

The Imperative of a Referendum

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The throne speech delivered to the Canadian Parliament by the new Liberal government in December 2015 made one very specific promise, which was crystal clear both in its commitment and its timing. “To make sure that every vote counts,” it declared, “the government will undertake consultations on electoral reform, and will take action to ensure that 2015 will be the last federal election conducted under the first-past-the-post voting system.”

The implications of this declaration are heavy for Canada’s democracy and for its political future. The obvious question has to be addressed: What is the point of promising consultations if the government has already made up its mind to proceed with making fundamental changes? The government of Canada must indeed consult widely, but more than that, it must put its reform proposals to the people of Canada in a referendum. It has no mandate to push its reforms through by some arbitrary, hard deadline. On four separate occasions, Canadians from various parts of the country expressed their support for the first-past-the-post voting system. The gov-

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ernment of Canada cannot impose electoral procedures that have been rejected without asking for the right to do so. Such an imposition would be simply undemocratic, an act outside the conventions and precedents of this country.

Since the first election in Canada in 1792, Canadians have used the simple plurality system (commonly known as the “first-past-the-post” system) to elect their representatives to the House of Commons, the provincial assemblies, and municipal governments. It remains a conventional practice used in most Canadian civic, corporate, and social situations that require a vote to choose representatives.

For 225 years, it has been a broadly accepted practice in Canada, part of the very fabric of the country’s political culture. There has been no clamour for it to be changed; the demands that it be changed in time for the 2019 election must have been expressed privately. Furthermore, while the Liberal Party inserted a few lines in its election manifesto about changing the electoral system because it found it “undemocratic,” it won a disproportionate majority under those very same rules. The election it won, with almost 60% of the electorate voting against it, did not give it a mandate to transform the electoral rules that have been rooted in this country’s constitutional conventions for more than ten generations.

This chapter examines the nature of the precedents that have been set in Canada and in other Westminster systems over the past decades for the use of plebiscites to effect electoral reform. The record is clear. Before any changes to Canada’s long-established practices are implemented, political leaders have asked voters for their assent. As such, they have established an unavoidable convention.

The duty to consult

Precedents and conventions matter.

In 1980, the newly elected government (elected with 44% of the vote) headed by Pierre Elliott Trudeau launched a drive to patriate the Canadian Constitution and to amend it with a Charter of Rights and Freedoms. It

drafted a *Proposed Resolution for a Joint Address to Her Majesty the Queen* respecting the Constitution of Canada that, presuming to speak on behalf of Canadians, laid out a series of amendments. A number of provinces challenged this procedure. Their argument hinged on the fact that on many occasions, the federal government had come to an agreement with the provinces before petitioning Westminster to draft an amendment to the *British North America Act* (the BNA Act). Canada, they argued, had been established for the benefit of the provinces; it was inconceivable that it could be changed against their explicit wishes. The BNA Act's preamble was clear that "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" and that, in particular, "such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire." For the provinces, it was imperative: they had to approve any constitutional amendment that affected their rights.

That idea was rejected by Pierre Trudeau's Liberal government. It argued that it had a clear mandate from the people and the constitution did not explicitly require the consent of provinces by virtue of the fact that there was no amending formula in the BNA Act. The government's position hinged on the assumption that Canada was a constitutional being that could act on its own. Manitoba, Newfoundland, and Quebec acted on their convictions that Ottawa could not act unilaterally and each took their cases to their respective Courts of Appeal.

Manitoba put three theoretical questions to its highest court. The first asked if the amendment to the BNA Act proposed by Ottawa would affect the rapport between the national government and the provinces as well as the very powers enjoyed by their governments. The second question probed the issue of constitutional understanding: was it not a matter of constitutional convention that any change to the relationships between the federal government and the provinces—or indeed their very powers—could not be made without the agreement of the provinces? The third and

final question plainly asked if the BNA Act implicitly required that any amendment had to have the agreement of the provinces.

The Manitoba Court found that indeed the government of Canada's proposal would affect provincial powers, but responded negatively to the last two questions. The matter of constitutional convention was too murky and it found nothing in the constitution that prevented Ottawa from acting unilaterally, without the consent of the provinces.

