitimacy and announce that they will oppose the ministry in the assembly, as in British Columbia in 2017 and New Brunswick in 2018, the caretaker period would not end until one grouping demonstrates that it can command the confidence of the assembly. A caretaker ministry should therefore not undertake any controversial or irreversible decisions that would bind its successors. For instance, a government should probably not sign a major contract during an election, especially if it relates to an issue that has become contentious during the campaign. But the caretaker ministry not merely should, but must, continue making routine and necessary decisions on matters of state (such as international affairs and defence), public health, public safety, and in responding to emergencies. The Caretaker Convention temporarily elevates the obligatory routine and technocratic functions of the modern welfare-state and core matters of state like defence of the realm and managing emergencies above contentious political questions and encourages politicians to remain on their best behaviour.[168]

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[167] Canada, Department of Canadian Heritage, *Ceremonial and Protocol Handbook* (Ottawa: Her Majesty the Queen in Right of Canada, 1998) at G.4-2; Henri Brun, Guy Tremblay, and Eugénie Brouillet, *Droit constitutionnel,* 5th ed (Montreal: Éditions Yvon Blais, 2008) at 371.

[168] J.W.J. Bowden and Lyle Skinner, "'There's Nothing Strategic About This': How Dwight Ball Distorted the Caretaker Convention in Newfoundland and Labrador in 2019," *Journal of Parliamentary and Political Law* 15, no. 2 (2021) at 214.

The Caretaker Convention has also steadily expanded in scope since its ancestor emerged in the 19th century. At first, it simply tempered the worst excesses of the Spoils System and applied only to the *post*-writ in between majority parliaments. After the opposition party won a parliamentary majority, the incumbent Prime Minister would resign and allow his successor, the leader of the party which won the majority, to meet the new parliament. By the 2010s, the Caretaker Convention had grown throughout Canada to include restrictions on government advertising and announcements during a nebulous "pre-writ," currently defined by Ottawa and Manitoba in statute as 90 days before dissolution.[169] Fixed-date election laws in majority parliaments have made this development possible, since, by definition, no clear pre-writ can exist prior to a snap election that only the Prime Minister or Premier could have possibly had in mind.

The debate between Tupper and Laurier also reveals two competing conceptions of sovereignty and how this influences the constitutional conventions on forming governments, as well as when and under what circumstances the incumbent Prime Minister should resign after an election. Strictly speaking, any incumbent ministry could stay in office after any election — even if another party wins a parliamentary majority — subsequently meet the new House of Commons, and, finally, only resign after losing the vote of confidence on the Address-in-Reply to the Speech from the Throne. This convention dates from the early days of Responsible Government (1840s to 1870s) and started to die out once stricter party discipline rendered it inefficient and unnecessary. This modern convention which still applies today took shape in the United Kingdom amidst the various oscillations between Liberal Prime Minister William Gladstone and Conservative Prime Minister Benjamin Disraeli in the 1860s and 1870s.[170] Queen Victoria approved of this development and regarded the old method which predominated her early reign as "simply a waste of time."[171] The same convention had taken hold in British North America by the 1870s as well, and Tupper's rear-guard action in 1896 succeeded only in definitively putting the old conventions into abeyance in majority parliaments. After Aberdeen dismissed Tupper, it became universally accepted in Canada that the incumbent Prime Minister concedes defeat as soon as possible if another party wins a parliamentary majority and then resigns within two to three weeks after the election rather than remaining in office and testing the confidence of the new House of Commons.[172] In other words, the *electorate*, no longer the House of Commons, now in effect decides

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[169] *Canada Elections Act,* S.C. 2000, c. 9, s. 2; *Election Financing Act*, C.C.S.M. c. E27, s. 115.

[170] Forsey and Eglington, *supra* note 5, at 59.

[171] *Ibid.*

[172] Unlike in the United Kingdom, where the leader of a victorious majority party strolls up to Number 10 Downing Street the day after an election and quotes St. Francis of Assisi or asks rhetorically whether a new dawn has broken, Canadian ministries switch all at once and on the same day — prime minister and ministers all — two to three weeks after the election when the Governor General or Lieutenant Governor

who governs in the case of majority parliaments. Canadian politicians and voters accepted a key premise of popular sovereignty some one hundred forty years ago, but this concession to popular sovereignty can only apply under majoritarian electoral systems and a strong two-party system. If either or both of those underlying conditions change, then the convention and default option would also have to change in kind.

