Democratic Legitimacy of Executive Government under the *Charter of Rights and Freedoms*: Reassessing Crown Prerogatives and Political Constitutionalism under Sections 3 to 5 of the *Charter*

By

Ian A. McIsaac

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Abstract

This thesis reviews the effect of the democratic rights contained in the *Charter of Rights* on the political constitution, being the extra-legal rules that have traditionally structured Canadian democracy. This thesis investigates the possibility that the political constitution is now augmented by the democratic *Charter* rights and that the historic prerogative powers, traditionally viewed as being plenary and not subject to judicial scrutiny, may now be legally restricted and judicially reviewable.

This thesis does so based on a novel interpretation of section 3, focusing on the representative and institutional elements referred to in the text of this provision. Specifically, that the "right to vote" is meant to result substantively in democratic outcomes and that the members elected to the House of Commons must have a role in perfecting the outcome of an election. Section 3 is also analyzed in the context of the unwritten constitutional principles and the related democratic *Charter* rights set out in sections 4 and 5 of that instrument. This thesis finds that section 3 provides not simply the right to vote in elections, but it also provides a right to an executive government with democratic legitimacy based on the confidence of the House of Commons.

This thesis concludes that such a right to democratic legitimacy might create a correlative duty on the Crown when exercising prerogative powers relating to democracy and the democratic process. For instance, there might now be a legal framework surrounding prerogative matters, such as the appointment of a prime minister and control of the Parliamentary process.

This thesis also explores justiciability of prerogative powers and potential judicial remedies for breaching section 3. This thesis finds that courts may limit justiciability of certain prerogative decisions to protect the democratic process from undue litigation and that the democratic process could be further protected by limiting tangible legal remedies to only the most pressing circumstances.

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Dedication

This thesis is dedicated to my wife, Stephanie.

It is impossible to adequately express my gratitude for your support during my enrollment in this program or the experiences that we've shared.

We saw the outbreak of a global pandemic far from home.

We lost our rental in Winnipeg due to the ensuing property crisis and had to move first to Gimli, then back to Nova Scotia.

I moved back to Winnipeg, and then we shared the wonderful news, separated by 3500km and a pandemic, that you were expecting. When I returned home, I had to finish a 14-day travel quarantine (my third of the pandemic) before I could finally see you. I also had to write a paper or two.

We then spent a fearful week in the hospital before the time came for our sweet daughter to be born, over three months early. We spent four months in the NICU with her, where you were always ready to take care of her while I read constitutional law in the quiet room.

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Finally, and on a very different level, I want to dedicate this thesis to my friends and former colleagues at the Legislative Counsel Division at Manitoba Justice, where I had the privilege of helping to write the laws of the province. You made me feel welcome and at home, while I was very far from home. Special thanks to Christina Wasyliw and Glenn Joynt for bringing me to Winnipeg and Tracey Keryluk for being my guide to everything local.

TABLE OF CONTENTS

Introduction……………………………………………………………………………………..5

Chapter 1: Parliamentary Government in Canada: Law and Conventions………………………14

Chapter 2: Section 3 of the *Charter*: Text and Purpose………………………………………….35

Chapter 3: The Preamble to the *Constitution Act, 1867* and Responsible Government…………50

Chapter 4: Sections 4 and 5 of the *Charter*……………………………………………….….65

Chapter 5: Standards for Democratic Legitimacy……………………………………………….81

Chapter 6: Controlling Indeterminacy: Justiciability and Subsection 24(1) and Appropriate Remedies …………………………………………………………………………………101

Conclusion …………………………………………………………………………………110

Bibliography………………………………………………………………………………118

Introduction

Does Canada's Constitution legally require democratic outcomes to elections, and if so, how? While democracy is a fundamental norm of Canadian society, the answer to this specific question is quite complex, given Canada's unique blend of political and legal constitutional traditions. The difference between political and legal constitutionalism, in a nutshell, is the means by which government is held to account: through political processes or through the law and judicial institutions?[1] Mark Harding notes that under an approach of pure political constitutionalism, all rights-based questions would be settled politically through ordinary statute law, reflecting the principle of Parliamentary supremacy.[2] And, indeed, Canada's Constitution was traditionally viewed as being political in nature from confederation until patriation. The political nature of Canada's Constitution was received in part through the preamble to the *Constitution Act, 1867*, and is premised on the notion that the powers and duties of key government offices and institutions are not set out in statutory law, but are rather established by centuries of extra-legal development. Peter Oliver notes that political constitutionalism in Canada was primarily manifested through "concepts such as parliamentary sovereignty, parliamentary privilege and the many constitutional conventions that filled out the essentially uncodified Constitution".[3] However, with the enactment of the *Constitution Act, 1982*, Canada's constitutional order was transformed from one largely political in nature to one largely legal in nature.[4] This is demonstrated most starkly by subsection

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[1] Jean Leclair, "Unwritten Constitutional Principles: the Challenge of Reconciling Political and Legal Constitutionalisms" (2019) 65 McGill LJ 153 at 161.
[2] Mark Harding, *Judicializing Everything? The clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom* (Toronto: University of Toronto Press, 2022) at 39.
[3] Peter C. Oliver, ""A Constitution Similar in Principle to that of the United Kingdom": The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 209 at 2010.
[4] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72, 161 DLR (4th) 385 ["*Secession Reference*"].

52(1) of the *Constitution Act, 1982*, which declares that the Constitution is the supreme law of Canada and any inconsistent law is of no force or effect.[5]

Under the political constitution, the fundamental rules of democracy were set out in extra-legal requirements called constitutional conventions. A notable feature of the constitutional conventions is that their breach does not give rise to a legal remedy, as they are not codified by statute.[6] To this end, the Supreme Court of Canada ("SCC") in *Re: Resolution to amend the Constitution* found that a breach of a convention in certain circumstances would be unconstitutional and could be tantamount to a *coup d'etat*, but would not be illegal.[7] The notion of a legal *coup* is somewhat unsettling, especially given the rise of populism and diminishing faith in democratic norms and political institutions. In the recent occupation of Ottawa, for example, the Governor General was inundated with calls and letters to dismiss the incumbent prime minister and to appoint a protest leader instead.[8] Another group called on the Governor General to lift all COVID restrictions on her own initiative.[9] If the Governor General had acted on these requests, there could be political remedies for such actions, but it is important to note that they can be difficult to achieve and are sometimes imperfect. As one political constitutionalist has expressed, such remedies can be "awkward and sometimes cataclysmic and they are generally dependent on

[5] *Constitution Act, 1982*, s 52, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ["*Constitution Act, 1982*"].
[6] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 882, 125 DLR (3d) 1 ["*Patriation Reference*"].
[7] *Ibid*.
[8] Christopher Nardi, "Governor General's office inundated by protest supporters demanding the PM be fired" *National Post* (February 4, 2022) online: National Post < https://nationalpost.com/news/politics/governor-generals-office-inundated-by-protest-supporters-demanding-the-pm-be-fired>.
[9] Mike Blanchfield and Jim Bronskill, "Blair and Mendicino blast Ottawa protestors seeking to join opposition 'coalition'" *Globe and Mail* (February 8, 2022) online: Globe and Mail < https://www.theglobeandmail.com/canada/article-blair-and-mendicino-meet-with-ottawa-mayor-to-discuss-trucker-convoy/>.

the engagement of the citizenry".[10] In *The Veiled Sceptre*, Anne Twomey notes numerous instances where the Queen refused to proactively intervene in commonwealth affairs, which has been especially problematic where a vice-regal representative has dismissed a responsible first minister.[11] While of a much different category, Dr. Heather MacIvor notes several instances where political remedies were elusive against former Prime Minister Stephan Harper, who was awarded with a majority government after breaching a fixed-date election law, proroguing Parliament several times and being held in contempt of Parliament.[12] The same could be said for prorogation and early dissolutions under Prime Minister Justin Trudeau's current government.[13]

Further, while the royal prerogative (being the legal powers underpinning the conventions) is generally justiciable, courts will nevertheless refuse to review the use of these powers when they relate to highly political matters. Indeed, the only possible means of review for such a decision is on a *Charter* basis.[14] In addition to the limited justiciability of prerogative powers, it is also possible that clause 41(a) of the *Constitution Act, 1982* entrenches the prerogative powers of the Queen, Governor General and Lieutenant Governors. If so, this could have the effect of making it practically impossible to update or codify the legal powers of responsible government, even in a single provincial jurisdiction. Thus, the virtually unreviewable legal powers relating to Canadian

[10] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 98, as cited by Emmett Macfarlane, "The Place of Constitutional Conventions in the Constitutional Architecture, and in the Courts" 55 Canadian Journal of Political Science 322 at 337.
[11] See, Twomey, *infra* note 41 at 18, 766.
[12] Heather MacIvor, "Unwritten Constitutional Principles" (2012) 6 Journal of Parliamentary & Political Law 339 at 351-352.
[13] Ian Austen, "Trudeau Calls Early Election in Canada" *New York Times* (August 15, 2021), online: *New York Times* < https://www.nytimes.com/2021/08/15/world/americas/canada-trudeau-election-covid.html>;
[14] Kathleen Harris & Aaron Wherry, "Parliament prorogued until Sept. 23 as Trudeau government reels from WE Charity controversy" *Canadian Broadcast Corporation* (August 18, 2020), online: *CBC* < https://www.cbc.ca/news/politics/liberal-government-trudeau-prorogue-government-1.5690515>.

democracy may also be practically impossible to amend.[15] While the political actors could conceivably act to simply change the conventions where need be, this can be fraught as well, as the actors who benefit from the conventions often have the least interest in changing them. Therefore, under the orthodox view of the Constitution, there may be an undemocratic and unchangeable void at the centre of Canada's Constitution.[16]

More fundamentally, this view of the Constitution reveals a paradox of political and legal constitutionalism. That is, a lack of a legal framework around the use of prerogative powers means that fundamental decisions regarding who might form government may be made by those with no democratic mandate or oversight or who are attempting to avoid democratic oversight. Consider the example of the 2008 prorogation: Emmett Macfarlane, a political constitutionalist, lauds this example in that a political resolution to a constitutional impasse was achieved in a flexible manner without recourse to the courts. But, while the political situation was resolved to a certain extent, it is not clear that it was actually resolved by political actors. Arguably, it was the Governor General who interfered in the political process, as, up to prorogation, the House of Commons was acting completely within its proper role. That is, a majority of the House of Commons disagreed with the government's policy, they intended to vote non-confidence and offered an alternative ministry, but were frustrated in doing so through the powers of the Governor General. In a sense, this was the political system working by placing key decisions about the governance of the country in the hands of elected politicians. By Peter Hogg's explanation, it was the Governor General who ultimately made the decision to prorogue Parliament, meaning that she weighed the wisdom of the

[15] Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions During a Parliamentary Crisis" (2010) 27 NJCL 217 at 222-223.
[16] Mark D. Walters, "The Law Behind the Conventions of the Constitution: Reassessing the Prorogation Debate" (2011) 5 Journal of Parliamentary and Political Law 131 at 137.

democratically elected House of Commons. While this debate will be reviewed in greater detail later in this thesis, the point is that a clear legal framework surrounding the democratic prerogatives might ensure that the most highly political questions are answered by actors with a democratic mandate (that is, the MPs acting within the institution of the House of Commons).[17]

Nonetheless, as noted above, even highly political prerogatives are presumptively justiciable on a *Charter* basis, which includes several rights that are expressly democratic in nature.[18] This thesis investigates what impact these democratic *Charter* rights might have in relation to the legal and conventional aspects of Canada's Constitution. In particular, this thesis focuses on section 3 of the *Charter* and asks if the right to vote in an election also entails a right for that election to be honoured, and on what basis? The starting point of this thesis is an obvious but key point: that in a democratic society the franchise ought to have a bearing on who forms government. If not, the society could simply not be called democratic. The question becomes more complex from there and must be set in the context of Canada's unique blend of political and legal constitutional traditions. At a very basic level, the text of section 3 likely requires the House of Commons to play a pivotal role in deciding who forms government. As Peter Russell notes, "[t]he licence to govern comes from being able to secure the support of a majority of members in the House of Commons."[19] While Russell approaches this from a political constitutionalist perspective, it is arguably also an element of the legal constitution through section 3, which comprehends not just the right to vote, but also representation and institutions in perfecting democracy. As Canadian courts have already recognized a derivative right to effective

[17] See Hogg, *infra* note 230 at 9.2.
[18] Gerard J. Kennedy & Mary Angela Rowe, "*Tanudjala v. Canada (Attorney General)*: Distinguishing Injusticibility and Deference on Motions to Strike" (2015) 44(3) Advocates' Q 391 at 392.
[19] Peter Russell, "Learning to Live with Minority Governments" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 136 at 137 [Russell, "Minority Governments"].

representation in order to provide the franchise with meaning, this thesis asks the further question: are there institutional elements to section 3 that might be required to provide meaning to the franchise?

If the House of Commons has an institutional right in deciding who forms government as an incident of the franchise, then on whom does the corresponding duty to honour those elections fall?[20] This thesis argues that for many reasons (most importantly the constitutional nature of Parliamentary privilege), such duties must fall squarely on the vice-regal representatives in Canada and thereby limit and guide their powers. For instance, if the governor general used their powers to appoint or dismiss a prime minister without reference to the confidence of the House of Commons (for example, by appointing a protest leader), they might not simply be violating several constitutional conventions but could also be overturning the results of the previous election held pursuant to section 3 of the *Charter*.

While some basic premises about the need for democratic legitimacy under section 3 are relatively simple, it is important to situate this right within Westminster-style parliamentary government. Under this system, democracy is not a series of discrete events, where an officeholder is elected for a definite term as in the United States.[21] Rather, a government under the Westminster system is required to constantly have the confidence of the House and therefore the results of an election continue to be relevant until the House is dissolved and new elections held. Thus, if section 3 is truly a democratic right, it cannot be solely limited to the act of voting, but must continue to have some relevance throughout the lifecycle of a Parliament. Some may argue that the right to annual sittings of Parliament under section 5 creates the necessary preconditions for responsible

[20] Joseph Dainow, "The Science of Law: Hohfeld and Kocourek" (1934) 12 Can Bar Rev 265 at 270-271.
[21] See, for example, Section 2 of Article 1 of the *Constitution of the United States of America*, as cited by *Black's Law Dictionary,* 3d ed at 793.

government in Canada between elections, but this is only half of the equation. This is because section 5 does not require the governor general to follow the advice of a minister with the confidence of the House. Only section 3 can achieve this by requiring a democratic government realized through the election of representatives to the House of Commons. In this sense, section 3 might create a legal duty to act according to ministerial advice. This thesis explores examples of how the political constitution may now be augmented, displaced, or adopted by the legal constitution under the democratic *Charter* rights. It does so by undertaking a purposive analysis of section 3, a review of the unwritten constitutional principles and reading section 3 in the context of sections 4 and 5 of the *Charter*.

It is important, however, that the legal constitution does not usurp democracy in the name of protecting it. To this extent, courts should not be substituting their judgment for the governor general's in determining whether the best democratic outcome is achieved after and between elections. Rather, the role of legal constitution must be to provide a basic framework in which the political process may properly unfold. Thus, it is important to also identify limits on the legal constitution in relation to democratic legitimacy. This thesis explores the limits of the legal constitution in three respects. First, it examines the doctrine of justiciability and the possibility of using the "rights and legitimate expectations" test for limiting review of prerogative powers in certain circumstances. Secondly, this thesis reviews the role of section 1 of the *Charter*, in particular, that a political actor should be able to justify their decision if it *prima facie* breaches a right to a democratic outcome in an election. In this sense, the criticisms of the political constitutionalists may be answered by allowing for flexible and innovative responses to difficult situations so long as they are reasonable. Finally, this thesis examines the role of subsection 24(1), which may help protect the political process through remedies that are appropriate and just in the

circumstances. For example, an appropriate and just remedy might be very different for the leader of an opposition party who is frustrated by the use of a prerogative power versus an individual who has no tangible interest in the outcome of the same decision.

This thesis does not advocate for the increased judicialization of the political process. Quite the opposite. While it might not be obvious, this thesis is primarily concerned with allowing the political constitution to resolve issues of democratic legitimacy and during political impasses. As Jean Leclair, in advocating for careful use of constitutional principles, notes: "[c]ourts must constantly reiterate that the fate of liberal democracy is the responsibility of citizens and their representatives."[22] But, as will be discussed in further detail, the problem with prerogative powers is that they can be used to avoid and frustrate the democratic process and institutions which are meant to provide a venue for citizens and representatives to make political decisions. To this extent, giving legal force to certain aspects of the political constitution through the democratic *Charter* rights does not necessarily have the effect of creating a "democracy without people", which Jean Leclair describes as one where Courts have overstepped their bounds and created "a polity where democratic principles are honoured by courts, but where the soul of democracy – public participation – withers away."[23] Rather, the interpretation of the democratic *Charter* proffered in this thesis reflects the approach of the Supreme Court in *Reference re Secession of Quebec* by enhancing and providing respect for public participation in Canada's politics. Namely, democratic institutions are better able to resolve fundamental political questions on a democratic basis when they do so within a clear and principled legal framework.

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[22] Leclair, *supra* note 1 at 166.
[23] Leclair, *supra* note 1 at 165-166.

Chapter 1

Parliamentary Government in Canada: Law and Conventions

Canada is a constitutional monarchy and its government is operated in the Westminster-style of parliamentary democracy. While executive powers in Canada are formally in the hands of the Queen through section 9 of the *Constitution Act, 1867*, many of these powers are specifically allocated to the governor general under various enabling provisions in the remainder of the *Constitution Act, 1867*.[24] Further, any other powers of the Queen have since been delegated to the governor general through the *Letters Patent Forming the Office of Governor General, 1947*, being the latest iteration of this instrument.[25] The *Letters Patent* include most powers of the Queen relating to the formation of government and the parliamentary cycle (although section 50 of the *Constitution Act, 1867* is viewed by the federal government as the legislative authority for dissolution). Nonetheless, clause VI of the *Letters Patent* delegates the power of dissolution as well as summoning and prorogation to the governor general and requires the governor general to act with the advice and consent of the Privy Council for Canada.[26]

There is general scholarly consensus that the source of the powers relating to the formation of government and parliamentary cycle is the royal prerogative, which are the historic powers of the Crown, although they differ on the exact definition for the prerogative. William Blackstone, writing in the 18th century, described the royal prerogative as being "that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the

[24] *The Constitution Act, 1867*, 30 & 31 Vict, c 3 at s 9, reprinted in RSC 1985, App II, No 5 ["*Constitution Act, 1867*"].
[25] *Letters Patent Constituting the Office of Governor General of Canada* (October 1, 1947; reprinted at R.S.C. 1985, App. II, No. 31), article 2 ["*Letters Patent*"].
[26] *Ibid* at article VI.

common law, in right of his regal dignity."[27] Blackstone asserts that the prerogative must be something unique to the Crown and therefore cannot be any power that could otherwise be held or exercised by a subject of the Crown.[28] AV Dicey defined the prerogative as being "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." Dicey elaborates further, saying:

> The power of the Crown was anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name of the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers. Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative.[29]

The Supreme Court of Canada has adopted Dicey's formulation of the prerogative and recently added that the prerogative "is a limited source of non-statutory administrative power accorded by the common law to the Crown".[30] However, the Supreme Court of Canada's formulation may not provide a full understanding of its origins: Sebastian Payne, for example, asserts that the while the common law recognizes the prerogative and can be used to declare its limits, prerogatives powers are anterior to the common law and not its product.[31] The prerogative powers are key to Canada's democracy in two interrelated senses: first, the prerogative is the legal source of power for appointing and dismissing ministries and secondly, the prerogative powers are

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[27] William Blackstone, *Commentaries on the Law of England: Book 1, Of the Rights of Persons* (Oxford: Oxford University Press, 2016) at 155.
[28] *Ibid*.
[29] AV Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013) at 189 [Dicey].
[30] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para 34, [2010] 1 SCR 44 ["*Khadr*"], citing *Reference as to the effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] SCR 269, [1933] 2 DLR 348.
[31] Sebastian Payne, "The Royal Prerogative" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 2003) 77 at 87.

used to regulate the parliamentary cycle through summoning, dissolving and proroguing Parliament. These two powers are related in that the democratic foundation for the executive branch is established through the confidence of the legislative branch. As noted by Peter Russell: "the golden rule of parliamentary democracy, as opposed to the U.S. presidential/congressional system, is that the right to govern depends on having the support of a majority in the newly elected House of Commons."[32]

The office of the prime minister and the cabinet both play important roles in Canadian democracy by fusing the political supremacy of Parliament with the legal powers of the Crown.[33] Under the constitutional conventions the powers of the Crown must be used on the advice of the prime minister because the prime minister has a mandate from and is accountable to the democratic House of Commons.[34] However, the office of the prime minister is wholly conventional and gains authority through its influence over cabinet.[35] Cabinet, meanwhile, does not have an independent legal foundation but rather is considered at law to be a subcommittee of the Privy Council for Canada.[36] The governor general plays a key role in this respect, given its responsibility for appointing members of the privy council under section 11 of the *Constitution Act, 1867*.[37] Apart from section 11, there are very few legal restrictions or duties for the governor general in appointing the cabinet. And, while many of the powers of the governor general under the *Constitution Act, 1867* require the governor general to act with the advice and consent of their Privy Council, there is no legal requirement for the cabinet to have or maintain the confidence of

[32] Russell, "Minority Governments", *supra* note 19 at 137.
[33] Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) at 61.
[34] Dicey, *supra* note 29 at 192.
[35] Eugene A Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 UNBLJ 11 at 18 ["Forsey"].
[36] Newman, *supra* note 15 at 220. Oliver, *supra* note 3 at 216.
[37] *Letters Patent*, *supra* note 25 at article II.

the House of Commons in order for the Privy Council to provide advice to the governor general.[38] Nor, strictly speaking, is there a legal requirement for the governor general to act on any advice proffered by the cabinet, although the *Constitution Act, 1867* refers to many powers which must be used with the advice of the Privy Council.[39] Moreover, many of the powers that have been delegated by the Queen to the governor general through the *Letters Patent* that relate to the Parliament (and hence the ability of Parliament to decide on their confidence in government) do not seem to require the advice of the Privy Council (nor cabinet, for that matter).[40] Indeed, the appointment of a ministry after an election appears to be inherently a personal prerogative of the governor general, as the incumbent prime minister has no legitimate role in this decision.[41]

While the legal powers of the Crown are broad and could nominally be used in opposition to democracy, in reality Canada has operated as an effective (albeit imperfect) democracy throughout its history.[42] Canada's democratic nature is implied by the preamble to the *Constitution Act, 1867*, which states that Canada is to have "a Constitution similar in Principle to that of the United Kingdom".[43] Until 1982, this primarily referred to the rules and practices of responsible government as established in the United Kingdom up to 1867.[44] However, it is important to note that the United Kingdom did not have a unified, written constitution in 1867 (nor does it today)

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[38] Brian Slattery, "Why the Governor General Matters" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 79 at 81

[39] See, for example, *Constitution Act, 1867*, *supra* note 23 at ss 12-13.

