

“There’s Nothing Strategic About This”: How Dwight Ball’s “New Government” Distorted the Caretaker Convention in Newfoundland & Labrador in 2019

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ABSTRACT

We use the provincial general election in Newfoundland and Labrador in 2019 as a case study in the Caretaker Convention, the authority of the Lieutenant Governor in forming governments, and how incumbent governments can remain in office and test the confidence of a minority parliament. We review how incumbent Premier Dwight Ball took the unusual step of advising the Lieutenant Governor to re-appoint him to the office that he already occupied in an apparent attempt to liberate his incumbent government from the constraints of Newfoundland & Labrador’s new official guidelines on the Caretaker Convention over one week *before* obtaining the confidence of the new House of Assembly in which no party held a majority. We also examine the unique history of Newfoundland’s House of Assembly and similar historical precedents. We conclude by comparing the Canadian method of appointing premiers used in other provinces to the novel Ball Method and to the system of confirmation voting used in other jurisdictions, demonstrating that the Ball Method provides the least accountability of the three.

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INTRODUCTION: AN EARLY ELECTION LEADS TO A HUNG PARLIAMENT

Dwight Ball became Premier of Newfoundland and Labrador on 14 December 2015 after leading the Liberals to a parliamentary majority on 30 November 2015.¹ Newfoundland and Labrador's fixed-date election law would have scheduled the next general election for 8 October 2019, unless it would have overlapped with the federal general election (which it would have), in which case the *House of Assembly Act* would delay it until 25 November 2019.² But the statute also required that the Premier announce by 1 April 2019 whether he believed that the provincial election would have to have been delayed from October to November.³ Ball's silence at the beginning of April therefore guaranteed that Newfoundlanders and Labradoreans would go to the polls a few months early.

On 17 April 2019, Premier Dwight Ball advised Lieutenant Governor Judy Foote to dissolve the 48th House of Assembly of Newfoundland and Labrador and call an early election.⁴ Thus for the 7th time, a Canadian first minister sought and received an early dissolution and new elections notwithstanding a fixed-date election law. Upon dissolution, the Liberals commanded a comfortable parliamentary majority of 27 out of 40, opposite 8 Progressive Conservatives, 2 New Democrats, and 3 independent MHAs. Ball's risky early dissolution did not pay off. On 16 May, Newfoundlanders and Labradoreans returned their first minority legislature since the 1-day Assembly of 1972 and only their second since the restoration of Responsible Government in 1949. The 49th House of Assembly reduced the Liberals to 20 out of 40 against 15 Progressive Conservatives, 3 New Democrats, and 2 independents. Ball opted to start the 1st session of the new 49th House of Assembly on 10 June 2019.

By the well-established norms of Responsible Government, the 13th Ministry of Newfoundland & Labrador since 1949, led by Premier Ball, remained in office throughout the writ as the incumbent government and could remain in office to meet the new legislature and test its confidence. In Canada, the tenure of the prime minister or premier determines the tenure of the Ministry as a whole, and that term only ends upon the resignation, dismissal, or death of the first minister.⁵ Yet Lieutenant Governor Foote appointed Premier Ball as Premier at Government House on 30 May 2019. It's

¹ *CBC News*, "Dwight Ball, New Liberal Cabinet Sworn In at Government House" (14 December 2015).

² *House of Assembly Act* (Newfoundland and Labrador), R.S.N.L. 1990, c. H-10, s. 3(2), 3(5).

³ *House of Assembly Act* (Newfoundland and Labrador), R.S.N.L. 1990, c. H-10, s. 3(4).

⁴ Fred Hutton, "May 15 Set for Newfoundland and Labrador Election, Sources Say", *CBC News* (16 April 2019).

⁵ 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 77-79.

hard to appoint someone to an office that he already occupies. The Executive Council of Newfoundland and Labrador even tacitly acknowledges as much in this rather tautological wording, referring to Ball as premier already, yet also being sworn in as premier again: “The Honourable Dwight Ball, Premier of Newfoundland and Labrador, today announced his Cabinet, with the Premier and all Ministers being sworn in at Government House.”⁶ The headline of the official press release also characterises a cabinet shuffle in an incumbent government as the swearing in of a “New Government.” Premier Dwight Ball also insisted to reporters upon his re-appointment, “There’s nothing strategic about this.”⁷ Ball added: “I would prefer if the judicial recount was done today and over and we had that decision made, that would be my preference, but it’s not.”⁸ We will demonstrate how the Premier’s remarks are indicative of a distortion of how the Caretaker Convention operates.

1. THE CARETAKER CONVENTION IN CANADA AND NEWFOUNDLAND & LABRADOR

Ball’s decision had significant consequences. Rather than a perfunctory and welcome attempt to update dusty old hidebound constitutional conventions and customs in Canada, Dwight Ball went through this ceremony of having himself re-appointed to an office that he already occupied as the head of a “New Government” for purely political and self-interested purposes. In short, Ball sought to by-pass Newfoundland and Labrador’s official guidelines on the Caretaker Convention, created under his watch, and put his ministry back on full footing *before* meeting the House of Assembly on 10 June and re-tabling the budget from earlier that year, let alone before demonstrating that his Ministry commanded the confidence of the newly elected House of Assembly. This whole episode reveals why we should sometimes emphasise the prescriptive aspect of constitutional conventions (what should happen) and the correct decision and course of action required to uphold these norms over and above the descriptive aspect of constitutional conventions (what happens). Constitutional conventions should rely first and foremost on underlying principles or exigencies so that we modify them only when absolutely necessary.⁹ Otherwise, we risk turning the uncodified part of our constitution into an unprincipled and futile tautology — “the constitution is purely what happens” — based on the impulses of individual politicians

⁶ Newfoundland and Labrador, Executive Council Office, “Cabinet of Premier Dwight Ball Sworn In as New Government Is Formed” (30 May 2019).

⁷ Holly McKenzie-Sutter, “Newfoundland and Labrador Minority Government Swears in Cabinet”, *Toronto Star* (30 May 2019).

⁸ *Ibid.*

⁹ James W.J. Bowden and Nicholas A. MacDonald, “Writing the Unwritten: The Officialisation of Constitutional Convention in Canada, the United Kingdom, Australia, and New Zealand,” *Journal of Parliamentary and Political Law* 6, no. 2 (August 2012) at 367-368; James W.J. Bowden, “Canada’s Legal-Constitutional Continuity, 1791-1867” (2020) 14:3 J.P.P.L. 614.

instead of relying on sound methods grounded in both well-understood underlying principles and relevant precedents.

The Governor's authority over forming governments and dissolving parliaments is paramount. This is because the first duty of the Governor is to ensure that there is always a duly-appointed ministry in office which can take responsibility for all decisions carried out in the Queen's name.¹⁰ As such, while Members of the House of Assembly cease to be MHAs upon the dissolution of the Legislature and during the writ, the premier and cabinet ministers remain in office as Executive Councillors. The Caretaker Convention provides a political solution to the legal-constitutional fact that the premier and cabinet remain in office during the writ with the same executive authority as they do when the assembly sits, even though the premier and cabinet cannot command the confidence of an elected assembly which no longer exists and which can no longer hold them to account.

The Caretaker Convention means simply that the incumbent premier and cabinet should restrict themselves to routine and necessary business when the legislature is dissolved. The Caretaker Convention begins upon dissolution. When voters elect a majority legislature, the Caretaker Convention ends before the new legislature meets when either the incumbent stays in office or the Governor appoints the leader of the majority party as the new premier. But when voters return a minority legislature, the Caretaker Convention does not end until some time after the new assembly meets. In a minority legislature, the Caretaker Convention ends either when the incumbent caretaker ministry wins a vote of confidence, or, if the incumbent ministry loses that first vote on a confidence matter, when the governor appoints the leader of the opposition as the next premier. A caretaker premier and cabinet should therefore not undertake any controversial or irreversible decisions that would bind their 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 a government should continue to make routine and necessary announcements during an election, such as on public health measures, responses to natural disasters, advisories on inclement weather, anything pertaining to the availability of government services, or other matters of public safety. Even while limiting itself in a caretaker capacity, the incumbent ministry must always continue to promulgate routine matters of government.