As such, the old 19th-century convention — the redoubt which Tupper sacrificed his premiership to defend — still applies to minority parliaments. Several recent federal, provincial, and territorial elections in Canada since 2017 have produced minority parliaments and shown that the incumbent Prime Minister can choose to concede before the new parliament meets, or, alternatively, test the confidence of the new minority parliament. However, practical considerations still apply, namely whether the incumbent government's party has retained a plurality, the overall standings of all the parties, and whether other party leaders express willingness to work with the incumbent. The incumbent ministry can choose to resign if another party wins the plurality of seats, as in Prince Edward Island in 2019.[173] The incumbent Premier can remain in office and test the confidence of the new assembly, either managing to cobble together an *ad hoc* working majority (as in Ottawa and in Newfoundland and Labrador in 2019[174], and Yukon and Ottawa once more in 2021[175]), or finding that confidence wanting and either resigning

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swears them all in as Privy Councillors (or Executive Councillors in the provinces) at a public ceremony.

[173] In April 2019, Prince Edward Islanders returned their first minority legislature since 1851; the incumbent Liberal Premier Wade MacLauchlan lost his own seat and resigned after the Liberals came in third. In an assembly of 27 seats, the Progressive Conservatives won 13; the Greens, 8; and the incumbent Liberals, 6. Lieutenant Governor Antoinette Perry appointed the leader of the Progressive Conservatives, Dennis King, Premier on 9 May, and his single-party minority government has continued through *ad hoc* majorities on key votes. Malcolm Campbell, "Liberal Leader Wade MacLauchlan Loses Seat," *CBC News*, 23 April 2019; Sara Fraser, "Clear win for PC Natalie Jameson in P.E.I.'s deferred election," *CBC News*, 15 July 2019; Government of Prince Edward Island, News Releases, "Prince Edward Island Premier and New Cabinet Sworn In Today," 9 May 2019.

[174] Kathleen Harris, "Trudeau Rules Out Coalition, Promises Gender Equity in New Cabinet," *CBC News,* 23 October 2019; *CBC News*, "N.L. Budget Passes as Liberal Minority Government Survives Its First Confidence Vote," 26 June 2019. In May 2019, Newfoundlanders and Labradoreans reduced the provincial Liberals from a majority to a plurality, in the province's first minority legislature since the 1970s, but Dwight Ball's minority government won the confidence of the House of Assembly. Canadians similarly in October 2019 reduced the federal Liberals led by Justin Trudeau to a plurality, but the Trudeau government continued as a single-party minority government by winning enough *ad hoc* support of confidence and supply bills until Trudeau sought and received an early dissolution in August 2021.

[175] *CBC News,* "Yukon Liberals, reduced to Minority, Embrace the NDP," 28 April 2021. In 2021, the incumbent Liberals of Premier Sandy Silver lost their majority and tied with the conservative Yukon Party, at 8 seats each. But the three New Democrats formed a confidence-and-supply agreement with the Liberals, yielded a combined majority of 11 out of 19 MLAs.

willingly (as in New Brunswick in 2018[176]), or being dismissed by the Governor (as in British Columbia in 2017).[177] If the incumbent Prime Minister chooses to remain in office and test the confidence of the new minority parliament, the House of Commons should first reject the ministry before the Governor General dismisses the Prime Minister from office. This order of events best maintains the democratic role of the elected lower house and safeguards the neutrality of the Crown. However, if the incumbent Prime Minister loses on the Address-in-Reply or fails to obtain supply and then, as a result, seeks an early dissolution instead of resigning, then the Governor should as a last resort dismiss the incumbent Prime Minister and appoint a new ministry if the House of Commons or legislative assembly can support an alternative government, as occurred in British Columbia in 2017.

Tupper's mid-19th century view of British parliamentarism ironically corresponds more closely to the method of forming governments that became the norm after the Second World War. The Federal Republic of Germany adopted confirmation voting in 1949, which the State of Israel and the Kingdom of Spain later emulated.[178] Tupper referred to this system as "a vote of credit from Parliament, previous even to the formation [...] of their government."[179] Under this procedure, the head of state formally appoints whom the elected assembly nominates as Prime Minister, or the elected assembly confirms the head of state's chosen candidate as Prime Minister.[180] In Germany, the President nominates a candidate for Chancellor whom the Bundestag must either confirm or reject; only if MPs reject the President's choice can they nominate their own candidate instead.[181] In Spain, only the King can nominate a candidate for President (what the Spanish call their Prime Minister), but if His Majesty's first choice fails to win the support of the

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[176] Jacques Poitras, "Brian Gallant's Minority Government Defeated After Losing Confidence Vote," *CBC News,* 2 November 2018.