[40] Forsey, *supra* note 35 at 18-19.

[41] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge: Cambridge University Press, 2018) at 116-117 ["Twomey"].

[42] Craig Forcese & Aaron Freeman, *The Laws of Government,* 2d ed (Toronto: Irwin Law Inc, 2011) at 71-72: Canadian democracy excluded women, indigenous peoples and other persons of colour from the vote at various times before the enactment of section 3 of the *Charter*.

[43] The *Constitution Act, 1867*, *supra* note 23 at the preamble. Notably, the United Kingdom did not achieve a semblance of democracy until 1918 when property qualifications for men (and women over 30) were lifted: see Peter Clarke, *Hope and Glory: Britain 1900-2000*, 2d ed (Toronto: Penguin Books Ltd, 2004) at 97-98.

[44] Peter C. Oliver, *supra* note 3 at 217-218, 227.

unlike the United States of America and France which have relatively complete and unified constitutions. Rather, the constitution of the United Kingdom in 1867 was a mixture of discrete statutes and extra-legal rules of conduct that evolved to transform the historic prerogative powers into a system of responsible and representative government.[45] A.V. Dicey was the first commentator to label these extra-legal rules as being constitutional conventions, which are the "constitutional morality" by which political actors ought to act.[46] Geoffrey Marshall defines conventions as "binding rules of constitutional behavior which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence), nor by the presiding officers in the Houses of Parliament."[47] Anne Twomey identifies the following as the main conventions of responsible government:

> 1. the head of state, except in the exercise of reserve powers, acts upon the advice of responsible ministers;
>
> 2. the head of state appoints as chief minister the person most likely to command the confidence of the lower House;
>
> 3. the head of state appoints or removes ministers (other than the chief minister) upon the advice of the chief minister;
>
> 4. ministers are collectively and individually responsible to Parliament;
>
> 5. a chief minister who has lost the confidence of the lower House must either secure a dissolution or resign;
>
> 6. the head of state may dismiss a chief minister who has lost the confidence of the lower House and has neither resigned within a reasonable period of time nor secured a dissolution;
>
> 7. a government that has lost the confidence of the lower House, or which cannot establish responsibility because Parliament has been dissolved, must limit its actions

[45] Emmett Macfarlane, *supra* note 10 at 330.
[46] Dicey, *supra* note 29 at 20, 185.
[47] Geoffrey Marshall & Graeme C Moodie, *Some Problems of the Constitution* (London: Hutchinson, 1959) at 23-24, as cited by Malcolm Rowe & Nicolas Deplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020) 98 Can B Rev 430 at 433 ["Rowe & Deplance"].

> to the ordinary administration of government until a responsible government is formed;
>
> 8. there must always be a government in place, so a defeated government or one that has lost the confidence of the lower House must remain in office as a caretaker government until a new responsible government takes office;
>
> 9. the resignation of the chief minister entails the resignation of the whole ministry; and
>
> 10. where an election produces a hung Parliament, the incumbent chief minister, as the last person who held the confidence of the lower House, is entitled to remain as chief minister until facing the House and determining confidence.[48]

The conventional approach to democracy under the Westminster-style of Parliamentary government has provided numerous advantages. Justice Malcolm Rowe and Nicolas Deplanche note that the flexible nature of conventions has allowed the constitutional order to "withstand political and social change."[49] Andrew Heard agrees that conventions remain relevant through their flexibility, but also notes that certain conventions are very precise in nature and have changed very little over time: for example, the convention that the ministry of the day must enjoy the confidence of the elected members of the legislature has endured for over two centuries with little change.[50] While the non-legal nature of constitutional conventions has allowed for flexibility in their development, this should not be taken as diminishing their importance to the constitutional order. For example, Justices Ritchie and Martland found in the *Patriation Reference* that ignoring certain conventions of responsible government would be tantamount to a *coup d'etat*.[51] Nonetheless, the traditional view espoused by the Supreme Court of Canada is that there is no legal remedy available for breach of a convention because their authority does not come from a statute

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[48] Twomey, *supra* note 41 at 30-31.
[49] Rowe, *supra* note 47 at 447.
[50] Andrew Heard, "Constitutional Conventions: The Heart of the Living Constitution" (2012) 6 Journal of Parliamentary & Political Law 319 at 337 [Heard, "Constitutional Conventions"].
[51] *Patriation Reference, supra* note 6 at 882.

or the common law.[52] For example, it is arguable that if a prime minister failed to resign after conclusively losing an election and the governor general failed to dismiss them, there would be no legal recourse for this breach of convention. Indeed, to try to enforce conventions with a legal remedy could cause confusion, as the conventions are often in direct opposition to the written text of the constitution.[53]

While conventions will not give rise to a legal remedy, Canadian courts have been willing to determine the existence and scope of an asserted convention. In the *Patriation Reference*, for example, a majority of the Court found there was no legal impediment to patriating the constitution without provincial consent, but the conventions did require a "substantial measure of provincial consent".[54] Eugene Forsey, however, argues that there are risks in allowing Courts to consider matters of convention, pointing to the SCC's misstatement of responsible government (albeit, in *obiter*) that the governor general is to select as prime minister the leader of the party with the most seats.[55] A further problem with judicializing the recognition and scope of conventions is that doing so might have the effect of freezing them at the date of the decision and preventing political actors from modifying or discarding those conventions when justified.[56] On the other hand, Andrew Heard argues that Courts have been too cautious in applying the test for finding a convention posited by Sir Ivor Jennings and adopted by SCC:

> [F]irst, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.[57]

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[52] *Ibid* at 857.
[53] Rowe, *supra* note 47 at 442-443.
[54] *Patriation Reference, supra* note 6 at 836, 905.
[55] Forsey, *supra* note 35 at 38-39.
[56] *Ibid* at 40.
[57] *Patriation Reference*, *supra* note 6 at 888.

Heard argues that this test is too restrictive, as there are instances where political actors have prospectively demonstrated their intention to create binding conventional rules regarding legislative powers.[58] Nonetheless, while the Courts will hear and decide on conventions, they will not craft a legal remedy for their breach.

The Legal Powers of the Crown are generally not justiciable

While conventions do not give rise to a legal remedy, it is important to note that the prerogative powers that underly those conventions are generally subject to judicial review because of the inherent supervisory role of superior courts under section 96 of the *Constitution Act, 1867*.[59] However, courts have treated prerogative powers cautiously given their highly political nature and the assessment of the appropriateness for subjecting a prerogative decision to judicial review is referred to as justiciability.[60] As described by Lorne Sossin, justiciability "determines the boundaries between our legal and political systems" and "[b]y delineating the scope of judicial adjudication of disputes, courts determine what matters are appropriate for legal determinations, and what matters must be left for political resolution."[61] Fundamentally, justiciability is about respecting the separation of powers, which sets out proper "spheres of action" for each branch of government. As Sossin states:

> Matters properly dealt with by the legislative or executive branch, in other words, cannot also be justiciable in a court without leading to contradictory and incoherent legal standards. Each branch of government must have exclusive authority to render judgments over matters within its jurisdiction. Just as the executive is the only branch

[58] Heard, "Constitutional Conventions", *supra* note 50 at 319.
[59] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 31, [2008] 1 SCR 190.
[60] Lorne Sossin, *Boundaries of Judicial Review: the Law of Justiciability in Canada*, 2d ed (Toronto: Carswell, 2012) at 1.
[61] *Ibid* at 2.

> of government which can determine the wisdom of foreign policy decisions, the judiciary is the only branch of government which can determine the legal validity of those decisions.[62]

Courts have traditionally been hesitant to review prerogative decisions for any purpose besides determining the existence and scope of the asserted power.[63] As stated by Sir Edward Coke in the 1610 *Proclamations Case*: "the King hath no prerogative, but that which the law of the land allows him."[64] With the waning of the monarch's personal powers under the prerogative, courts in the United Kingdom gradually expanded their ability to review prerogative decisions. For example, in *Council of Civil Service Unions v Minister for the Civil Service ("GCHQ")*, the House of Lords found that it was "no longer constitutionally appropriate to deny the court supervisory jurisdiction over a governmental decision merely because the legal authority for that decision rested on prerogative rather than statutory powers."[65] Rather, Lord Diplock found that such administrative actions should be treated as any statutory power; that is to say, the use of a prerogative could be reviewed on the basis of illegality, irrationality or for procedural fairness.[66] While agreeing with Lord Diplock on the general grounds of administrative review in the United Kingdom, Lord Roskill added that the courts should first look to the subject matter of the prerogative to determine if a judicial forum was appropriate, or if this was inherently a political matter. Notably, Lord Roskill found that the powers to dissolve Parliament and to appoint ministries were presumptively inappropriate for judicial review.[67] In *R v Secretary of State for*

[62] *Ibid* at 20.
[63] *Ibid* at 1.
[64] *Case of Proclamations*, [1610] EWHC KB J22, (1611) 12 Co Rep 74.
[65] [1985] AC 374, [1984] 3 All ER 935.
[66] *Ibid*.
[67] *Ibid*.

Foreign and Commonwealth Affairs, ex p. Everett, Lord Justice Taylor would describe these subjects as being matters of 'high policy'.[68]

In *Black v. Chrétien,*[69] Justice Laskin of the Ontario Court of Appeal followed the House of Lords by deciding that certain political prerogatives were not justiciable despite affecting the rights or legitimate expectations of an individual: "[w]here matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations."[70] Notably, Laskin JA agreed with the Lord Roskill that dissolution is one subject matter that is presumptively excluded from judicial review. Canadian trial level courts have generally adhered to the approach set out by Laskin JA in *Black v. Chrétien*. For example, Justice Heneghan agreed with Laskin JA in *Blanco v. Canada*, finding that the power to wage war is a matter of high policy and therefore not subject to the judicial process.[71] Justice Beaudry made a similar finding in relation to the power to wage war in the federal court decision *Turp v. Chrétien*.[72] Nonetheless, Justice Laskin in *Black v. Chrétien* did allow that the use of a political prerogative could still be reviewed on a *Charter* basis by following Justice Wilson's earlier decision in *Operation Dismantle v. R*.[73]

In that case, Justice Wilson found that prerogative decisions (even political prerogatives) were inherently justiciable if they affected an individual's *Charter* rights, as the underlying matter of the prerogative (in this case defence and foreign affairs) were properly under the authority of

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[68] [1989] 2 WLR 224, [1989] QB 811.
[69] 54 O.R. (3d) 215, [2001] O.J. No. 1853 ["*Black*"].
[70] *Ibid* at para 52.
[71] 2003 FCT 263 at para 21.
[72] 2003 FCT 301 at para 19. See also, Jennifer Klinck, "Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada" (2017) 54 Alta L Rev 997.
[73] [1985] 1 SCR 441, 18 DLR (4th) 481 ["*Operation Dismantle*"].

Parliament and therefore met the requirements of section 32 of the *Charter*.[74] Justice Wilson also rejected the notion that there are matters on which the judiciary inherently cannot decide upon, finding that while it is not for the court to "second guess" the wisdom of an executive decision within its proper authority, the judicial branch has an obligation to hear the matter when they are being asked whether or not a citizen's rights have been violated.[75] As stated by Justice Wilson:

> The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question"….[76]

Canadian courts have followed the principle that prerogative powers are justiciable on *Charter* grounds, regardless of their "subject matter".[77] For example, in considering *Charter* rights and foreign affairs in *Canada (Prime Minister) v. Khadr*, the Supreme Court of Canada found:

> The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. … But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken.[78]

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[74] *Ibid* at para 50.
[75] *Ibid* at para 65.
[76] *Ibid* at para 64.
[77] *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para 43.
[78] Khadr, *supra* note 30 at para 37.

Canadian courts will also review prerogative decisions to ensure compliance with constitutional norms. In *Air Canada v Attorney General of British Columbia*,[79] the Lieutenant Governor of British Columbia was advised to not provide Air Canada with a fiat required for leave to reclaim taxes paid under an unconstitutional statute. Justice Dickson found that "[a]ll executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives."[80] Justice Dickson also asserted that "discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution."[81] Thus, apart from narrow constitutional grounds, the prerogative powers that form the legal foundations of the conventions are generally injusticiable.

Political prerogatives may be constitutionally entrenched

In addition to the lack of legal remedy and limited justiciability, it is also notable that the prerogative powers relating to responsible government may be entrenched in the Constitution of Canada and therefore require the consent of all the provinces and the federal Parliament to amend, even for a single jurisdiction.[82] The Constitution of Canada is a non-exhaustive concept and is therefore not limited to the texts referred to in the schedule to the *Constitution Act, 1982*. Part V of the *Constitution Act, 1982*, sets out the procedures for amending the Constitution of Canada.

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[79] 1986 CarswellBC 369.
[80] *Ibid* at para 15.
[81] *Ibid* at para 17. Although outside the scope of this thesis, Lorne Sossin notes that the principle of the rule of law will not allow a public official to "make a decision that is arbitrary, improper or in bad faith": Lorne Sossin, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55 McGill LJ 661 at 672.
[82] Phillipe Lagassé & Patrick Baud, "The Crown and Constitutional Amendment in Canada" in Michel Bédard & Phillipe Lagassé, eds, *The Crown and Parliament* (Montreal: Édition Yvon Blais, 2013) 203 at 220-221.

Sections 44 and 45 respectively allow unilateral amendments to certain aspects of the federal and provincial constitutions, but these powers are subject to clause 41(a) which requires the unanimous consent of all jurisdictions when amending the office of the Queen, Governor General or of a Lieutenant Governor.

Prior to confederation, subsection 92(1) of the *Constitution Act, 1867* played a similar role to sections 41(a), 44 and 45 of the *Constitution Act, 1982* by allowing for unilateral amendments to provincial constitutions with the exception of the office of the Lieutenant Governor. The Judicial Committee of the Privy Council considered what was meant by "the office of the Lieutenant Governor" in *Reference Re Initiatives and Referendums Act*, and found that the powers of the Lieutenant Governor were part of their office and therefore protected from unilateral amendment by a province.[83] More recently, Justice Beetz of the Supreme Court of Canada found in *obiter* that the legal powers of responsible government might also be entrenched and protected from unilateral amendment by a province:

> The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. Thus, it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.[84]

[83] [1919] A.C. 935 at 943.
[84] *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, 41 DLR (4th) 1 at 46.

Moreover, the conventional relationship between the prime minister and the governor general, although not based in statute, might now be entrenched as well. As Warren J. Newman notes:

> [F]or sound constitutional reasons, no Act of Parliament has gone so far as to purport to fetter the Prime Minister's substantive capacity to advise the Crown. The reason is that in our system, there is a risk that in statutorily binding a Prime Minister's capacity to advise the Governor General on the exercise of her powers, Parliament would in fact be affecting the office and powers of the Governor General.[85]

This theory may be bolstered by the SCC's decision in *Reference re Senate Reform*, which looked to the architecture of the constitution to give meaning to the special amending formulae under Part V of the *Constitution Act, 1982*.[86] That is, the Court would not privilege "form over substance" when considering what was to be protected by clause 42(1)(b) of the *Constitution Act, 1982*, and held that doing so would reduce "the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified."[87] Therefore, the Court concluded that introducing consultative elections would nonetheless change the method of selecting senators as it would implicitly provide the Senate with a democratic mandate.[88] In other words, the fundamental nature and role of the institution would be changed. By the same token, attempting to amend the legal powers relating to summoning, proroguing or dissolving Parliament might substantively change the fundamental nature and role of the vice-regal representatives and therefore require the consent of all Canadian provincial jurisdictions under clause 41(a).[89]

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[85] Newman, *supra* note 15 at 224.
[86] 2014 SCC 32 at paras 27, 53, , [2014] 1 SCR 704 ["*Senate Reference*"].
[87] *Ibid* at para 52.
[88] *Ibid.*
[89] But see Fabien Gélinas & Léonid Sirota, "Constitutional Conventions and Senate Reform" (2013) 5 RQDC 107 ["Gélinas & Sirota"]; Ian McIsaac, "Provincial Constitutions and the Lieutenant-Governor: The Constitutional Amending Process and Legal Responses to the 2012 Ontario Prorogation" (2015) 9 Journal of Parliamentary and Political Law 345.

The entrenched nature of the Queen and vice-regal representatives may mean that certain conventions should now be treated as law, given the architectural understanding of the Constitution outlined most prominently in the *Senate Reference*. [90] This is in part because the offices and institutions entrenched under Part V of the *Constitution Act, 1982*, often have a limited and incomplete statutory foundation and are therefore difficult to understand without reference to their conventional background.[91] Léonid Sirota, for example, notes that clause 41(a) of the *Constitution Act, 1982* may legalize the convention for ministerial advice, because the office of Governor General cannot be fully understood except in reference to such advice.[92] Given the concreteness of certain rules of responsible government, Sirota seems to suggest that they may be beyond amendment even by extra-legal practice. In turn, this would mean that a breach of a convention, such as continuing in government with the clear lack of confidence of the House of Commons, would be tantamount to a rewriting of the conventional foundation of section 41(a) and therefore be a matter of law.[93]

While Sirota appears to be neutral as to whether conventions ought be treated as law, Emmett Macfarlane states that such an outcome would be "a grave threat to the coherence of the Constitution and for the prospects of future constitutional evolution."[94] More pernicious for Macfarlane is the breach of the separation of powers that would occur by having the courts evaluate and provide remedies for breaching the rules of responsible government. Macfarlane argues that had the conventions of responsible government been judicially enforceable during the 2008 prorogation crisis in Canada, it would have "risked bringing the courts into a deeply contested and

[90] Leonid Sirota, "Immuring Dicey's Ghost: The *Senate Reform Reference* and Constitutional Conventions" (2020) 51:2 Ottawa LJ 313 at 318-319, 333, 345 [Sirota, "Immuring"].
[91] *Senate Reference*, *supra* note 86 at para 52.
[92] Sirota, "Immuring", *supra* note 90 at 346.
[93] *Ibid* at 358-359.
[94] Macfarlane, *supra* note 10 at 329-30.

explicitly partisan affair, even raising the spectre of the Supreme Court ultimately determining which party or parties form government."[95] This is unacceptable to Macfarlane, as it would not only result in the judicialization of politics but would also have usurped the proper role of the governor general as constitutional umpire. In this respect, the Court would be assuming "an explicit and core executive function" and amount to a "significant violation of the separation of powers."[96] Macfarlane asserts that in the 2008 prorogation crisis a political solution was ultimately found for the constitutional impasse through a prorogation that would return Parliament to session only 10 days later than expected and that the House of Commons would have an opportunity to pass confidence on their return to session.[97] The better solution in such situation, Macfarlane argues, is to use the political remedies that are already available and ensure that the judiciary maintains its proper role:

> The core conventions especially ensure that Canada's formal constitutional monarchy operates as a functional democratic constitutional system in practice, by locating the exercise of power in the appropriate actors who are themselves subject to democratic mechanisms and whose choices are constrained or informed by subsidiary conventions. The conventions surrounding responsible government also ensure that the guardians of responsible government are already designated—in some contexts that may mean the governor general, in others the legislature, and in others still the electorate. Judicial enforcement would not merely intrude on the functions of the executive or legislative branches but would fundamentally transport the courts away from the law and into the nucleus of executive and legislative power relationships, which are properly governed by politics.[98]

There is much to be lauded in Macfarlane's position. While the higher order rules of responsible government are fairly concrete, there are many areas where the formation of

[95] *Ibid* at 13.
[96] *Ibid* at 13.
[97] *Ibid* at 14.
[98] *Ibid* at 13.

government and the establishment of democratic legitimacy are not readily apparent. By rigidly applying rules through a judicial process it could prevent Parliament and the democratically elected political actors from finding a satisfactory political solution to certain situations. Perhaps more to the point of Macfarlane's article, it might disincentivize politicians from acting reasonably and collaboratively to find solutions when contentious issues arise in the process of deciding who forms government and on what basis. As Twomey notes, from the perspective of the political constitution the fundamental consideration of the governor general in deciding who to appoint as their prime minister is who is best able to command the confidence of the House of Commons, and this is not a decision that the judiciary ought to be involving themselves in.[99]

The doctrine of reserve powers of the governor general further complicates the legalization of conventions. Reserve powers refer to the notion that the governor general may act without or against the advice of their prime minister when that prime minister has lost the confidence of the House of Commons. The reserve powers are "the last line of defence against governmental actions in breach of fundamental constitutional principles" and act as a kind of constitutional fire-extinguisher: to be used sparingly and only in an emergency.[100] Given the imprecise and highly political nature of the reserve powers, it would seem difficult to expect the courts to not only evaluate their use on the basis of compliance with the conventions of responsible government generally, let alone to craft an appropriate judicial remedy for them.