The Caretaker Convention temporarily elevates the obligatory routine and technocratic functions of the modern welfare-state above contentious political questions and encourages politicians to remain on their best behaviour. Countries like Belgium have honed the Caretaker Convention to a fine art, and the incumbent prime minister and cabinet often limp along for months as caretakers (and, in the infamous case of the LeTerme II cabinet, from July

¹⁰ Canada, Department of Canadian Heritage, *Ceremonial and Protocol Handbook* (Ottawa: Government of Canada, c. 1998) at G.4-2; Henri Brun, Guy Tremblay, and Eugénie Brouillet, *Droit constitutionnel. 5th Ed.* (Montreal: Éditions Yvon Blais, 2008) at 371.

2010 to December 2011!) after an election. The Belgians call a caretaker government *un gouvernement d'affaires courantes* — literally “a government of current affairs,” or, one might say in clearer English, a government of routine matters.¹¹

Elizabeth Day, the Clerk of the Executive Council of Newfoundland and Labrador, sent an e-mail to all provincial civil servants in April 2019 on the Caretaker Convention:

The caretaker period begins on the day a general election is called and continues until after the election reveals a clear result which confirms an incumbent government is re-elected, or the day a newly elected government is sworn in.¹²

Day also attached a copy of Newfoundland and Labrador’s official *Guidelines on the Conduct of Public Servants During An Election Period*, which mirrors the Privy Council Office’s *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff, and Civil Servants During an Election*, and contains much the same information, slightly re-formulated.¹³

This document defines the caretaker period as the writ and the time after an election where the result remains unclear. Notably, Newfoundland and Labrador’s Executive Council Office rejects the idea that the Caretaker Convention should apply *before* the writ.

The caretaker period begins once the election writ is issued and continues until after the election reveals a clear result (i.e., the incumbent government is clearly re-elected or a newly elected government is sworn in).¹⁴

If an election results in the incumbent government being re-elected, public service business can return to normal operations on the day following the election. If a new government is elected or if an election result is unclear about which party will form the government, then caretaker guidelines continue to apply until a government is clearly identified as sworn in.

¹¹ Régis Dandoy and Lorenzo Terrière, “Caretaker Cabinets in Belgium: A New Measurement and Typology,” *Politics of the Low Countries*, Online First (2020) at 1-16.

¹² Elizabeth Day (Clerk of the Executive Council of Newfoundland and Labrador), e-mail to all provincial civil servants of Newfoundland and Labrador, 11 April 2019.

¹³ 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); 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, 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, 11 September 2019).

¹⁴ Newfoundland and Labrador, Executive Council Office, *Guidelines on the Conduct of the Public Service During An Election Period* (St. John’s: Cabinet Secretariat, Spring 2019) at 3.

Newfoundland & Labrador's Executive Council Office states the same rationale as the Privy Council Office for why governments should restrict their activity during the writ:

“[The] caretaker convention requires that during this period, government will exercise restraint in decision-making, arising from the fact that there is no accountability to an elected House of Assembly and the incumbent government cannot assume that it will command the confidence of the House following the election.”

During the caretaker period, the daily business of government continues and routine matters of administration still need to be addressed. Cabinet Ministers will remain as ministers throughout the caretaker period but activity should be restricted to matters that are routine and non-controversial, or require urgent action, such as emerging public health or safety concerns. In accordance with these guidelines, government should avoid making major policy decisions; entering into new major projects or costly undertakings and making executive or board appointments.¹⁵

The evidence suggests that the “caretaker period” lasted not from 17 April (the day that Lieutenant Governor dissolved the 48th House of Assembly for an early election in accordance with Premier Ball's advice) to 10 June, when the minority Ball government demonstrated that it can command the confidence of the new 49th House of Assembly, but instead from 17 April to 30 May 2019, when Premier Ball advised the Lieutenant Governor to “re-appoint” him as premier, even though he had never stopped being premier because he had never resigned from office. And the Ball government put those additional eleven days outside of the caretaker period to good use. Premier Ball's “re-appointment” to the office that he already held on 30 May met the condition where “a newly elected government is sworn in” under the Executive Council Office's *Guidelines* and brought an end to the caretaker period. For example, the last page of the *Guidelines* say, “During the caretaker period, the government should not engage in collective bargaining for the renewal of a collective agreement [. . .].”¹⁶ And on 31 May, the day following its “re-appointment,” the Ball government announced that it had reached a collective agreement with the province's nurses.¹⁷

Another piece of evidence relating to public consultations on new public works also suggests that the caretaker period ended on 30 May. The *Guidelines* state:

During the caretaker period, the public service does not undertake consultation or engagement sessions with the general public or targeted stakeholders. Any consultations that are on-going at the

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at 16.

¹⁷ Newfoundland and Labrador, Finance and Health & Community Services: “Provincial Government Reaches Collective Agreement with Registered Nurses Union” (31 May 2019).

time that the election is called must be postponed until after the caretaker period concludes.¹⁸

And on 6 June, Lisa Dempster, the Minister of Municipal Affairs and Environment, announced that the government had registered two public undertakings for environmental assessments — one on 4 June and the other on 5 June — and would invite public comment up to 11 July.¹⁹ One pertained to a “Freshwater Bay Cottage Access Road” in Doctor’s Cove (which falls within a provincial park); the other, to the “St. Lawrence Fluorspar Marine Shipping Terminal Project” in Mine Cove.

Finally, the general tenor of the Government of Newfoundland and Labrador’s official news releases demonstrates that the civil service followed the *Guidelines* and that the caretaker period ended upon the constitutionally irregular “re-appointment” of the incumbent Ball ministry. The *Guidelines* describe the following limits:

News releases, statements and public advisories will be kept to a minimum during the caretaker period and new programs, policies or funding commitments will not be announced unless they are addressing an exceptional circumstance such as a public emergency, or the lack of an announcement would mean a material loss to government.

Announcements will be limited to operational communications (e.g., Justice and Public Safety enforcement notifications, Occupational Health and Safety (OHS) proceedings or changes, notifications of road closures, emergency situations or matters affecting public health). IN these cases, quoting Cabinet ministers should be avoided; however, there may be circumstances where it is appropriate to do so (issue of public health, for example).²⁰

News releases immediately before the writ was drawn up on 17 April include a flurry of spending announcements and government activity. For example, the Ball government issued nine press releases on 16 April, most of which emanated directly from spending commitments contained in the budget. On 17 April, the Ball government even announced \$270.6 million, in conjunction with the Government of Canada, for social housing.²¹ But during the writ, several days would often go by with no announcements at all. And those which did happen conformed to the *Guidelines*, focussing mainly on reports which agencies would have produced anyway, election or not,²² and on

¹⁸ Newfoundland and Labrador, *Guidelines on the Conduct of the Public Service During An Election Period*, at 13.

¹⁹ Newfoundland and Labrador, Municipal Affairs and Environment, “Environmental Assessment Bulletin” (6 June 2019).

²⁰ Newfoundland and Labrador, *Guidelines on the Conduct of the Public Service During An Election Period*, at 12.

²¹ Newfoundland and Labrador, Executive Council Office & Children, Seniors and Social Development, “Provincial and Federal Governments Announce \$270 Million Housing Agreement,” 17 April 2019.

²² Newfoundland and Labrador, Office of the Information and Privacy Commissioner,

“Public Advisories” for things like extending the use of studded tires due to wintery weather,²³ the surplus of moose and deer on highways,²⁴ road closures,²⁵ a warning about polar bears spotted on the northern reaches of the island of Newfoundland²⁶ and in Labrador,²⁷ as well as warnings about the risk of forest fires²⁸ and flooding.²⁹ All of these qualify as necessary and routine. The only official announcements which mentioned ministers by name happened *after* the writ and election day on 14 May itself but during the caretaker period (before 30 May) were published on 23 May and 29 May. In the first, Premier Ball expressed his condolences upon the death of a former Premier of Newfoundland & Labrador, Beaton Tulk;³⁰ in the second, the Minister for Tourism, Culture, Industry and Innovation marked Francophonie Day³¹ — both wholly uncontroversial and routine.