[177] Justin McElroy and Richard Zussman, "Showdown at Government House: The Meeting That Ended 16 Years of BC Liberal Rule — Why Lieutenant Governor Guichon Rejected Premier Christy Clark's Advice and Allowed the NDP to Form Government," *CBC News*, 30 June 2017. Premier Clark of British Columbia in 2017 and Premier Gallant of New Brunswick in 2018 both elected to remain in office and meet the new legislatures rather than resign beforehand, only to face defeat on the Address-in-Reply to the Speech from the Throne. Clark advised early dissolution; Lieutenant-Governor Guichon refused, thereby forcing Clark's immediate resignation, and subsequently appointed John Horgan in her place. Gallant took the more honourable course and simply tendered his resignation to Lieutenant-Governor Roy-Vienneau who, in turn, appointed Blaine Higgs as the new Premier.

[178] Elsa Piersig, "Reconsidering Constructive Non-Confidence for Canada: Experiences from Six European Countries," *Canadian Parliamentary Review* 39, no. 3 (2016) at 6.

[179] *Supra* note 75 at 1633.

[180] *Basic Law of the Federal Republic of Germany,* Articles 63 & 69; Reuven Y. Hazan, "Analysis: Israel's New Constructive Vote of No-Confidence," *Knesset News*, 18 March 2014.

[181] Christian Tomuschat, David P. Currie, and Donald P. Kommers, translators, Article 63, sections 1-4 in *Basic Law of the Federal Republic of Germany* (Berlin: Language Service of the Bundestag, November 2012) at 53.

Congress of Deputies (the lower house), he would have to consult with political leaders in nominating other candidates.[182]

Something akin to confirmation voting has even emerged within the United Kingdom and Canada. In the devolved assemblies of Scotland and Wales, Her Majesty the Queen must appoint the First Minister on and in accordance with the elected assembly's nomination.[183] In Northern Ireland's devolved assembly, the confirmation vote itself doubles as the appointment of the First Minister, presumably because the Irish nationalists demanded that the Queen play no role whatsoever in the Northern Irish Assembly and Executive.[184] The Northwest Territories and Nunavut have codified in statute a procedure for confirmation voting: the territorial Commissioner (equivalent to a Lieutenant Governor) must appoint a Premier on and in accordance with the vote of the legislative assembly.[185] Northwest Territories and Nunavut have also pioneered Consensus Government, a system which bans political parties and provides far less latitude to the Premier and cabinet than elsewhere in Canada. In all these jurisdictions, the incumbent first minister remains in office until the new elected assembly meets and selects a successor. All these polities have also codified these procedures, either in their constitutions or in statute.

(c) Rejecting Constitutional Advice Means Dismissing Ministries

The Tupper-Aberdeen Correspondence, shorn of any ambiguity, definitively illustrates the established constitutional positions of the Governor General and Prime Minister. When a Governor General rejects and refuses to act on the Prime Minister's constitutional advice, the Prime Minister, and thus the ministry as a whole, must resign, and the Governor General must appoint another Prime Minister and cabinet that the House of Commons will sustain. This new ministry then takes responsibility for the dismissal of its predecessor. Functionally, this means that Governors General can only reject a Prime Minister's constitutional advice if an alternate government already exists within the same House of Commons.[186] The same applies in the provinces with the Lieutenant Governors and Premiers. Responsible Government means that "Ministers of the Crown take responsibility for all acts of the Crown" and that the Governor General acts on and, save for exceptional circumstances, in accordance with, ministerial advice.[187] But ministers cannot take responsibility for the opposite of the

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[182] *The Spanish Constitution,* Article 62(d), Article 99(1-5) (Madrid: Agemcoa Estata Boletin Oficial del Estado, accessed October 2021) at 22, 31.

[183] *Scotland Act, 1998* (United Kingdom), c. 46, s. 46(1-4); *Government of Wales Act, 2006* (United Kingdom), c. 32, s.46-47.

[184] *Northern Ireland Act, 1998* (United Kingdom), c. 47, s. 16A; Northern Irish Assembly, *Standing Orders,* Standing Order 44(1).

[185] *Legislative Assembly and Executive Council Act* (Nunavut), c. 5, s. 60; *Legislative Assembly and Executive Council Act* (Northwest Territories), c. 22, s. 61(1.1)

[186] Sir John George Bourinot, *Parliamentary Procedure and Practice,* 1st ed (Montreal: Dawson Brothers Publishing, 1884) at 58; Todd, *supra* note 5, at 760-761.

advice that they gave, hence why they must resign if the Governor exercises his discretion to reject their constitutional advice. This is simply a practical matter, not a grand theoretical consideration.