For example, Peter Hogg argues that a vice-regal representative is entitled to rely on their reserve powers if it appears their first minister will lose confidence of their assembly, otherwise "a Prime Minister could always avoid (or at least postpone) a pending vote on no-confidence

[99] Twomey, *supra* note 41 at 142-143.
[100] *Ibid* at 33.

simply by advising the prorogation (or dissolution) of the pesky Parliament."[101] But MacDonald and Bowden dispute this assertion, at least in the case of prorogation, and assert that the governor general should only use the reserve powers in "the most exceptional circumstances" and in accordance with two conditions articulated by Professor Dawson: (1) "the governor general must be so sure of the inherent righteousness of his intervention and his popular vindication that he is willing to stake both his reputation and his office upon its general acceptance"; and (2) "there should also be no reasonable doubt whatever of the essential wisdom and justice of the governor's intervention".[102] In either case, by directly evaluating and enforcing conventions the courts could be overstepping their role by making political rather than legal decisions. As noted by the Court in *Reference Re Secession of Quebec*: "the workings of the political process are complex and can only be resolved by means of political judgments and evaluations."[103]

Nonetheless, there are lingering and difficult questions that remain in Macfarlane's critique of the legal rather than political enforcement of conventions, in that the political mechanisms for enforcement and adjudication of conventions tends to be weak. Governors General, for example, tend to have little expertise in constitutional law, have no political legitimacy and generally serve for shorter terms than their prime ministers.[104] Further, Jeremy Webber notes that the process of resolving political crises through political remedies can be very difficult and sometimes "cataclysmic".[105] For instance, it seems that the political remedies tend to reward political actors

[101] Peter Hogg, "Prorogation and the Power of the Governor General" (2009-2010) 27 NJCL 193 at 198 [Hogg, "Prorogation"].
[102] Nicholas A. MacDonald and James W.J. Bowden, "No Discretion: On Prorogation and the Governor General" (2011) 34 Canadian Parliamentary Review 7 at 12 [MacDonald & Bowden].
[103] *Secession Reference*, *supra* note 4 at para 100.
[104] Jean Leclair & Jean-Francois Gaudreault-Desbiens, "Of Rereprentation, Democracy, and legal Principles: Thinking about the *Impensé*" in Peter Russell & Lorne Sossin, eds, Parliamentary Democracy in Crisis (Toronto: University of Toronto Press, 2009) 105 at 117.
[105] As cited by Macfarlane, *supra* note 10 at 337.

who are opportunistic rather than those who honour the principles of the conventions.[106] Furthermore, while Macfarlane warns of the consequences to the separation of powers that might result from the courts adjudicating on a convention of responsible government, he misses the key point that constitutional impasses often result from a breach of the separation of powers, given the House's role in determining who forms government.[107]

Furthermore, the political remedies lauded by political constitutionalists tend to protect institutions rather than individual interests in democracy. Constitutional conventions, for example, have been generally effective in resolving impasses between elite interests and institutions in the 17th to 19th centuries.[108] While elite landholding interests in the 18th and 19th centuries may have been protected through certain aspects of Parliamentary supremacy, Parliament was certainly not focused in promoting the promotion of self-government for many individuals both in the United Kingdom and later in Canada, including women and minorities. Rather, the Commons (and its ability to provide political remedies to breaches of convention) gained importance not because of individual rights *per se*, but because taxation was expected to be granted by all property holders of England and not simply the Lords.[109] While democracy provided significant justification for the legal theories of Blackstone in the 18th century and Dicey in the 19th century, the fact is that democracy at their respective times was limited and certainly not universal. However, in 21st

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106 See, for instance, Twomey, *supra* note 41 at 391 in relation to the King-Byng affair. In 1926, Mackenzie King lobbied for the support of the Commonwealth office to force the Governor General into dissolving Parlaiment, but then subsequently campaigning against British interference in Canadian affairs after the appointment of Arthur Meighen as Prime Minister.
107 Forsey, *supra* note 35 at 38.
108 See generally, J.R. Maddicott, *The Origins of the English Parliament, 924-1327* (Oxford: Oxford University Press, 2010) at *331*-333, 417-418; Betty Kemp, *King and Commons: 1660-1832* (London: Macmillan & Co Ltd, 1959) at ch IV.
109 Marc Bosc and André Gagnon, *House of Commons Procedure and Practice*, 3d ed (Ottawa: House of Commons, 2017) at chapter 18, online: <https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_18-e.html#18-0-3-1> ["*House of Commons Procedure and Practice*"].

century Canada there is a greater focus on the inherent dignity of individuals through the values reflected in the *Charter* and the protection of individuals interests in democratic governance through sections 3 to 5 of the *Charter*.[110] To this end, political remedies which were not designed to protect individual interests may not be well suited to protect the individual legal rights protected by the *Charter*. More to the point, the individual rights protected by the *Charter* should not be circumscribed or limited simply because a political remedy exists, and courts should be unafraid to provide full meaning to the legal rights set out in the *Charter* for this reason alone.

To this end, a gap exists in Canada's democracy, in that citizens might have a legal right to vote but there is no correlative legal duty on the Crown to ensure that vote is honoured. That is to say, while the evolution of Canada's democracy was premised increasing responsibility of the Crown to Parliament (or, the executive to the legislative), this evolution, some political constitutionalists might argue, is purely conventional and does not provide individuals with a legal right to an executive government based on the outcome of those Parliamentary elections. At best, under the political constitution, individual citizens have a right to vote for parliamentarians who may be afforded to the opportunity to pass judgment on the government, but in so doing there are few legal barriers (if any) on the executive using Crown powers to stymie or set aside the results of an election. However, the *Charter* now provides a legal right to vote for members of the House of Commons as a democratic right. Accepting that democracy is the promotion of self-government, on whom does the correlating duties and burdens of this right fall? This thesis explores the possibility that the right to vote in elections for members of the House of Commons implies that MPs have a role in deciding who forms government and that the House of Commons is the locus for that role. Therefore, the legal rights provided by section 3 might create legal duties and

[110] *R. v. Oakes*, [1986] 1 SCR 103 at 136, 26 DLR (4th) 200 ["*Oakes*"].

restrictions on Crown powers relating to democracy in order to give the right to vote meaning. In this sense, the individual right to vote might also create a legal requirement for the executive government to have democratic legitimacy and could prevent Crown powers from being used to interfere in the determination of democratic legitimacy through the House of Commons, which is specifically mentioned in section 3 and which thereby is the prime institution for perfecting the individual democratic rights of citizens. In this thesis, the notion of democratic legitimacy means a government that has a justifiable claim to represent the will of the people based on reasonable inferences made from the processes and institutions described or alluded to in the constitutional text and unwritten constitutional principles. Theoretically, democratic legitimacy could occur in several different ways, but as will be explored in the next chapter, not all theories of democratic legitimacy are compatible with the wording of section 3 of the Charter, other constitutional provisions and the unwritten constitutional principles.

Chapter 2
Section 3 of the *Charter*: Text and Purpose

Introduction

This chapter examines the text and jurisprudence of section 3 to determine what type of democratic outcomes might be permissible by that provision. While some commentators focus on the words "the right to vote", section 3 is much more complex and nuanced by referring to both representation (in the sense that section 3 refers to voting for members as an outcome of an election) and institutions (as those members will be elected to the institution known as the House of Commons). The right to vote in Canada is highly structured and tightly circumscribed. That is, democratic rights are limited to selecting members who will serve in the House of Commons.[111] Democracy is rule by the people and if the object of a democratic right is to somehow further or support that end, there is likely some legal relationship between the vote, the members elected by that vote and the institution in which those members serve. It might be a necessary implication that the composition and powers of the House of Commons must have a bearing on who forms executive government; if not, then how might the executive government have democratic legitimacy? Further, as will be discussed in greater detail in later chapters, an interpretation of section 3 and the Constitution that promotes or allows for irresponsible democracy, (that is, one where executive can act substantively without or against the approval of the legislative branch) is questionable. Moreover, Canada has been evolving towards a more inclusive and more responsible form of democracy for centuries, and this evolution has arguable crystalized with the patriation of the Constitution and in the text of section 3. How else can section 3 be understood without

[111] Section 3 includes parallel rights for voting in provincial assemblies. The interpretation proffered in this thesis applies equally to representation and the role and existence of institutions at the provincial level, but for ease of use this thesis will refer exclusively to members of the House of Commons.

reference to the notion that the executive government's legitimacy rests in part on the confidence of the House of Commons? If not, then it is difficult to see how section 3 promotes and protects democracy in Canada, as the purpose of section 3 would be undermined if the popular vote were solely used to appoint an executive rather than the will of the House. The wording of section 3 and the nature of this relationship between the Crown and the House of Commons therefore precludes certain theories of democracy, such as populist democracy or direct democracy. While the jurisprudence demonstrates a recognition of a representative aspect of section 3, this chapter argues that section 3 might also include an institutional aspect through its reference to the House of Commons and the ability to stand for election to this body as well.

Purposive Interpretation Generally

The *Charter of Rights* is interpreted using a purposive approach, meaning that *Charter* rights are to be understood by the purpose of the guarantee or in the light of the interests the right was meant to protect.[112] When trying to determine the purpose of a right, it is appropriate to refer to "the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[113] A purposive analysis also calls for the right to be placed in "its proper linguistic, philosophic and historical contexts."[114]

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[112] *R. v. Big M Drug Mart Ltd*., [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 ["*Big M Drug Mart*"].
[113] *Ibid*.
[114] *Ibid*.

That being said, the starting point for a purposive analysis is the text of the provision which forms the "outer edges" of the purposive analysis.[115] As noted by Benjamin Oliphant, the purposive analysis in some circumstances is used to read down otherwise broad constitutional language in order to respect the values of the rule of law, democracy and parliamentary sovereignty. This is necessary, because otherwise broad constitutional language could actually be used to undermine the rule of law through indeterminacy and would undermine the democratic provenance of the constitution by *de facto* judicial amendment of the constitution.[116] This indeterminacy, Oliphant argues, occurs most prominently under an "abstract right" approach to purposive interpretation, where courts find rights within constitutional provisions that are largely untethered from its text. Oliphant also asserts that "necessary implication" purposivism is acceptable in some circumstances where required by the text, but only if such implications are tightly circumscribed and "directed toward finding implications that are truly mandated by a fair rendering of the constitutional text."[117]

In regard to section 3, however, Oliphant argues that the complete suite of necessary implications are already present given the fact that a vote must occur in the context of an election: "those incidents of the right to vote strictly *necessary* to its exercise are *already* required by the concept itself."[118] Oliphant therefore argues that any concepts beyond the textual reference to "the right to vote" are impermissible, such as the right to "meaningful participation", "effective representation" and "free and fair elections". Nevertheless, Oliphant acknowledges that there must be a minimal substantive content to section 3 beyond placing a ballot in a box:

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[115] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at para 9 ["*9147-0732 Québec*"].
[116] *Ibid* at paras 8 and 9.
[117] Benjamin Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*" (2015) 65 UTLJ 239 at 249.
[118] *Ibid* at 276.

> This is not to say that the 'right to vote in an election' is fulfilled wherever citizens have been permitted to place a ballot in a box. For instance, it seems clear that a government would not be fulfilling the right to vote if people were forced to 'vote in an election' at gunpoint or if, despite their having placed a ballot in a box, the ballots were left uncounted and the boxes ritually burned. However, that is because these examples are not really a vote in an election, in any cognizable sense. Faced with such a situation, a court could plausibly say that a coerced individual has not really voted, or that leaving ballots uncounted is not really an election, as those terms are understood in our democratic tradition.[119]

This is an odd conclusion given Oliphant's focus on the primacy of the text, as he rejects the indeterminacy created by "meaningful participation" in one breath, while essentially calling for a requirement for a "meaningful election" or an "effective election" in the next. A better explanation to the problem raised by Oliphant is found in section 3's section heading and centred heading, which both refer to that provision as being a <u>democratic</u> right. Democracy, in turn, is primarily concerned with "the promotion of self-government" and the citizens of Canada exercise their right to self-government through the democratic process.[120] Therefore, if citizens were forced to vote at gun point, it would be impermissible not because of Oliphant's assertion that it was not substantively an election, but rather because the election itself could not be considered <u>democratic</u> (in the sense that the election would not be providing for the rule of the people). In other words, given section 3's role as a democratic right (that is, the promotion of self-government) and the limitation of this right to the election of members of the House of Commons, there may be a connection between those MPs elected by the citizens and the determination of who legitimately exercises the powers of executive government in Canada (thereby fulfilling self-government for Canadians).

[119] *Ibid* at 276-277.

[120] *Secession Reference*, *supra* note 4 at para 64.

With this in mind, it is helpful to consider the entire text of section 3 in order to determine what is actually encompassed by it:

Democratic Rights

> **Democratic rights of citizens**
> **3** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Section 3 provides not simply the right to vote, but rather the right to vote in elections of members of the House of Commons as a democratic right. While Oliphant would focus primarily on the act of voting, it is important to consider the case or circumstance in which the right to vote is exercised: namely, for members of the House of Commons. Thus, the text encompasses not only the act of voting but also contemplates (a) representation through MPs, and (b) the institution of the House of Commons in promoting and protecting Canadian's right to self-government.[121] Oliphant's interpretation of section 3 also ignores the use of section headings and centered headings in *Charter* interpretation, which are substantive and can be used in the interpretation of the provision (unlike section headings in Manitoba's legislation).[122] It is also important to note what the text does not include: namely, elections for any other executive or legislative offices or institutions in Canada. For example, section 3 does not provide for the right to vote in elections for the governor general, prime minister or Senators. Furthermore, section 3 also protects the right for individual citizens to stand for election to the House of Commons, which also presumes that the House of Commons plays an instrumental role in perfecting Canadian democracy. This is to say, if a citizen

[121] As will be discussed, the representative element of section 3 has already been recognized by the SCC: *Saskatchewan Reference*, *infra* note 130.
[122] *Law society of Upper Canada v. Skapinker*, [1984] 1 SCR 357 at 372, 376, 9 DLR (4th) 161 ["*Skapinker*"]; *The Interpretation Act*, C.C.S.M. c. I80 at s. 14.

has a right to stand to be a member of the House of Commons as a democratic right, and there are no other offices in which that individual has a right to stand for, then, in order for Canada to be democratic, that office must have some role in the governance of the country. If electing or being elected to membership in the House of Commons had no bearing on the executive government, the promotion of self-government would be incomplete at best under section 3, given that members of the House of Commons act in a legislative and not executive role, and Canada would not be a complete democracy. At best, the House of Commons could legislate certain requirements for executive government and perhaps eventually defund the government. And, while this might be true to a certain extent (as will be discussed in Chapter 4, the Commons has a general ability to defund the government over an extended period of time), such a construction of the Constitution would hardly be the promotion of self-government given the multitude of discretionary decisions and prerogative powers available to the executive government. Indeed, the control of executive government is arguably the most important aspect of democracy in Canada today. But irresponsible government has not been a feature of Canadian democracy in a political sense for several centuries and responsible government is part of the unwritten principle of democracy (and likely part of Canada's constitutional architecture).[123] While the role of unwritten constitutional principles will be considered in greater detail in later chapters, it is sufficient to note that the principles may be used to help understand the connection between the text of section 3, the institution referred to in it and democracy as understood in light of the principles.

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[123] *Secession Reference*, *supra* note 4 at para 63, 65; See for example *Senate Reference, supra* note 86 at para 59, where the Court alludes to the confidence role of the House of Commons.

This raises another area in which Oliphant's interpretation of section 3 undershoots its purpose. For example, what would be the effect of section 3 in a situation where a valid vote was held, the votes were duly counted, MPs sworn in, but the House of Commons had no role in selecting who formed the executive government? Oliphant's interpretation ignores the express reference to MPs and the House of Commons and thereby opens the door to theories of democratic legitimacy that are textually incompatible with section 3. Take, for example, Prime Minister Stephen Harper's theory of government formation advanced in the wake of a proposed coalition government in 2008, which stated that a government was not legitimate unless it "won" an election.[124] In support, Tom Flanagan argued that the rules of responsible government were antiquated and that a coalition government could only be legitimate if it was disclosed during an election.[125] Jennifer Smith describes this as "populist democracy", where total votes matter more than the composition of the House of Commons in determining who forms government.[126] The result of such a theory of democratic legitimacy is that a government ministry is only legitimate if they win the most votes based on party lines across the nation.[127] Populist theories of democracy have an intuitive appeal: if your party of choice collectively receives more votes than any other party, then that party "won" the election and ought to form government. Such a resolution to an election could meet the textual requirements of section 3 proffered by Oliphant, in that each citizen

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[124] Russell, "Minority Governments", *supra note 19* at 141-142; "Full text of Harper's televised address" *Toronto Star* (December 3, 2008), online: Toronto Star <://www.thestar.com/news/canada/2008/12/03/full_text_of_harpers_televised_address.html>.

[125] Tom Flanagan, "Only voters have the right to decide on the coalition" *The Globe and Mail* (January 9, 2009), online: *The Globe and Mail* < https://www.theglobeandmail.com/opinion/only-voters-have-the-right-to-decide-on-the-coalition/article782719/>. But see Rainier Knopff and Dave Snow, ""Harper's New Rules" for Government Formation: Fact or Fiction?" 36(1) Canadian Parliamentary Review 18 at 21, which asserts that Flanagan was concerned about the democratic legitimacy of the particular Liberal-NDP coalition of 2008, rather than coalition governments in general.

[126] Peter Aucoin, Mark Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Edmond Montgomery Publications, 2011) at 186 ["Aucoin"].

[127] Jennifer Smith, "Parliamentary Democracy versus Faux Populist Democracy" in Peter Russell & Lorne Sossin, eds, Parliamentary Democracy in Crisis (Toronto: University of Toronto Press, 2009) 175 at 184.

was able to vote and there was a type of democratic outcome to the election. In this sense the governor general would not run afoul of section 3 if they maintained the government in office against a willing and ready opposition coalition after an election, because no coalition party had actually "won" the election.[128] Indeed, taking Oliphant's interpretation to its logical conclusion, the governor general would also not breach section 3 if they dissolved Parliament shortly after the election without regard to the proposed coalition because "losers" should not form government. This interpretation of section 3, however, cannot be sustained by its text, which clearly contemplates the role of representatives and the House of Commons' in perfecting an election. Given section 3's reference to the election of members of the House of Commons as a result of an election, those representatives and the House of Commons must play some role in the promotion of self-government. If elections were perfected by mere mathematics (that is, the winner of largest share of the popular vote wins the election) and not the powers of MPs acting through the institution of the House of Commons, then it would render section 3 meaningless and contradictory. While it is one thing to surmise that elections generally require democratic outcomes, unpacking the actual scope and nature of this requirement under section 3 requires a full purposive analysis of that provision. While this purposive analysis will unfold in more detail over the next several chapters, it is useful at this point to review the jurisprudence on section 3 and how its purpose has been interpreted.

Effective Representation and Meaningful Participation

[128] Such a situation could be unconstitutional as breaching conventions. However, as will be discussed later, the conventions of responsible government can be vague and the legal powers of the Governor General can be used to frustrate attempts by the House of Commons in assessing confidence.

The SCC has determined that section 3 contains at least two purposes: the right to effective representation and the right to meaningful participation in the electoral process.[129] Regarding effective representation, the SCC has noted the importance of the representative and institutional elements of section 3. As noted by Justice McLachlin (as she then was) in *Reference re Prov. Electoral Boundaries (Sask.)*:

> Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in ***Dixon v. B.C. (A.G.),*** **… elected representatives function in two roles – legislative and what has been termed the "ombudsman role"**.[130]

Given that McLachlin J expressly adopted her categorization of the roles of representatives in her earlier decision in *Dixon*, it is useful to consider how the legislative role of representatives was explained in that earlier case:

> In the legislative role, it is the majority of elected representatives who determine who forms the government and what laws are passed. In principle, the majority of elected representatives should represent the majority of the citizens entitled to vote. Otherwise, one runs the risk of rule by what is in fact a minority. Moreover, party majorities may be small and coalitions or minority governments formed. Governments may stand or fall depending on the decisions of one or two members of the Legislature. If there are significant discrepancies in the numbers of people represented by the members' of the Legislature, the legitimacy of our system of government may be undermined.[131]

Given this adoption by the Supreme Court of Canada of McLachlin J's description of the roles of representatives elected pursuant to section 3, it would seem that there is the highest jurisprudential

[129] *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 at para 25, [2003] 1 SCR 912 ["*Figueroa*"].
[130] *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 SCR 158 at 183, 81 DLR (4th) 16 ["*Saskatchewan Reference*"].
[131] [1989] 4 W.W.R. 393 at 413, 59 DLR (4th) 247

support in Canada for an understanding of section 3 that acknowledges MPs' fundamental role in determining who forms executive government. While these cases focused primarily on the effects of diluting the power of an individual vote, it is clear that the reason this was a pressing matter was because of its effects on the formation of government through representatives and institutions.