CBC News reported that the policies contained in the caretaker guidelines held up several key construction contracts already allocated funding and approved at the start of the province’s short construction season.³² Percy Farwell, the Mayor of Gander, told *CBC News* that the early unscheduled election this spring “forced municipalities to delay the release of tenders” for

“Office of the Information and Privacy Commissioner — Report PH-2019-001 Released” (25 April 2019).

²³ Newfoundland and Labrador, Service Newfoundland & Labrador, “Public Advisory: Studded Tire Season Extended” (26 April 2019); Newfoundland and Labrador, Service Newfoundland & Labrador, “Public Advisory: End of Studded Tire Season Approaching” (9 May 2019).

²⁴ Newfoundland and Labrador, Fisheries & Land Resources and Transportation & Works, “Public Advisory: Motorists Reminded of Increased Moose and Caribou Presence on Highways” (25 April 2019).

²⁵ Newfoundland and Labrador, Fisheries & Land Resources, “Public Advisory: Seal Bay Forest Access Road Re-opening May 17” (14 May 2019).

²⁶ Newfoundland and Labrador, Fisheries & Land Resources, “Public Advisory: Polar Bear Warning Issued for L’Anse Amour” (22 May 2019).

²⁷ Newfoundland and Labrador, Fisheries & Land Resources, “Public Advisory: Polar Bear Warning Issued for Fleur-de-Lys” (21 May 2019).

²⁸ Newfoundland and Labrador, Fisheries & Land Resources, “Public Advisory: Fire Season in Effect on Island Portion of Province” (1 May 2019); Newfoundland and Labrador, Fisheries & Land Resources, “Public Advisory: Residents Advised to Exercise Extreme Caution When Using Fire” (9 May 2019).

²⁹ Newfoundland and Labrador, Transportation & Works and Municipal Affairs & Environment, “Public Advisory: Crews Monitoring Rising Water Levels on Route 520” (13 May 2019).

³⁰ Newfoundland and Labrador, Executive Council Office, “Statement by Premier Ball on Passing of Beaton Tulk” (23 May 2019).

³¹ Newfoundland and Labrador, Tourism, Culture, Industry and Innovation, “Media Advisory: Minister Mitchelmore to Attend Provincial Francophonie Day Celebration” (29 May 2019).

³² *CBC News*, “Here’s How the N.L. Election Could Cause a Construction Backlog: Municipalities Can’t Go to Tender While Election Is Underway, Even If Work Was Approved Months Ago” (14 May 2019).

public works where municipalities and the provinces share costs. This unwarranted delay has eaten into the construction season, very short in Newfoundland & Labrador as compared to, say, southwestern Ontario and Vancouver Island. This delay on the part of the provincial government should never have happened, not even under these caretaker guidelines. Re-paving roads certainly qualifies as a routine and necessary expenditure — that’s why we called it “construction *season*” — and there is no reason why the Caretaker Convention should prevent public works already paid for and approved from starting construction. The *Guidelines* say that “During the caretaker period, new, non-routine tenders should not be initiated.” But these projects to re-pave roads qualify as old and very routine indeed. If the provincial government invoked the Caretaker Convention in order to prevent routine summer road construction from starting in May, then either the Ball Ministry itself or the civil service of Newfoundland & Labrador applied these *Guidelines* over-zealously and wasted an entire construction season.

The *Calgary Herald* catalogued similar instances which occurred during the federal general election of 2015. Parks Canada infamously agonised over issuing a routine public advisory about the threat that bears and mountain lions posed to hikers in the Rocky Mountain National Parks that fall, falsely believing that the Caretaker Convention in general and the Privy Council Office’s *Guidelines* in particular prohibited such communication. Parks opted not to warn the public of the feline and ursine dangers prowling and lurking in the forests, and this inaction could have put lives at risk.³³

2. SUMMONING THE NEW HOUSE OF ASSEMBLY, ELECTING THE SPEAKER, AND TABLING THE BUDGET

The Lieutenant Governor swore in only 39 of the 40 members-elect as Members upon the opening of the assembly on 10 June.³⁴ This is because Premier Ball had opted to meet the new House of Assembly before the results of the recount in Labrador West became official; the race had come down to either the Liberal or New Democratic candidate. The dispute was not resolved until 21 June, when the Liberal incumbent and Minister of Municipal Affairs, Graham Letto, lost his 5-vote lead, and New Democratic candidate Jordan Brown won by a margin of 2 votes.³⁵ If Letto had won re-election, the Liberals would have won a slim majority of 21 out of 40 and functionally a plurality of 20 out of 40 under a Liberal MHA as Speaker. As *CBC News* pointed out on 30 May, “The balance of power rests with a judicial recount.”³⁶ And as of 21

³³ Editorial Board, “Parks Canada’s Silence Unbearable,” *Calgary Herald* (3 September 2019).

³⁴ Newfoundland and Labrador, *House of Assembly Proceedings*, “Swearing In Of Members,” 49th House of Assembly, 1st Session, Vol. XLIX, Special Session (10 June 2019) at 1-14.

³⁵ Katie Breen, “Ballots from Tight Labrador West Race Locked Up Ahead of Judicial Recount,” *CBC News* (4 June 2019); *CBC News*, “NDP’s Jordan Brown Declared MHA in Recount for Labrador West” (21 June 2019).

June, that balance of power then rested firmly with the opposition with the addition of New Democratic MHA-elect Jordan Brown.

After this recount, the 49th House of Assembly included 20 Liberals, 15 Progressive Conservatives, three New Democrats, and two independents. The Liberals effectively reduced their parliamentary party from 20 to 19 out of 40 after putting up one of their own MHAs, Perry Trimper, as speaker on 10 June.³⁷ The Opposition allowed Trimper to become Speaker by acclamation and did not nominate any candidates of their own. Making a Liberal MHA Speaker has precluded the possibility that would have arisen if Graham Letto had been re-elected where the Liberal Speaker would have been able to break a tie in favour of the government, which means that the Opposition could have combined their numbers of 20 to defeat the 19 Liberals supporting the Ball government. Lieutenant Governor Judy Foote swore in New Democratic candidate Jordan Brown as an MHA on 25 June.³⁸

On 10 June, Lieutenant Governor Judy Foote read a short and courteous Speech from the Throne shorn of obtuse partisan rhetoric — the kind of speeches that premiers and prime ministers should always provide the Governors to read.³⁹ Normal Westminster practice is to treat the formal motion of the Address-in-Reply to the Speech from the Throne as a confidence vote. This motion is both debatable and amendable. But the *Standing Orders* of the House of Assembly, as well as *Hansard* and the *Order Papers* of previous sessions, show that Newfoundland and Labrador uses a slightly different practice from other Canadian assemblies, whereby they assign the drafting of the Address-in-Reply to a select committee. This process historically occurred in other assemblies but has since fallen into disuse, due in part to its cumbersome nature, and to the general trend of reducing the Address-in-Reply to a simple message of thanks to the Governor.⁴⁰ This creates a degree of ambiguity in the confidence convention, because a motion to refer the Address-in-Reply to the Committee is merely a procedural motion and not a substantive question of confidence. The House of Assembly of Newfoundland and Labrador presently treats the Address-in-Reply purely as a *pro forma* procedure akin to the *pro forma* Bill 1 tabled in the House of Commons, Senate, and some provincial legislative assemblies.⁴¹ Standing

³⁶ *CBC News*, “A Lot of Familiar Faces Sworn In As Dwight Ball’s Liberal Cabinet” (30 May 2019).

³⁷ Newfoundland and Labrador, *House of Assembly Proceedings*, 49th House of Assembly, 1st Session, Vol. XLIX No. 1 (10 June 2019) at 1-13.

³⁸ Newfoundland and Labrador, House of Assembly, “Media Advisory: Swearing-in Ceremony for the Member-Elect for Labrador West” (25 June 2019).