Newfoundland posed the same questions as Manitoba, but also added a question (mindful that a referendum had sanctioned Newfoundland's union with Canada in 1949). It asked: "Could the Terms of Union between Newfoundland and Canada be amended directly or indirectly... without the consent of the Government, Legislature or a majority of the people in the Province of Newfoundland voting in a referendum?" (*SCC Re: Resolution to amend the Constitution*: 763). The Newfoundland Court of Appeal found that the government of Canada could not act unilaterally.

Quebec also asked its highest court essentially the same questions, and received similar answers. The Quebec Court of Appeal responded that, in its judgment, the federal government's proposed amendments would indeed have an impact on the province's competence and would even have an impact on the status of the provincial legislatures within the Canadian federation. It also held that Ottawa did have the authority to make unilateral changes to the Constitution.

Unsatisfied by their own courts' answers, the three provinces appealed to the Supreme Court of Canada, which heard all three appeals together. In *SCC Re: Resolution to amend the Constitution*, the Court unanimously ruled that it agreed with the responses of the Manitoba and Quebec Courts of Appeal to the first questions. There was no doubt that Ottawa's proposed changes to the Constitution would indeed affect the "powers, rights or privileges" of the provinces.

The Court also examined the two other questions: the issue of the legality of Ottawa's plans, and the issue of whether a convention existed. A majority of the Court judged that the federal government did in fact have the legal authority to unilaterally approach the United Kingdom's Parliament for a constitutional amendment.

In its third ruling, the Court also affirmed the existence of constitutional conventions in Canada, and a majority of the justices found that the government of Canada’s plan did in fact violate the conventions by trying to act unilaterally. However, it shied away from imposing itself further, stating essentially that it was not up to the courts to uphold conventions—its duty was to ensure that formal rules were obeyed. In other words, there were certainly precedents and conventions that had to be observed, but these were political, not legal, and thus beyond the purview of jurisprudence. “The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice,” the court stated (*SCC Re: Resolution to amend the Constitution*: 888).

The key point from the Supreme Court of Canada’s statement was that precedents and conventions mattered. They are important because they capture a certain idea of political culture and practice. In the context of the British system, one which works without a constitutional text and is therefore instructed by past actions, the British expert Sir Ivor Jennings argued that constitutional conventions “provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas” (Jennings, 1959: 136). Jennings articulated a series of questions to test the validity of a convention. For him, three conditions had to be met in order to do so and together they became known as the “Jennings Test.”

- Were there precedents?
- Did the key actors in the precedents believe that they were bound by a rule?
- Would there be a constitutional reason for the rule?

These were the considerations that the Supreme Court of Canada applied to gauge the resilience of the convention and whether it had withstood a test of time. For Jennings, all three questions had to be satisfactorily answered in order to judge a practice a valid “convention.” In giving answers to the reference put to it by Pierre Trudeau’s government, the Supreme Court of Canada found that provincial consent had to be secured

because there were indeed a number of precedents. The Court pointed to five amendments (1930, 1931, 1940, 1951, and 1964) that directly affected federal-provincial relationships by changing provincial legislative powers. It observed that the provinces had been consulted and had agreed to the amendments. Past federal governments did believe that they had to secure provincial support in order for the actions to be ultimately legitimate. Not least, the constitutional division of powers between the government of Canada and the provinces lent support to the convention.

Consequently, it judged that there did exist a convention by which Ottawa, the provinces, and even the British Parliament had lived in order to change the constitution. The court summed up its judgment by saying that “the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the *Proposed Resolution for a Joint Address to Her Majesty the Queen* respecting the Constitution of Canada and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense” (*SCC Re: Resolution to amend the Constitution*: 909). Instructed by the Supreme Court that it needed a “substantial measure” of provincial consent, the Trudeau government redoubled its efforts and secured the approval of all the provinces, save Quebec, for its constitutional reform package.

The convention of plebiscites to reform voting practice in Canada

The voting system in practice in Canada is not enshrined in the constitution. The Constitution Act does specify that members of Parliament must be “elected” but says nothing about what system is to be used to choose winners. There is, moreover, no constitutional amending formula that applies to any changes in the way Canadians vote. However, there are precedents and conventions about how elections are determined have been part of the Canadian political culture for over a century. The Jennings test for conventions thus applies.

Over the past decade, five provincial governments—Prince Edward Island (2003), Ontario (2007), New Brunswick (2008) Quebec (2003-2007),

and British Columbia (2005 and 2009)—considered changing the voting system in their jurisdictions. Living up to the conventions of elections in Canada, four committed to put the question to the people: British Columbia (2005 and 2009), Prince Edward Island (2005), and Ontario (2007). In New Brunswick in 2006, the Progressive Conservative government led by Premier Bernard Lord promised a plebiscite on electoral reform in 2008, but it was never held as the government was defeated. Quebec considered a number of proposals, but plans were quietly abandoned.