The representative and institutional aspects of section 3 are further elaborated on by the Court in *Haig v. Canada (Chief Electoral Officer)*,[132] where the SCC rejected the argument that section 3 conferred a right to vote in a referendum. In considering the content of the right to vote, Justice L'Heureux-Dubé found that "in a democratic society…[section 3] must be given a content commensurate with those values embodied in a democratic state."[133] In her decision, L'Heureux-Dubé J also notes the important binding qualities of the democratic rights protected under sections 3, 4 and 5 compared to a non-binding referendum:

> The democratic rights contained in ss. 3, 4 and 5 of the *Charter* are quite explicitly articulated. In his discussion in "Democratic Rights", in Gérald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989), at p. 265, Professor Beaudoin summarizes these rights at p. 266 as:
>
> > "The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights."
>
> The democratic rights guaranteed in the *Charter* are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the *Charter*, would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. **Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach**.[134]

[132] [1993] 2 SCR 995, 105 DLR (4th) 577 ["*Haig*"].
[133] *Ibid* at 1031.
[134] *Ibid* at 1031-1032.

A referendum, on the other hand, is a matter for measuring popular opinion on a particular question.[135] Justice L'Heureux-Dubé suggests that governments are under no general obligation to hold referendums and if a government were to hold one and ignore the results, the remedy would be "in the political and not the legal arena"[136]. Justice L'Heureux-Dubé thus concludes that "these differences provide further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum."[137] Therefore, *Haig* is useful in understanding the paramount and binding nature of elections in relation to Canada's democracy and the importance of honouring the results of an election.

McLachlin CJ's discussion of the right to vote in *Sauvé v. Canada (Chief Electoral Officer)*[138] is also helpful in understanding the purpose of section 3. Here, McLachlin CJ notes the social contract theory justifying adherence to the law and the connection between the individual, representative and institutional aspects of the right to vote:

> In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote…. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.[139]

Thus, McLachlin CJ concludes that denying the franchise also denies "the basis of democratic legitimacy" as citizens are the ultimate source of governmental power in a democracy.[140] Indeed, McLachlin CJ asserts, the right to vote "underpins the legitimacy of

[135] *Ibid* at 1032.
[136] *Ibid*.
[137] *Ibid*.
[138] 2002 SCC 68, [2002] 3 SCR 519 ["*Sauvé*"].
[139] *Ibid* at para 31.
[140] *Ibid* at para 32.

Canadian democracy and Parliament's claim to power" and she concludes that a government that denies the right to vote to prisoners "weakens its ability to function as the legitimate representative of the excluded citizens" and "jeopardizes its claim to representative democracy".[141] McLachlin CJ also asserts in this case that "laws command obedience because they are made by those whose conduct they govern."[142] In other words, the right to vote is the mechanism in which the constituent sovereignty of the people is transformed into constituted powers and the institution and offices of state are given democratic legitimacy.

Justice Iacobucci's majority decision in *Figueroa v. Canada (Attorney General)* found that section 3 was primarily a procedural right and rejected the notion that it could be used to justify legislation that favoured majority government over minority governments.[143] Nonetheless, the majority decision in *Figueroa* in some senses bolsters the case for a limited institutional element to section 3. For example, Iacobucci J's discussion of the formation of majority governments should be taken as highlighting the possibility and legitimacy of minority governments (in which the House by nature will be responsible for negotiating democratic legitimacy) and also the importance of protecting the role of independent MPs and smaller parties in the democratic process.[144] If independent and small-party MPs had no possible say in who formed government, then there would be no purpose in their election to office. On this reading of Iacobucci J's decision, the theories of populist democracy or plebiscitary democracy can be ruled out as being compatible with section 3 as well. That is to say, if section 3 does not require majority governments, then there

[141] *Ibid* at para 34.
[142] *Ibid* at para 44.
[143] *Figueroa*, *supra* note 129 at para 23.
[144] See, for example, *ibid* at paras 79, 81. Justice Iacobucci also adopts Justice McLachlin's explanation of effective representation at paras 23-25, which, as discussed above, is premised on the notion that a government can be formed on a small majority or a minority basis.

must be a way for MPs and the House of Commons to decide who does in fact form government. As noted by Iacobucci J, "the systems and regulations that govern the process by which governments are formed should not be easily compromised."[145]

Justice Iacobucci's discussion on the neutrality of the electoral system in relation to first-past-the-post and proportional representation further supports the case for an institutional element to section 3, given that most forms of proportional representation result in minority governments (and therefore conferral of legitimacy must come through the parties combining to form majorities in the House). Notably, Michael Pal underlines that some forms of proportional representation might not be compatible with the text of section 3, which assumes the election of MPs from constituencies and not lists.[146] This further bolsters the notion that section 3 cannot support theories of democratic legitimacy that prioritize parties over the MPs working through the House of Commons.

More recent jurisprudence continues to demonstrate the representative and institutional aspects of section 3. In *Harper v. Canada*, the Court again reiterated section 3 provides "more than just a right to be effectively represented in Parliament."[147] In *Frank v. Canada*, Chief Justice Wagner, while emphasizing that meaningful participation was the "central purpose" of section 3, nonetheless found that section 3 required a broad interpretation that "enhances the quality of our democracy and strengthens the values on which our free and democratic state is premised" and that

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[145] *Ibid* at para 72.
[146] Michael Pal, "Constitutional Amendment After the Senate Reference and the Prospects for Electoral Reform" (2016) 76 SCLR 377 at 390 [Pal, "Constitutional Amendment"].
[147] 2004 SCC 33 at paras 68-69, [2004] 1 SCR 827.

"an overly narrow interpretation of the right to vote would diminish the quality of democracy in our system of government."[148]

Conclusion

The text of section 3 of the *Charter* encompasses more than the right to vote: it also refers to democracy through the centered and section headings (which is considered to have substantive effect by SCC jurisprudence), representation through the election of MPs and their membership in the House of Commons. An interpretation of section 3 must recognize these aspects of the right and limiting section 3 solely to the mechanics of voting would severely undershoot the purpose of the right. The main flaw in Oliphant's analysis is that he does not appreciate the full implications of section 3 being a <u>democratic</u> right. Moreover, Oliphant curiously overlooks the unwritten constitutional principles in giving meaning to the notion of democracy. The unwritten constitutional principles are the "vital unstated assumptions" that the constitutional text, including section 3 of the *Charter*, is based on.[149] Given this nature, the unwritten constitutional principles may be used to interpret the text in the event of an ambiguity or to help "develop structural doctrines" for the constitution, from which courts can use the principles to fill gaps in the text.[150] While this will be discussed in more detail in the coming chapter, it is worth noting that an examination of the unwritten constitutional principles reveals that democracy in Canada has a unique historical and philosophical background and that is strongly connected to the supremacy of Parliament and the responsibility of the Crown to the House of Commons. In this sense, while

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[148] 2019 SCC 1, at paras 26-27, [2019] 1 SCR 3 ["Frank"].
[149] *Secession Reference*, *supra* note 4 at para 49.
[150] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para 55-56.

Canadian democracy is punctuated by elections it is not limited to these events. Without a structure and framework, envisioned by the representative and institutional elements of section 3, democracy in Canada cannot be realized.

Nevertheless, the right to “effective representation” alone might not be sufficient to ensure democratic legitimacy. At its most broad aspect, effective representation ensures the legitimacy of the individual MP representing their constituents, but democratic legitimacy cannot be achieved through MPs without the institution of the Commons. Rather, democratic legitimacy can only be conferred by MPs acting collectively through the processes, procedures and privileges afforded by the House of Commons. To this extent, there is perhaps a third aspect of section 3 relating to the institutional role of the House of Commons in perfecting the individual right to vote. For example, MPs do not have a freestanding right to raise matters of confidence, they are limited to specific matters and as provided by House procedures. Thus, where effective representation connects an elector to their representative, the right to democratic legitimacy connects the electors to the House of Commons. Or, in other words, the focus of democratic legitimacy is protecting and preserving the right of the House of Commons to decide who forms government, as a collective right of the MPs.

Finally, it is important to recognize that section 3 must be read in light of the other democratic *Charter* provisions, namely sections 4 and 5. These provisions provide for frequent elections and an annual sitting of Parliament. These sections will be discussed in greater detail in Chapter 5, but notably, as institutional requirements, they will augment and narrow any possible institutional element to section 3.

Chapter 3
The Preamble to the *Constitution Act, 1867* and Responsible Government

The preamble to the *Constitution Act, 1867* is important in understanding the democratic rights under the *Charter* and the Constitution in general. The preamble was originally interpreted prior to the 1982 patriation of the Constitution as being primarily focused on the conventions of responsible government.[151] After the patriation of the constitution, Canadian courts used the preamble to explain and elaborate on a number of unwritten constitutional principles and imparted them with full legal force. The notion of full legal force, in turn, means that the principles can be used to interpret textual constitutional provisions and may be used to fill gaps in the text of the Constitution itself. Constitutional principles are relevant to understanding the requirement for democratic legitimacy by explaining the foundations of Canadian democracy and the relationship between various democratic institutions and offices. The rule of law and constitutionalism are also important constitutional principles to consider, as democracy requires a legal foundation from which the will of the people can be ascertained, and power peacefully allocated. The constitutional status of parliamentary privilege also emerges from the preamble. The constitutional nature of parliamentary privilege is important for understanding the scope and nature of the right to democratic legitimacy under the *Charter*, as the internal proceedings of the House of Commons are not subject to the *Charter*. Therefore, certain populist theories of government formation and democratic legitimacy are impermissible when considered in light of the principles, as populist theories of section 3 would necessarily affect the internal proceedings of Parliament by restricting individual legislators from exercising personal judgment on confidence matters. This Chapter

[151] Oliver, *supra* note 3 at 216.

therefore concludes that the principles of democracy, parliamentary sovereignty, parliamentary privilege, and the rule of law and constitutionalism all favour an interpretation of section 3 requiring democracy legitimacy in government.

The preamble to the *Constitution Act, 1867*

The preamble to the *Constitution Act, 1867* reads: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom". In statutory interpretation, preambles are generally used for the purposes of construing the context and purpose of an Act.[152] This approach has been used in relation to the preamble to the *Constitution Act, 1867* by Canadian courts and the Judicial Committee of the Privy Council ("JCPC"). The preamble in the early confederation period referred primarily to responsible government and the institutions and offices critical to responsible government.[153] For example, Justice Mills of the Supreme Court of Canada in *In re Representation of Certain Provinces in the House of Commons* asserted that the colonial delegates and the Imperial Parliament agreed that the preamble meant "ministers responsible to the House of Commons, and with a Parliament Supreme in the Government of the Dominion."[154] Justice Duff also found that the preamble referred to the notion of Parliamentary supremacy and the responsibility of the

[152] Oliver, *supra* note 3 at 214.
[153] *Ibid* at 217.,
[154] *In re Representation of Certain Provinces in the House of Commons* (1903), 33 SCR 475 at 582, 1903 CanLII 73.

executive to Parliament.[155] The foundation of responsible government in the preamble was more recently stated by the Supreme Court in the *Patriation Reference* as well as *Quebec v. Blaikie*.[156]

The importance and scope of the preamble grew in the post-patriation period with the rise of unwritten constitutional principles. In *Re Manitoba Language Rights* the Supreme Court relied on the principle of the rule of law to delay the invalidation of Manitoba's entire statute book after failing to meet the language requirements of the *Manitoba Act*.[157] Chief Justice Lamer elaborated on these constitutional principles in *Reference Re remuneration of Judges of the Provincial Court of PEI*[158] in interpreting broad protections for judicial independence under sections 96-100 of the *Constitution Act, 1867*. Lamer CJ, for example, asserting that the preamble "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme" and that the principles are "the means by which the underlying logic of the Act can be given the force of law."[159]

The unwritten constitutional principles played an even more central role in *Reference Re Secession of Quebec*. Here, the Court found that the principles could be used to "assist in the interpretation of the text…, the scope of rights and obligations, and the role of our political institutions."[160] The principles could also "give rise to substantive legal obligations" and have "full legal force."[161] In *Toronto (City) v. Ontario (Attorney General)*, Chief Justice Wagner and Justice Brown found that the notion of full legal force could not be used to supplement the constitutional text and that the principles' legal force "lies in their representation of general principles within

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[155] *Reference re meaning of the word "Persons" in s.24 of British North America Act*, [1928] SCR 276 at 291-292, 1928 CanLII 55.
[156] *Patriation Reference*, *supra* note 6 at 805-806; *Attorney General of Quebec v. Blaikie et al*., [1981] 1 SCR 312 at 320, 1981 CanLII 14.
[157] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 747-752, 767.
[158] [1997] 3 SCR 3, 1997 CanLII 317.
[159] *Ibid* at para 95.
[160] *Secession* Reference, *supra* note 4 at para 52.
[161] *Ibid* at para 54.

which our constitutional order operates and, therefore, by which the Constitution's written terms — its *provisions* — are to be given effect."[162] Thus, the first method by which the constitutional principles achieve full legal force is through the interpretation of constitutional provisions. This includes their use in a purposive interpretation of *Charter* rights by informing "the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined".[163] The second use for the principles is to "develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture."[164] Nonetheless, the principles should only be resorted to when constitutional text "is not sufficiently definitive or comprehensive to furnish the answer to a constitutional question" and courts should not use the principles to overshoot the purpose of a constitutional provision.[165] In other words, despite the constitutional principles, "the text remains of primordial significance to identifying the purpose of a right" and is "the first indicator of purpose."[166] Nonetheless, Chief Justice Wagner and Justice Brown seem satisfied that the principles can create substantive legal force by necessary implication from the constitutional text, although such necessary implications are not freestanding rights created by the principles, but are rather anchored by the constitutional text and revealed using a purposive interpretation of the text.[167]

The Court identified four constitutional principles in the *Secession Reference*: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[168] It has also

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[162] *Toronto (City), supra* note 150 at para 54.
[163] *Ibid* at para 55.
[164] *Ibid* at para 56.
[165] *Ibid* at para 65.
[166] *Ibid* at para 65.
[167] *Ibid* at para 75.
[168] *Secession Reference*, *supra* note 4 at para 49.

recognized the principle of Parliamentary sovereignty.[169] The Court asserted that the constitutional principles "function in symbiosis" and that "[n]o single principle can be defined in isolation from the others, nor does any one trump or exclude the operation of any other."[170]

Constitutional conventions and constitutional principles

There are a number of scholars who have argued for the direct incorporation of conventions into the legal constitution through the constitutional principles. For example, Sirota has argued that certain conventions should be considered as part of the legal constitution through an architectural approach.[171] Jean Leclair notes, however, that the unwritten principles lack legitimacy and lack coherency in relation to each other and therefore their use to create freestanding legal obligations should be limited.[172] And, as noted above, the Supreme Court of Canada has restricted the use of unwritten principles as a freestanding matter to filling gaps in the constitutional text. Mark Walters, meanwhile, has argued that ministerial advice to the Crown may be subject to judicial review because it "is given in the performance of a legal duty by ministers who hold a legal office, and the common law has always regarded ministers as legally responsible for the advice they give."[173] While these theories on the legal nature of conventions and advice-giving are a rich area for further commentary and analysis, it is outside the scope of this thesis to consider if the unwritten constitutional principles might or should have some independent effect on executive powers in relation to Parliament. Rather, the purpose of this thesis is to consider if the *Charter* provides a right to democratic outcomes of elections, and if so, why? To this end, the

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[169] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para 55, [2002] 3 SCR 3.
[170] *Secession Reference*, *supra* note 4 at para 49.
[171] Sirota, "Immuring", *supra* note 90.
[172] Jean Leclair, "Canada's Unfathomable Unwritten Consti-tutional Principles" (2002) 27:2 Queen's LJ 389, as cited by Michael Pal, "The Unwritten Principle of Democracy" (2019) 65 McGill LJ 269 at 279-280.
[173] Mark D. Walters, "Judicial Review of Ministerial Advice to the Crown" (2016) 25 Const Forum Const 33 at 39.

unwritten principles will be considered in light of their first purpose articulated by the SCC: for clarifying and understanding the text of the constitution.

Unwritten Principle of Democracy

Sections 3 to 5 are referred to as democratic rights by their centred heading in the *Charter*, but what is meant by democracy? Abraham Lincoln famously described it in the Gettysburg address as rule "by the people, for the people, of the people."[174] While this is broadly true, democracy lacks a specific definition because it has arisen in many different forms in different places in different times. To this extent, the unwritten constitutional principles can assist in understanding what is meant by democracy in the context of section 3. The first important point is that democracy in Canada is concerned with substantive goals, such as the promotion of self-government, given that "a sovereign people exercises its right to self-government through the democratic process."[175] Thus, democracy is not simply concerned with the act of voting, but rather the broader goal of achieving self-government, which is imbedded and undertaken after and between elections. This leads to the second point, which is that democracy has both individual and institutional elements.[176] While the individual elements appear to be satisfied through the franchise and the ability to stand as candidates, these would have little meaning without reference to their institutional context. To this end, the Constitution clearly contemplates "the process of representative and responsible government" at an institutional basis and the House of Commons forms "the core of the system of representative government". [177] The third point is that democracy,

[174] Jared Peatman, *The Long Shadow of Lincoln's Gettysburg Address* (Carbondale: University of Southern Illinois Press, 2013) at xvii.
[175] *Secession Reference*, *supra* note 4 at para 64.
[176] *Ibid* at para 61.
[177] *Ibid* at para 65.

situated in the context of representative and responsible government, has evolved from a mediation of the rights and interests of the monarch and the aristocracy to a recognition of the inherent dignity and worth of individuals:

> The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, …, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation".[178]

Thus, while the conventions that helped facilitate modern democracy may have emerged as political resolutions and comprises to discrete situations, there is a broader recognition of a crystallization of democracy for inherent and philosophical reasons in the patriation process which might now be confirmed and enhanced by section 3 of the *Charter*, similar to the evolution of the Supreme Court of Canada in Canada's constitution.[179]

Returning to the text of section 3, it is important to recall that it is a democratic right in terms of its centered heading and its section heading, both of which have substantive effect in a purposive interpretation. Democracy, in a broad sense, means rule by the people as opposed to rule by the few.[180] The unwritten principles describe it as being concerned with the promotion of self-government and that the people of Canada exercise this right to self-government through the democratic process. Section 3 is clearly a democratic right in substance, as it allows each individual citizen to cast a ballot in an election for an MP or to be qualified as a member of the House of Commons. While this thesis has argued that textually this is sufficient to infer that there ought to

[178] *Ibid* at para 63.
[179] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 88, [2014] 1 SCR 433.
[180] Ross Harrison, "Democracy" in Edward Craig, ed, *The Shorter Routledge Encyclopedia of Philosophy* (New York: Routledge, 2005) at 166.

be a connection in section 3 between the right to vote and role of the House of Commons in providing democratic legitimacy to the executive government (in order to make section 3 a truly democratic right), but to the extent this is unclear, then the unwritten principles may be used to help in interpreting the purpose and therefore the scope of section 3.

As mentioned above, the unwritten principle of democracy has made clear that Canada's democracy is responsible in nature and this has been the culmination of a long evolution to a more inclusive democracy. This is in contradiction to the colonial legislatures, which had popular mandates and financial responsibilities, but the colonial Governors did not make decisions based on the advice of responsible ministers nor were they ultimately concerned with the confidence of their assemblies in exercising executive powers.[181] The responsible nature of Canada's Constitution is further demonstrated through individual provisions of the *Constitution Act, 1867*, such as sections 53 and 54, which implement the historic practices of originating appropriation and tax bills in the House of Commons, subject to the requirement that such bills can only be introduced with the royal recommendation of the governor general. Clearly, this goes to the historic and philosophical notions that the Crown's primary consideration is to receive funding and the primary mode of doing so is by having a ministry that can command the confidence of the House of Commons.

The discussion of the House of Commons's role in Canada's constitutional architecture in the *Senate Reference* provides further support to the responsible nature of the Constitution. Informal reform to the Senate was impermissible because it would have made the Senate a democratic body that challenged the House of Commons for primacy and legitimacy within the Canadian state.[182] The Court notes on several occasions that democratic elections would confer

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[181] Hogg, *infra* note 231 at 9.2.

[182] *Senate Reference*, *supra* note 86 at paras 54-55.

democratic legitimacy on the Senate and bestow it with a mandate that is incompatible with its place in the Constitutions, as currently understood: "the consultative election proposals … would amend the Constitution of Canada by changing the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy."[183] Rather, the role of the Senate under the architecture of the Constitution was to act as a complimentary legislative body of sober second thought.[184] By contrast, the House of Commons has such legitimacy and mandate because of its membership of democratically elected representatives.[185]

> The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture. It would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought.
>
> The *Constitution Act, 1867* contemplates a specific structure for the federal Parliament, "similar in Principle to that of the United Kingdom": preamble. The Act creates both a lower *elected* and an upper *appointed* legislative chamber….[186]

Further, Michael Pal describes the fundamental nature and role of the House of Commons as being "the confidence chamber, the location from which money bills could be introduced, and the locus of responsible government."[187] It follows that Canada's constitutional architecture clearly comprehends the House of Commons as the primary institution for democracy and hence as the sole body capable of conferring legitimacy on the executive government.