All these conventions had become well-established in Canada long before Aberdeen forced Tupper's resignation in 1896. For instance, George Brown resigned as co-Premier of the Province of Canada in August 1858 because Governor General Sir Edmond Head rejected his constitutional advice to dissolve the legislature. Brown said so unambiguously on 4 August 1858 (though in the third person).

> Mr Brown has the honour to inform his excellency the Governor General that, in consequence of his excellency's memorandum of this afternoon, declining the advice of the council to prorogue parliament with a view to dissolution, he has now on behalf of himself and colleagues to tender his resignation.[188]

On 31 July 1858, Governor Head informed Brown upon commissioning him and Antoine-Aimé Dorion to form a new ministry that he would accept advice to prorogue the session but warned that he would not accept advice to *dissolve* the legislature entirely. Head wrote:

> The governor-general gives *no pledge or promise, express or implied, with reference to dissolving parliament*. When advice is tendered to his excellency on this subject, he will make up his mind according to the circumstances then existing, and the reasons then laid before him. [...] The Governor-general has no objection to prorogue the parliament without the members of the new administration taking their seats in the present session.[189]

Head differentiated between proroguing and dissolving the parliament because any member of the Legislative Assembly appointed to the Executive Council automatically vacated his seat and had to run in a ministerial by-election. Head would have accepted advice to prorogue so that Brown, Dorion, and their colleagues could have run in their ministerial by-elections during an intersession and subsequently meet the assembly as one and kick off a new session with their speech from the throne. But Brown inexplicably ignored Head's clear instructions. Brown opted not to prorogue the session to accommodate the ministerial by-elections, and the Legislative Assembly duly seized upon the chance to withdraw its confidence from the Brown-Dorion ministry while none of these ministers could defend themselves and vote to

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[187] Bourinot, *supra* note 5, at 102; Robert Macgregor Dawson, *The Government of Canada,* 5th ed (Toronto: University of Toronto Press, 1970) at 175.

[188] Alpheus Todd, "Discretion of the Sovereign or Her Representative in Granting or Refusing to Ministers a Dissolution," chapter 17 in *Parliamentary Government in the British Colonies*, 2nd ed. (London: Longmans, Green, and Co., 1894) at 769. Until the early to mid-20th century, prorogation of the session always preceded the dissolution of the parliament in Canada. The British still usually conform to this practice of proroguing the session before dissolving the parliament, though there have been a handful of exceptions.

[189] Todd, *supra* note 5, at 764. The inconsistencies in capitalisation and the italicisation appear in Todd's text.

sustain their own ministry. After suffering this preventable defeat, Brown asked that Head dissolve the legislature, which His Excellency refused. Brown thereupon resigned.

The "King-Byng Affair" of 1926 has cast a long shadow over Canadian political history and continues to stir up debate amongst scholars nearly one century later. William Lyon Mackenzie King resigned from his first term as Prime Minister because Governor General Lord Byng rejected his constitutional advice to dissolve parliament on 28 June 1926.[190] But this crisis traces its origins to the previous general election in October 1925, when Canadians returned their second consecutive minority parliament. Arthur Meighen's Conservatives won the plurality with 116 seats, Mackenzie King's Liberals came in second with 101, and the Progressives (an offshoot of disaffected populist Liberals in the Prairie Provinces) came in third with 24.[191] Not only had the Liberals lost their plurality from the previous parliament elected in 1921, but King had even lost his own constituency. Yet he managed to cling to power as Prime Minister because the support of the Progressives gave his Liberal ministry a working majority in the House of Commons,[192] which he did not re-enter until winning a by-election in February 1926.[193] King advised Byng to dissolve parliament because the House of Commons seemed poised to withdraw its confidence from his weakened ministry over allegations of corruption.[194] Byng rejected King's constitutional advice on the grounds that the House of Commons could support an alternative government in Meighen's Conservatives:

> You advise me, "that as, in your opinion, Mr. Meighen is unable to govern the country, there should be another Election with the present machinery to enable the people to decide." My contention is that Mr. Meighen has not been given the chance of trying to govern, or saying that he cannot do so, and that all reasonable expedients should be tried before resorting to another Election.[195]

King tendered his resignation in writing:

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[190] E. George Smith, "King Resigns When His Excellency Refuses Dissolution," *The Globe*, 29 June 1926.

[191] *Supra* note 18, at 1274.