British Columbia, 2005 and 2009

In British Columbia, the Liberal party, led by Gordon Campbell, included a commitment to electoral reform in its 2001 election campaign. Its plan was to “Appoint a Citizens’ Assembly on Electoral Reform to assess all possible models for electing the MLAs, including preferential ballots, proportional representation, and our current electoral system.” It also promised that the Citizens’ Assembly would hold public hearings throughout the province, and that “if it recommends changes to the current electoral system, that option will be put to a province-wide referendum” (British Columbia Liberal Party, 2001: 30).

The Throne speech of 2003 entrenched the process. In April of that year, the government introduced a motion to establish the Citizen’s Assembly (British Columbia, 2003, 4th Session, 37th Parliament). It was unanimously supported in the legislature (British Columbia, 2003, April 28).

At the same time, the government committed to holding a referendum two years later, in May 2005. Premier Campbell noted that: “This has never happened before, where a legislative body has said to the people who elect them that they want the advice of the public on how we should elect our elected representatives in the province of British Columbia. Indeed, if you go back to 1858, this is the first time in 145 years we are actually giving the people of British Columbia a direct say in how they should elect the MLAs that are meant to serve them. After all, in a democracy, we should

remember we are here at the service and the pleasure of the people of this province” (British Columbia, 2003, April 30).

He continued by emphasizing that “There is no more fundamental tenet that we agree to as we seek office than that in a democracy, the rules of the democracy should be designed by the people they serve, not by the power brokers who may wish that the democracy worked in their interests. It is by turning to the people and trusting the public that I believe we can re-establish the critical link between our democratic institutions and those that they are supposed to serve.”

Finally, he justified the need for a plebiscite by stating that “The government wants to ensure that all British Columbians have an opportunity to vote before any change is adopted. We want to be sure any change that is adopted is truly endorsed by the regions of the province and the people of the province” (British Columbia, 2003, April 30; British Columbia, Citizens’ Assembly on Electoral Reform, 2004).

The government established a minimum level of support for the plebiscite results to be accepted. For reform to be enacted, at least 60% of the valid votes had to be cast in support of any proposal and a simple majority in favour in at least 60% of all electoral districts (48 out of 79) had to be achieved.² Many argued that the threshold was too demanding. Premier Campbell defended the decision thus: “We believe this is a fundamental and significant change, and we therefore have placed a double approval process in place. There are some who have already suggested that that is too high an approval rating. Clearly, the government disagrees with that. We believe this is a significant change. It’s a significant change that should require the kind of approval that says, indeed, a great majority of people in this province feel that they will benefit from this change” (British Columbia, 2003, April 30).

² It is worth noting that governments require a two-thirds vote of shareholders for fundamental changes or “special resolutions” to corporate statutes. For example, see s.1 of the *Business Corporations Act* (Ontario). I am indebted to Mr. Stephen Thiele for this observation.

The question put to the voters was clear: “Should British Columbia change to the BC-STV electoral system as recommended by the Citizens’ Assembly on Electoral Reform?” Nearly 58% of the citizens who cast a ballot supported the proposed single transferable vote (STV) electoral system, a proportional representation method that allows voters to express their choices for office by order of preference in a multi-member constituency. A solid majority supported STV in all but two of BC’s 79 constituencies. But that was not enough to pass, according to the rules this legislature had unanimously established. The participation rate was relatively low on such an important issue: 58.2%. In effect, therefore, just over 33% of eligible voters supported the initiative.

The proposal was rejected by voters, but the government renewed its commitment to electoral reform. In the Throne speech of September 2005, a few months after the first proposal for electoral reform was defeated in the plebiscite, the government declared that it “has been clear that it does not intend to rewrite those rules after the fact or to pretend that the vote for STV succeeded when it did not. Nor can it ignore the size of the double majority that voted to change our current electoral system to the STV model” (British Columbia, 2005, September 12).