Returning to section 3, such considerations can help resolve any ambiguities in the legal role that MPs and House of Commons play in perfecting the democratic outcome of an election and

[183] *Ibid* at para 63.
[184] *Ibid* at para 54.
[185] *Ibid* at para 14.
[186] *Ibid* at 54-55.
[187] Pal, "Constitutional Amendment", *supra* note 146 at 388.

imbuing the government with legitimacy. Some political constitutionalists would say that the representative powers of the House of Commons, akin to the powers of the colonial legislatures, are sufficient to ensure democratic outcomes to elections. That is to say, if a majority of the MPs are unsatisfied with the appointment or continuance of a government in office after an election, then they may legislate restrictions on that government or attempt to defund the government. However, when read in light of the text of section 3 and the unwritten constitutional principles, such an interpretation becomes less plausible. Rather, section 3 clearly comprehends a democratic government (that is, a government of the people) involving the House of Commons and the members who are elected to that institution. If that institution, as a locus of democratic legitimacy, does not play a role in selecting the government of the day or in the requirement for the government to act with the confidence of the House then it is hard to see how Canada has self-government, and certainly not one that reflects its history of responsible government or the broader architecture of the Constitution. To this extent, as will be discussed in greater detail in chapter 5, uses of the royal prerogative that are specifically intended to frustrate or interfere with this legitimacy-conferring role of the House of Commons, comprised of members duly elected by the citizens of Canada pursuant to section 3, is in fact an interference with the right to vote itself.

The rule of law, constitutionalism and parliamentary supremacy

The understanding that section 3 requires democratic legitimacy in the executive government through the House of Commons is bolstered by the interaction between democracy and the rule of law. Democracy cannot function without having a framework of determining how an election is actually "won" and "lost". As the Court notes, "[i]t would be a grave mistake to equate legitimacy

with the 'sovereign will' or majority rule alone".[188] Therefore, the Court asserts, "it is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented."[189] Thus, constitutionalism facilitates democracy by creating a clear framework for making political decisions.[190] Without such a framework, democracy would be undermined because it would be impossible to determine the will of the people.[191] Indeed, without a basic framework on who ought to form government and what basis would mean that each election could be contested through the "cataclysmic" political remedies described by Webber above. The result of an election would not necessarily be based on any consistent or justified reason, but rather which party could whip their supporters and public opinion into a frenzy. Given that the Constitution "vouchsafes order and stability", it is best served by a predictable, clear and justified means of resolving an election and deciding who forms government. Section 3 and the unwritten unconstitutional principles suggest that this is the through the confidence of the duly MPs under a system of responsible government.

Recent jurisprudence on Parliamentary sovereignty and prerogative powers from the UK is also helpful in assessing how the principles might be used to interpret section 3. For example, Lady Hale and Lord Reed of the United Kingdom Supreme Court found in *R (Miller) v. the Prime Minister* that the act of prorogation in 2018 had the purpose or effect of frustrating Parliament from fulfilling its constitutional role and therefore breached the principle of Parliamentary sovereignty, leading the Court to set the prorogation aside as being illegal:

> The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to

[188] *Secession Reference, supra* note 4 at para 67.
[189] *Ibid*.
[190] *Ibid* at para 78.
[191] *Ibid*.

> prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.
>
> ***
>
> [T]herefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[192]

While the decision in *Miller* provides a much more expansive role for the judicial review of democratic prerogatives than is proposed in this thesis, the case is still useful to highlight that the government is responsible to Parliament in the Westminster style of parliamentary democracy and also in Canada's constitutional architecture.

Parliamentary privilege

It is also important to note how parliamentary privilege interacts with the democratic *Charter* rights. Parliamentary privileges are "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions" and includes "the <u>necessary immunity</u> that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces . . . <u>. in order for these legislators to do their legislative work</u>."[193] Necessity in the context of privilege is meant broadly, and refers to the what the dignity

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[192] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*, [2019] UKSC 41 at paras 42, 50 ["*Miller*"].

[193] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para 29, [2005] 1 SCR 667 ["*Vaid*"] [emphasis in original].

and efficiency of the House requires.[194] As noted by Justice Binnie in *Canada (House of Commons) v. Vaid*, "[i]f a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege."[195] In addition to the considerable protections given to individual MPs in discharging their parliamentary duties, parliamentary privilege also protects the House in determining its internal proceedings from interference by the Crown and judiciary.[196]

Parliamentary privilege is part of the Constitution and therefore the *Charter of Rights* does not apply or prevail over a privilege.[197] As noted by the Court in *New Brunswick Broadcasting,* "one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[198] In that case, a fragmented majority of the SCC refused to allow the freedom of the press protected by section 2(b) of the *Charter* to trump the Nova Scotia House of Assembly's powers to control its internal affairs; which included the ability to exclude strangers from the House.[199] This view was later determined to be settled law by the SCC in *Vaid.*[200]

Populist theories of democratic legitimacy are generally incompatible with parliamentary privilege, in that section 3 would freeze or limit the ability of MPs by requiring them to vote in a certain manner to sustain the government on matters of confidence, as they would be bound by the subjective opinion of the governor general as to who "won" the election. As noted by Aucoin et al, such a formulation would trump the internal proceedings of Parliament by fettering MPs discretion in deciding who forms government, and more broadly would prevent individual MPs

[194] *Ibid*.
[195] *Ibid*.
[196] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 22, [2018] 2 SCR 687.
[197] *Vaid*, *supra* note 193 at para 30.
[198] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 373, 1993 CanLII 153.
[199] *Vaid*, *supra* note 193 at para 29.
[200] *Ibid* at para 33.

from leaving their parties and prevent MPs from voting in any manner besides with their party.[201] It would also render independent MPs or MPs from small or regional parties powerless in the affairs of Parliament.

Of course, such a theory of democratic legitimacy does not reflect the jurisprudence delimiting the *Charter* and Parliamentary privilege. Section 3 must ensure democratic legitimacy in executive government while also preserving the power the individual and collective powers of the MPs. Therefore, the democratic legitimacy implied by the constitutional principles must allow the MPs to have discretion in using their powers, especially in relation to determining who forms government. A populist theory of democracy, where the winner of the popular vote was entitled to form government, would ossify the results of an election and undermine the role of individual MPs acting through the House of Commons in deciding who legitimately forms executive government in Canada. It is the role of the House of Commons to determine who is the winner of an election and it is a privilege of the members to have full discretion in making this collective decision. This does not preclude Parliament from legislating regarding its privileges. While it is outside the scope of this paper, legislation that limits floor-crossing is instructive, as no such legislation purports to prevent MPs from dissenting from their party or even leaving their party.[202] Rather, these bills focus on denying MPs the benefits of caucusing with other parties without first resigning their seat and seeking approval for their actions through a by-election.[203]

Conclusion

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[201] Aucoin, *supra* note 126 at 185-186.

[202] Andrew Flavelle Martin, "Unconstitutional or Just Unworkable? The Life and Death of a Prohibition on Floor-Crossing in *Fletcher v. the Government of* Manitoba" (2019) 42 Man JL 51 at 58, n 38.

[203] See, for example, Brendan Roziere, "Reconsidering Bill 4 – The Legislative Assembly Amendment Act (Member Changing Parties): Finding a Balanced Approach to Floor Crossing in Manitoba" (2019) 42 Man LJ 73 at 77.

The unwritten constitutional principles comprehend a certain form and structure of government. In Canada, that is a parliamentary democracy informed by the centuries of history and development under the Westminster system. Section 3 is a democratic right and is therefore concerned with the promotion of self-government. To this end, the franchise that is guaranteed by section 3 should fit into the democratic history of Canada, which is based on Parliamentary supremacy and the responsibility of the executive to the House of Commons. Thus, based on the constitutional principles, democratic legitimacy in executive government can only be conferred by the Commons which represents the people of Canada. Further, principles such as the rule of law and constitutionalism require an orderly form of rules in the formation of government and democratic legitimacy. Finally, the doctrine of parliamentary privilege and its relationship to *Charter* rights makes clear that certain forms of populist democracies are incompatible with section 3, because it would require MPs to either be ignored in the formation of government or to constrain them from using any discretion other than as directed by their party.

Chapter 4

Sections 4 and 5 of the *Charter*

This chapter addresses sections 4 and 5 of the *Charter* in relation the right to democratic legitimacy. The first use of these sections is as an interpretive tool for section 3. The Court in *Skapinker* found that *Charter* provisions could be read in reference to other related provisions, especially those found under the same centred heading.[204] The Court has consistently reaffirmed the assertion made in *Big M Drug Mart* that a purposive interpretation of one provision may be better understood by "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[205] Sections 4 and 5 provide the right to frequent elections and frequent sittings of Parliament. It is arguable that these provisions are sufficient legal protections for the political constitution, in that frequent elections ensure that the House has a democratic mandate and that frequent sittings of Parliament provide a baseline for the House to exercise its historic powers over the executive through its powers of the purse. However, the ability to sit frequently is only half of the story: the governor general must also give effect to the right to vote by appointing and maintaining ministers who have the confidence of the House of Commons. Secondly, this chapter discusses the possibility that section 5 itself might create a substantive limitation on the prerogative powers. This is because the purpose of section 5 deals with a fundamental role of Parliament in the process of annual appropriations and by extension confidence in the government. However, this chapter finds that section 5 might not be sufficient to protect individual democratic rights nor does it allow the executive to use the royal prerogative in any many contrary to democracy so long as section 5 is textually honoured.

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[204] *Skapinker*, *supra* note 122 at para 28.
[205] *9147-0732 Québec*, *supra* note 115 at para 68.

Democratic process in Canada

Canadian democracy is tightly intertwined with the Parliamentary cycle, given that under the conventions of the Constitution the executive government derives its legitimacy from the confidence of the House of Commons. The Parliamentary cycle begins with the summoning of a new Parliament after an election, which also starts a new Parliamentary session. The power to summon is exercised by the governor general and its legal basis is the royal prerogative, but under the political constitution is typically exercised on the advice of a responsible minister.[206] One of the first steps for a new Parliament is to elect a speaker for the House of Commons, as required by section 44 of the *Constitution Act, 1867*.[207] After a Speaker is elected by the House, the governor general attends the Senate to read the Speech from the Throne in the presence of the members of the House and Senate. The Speech from the Throne sets out the reasons for the summoning of the Parliament, or, in other words, the government's legislative agenda for the session.[208] After the Speech from the Throne, the MPs and their Speaker return to the House of Commons and begin the business for the first day's sitting.[209] The date for the debate on the Speech from the Throne, referred to as the "Address in Reply to the Speech from the Throne" is not actually required by statute or standing order to occur contemporaneous to the Speech, but is traditionally held shortly after the Speech from the Throne.[210] If the opposition is successful in adding a substantive amendment to the Address in Reply to the Speech from the Throne, it may be presumptively treated

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[206] *Letters Patent, supra* note 25 at article III; Forsey, *supra* note 35 at 23-24; Twomey, *supra* note 41 at 555-556.
[207] *Constitution Act, 1867, supra* note 23 at s 44; *House of Commons Procedure and Practice*, *supra* note 109 at ch 4, online: <https://www.ourcommons.ca/about/procedureandpractice3rdedition/ch_04_6-e.html#4-6-1-2>.
[208] *Ibid* at ch 8, online: <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_08_2-e.html#footnote-104>.
[209] *Ibid*.
[210] *Ibid*.

as a matter of confidence.[211] It is also open to the opposition parties to make formal amendment of non-confidence of the government in the Address in Reply, although this has never been successful in Canadian history.[212]

If the government survives the Address in Reply to the Speech from the Throne, the routine business of the House and Parliament commence, in which the government's MPs have a tremendous amount of procedural control. For instance, opposition parties control the daily proceedings only twenty-two times per year on days called "supply days", but the scheduling of these days are controlled by the majority.[213] Of particular significance for Canadian democracy, supply days are the only days on which opposition parties can force a non-confidence vote. Thus, opposition parties are restricted in bringing confidence motions on their own initiative, but nevertheless some government initiatives are presumptively considered to be confidence matters, such as a vote relating to the government's fiscal plan.[214]

A session of Parliament continues until it is terminated, either through prorogation or dissolution, both of which are Crown prerogatives conventionally exercised on the advice of a responsible minister. Prorogation has the effect of suspending Parliament and has been used since at least 1530, where Henry VIII did not want to dissolve the House of Commons because of its friendly composition, but also did not require it to be in session.[215] Prorogation is routinely used without controversy at the federal and provincial levels in Canada and in the United Kingdom, but

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[211] Heard, "Constitutional Conventions", *supra* note 50 at 398.
[212] *Ibid*, at ch 2, n 12, online: <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_02_2-e.html#footnote-075-backlink>.
[213] Rob Walsh, *On the House: An Inside Look at the House of Commons* (Montreal: Mc-Gill-Queen's University Press, 2017) at 127-128.
[214] Heard, "Constitutional Conventions", *supra* note 50 at 398.
[215] Bruce Hicks, "British and Canadian Experience with the Royal Prerogative" (2010) 33 Canadian Parliamentary Review 18 at 19.

as was the case in 2008 in Canada, it can be used to avoid confidence votes or, as was the case in 2019 in the United Kingdom, to avoid Parliamentary oversight on certain matters.[216] The more typical use of the prerogative is to prorogue Parliament on the same day that Parliament is to be called back into session and a Speech from the Throne is to be made.[217] Dissolution has the effect of terminating both the session of Parliament and the Parliament itself. Any bills on the order paper die and any possible confidence votes are avoided. The governor general also issues the writs of election at the same time Parliament is dissolved.[218]

If the House loses confidence in the government, one of two things must happen by convention: either the Parliament must be dissolved or an alternative ministry must be appointed from the existing House of Commons.[219] The legal power to do either is in the hands of the governor general. Appointing a ministry is said to be a personal prerogative in that it is not done so on the advice of a responsible minister. The decision to dissolve a Parliament when the House votes non-confidence might be conventionally a reserve power, as technically the governor general is not bound by the advice of their incumbent first minister.[220] The overarching political duty of the governor general in this case is to ensure the democratic and responsible nature of their government continues, and while there are often only a narrow range of options, the decision is nonetheless the governor general's to make.[221]

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[216] Hogg, "Prorogation", *supra* note 101 at 195; *Miller*, *supra* note 192 at para 50.
[217] *Miller, supra* note 192 at para 2.
[218] James W.J. Bowden, "When the Bell Tolls for Parliament: Dissolution by Efflux of Time" (2017) 11 Journal of Parliamentary and Political Law 129 at 132-133 [Bowden, "Dissolution"].
[219] Andrew Heard, "Constitutional Conventions and Parliament" (2005) 25 Canadian Parliamentary Review 19 at 19.
[220] Twomey, *supra* note 41 at 116-117.
[221] *Ibid* at 35-37, 117.

Sections 4 of the *Charter*

Section 4 of the *Charter* creates a legal requirement to hold frequent elections (at least once every five years), unless a Parliament is extended in times of emergency:

> **Maximum duration of legislative bodies**
> **4(1)** No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.
>
> **Continuation in special circumstances**
> **(2)** In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Subsection 4(1) of the *Charter* largely mirrors section 50 of the *Constitution Act, 1867*, which remains in force. Subsection 91(1) of the *Constitution Act, 1867* previously provided authority for Parliament to continue itself past its five-year maximum duration in times of war, invasion or insurrection, but this was repealed with the implementation of the *Charter*.[222] These provisions have not received significant judicial consideration. One analogous situation was the continuation of Ontario's provincial assembly beyond its five-year maximum duration during World War II, which Justice Riddell of the Ontario Court of Appeal found to be valid amendment of the province's constitution.[223]

The SCC discussed section 4 in the context of the unwritten constitutional principle of democracy in the *Secession Reference*. In this case, the Court found that "the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections

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[222] See subitem 1(3) of the Schedule to the *Constitution Act, 1982, supra* note 5.
[223] *R. ex. Rel. Tolfree v. Clark et al.*, 1943 CanLII 12 (ON CA) at para 29.

and to permit citizens to elect representatives to their political institutions."[224] The Court further noted that "[t]he democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33."[225] Justice L'Heureux-Dubé discussed section 4 in the broader context of democratic *Charter* rights in *Haig*, writing:

> Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the *Charter*, would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach.[226]

It is clear from the text of section 4 that the termination of a House of Commons has significance for Canadian democracy and therefore the renewal of its democratic mandate has import in this respect. As noted by Dicey, the House of Commons acts as a pivot between executive power and the democratic will of citizens:

> [D]issolution is in essence an appeal from the legal to the political sovereign. … No modern constitutionalist will dispute that the authority of the House of Commons is derived from its representing the will of the nation, and that the chief object of a dissolution is to ascertain that the will of parliament coincides with the will of the nation."[227]

It is also important to note that section 4 does not set out the legal mechanism for upholding this right: it creates a maximum duration for the House of Commons, but otherwise does not say how or when it may be discontinued. Although James Bowden, citing Blackstone, argues that parliaments may be dissolved by operation of law through effluxion of time, [228] the text of

[224] *Secession Reference, supra* note 4 at para 65.
[225] *Ibid*.
[226] *Haig, supra* note 132 at 1031-32.
[227] Dicey, *supra* note 29 at 193-194.
[228] Bowden, "Dissolution", *supra* note 218 at 133.

subsection 4(1) does not necessarily bear this out, as it refers only to the continuance of the House of Commons, and not the actual dissolution of Parliament. Thus, subsection 4(1) may in fact create a duty on the governor general to use their legal powers to dissolve Parliament and likely implies a constitutional duty for the governor general to issue writs of election at the same time. Subsection 4(2) augments the political constitution as well, given that it could create a duty for a governor general to disobey the advice of a minister who has the confidence of a majority of the House (but not the requisite two-thirds majority needed in an emergency).

Section 5 of the *Charter*

Section 5 creates a requirement for annual sittings of Parliament:

> **Annual sitting of legislative bodies**
> **5** There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Section 5 has not given rise to significant judicial or academic commentary. Section 5 is briefly mentioned in *Haig v. Canada*, where Justice L'Heureux-Dubé refers to the democratic rights as being "explicitly articulated" and that the democratic rights generally are positive in nature.[229] Professor Beaudoin refers to this right as being "the right for those elected to sit regularly".[230] Professor Hogg suggests a narrow interpretation for this section, stating that while section 5 might be violated by a prorogation over a year in duration, a "very short sitting (one day, for example) would satisfy this requirement."[231] Benjamin Oliphant, in advancing an argument for a purposive interpretation limited to the text of a *Charter* provision, describes section 5 as being

[229] *Haig*, *supra* note 132 at 1031.
[230]*Ibid* at 1032.
[231] Peter Hogg, *Constitutional Law of Canada,* 5th ed (Toronto: Thomson Carswell, 2007) at 45:8.

drafted in "relatively narrow and rule-like terms".[232] Oliphant argues it would be wrong to ascribe any legal meaning to section 5 beyond what is expressly stated in the text:

> [I]f we generously toss in the word 'meaningful' before 'sitting,' we have a very different guarantee. Courts then would be tasked with assuring that a particular legislative session was sufficiently meaningful to pass constitutional muster. With great respect, I am not convinced this is a test a single legislature in the country could pass with any regularity. Likewise, if we engaged in the type of purposive reasoning employed in the context of section 3, we might say that the purpose of section 5 is to - for instance - 'enhance democratic accountability.' Doubtless it does have that purpose. But if every breakdown of democratic accountability constituted an independent violation the *Charter*, would the courts have time to address anything else?[233]

Léonid Sirota asserts that the *Miller* prorogation case from the UK should not apply in Canada, given that short prorogations will not offend the specific requirement under the Constitution for an annual sitting of Parliament.[234] Sirota states that "[t]he *Charter* sets out a bright-line rule and it would not be the courts' role to re-write the Constitution that Canada actually has to improve it on a pattern suggested, decades after its enactment, in a different jurisdiction."[235] Justice Côté in *References Re Greenhouse Gas and Pollution Pricing Act*[236] paints a different picture of the meaning of section 5 than these scholarly sources, finding that section 5 is emblematic of the separation of powers and is demonstrative of the ascendency of Parliament in Canada's complex constitutional history.[237]

However, when undertaking a purposive analysis, it is important to consider the historic and philosophic background to the provision in question. When viewed in this context, the text of

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[232] Oliphant, *supra* note 117 at 272.
[233] *Ibid* at 275.
[234] Leonid Sirota, "The Case of Prorogations and the Political Constitution" (2021) 3 Journal of Commonwealth Law 103 at 151.
[235] *Ibid*.
[236] 2021 SCC 11.
[237] *Ibid* at para 293.

section 5 reflects a key aspect in the development of responsible government: namely the annual appropriations process. Indeed, Parliament itself arose as a venue for approving "aid and supply" in the middles ages (provided by military service or payment of taxes in lieu of service).[238] The institution of Parliament took root after the Magna Carta of 1215, in which English nobles asserted a right of consent to taxation (rather than being unilaterally imposed by the King).[239] Eventually Parliament developed as a permanent institution and was later divided into distinct houses. Given that taxes were raised from the population at large rather than simply the Lords, the House of Commons became primarily responsible for granting funding. To this end, Erskine May articulated the famous formula that the Crown demands, the Commons grants and the Lords assent.[240] In the 17th century, the relatively harmonious relationship of Parliament and the Crown (which had recently asserted its sovereignty over England against papal authority) broke down as Parliament refused to grant Charles I necessary funds to cover his personal and state costs, who then resorted to extra-Parliamentary methods of raising funds.[241] By the end of the 17th century, this struggle between royal and parliamentary power culminated in the Crown being completely dependent on Parliament for funding.[242] The *Bill of Rights, 1689*, for example, prohibits the Crown from raising taxes by any means other than Parliament and from keeping a peacetime army except with the consent of Parliament.[243] These two factors quickly evolved into a system of annual appropriations as a means of controlling the Crown. As noted by G.M. Trevelyan:

> [T]he Commons took good care that after the Revolution the Crown should be altogether unable to pay its way without an annual meeting of Parliament. William had no large grant made him for life. Every year he and his Ministers had to come, cap in

[238] Maddicott, *supra* note 108 at 76.
[239] Loughlin, *supra* note 33 at 45.
[240] Douglass C. North & Barry R. Weingast, "Constitutions and Commitments: The Evolution of Institutions Governing Public Choice in Seventeenth Century England" (1989) 49 The Journal of Economic History 803 at 818.
[241] Walsh, *supra* note 213 at 46-47.
[242] Frederic Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) at 309.
[243] Loughlin, *supra* note 33 at 51.

