

Memo for Workshop on Constitutional Studies

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The Caretaker Convention in Canada

There is very little written on the Caretaker Convention in Canada. Aside from the lack of analysis, the conventional rules are ambiguous and inherently lacking in specificity and predictability. They rely on judgment. They should. But they can be clarified and the principles better articulated.

The Caretaker Convention:

There are several different circumstances when the Caretaker Convention may apply. These include the period **before the election** after the writs are issued, **after the election** when the **outcome is clear** or **after the election** when it is **not clear**. The principle to be applied is “that Governments act with **restraint** confining itself to necessary public business”. This means there is a legal personality to the government, but no political legitimacy. The Government of the day still has all authority in law. But it must be exercised subject to the principle of the **supremacy of Parliament**. Since the confidence of the House cannot be assumed before the election, restraint is the watchword.

Governments should not make decisions that will unnecessarily bind or limit the freedom of an incoming Government. Thus it is perfectly legitimate for the Caretaker Government to make **routine** decisions. They can deal with non-controversial issues as before. They can treat **urgent issues** in the public interest. They can make decisions that are **reversible** without undue cost. They can make decisions **after consultation** with the Official Opposition, and in some circumstances, other parties. These behavioural guidelines have different application to Ministers as to officials.

There are useful examples and elaborations in Australia and New Zealand with published official Guidelines.

Application or lack thereof:

Several times in our history the Caretaker Convention has been called into question. In 1896, Lord Aberdeen, the then Governor General, decided not to make **appointments** to the bench and to the Senate recommended by Charles Tupper's Government because of questions of legitimacy. They were decisions that were important and irrevocable and could wait for the results of the election. Similar refusals took place by the LG in Nova Scotia, New Brunswick and Québec in the 19th century and early 20th century. However, there are examples where an LG followed advice of a deposed Government and did make such appointments, as did Mackenzie King make such appointments in 1940 after losing an election and in 1945. In 1984 Prime Minister Trudeau made several appointments prior to his successor, Prime Minister Turner allowing them to go through after the call of the election and the dissolution of Parliament. According to Brian Mulroney during the televised debates Turner “had a choice” and should have advised the Governor General not to make the appointments. The 1981 Reference on Patriation was important both for the judgment of the Supreme Court of Canada in the Reference, with its elaboration of the principles of Conventions, as well as for the Export Development Corporation's advertisements of “freedom” flying geese singing Oh Canada that was seen to be a violation of the Caretaker-like principles that might or should apply to referenda.

In 1979 Prime Minister Clark decided not to proceed with a \$2billion **contract** for fighter jets as he announced his Government had lost the confidence of the House and thus had not the authority to make the purchase. The most well known recent example was Prime Minister Campbell approving the **contract** of sale of Pearson airport after the dissolution of Parliament and then Prime Minister Chrétien cancelling the contract after the election because, according to him, the Caretaker Convention had not

been respected. During the 1993 election the conclusion of the NAFTA negotiations presented officials of the government with a challenge in terms of briefing the Opposition and preparing for the incoming Government to actually sign an **international** agreement negotiated by its predecessor. In 2004, Prime Minister Martin attended the G7/8 meeting in Sea Island during the election campaign. It was suggested variously that it provided him a lift as an international statesman, was necessary for him to represent Canada abroad, and took him away from campaigning. After the call of the election for January 2006, Stéphane Dion chaired the UN Montréal Climate Conference on a most controversial issue during the Caretaker period. And finally, there was the situation of the RCMP **announcing a criminal investigation** into the possible leak of Budget material during the election campaign of 2005/6.

In each of these circumstances, whether followed or not, the Caretaker Convention arose as an issue of some import and controversy. In these circumstances, the public awareness and the development of precedents build up important understandings about the operation of the Convention. These events have helped elaborate the Jennings rules on Conventions as applied to the Caretaker Convention.

Issues:

1. Can you have an effective Convention dependent on the political good will that is required for its application? Is this eroded by the long gaps in serial power-sharing among at least the two leading parties who thus lose appreciation of why it may be good governance?
2. Will officials and Ministers sometimes bend over backwards to avoid controversy and not take decisions they should in order to demonstrate respect for the inchoate principles of the Caretaker Convention?
3. How broad is the definition of Government as it applies to Crown corporations and agencies? How can it apply to quasi-judicial bodies with regulatory authority?
4. How should law enforcement agencies behave during the Caretaker period?
5. How should agents of Parliament behave who may be public political actors like the Information Commissioner, the Auditor General and Parliamentary Budget Officer?
6. Will the likely continuation of minority governments make the Caretaker Convention more important and more difficult to apply?
7. If we developed a tradition of coalition, how would the Caretaker Convention or its practice have to adapt?
8. Does it apply during a referendum?
9. Is the Caretaker Convention stronger in application after a Government loses the confidence of the House than if it calls an election on its own?
10. Is it weaker in application after the election where the result is clear and consultation with an incoming Government is possible?
11. Is it different if a Minister loses his seat but the Government is returned?
12. How will it work in jurisdictions with fixed terms like Ontario or B.C.? How long before the election will it begin?
13. How can it apply during crises like 9/11 or the Ice Storm had they happened during the Caretaker period (eg Red River flooding)?
14. How should public servants behave in regard to Access to Information during the Caretaker period with respect to release of sensitive issues on controversial subjects or requests for extension?
15. What appointments cannot wait? Are these circumstantial?
16. What kinds of normal advertising for service delivery should be able to proceed? What about CRA at tax time during an election period or Canadian Forces recruitment when deployment is an election issue?

17. What should departments of government do or refrain from doing on their websites during an election period? What about the use of social media?
18. What should guide officials briefing the Opposition during the Caretaker period? How to treat secret information?
19. What is the role of Clerk of the Privy Council in "enforcing" the Caretaker Convention? What about Deputy Ministers? What about the Governor General?
20. How can the professional, non-partisan public service prepare for the next Government while serving the government of the day in preparing new policies, costing Opposition proposals, suggesting new approaches to delivery or cost cutting etc?
21. What if the Government runs out of money voted by Parliament during the Caretaker period and has to use Governor General's warrants? Are the rules of application clear in law? In politics?
22. What is the conventional application of collective responsibility of Cabinet during the Caretaker period?
23. How does the caretaker convention apply to a Minister defeated in an election, where the Government is returned?
24. How does it apply to exempt staff?
25. Can there ever be a codification of the Caretaker Convention that removes the need for judgment?
26. Which international meetings is it appropriate for Ministers or the Prime Minister to attend?

Proposal:

1. The Government should make public the existing Guidelines it uses to advise Ministers and Senior Officials as is done in Australia and New Zealand.
2. The Prime Minister should announce when he is deciding NOT to make a decision in application of the Guidelines.
3. The Guidelines should be deliberately updated to adapt to circumstances.

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