Just as significantly, the government stated that it did “not accept that the solution to a majority vote that failed to pass is to essentially ignore it and impose yet another electoral system. It does not accept that the answer to the minority’s rejection of the Citizens’ Assembly proposal is to redo its work. It does not accept that the 79 members of this assembly are any better qualified than the 161 members of the Citizens’ Assembly were to choose the best electoral model” (British Columbia, 2005, September 12). The British Columbia government nevertheless committed itself to continue to explore electoral reform. A new Electoral Boundaries Commission was given the task of examining the provincial electoral map and then to examine and report back on the “the best and fairest way to configure British Columbia’s electoral districts under the STV model.”

The government also again committed itself to seeking public support. The 2005 Speech from the Throne promised an “extensive effort to better inform British Columbians about the two electoral options: the current

system and STV” and that equal funding will be provided “to support active information campaigns for supporters and detractors of each model” (British Columbia, 2005, September 12: 28). It promised that the two models would be put to a province-wide vote, along with the applicable electoral boundaries, in a referendum that would be held in tandem with the November 2008 municipal elections. The government also indicated that the premier would remain neutral and that the rules and thresholds that had applied for passing STV in the 2005 referendum would again apply.

The second plebiscite was eventually held during the provincial election of 12 May 2009. Voters were asked to vote on whether they preferred the STV method or the traditional “simple majority” system:

Which electoral system should British Columbia use to elect members to the provincial Legislative Assembly?

- ♦ The existing electoral system (first-past-the-post)
- ♦ The single transferable vote electoral system (BC-STV) proposed by the Citizens’ Assembly on Electoral Reform

The STV proposal earned the support of 31% of voters—a dramatic drop in support compared with the first plebiscite—while 61% voted against it. The turnout for the election/plebiscite was 51%, indicating that popular support for the STV alternative was less than 10% of eligible voters.

Prince Edward Island, 2005 and 2015

In the 2000 election in Prince Edward Island that saw the re-election of the Progressive Conservative government under Premier Pat Binns, the opposition had gathered close to 45% of the vote, but was reduced to one representative in the legislature. In 2001, the province’s legislative assembly created a special committee to review the Elections Act and also commissioned a study from Elections PEI to examine systems of proportional representation. That report was submitted to the legislature in April 2002. In January 2003, the legislature formed a Commission on Prince Edward

Island’s Electoral Future (Prince Edward Island, 2003, January 21). The commission concluded that a mixed member system would be appropriate (Prince Edward Island Electoral Reform Commission, 2003).

The government decided to put the matter to the voters of PEI. In mid-December 2004, Premier Binns stated that “We’re providing time for Islanders to debate this subject, to look at our current model, first past the post, to compare that to a mixed member system which would have some combination of first-past-the-post plus a slate, and to make a considered judgment on which is the best and most appropriate model for PEI” (Prince Edward Island, 2004, December 16: 1036). Prince Edward Island’s House Speaker Gregory Deighan put it most eloquently: “It stands to reason,” he said, that Islanders “should have a strong voice in determining how these electoral systems work because they do have significant bearing on the final results of an election.” (Prince Edward Island, 2005, February 17). In the Throne Speech of November 2005, the government committed itself to holding a referendum in order to give “a significant opportunity for Islanders to express their preference for our future electoral process” (Prince Edward Island, 2005, Nov. 16).

The referendum took place a few weeks later. The referendum question was: “Should Prince Edward Island change to the Mixed Member Proportional System as presented by the Commission of PEI’s Electoral Future?” In line with British Columbia’s practice, PEI also set a higher ceiling for approval. In order to pass, the referendum had to receive 60% of the province-wide popular vote and a simple majority in 60% (16 of 27) of the electoral districts. Voters rejected the proposed reform: 63.6% of eligible voters voted against the motion. Two districts (out of 27) carried a majority in favour of reform.

Almost a decade later, the June 2015 Throne speech committed the PEI government, now led by Liberal Premier Wade MacLauchlan, to another round of reflection on the province’s electoral system. A white paper on democratic renewal was submitted by the government to the legislature in the summer of 2015. The government also committed that electors would be able to vote formally on any proposals for reform. At the time of writing, the government is proposing three choices on the ballot:

- ♦ First-past-the-post, the current voting system;
- ♦ Some form of proportional representation;
- ♦ Preferential ballot, or ranked ballot.

The Special Committee of the Legislature has promised to craft a plebiscite question in 2016 (Prince Edward Island, 2015, November 27).