> hand, to the House of Commons, and more often than not the Commons drove a bargain and exacted a quid pro quo in return for supply.[244]

Parliament also passed annual *Mutiny Acts* for approximately 200 years after the revolution, which further reinforced their powers of the purse. The *Mutiny Acts* were yearly authorizations for the Crown to keep a peacetime army which, if they were not renewed, would allow active duty soldiers to walk away from their posts without legal consequences.[245] As noted by Josh Chafetz, "[w]hat both of these elements of the Revolution Settlement have in common is their creation of an annual baseline. They did not require the Monarch to call regular Parliaments, but they made it very difficult for the Monarch to exercise power without the aid of Parliament."[246] Clayton Roberts finds that the unforeseen consequences of these practices was "the eventual seizure of the executive machinery by the party that governed in parliament."[247] Gary Cox argues that the effects of the "constitutional engineering" of the revolutionary winners included an establishment of the "main elements of ministerial responsibility… thereby giving Parliament its first workable means to control the executive branch's actions."[248] This notion of imposing Parliament's will on the King's ministers eventually led to the growth of cabinet government, the development of the office of prime minister and the modern conception that the executive should be responsible to Parliament. As Martin Loughlin notes:

> The settlement is generally labelled 'representative and responsible government'. Since the policies of the king's government had to be supported by Parliament, the most effective way of achieving this was to appoint parliamentary leaders as the king's Ministers…. Although the prerogatives of the government remained vested in the

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[244] G.M. Trevelyan, *The English Revolution, 1688-1689* at 96 (1977), as cited by Josh Chafetz, "Congress's Constitution" (2012) 160 U Pa L Rev 715 at 726.
[245] Chafetz, *ibid*.
[246] *Ibid.*
[247] Clayton Roberts, "The Constitutional Significance of the Financial Settlement of 1690" (1977) 20 The Historical Journal 59 at 73.
[248] Gary W. Cox, "Was the Glorious Revolution a Constitutional Watershed?" (2012) 72 Journal of Economic History 567 at 568.

> Crown, the King had to appoint Ministers who could manage Parliament and direct the administration.[249]

The fundamental importance of the annual appropriations process is accentuated by the fact that financial measures are generally viewed as inherently being matters of confidence.[250] This is, in effect, an acknowledgment that a government has no claim to power if it is unable to secure supply for the Crown. Indeed, Hogg has described the rules surrounding the appropriations process as safeguarding parliamentary democracy.[251]

Conclusion

Sections 4 and 5 may help in the interpretation of section 3 in that they imply a system of responsible government. Section 4 does so by articulating an outside limit on when elections must be held but is silent as to when an earlier election must be held. This silence must be resolved, and, between section 3 (which makes clear that the House of Commons is the locus of democratic legitimacy) and the unwritten principles (which refers to responsible government), it is plausible to infer that elections are legally justifiable when the House has lost confidence in the government or when the government has legitimacy of the House but feels the need to refresh its democratic mandate. The converse of this conclusion is illuminating as well, in that a dissolution that does not seek to uphold or further the purposes of section 3 might be impermissible. That is to say, given that section 3 and 4 must be read together, a dissolution that is meant to interfere with the outcome

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[249] Loughlin, *supra* note 33 at 51-52.
[250] Walsh, *supra* note 213 at 128.
[251] Peter Hogg and Patrick Monahan, *Liability of the Crown,* 3rd ed at 316, as cited by Micah B Rankin, "The Improbable Rise and Fall of *Auckland Harbour Board v The King*" (2019) 97 Can B Rev 2019 43 at 50-51.

of an election might be unreasonable and therefore impermissible. Section 5 might also assist in understanding section 3. This is primarily through the philosophical and historical background of section 5, in that annual appropriations are closely connected with responsible government, which supports a reading of section 3 that is connected to processes and institutions associated with responsible government.

On the other hand, some might argue that sections 4 and 5 provide the necessary legal framework for the political constitution. That is, section 4 gives effect to the right to vote by requiring that elections be held frequently. In turn, section 5 ensures a democratic outcome to an election by requiring Parliament sit at least once a year, and at such a sitting the House of Commons is entitled to exercise its powers under the political constitution. If the executive continues to ignore the will of Parliament, they will ultimately run out of money and be forced to follow the direction of the Commons. On this construction of the constitution, it would be unnecessary to rely on section 3 for anything other than procedural rights in relation to an election. But such a theory would be incomplete for several reasons and not preferable to the uses of sections 4 and 5 described above. While annual appropriations are helpful in understanding the purpose of section 5 and the architecture of the Constitution, it is not necessarily true that the requirement for annual appropriations is part of the Constitution of Canada. Many aspects of Canada's statute book and the scheduling for the House of Commons are premised on an annual financial calendar, but it does not appear impossible to change this if Parliament so desired: certainly, the internal operations of Parliament itself are not subject to challenge through the courts on the basis of parliamentary privilege.[252] Moreover, until the amendment of the *Financial Administration Act* in

[252] But see *Alford v. Canada (Attorney General)*, 2022 ONSC 2911 at para 46, in which the Ontario Superior Court of Justice found that a constitutional amendment is required to abrogate or restrict privileges in certain

1997, the government could fund its operations through special warrants of the governor general outside of writ periods. Special warrants allow the government to make appropriations from the Consolidated Revenue Fund without the authorization of Parliament (but Parliament must retroactively approve them when the House reconvenes). Funding government through special warrants outside of writ periods happened several times after the 1988 election, where the government adjourned and prorogued several times out of convenience and used the special warrants to fund the routine business of government.[253]

But more importantly, democracy in Canada has a much more expansive meaning in Canada after patriation than simply the holding of frequent elections and the possibility of annual appropriations. *Charter* rights in Canada require a purposive interpretation because they are meant to give meaning to the principles and values essential to a free and democratic society, such as "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[254] Further, Canada's democracy has been evolutionary in nature, reaching for more meaningful protection of democratic rights and norms over the centuries. Thus, while in some circumstances sections 4 and 5 might continue to provide adequate protection for democratic legitimacy in Canada, it is important to note that there might be some circumstances where these provisions are simply not sufficient to uphold the expectation that Canadians have in a modern democracy. For example, on the purely textual interpretation of section 5 proffered by Oliphant,

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circumstances. To this end, Parliament might not be permitted to deviate by statute from the process of annual appropriations without a constitutional amendment.

[253] *House of Commons Procedure and Practice*, *supra* note 109 at ch 18, n 381, online: < https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_18_3-e.html>.

[254] *Oakes, supra* note 110 at para 64.

Hogg, and Sirota, a prime minister could be entitled to a series of dissolutions so long as they sat for a day (presumably for a vote of non-confidence). Such an approach could not be considered truly democratic though. As noted by Peter Russell, "for a parliamentary democracy to go without parliament sitting for many months simply because the prime minister of the day advises the governor general to close it down is to convert our system from one in which the prime minister is the servant of parliament to one in which parliament is the servant of the prime minister."[255] Likewise, such an interpretation of section 5 could also allow a prime minister to lose a series of throne speeches after or between elections, so long as the 12-month textual requirement is met.

Thus, while the text of sections 4 and 5 create a requirement to hold frequent elections and sessions of Parliament, it does not create a duty for the governor general to respect the role of the House of Commons in appointing ministries, to follow the advice of their responsible ministers, or to refrain from improperly interfering in the Parliamentary process. In other words, sections 4 and 5 do not guarantee that Canada is in fact governed according to the wishes of the people, as structured through section 3. Further, an interpretation of section 3 that prevents the use of royal powers in certain circumstances is generally compliant with the Court's decision in *New Brunswick Broadcasting*, in that such a reading of section 3 will not abrogate section 5. For example, simply because the Crown is prohibited from proroguing for longer than a year does not necessarily mean that a decision to suspend Parliament while it is <u>already</u> in session for any amount of time short of one year is inherently permissible. As will be discussed in the next chapter, if the purpose of the prorogation is to interfere with a confidence matter where the government has a real prospect of defeat, it is difficult to see how even a short prorogation is permissible, given that the legal powers of the Crown are being used to interfere with the House's role (and by extension, the electorate's

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[255] Peter Russell, "Discretion and the Reserve Powers of the Crown" (2011) 34 Can Parl Rev 19 at 21.

role) in deciding who forms government. Such an interpretation is consistent with *Toronto (City) v. Ontario (Attorney General)*, in that the constitutional principles are not being asked to expand the purpose of section 5 into section 3 (like importing a right to effective representation into municipal elections under clause 2(b) of the *Charter* as advocated by Michael Pal but rejected by the SCC).[256] Rather, section 3 would act as a shield against royal interference in confidence matters as opposed to section 5, which would act as a sword by positively requiring an annual session. In other words, it is one thing to validly prorogue or adjourn Parliament for a year after a session that produced a budget and implemented the government's policy, but it is a very different thing to prevent that same Parliament from exercising its constitutional powers and fulfilling its duties once it has returned to session. Further, it is notable that section 5 is passively drafted and applies equally to discipline Parliament itself from adjourning for up to a year. That is, if the House of Commons were to adjourn for a period of over a year, the governor general may be required to prorogue Parliament back into session in order to fulfill this right. In this sense, section 5 (like sections 3 and 4) reflects the strong individual interest in having and protecting processes and institutions that are essential to Canada's democracy, and that these institutions are no longer simply the province of elite political actors.

Finally, it is important to recognize that sections 4 and 5 must in some circumstances augment the political constitution insofar as the political constitution is based primarily on the confidence convention (including the theory of reserve powers). This is because to give these provisions meaning, the governor general might have to act contrary or without the advice of a responsible minister. For example, a governor general might need to dissolve Parliament to give meaning to section 4, even in circumstances where a majority of the House (but less than a two-

[256] Pal, "Unwritten Principle of Democracy", *supra* note 172 at 296-297; *Toronto (City)*, *supra* note 150 at para 5.

thirds majority) approves its own continuance during a time of emergency. Contrast this with the statutory extension of the Ontario legislature referred to above, which only required a simple statute (and therefore a bare majority of the House) to accomplish. Furthermore, the governor general might need to prorogue and summon Parliament on their own volition if a majority prime minister refuses to advise summoning Parliament or if a Speaker fails to reconvene a House that is in session.[257] The upshot is that the political constitution will necessarily be effected by the democratic rights, and that the democratic rights should prevail over the political constitution because of the notion of constitutional supremacy in the post-patriation constitutional order.

[257] See, for example, Twomey, *supra* note 41 at 606, 615: The Governor of the Indian State of Punjab was required to prorogue and summon the legislature when the Speaker refused to recall the House for fear of dismissal. More recently, at the federal level in Australia, the power to prorogue and summon Parliament was needed to bring its House and Senate back into session to break an impasse between those bodies. The government at the time did not have a majority in the Senate and therefore could not force it to return to sitting.

Chapter 5

Standards for Democratic Legitimacy

Introduction

The previous several chapters undertook a purposive interpretation of the democratic *Charter* rights. While section 3 is often referred to as the right to vote, textually it is much more complex. It is meant to be a democratic right (both through the centred heading and the section heading), which the Supreme Court of Canada has interpreted to be the promotion of self-government through democratic processes.[258] The democratic process, in turn, is not limited to placing a ballot in a box but is also achieved through representatives acting within the institution of the House of Commons. Thus, it is possible that there is a connection between voters, representatives and the House of Commons in providing democratic legitimacy to executive government. The constitutional principles imply a structure to the Constitution which reflects the historic relationship between Parliament and the Crown, one based on the supremacy of Parliament and the accountability of the executive to the legislative branch. This structure of the Constitution is reflected not just in section 3 of the *Charter*, but also in sections 4 and 5 as well as sections 53 and 54 of the *Constitution Act, 1867*. In this sense, it is reasonable to infer that section 3 might create substantive powers for the institution of the House of Commons in deciding who forms government, which in turn might create legal duties and legal restrictions on the use of Crown prerogatives.

But it is important to note that this interpretation of the Constitution is novel. If argued, it is far from certain that a court would agree with the points made herein. While it is difficult to pinpoint how this right to democratic legitimacy might work in practice, this chapter will analyze

[258] *Secession Reference*, *supra* note 4 at para 64.

several instances in which it might arise and affect the powers of the Crown. Specifically, this chapter reviews: (a) the appointment and dismissal of first ministers; (b) the advice-giving role of a first minister; and (c) the powers of the governor general in relation to the parliamentary cycle. This chapter also assesses these circumstances in light of section 1 of the *Charter*, which might provide flexibility for the political actors in a novel situation if their actions are meant to further democracy and democratic accountability to the electorate. This chapter asserts that the conventional rules regarding appointment and dismissal of a first minister may now be limited somewhat by the democratic *Charter* rights. It also asserts that the requirement for the governor general to act with the advice of a responsible minister may also be legalized to a certain extent. Finally, it argues that section 3 might limit the circumstances where prorogation and dissolution can be used.

Is the Governor General legally obliged to appoint a ministry with democratic legitimacy?

The power to appoint a ministry is said to be a 'personal prerogative' of the governor general because it is not exercised on the advice of a prime minister. Rather, it is to be exercised solely after the prime minister has resigned, been dismissed or died while in office.[259] This personal prerogative is a legal power recognized by the common law. Conventionally, the primary consideration for a governor general is to appoint the person best able to command the confidence of the House of Commons, but legally, the governor general is not said to be under any restrictions.[260] Under the political constitution, if a prime minister acts improperly after an election, then it is for the House of Commons, the governor general, the Queen and other political actors to

[259] Twomey, *supra* note 41 at 118.
[260] Twomey, *supra* note 41 at 162-163.

remedy. The same is generally true when the governor general acts improperly after an election. However, as mentioned above, the *Charter* might now provide legal remedies in such circumstances as well. This would arise from the fact that section 3 creates a democratic right (that is a right to self-government) through the election of members to the House of Commons. Given that there is a legal right to vote for MPs in the House of Commons for the purposes of self-government, then the use of the legal powers of the Crown to frustrate that legal right to self-government through the selection of MPs who act within the framework of the House of Commons ought to be unconstitutional.

For example, it is difficult to see how a governor general could exercise any discretion when appointing a prime minister after an election that results in a single opposition party winning a majority of the seats. That is, if the governor general were to appoint someone other than the leader of the majority party as prime minister, this would violate section 3 in a broad sense, in that it would be setting aside or ignoring the results of an election held pursuant to section, given its democratic purposes. To this end, section 3 might also create a legal duty for the governor general to eventually dismiss a prime minister who has decisively lost an election and is refusing to resign. While a government is expected to continue in a caretaker fashion even after a majority defeat, this does not mean that they are entitled to stay on indefinitely. Indeed Patrick Monahan suggests there might be a conventional duty for the governor general to dismiss a prime minister in these circumstances short of a required session under section 5, stating "[i]t would seem wrong for the governor general to abdicate any role or judgement in the matter, simply because the government had not yet been formally defeated on a motion of non-confidence."[261] If this unlikely event were

[261] Patrick Monahan, "The Constitutional Role of the Governor General" in Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown* (Montreal: McGill-Queen's University Press, 2012) at 75, as cited by Twomey, *supra* note 41 at 388.

to happen (and the governor general failed to use their reserve powers to dismiss), it is entirely possible that section 3 could be used to compel the governor general to dismiss the incumbent prime minister earlier than a confidence vote held pursuant to section 5 in order to ensure that Canadians have self-government through the selection of MPs. That is, section 3 might be used to expedite the transfer of power through dismissal of the incumbent prime minister if the results of an election are indisputable and the conventions, norms and practices of responsible government have broken down. As noted by Justice L'Heureux-Dubé in *Haig*, the results of an election are clearly meant to be binding on the citizens and are meant to have legal effect.[262] Such an interpretation of section 3 reflects aspects of sections 4 and 5 noted above, in that the democratic *Charter* provisions will necessarily augment the political constitution (subsection 4(2), as noted, will compel the governor general to act in certain circumstances despite the prime minister having the confidence of the House). Moreover, such an interpretation of section 3 supports of the political constitution, by honouring the choice of voters in the democratic process.

The legal requirements for the governor general in relation to a hung Parliament could be much different, given that (as noted by McLachlin J in *Dixon*) "party majorities may be small and coalitions or minority governments formed" and "[g]overnments may stand or fall depending on the decisions of one or two members of the Legislature."[263] In such circumstances, there is a conventional rule that the incumbent prime minister is entitled to meet the House of Commons to try and win its confidence, even if their party did not win the most seats in that election.[264] In these situations, it might be impermissible for the courts to intrude into the political realm by requiring

[262] *Haig*, *supra* note 132 at 1031-1032.
[263] *Dixon*, *supra* note 131 at 413.
[264] Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms" (2019) 28 Const Forum Const 1 at 10 [Lagassé].

a governor general to dismiss an incumbent prime minister.[265] To this end, section 5 may be the primary legal rule and should allow the political actors as much time as they consider necessary to resolve any political impasses.

While section 5 might allow a prime minister to continue in office for some time, it may nonetheless be impermissible under section 3 for the incumbent prime minister to continue governing as if they had confidence the confidence of the House while also refusing to have Parliament summoned. This is because Canada is a democracy, a system in which the people rule. Canada's democracy is structured through the election of MPs to the House of Commons pursuant to section 3. In order to have democratic government as reflected in section 3 (and in light of the architecture and principles of the Constitution) the MPs and House of Commons must play a role in conferring legitimacy on a government. When a government is refusing to verify their legitimacy or is taking steps to frustrate Parliament in playing this role, there is a strong argument that while perhaps they are not required to immediately resign, they might be prevented from carrying on as if they had full democratic legitimacy. If not, Canada would not be a true democracy because in those circumstances the government does not have an actual connection to the people and the peoples' vote.

This attempt to govern without reference to the will of the House has happened several times in Canadian history. After the 1929 provincial election in Saskatchewan, the governing Liberals lost their majority in the Assembly. The opposition parties grouped together to form a proposed coalition and publicly announced their intention to form government. Nonetheless, the Liberal government refused to advise the Lieutenant Governor to summon the legislature and the

[265] Although, if the parties have conclusively come to a coalition agreement or campaign on a coalition, this might be different and similar to a majority outcome described above.

Lieutenant Governor refused to act after being petitioned to do so by the opposition MLAs. The Liberals continued governing for three months before summoning the legislature and were promptly defeated on the reply to the address to the speech from the throne.[266] In Prince Edward Island in 1853 the Liberal government continued to govern for six months after losing an election without summoning the legislature. Finally, in British Columbia in 1882 the Beavan government refused to summon their legislature after losing an election and continued to govern for six months. They were likewise defeated on a confidence vote immediately on the legislature coming into session.[267]

If a similar circumstance arose today it is possible that, despite the section 5 requirement to recall Parliament within a year, section 3 of the *Charter* might legalize some aspects of the caretaker convention and prevent the government from acting as if it had the support of the House of Commons. The caretaker convention is the notion that "governing authority should be constrained when a parliament has been dissolved and voters are deciding the composition of the next legislature."[268] While the government might not be legally required to bring Parliament back into session immediately in these circumstances, this does not necessarily mean that they are legally entitled to advise the governor general on all aspects of the royal prerogative because such a government has not secured the support of the House of Commons and therefore the results of the previously held election have not been perfected. If a government could continue exercising all the powers of office in a democracy while simultaneously avoiding the judgment of the House, then it undermines the very institution of the House of Commons and by extension the purpose of voting for members in that institution. Put another way, if section 5 allows for a government to

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[266] Twomey, *supra* note 41 at 153-154.
[267] Twomey, *supra* note 41 at 566.
[268] Lagassé, *supra* note 264 at 9.

continue in office for a period of up to a year after the last sitting of Parliament, then section 3 may limit that same government if they are attempting to cling to power without refreshing their democratic mandate through the confidence of the House of Commons, comprised of members who were duly elected pursuant to section 3.

Must the Governor General act on the advice of a responsible minister?