[192] F.C. Mears, "Promise Is Given to Refrain from Making Appointments," *The Globe*, 4 November 1925; F.C. Mears, "'Usurping of Power,' Meighen Charges," *The Globe*, 5 November 1925.

[193] Parliament of Canada, Library of Parliament, ParlInfo: "History of Federal Ridings Since 1867, By-Elections in the 15th Parliament," 31 July 2018.

[194] However, even if King had not advised Byng to dissolve parliament until after the House of Commons had voted against his ministry, Byng would still have rejected King's advice. Meighen's new ministry lost the confidence of the House of Commons within a few days, which necessitated an early election after all. Byng granted Meighen's advice to dissolve the spent parliament, and King led the Liberals to a majority in that election.

[195] Governor General Lord Byng, letter to Prime Minister W.L. Mackenzie King, 29 June 1926, at 109,527 in Library and Archives fonds.

> Your Excellency having declined to accept my advice to place your signature to the Order-in-Council with reference to a dissolution of parliament, which I have placed before you today, I hereby tender to Your Excellency my resignation as Prime Minister.[196]

Brown and King both stated unambiguously in writing that they resigned *because* the Governor General had rejected his constitutional advice. Tupper said the same in 1896:

> Adhering respectfully but firmly to the opinions I have ventured to express in this memorandum, which I regret to find do not agree with those of Your Excellency, it remains only for me to tender the resignation of my colleagues and myself, and to ask that we may be relieved from our responsibilities as Ministers of the Crown at the earliest convenience of Your Excellency.[197]

Sir Wilfrid Laurier himself nearly suffered the same fate as Tupper only four years later. Governor General Lord Minto almost forced Laurier, and thus the ministry as a whole, to resign in February 1900 when he initially rejected the Laurier ministry's advice to replace Major-General Hutton as the Officer Commanding in British North America, which reflected broader disagreements between Laurier and Minto on Canada's contribution to the Second Boer War. Minto recognised that he would force Laurier's resignation if he rejected his constitutional advice. He wrote Colonial Secretary Joseph Chamberlain on 1 February 1900:

> Prime Minister [Laurier] replied that then they [cabinet] would exercise right of dismissing him [General Hutton]. Such a dismissal I might decline to approve and resignation or dismissal of my Government would follow.[198]

Minto only relented and carried out Laurier's advice because Chamberlain ordered him to do so.[199]

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[196] William Lyon Mackenzie King, letter to Governor General Lord Byng, 28 June 1926, at 109,524-109,525 in Library and Archives fonds. I've lost track of the series and reels.

[197] Tupper, "Memorandum to His Excellency the Governor General" at 7.

[198] Carman Miller, *The Canadian Career of the Fourth Earl of Minto: The Education of a Viceroy* (Waterloo, Ontario: Wilfrid Laurier University Press, 1980) at 110-114; Paul Stephens and John T. Seywell, editors, "Lord Minto, Despatch to Joseph Chamberlain, CO 42/875, 1 February 1900" in *Lord Minto's Canadian Papers: A Selection of the Public and Private Papers of the Fourth Earl of Minto, Volume I* (Toronto: The Champlain Society, 1981) at 257-258.

[199] Colonial Secretary Chamberlain replied to his subordinate Lord Minto later the same day, though two hours after Minto had met with Laurier at noon Ottawa time. In diplomatic language that any civil servant today would instantly recognise as a direct order disguised and softened as a suggestion, Chamberlain told Minto that even though that Laurier is wrong on a matter of policy, Minto must accept Laurier's constitutional advice nevertheless and promulgate the Order-in-Council dismissing General Hutton. Essentially, Chamberlain wanted to come up with a lateral appointment for Hutton that would allow all parties to save face. Chamberlain wrote: "Will try and arrange that offer of Hutton's services for S. Africa may be accepted as I do not think it advisable to force an officer on Your Govt. who is

A long line of Canadian historians, including Alpheus Todd, Sir John George Bourinot, R. Macgregor Dawson, and Eugene Forsey, consistently upheld from the 1840s to the 1980s that Governors General who exercise their discretionary authority reject a Prime Minister's constitutional advice thereby force that Prime Minister to resign.[200] By the 21st century, some political scientists inexplicably began either ignoring or rejecting this simple fact, against the body of precedents and evidence from the 1840s to the present day which prove it true.[201] But in 2017, another precedent in this vein came out of British Columbia. On 29 June 2017, Liberal Premier Christie Clark lost the vote of confidence on the Address-in-Reply in a minority legislature by a margin of 44 to 42.[202] She had already decided to test the confidence of the new assembly even though the New Democrats and Greens — which combined outnumbered her Liberals — had struck up a confidence-and-supply agreement fully one month *before* the vote on the Address-in-Reply.[203] Clark trundled down to Government House within minutes after losing the vote and expected that Lieutenant Governor Judith Guichon would accept her advice to dissolve the legislature; instead, Her Honour rejected Clark's constitutional advice, forcing her to resign, and immediately named John Horgan, leader of the opposition and New Democratic Party, as Premier-designate.[204] Guichon swore in Horgan as Premier on 18 July 2017.[205]