³⁹ Richard Berthelsen, “The Speech from the Throne and the Dignity of the Crown,” chapter 11 in *Canada and the Crown: Essays on Constitutional Monarchy*, edited by D. Michael Jackson and Philippe Lagassé, 161-178 (Montreal-Kingston: McGill-Queen’s University Press, 2013).

⁴⁰ Marc Bosc and Andre Gagnon, “Address in reply to the Speech from the Throne,” in *House of Commons Procedure and Practice, 3d Edition* (Ottawa: House of Commons, 2017).

Order 66(3) says, “A select committee to draw up an Address in Reply to the Speech from the Throne may be appointed at once, without notice.”⁴²

Standing Order 46(3) contemplates indirectly the procedural possibility that the Leader of the Opposition could move an amendment to the Address-in-Reply to express a want of confidence in the government, though under limited time.

SO 46 — Time Limits

3) The Leader of the Opposition and the Leader of the Government in the House have unlimited time when the Leader of the Opposition moves a motion of non-confidence and the Leader of the Government in the House replies to such a motion other than an amendment to the Address in Reply or the Budget motion.⁴³

This highlights the distinction between procedure and mere practices of the House: the House of Assembly *could* already, under its existing rules, treat the Address-in-Reply as a matter of confidence as other Canadian assemblies do, but it chooses not to do so. From a constitutional view, the Assembly should reassert the vote on adopting the Address-in-Reply as the first question of confidence of the session. The current practice of not treating the Address-in-Reply as a confidence matter deprives the Assembly of an early opportunity to pronounce whether it has confidence in the government, and thus could also extend the duration where the Caretaker Convention applies.

For example, *Hansard* records that the 1st session of the 48th House of Assembly on 8 March 2016 created of a select committee consisting of three MHAs — two Liberals (Randy Edmunds and Carol Anne Haley) and one Progressive Conservative (Barry Petten) — to draft an Address-in-Reply.⁴⁴

⁴¹ Audrey O’Brien and Marc Bosc, *House of Commons Procedure and Practice*, 2d Edition (Ottawa: House of Commons, 2009) at 368-369. The practice of introducing the *pro forma* bill as the first order of business originated as an expression of the independence of the English House of Commons from the Sovereign during the reign of Elizabeth I in 1558; the custom carried over to the British House of Commons and colonial assemblies in the following centuries. In Canada, the Prime Minister usually tables this bill, *An Act Respecting the Administration of Oaths of Office*, but it never goes beyond First Reading. This practice began centuries before Cabinet Government fully emerged in the United Kingdom and before London granted Responsible Government to self-governing colonies in the 19th century, at a time when the House of Commons and House of Lords could truly assert their autonomy from the Sovereign and the Sovereign’s Ministers. But now that the Ministry by definition controls the *Order Paper* as part of commanding the confidence of the House of Commons, there is something contradictory and farcical about the Prime Minister tabling a bill the principle of which is the House of Commons can debate whatever it likes. If anything, a backbencher from the opposition should table said *pro forma* bill.

⁴² Newfoundland and Labrador, *Standing Orders* (St. John’s: House of Assembly, 1 April 2019) at 51.

⁴³ *Standing Orders* (St. John’s: House of Assembly of Newfoundland and Labrador, September 2020) at 38.

⁴⁴ Newfoundland and Labrador, *House of Assembly Proceedings*, 48th House of Assembly, 1st Session, Vol. XLVIII No. 2 (8 March 2016) at 31.

Dwight Ball's Liberals held a majority of 27 out of 40 in that House of Assembly.

MR. SPEAKER: It has been moved and seconded that a Select Committee be struck to draft an Address of Thanks to be presented to His Honour the Lieutenant Governor, in reply to the gracious Speech from the Throne with which he has been pleased to open this present session of the House of Assembly.

The Members of the Select Committee are the Member for Torngat Mountains, the Member for Grand Bank and the Member for Conception Bay South.

Is it the pleasure of the House to adopt the motion?

All those in favour, 'aye.'

SOME HON. MEMBERS: Aye.

MR. SPEAKER: All those against, 'nay.'

Carried.⁴⁵

On 10 March 2016, the Select Committee reported back to the House, which voted to defer debate on a *pro forma* Address-in-Reply that simply thanked the Lieutenant Governor for having read a Speech from the Throne:

MR. SPEAKER: The hon. the Member for Torngat Mountains.

MR. EDMUNDS: Mr. Speaker, on behalf of the Select Committee appointed to draft a reply to the speech from His Honour the Lieutenant Governor, I am pleased to present the report of the Select Committee, which reads as follows:

To His Honour, the Lieutenant Governor, the Hon. Frank Fagan.

May it please Your Honour, we, the commons of Newfoundland and Labrador, in Legislative Session assembled, beg to thank Your Honour for the gracious speech to which Your Honour has addressed to this House.

MR. SPEAKER: When shall the report be received?

The hon. the Government House Leader.

MR. A. PARSONS: Mr. Speaker, I move, seconded by the Minister of Natural Resources, that the debate be deferred.

MR. SPEAKER: Is it the pleasure of the House to adopt the motion?

All those in favour, 'aye.'

SOME HON. MEMBERS: Aye.

MR. SPEAKER: All those against, 'nay.'

Carried.⁴⁶

⁴⁵ Newfoundland and Labrador, *House of Assembly Proceedings*, 48th House of Assembly, 1st Session, Vol. XLVIII No. 2 (8 March 2016) at 31.

The 1st session of the 48th House of Assembly periodically revisited debate on the Address-in-Reply, with the last debate occurring nearly a year after the Throne Speech during the 59th sitting on February 27, 2017.⁴⁷ However, the Address-in-Reply remained on the *Order Paper* until the Assembly was prorogued on March, 27, 2017,⁴⁸ which would mean that some financial measure or other major government bill served as the first motion of confidence in that session. Similarly, the motion respecting the Address-in-Reply still languished as item number 1 on the *Order Paper* when the 49th House of Assembly met for the last time on December 14, 2020, prior to the dissolution of the Legislature.⁴⁹

Standing Order 72(1) further provides a procedure whereby the House of Assembly can affirmatively declare its confidence in the government:

The striking committee established pursuant to Standing Order 65(1) may move the appointment at each Session, following the presentation of the motion to move “That this House approves in general the budgetary policy of the Government”, of a committee or committees of the House composed of such Members as are set out in the motion to consider and report upon any estimates referred to it.⁵⁰

The motion “That this House approves in general the budgetary policy of the Government” stands in as an affirmative vote of confidence practised in legislatures throughout Canada.⁵¹

Journalists and the MHAs themselves, both in government and in opposition, seemed to regard the main budget, debated throughout June 2019 and approved by the House on 26 June, as the first vote of confidence in the 1st session of the 49th House of Assembly. For example, *CBC News* marked the occasion on 26 June with the headline, “N.L. Budget Passes as Liberal Minority Government Survives Its First Confidence Vote.”⁵² However, the House of Assembly already approved interim supply on 11 June 2019 and carried the motion “That his House approves in general the budgetary policy of the Government,” and not even on division but by a voicevote.⁵³

⁴⁶ Newfoundland and Labrador, *House of Assembly Proceedings*, 48th House of Assembly, 1st Session, Vol. XLVIII No. 4 (10 March 2016) at 95-96.

⁴⁷ Newfoundland and Labrador, House of Assembly, *Order Paper*, No. 68/2016-17, 48th General Assembly, 1st Session (27 March 2017).

⁴⁸ Newfoundland and Labrador, House of Assembly, *House of Assembly Proceedings*, Vol. XLVIII, No. 59, 48th General Assembly, 1st Session (27 February 2017).

⁴⁹ Newfoundland and Labrador, House of Assembly, *Order Paper*, No. 65/2019-20, 49th General Assembly, 1st Session (14 December 2020).

⁵⁰ Newfoundland and Labrador, *Standing Orders* (St. John’s: House of Assembly, 1 April 2019) at 54.