After properly appointing a prime minister, it is also possible that the governor general is now legally required by section 3 to act on their advice. A prime minister derives their legitimacy from the confidence of the House of Commons which in turn derives its legitimacy from elections constitutionalized through section 3. The independent use of Crown powers by the governor general without reference to their responsible ministers (who have been legitimated by a vote held pursuant to section 3) could be considered a repudiation of the election that led to their appointment. In other words, while the governor general's office is responsible for the historic Crown prerogatives, their role and interest is now limited, and ought to be limited as an incidental matter under section 3, to simply ensuring that the government of the day has democratic legitimacy through the House of Commons. Thus, a governor general who acts on the advice of protest leaders rather than their prime minister might not just be breaching convention, but also section 3 of the *Charter* given that democratic legitimacy can only be conferred through the representatives elected pursuant to section 3 and any other use of Crown powers is *prima facie* without democratic legitimacy. As noted in *Haig*, elections matter and simply because a vocal group of citizens disagree with the decisions of the government of the day does not authorize the governor general to use the legal powers at their disposal against the advice of their responsible

ministers. This would not be democratic as understood under section 3 and in the broader context of the Canadian Constitution.

While political constitutionalists would correctly argue that there are political remedies to control a renegade governor general who would follow the advice of unelected protest leaders over their responsible ministers, this should not necessarily preclude legal remedies where appropriate. Indeed, legal remedies could provide a meaningful and expeditious resolution to a circumstance where a governor general dismisses a prime minister without cause. For example, the political remedy in this circumstance would appear to be for the Queen to dismiss the governor general, but, as Anne Twomey notes, this can be difficult and cumbersome after a responsible prime minister has been improperly dismissed, as they no longer have any formal standing with the Queen.[269] Section 3 in combination with subsection 24(1) of the *Charter* might be used to set aside such a decision.

Of course, it is a feature of responsible government that a prime minister may eventually lose the confidence of their Parliament. In this case, conventionally, the prime minister is expected to ask for a dissolution or to offer their resignation. It is also said that the governor general is capable of exercising reserve powers in these circumstances, as they are not obliged by convention to follow the advice of a prime minister who does not have the confidence of the House. While this point will be discussed in further detail below, section 3 should not prevent a governor general from acting without or opposed to the advice of an irresponsible minister because that prime minister no longer has democratic legitimacy through the House of Commons. But section 3 might limit the governor general's powers and discretion to those acts that are strictly meant to bring

[269] Twomey, *supra* note 41 at 766.

Canada back into a state of responsible government. It is difficult to be categorical about this, as a dissolution is likely beneficial for responsible government in most circumstances, but in others it can be detrimental (for example, to overturn the results of a recently held election). This balancing will be discussed in more detail in the section dealing with section 1 below.

Summoning, Proroguing and Dissolving Parliament

Summoning, prorogation and dissolution of Parliament are three powers exercised by the governor general (typically on the advice of the prime minister) to control the parliamentary cycle. It is important to highlight the role of section 5 in creating temporal limits and duties in relation to these powers. For example, if, after an election, a prime minister fails to advise the governor general to summon Parliament, it is quite likely that section 5 will eventually create a legal duty for the governor general to do so on their own accord. Short of this, as discussed above, there may be some situations where section 3 requires a governor general to dismiss their incumbent prime minister without the need of a formal non-confidence vote and section 3 might also limit incumbent prime ministers to a caretaker role until they received the confidence of the House.

To this end, section 3 might limit the power of the governor general to dissolve Parliament immediately or relatively soon after an election. While dissolution is typically an inherently democratic action because it provides the voters with an opportunity to pass judgment on their representatives, there are instances where it can be anti-democratic under the Westminster system. This is because dissolution has the obvious effect of erasing the results of the previous election, but, more perniciously, it can also be used to frustrate the results of the previous election. Consider, for example, an incumbent prime minister who seeks a dissolution of a Parliament immediately

after an election because they did not like the results of that election.[270] While the governor general could be under a moral or conventional duty to reject such a dissolution, there might also be a legal prohibition on doing so under the *Charter*.[271] If the prime minister were to advise dissolution in that circumstance and the governor general acceded, it would breach section 3 as it was specifically designed to avoid the results of the election that had just been held, in that the members duly elected by section 3 would be dismissed without even being afforded to the opportunity to pass judgment on the government. The representatives and institutions referred to in section 3 would be ignored and the process could hardly be said to be democratic, because it would be judgment of one individual (the prime minister) which would trump the judgment of the people who had voted according to section 3. This also accentuates the fallacy of relying too heavily on section 5: the requirement to meet within one-year does not provide much meaning or protection for democracy in Canada if the incumbent prime minister could hold several successive elections before finding their preferred composition of the House of Commons. While political constitutionalists would rightly argue that there are political remedies in such circumstances, this does not diminish the individual interest in having a democratic outcome to their vote. Therefore, it is plausible that section 3 could be used to restrict Crown powers in certain circumstances or set aside their use.

[270] See, for example, Lagassé, *supra* note 264 at 8 (In 2017 then Premier Christie Clark in British Columbia advised that the Lieutenant Governor dissolve their Legislature before it met when her governing Liberal party lost its majority after an election. This request was rejected and the Lieutenant Governor appointed John Horgan, the leader of the opposition NDP, as premier. His NDP party had negotiated a supply and confidence agreement with the Green party which held the balance of power in the House).

[271] Adrienne Clarkson asserted moral duty not to dissolve within six-months of the previously held election in 2004: Dr. Bryan Schwartz, "Constitutional Conventions Concerning the Dissolution of Parliament and the Parliamentary Crisis of December 2008" (2010) 4 JPPL 37 at 44. See also Lagassé, *supra* note 264 at 12 (the six-month period is a "shaky" precedent and describing it as a custom and not a convention of responsible government).

That being said, it is important to emphasize the general point that dissolving Parliament on the advice of a responsible minister is inherently compatible with this theory of section 3. In recent years, a number of cases have been tried challenging the fixed-date election laws that are now seen in most jurisdictions.[272] While these cases argued that section 3 is breached by snap elections because it creates an unfair advantage for the incumbent party, these arguments have been firmly rejected by Canadian courts.[273] But the *Charter* arguments in these cases are much different than the representative and institutional issues that can be affected by dissolution in this thesis. Indeed, these decisions tend to match the basic argument made in this thesis; so long as the prime minister has the confidence of the House, they are entitled through section 3 to advise the governor general, who is likewise expected to act on such advice.[274]

Prorogation can also affect democratic rights under section 3 by avoiding confidence votes.[275] In these cases, the legal powers of the Crown are clearly being used to avoid the judgment of the House of Commons and by extension the judgment of the citizens of Canada. While section 5 might create an outside limit to how often the House must sit, it does not protect the House when it is properly in session, nor does it require the governor general to honour the outcome of such a vote by following the direction provided by the MPs. Sections 3 and 5 must be read harmoniously and it is problematic to limit democratic legitimacy to the textual requirements for annual sittings.

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[272] See, for example, *The Elections Act*, C.C.S.M. c. E30, s 49.

[273] *Conacher v. Canada (Prime Minister)*, 2009 FC 920 at para 76, , [2010] 3 FCR 411; *Engel v Prentice*, 2020 ABCA 462 at para 36.

[274] *Democracy Watch v New Brunswick (Attorney General)*, 2021 NBQB 233 at para 17.

[275] See for example, Macdonald & Bowden, *supra* note 102 at 8-9 (in the Pacific Scandal 1873, for example, Sir John A Macdonald had Parliament prorogued to prevent a House committee from tabling its report on financial conflicts and corruption in relation to the Pacific Scandal. Parliament returned after a 10 week suspension and Macdonald was censured by the House and resigned); Michael Valpy, "The 'Crisis': A Narrative" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 3 at 12 (in 2008, Stephen Harper advised prorogation to avoid a confidence vote); Twomey, *supra* note 41 at 593 (in relation to several commonwealth examples).

While these annual sittings are important (indeed crucial) for the House to fulfill its democratic rule, it does not protect the House once it is in session nor does it require that the Crown act with democratic legitimacy. While Benjamin Oliphant is likely correct that the quality of MPs acting within Parliament is beyond the judgment of the Courts (especially as a matter of privilege), it is not necessarily true as asserted by Sirota that section 5 allows for any prorogation so long as it does not last longer than a year.[276] This is because the timing and purpose of a prorogation matters. If a prorogation is meant to frustrate the opposition from voting non-confidence in the government, then it should not matter how long the ensuing prorogation lasts. In that case, section 3 and the right to democratic legitimacy must be given meaning too.

This is not to say that such an obligation under section 3 is unlimited. For example, a prorogation before a budget was passed would be a constitutional irregularity according to Erskine May, and indeed Anne Twomey lists several circumstances where the reserve powers of the governor general could be validly used to ignore the advice of a first minister who was attempting to prevent their assembly from passing a budget.[277] But it does not follow that there is a general legal prohibition in Canada on proroguing before a budget; for example, a majority government may need to take a pause and recalibrate their legislative agenda through prorogation. In such a case there is no question of democratic legitimacy because there was no real possibility that the government would lose the delayed confidence vote. Another example is the extension of a prorogation to facilitate the change in the premiership itself, which occurred when Paul Martin assumed this office after the retirement of Jean Chrétien.[278]

[276] Oliphant, *supra* note 117 at 275; Sirota, "Prorogations", *supra* note 234 at 386.
[277] Twomey, *supra* note 41 at 605-606.
[278] Audrey O'Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2d ed. (Ottawa: House of Commons, 2009) at 382, n 112.

As articulated by the Court in *Big M Drug Mart*, the section 3 right to democratic legitimacy should be understood in light of the interests it was meant to protect, which this thesis asserts is the promotion of self-government through the House of Commons. To that extent, section 3 should be unconcerned with prorogation if there is no serious question of democratic legitimacy at hand. For example, a prorogation will likely interfere with a whole slew of scheduled 'supply days' where the opposition could conceivably force a non-confidence vote, but this does not mean there is a real possibility of defeat for the government. Rather, section 3 should protect against prorogations that are clearly have the purpose or effect of interfering with confidence votes that have a real chance of success. To this end, prorogation may always be legally permissible if the government of the day has a majority government.[279]

Section 1 of the *Charter*

A prerogative decision, like any administrative decision, may be justified under section 1 despite being found to breach a *Charter* right.[280] The appropriate framework for undertaking a section 1 analysis of an administrative decision is set out in *Doré v. Barreau du Québec*,[281] where Justice Abella found that courts should review the decision on the standard of reasonableness in order to mirror the proportionality step of the *Oakes* test.[282] As noted by Abella J, there is "conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative

[279] Although this might not apply where there is an intra-party dispute and the Prime Minister is at odds with their parliamentary caucus.
[280] Guy Regimbald, *Canadian Administrative Law*, 3d ed (Toronto: LexisNexis Canada Inc., 2021) at 83.
[281] 2012 SCC 12, [2012] 1 SCR 395.
[282] *Ibid* at para 56.

bodies in balancing *Charter* values against broader objectives."[283] In turn, the Supreme Court of Canada set out a fairly comprehensive statement on what constituted a reasonable decision in *Vavilov*.[284] A reasonable decision is one which is both reasonable in outcome as well as the chain of logic that led to the decision.[285] A reasonable decision also depends on the nature of the legal authority being exercised and the decision made pursuant to it being justified, intelligible and transparent to the individuals who are subject to the decision.[286]

What is the grant of power afforded to the governor general? Formally, it is found in the *Letters Patent, 1947*, which states that the governor general has all the powers of the Queen in respect of the royal prerogative in Canada and that they must exercise these powers with the advice and consent of their Privy Council. To this end, some commentators emphasize the duty of a governor general to follow the advice of their first minister.[287] But this seems to be too simplistic of a conception of the role of the governor general. Rather, to understand the grant of authority given to the governor general, as it has evolved from confederation and as it was enshrined in Part V of the *Constitution Act, 1982*, one must consider the fundamental nature and role of that office under the Constitution.[288] When viewed from this perspective, it is possible that the reason a governor general is expected to follow the advice of their first minister is because their fundamental nature and role is to uphold responsible government, democracy and Parliamentary supremacy.[289] This point is reflected in Justice Beetz's *obiter* statement on the legal powers of the lieutenant governor in *OPSEU*, which makes clear that the powers of the governor general are

[283] *Ibid* at para 57.
[284] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"].
[285] *Ibid* at para 87.
[286] *Ibid* at para 95, 106-124.
[287] Newman, *supra* note 15 at 224-225.
[288] *Senate Reference, supra* note 86 at para 48.
[289] Gélinas & Sirota, *supra* note 89 at 116.

entrenched because they are essential for maintaining responsible government itself.[290] To this end, a prerogative decision may still be reasonable even if it formally violates one or more of the instantiations of responsible government so long as it is done to protect the core elements of responsible government.

The 2008 prorogation crisis provides a useful example to assess the reasonableness of a decision to interfere with a confidence vote. Here, Prime Minister Stephen Harpers government had been returned in an election in October 2008 with an increased plurality, but still held a minority of seats in the House of Commons. Days after having received approval of their Throne Speech, the government announced a change to electoral financing rules that represented an existential threat to the opposition Liberal, NDP and BQ parties, who promptly announced their intention to vote non-confidence in the government at the earliest opportunity and to ask Governor General Michaëlle Jean to appoint a Liberal-NDP coalition government under Liberal leader Stephane Dion (who had previously announced he would step down as Liberal leader). When it appeared that the opposition parties were serious about following through on this, Prime Minister Harper requested a prorogation from the Governor General, who made the Prime Minister wait for two hours while she considered the request. The Governor General ultimately approved of the prorogation to late January. By late January, the Liberals had selected Michael Ignatieff as their leader and the government, having made conciliations in their plans for electoral finance reform, would garner the support of the Liberals for the time-being and NDP leader Jack Layton declared the proposed coalition to be over.[291]

[290] *OPSEU, supra* note 84 at 46.
[291] Hogg, *supra* note 231 at 9.21

The justification for the prorogation generally follows one of two lines: first, the coalition was unstable, and secondly, the prorogation was for a short period. On the first point, Peter Hogg noted that the Liberals and NDP had not campaigned on a coalition government, Stephane Dion had a tenuous hold on the leadership of the Liberal Party, the coalition agreement had been "negotiated in haste and anger", and the coalition would have to rely on the Bloc Quebecois for matters of supply and confidence.[292] Thus, it was reasonable for the Governor General to prorogue based on the notion that "the coalition was likely to be an unstable alternative government."[293]

While these are all valid practical reasons why the proposed coalition was inadvisable, they do not seem to be valid justifications under the political or legal constitution for avoiding a confidence vote. And, as noted above, when considering the reasonableness of an administrative decision, courts must consider the chain of logic that led to the decision as well as the outcome of that decision.[294] Under Peter Hogg's explanation, the Governor General may have acted outside the scope of her powers by considering the political wisdom of the MPs rather than allowing them to fulfill their constitutional role in assessing confidence in the government. By doing so, the governor general essentially decided that certain MPs were unfit to decide who ought to be prime minister and by extension undermined the electors who voted for those MPs. Under section 3, it is the voters who ought to be considering the wisdom of MPs actions, because MPs have democratic accountability to their electors. While Peter Hogg might paint the Governor General's decision as being one of statecraft, it is important to remember that the goal of the legal constitution (as well as the political constitution) should be, as Jean Leclair notes, to place responsibility for the fate of

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[292] *Ibid* at 200.
[293] *Ibid.*
[294] *Vavilov*, *supra* note 284 at para 87.

liberal democracy in the hands of citizens and their representatives.[295] Nonetheless, there might be a situation where the actions of the MPs are so imprudent as to undermine responsible government and democracy and therefore justify the intervention of the Governor General; for example, by preventing or delaying a party from forming government that is seeking to use the powers of government to illegally overturn the constitutional order. Otherwise, the governor general's primary concern should not be the wisdom of a particular party or parties forming government, but rather whether or not their actions further or detract from the results of the preceding election. Wisdom *simpliciter* is not the province of the lawyer nor an unelected and unaccountable governor general. Rather, a legal analysis must focus on the relevant factors and ignore the irrelevant factors of the grant of power. [296]

Second, scholars have justified the 2008 prorogation on the grounds that it was only for a "very short" period of time and the government would be subject to a confidence on its return.[297] Others point out that prorogations might be justified for a temporary loss of confidence. Again, the legal analysis for justification should focus on the relevant legislative provisions and grant of power. The ability to pass confidence votes is tightly circumscribed and indeed is largely in the hands of the executive government. Serious confidence votes simply do not materialize out of nowhere and usually indicate that there is a serious matter at hand. If the MPs, given the opportunity, deem it advisable to vote non-confidence in the government it is difficult to see why the governor general ought to second guess the representatives of the citizens. In 2008, if the coalition was inadvisable, it would have been better from a political constitutionalist perspective to have recalcitrant Liberal MPs vote against their interim leader or to hold themselves accountable

[295] Leclair, *supra* note 1 at 166.
[296] Regimbald, *supra* note 280 at 236-237.
[297] *Ibid*.

to their constituents for supporting a dubious coalition. Further, if the MPs were not responsible for making a decision as to who formed government in December 2008, why would they be any more responsible to do so in January 2009?

Moreover, the notion of a short "cooling off" period ignores the substantive differences between prorogations and adjournments: in 2008, it was one thing for the House to naturally adjourn for the holidays, but it is an entirely different matter for the executive to shut Parliament down to avoid a confidence vote. As well, the use of "cooling off" periods raises additional questions about Canadian democracy. In 2008-2009 for example, the cooling off period may have created an extended period where the governor general could have discretion on whether or not to follow their prime minister's advice. As noted above, such a state could be very problematic under section 3 as the Crown powers would be used without democratic legitimacy. The same could be said for the Senate appointments made by the government during the cooling off period: if the incumbent prime minister did not have democratic legitimacy, it is not clear why they ought to be advising the governor general on any matter beyond the routine business of government. While it is not possible to categorically state that all "cooling off" prorogations are unreasonable under section 1 of the *Charter*, it is important to keep in mind that a vote of confidence does not necessarily mean that an unwise opposition coalition will necessarily form government afterwards. In many circumstances, a dissolution of Parliament will be justifiable if it were ever challenged on this basis. However, it is also important to note that a decision to dissolve Parliament is more likely to be unreasonable the closer it is to the previous election, as the purpose or effect of that dissolution would be to overturn the previous election.

Finally, it is important to recognize that the possibility of judicial review of a governor general's decision might have the upshot of prodding them into issuing reasons for their decisions.

For example, Lorne Sossin and Adam Dodek note that it would be beneficial for governors general to issue reasons for accepting or rejecting the advice of prime ministers in contentious decisions given that "public officials ought to be expected to justify their actions, particularly when the legitimacy of Canada's democratic institutions itself hangs in the balance."[298] While *Vavilov* does not indicate that reasons are necessarily required for a decision to be reasonable, reasons are usually an indicator that the decision maker carefully examined their own thinking and encourages decision makers to articulate their analysis in the process.[299] Provision of reasons does not necessarily indicate that the governor general will be personally involved in any litigation of their decision, as typically it is the decision itself that it subject to judicial review.[300]

Conclusion

Democracy in Canada is not a series of discrete elections as in the United States. Rather, under the Westminster-system of parliamentary democracy, the results of an election continue to echo through the lifespan of a Parliament until it is dissolved. This is demonstrated by the fact that a government requires the confidence of the House of Commons to have democratic legitimacy. To this end, the royal powers used in appointing ministries and controlling Parliament may be circumscribed by section 3. As noted though, this should not be a surprising revelation, given that these royal powers will be affected in a variety of ways under sections 4 and 5. That is to say, with the patriation of the Constitution it is entirely natural that the powers under the political constitution would be augmented under a system of constitutional supremacy. It is difficult to

[298] Lorne Sossin and Adam Dodek, "When Silence Isn't Golden: Cosntitutional Conventions, Constitutional Culture, and the Governor General" in Peter Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2010) 91 at 91.
[299] *Vavilov, supra* note 284 at paras 80, 138.
[300] See generally *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588.

precisely define when section 3 might be infringed by a royal power given the universe of possibilities and the complicated nature of the political constitution. However, it is conceivable that when an action is taken using the legal powers of the Crown that are specifically designed to frustrate or avoid the results of an election, then that action might also infringe the representative and institutional aspects of section 3 of the *Charter*. To this end, a governor general's legal powers in relation to the appointment and dismissal of prime ministers and following the advice of prime ministers might now be required by section 3 of the *Charter*. Further, there might be some instances where prorogation or dissolution is intended to interfere or frustrate the democratic processes that give meaning to the right to vote and therefore also violate section 3 of the *Charter*. Section 1 may justify such a decision if it is reasonable and this thesis asserts that a decision of the governor general is reasonable if it protects or promotes responsible government and democracy. It is likely to be unreasonable if it is meant to interfere with the role of Parliament in deciding confidence and conferring democratic legitimacy. Section 1 probably does not prescribe specific outcomes in all circumstances, but the closer a prorogation or dissolution is to an election, the more likely it is to be unreasonable.