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distasteful to them. At the same time I regret their actions & agree with your views of its consequences." Paul Stephens and John T. Seywell, editors, "Chamberlain to Minto, Draft, Personal, CO 42/875, 1 February 1900," in *Lord Minto's Canadian Papers: A Selection of the Public and Private Papers of the Fourth Earl of Minto, Volume I* (Toronto: The Champlain Society, 1981) at 258.

200 Bourinot, *supra* note 5 at 102; Todd, *supra* note 5 at 760-761; Dawson, *supra* note 5, at 332-337; Forsey and Eglington, *supra* note 5, at 16-17. In his famous treatise on *The Royal Power of Dissolution,* Forsey quotes several other constitutional authorities who affirm that when Governors refuse to promulgate constitutional advice of the Prime Minister, he forces the Prime Minister to resign, but Forsey himself does not state this fact emphatically. Forsey, *The Royal Power of Dissolution of Parliament*, at 88, 89, 96, 100, 112-113, 122, 127.

201 Aucoin *et al., supra* note 6; Errol Mendes, "Harper's Snap Election Call Would Violate 'Principle' He Fought For; It Will Take Some Twisted Rhetoric to Justify Breaking With Fixed Election Date," *Edmonton Journal*, 29 August 2008, at A16; Peter H. Russell, "Discretion and the Reserve Powers of the Crown," *Canadian Parliamentary Review* 34, no. 2 (July 2011) at 19-25; Tyler Chamberlain, "The Right to Refuse First Ministers' Advice as a Democratic Reform," *Canadian Political Science Review* 15, no. 1 (2021) at 1-15; Johannes Wheeldon, "Constitutional Peace, Political Order, or Good Government? Organizing Scholarly Views on the 2008 Prorogation," *Canadian Political Science Review* 8, no. 1 (2014) at 102-125.

202 British Columbia, Legislative Assembly, *Orders of the Day*, No. 7, 41st Legislature, 1st Session, 29 June 2017.

203 Justin McElroy, "B.C. Green Party Agrees to Support NDP in the Legislature," *CBC News,* 29 May 2017.

204 British Columbia, Office of the Lieutenant Governor, "A Statement from the Lieutenant Governor," 29 June 2017; Justin McElroy & Richard Zussman, "Showdown at Government House: The Meeting That Ended 16 Years of BC Liberal Rule

7. CONCLUSION: THE NATURE OF CONSTITUTIONAL CONVENTIONS

Constitutional conventions are uncodified, politically enforceable norms which govern how holders of public office should behave and which contextualise or regulate how constitutional and statutory provisions are exercised in practice.[206] For instance, the *Constitution Act, 1867* recognises and vests various authorities in the Governor General without reference to ministers, such as summoning, proroguing, and dissolving parliament, summoning senators, and appointing judges.[207] Yet by convention, the Governor General cannot exercise these authorities unilaterally but must instead act on the constitutional advice of the Prime Minister who heads a ministry which commands the confidence of the House of Commons. Similarly, where the *Constitution Act, 1867* or legislation assign functions to the Governor General-in-Council, the Governor General acts on the advice of cabinet.[208] In Canada, only by combining the text of the *Constitution Acts* with constitutional conventions can we identify what the Constitution of Canada means and describe how our system of government works.

Constitutional conventions operate independently of the courts, which do not adjudicate upon them and cannot enforce them precisely because they are not codified in statutes or constitutional provisions. Instead, constitutional conventions are political and therefore remain politically enforceable. Political enforceability means that ministers take responsibility for their decisions and face the consequences of their actions. In the normal course of events, ministers restrain themselves based on their own conscience or sense of decency; for those without scruple, the threat of dismissal by the Governor, ousting by cabinet or the parliamentary party, or the prospect of defeat at the polls might keep them in line.[209] Ministers of the Crown and the Governors decide which constitutional conventions obtain, and the Governor can under exceptional circumstances enforce constitutional conventions by dismissing a Prime Minister, and thus the ministry as a whole, from office for having attempted to undermine them. Elected members of parliament and the voters also provide political enforcement. For instance, the House of Commons can

— Why Lieutenant Governor Guichon Rejected Premier Christy Clark's Advice and Allowed the NDP to Form Government," *CBC News*, 30 June 2017.