⁵¹ Audrey O’Brien and Marc Bosc, “The Business of Ways and Means” in *House of Commons Procedure and Practice*, 2d Edition (Ottawa: Parliament of Canada, 2009) online edition.

⁵² CBC News, “N.L. Budget Passes as Liberal Minority Government Survives Its First Confidence Vote”, *CBC News* (26 June 2019).

MR. SPEAKER: The motion is that this House approves in general the budgetary policy of the government.

[. . .]

MR. SPEAKER: Thank you. The motion is that debate be adjourned. Is it the pleasure of the House to adopt the motion? All those in favour, ‘aye.’ **SOME HON. MEMBERS:** Aye.

MR. SPEAKER: All those against, ‘nay.’ The motion is carried.

This vote for interim supply on 11 June 2019 really should have been regarded as the Ball government’s first vote of confidence in the 1st session of the 49th House, and it would also explain why Premier Ball wanted the Lieutenant Governor to open the 1st session *before* the recount in the riding of Labrador West had begun. The minority Ball government thus demonstrated on 11 June that it commands the confidence of the new House and would have continued to command it until the moment that the House decided otherwise in a subsequent formal vote in the chamber. As it happens, the Ball government continued to hold the confidence of the House of Assembly until Dwight Ball, and thus the ministry as a whole, resigned on 19 August 2020.⁵⁴

Interestingly, during the debate on 11 June, the Progressive Conservatives even ruled out voting against — or, at least, bringing the Ball government down over — the main budget later in June. Speaking for the Official Opposition, Tony Wakeham said:

Our Leader [Ches Crosbie] has made it clear, on behalf of our caucus, that we have no intention right now of trying to bring down this government on a matter of confidence, such as the budget, and send the province into political turmoil and perhaps a new election. The people have spoken their will and given us a mandate to find a way to make things work.⁵⁵

The Conservatives did end up voting against the Ball government’s budget on 26 June, but their opposition mattered not because three New Democrats and one independent MHA bolstered the Liberal minority, passing the budget 23 to 14.⁵⁶

MR. SPEAKER: Order, please!

Is it the pleasure of the House to adopt the motion, Motion 3, that this House approves in general the budgetary policy of the government?

⁵³ Newfoundland and Labrador, *House of Assembly Proceedings*, 49th House of Assembly, 1st Session, Vol. XLIX No. 2 (11 June 2019) at 40-45.

⁵⁴ Lindsay Bird, “New N.L. Premier, New Finance Minister: Andrew Furey Takes Office and Shuffles Cabinet” (19 August 2020) *CBC News*.

⁵⁵ Tony Wakeham [“Committee of the Whole”] in Newfoundland and Labrador, *House of Assembly Proceedings*, 49th House of Assembly, 1st Session, Vol. XLIX, No. 2 (11 June 2019) at 51.

⁵⁶ CBC News, “N.L. Budget Passes as Liberal Minority Government Survives Its First Confidence Vote” (26 June 2019).

All those in favour, please rise.

CLERK (Barnes): Mr. Ball, Mr. Andrew Parsons, Ms. Coady, Mr. Haggie, Mr. Byrne, Mr. Crocker, Mr. Osborne, Ms. Dempster, Mr. Reid, Mr. Davis, Ms. Haley, Ms. Gambin-Walsh, Mr. Mitchelmore, Mr. Warr, Mr. Bennett, Ms. Pam Parsons, Ms. Stoodley, Mr. Bragg, Mr. Loveless, Ms. Coffin, Mr. James Dinn, Mr. Brown, Mr. Lane.

MR. SPEAKER: All those against the motion, Motion 3, please rise.

CLERK: Mr. Crosbie, Mr. Brazil, Mr. Petten, Mr. Kevin Parsons, Mr. Lester, Mr. Dwyer, Ms. Evans, Ms. Conway-Ottenheimer, Mr. Paul Dinn, Mr. Pardy, Mr. Parrott, Mr. O'Driscoll, Mr. Tibbs, Mr. Forsey.

Mr. Speaker, the ayes 23, the nays 14.

MR. SPEAKER: I declare the motion carried.⁵⁷

But in traditional Westminster parliaments which rely on conventions of confidence instead of codified rules for constructive non-confidence, the question of whether the Government commands the confidence of the elected assembly remains open to interpretation by both the Government and the elected assembly alike. Governments are free to deem losses on government bills either as minor setbacks, or they can choose to interpret them as a loss of confidence overall.⁵⁸ Only in jurisdictions which employ constructive non-confidence do the prime minister and cabinet lose the discretion to determine whether they have lost the confidence of the elected assembly; under this system, the elected assembly alone decides if the ministry has lost its confidence, and it must propose an alternative government along with a vote of want of confidence in the current government.⁵⁹ In this case, for practical purposes, the full budget and main estimates probably supersede the interim supply passed on 11 June.

If the Ball Government had fallen on the budget vote or the vote for interim supply, the Lieutenant Governor would have either asked the Progressive Conservatives under Ches Crosbie to form a new government in a process similar to what happened in New Brunswick in 2018, or Her Honour would have dissolved the Assembly on Ball's advice. Based on seat count, it would be highly unlikely that Crosbie could form a stable government. Therefore, dissolution and a subsequent election would have been the only practical outcome. However, voters would weigh the merits of the Government's policy changes prior to the loss of confidence. Politically, it

⁵⁷ Newfoundland and Labrador, *House of Assembly Proceedings*, 49th House of Assembly, 1st Session, Vol. XLIX No. 10 (26 June 2019).

⁵⁸ Philip Norton, "Government Defeats in the House of Commons: The British Experience," *Canadian Parliamentary Review* (Winter 1985-1986) at 6.

⁵⁹ José Antonio Cheibub & Bjørn Erik Rasch, "Constitutional Parliamentarism in Europe, 1800–2019," *West European Politics* (2021) at 12; Rod Hague and Martin Harrop, *Political Science: A Comparative Approach*, 5th Edition (Palgrave-MacMillan, 2007) at 340.

was also advantageous for Premier Ball to bring the caretaker period to an end as quickly as possible. Once freed from the caretaker restraint, the premier and cabinet can make funding announcements and government commitments. Indeed, our analysis of the official press releases issued by the Government of Newfoundland & Labrador confirms that cabinet utilized this newfound freedom.

Upon the “swearing in” of his “new government” on 30 May, Ball indicated that he would not force a vote on the budget until after the recount confirmed the results of the riding of Labrador West. Until the results were confirmed, Ball had a 1-seat majority government in the House. He indicated to media his rationale for delaying the budget vote:

There’s nothing strategic about this. I would prefer if the judicial recount was done today and over and we had that decision made, that would be my preference, but it’s not.⁶⁰

As we have demonstrated, this entire process has involved a high degree of parliamentary and political strategy. The “swearing in” of the “new government” on 30 May lifted the Caretaker Convention, and the Assembly granted interim supply on 11 June, clearly demonstrating its confidence in the Ball government. What remains unclear is whether the Clerk of the Executive Council formally confirmed to the civil service that the “swearing in” of the incumbent government as a “new government” formally met the requirements outlined in *Guidelines on the Conduct of the Public Service During an Election Period*, which say: “the caretaker guidelines continue to apply until a government is clearly identified and sworn in.”⁶¹

3. HISTORICAL PRECEDENTS: NOT ELECTING A SPEAKER AND NOT PASSING THE ADDRESS-IN-REPLY

It seems that Premier Ball’s actions allowed him to by-pass the consequences of several important precedents in Newfoundland and Labrador that did not favour the incumbent government.

In 1908, the Liberal Party of the incumbent Premier Sir Robert Bond won 18 seats. The People’s Party (formerly the Tory Party) also won 18 seats. Sir Robert Bond remained in office as the incumbent premier and met the new assembly, but it could not elect a new speaker. The assembly therefore became deadlocked and could not transact any business, such as passing supply. Premier Bond advised Governor Sir William MacGregor to dissolve the assembly; MacGregor refused, and Bond therefore resigned because the Governor had rejected his constitutional advice and no longer held confidence in his first minister. Governor MacGregor then commissioned the leader of the People’s Party, Sir Edward Morris, to form a new ministry. But even after this

⁶⁰ Holly McKenzie-Sutter, “Newfoundland and Labrador Minority Government Swears in Cabinet” (30 May 2019) *Toronto Star*.