Ontario, 2007

The Ontario Liberal Party had campaigned in 2003 on a program that included a range of electoral reforms. In November 2004, a year after being elected, Ontario Premier Dalton McGuinty, leader of the Liberal Party, issued a statement following a “Dialogue on Democracy” conference that said: “When it comes to how the people elect their representatives, the people of Ontario will have their say” (Ontario, 2004a, November 18).

Michael Bryant, the Attorney General and Minister Responsible for Democratic Renewal, stated that “We will involve Ontarians directly in improving the quality of our democracy, modernizing our political institutions, and restoring public faith in government” (Ontario, 2004).

The government promised to create a Citizens’ Assembly on Electoral Reform that would be free to consider all options. “It may be that Ontarians choose to keep our first-past-the-post system,” the premier indicated, “That’s fine. The very exercise of re-examining our electoral system will reinvigorate and heighten our appreciation of it.” Significantly, he pointed out that “This is a matter for Ontarians to decide. Our responsibility is to ensure the public’s voice is heard loud and clear, and has an impact” (McGuinty, 2004).

The premier reemphasized the point in Parliament when he declared that “We’re going to the citizens of Ontario. We believe the issue of electoral reform is so fundamental, so basic, that we’re asking the people of Ontario for their judgment in this matter” (McGuinty, 2004).

Kuldip Kular, the parliamentary assistant to the attorney general, declared that “Ontario’s electoral system belongs to Ontarians, not to elected

officials or appointed commissions. So we are asking Ontarians to decide for themselves how our political system should work and how they want to elect MPPs here to Queen’s Park. No government in this province has ever given citizens this kind of opportunity. This bill, if passed, will give the people of Ontario the chance to have their say on the role of money in politics and electoral reform” (Ontario, 2005, June 13).

The government decided to apply the same formula as in British Columbia and PEI. For electoral change to be triggered, the alternative system would require 60% of voter support, as well as at least 50% support in 64 of the 107 (60% of total) ridings. The referendum in Ontario was held at the same time as the provincial election of October 2007. The Citizens Assembly had come to the conclusion that a mixed-member proportional system be adopted. The question put to the people was:

Which electoral system should Ontario use to elect members to the provincial legislature?

- The existing electoral system (first-past-the-post)
- The alternative electoral system proposed by the Citizens’ Assembly (Mixed Member Proportional)

The proposal was defeated, with 36.9% of the electorate supporting the proposal, and 63.1 voting in favour of the existing electoral system. Five ridings (out of 107), all in central Toronto, gave a majority of support to the Citizens’ Assembly proposal. The turnout for the 2007 election was 52.8%, indicating that less than 20% of eligible voters supported the proposal.

The convention of voting practice in Westminster systems

The Constitution of Canada was drafted with a commitment to live by the “principles” of the Westminster system. It is worthwhile to examine how other jurisdictions in the Westminster family have consulted the public to legitimize electoral reform.

The United Kingdom

Following the 2010 general election in the United Kingdom, the Conservative Party led by David Cameron and the Liberal Democratic Party led by Nick Clegg agreed on a coalition agreement which committed the government to holding a plebiscite: “You will get a referendum on the voting system, so you have a greater say on who represents you in Parliament. Government will be transparent. You will be able to get your hands on all the information you need,” Deputy Prime Minister Nick Clegg declared (United Kingdom, Office of the Prime Minister, 2010, May 2010). That September, Clegg said to the House of Commons that “When a big question mark hangs over something as important as our voting system, the only way to resolve the dilemma is to let people have their say.” He emphasized that “that the final decision should be made not by us, but by the British people” (Stevenson, 2010).

Prime Minister David Cameron emphasized the need for a clear public mandate. In January 2011, the prime minister said, through his spokesman, that a referendum was necessary in order to “allow the people to decide on voting reform and that a referendum was a democratic step” (Cameron, 2011a). A month later, the prime minister declared, on behalf of Mr. Clegg and himself, that “Far above our beliefs about how the voting system should work, we share a much more important belief—a belief in democracy and the voice of the people being heard”(Cameron, 2011b).

The referendum was held in May 2011. Eligible voters were asked to express either a “yes” or a “no” to the following question:

At present, the UK uses the “first past the post” system to elect MPs to the House of Commons. Should the “alternative vote” system be used instead?

With a turnout of 42.2%, the “No” won this campaign, registering 67.9% of the vote. 32.1% (or 13.5% of eligible voters) thus expressed their support for the alternative voting method.