[205] Richard Zussman and Justin McElroy, "B.C.'s New NDP Government Sworn into Office," *CBC News,* 18 July 2017.

[206] James W.J. Bowden and Nicholas A. MacDonald, "Writing the Unwritten: The Officialization of Constitutional Conventions in Canada, the United Kingdom, New Zealand, and Australia," *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012) at 367.

[207] Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021) at sections 24, 38, 50, 96.

[208] *Ibid.,* section 93.

[209] Jonathan S. Gould, "Codifying Constitutional Norms," *The Georgetown Law Journal* 109, no. 4 (March 2021) at 712-713.

withdraw its confidence from the ministry and either force the Prime Minister to resign or obtain an early dissolution and a general election, in which voters can then decide whether to punish or reward the incumbent Prime Minister.

Constitutional conventions remain flexible and adapt to changing circumstances. When the constitutional or statutory provisions which sustain a convention are amended or repealed, or when the circumstances that sustained a convention disappear, any constitutional conventions which derive from them thereby must also change or go extinct.[210] This is what Laurier meant when he highlighted the "elasticity of the British constitution." In practical terms, conventions require Ministers of the Crown and Governors to exercise judgement and decide how they should respond to political circumstances as they arise.[211] British constitutional historian Sir Ivor Jennings famously argued that we must consider three questions to determine whether a custom or practice qualifies as a constitutional convention: What are the precedents? Do the politicians believe they were bound by a rule? Is there a reason for the rule?[212] These questions in and of themselves can only be answered by debating the meaning and applicability of relevant precedents, or in circumstances lacking clear precedents, of foundational norms. Constitutional conventions are therefore dialectical and revealed through argument, debate, and dialogue. Too many Canadian political scientists have failed to grasp this fundamental feature of constitutional conventions and instead portray them as absolute instead of arguable. For instance, some Canadian scholars lamented in 2011 that "we have seemed content to allow the confusion and disagreement of the King-Byng Affair to fester for more than 85 years."[213] What they dismiss as a

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[210] *Supra* note 7, at 614. Canadian history provides a fascinating example of this process. The *Act of Union, 1840* which clumsily combined the predominantly English-speaking Upper Canada and the mainly French-speaking Lower Canada into one polity known as the Province of Canada also deliberately preserved the separate Common Law and Civil Law legal systems of the two former sections and, furthermore, mandated that each former section would be represented in the Legislative Assembly by the same number of MPs irrespective of differences in population. By necessity, this dual legal system and sectional equality forced Responsible Government in the Province of Canada to evolve along lines unique within the British Empire between the 1840s and 1867 into bifurcated cabinets, with an attorney general and solicitor general for each section, capped off by two co-premiers. Other conventions bifurcated collective ministerial responsibility between the two sections, and these dual cabinets functioned like *de facto* coalition governments between English and French conservatives or English and French liberals. But as soon as the *British North America Act, 1867* replaced sectional equality with representation by population in the federal House of Commons and turned Canada into a federal state with a division of powers between two orders of government, isolating civil law within the Province of Quebec, all of these constitutional conventions based on consociationalism and bifurcated cabinets immediately died out because the statutory provisions which sustained them had been repealed. The Northern Irish Executive relies on a similar consociation today, where the largest unionist and nationalist parties must share power as First Minister and Deputy First Minister in a dyad and *de facto* co-premiership.

[211] *Supra* note 206, at 367.

[212] *Ibid.*

confusing multi-decadal dispute festering like a gangrenous sore in fact constitutes a lively and healthy debate amongst Canadian politicians, historians, lawyers, and political scientists over the last century about what a crucial precedent means and how, if at all, it relates to other similar cases. Precedents where Governors have dismissed Prime Ministers almost always provoke controversy both at the time amongst politicians themselves and afterwards amongst historians, as this study on how Aberdeen dismissed Tupper in 1896 demonstrates.