⁶¹ Newfoundland and Labrador, Executive Council Office, *Guidelines on the Conduct of the Public Service During An Election Period* (St. John’s: Cabinet Secretariat, Spring 2019) at 3.

change in government, the assembly still could not elect a new speaker and therefore could not transact any business at all, let alone pass supply, leaving only one solution: early dissolution. Despite not being able to obtain supplies, Morris took full advantage of his executive authority as premier and made numerous patronage appointments, which worked heavily in favour of the People's Party. Having exhausted all his options and the effective life of that legislature, Governor MacGregor accepted Premier Morris's advice to dissolve the dysfunctional assembly, and the People's Party went on to win a decisive parliamentary majority in the general elections of 1909.⁶²

The House of Assembly of Newfoundland has struck committees to draft the Address-in-Reply to the Speech from the Throne from the 1830s onwards, but diminishing the Address-in-Reply from a vote of confidence to a *pro forma* report seems to date from the early 1970s. The practice of tasking a select committee to draft the Address-in-Reply first emerged when London granted Newfoundland a legislature and Representative Government in 1833.⁶³ And when London extended Responsible Government to Newfoundland twenty-two years later in 1855, tensions between the Assembly and the Governor remained in terms of parliamentary procedure.⁶⁴ For example, in 1870, pro-Confederation Premier Frederick Carter was defeated on a motion of non-confidence put forward by Anti-Confederation opposition leader Charles Fox Bennett. The Anti-Confederation Party had won a parliamentary majority of 21 versus 9 for the Pro-Confederation Party in the snap election of 1869, but as per the standard practice of the 19th century, Premier Carter remained in office as premier and tested the confidence of the 10th General Assembly.⁶⁵ The Anti-Confederation Party moved an amendment to the *pro forma* motion that a select committee draft an Address-in-Reply, stating, "It is inexpedient to reply to the Gracious Speech with which His Excellency the Governor has opened the present Session of the Legislature until a new Administration is formed."⁶⁶ The following day, Governor Hill transmitted a message to the Assembly saying that the House "should have departed from the usual and expected courtesy, by superseding the motion for a Select Committee" to prepare a response for the Address-in-Reply. That being understood, Governor Hill perceived that the incumbent government lacked the confidence of the Assembly and believed that if the ministry resigned, he, as

⁶² Arthur Berriedale Keith, *Responsible Government in the Dominions*, Volume 1 (Oxford: Clarendon Press, 1912) at 209-211.

⁶³ Newfoundland, *Journal of the House of Assembly of Newfoundland*, 1st General Assembly of Newfoundland, 1833, at 9.

⁶⁴ Jeff A. Webb, "Responsible Government, 1855-1933", *Heritage Newfoundland & Labrador*, at 2001.

⁶⁵ James W.J. Bowden, "1896: Tu Perds — How Governor General Lord Aberdeen Dismissed Prime Minister Sir Charles Tupper" (Winter 2019) 9:2 *The Dorchester Review*, at 31-42.

⁶⁶ Newfoundland & Labrador, *Journals of the Newfoundland House of Assembly*, 10th General Assembly, 1st Session, at 10.

Governor, “will be prepared to follow the accustomed and constitutional practice in appointing their successors.”⁶⁷

Subsequently, on 8 February 1870, Bennett presented his own draft of an Address-in-Reply expressing non-confidence in the Carter ministry, and the Assembly itself resolved into Committee of the Whole to deliberate. The Committee reported back to the Assembly:

There was no intention on the part of the House to depart from the usual and expected courtesy due to [the Governor], in superseding the motion for a Select Committee, by a Resolution expressive of want of confidence in your Excellency’s present constitutional advisors. . . . The House deemed it important to ascertain, without delay, for . . . [The Governor] forming an Administration possessing the confidence of the majority of the Representatives of the people.⁶⁸

The motion was carried, and the Governor soon thereafter commissioned Bennett as premier. But Premier Bennett chose not to prorogue the Assembly, meaning that the House subsequently debated a second Address-in-Reply during the same session! This process presents a curious procedural quirk, because other Canadian assemblies around the same time had no issue with a motion of non-confidence being moved in amendment to the Address-in-Reply, as the precedent from New Brunswick in 1883 illustrates.⁶⁹ However, in 1870, the Address-in-Reply was at least seen as a matter of confidence as it was and still is in other Canadian legislatures. The Governor merely objected to the exact procedures by which the Address-in-Reply became a test of confidence, though even that sort of vice-regal interference based on his legislative, Crown-in-Parliament role would have raised eyebrows in the Dominion of Canada and the provinces at the time. But as Irish constitutional historian Donal Coffey has noted, elected representatives in Newfoundland have always shown an unusual level of deference to the Governor (and sometimes also to London, except, apparently on the issue of joining Confederation in 1869!) up to the point where the colony willingly relinquished its self-government in 1934.⁷⁰

Nearly one hundred years later, the tumultuous election of October 1971 resulted in a hung parliament, the resignation of Liberal Premier Joey Smallwood, and the formation of a Progressive Conservative government under Premier Frank Moores, the first change of government in Newfoundland since the Province joined Confederation and restored

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ The Conservative government of Daniel Hanington was defeated by an amendment to the Address-in-Reply on 26 February 1883, at the start of the 2nd session. Lieutenant Governor Wilmot rejected Hanington’s advice to dissolve the one-year-old legislature and thereby forced Hanington’s resignation. Wilmot then appointed Liberal opposition leader Andrew Blair as premier. Alpheus Todd, *Parliamentary Government in the British Colonies, 2d Edition* (London: Longmans, Green, and Co., 1894) at 800.

⁷⁰ Donal Coffey, “Newfoundland Charts a Different Course,” presentation to the Constitution at 150 Conference at the Universite de Montreal, Montreal, Quebec, 16 May 2019.

Responsible Government in 1949.⁷¹ However, the Moores government also proved unstable due to a series of defections and the withdrawal of support of the New Labrador Party. On 1 March 1972 — the one and only day on which the 35th General Assembly ever met⁷² — the House faced 20 Government Supporters against 20 in Opposition.⁷³ The appointment of Progressive Conservative James Russell as Speaker reduced the Progressive Conservatives to a plurality and rendered the Moore ministry a single-party minority government. In response to the motion to appoint a select committee to write the Address-in-Reply, the new Liberal leader, Edward Roberts, noted this peculiarity, remarking: “I know of no situation in the history of the Parliamentary System in which the Opposition Party, a single party, have had a larger group than the Government Party and have not immediately attempted to throw them out of office.”⁷⁴ Roberts also observed that the Speech from the Throne also failed to mention the request for Supply, citing that the “First duty of this Government must be to get supply, to get the authority of the peoples’ House to spend money.”⁷⁵ Roberts recommended that the House would have to pass supply, either for the interim or as part of the main budget. True to his word, the motion for a select committee passed on a voice vote.⁷⁶ However, later that evening and perhaps after having taken Roberts’ warning into account, Premier Moores advised Lieutenant Governor Harnum to dissolve the Assembly on the grounds that it had exhausted its potential to give any government a working majority.⁷⁷ Just as in 1908, Moores’ Progressive Conservatives won a parliamentary majority of 34 MHAs to 8 Liberal MHAs in the ensuing general election in March 1972.⁷⁸

Joey Smallwood led Newfoundland & Labrador into Confederation, restored Responsible Government, and served as premier from 1949 to 1972. The parliamentary record shows that the House of Assembly revived its old practices pre-Commission Government in 1949 by creating a committee to draft the Address-in-Reply and that this served as the first vote of confidence in the session. In the 1st session of the 29th General Assembly adopted an Address-in-Reply before passing a supply bill.⁷⁹ The 1st session of the 30th

⁷¹ Peter Neary, “Changing Government: the 1971-72 Newfoundland Example” (1979) 5 *Dalhousie Law Journal*, at 631-658.