New Zealand

The issue of electoral reform in New Zealand brewed for many years before changes were actually enacted. In all cases, the New Zealand government sought the support of the people. In 1984, the Labour Party committed itself to a reform agenda and established a Royal Commission once it was elected. That commission's report recommended major changes; it also insisted that a referendum be held on the issue. New Zealand turned to voters three times in order to decide on electoral reform.

The first referendum, held in 1992, was technically non-binding and asked two questions. The first was whether the first-past-the-post system should be replaced or retained. The second asked voters to choose between four systems: Single Transferable Vote (STV) (a form of ranked ballots that is used to select a number of members of Parliament in a single riding), Alternative Vote (AV) (another variant of ranked voting), Supplementary Member (SM) system (a preferred ballot system, but one where only two choices can be made), or Mixed Member Proportional (MMP) (a two-tier system involving the election of a local member of Parliament based on traditional voting methods, but also members of Parliament drawn from a list and who are elected according to the proportion of the vote the party received in the election). New Zealanders voted 84.7% in favour of change, with over 70% favouring the MMP model.

A second referendum was held in 1993 and, this time, it was binding. It asked voters to choose either the Mixed Member Proportional method or the traditional system: 53.86% of voters supported the MMP proposal and 46.14% supported first-past-the-post.

Based on majority support, New Zealand immediately introduced MMP. The experience was mixed, and in 2008 the National Party proposed another referendum. Prime Minister John Key declared that "Finally, we'll open our ears to New Zealanders' views on their voting system" (Key, 2008). This referendum, like the one held in 1992, was to be non-binding. It gave voters the choice of either maintaining the MMP system, or to change it. The second question asked voters to choose among first-past-the-post, Alternative Vote (or ranked voting), Single Transferable Vote, or Supplementary Member schemes.

New Zealanders voted to keep the MMP system (56.17%). Of those who wanted to scrap the MMP system, 31.19% of voters chose the first-past-the-post system, with the other three systems earning much less popularity.

Australia: The Australian Capital Territory (1992)

Australia has long made important changes to its electoral system without consulting the public. That changed when a referendum was held in the Australian Capital Territory (ACT) in February 1992. The ACT was, at the time, a relatively small jurisdiction of about 300,000 people, which tended to produce dramatically lopsided electoral results.

The 1992 referendum was an “advisory poll” held simultaneously with the ACT’s Assembly election. The question simply asked if voters preferred the traditional “first-past-the-post” method or the Single Transferable Vote (or ranked vote) scheme. With a turnout of over 90%, voters chose the STV system over the single-member electoral system by a margin of 65.3% to 34.7%.

It is clear that other Westminster systems have also considered electoral change. What is remarkable is that in the last 25 years, governments felt compelled to allow the voters to have a say. The Canadian practice at the provincial level was thus consistent with other systems that have operated under the “principles of the United Kingdom.”

Less important issues have been put to the people

Electoral reform touches the fibre of a political culture, so it is not surprising that Westminster jurisdictions that have contemplated change have referred the question to the electorate. Indeed, on many occasions in history, Canadians were asked to express themselves on far less consequential matters.

In September 1898, for instance, a national referendum was held on whether a prohibition of alcohol should be implemented. Twenty-one years later, a referendum was held in Quebec asking voters if they wished

to see the sale of alcohol legalized again. In 1988, Prince Edward Island held a plebiscite to approve the idea of a bridge that would link the island to the mainland. In Newfoundland and Labrador, voters were asked twice to answer specific policy choices for their educational system: In September 1995, a referendum was held on the abolition of denominational education system. Two years later, another referendum was held on the establishment of non-denominational education system.

In 1997, Alberta held a series of referenda at the local level on the installation of Video Lottery Terminals. Prince Edward Island did the same the following year, as did New Brunswick in 2001. In October 2004, Nova Scotia voters were asked to express themselves on Sunday shopping. British Columbia held a referendum on retaining the Harmonized Sales Tax in the summer of 2011.

Some broader policy issues have also been put to the people. In April 1942, the Canadian government asked voters to release it from a promise not to implement conscription. In 2002, British Columbia held a referendum on treaty negotiations. According to Premier Gordon Campbell, the motivation to go to the people was to foster engagement: “We believe it’s time the public was included in this process,” he said. “The referendum will give British Columbians a direct say on the principles that we believe should guide the province’s approach to treaty negotiations” (Campbell, 2002, April 27).