Chapter 6

Controlling Indeterminacy: Justiciability and Subsection 24(1) and Appropriate Remedies

The possibility of recognizing a *Charter* right to democratic legitimacy in the federal government could create a problem of indeterminacy. For example, if each citizen has the right to a democratic government, then every decision to prorogue or dissolve Parliament might become subject to litigation, and likewise for the appointment and dismissal of a prime minister. Yet the *Charter* rights might give rise to legal requirements on the use of Crown powers. How might this problem of indeterminacy be avoided or constrained? The first is through the doctrine of justiciability and the second is through a careful consideration of remedies. For justiciability, Canadian courts might decide to approach a case in a similar manner to the SCC in the *Secession Reference*, by accepting jurisdiction to set out the general legal framework relating to the impasse, but refusing to actually take any role afterwards. In this sense, the constitutional role of the governor general and the accountability of the political actors could be protected from undue interference from the judiciary. Secondly, courts might use doctrines of justiciability that apply to prerogative decisions outside of the *Charter* context: namely, the rights and legitimate expectation test. The upshot of this test is that it might limit justiciability of highly political matters to those litigants who have a real and direct interest in the outcome of the decision. This would eliminate the possibility of judicial review of a prerogative decision that no political representative supports.

Further, courts could limit indeterminacy by issuing appropriate remedies. Subsection 24(1) of the *Charter* allows a court of competent jurisdiction to award any remedy it considers just and appropriate when an individual's *Charter* right has been breached. This chapter reviews remedies that have been granted in other jurisdictions for abuses of the political prerogatives and

also reviews remedies granted in relation to *Charter* breaches dealing with matters of high policy in Canada. In this context, this chapter considers if a just and appropriate remedy for the breach of a political prerogative is different for the leader of an opposition political party versus an ordinary citizen with no direct stake in the outcome of the decision.

Justiciability

Justiciability is a consideration by courts as to "what matters are appropriate for legal determinations, and what matters must be left for political resolution."[301] Canadian courts will generally treat matters as justiciable even in highly political contexts if there is a "sufficient legal component to warrant the intervention of the judicial branch."[302] As noted by the SCC in the *Secession Reference*, "if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question."[303] However, when dealing with prerogative decisions, Canadian courts generally take a more restrictive view of justiciability, as articulated by Laskin JA in *Black v. Chrétien* above. Here, Laskin JA noted that a prerogative decision is suitable for adjudication if it affects a person's rights or legitimate expectations.[304] Notably, however, the rights and legitimate expectations test does not apply in relation to highly political prerogative powers (such as dissolution), but on the other hand, there is

[301] *Ibid* at 2.
[302] *Secession Reference, supra* note 4 at para 26. See also Klinck, supra note 72 at 1037. Klinck, however, advocates that the "subject matter" test of inherent injusticiability should be maintained in relation to prerogative powers relating to the democratic process.
[303] *Ibid* at para 28.
[304] *Black, supra* note 69 at para 48.

no presumptive limitation of justiciability when *Charter* rights are at stake (even when dealing with highly political prerogative powers, such as foreign affairs).[305]

Litigating prerogative decisions represents a problem of indeterminancy, as it could subject many legitimate political decisions regarding prime ministerial appointments and the parliamentary cycle to the judicial process. As Gerard Kennedy notes, motions to strike pleadings provide a powerful tool for courts to resolve legal questions on pleadings when it is "plain and obvious" that a claim will fail or that it has "no reasonable prospect of success."[306] In these situations, simply because the question before the court might be novel does not appear to be a reason for allowing it to proceed if there is no genuine issue relating to democratic legitimacy being proposed by the litigant.[307] A further possibility is that the "rights and legitimate expectations" might be made to apply to political prerogatives in *Charter* cases. While this would derogate somewhat from the Court's ruling in *Operation Dismantle*, it might nonetheless be appropriate where the litigant has no real right or legitimate expectation arising from the decision. That is to say, if the litigant cannot expect to become or continue to be prime minister as a result of the governor general's decision, then perhaps they should not have standing to bring the claim. In this sense, while section 3 might create rights to democratic legitimacy, it might be impermissible for a court to hear such claims unless the person bringing them is an MP or party leader. This application of the doctrine of justiciability is not necessarily compatible with Justice Wilson's decision in *Operation Dismantle* and it is debatable whether such an approach fully respects such a fundamental right held by Canadians.

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[305] *Black, supra* note 69 at para 58; *Operation Dismantle*, *supra* note 73 at para 64.

[306] Gerard Kennedy, "*Nevsun, Atlantic Lottery,* and the Implications of the 2020 Supreme Court of Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 UNBLJ 82 at 83-84, 103.

[307] *Ibid* at 103.

Subsection 24(1) of the *Charter*

Alternatively, courts could limit indeterminacy by providing appropriate remedies under subsection 24(1) of the *Charter*, which reads:

> **Enforcement of guaranteed rights and freedoms**
> **24(1)** Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Peter Hogg notes that the powers of the Court under subsection 24(1) are immense and are limited only by the requirement that the remedy crafted by the Court be appropriate and just in the circumstances.[308] Courts are able to craft remedies that are negative or positive in nature under subsection 24(1). The British Columbia Court of Appeal, for example, considered ordering the provincial legislature to amend a statute, before ultimately awarding declaratory relief.[309] Remedies for misuse of a highly political prerogative power vary in practice. In *Miller*, the UKSC was asked to determine the legality of a prorogation that had the effect of frustrating the House of Commons' role in a key step during Brexit. In this case, the Court determined that the advice that led to the decision to prorogue was unlawful and therefore outside the powers of the prime minister to tender.[310] As a result, the Order in Council was therefore unlawful, meaning that the prorogation, in the eyes of the law, never happened.[311] Thus, the UKSC concluded,

> as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the *Meeting of Parliament Act 1797*. Nor has Parliament voted to adjourn or go into recess. Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons

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[308] Hogg, *supra* note 231 at para 40:17
[309] *Hoogbruin v. A.G.B.C.*, 1985 CanLII 335 at para 14, [1986] 2 WWR 700.
[310] *Miller*, *supra* note 192 at para 69.
[311] *Ibid* at para 70.

> and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court. [312]

In Canada, Courts have been more cautious in relation to highly political matters. In *Canada (Prime Minister) v. Khadr*, the SCC had to decide on an appropriate remedy after a lower court found that the applicant's section 7 rights were breached when the federal government refused to seek his repatriation.[313] A lower court ordered the federal government to use its prerogative powers for foreign affairs to request repatriation of the applicant as soon as practicable.[314] To decide if this remedy was appropriate, the Court found that it needed to address two questions: "(1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?"[315] To the first point, the Court had to consider if the remedy was appropriate and just in the circumstances, which is "one that meaningfully vindicates the rights and freedoms of the claimants".[316] In doing so, the Court found that requesting repatriation was sufficiently connected to the breach, in that the breach was the reason for his continued detention. For the second question, the Court noted the narrow scope of review for prerogative powers for constitutional reasons:

> judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged…. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the

[312] *Ibid*.
[313] *Khadr*, *supra* note 30 at para 9.
[314] *Ibid*.
[315] *Ibid* at para 27.
[316] *Ibid* at para 30.

> government's foreign affairs prerogative is exercised in accordance with the constitution….[317]

To this end, an appropriate and just remedy in these circumstances is one that is "legitimate within the framework of our constitutional democracy" and that is consistent with the "function and powers of a court."[318] Therefore, the SCC rejected the lower court's decision to order Canada to request the applicant's repatriation, finding that declaratory relief was more appropriate in the circumstances.[319] This was due in large part to the "complex and ever-changing circumstances" necessarily involved with the conduct of foreign affairs, but also due to the inadequacy of the records for the applicant's situation.[320] That being said, the Court noted that it had crafted more direct remedies in other circumstances involving foreign affairs when Canada had more control over the circumstances.[321] Nonetheless, the Court concluded, a declaration of unconstitutionality was still an important remedy, as "an effective and flexible remedy for the settlement of real disputes" and that this declaration will "provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."[322]

Appropriate and Just in the Circumstances

[317] *Ibid* at para 37.
[318] *Ibid* at para 33.
[319] *Ibid* at para 38.
[320] *Ibid* at para 39.
[321] *Ibid* at paras 42, 44.
[322] *Ibid* at paras 46-47.

What might be an appropriate and just remedy in the case of an abuse of a prerogative power? The answer might depend on the nature of the breach and the parties involved. For example, an individual who has a legitimate interest in the outcome of the decision, such as the leader of an opposition coalition seeking to vote non-confidence in the government might have a very different interest in the decision than a private citizen who has no connection to the political process apart from their vote. In the former case and on a clear public record, the Court might be justified in acting as boldly as the UKSC in declaring a prorogation or dissolution a nullity. In other circumstances, declaratory relief might be the preferred option. It is imaginable, for example, that an individual citizen could bring a claim under section 3 challenging a prerogative decision, but the outcome would not necessarily be supported by the political actors. Indeed, this could be the case in relation to the 2008 prorogation crisis, where the Liberals might have been using the prorogation as a convenient means of extricating themselves from the proposed coalition. The benefit of subsection 24(1) is therefore that an individual's *Charter* right might be protected while simultaneously limiting the involvement of the judiciary in the political process. In other words, subsection 24(1) should not be used to force particular political results on otherwise unwilling MPs. This should alleviate the concerns of political constitutionalist such as Forsey and Macfarlane who fear judicial involvement in political matters by ensuring that the judiciary continues to be "legitimate within the framework of our constitutional democracy" and keep their role consistent with the "function and powers of a court."[323]

The flexibility in subsection 24(1) may also be able to address circumstances where there is a temporary or ephemeral loss of confidence. If, for example, the government of the day mishandled an unexpected confidence vote, had temporary absences from the House on key

[323] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 56-57, [2003] 3 SCR 3.

matters, or even was waiting on the results of a by-election, declaratory relief could be used to articulate the principles contemplated by section 3 while not overly involving the Court in political minutiae. That being said, it is important to not drain the procedural elements of responsible government (and thereby the right to vote) completely. The government already has significant powers over the internal operations of the House and the ability to vote confidence in the government is generally limited to matters of inherent confidence (like the Address in Reply and budgetary matters) and to opposition supply days (which are scheduled by the governing caucus and few and far between). If the government is not prepared to work to maintain the confidence of the House on those limited occasions, and there is a serious issue on which the opposition would chance the formation of government or an election, it is difficult to see why the House as an institution should be precluded from passing judgment on the government. This goes to the golden rule of parliamentary democracy which is that the right to govern depends on the support of a majority of the House, which is in turn reflected in section 3 (whereby individuals' democratic rights are perfected through the election of members to the House of Commons).[324]

Finally, the use of declaratory relief strikes an interesting parallel to the judicial consideration of constitutional conventions. As noted, Courts will entertain matters involving conventions and even decide whether an actor has breached a convention, but will not issue a remedy for it. In the same vein, while the *Charter* may legalize certain conventions of responsible government, in all practical sense it will be a distinction without a difference when the remedy is declaratory relief. Nonetheless, it still leaves an important role for creating a legal framework in which the political process can play out, similar to the role envisioned for the Court in the *Quebec Reference*. Moreover, the realization that declaratory relief may be the most appropriate and just

[324] Russell, "Minority Governments", *supra* note 19 at 137.

relief in most cases does not diminish the possibility that the Court will be able to craft a more concrete remedy when the circumstances require it.

Conclusion

Section 3 requires democratic legitimacy in the outcome of elections. This conclusion is supported by the text of section 3, which connects democracy with the right to vote, and contextualizes the right to vote by stating that the right is exercised in relation to the selection of members in the House of Commons. While the text is clear, this interpretation is aided by the purposive approach to constitutional provisions. The purposive approach aims to place the right in its "appropriate linguistic, philosophic and historical contexts".[325] It also requires a consideration of the context of the right within the *Charter*, including its interaction with related provisions. Finally, a purposive analysis is meant to understand the right "in the light of the interests it was meant to protect."[326] The unwritten constitutional principles may be used as an aid to a purposive interpretation of a *Charter* right by informing "the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined".[327]

Textually, section 3 refers to democracy in its centered and section headings in the *Charter*. As an unwritten constitutional principle, democracy is concerned with more than the process of holding elections. Rather, democracy is fundamentally about self-governance. While elections certainly play a large component in this, they are not the only part of democracy. Rather, democracy is predicated on institutions to aggregate and structure votes into a system of self-government. To this end, democracy in Canada is based on democratic institutions such as the House of Commons and Parliament. Moreover, the rule of law requires a stable and predictable

[325] *Toronto (City), supra* note 150 at para 14.
[326] *Big M Drug Mart*, *supra* note 112 at para 116.
[327] *Toronto (City)*, *supra* note 150 at para 55.

order to democracy in order to ensure fairness, legitimacy and respect for self-government. Section 3 must also be understood in light of sections 4 and 5 of the *Charter*. The text of section 4 suggests a reliance on responsible government, given that there it is implied that there will be a mechanism of some type to determine when elections will be held in every five-year period. Section 5 may be said to be the embodiment of responsible government within the Westminster system of parliamentary democracy, given the close connection between Parliament's power of the purse, their assertion of the right to approve appropriations on an annual basis, and the resulting requirement for the Crown to have minister's who could reliably secure its funding. In light of this, it is difficult to see how democratic legitimacy in the current system (or any Parliamentary system) could be satisfied through any mechanism other than the confidence of the House of Commons. It would be difficult to reconcile a system of populist or direct democracy, where MPs do not have a role in selecting who forms government.

It is in this sense that the textualist argument proffered by Benjamin Oliphant in relation to the democratic rights fails on its own logic. Oliphant would restrict the text of section 3 to "the right to vote" and does not consider the reference to democracy in the section heading or the reference to representation and institutions (MPs and the House of Commons) to be useful in understanding section 3. Rather, he claims that so long as a citizen is able to vote, then their democratic rights under the *Charter* will have been satisfied. It would be very curious, on its face, however, to have a democratic right to vote in an election but have no right to democratic legitimacy in the outcome of the election. While I believe that democratic legitimacy in the outcome of elections is a necessary component to section 3, this is not without difficulty, as shown by how such a right might operate in practice in the previous chapters.

Nonetheless, the argument proffered by Oliphant has broadly gained currency in the recent decisions of the Supreme Court. In *Toronto (City) v. Ontario (Attorney General)*, for example, in grappling with the legal effect of unwritten constitutional principles, a majority of the Court emphasized that "the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose"."[328] While there is logic to treating the text as being a primary step in interpretation, it does a disservice to the concepts enshrined in them, at least in respect of the democratic rights. While the language of the *Charter* went through the "democratic crucible" (as put by Oliphant), the reality is that the concepts of democracy enshrined in the *Charter* did not begin with the 1982 framers. To call them "primordial" downplays the evolutionary nature of Canada's democracy espoused in the *Secession Reference*, including the complex and structured history of law, politics and convention that led to the centrality of electing MPs to the House of Commons in the Westminster style of parliamentary democracy. Even if the framers had been primarily concerned with entrenching the right to vote, as Christa Scholtz argues, and thereby deliberately remained silent on responsible government, some meaning and sense needs to be ascribed to this provision by necessary implication.[329] In this respect, I think some of the framers would have found it silly to spell out that democratic elections should result in democratic governments and the logical implication is that it elections must do so through certain aspects of responsible government. Therefore, while the Courts' renewed focus on the text of the Constitution is welcome in some respects, it is important to remember that our 1982 framers were in many respects not acting from a blank slate. Like the institution of the Supreme Court of Canada, democracy and the right to vote have evolved over time and the inclusion of section 3 might be a

[328] *Toronto (City), supra* note 150 para 65.
[329] Christa Scholtz, "The Architectural Metaphor and the Decline of Political Conventions in the Supreme Court of Canada's *Senate Reform Reference*" (2018) 68 UTLJ 661 at 690.

crystallization of that rich historic and philosophic background.[330] Thus, while section 3 might not adopt the conventions of responsible government in their entirety, the strict dichotomy between the legal and political constitution needs to be reconsidered to ensure section 3 has any meaning as a democratic right. The caution of textualists such as Oliphant must be recognized as well; section 3 should be strictly limited to providing legal remedies for breaching the right to democratic legitimacy in government and allowing as much space as possible to political actors to explore political solutions.

To this end, I am skeptical that section 3 could be used to prevent prorogations that do not interfere with Parliament's confidence role. For example, the 2009-2010 prorogation regarding Afghan detainees or the 2020 prorogation regarding questions surrounding WE Charity were not meant to prevent the House from passing judgment on the legitimacy of the government and therefore would not be frustrating the results of an election. That is to say, such prorogations might provide a reason for MPs vote non-confidence in the government at the next opportunity but were not intended to interfere with a non-confidence vote itself. There is a substantive difference between a parliamentarian who chooses not to hold the government accountable versus a parliamentarian who is prevented from doing so. The same would be true if the circumstances of *Miller* were to happen in Canada – the role of Parliament in a broad sense is being interfered with, but not the democratic foundations of government. Such an argument would have to turn on whether effective representation required the non-interference with Parliament in routine matters. Such an interpretation is not impossible, but it appears to be less likely when the text of the right is given its appropriate weight in constitutional interpretation. This is because at the end of the day, Parliament and Crown are highly fused: the majority in Parliament have great control of the

[330] *Supreme Court Reference, supra* note 177 at paras 76, 88, 95.

proceedings of that institution and Parliamentarians do not have free standing rights within the House of Commons. Rather, the procedures are tightly organized on the principle that "the majority must have its way but the minority must have its say."[331] Therefore, while Parliament is being interfered with in those prorogations, the individual right to a democratic government is not necessarily being so interfered with.

Political versus legal constitutionalism

There is a great deal of academic scrutiny from both political scientists and legal scholars on the role of courts in assessing and applying conventions. This concern has only been heightened in recent years with the Supreme Court of Canada increasingly relying on architectural and structural arguments in their reasoning, which can often mirror the role of constitutional conventions. Such a role by the judiciary is antithetical to political constitutionalists. Eugene Forsey notes the risk of courts in enforcing conventions is that courts are not experts in conventions and can and do state them incorrectly (as the Supreme Court of Canada did in relation to responsible government in the *Patriation Reference*).[332] Moreover, the judicialization of conventions also risks ossifying them and undermining their advantages, which is said to be flexibility and evolution. The more recent innovation of unwritten constitutional principles are risky, argues Jean Leclair because they lack legitimacy (amounting to a judicial amendment of the constitution) and they are incoherent in relation to one another.[333] Léonid Sirota raises the possibility that certain conventions should now be considered part of the law of the Constitution

[331] Bill Hartley, "Parliamentary Reform: Recent Proposals and Developments"(2000) 23 Canadian Parliamentary Review 2 at 3.
[332] Forsey, *supra* note 35 at 38-39.
[333] As cited by Pal, "The Unwritten Principle of Democracy", *supra* note 172 at 274.

given the Court's ruling in the *Senate Reference*, which relied on an architectural analysis to incorporate certain unwritten rules regarding the appointment of Senators to under section 42(1)(b) of *The Constitution Act, 1982*. Emmett Macfarlane, however, finds this to be inadvisable. Macfarlane argues that there are viable political remedies for the breach of convention and asserts that conventions are generally not suitable for providing definitive answers. Macfarlane also argues that the law would be ineffective in most circumstances where conventions fail. In extreme situations, for example, where a government attempts to stay in power after a clear confidence vote, Macfarlane asserts that "there is little reason to think actors taking such drastic, anti-democratic action would heed a court opinion."[334] In less extreme situations, Macfarlane believes the political remedies that are available are better suited to correct the situation than legal remedies in order to uphold the separation of powers.[335] Macfarlane also asserts that retaining political solutions for problems relating to government formation will prevent the atrophy of citizen engagement and non-judicial mechanisms for resolving democratic disputes.[336]

The argument raised by these authors are compelling in that it is important to allow political actors and the political process to determine who forms government. I broadly agree with the assertion of these political constitutionalists that conventions ought not, as a general matter to be treated as law and I agree generally with the notion that the use of the constitutional principles should be limited for the reasons articulated by Jean Leclair. However, this thesis does not argue for the legalization of all conventions of responsible government per se. Rather, section 3 simply should be seen as limiting the legal powers of the Crown in certain circumstances to ensure the political constitution is given the space it needs to provide a democratically legitimate outcome.

[334] Macfarlane, *supra* note 10 at 333.
[335] *Ibid*.
[336] *Ibid* at 333-34.

In this sense, the political constitution can viably coexist with a minimal amount of judicial oversight through the legal constitution and, more particularly, section 3.

Moreover, even when a negative check on the powers of the governor general is necessary, this still does not amount to deciding who forms government, unless one thinks that Parliament is not the primary entity for making that decision. For example, the "political constitution" that allowed the Prime Minister through the Governor General (or the Governor General directly, on Hogg's account) to frustrate a confidence vote meant that, essentially it was the Prime Minister who was determining if the opposition should and could form government. This is in essence a breakdown and inversion of the history and philosophy of Westminster-style parliamentary democracy and it is hard to see how this is preferable to having a basic legal framework and the possibility of accountability through subsection 24(1) as a last resort. Further, the ease in which political remedies can be realized should not be overstated: Anne Twomey notes numerous instances where a rogue governor general for a common-wealth country can be difficult to reign in, based on the fact that the Queen is often even more cautious and has less authority in interfering in the internal affairs of a country than her vice-regal representative. For instance, a first minister who has been unjustifiably dismissed by a vice-regal representative does not have standing with the Queen, and must be commissioned before their advice (such as dismissing the rogue governor general) is accepted by the Queen. Further, if section 3 is truly an empty vessel in terms of providing guidance as to who gets to form government after an election, and why, then it means that Canadians may be subject to increasing civil strife in order to settle political questions, as has been seen in the United States in recent years. To this end, the primary goal of section 3 in relation to the formation of governments is providing the legal space in which the political constitution can

function and flourish. In this sense, the legal and political constitutions can and should act in symbiosis.

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