⁷² Newfoundland and Labrador, House of Assembly, 35th General Assembly, 1st Session, *Verbatim Report*, Volume 1 (1 March 1972).

⁷³ Jenny Higgins, “Changing Government, 1971-72,” *Heritage Newfoundland & Labrador*, 2011.

⁷⁴ Newfoundland, House of Assembly, 35th General Assembly, 1st session, *Verbatim Report*, Volume 1 (1 March 1972) at 26.

⁷⁵ *Ibid.*, at 26-27.

⁷⁶ *Ibid.*, at 46.

⁷⁷ Neary, “Changing Government”, at 657.

⁷⁸ *Ibid.*, at 658.

⁷⁹ Newfoundland and Labrador, House of Assembly, 29th General Assembly, 1st Session, *Index*, “Speech from the Throne”, at 46; and Newfoundland and Labrador, House of Assembly, 29th General Assembly, 1st Session, *Index*, “Supply Act (1949)”,

Assembly in 1952 also adopted the Address-in-Reply before the budget.⁸⁰ The same applied in 1954, the last year for which records are readily available before a gap until 1970.⁸¹ By Smallwood's last assembly as Premier in the early 1970s, the House of Assembly passed interim supply at the beginning of the sessions in 1970 and 1971 as the first votes of confidence, dethroning the Address-in-Reply.⁸² In 1970, the Assembly never adopted the Address-in-Reply at all, and in 1971, the Assembly did not adopt it until well after having affirmed its confidence in the Smallwood government by granting interim supply. However, after the hung parliament elected as the 35th General Assembly in 1971, and all the confusion that it generated, the Address-in-Reply seems to have lost its status as a proper vote and test of confidence, and it has remained bereft of that function ever since. This shift from the Address-in-Reply to supply as the first active vote of confidence originated in the Smallwood Era, but it did not become definitive until after 1972 under the Moores government, perhaps as a result of the tumult and confusion over the transition of power between Smallwood and Moores in the short-lived 35th General Assembly.

As such, the 1970s marked a decline in the Address-in-Reply as an operative vote of confidence in the government. By 1972, the House of Assembly had already dispensed with treating the Address-in-Reply as the first vote of confidence of the session. While the Assembly did pass a motion to approve the Address-in-Reply that year, it had already voted to approve a bill for interim supply weeks earlier as the first vote of confidence of the session and relegated the vote on the Address-in-Reply to a formality. The 1st session of the 36th General Assembly opened on 19 April 1972, and the House set up a committee to draft the Address-in-Reply.⁸³ Edward Roberts, the Leader of the Opposition and Liberal Party, praised Newfoundland's uniqueness, saying:

at 47. The House of Assembly did not begin debate on the *Supply Act* until long after having adopted the Address-in-Reply, which seems to have served as the first vote of confidence in the Smallwood government.

⁸⁰ Newfoundland and Labrador, House of Assembly, 30th General Assembly, 1st Session, *Index*, "Speech from the Throne", at 44; Newfoundland and Labrador, House of Assembly, 30th General Assembly, 1st Session, *Index*, "Budget (1952)", at 4.

⁸¹ Newfoundland and Labrador, House of Assembly, 30th General Assembly, 4th Session, *Subject Index*, "Speech from the Throne", at 95; Newfoundland and Labrador, House of Assembly, 30th General Assembly, 4th Session, *Subject Index*, "Budget (1954)", at 9.

⁸² Newfoundland and Labrador, House of Assembly, *Hansard Index: 1970*, 34th General Assembly, 4th Session (18 February – 24 July 1970) at 6. The House of Assembly passed interim supply at 3rd Reading on 10 March 1970, and the bill received Royal Assent the following day. The last recorded debate on the Address-in-Reply happened on 16 April 1970, and it was never adopted. Newfoundland and Labrador, House of Assembly, *Synoptic Index: 1971 Session*, 34th Assembly, 5th Session (25 March – 2 June 1971) at 4. The *Interim Supply Bill* carried on division on 30 March, five days after the start of the session. In contrast, the Address-in-Reply was not carried until 16 April 1971.

May I also congratulate the two members who in the tradition of this House quite ably moved and seconded the appointment of the committee to draft the Address in Reply. I believe, Sir, we are the only House in the British Commonwealth that actually appoints a committee and then at a subsequent stage moves in to debate on the Address in Reply. It is an interesting anachronism and I hope we will keep it. There are many things unique about this House. This is one of them.⁸⁴

Under the new majority government of Progressive Conservative Premier Frank Moores, the assembly approved a supply bill as its first question of confidence on 20 April,⁸⁵ but it did not carry the Address-in-Reply until 30 May.⁸⁶ By the mid-1970s, the Assembly would still sometimes amend motions relating to the Address-in-Reply but had stopped voting on adopting it. For example, the 4th session of the 36th General Assembly in 1975 appointed the committee to draft the Address-in-Reply, and the opposition moved two amendments to the draft that would have amounted to votes of non-confidence if they had passed. One amendment stalled because it lacked a seconder, and the Assembly defeated the other amendment on division — all without actually adopting the Address-in-Reply itself.⁸⁷ That session opened on 26 February 1975, but the Assembly did not defeat the amendment to the Address-in-Reply until 5 May 1975.⁸⁸ It adopted another motion to draft an Address-in-Reply on 6 June 1975 but never bothered adopting it before its last sitting of the session on 25 June.⁸⁹ Finally, by 1979, the House of Assembly no longer voted on the motion to adopt the Address-in-Reply at all after three sittings of debate, which means that it could no longer count as an operative vote of confidence at any time.⁹⁰ The House of Assembly has over the last forty years opted instead to use votes on supply bills as the first operative question of confidence. The same procedure applied in 2019.

⁸³ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 1st Session, *Verbatim Report*, Volume 1, No. 1 (19 April 1972) at 14-18.

⁸⁴ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 1st Session, *Verbatim Report*, Volume 1, No. 1 (19 April 1972) at 19.

⁸⁵ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 1st Session, *Verbatim Report*, Volume 1, No. 2 (20 April 1972) at 107-108.

⁸⁶ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 1st Session, *Verbatim Report*, Volume 1, No. 17 (30 May 1972) at 1,241.

⁸⁷ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 4th Session, *Index*, “Address in Reply and Amendments Thereto”, at 2-3.

⁸⁸ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 4th Session, *Verbatim Report*, Volume 4, No. 1 (26 February 1975); Newfoundland and Labrador, House of Assembly, 36th General Assembly, 4th Session, *Verbatim Report*, Volume 4, No. 45 (5 May 1975) at 6,065.

⁸⁹ Newfoundland and Labrador, House of Assembly, 36th General Assembly, 4th Session, *Verbatim Report*, Volume 4, No. 48 (6 June 1975) at 6,256.

⁹⁰ Newfoundland and Labrador, House of Assembly, 38th General Assembly, 1st Session, *Index*, “Debate on Address in Reply,” 2. Debate occurred on 16, 17, and 23 July 1979, but a vote never happened.

To this day, the media in Newfoundland & Labrador also do not regard the Address-in-Reply as a confidence vote. After the election of the 50th General Assembly in 2019, none of the local media placed any emphasis on the Address-in-Reply, nor on the motion for interim supply, but instead regarded the vote on the main budget as the pivotal question of confidence. Like his predecessors Sir Edward Morris in 1908 and Frank Moores in 1972, Dwight Ball consolidated his authority over patronage and appointments in the event that he had to advise an early dissolution, first, by getting himself re-appointed to the office that he already occupied in order to escape the confines of the Caretaker Convention, and second, by taking advantage of the uncertainty created by the mandatory recount in Labrador West (which the Liberals ended up losing) and recalling the legislature and getting a favourable Liberal MHA elected as Speaker. Ball very astutely took advantage of the political uncertainty that the recount created and made it work in his favour. He might also have benefitted from the post-1970s practice that relegates the Address-in-Reply to a *pro forma* committee report which the Assembly debates but on which it does not vote instead of maintaining it as an operative vote of confidence. However, a vote on the budget soon followed the Speech from the Throne in this case.