Matters of critical importance to the governance of Canada have also been the subject of referenda. Citizens of Newfoundland and Labrador were given an opportunity in June and July 1948 to say if they wanted to become a part of Canada or remain independent. Quebeckers were given two opportunities to express themselves on their national destiny, in May 1980 and again in October 1995. In August 1992, a national referendum was held to approve the Charlottetown Accord.

In sum, Canadians have been asked to vote on particular issues and most were less consequential than electoral reform. In asking Canadians for their input, important precedents were set.

Conclusion

The Jennings test on the validity of the conventional rule can thus be applied to the necessity of seeking popular agreement on electoral reform. To the Jennings question of “What are the precedents?” this chapter has provided the record from Canada and abroad over the past two decades. In all cases, governments turned to referenda to seek the approval of voters.

The clear evidence is that, over the past generation, both in Canada and abroad, electoral reform proposals have been put to people. Governments big and small felt compelled by the idea that no changes to the electoral system could be implemented without the expressed consent of a majority (sometimes a supermajority) of the electorate. National governments in the United Kingdom and New Zealand have done so. So have governments in large Canadian provinces such as Ontario and British Columbia, and relatively small ones such as Prince Edward Island. Governments dominated by Progressive Conservatives felt the need to consult the electorate, as did Liberal and Labour governments. Plebiscites were used by governments in minority or coalition situations as well as by governments in utterly dominating positions. It has been, quite simply, the established practice—the very definition of convention—to consult voters about changes to the way representatives are elected.

To the Jennings question of “Did the actors in the precedents believe that they were bound by a rule?” the answer is equally clear. All the leaders felt compelled to make the argument that they needed a mandate from the people in order to proceed with whatever reform was being proposed by their parliamentary or extra-parliamentary commissions.

In each case, the government leaders felt compelled to give the reasons why. First, there was a recognition that no government—even one elected with a crushing electoral victory—had the mandate to proceed unilaterally. Second, the matter was judged to be intrinsically of such a fundamental nature that it was inconceivable to think that a transformation of vote-counting practices could be implemented without a solid expression in favour of it by the people. Not least, even governments that had included

electoral reform in their election platforms felt obliged to seek specific approval for those changes from voters.

In all cases, the governments took care to ask clear, concise questions that would yield either a mandate to continue or a warning to stop. Similarly, the various governments sponsored commissions and consultations to educate the electorate so as to engage it in considering the basis of the electoral system.

To the final Jennings question of whether there exists “a constitutional reason for the rule,” the answer lies in the preamble of the Canadian Constitution. Canada adopted a Westminster system of Parliament that in turn created a balance of power between the crown, the Houses of Parliament, and the Courts. The electoral system was a fundamental part of that bargain, based on conventions. It follows that any change to that equilibrium would be constitutional. Jennings’ questions thus must be answered in the affirmative in this case.

The Canadian electoral system has functioned on a system of conventions—understandings based on precedents, a recognition that going to the people was imperative, and that the issue was just as significant, if not more so, than other questions that have been put to the people. This reality was recognized by all the provinces that had made promises in their electoral platforms to consider reforms in how Canadians would be represented in legislative assemblies. In all cases, these governments considered it crucial to refer the question to the people. Why should it be different for the government of Canada? There is now a moral imperative to put the issue to the people. As Peter Hogg put it in his authoritative book *Constitutional Law of Canada*, “there is a stronger moral obligation to follow a convention than a usage, and that departure from convention may be criticized more severely than departure from usage” (Hogg, 2005: 24).

The way we vote shapes our political culture. Canada is not perfect, and its democracy has its faults. But it must be recognized that the system has worked and the electorate that has sanctioned the system for generations needs to be consulted. The government of Canada simply cannot assume that it can unilaterally change the way in which we vote. It has no exclusive claim to the electoral process and it must respect conventions. The prec-

edents set in Canada and in other Westminster systems over the past 20 years dictate this necessity.

The fact that electoral reform has already been rejected four times by Canadians in plebiscites makes the matter all the more imperative. The past views that voters have expressed cannot simply be discarded. As is the case in any other jurisdiction, the federal government must conduct rigorous and comprehensive consultations that are not simply driven by the self-appointed advocates of reform. Beyond that, the process must include a referendum, no matter how much it costs or how long it delays decisions. Regardless of the result, the government must abide by it. Without going to the people, it can expect no legitimacy to make any changes to the precious process of elections, the essential tool of our democratic civilization.

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