While the Jennings Test implicitly recognises constitutional conventions as dialectical, arguable, and open to debate, it also presents some limitations. For instance, in circumstances truly without precedent, only the third component "Is there a reason for the rule?" could possibly apply, which, in turn, suggests that Governors and Ministers of the Crown would have to base their decisions on what foundational norms suggest should happen. But here notable Canadian scholars disagree. Eugene Forsey famously quipped: "A constitutional convention without a single precedent to support it is a house without any foundation. [...] indisputably, at least one precedent is essential. If there is no precedent, there is no convention."[214] But this sort of tautological reasoning denies the flexibility of conventions and how they evolve in response to novel circumstances, and its logical extension would lead to an absurd paradox that conventions cannot change and, worse still, that they cannot even emerge in the first place. Yet they do emerge and evolve over time. Aberdeen outlined a normative justification for his argument, and thereby also expressly *rejected* the previous precedents from 1873 and 1878 in Canada, which *supported* Tupper's argument. R. Macgregor Dawson rebutted the thrust of the Forsey Tautology and offered a more logical take on how constitutional conventions can change: "It is obvious that if precedents were rigidly followed, no change under an unwritten Constitution could ever take place," which means that politicians must decide how to act "without being bound to [conventions] hand and foot."[215] In addition, the first two questions in the Jennings Test presume that holders of public office possess a working knowledge of the history of Responsible Government and the relevant precedents; sadly, this now presumes too much. While Jennings could reasonably take for granted that British politicians, civil servants, and reporters in the mid-20th century share an understanding of how the system worked, recent political controversies have shown that their Canadian counterparts in the 21st do not always possess the requisite knowledge of their own political history with which to make sound judgements. Politicians cannot even consider, let alone bind themselves to, precedents of which they remain ignorant — even if they *should* know them. The imbroglios over Harper's prorogations demonstrated that few civil servants, journalists, or

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[213] Aucoin *et al., supra* note 6, at x.

[214] Eugene Forsey, "The Courts & the Conventions of the Constitution," *University of New Brunswick Law Journal* 33 (1984) at 34.

[215] Dawson, *supra* note 5, at 334.

even scholars, knew of the precedent of Macdonald's tactical prorogation in 1873 and its close parallels to that of 2008. Similarly, the row over Turner's patronage appointments in 1984 showed that no one deemed Tupper's dismissal over blatant patronage appointments relevant, or knew about it at all.

The political enforceability of conventions also requires by implication a free and open debate based on competing interpretations of norms and precedents in which Governors, ministers of the Crown, members of parliament, and voters themselves engage. This strikes at the heart of what constitutional conventions are. Constitutional conventions exist in a dual, and perhaps even paradoxical or contradictory, state: both descriptive (what happens) and normative (what should happen).[216] Circumstances without precedent must necessarily rely on norms of what should happen instead of looking at what has happened before. Yet conventions also remain flexible and evolve over time or sometimes even go extinct altogether, which means that in retrospect they sometimes simply describe what happens, or what has happened in the past, and become authoritative on what will happen when similar circumstances present themselves in the future. The descriptivist tautology that "the constitution is what happens" would prevent us from judging what happened as "unconstitutional" or wrong in the first place. When we in the Commonwealth Realms judge an action or decision as "unconstitutional," we mean that it violates a norm. Governors and ministers of the Crown must decide how to interpret precedents and act accordingly, and members of parliament, journalists, scholars, and voters, in turn, evaluate those decisions.

Constitutional conventions thus always remain subject to debate and are fundamentally dialectical or dialogical. In other words, we can only derive the meaning and best interpretation of constitutional conventions through the back and forth of debating competing arguments, as Tupper and Aberdeen did in their correspondence in July 1896 and as Tupper and Laurier did in the House of Commons in September 1896. This debate continued outside of parliament between Tupper the Younger and William Weir in the journals of the era. Other controversies like the King-Byng Affair of 1926 and Harper's tactical prorogation of 2008 generated similar debates, both within and without the House of Commons, amongst politicians and scholars alike. Prime Ministers themselves can and often disagree on the best interpretation of relevant precedents. Tupper, Aberdeen, and Laurier examined the same precedents but drew different conclusions from them. Tupper and Laurier considered themselves bound to different sets of rules — parliamentary sovereignty versus popular sovereignty — and each marshalled distinct and coherent arguments in support of their opposing claims. Laurier promoted a new constitutional convention emerging in the late 19th century that the incumbent ministry should resign before meeting the new parliament, instead of staying in office to test the confidence of the new parliament and only

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[216] *Supra* note 124, at 273.

resigning after finding it wanting. But this rationale could only apply when Canadians elect majority parliaments. When that factor changes, Laurier's convention no longer applies. Indeed, Tupper's view (tempered by the Caretaker Convention and thus shorn of blatant patronage) still prevails in minority parliaments in Canada to this day, and many parliamentary jurisdictions have since 1949 adopted confirmation voting, which turns Tupper's interpretation of constitutional convention into statute law.