CONCLUSION: BALL DISTORTED THE PRINCIPLES OF GOVERNMENT FORMATION FOR NOTHING

The United Kingdom, Canada (the Dominion and the provinces), Australia (the Commonwealth and the states), and New Zealand rely on the unwritten conventions of Responsible Government in dissolving parliaments and forming governments. Newfoundland and Labrador largely conforms to the traditional Dominion parliamentary system, but with some notable quirks, such as how the Government sits to the Speaker's left, where usually the Government sits to the Speaker's right in Commonwealth parliaments.⁹¹ This is partly due to the separate parliamentary evolution of the House of Assembly prior to 1949. After Confederation, the House revised its *Standing Orders* in 1951 by incorporating aspects of those of Canadian provincial assemblies and also by giving greater weight to Canadian procedural authorities over the venerable *Erskine May: Treatise on the Law, Privileges, Proceedings and Usage of Parliament* for the United Kingdom.⁹² The House of Assembly also seems to have dispensed with making the Address-in-Reply to the Speech from the Throne the first proper confidence measure of the legislative session in 1971, but money bills are never far behind. The Ball government made matters of supply the first items of government business, so the Assembly still had the opportunity to determine whether it had confidence in the government or not.

⁹¹ Alex Marland, "Order, Please! The Newfoundland and Labrador House of Assembly," paper presented to the Canadian Study of Parliament Group, February 2011, at 12.

⁹² J.R. Courage, "The Development of Procedure in the General Assembly of Newfoundland" M.A. thesis, Memorial University of Newfoundland, 1960, at 171.

But newer parliamentary jurisdictions in Europe created or re-constituted since after the Second World War rely more heavily on codified constitutions or enabling statutes which spell out precisely how parliaments are dissolved and governments formed. The Federal Republic of Germany later pioneered constructive non-confidence and confirmation voting in its *Basic Law* of 1949, which other countries, like post-Francoist Spain and the State of Israel, later emulated.⁹³ Similarly, the devolved assemblies of Scotland, Wales, and Northern Ireland within the United Kingdom, the devolved territorial legislatures of Northwest Territories and Nunavut, and new Commonwealth Realms that gained their independence post-War like Tuvalu and Papua New Guinea, have also codified confirmation voting in place of the traditional method where the Crown appoints a prime minister before the new parliament meets.⁹⁴ Under confirmation voting, the Crown appoints a new prime minister only after the new legislature meets and in accordance with a motion or resolution adopted by a majority in the elected assembly. The Crown thus appoints a Prime Minister directly on and in accordance with the advice of the elected assembly itself. The Federal Republic of Germany also entrenched confirmation voting in its *Basic Law* in 1949.⁹⁵ In all these jurisdictions, the incumbent First Minister and Ministry therefore remain in office throughout the election, when the new elected assembly first meets, and up until the moment where the new elected assembly conducts its confirmation vote. Only if the incumbent First Minister loses the confirmation vote would he have to resign and make way for a successor. Confirmation voting thus unambiguously places the authority to support and choose a Ministry with the elected assembly, separate from any confidence vote on the government's main legislative programme, and also insulates the Crown or Head of State from accusations of nefarious political interference within either the Ministry or the elected assembly. Ironically, the older Westminster parliaments, including the Parliament of Canada and most provincial assemblies, practised a similar method of *de facto* confirmation voting in the 19th

⁹³ Cheibub & Rasch, "Constitutional Parliamentarism in Europe, 1800—2019," 16; Reuven Y. Hazan, "Analysis: Israel's New Constructive Vote of No-Confidence" (18 March 2014) *Knesset News*.

⁹⁴ These include constitutional or statutory entrenchment of confirmation votes for the premier or first minister. *Constitution of the Independent State of Papua New Guinea*, section 142; *Constitution of Tuvalu*, section 62, Schedule III; *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); *Scotland Act, 1998* (United Kingdom), c. 46, s. 46(1-4); *Government of Wales Act, 2006* (United Kingdom), c. 32, s. 46-47; *Northern Ireland Act, 1998* (United Kingdom), c. 47, s. 16A; Northern Irish Assembly, *Standing Orders*, Standing Order 44(1). Her Majesty the Queen appoints the First Ministers of Scotland and Wales in accordance with the confirmation vote, but the confirmation vote by the Northern Irish Assembly itself serves as the appointment of the First Minister of Northern Ireland. The Irish nationalists presumably demanded that Her Majesty play no role in the Northern Irish Assembly and cabinet.

⁹⁵ *Grundgesetz für die Bundesrepublik Deutschland*, Articles 63 & 69.

century, where the incumbent prime minister would always remain in office, even if another party won a majority, up until losing the first vote of confidence in the new parliament.⁹⁶

But by any objective measure — both in traditional Westminster parliaments like Canada's and in highly codified parliamentary systems like those of Tuvalu, Scotland, and the Northwest Territories — Dwight Ball's premise of having the Lieutenant Governor re-appoint him as premier and swear in a "New Government" before summoning the new House of Assembly and testing its confidence both undermined the House of Assembly and jeopardized the Lieutenant-Governor's political neutrality. Worse still, Ball most likely carried out this practice specifically in order to circumvent the official guidelines on the Caretaker Convention which he presumably authorised the Executive Council Office to distribute in April 2019. Specifically, Ball wanted to weaken the stipulation that the Caretaker Convention ceases as soon as the Lieutenant Governor swears in a "new government." The notion of re-appointing an incumbent government does not show that constitutional conventions in Canada are evolving to better recognise the popular will; it instead marks an attempt to subvert the basic principles of Responsible Government by depriving the elected assembly of its operative role in expressing its confidence or want of confidence in an incumbent government that has chosen to remain in office after an indecisive election. Ball's method cleverly places the Premier — under the auspices of the Governor, who acts on ministerial advice — above the House of Assembly.

When any doubt remains as to whether an incumbent government, reduced from a parliamentary majority to a parliamentary plurality, can still command the confidence of the elected assembly, the most obvious and correct course of action is simple: to meet the new assembly and test its confidence as soon as possible. It is the House of Assembly, not the premier acting through the Lieutenant Governor, which should indicate and speak for the "judgement of voters." Premiers should not seize the Crown as a shield and then cover behind it. The uncoded aspects of Canada's constitution are not merely what happens; constitutional conventions prescribe what should happen based on underlying reasons and rationales and punishments for those who deviate from them. This relates to the third part (ironically, the most important of the three) of the Jennings Test: "Is there a reason for the rule?"⁹⁷ If we apply this rule to Ball's actions, we find a strong reason *against* the Ball Rule. We conclude that Ball distorted the well-established Canadian rules that the tenure of the first minister determines the tenure of the Ministry as a whole⁹⁸

⁹⁶ James W.J. Bowden, "1896: 'Tu Perds': How Governor General Lord Aberdeen Dismissed Prime Minister Sir Charles Tupper," *The Dorchester Review* 9, no. 2 (Winter 2019) at 31-42.

⁹⁷ James W.J. Bowden and Nicholas A. MacDonald, "Writing the Unwritten: The Officialisation of Constitutional Convention in Canada, the United Kingdom, Australia, and New Zealand," (August 2012) 6:2 *Journal of Parliamentary and Political Law* 367.

⁹⁸ Canada, Privy Council Office, *Manual of Official Procedure of the Government of*

specifically in order to circumvent the very guidelines on the Caretaker Convention that the Executive Council Office of Newfoundland & Labrador created with his authorisation. Worse still, Ball did not even *need* to do so from a political standpoint, because he promptly summoned the minority 49th House of Assembly soon after an inconclusive election and then demonstrated that his Ministry can command the confidence of this minority assembly on its second sitting day, 11 June 2019. Dwight Ball had remained premier throughout the writ and did not need to get himself re-appointed to an office that he already occupied. He should have simply met the House of Assembly as he did anyway and awaited its judgement on the first vote of confidence of the session.

